CHINESE MIGRANT CHILDREN AND CANADIAN MIGRATION LAW

by

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ABSTRACT

This thesis reviews the underlying theoretical and normative paradigm in Canadian migration and asylum law and its effect on the refugee determination process with respect to the approximately 100 unaccompanied children who were among 599 migrants from Fujian Province, People's Republic of China who arrived in four boats off the coast of British Columbia, Canada in the Summer of 1999. Upon deconstructing Canadian migration legislation and jurisprudence, especially with respect to asylum, it is apparent that the dominant paradigm is one of liberal communitarianism/realism, rather than one based on individual, universal human rights. This communitarian/realist paradigm is reflected in and reinforced by normative distinctions between immigrants and illegal migrants, and between politically motivated, forced migrants (refugees) and economically motivated, voluntary migrants (illegal migrants). Illegal migrants, such as the Fujianese children, are de-legitimized and criminalized under Canadian migration law. Moreover, this paradigm had the effect of subsuming the children's human rights claims into an assessment of their motivations for, and the voluntariness of, their emigration, that is, into a refugee determination process based on an understanding of the children's migration that was both inherently incoherent and inconsistent with a nuanced comprehension of migration as a structural phenomenon. The author concludes with a proposal for the development of a more strongly human-rights based paradigm in Canadian migration and asylum law.
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INTRODUCTION

THE CHINESE MIGRANT CHILDREN

On July 20, 1999, an unmarked, unnamed ship arrived off the coast of Vancouver Island, British Columbia, Canada carrying 123 passengers. None of the passengers had obtained Canadian immigration visas prior to coming to Canada. The ship was intercepted by the Canadian coast guard, and the passengers taken to a Canadian armed forces base in Esquimalt, Vancouver Island. Once at the base, all 123 passengers, including 13 children, made refugee claims, seeking asylum under Canada’s refugee laws. It became evident that all of the passengers were Chinese nationals, from Fujian Province on the Southeast Coast of the People’s Republic of China,¹ and that their journey had been organized as a commercial venture by organized “human smugglers”.² Within two months, another three, virtually identical, ships arrived in British Columbia. By September, 1999, 599 individuals from Fujian Province, China had arrived in a total of four ships (the “Chinese Migrants”).³ Of the 599, approximately 100, and maybe as many as 131, were “unaccompanied children” — children under age 18 who arrived without a parent or guardian (the “Children”).⁴

¹ Hereinafter: “China”.
² These facts are from “Ship of Indonesian Origin Held After Landing Chinese Aliens in Canada” Star (20 July 1999). According to the Canada Department of Citizenship and Immigration, the passengers from this ship ultimately fled, failing to report their whereabouts to the Canadian Government, which suspects that they have migrated on to the United States: Canada, Department of Citizenship and Immigration, Lessons Learned: 1999 Marine Arrivals in British Columbia, (Ottawa: Department of Citizenship and Immigration, 2002) [Marine Arrivals Lessons Learned].
⁴ The actual number of Children is not clear. A 2005 CBC radio report quoted the Canadian Department of Citizenship and Immigration as stating that there were 98 Children, CBC Radio, “Chinese Migrants”, from “Think Vancouver: Think Waterfront” 2005, online:
None of the Chinese Migrants had obtained Canadian immigrant visas prior to coming to Canada, and almost all made refugee claims upon arrival. Never before had Canada experienced the arrival of so many individuals from Fujian Province, China in this manner.\(^5\)

This event captured substantial media and political attention in Canada. Domestic and international migration law and policy became a prominent subject of public debate, and has remained of significant interest since.\(^6\) The issues raised in public discourse around the Chinese Migrants were summarized by Gabriel Yu in an essay published in the *Vancouver Sun*:

\[\text{<http://www.cbc.ca/thinkvancouver/0307_migrants.html> (date accessed: 10 March 2005). In contrast, the Department of Citizenship and Immigration's own publication stated that there were 131: *Marine Arrivals Lessons Learned*, supra note 2 at 19. In August 2002, Dan Grant, Senior Planner, British Columbia/Yukon Regional Headquarters, Canada Department of Citizenship and Immigration, stated that the Children represented just 10% of the Chinese Migrants, which would make the total number of Children 59: *Human Smuggling Challenges*, ibid. at 9. However, also in August 2002, Robin Pike, of the British Columbia Ministry of Children and Families stated that there were 134 Children: *Human Smuggling Challenges*, ibid. at 21. During a discussion with Vancouver refugee lawyers in 1999, George Varnai, then Manager of the Canada Department of Citizenship and Immigration's Vancouver office stated that 93 of the Chinese Migrants were children, and that several of those were accompanied by a parent or other adult guardian: Interview by Canadian Bar Association, Vancouver Immigration Section, Refugee Committee with G. Varnai, Manager, Vancouver Office, Canada Citizenship and Immigration Canada, (15 September 1999) [Varnai Interview]. These variations in the reported number of Children may be a consequence of the fact that some of the Chinese Migrants provided conflicting information about their age at various points during their immigration proceedings. For example, in the case of "S.N.J.", he told immigration officials whom he met upon first arriving in Canada that he was an adult, then later told the Canada Immigration and Refugee Board that he was a minor. The Refugee Board ultimately found that S.N.J. was an adult. Re: S.N.J., [2000] C.R.D.D. No. 119 at para. 29-37 (QL).\]

\(^5\) However, other countries, such as the United States have received thousands of smuggled Fujianese migrants since the early 1990's – between 1992 and 1993 32 ships with as many as 5,300 Chinese destined for the United States were found in Asian and Latin American waters: see, K. Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, (Philadelphia: Temple University Press, 1999) at 4, and D. Kyle and Z. Laing, address (Managing Migration in the 21st Century, Europa Kolleg, Hamburg, Germany, June, 1998) [unpublished]. Furthermore, increasing numbers of migrants from Fujian have arrived in Canada by air, also apparently smuggled in through commercial smuggling operation: Varnai Interview, ibid.

\(^6\) For example, in November 2003 the Canadian national daily newspaper *Globe and Mail* published a multi-day series on illegal migrants called "Under the Radar" which included articles such as M. Jimenez, "20,000 Illegal Immigrants Toiling in Canada's Underground Economy" (15 November 2003) A1.
To be fair, many people in the Chinese community [in Vancouver] offer clear reasons why they are opposed to letting the boat people stay [in Canada]:

First, illegal entrants should not be rewarded for breaking the law.

Second, Canada has set procedures for immigration applications. Accepting people who jump the queue is unfair to those who stand in line.

Third, people who look for an improvement in their life or economic betterment are not refugees. Genuine refugees suffer from political oppression and should be accepted.

Fourth, once a precedent is set, more boat people will come to Canada.

Fifth, providing legal, medical, welfare and other aid to those people accepted will add to the already burdensome taxation suffered by the average Canadian citizen.

Sixth, people are worried that the gang problems plaguing the New York Chinese community will appear in Vancouver.7

Yu’s essay identified several important themes that have informed the public discourse about the Chinese Migrants and about migration to Canada since the summer of 1999: (i) unlike immigrants, who are pre-selected for membership in Canadian society, illegal migrants are not legitimate and therefore should be denied membership; (ii) illegal migrants pose a moral, economic and security threat to Canadian society; (iii) it is possible to distinguish illegal migrants whose migration was politically motivated from economic migrants: the former are refugees and therefore legitimate whereas the latter are abusing Canadian generosity. Yu also identified the underlying assumption made with respect to Fujian migration in particular, that migration from Fujian to Canada is economically motivated. These themes intersect to support the conclusion that, since Canada is economically better off than Fujian, such migration will continue and will

7 G. Yu, “Why the Boat People Should Go Home” The Vancouver Sun
increase until the problem of Fujian migration has been solved; that is, steps have been taken to reduce or eliminate it.\textsuperscript{8}

The themes Yu identifies are not merely elements of an anti-immigration discourse, they are fundamental assumptions around which Canadian migration law is structured. Canadian migration law is a law of distinctions: the distinction between immigrants and illegal migrants; and the distinction between political refugees and economic migrants. These distinctions, especially as they affected the asylum claims and other migration proceedings of the Chinese Migrants, are not consistent with the liberal insistence on the primacy of human rights. Moreover, these distinctions had profound implications for the Chinese Migrant Children's refugee claims, and the way in which those claims were determined by the Canada Immigration and Refugee Board.

Z.B. was one of the Children.\textsuperscript{9} He was 13 when he arrived off the Coast of Vancouver Island in a dilapidated, arguably unsafe, boat. If his journey was like those of other Fujian migrants who emigrate with the help of smugglers, he was likely subjected to physical abuse, and possibly sexual abuse, during the voyage.\textsuperscript{10} Z.B.'s parents arranged the trip for him. It was his second attempt to leave Fujian – Z.B. had been on a snakehead boat to Guam shortly before coming to Canada, but the boat caught fire

\textsuperscript{8} Comments made by Canadian politicians after the ships arrived reflected these themes, as well. For example, Preston Manning, then Leader of the Reform Party in Canada argued that Canada was being abused by "illegal immigrants" and "bogus refugees": T. Walkom "Shaky Sanctuary: This summer's boatloads of Chinese claimants enter a refugee system where good intentions are often overwhelmed by crass politics" Toronto Star (2 October 1999). Canada's then Minister of Citizenship and Immigration, Elinor Caplan, stated, "... we have to hear these stories before we prejudge who they are, whether they are genuine refugees" and the then British Columbia Attorney General, Ujjal Dosanjh stated, "Nobody likes the fact that we are being deluged by these kinds of ships": J. Beatty and P. O'Neil, "Ottawa backs migrants’ rights: Moe Sihota and Ujjal Dosanjh demand some boat people be deported immediately" Vancouver Sun (2 September 1999).

\textsuperscript{9} Bian v. Canada (Minister of Citizenship and Immigration), (11 December 2000), Vancouver Registry No. Imm-1640-00 (F.C.T.D.).

\textsuperscript{10} Chin, supra note 5 at 70-78.
and he was arrested by Japanese authorities and deported to China. Z.B. told the Canada Immigration and Refugee Board that he did not object to leaving Fujian Province, as he intended to study, work and make a better life. He did not know where he would end up, or what work he would be doing, but he knew that his parents would keep trying to send him overseas. Peter Kwong and Ko-Lin Chin's research on irregular Fujian migration suggest that there was a serious possibility that the snakeheads would have placed Z.B. in a menial job, working to assist his family to pay off the $33,000 debt owed the snakeheads for his voyage, in conditions that do not comply with Canadian labour standards. If he was living in a “safe house” operated by the smugglers, he could also be subjected to physical abuse.

It seems unarguable that Z.B.’s expulsion from Canada to China could put his human rights at risk. He was a child, and therefore vulnerable in law and in fact. He was vulnerable to being re-smuggled (and possibly trafficked), with his parents’ complicity and under the snakeheads’ control. He was vulnerable to being punished by Chinese authorities (under laws prohibiting unauthorized emigration from China) because he had been smuggled. Daiva Stasiulis suggests that in these circumstances a child’s rights are clearly engaged, along with the state’s corresponding obligation to protect children. Nonetheless, the Board rejected Z.B.’s claim to protection, to asylum. In its written reasons, the Board subsumed the question of Z.B.’s best interests as a child into the question of whether he was able to consent to migrate, in other words, whether he was a voluntary, economic migrant:

In this case, the claimant's parents made the decision it was best for their child to go to North America, and he was sent on a snakehead boat. Was it in fact the best decision?

for the claimant? I am in no position to decide this question.

... Counsel also argues that the claimant’s youth and lack of ability to legally consent to this course of action, makes it persecutory for him. I cannot agree. I find Justice Muldoon’s comments in Xiao instructive, that a child’s transformation to adulthood is not sudden, but there is a spectrum of evolving capacities. While the Protocol on Trafficking makes it clear that a person under 18 cannot consent to being trafficked, there is no such impediment to a minor to consent to being smuggled. The claimant clearly wanted to go to work in North America (and still does), and I do not find that the method chosen for him by his parents constitutes persecution. [emphasis added]¹³

In researching this paper, I reviewed the refugee claims, and the Board’s determinations, with respect to 36 of the Chinese Migrant Children. Without exception, in each case a central issue, often the central issue, before the Board was whether the Child in question had migrated “voluntarily”. The Board gave substantial weight to evidence that the Children were motivated by their economic, and not political, circumstances to leave Fujian Province. For example, in Re: Li, et. al., a case involving eight Children whose refugee claims were heard and determined together, the Board refused to protect the Children from punishment by Chinese authorities for having violated Chinese laws against unauthorized emigration, on the basis that the Children were economically motivated, voluntary migrants:

I do not accept their [the claimants’] illegal departure per se to be a political statement but rather an act driven primarily by economic considerations.

I make this finding cognizant of the claimants’ young age. The evidence, as noted earlier in these reasons, does not suggest that the claimants left the country involuntarily.

¹³ Re: P.G.L., [2001] C.R.D.D. No. 150 (C.R.D.D.) (QL) at para. 36-39. Note that the Canada Immigration and Refugee Board changes the initials of claimants’ on cases that are published publicly. Also note that Z.B.’s claim was originally rejected by the Board on March 7, 2000, but that decision was set aside because the reasons did not address material elements of Z.B.’s refugee claim: Bian, supra note 9.
They do not allege that their parents or anyone else forced them to leave.

None suggested they left China with the express purpose of claiming refugee status in Canada. There is no suggestion that if their ship had not been intercepted they would have voluntarily turned themselves over to Canadian immigration authorities. All the claimants left China primarily for economic reasons. 14

As Li, et. al. and Z.B. demonstrate, for the Chinese Migrant Children, their human rights as children were subsumed in a discourse about illegal, economic, and voluntary migrants. 15 In this paper, I explore the role of the dominant moral paradigm that shapes Canadian migration and refugee law, and its consequences for the Chinese Migrant Children's refugee claims. In Chapter I I describe two conflicting moral paradigms with respect to migration: a rights based approach and liberal communitarianism/realism. My tentative conclusion is that Canadian migration law reflects a communitarian liberal moral philosophy with respect to migration. This communitarian moral paradigm is not consistent with a human rights approach to asylum-seekers. In Chapter II I develop a more detailed analysis of Canadian migration law. I pay particular attention to the distinctions in Canadian migration law between immigrants and illegal migrants, and between refugees (involuntary, politically motivated migrants) and illegal migrants (voluntary, economically motivated migrants). I argue that these distinctions reflect and reinforce the communitarian moral paradigm, and that they had the effect of shifting the central issue in the Chinese Migrant Children's refugee determinations away from an

14 Re: Li, et. al., (4 February 2000), Vancouver Registry No. V99/03509/11/32/36/40/44/47/48 (C.R.D.D.). This decision was later overturned by Gibson, J. in Li v. Canada (Minister of Citizenship and Immigration), (11 December 2000), Vancouver Registry No. Imm-932-00 (F.C.T.D.); however, in the only re-determination decision I could find, Re: A.F.W., the Board again rejected the claimant's argument on the basis, inter alia, that he had consented to being smuggled: Re: A.F.W., [2001] C.R.D.D. No. 215 (C.R.D.D.) (QL).

15 With respect to the discourse of economic migrants as "illegal migrants", the Board's comment in Re: Li, et. al. that, "There is no suggestion that if their ship had not been intercepted they would have voluntarily turned themselves over to Canadian immigration authorities" is revealing: Re: Li, et. al., ibid.
assessment of the Children's human rights claims to an inquiry into their motivations for migration. In Chapter III I review some of the Chinese Migrant Children's characteristics, and their migration from Fujian to North America. I argue that, in focusing on the Children's motivations and volition for migrating, Canada's Immigration and Refugee Board engaged in an analysis that is disjunctive with a nuanced, contemporary understanding of the Children's migration as a structural phenomenon, and as a consequence of globalization generally. I conclude this paper with a brief review of some jurisprudential and legislative developments in Canadian migration law that might sustain a human rights based approach to children like the Chinese Migrant Children in future, and proposing an alternate approach to irregular migrants, especially those who are unaccompanied minors.
CHAPTER I

COMPETING MORAL PARADIGMS: HUMAN RIGHTS AND COMMUNITARIANISM

As I write this paper, it has been almost exactly six years since the first of the boats carrying the Chinese Migrants arrived in Canadian waters. Almost all of the Chinese Migrants’ asylum claims and subsequent Court and administrative immigration proceedings, some of which have taken several years, have been concluded.\(^\text{16}\) Looking back at immigration proceedings involving the Chinese Migrant Children, it is striking the extent to which their human rights claims, especially their rights claims as children and as victims of smuggling, were subsumed in the Canadian state's anxiety to rid itself of economically motivated, illegal migrants.\(^\text{17}\) In the next two chapters, I will analyze the Children's circumstances more closely, including the Immigration and Refugee Board and Court decisions on which my observation is based. First, however, it is helpful to understand the competing moral paradigms at work in liberal migration discourse: a rights based paradigm, and liberal communitarianism/realism. My position is that

\(^{16}\) Most of the Chinese Migrants have been deported to China.

\(^{17}\) Many migration scholars use the terms "asylum-seeker" and "refugee" interchangeably. Similarly, most describe all non-citizens who migrate to a state as "immigrants" (as opposed to "emigrants"). Because my argument challenges the manner in which Canadian migration law distinguishes "immigrants" (who are granted membership in the community) and "illegal migrants" (who are denied membership unless they are "refugees", and "refugees" from "illegal migrants", I use slightly different terminology. First, as I am largely unconcerned with the regulation of emigration, I use the term "migrant" to describe non-citizens who have come to Canada. "Migrants" may be "immigrants", in that they have been pre-selected for membership in the Canadian community as residents or visitors, or they may be "irregular migrants", who have come to Canada, or remained, without having been pre-authorized by the Canadian Government to do so. I use the term "asylum-seeker" to describe an irregular migrant who is seeking to remain in Canada, and who is at risk of a human rights violation if he or she is expelled to his or her home country. Thus, all of the Chinese Migrants who were unaccompanied by a parent or guardian upon arrival in Canada, were "asylum-seekers".

As well, in this paper I use the phrase "Canadian Government" to refer to the portion of the Canadian federal executive branch responsible for applying immigration law and policy. At present, this comprises the Minister of Citizenship and Immigration and the corresponding Department of Citizenship and Immigration, as well as the Minister for Public Safety and Emergency Preparedness and the corresponding Canada Border Services Agency. At the time of the Chinese Migrants' arrival, the relevant bodies were the Minister of Citizenship and Immigration and Department of Citizenship and Immigration only.
Canadian migration law, including refugee law, does not reflect a rights based moral approach to migration. Instead, the Canadian moral approach to migration is more consistent with liberal communitarianism and political realism, especially as articulated by Michael Walzer and James Woodward.\textsuperscript{18} Within these moral paradigms, the state has no moral obligation to admit to membership those outside the state's territory.\textsuperscript{19} Further, the state has only a limited moral obligation to admit to membership migrants seeking protection from expulsion ("asylum-seekers"), and that obligation is not derived from the rights claims of the asylum-seekers themselves. Rather, the state retains sovereignty over migration, and its sole obligation is to provide asylum to those migrants whom it determines are legitimate "refugees". "Refugees" exclude migrants whom the state finds are economically motivated, and therefore voluntary, as opposed to "forced", migrants. In contrast, a rights based approach to migration implies, \textit{inter alia}, that all individuals have a human right to be protected from risk. Such a right would result in membership (including protection from expulsion) for illegal migrants at risk regardless of the voluntariness of their migration or their motivation for migration.

Canadian migration recognizes a legal entitlement to protection for some migrants and, in some jurisprudence, legislation and political discourse the language used to describe this entitlement suggests that it arises out of a moral claim that is tantamount to a human right to protection from persecution, that is, protection from a "fundamental violation of basic human rights".\textsuperscript{20} However, upon examination, Canada's obligation to


\textsuperscript{19} Walzer acknowledges a very limited obligation to admit those with whom existing members share a sense of relatedness and mutuality ("affinity"); however, I argue that this obligation effectively reinforces the priority placed by liberal communitarian on the nation's interest in maintaining its existing national culture and identity: Walzer, \textit{ibid}.

those seeking protection is not consistent with a rights-based approach to refugee protection; rather, it is merely one aspect of a moral paradigm with respect to migration as a whole that has as its primary concern the protection of the Canadian state and the interests of Canadians. Nonetheless, although I am of the view that these two moral paradigms are opposed to one another, it may be possible to reconcile Canada’s communitarian approach to migration generally with some aspects of the human rights based paradigm, particularly with respect to migrants at risk. In other words, it may be open to Canada to treat asylum-seekers’ claims to membership as human rights claims, and to conceive of refugee law as human rights law.

1.1 Two Different Moral Paradigms: Rights and Community

Canada is a liberal state. Thus, moral reasoning, based on liberal principles, is an important tool in understanding the basis for Canada’s laws. However, liberalism is conflicted on the right to migrate, and therefore, on the scope of those illegal migrants who have a moral claim to membership.21 In order to understand the distinctions in Canadian migration law, it is helpful to understand some of these liberal moral arguments, both because the discourse of moral argument is used to justify Canadian laws, and because, ultimately, it is a particular moral paradigm that mandates the restrictive approach to asylum-seekers that can be seen in Canada’s present refugee

21 One of the interesting issues that is beyond the scope of this paper is whether simple protection from expulsion can be said to be “membership” in the state. It may be more cogent to state that only “citizenship” is true membership in a state. See, e.g. Donald Galloway’s critique of the differences in treatment of citizens and non-citizens in Canadian law: D. Galloway, “The Dilemmas of Canadian Citizenship Law” in T. Aleinikoff and D. Klusmeyer, eds., From Migrants to Citizens: Membership in a Changing World (Washington: Brookings Institution Press, 2000). Nevertheless, for the purposes of this paper I treat the right to non-expulsion as membership, although I acknowledge that it is a less secure and comprehensive form of membership than citizenship. In addition to Galloway’s article, there is a nuanced understanding and exploration of citizenship and membership in the essays found in R. Rubio-Marín, Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States (Cambridge: Cambridge University Press, 2000).
regime. I suggest that, although there is a discourse of rights with respect to refugees, the prevailing moral paradigm is a philosophy of liberal Communitarianism/realism largely consistent with the theories of Michael Walzer and James Woodward. This paradigm provides asylum-seekers who are “refugees” with a limited right to protection from expulsion, but also sharply circumscribes the scope of the legitimate “refugee”. However, an alternative moral paradigm is beginning to develop in Canadian law – one of human rights. If this paradigm is applied in the area of migration, the distinction between economically motivated and politically motivated migrants becomes less relevant. Rather, an asylum-seeker’s claim to membership in the Canadian state would turn on his or her claim to be protected from human rights violations.

1.2 A Rights-Based Approach to Migration and to Asylum

“Human rights” are important to Canadians, as they are to all liberals – indeed, the legality of state action may be measured against those rights. However, there is little agreement as to the conceptual basis for “human rights”, and no agreement as to what rights comprise the catalogue “human rights”. Nonetheless, as a starting point, I suggest that three characteristics of human rights can be identified: (i) human rights are the rights of an individual; (ii) human rights are universal; and (iii) human rights operate as a claim against the state, restricting some state action and mandating other action.

22 Walzer, supra note 18; Woodward, supra note 18.
23 Since 1982 this has been constitutionally enshrined in the Charter of Rights and Freedoms: Charter of Rights. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s.15 [hereinafter: Charter of Rights]. Section 52 of the Charter of Rights renders void legislation that contravenes the rights set out in the Charter of Rights. Although there is provision for the government to legislate out of the Charter of Rights (Section 33, the “notwithstanding clause”), in practice this has been very rarely done, illustrating the moral significance of rights in Canadian society.
While each of these statements about human rights is controversial,\textsuperscript{26} I would argue that they correspond with Canadians’ general understanding of human rights. Each of the three characteristics has implications with respect to the nature of a human rights approach to migration, and therefore to the scope of the “refugee”, who has a moral claim to remain in Canada.

The first characteristic that I suggest is that human rights are rights of the individual. That is, they are not rights held by the state or by a community, although they may be derived as a result of membership in a particular community. For example, under the extended definition of “refugee” in the 1969 Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa,\textsuperscript{27} the term “refugee” applies to individuals who are members of the group of persons who were compelled to migrate

human rights offer a means of measuring the morality of legal rules. Legal rules that violate human rights are, arguably, illegitimate: C. Nino, The Ethics of Human Rights (Oxford: Clarendon Press, 1991). Similarly, rights have been described as “trumps” over claims based on pure utility or preference: R. Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1977). I acknowledge that some theorists derive rights-like moral claims, including the moral claims of asylum-seekers, from utilitarian principles: see, eg., P. Singer and R. Singer, “The Ethics of Refugee Policy” in M. Gibney, ed., Open Borders? Closed Societies? The Ethical and Political Issues (Westport: Greenwood, 1988) [Gibney “Open Borders”]. However, such rights are contingent on considerations other than the fundamental humanity of the individual. Ultimately, utilitarianism does not treat human persons as equals, as it dissolves the individual into the “utilitarian aggregate”: Shestack, ibid. at 46. Howard Adelman suggests that utilitarian moral theories are not rights-based at all, that the basis of such theories, when applied to immigration, is that needs trump rights and it is the needs of either individuals within the state, potential refugees, or some combination of individuals within the state and potential refugees that determine what would be a “just” migration law: H. Adelman, “Justice, Immigration and Refugees” in H. Adelman, A. Borowski, M. Burstein and L. Foster, eds., Immigration and Refugee Policy: Australia and Canada Compared (Toronto: University of Toronto Press, 1994) 63.

\textsuperscript{26} Indeed, the concept of individual, universal human rights has been widely criticized for its cultural specificity and inapplicability to non-Western, non-liberal societies. See, e.g., C. Brown, “Universal Human Rights: a Critique” in T. Dunne and N. Wheeler, eds., Human Rights in Global Politics (Cambridge: Cambridge University Press, 1999) 103. However, for the purposes of this paper, I assume that Canada conceives itself as a liberal society, and that individual human rights are relevant and important.

\textsuperscript{27} Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 10001 U.N.T.S. 45. Obviously, Canada is not a party to this treaty.
as a result of particular conditions in the country of origin.\textsuperscript{28} Thus, the definition is objective, in the sense that whether an individual has a legal right to asylum depends upon conditions in the country of origin resulting in group exodus, but the right itself remains the right of each individual member in the group.

An individual right to asylum may be contrasted with the traditional understanding of the right to asylum in international law. Under that view, the right to asylum is not the right of the individual migrant to receive asylum but rather the right of the state to grant asylum. That is, it is a right exercised by the state against the international community, including the migrant's state of nationality, and it comprises the right to refuse to expel a migrant. Asylum is therefore a right derived from the state's sovereign authority over persons within its territory.\textsuperscript{29} An individual right to asylum conflicts with this view and, as set out below, challenges state sovereignty.

An individual human right to asylum also conflicts with theories of justice that are based on communitarianism or liberal nationalism. These theories assign moral and ethical weight to the claims of a community, rather than to the individual. For example, David Miller argues that a liberal nation has a moral claim to existence, and therefore, the limits of a just immigration policy are subscribed by the liberal nation’s ability to maintain its liberal national identity in the face of migration. Thus, Miller's argument is that rights accrue to the community – the nation – and not to an individual migrant.\textsuperscript{30} I deal in greater detail with these theories and, in particular, the liberal communitarian's moral obligations to those seeking asylum, below.

\textsuperscript{28} Ibid. See also I. Jackson, \textit{The Refugee Concept in Group Situations} (The Hague: Kluwer Law International, 1999) at 177.


The second characteristic of human rights is their universality. That is, persons possess human rights by virtue of their humanity alone; human rights are not contingent on arbitrary factors such as race or birthplace. The corollaries of universality are that rights are held equally by all persons, and that rights are derived from the inherent human dignity of all persons. Equality is a powerful concept in liberal states like Canada, and respect for the equality and dignity of all persons seems axiomatic. However, universality, equality and dignity are not readily reconcilable with sovereignty of the state over migration, a prominent concept in Canadian migration laws, as evidenced by the jurisprudence of the Supreme Court of Canada.

The historic prominence of sovereignty in Canadian migration laws can be seen in the Supreme Court's decision in \textit{Shin Sim v. The King}. In that case, the Supreme Court dealt with the issue of whether the \textit{Chinese Immigration Act} excluded from admission to Canada Canadian citizens who had been wrongfully determined by the Controller of Chinese Immigration to be aliens with no right of entry to Canada. Ms. Sim, described as a "Chinese woman" in the Court's decision, arrived in Vancouver and stated that she was a Canadian citizen born in Victoria and was married to a man living in Vancouver. The Controller of Chinese Immigration for the City of Vancouver found that she was not who she claimed to be and made a deportation order against her and detained her. Ms. Sim sought \textit{habeus corpus}. At trial, the Court reviewed new evidence proving Ms. Sim's Canadian citizenship, and released her from custody. The Crown appealed, arguing that the \textit{Chinese Immigration Act} excluded the Court's jurisdiction and that the

\footnotesize{31} Equality is sufficiently important to Canadians that equality rights are enshrined in Section 15 of the \textit{Charter of Rights}. \textit{Charter of Rights}, supra note 23.


\footnotesize{33} \textit{Chinese Immigration Act}, R.S.C. 1927, c.95.
Court could not look behind the Controller's order. The British Columbia Court of Appeal granted the Crown's appeal. Ultimately, the Supreme Court overturned the Court of Appeal's decision. However, it did so solely on the basis that the *Chinese Immigration Act* was not sufficiently clearly worded so as to exclude the Court's jurisdiction in Ms. Sim's case. The Court held that it would be within the state's power to enact such legislation; that is, legislation prohibiting the admission of Canadian citizens to Canada and that, indeed, the question as to whether it was the intention of Parliament to do so by way of the *Chinese Immigration Act*:

> is, no doubt, a debatable one, but the construction adopted by the Controller and contended for by the Crown ought, I think not to be accepted in the absence of plain language.\(^\text{34}\)

Thus, in *Shin Sim*, the Supreme Court affirmed the broad scope of Parliament's sovereign power over migration, a power extending even to allow the state to entry to a Canadian citizen.\(^\text{35}\)

More recently, in *Chiarelli v. Minister of Employment and Immigration*,\(^\text{36}\) the Court considered the constitutionality of a provision of the *Immigration Act* allowing for the deportation of a Canadian permanent resident without giving the resident any opportunity to raise humanitarian concerns about his deportation. Such concerns could

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\(^{34}\) *Shin Sim v. The King*, supra note 32 at 380 (Duff, C.J.). There was a minority judgment by Crocket, J. who agreed with the majority as to the outcome but focused primarily on the privative clause whereas the majority's decision was based on both the privative clause and other relevant sections of the *Chinese Immigration Act*.

\(^{35}\) It should be noted that contemporary citizenship law, both internationally and domestically in Canada, does not generally contemplate that a state could deny a citizen by birth the right to return. Interestingly, Emanuel Gross argues that democratic states may be morally and legally justified in stripping "terrorist" naturalized citizens of their citizenship and deporting them, in order to protect national security: E. Gross, "Defensive democracy: Is it possible to revoke citizenship, deport or negate the civil rights of a person instigating terrorist action against his own state?" (2003) 72 Univ. of Missouri at Kansas City Law Rev. 51.

include the risk the resident would face if he were to be deported. Writing for a unanimously Court, Sopinka, J. stated:

The most fundamental principle of immigration law is that noncitizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country.

Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada.

As these two cases highlight, state sovereignty is fundamental to the moral paradigm informing Canada's migration laws, including its laws with respect to persons seeking asylum.

A universal right to asylum that is shared equally by all human beings threatens sovereignty. Sovereignty is a defining characteristic of the state. Indeed, a state may be defined as "a population ruled by a government in a territory". Sovereignty is the power of the state to control matters affecting the population within its territory. However, a universal right to asylum extends the state's obligations to individuals with origins outside the state's territory and population, as universality prohibits distinctions on the basis of arbitrary characteristics such as state of origin. Such a right threatens

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37 Chiarelli, ibid at 182-183.
38 See also Prata v. Canada (Minister of Manpower and Immigration), [1976] S.C.R. 376. The present Immigration and Refugee Protection Act enshrines the importance of sovereignty in section 3 "Objectives and application" wherein it specifically states, "This Act is to be construed and applied in a manner that furthers the domestic and international interests of Canada": Immigration and Refugee Protection Act, S.C. 2001, c.27 (IRPA). The IRPA has been in force since June, 2002. The previous Immigration Act included a similar section stating, "Immigration objectives - It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada ...": Immigration Act, R.S.C. 1985, c.-l-2.
40 Thus, illegal migration is a serious threat to the state since, by entering illegally, such migrants have placed themselves within the state's territory and, arguably, within the scope of the state's moral obligations, even though the state would have prevented their immigration, had it been able to do so.
both the state's territorial integrity and its control over membership in its population, thereby threatening the state's sovereignty.\textsuperscript{41} Consequently, a moral paradigm that prioritizes state or national sovereignty as an element of asylum law is not compatible with a human right of asylum.

The third characteristic of human rights is that they constitute claims that supersede competing claims based on preference or utility, although they may be subject to competing rights claims; Ronald Dworkin describes rights as "trumps".\textsuperscript{42} Thus, a rights-based approach to asylum may be distinguished from one based on a utilitarian approach, such as that advocated by Peter and Renata Singer.\textsuperscript{43} Although a utilitarian approach may be universal, ultimately the moral claims of asylum-seekers are determined not by their inherent rights but by the aggregate interests of community members.\textsuperscript{44}

\textsuperscript{41} Phillip Cole points out that, while sovereignty may be consistent with liberal theory, the liberal justification for sovereignty – which assumes that the members of the state have freely voluntarily and actively consented to the state's authority – cannot apply to migration matters since, by definition, those seeking to migrate did not participate in this consent: P. Cole, \textit{Philosophies of Exclusion: Liberal Political Theory and Migration} (Edinburgh: Edinburgh University Press, 2000) at 187. Fernando Teson argues from a liberal rights position for a modified sovereignty where a state's sovereignty depends upon its "legitimacy", which he defines as "the legitimacy of the social contract among the citizens that form the state, their political association" along with "the legitimacy of the agency contract between the subjects and the governed – the legitimacy of the government itself": Teson, \textit{supra} note 39 at 40. Notably, neither of these notions of legitimacy recognizes non-members, or their concerns, at all. \textsuperscript{42} Dworkin, \textit{supra} note 25.

\textsuperscript{43} P. Singer and R. Singer, \textit{supra} note 25

\textsuperscript{44} Peter and Renata Singer articulate a universalist utilitarian moral theory with respect to migration. They argue that, in determining migration policy including refugee intake, the "interests of all those affected, either directly or indirectly, whether as an immediate result of the policy, or in the long run" should be taken into account. Thus, the Singer's approach is universal in the sense that it is not limited, as some utilitarian approaches are, to the interests of members of the receiving state; however, it is based on interests and not rights. For example, the Singers argue that migration policies ought to take into account matters such as the potential pressure of increased population on the natural environment resulting in reduced recreational opportunities for members of the receiving state: \textit{Ibid.} at 111.
Similarly, a rights-based approach is distinct from the “realist” approach taken by James Woodward. Woodward argues that migration policies ought to respond to concerns about the negative consequences of immigration on the labour market for a state’s members, and on social services like public education, health care, unemployment, disability and welfare programs. Although Woodward acknowledges that this approach is not necessarily consistent with equality-based liberal moral paradigms, he argues that it better reflects the “motivation and behaviour of real people and states”. This “realist” approach is an important theme in Canada’s migration discourse, as well. In particular, Canadian immigration policy has been significantly shaped by a discourse about the perceived impact of immigration on the Canadian economy; that is, on the labour market and the ability of Canada to continue to provide the social services to which its citizens and residents have become accustomed. Catherine Dauvergne writes that, “linking economics and immigration is the strongest element in Canadian immigration discourse”. Obviously, this is not a rights based, or even moral, approach to migration policies.

Arguably, tension between this economic discourse on migration issues generally, and the rights discourse with respect to refugees, contributes to the divide in Canadian migration law between “immigrants” and “refugees”. In general, migrants are subject to

45 Woodward, supra note 18. Woodward argues that these programs represent policies that reflect the state’s liberal egalitarian values and, if these programs are threatened, the state’s liberal egalitarian nature will therefore be threatened, as well. Woodward does not explicitly address the issue of asylum; rather, his approach appears to group asylum seekers along with other migrants, as Woodward’s focus is on the receiving state, rather than on the migrant.

46 Phillip Cole critiques Woodward’s paradigm, which Cole describes as “Hobbesian”: Cole, supra note 41 at 165-191. Cole points out that many of Woodward’s assumptions about the deleterious effect of immigration on the labour market and social services are not supported by empirical evidence. Cole also questions the moral legitimacy of “realism” as a source for a moral paradigm with respect to migration. Cole’s concerns on this point are shared by Robert Goodin: R. Goodin, “If people were money ...” in Barry & Goodin, supra note 18 at 6.

migration policies and laws that reflect the economic discourse. Thus, "immigrants", who can claim membership in the Canadian state, are pre-selected by the Canadian Government based, *inter alia*, on whether they will provide a net benefit or loss to the Canadian economy.\(^{48}\) Moreover, a natural corollary to the concern that immigrants provide a net benefit to the Canadian economy is that the state must be protected from migrants who themselves seek to benefit from Canada's social service network and economic opportunities, without contributing to the economy.\(^{49}\) However, because humanitarianism and respect for human rights are integral to Canada's understanding of itself, a space must be created for these aspects of the national identity. I suggest that this space is occupied by "refugees". Asylum-seekers do not fit within the economic discourse – they seek membership on the basis of need, not on the basis of their ability to contribute to the Canadian economy. Thus, asylum-seekers appear to occupy both the economic space and the human rights space, reflecting the tension between these two discourses. Canadian migration policy and law resolves this tension by assigning those asylum-seekers who are economically motivated to the economic space, on the basis that they are not legitimate "refugees". In contrast, "refugees" are subject to an apparent "rights-based" discourse, although, as I argue elsewhere, that discourse is hollow. There is a moral space for refugees, but it is a not a true human rights space because it is limited by communitarian concerns.

\(^{48}\) I consider the immigrant selection system in Canadian migration legislation in more detail in Chapter 2.

Having identified these characteristics – individuality, universality and moral supremacy – what then is the space occupied by refugees, asylum-seekers, within a moral paradigm about migration that is rights-based? Joseph Carens and Ann Dummett argue from within a rights-based framework that migration controls are not justified, as every human individual has a right to move freely between states.

Carens argues that freedom of movement is a fundamental right in a liberal society, as it is this freedom that allows for equality of opportunity: “You have to be able to move to where the opportunities are in order to take advantage of them”. Carens points out that liberal states recognize this right; indeed, in Canada this right is enshrined in the Charter of Rights. In arguing that freedom of movement is a core human right, Carens is adopting the theories of John Rawls; however, Rawls’ approach to liberalism assumed a close state; that is, Rawls never dealt with the question of international migration. Carens, extends freedom of movement across states by applying the principles of universalism and equality to extend the right to free movement to all individuals. As Carens states:

The radical disjuncture that treats freedom of movement within the state as a moral imperative and freedom of movement across state borders as merely a matter of political discretion makes no sense from a perspective that takes seriously the freedom and equality of all individuals.

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50 J. Carens, “A liberal egalitarian perspective” in Barry & Goodin, supra note 18 at 25.
51 A. Dummett, “The transnational migration of people seen from within a natural law tradition” in Barry & Goodin, supra note 18 at 169.
52 Section 6 of the Charter of Rights enshrines mobility rights, although those rights are limited to Canadian citizens and residents: Charter of Rights, supra note 23 at s.6.
Dummett also extrapolates a right of free movement across borders from a liberal right. However, she derives the right to immigrate from the right to emigrate. Dummett points out that international human rights documents recognize the right to free movement within states, the right to enter one’s country of nationality, and, most importantly, the right to emigrate from any country. Dummett argues that the right to emigrate is, in practical terms, rendered meaningless if there is no accompanying right to immigrate:

Logically, it is an absurdity to assert a right of emigration without a complementary right of immigration unless there exist in fact (as in the mid-nineteenth century) a number of states which permit free entry. At present, no such state exists, and the right of emigration is not, and cannot be in these circumstances, a general human right exercisable in practice.55

In addition to this argument based on the logical necessity of symmetry in a rights-based moral paradigm with respect to migration,56 Dummett also adopts the argument of Carens, based on universality and equality. However, as Dummett recognizes, neither her position nor that of Carens mandates unlimited migration. Rather, like any human right, it may be counterbalanced against other human rights claims.

Thus, for both Carens and Dummett, the right to migrate is limited by concerns with respect to public order or national security. Dummett places this in a human rights context more explicitly than does Carens, who simply asserts that the state’s duty to maintain order may justify restrictions on migration.57 Dummett states:

55 Dummett, supra note 51 at 173.
56 Phillip Cole agrees with Dummett that this asymmetry is not logically or theoretically sustainable: Cole, supra note 41.
57 Carens also appears to suggest that some cultural concerns may justify limits on migration, at least with respect to certain economic migrants. He gives the example of Japan, where he states that it “would be reasonable to suppose that this distinctive [Japanese] culture and way of life would be profoundly transformed if a significant number of immigrants came to live in Japan ... I do not see why an interest in marginally better economic opportunities should count more than an interest in preserving a culture” Carens, supra note 50 at 37-38. Thus, his position may, in some ways, be closer to that of certain liberal communitarians.
If, and only if, the exercise by great numbers of people of their right to move threatened the fundamental human rights of other individuals, the right to move could be limited and this limitation could properly be imposed by state authorities which have a duty to preserve human rights within their jurisdictions. On this view the collective interest of a receiving society could not be weighed against the individual’s right to move, in the sense that the interests of an economy, a culture of a theory of the nation could not be advanced against the right.\(^{58}\)

Both Dummett and Carens approach the issue of migration from the right to freedom of movement. Before leaving a discussion of the “rights based” moral paradigm with respect to asylum-seekers, I want to deal briefly with the argument that the rights of some migrants — who can be defined as refugees — arise out of other fundamental rights, aside from any right to freedom of movement, the inclusion of which in the catalogue of human rights may be disputed. This argument would suggest that it may be consistent with a “rights based” moral paradigm to distinguish between “refugees” and immigrants/illegal migrants. Dummett herself suggests that refugees may have a superior moral claim to immigrate than others, because their claim arises out of rights more urgent than freedom of movement, although she then qualifies her statement, explaining that freedom of movement is as important as these other rights:

> It is consistent with a natural law line of argument to prefer the refugee whose life is in immediate danger to other applicants for entry. The asylum-seeker has an overwhelming claim. But this is not to say that other claims are non-existent, only that their basis is different: a claim to free movement rather than a claim to life itself or freedom from torture. I think that if one is arguing on the basis of universal human rights, and asserting that one of these is a right to free movement, the only reasonable position to take is that no state can prefer one migrant over another on the grounds of skill, economic status or other consideration, save for the preservation of the individual human rights of others.\(^ {59}\)

\(^{58}\) Dummett, *supra* note 51 at 177.

\(^{59}\) *Ibid.* at 179
Dummett's statement implies that it may be possible to argue on the basis of universal human rights, without asserting that the right to free movement is one of those rights, such that “refugees” are those illegal migrants whose other human rights will be imperiled if they are not allowed to remain to the receiving state. As I argue later, in some ways, this is the direction in which Canadian migration laws may develop, especially in light of a nascent rights based discourse around deportation and refugees. Although this approach is problematic in that it undermines the universality of human rights, it is preferable to the strongly communitarian/realist paradigm that dominate Canadian migration law at present.

There are two possible ways to structure this approach:

1. All rights other than a right to free movement give rise to a moral claim to asylum (that is, a claim to be admitted and to remain so long as the human right in question is threatened). The problem with this position is that it is generally agreed that, in the absence of freedom of movement, many other rights cease to have any meaningful content. For example, given the disparities in economic conditions worldwide, subsistence rights are meaningless in the absence of the ability to move in order to realize those rights. Thus, the absence of freedom of movement is only consistent with the preservation of other rights if conditions are identical for every individual in every place in the world. Henry Shue explains that it is freedom of movement that renders rights “rights” – moral demands – rather than privileges:

   Yes, even in the absence of a right to freedom of physical movement, people can enjoy the substances of many rights. But they cannot enjoy them as rights, only as privileges, discretions, indulgences. Deprivation can occur

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60 In refugee law this is the right of "non-refoulement". Non-refoulement is, essentially, the legal right not to be forcibly expelled from the state of asylum, where there is a risk of a serious human rights violation (for example torture) in the state of return.
as readily as provision, and this is not what enjoying a right means.61

2. The second approach would be to identify a limited list of those “core rights” that are so important that their infringement could constitute a moral claim to asylum. The difficulty of this position is that it implicitly assumes that those who are already members of the state possess all rights equally and universally, but those outside do not – the only rights of theirs that need to be respected are a limited list of core rights. Moreover, this approach raises the difficulty of selecting which rights warrant protection. The right to be free from torture? The right to life? Free speech? Subsistence? The very process of selecting those rights that are universal – that is, that apply to outsiders as well as insiders – and those that are for insiders only is arbitrary unless it is informed by moral considerations. However, if it is informed by moral considerations, those are essentially the considerations of communitarianism since, as I have explained, it is communitarianism that assumes that rights are not, as a general matter, universal. As I explain below, communitarianism fundamentally conflicts with a rights based approach.

1.3 Liberal Communitarianism: Inside and Outside the Nation

Unlike a human rights based moral paradigm, liberal communitarianism62 mandates a selective approach to migrants. This paradigm elevates the community, and the need to maintain the community’s (or “nation’s”) values, cultures and institutions, above the rights of any individual who is outside that community. As with a human rights based

62 Although I am calling it “communitarianism”, others use different terminology to describe this approach. For example, Matthew Gibney describes this as a “partial” approach, contrasting it with a rights-based “impartial” approach: M. Gibney, “Liberal Democratic States and Responsibilities to Refugees” (1999) 93 American Pol. Science Rev. 169. It should also be noted that some question whether some of the “communitarian” theorists like Michael Walzer are liberal at all: Cole, supra note 41 at 60-61.
approach, there is disagreement with respect to the many elements of this approach; however, in the context of migration two central characteristics are evident: (i) the importance of protection of the nation-state; (ii) the distinction between those who are already members of the nation and those who are seeking membership.

The communitarian moral paradigm places moral significance on the citizen community—the nation-state. Liberal values do not necessarily imply that individuals must live in a community; however, many liberal theorists base their approach on the existence of such a community, occupying a defined geographic space with access to defined resources.  

David Miller and Michael Walzer, both of whom address the place of migration in a liberal communitarian (or nationalist) moral paradigm, identify the nation-state as an ideal political unit as it is a place wherein individuals may express their identities and exercise their wills, which identities are shaped by the individuals' shared values, responsibilities and attachments to one another.  

Shared values, responsibilities and attachments comprise a culture wherein individuals have reciprocal obligations to one another. It is this culture that defines the community; therefore, this culture must be protected from threats to its coherence and integrity.  

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63 Some theorists simply assume the nation without exploring its moral validity or limitations. See, e.g., Rawls, supra note 53 and Dworkin, supra note 25.

64 Miller, supra note 30, Walzer, supra note 18.

65 Of course nationalism is not, in itself, necessarily liberal. One can conceive of a shared culture that is fundamentally illiberal and yet shared by the community's members, including some adversely affected by it. For example, a national identity may be based on the acceptance and practice of slavery. Thus, liberal nationalist theorists may identify criteria for an acceptable shared national identity. For example, Miller specifies that a national identity must not be racist, must have an acceptable balance between public and private culture, and must arise through a free and equal process of public contestation, that is be self defined by the community and therefore "authentic": Miller, ibid. In contrast, Walzer posits only the lesser restriction that a national identity must be authentic. Thus, for Walzer, those in the United States in the 1920's who argued for immigration to be restricted to defend an allegedly white and protestant American culture were arguing on the basis of an illegitimate national identity, as the United States at that time was, in reality, a multicultural community: Walzer, ibid. Both Miller and Cole criticize Walzer for his failure to place any other restrictions on the scope of an acceptable national
Taylor argues, members of nations "have the right to demand that others respect whatever is indispensable to ... [their] being full human subjects"; that is, respect for the shared values and attachments that give citizens of nations their identities.\textsuperscript{66}

In this moral paradigm, migrants who do not share the national culture, are a threat to the nation-state. In his summary of the communitarian moral paradigm Gibney explains the threat posed by migrants:

the profound changes that new members can bring about in the character and internal environment of a state – most obviously, by changing its dominant language and mores – make control over entry an essential feature of any independent community.\textsuperscript{67}

Thus, in the liberal communitarian moral paradigm, migration must be controlled; limited to those who do not threaten the national culture.

As the nation is defined by its national identity or culture, liberal communitarians mandate that this identity be authentic. That is, it must reflect a genuine understanding shared by all of the community's existing members.\textsuperscript{68} Because the nation is constructed out of a population within a fixed geographic area, those existing members include "aliens" within the nation's territorial boundary. As Walzer acknowledges, the liberal nation is morally prohibited from expelling such individuals:

Initially, at least, the sphere of membership is given: the men and women who determine what membership means, and who shape the admissions policies of the political community, are simply the men and women who are

\textsuperscript{67} Gibney, \textit{supra} note 62 at 172.
\textsuperscript{68} Miller, \textit{supra} note 30.
already there. New states and governments must make their peace with the old inhabitants of the land they rule.\(^69\)

Thus, the community cannot expel those who are, at least initially, within its geographic territory. Such persons are necessarily members of the nation.

However, those who are outside the nation's territory - strangers - may become members only if the community grants them membership. As set out above, a cornerstone of the communitarian paradigm is that the community determines the requirements for membership, as it is the community that determines the core values it is seeking within potential new members. Nonetheless, most liberal nationalists or communitarians identify a moral obligation on the part of the state to admit certain needy outsiders. However, for all liberal communitarians this obligation is limited. That is, the issue is not one of a universal “right to asylum” but rather of “how many” and “which” asylum-seekers should be admitted. Miller, for example, takes the position that a national identity is not necessarily static and therefore the nation can absorb culturally diverse refugees, provided that migrants arrive at a reasonable rate, such that the rate of migration by problematic groups (i.e. those who are significantly culturally different from the liberal national identity) ought to be controlled by the state.\(^70\) Other theorists set the limitations at the point at which liberal institutions may begin to suffer, such that the state ought to control both the potential economic and cultural impact of refugees.\(^71\)

\(^69\) Walzer, *supra* note 18 at 43.
\(^70\) Miller, *supra* note 30 at 25
\(^71\) F. Whelan “Citizenship and Freedom of Movement: An Open Admission Policy?” in “Gibney, Open Borders”, *supra* note 25 at 1. Whelan summarizes this position in his article, although he does not necessarily advocate it. This is also the limitation drawn by liberal realists, who, although they do not necessarily ascribe moral worth to the nation, acknowledge the existence of nations and perceive new members as a potential threat to liberal institutions within those nations: see, e.g., Woodward, *supra* note 18. In contrast, Henry Sidgwick focused on the economic impact of migration only, saying that immigration by those in need should be allowed until the point at which it detrimentally affects the standard of living of the nation's poor: Sidgwick cited in Cole, *supra* note 41 at 64. Gibney has criticized the liberal communitarian moral paradigm as offering little guidance as to appropriate refugee admissions policies,
I suggest that the moral limitations suggested by Michael Walzer’s version of communitarianism best explain the legal limitations on asylum in Canadian migration laws.

In determining the limits of the nation-state’s moral obligation to admit non-members in need, Walzer relies on what he describes as the membership principle of “mutual aid”, which he says is necessarily part of a liberal national identity. 72 Mutual aid mandates that a party provide assistance to a party in need if the costs of doing so are relatively low for the first party. Walzer uses the example of the white Australia policy as an example of a case where the community violated the principle of mutual aid. As Australia had sufficient territory to “share” with new members, mutual aid would have prevented the exclusion of strangers in need. However, Walzer also allows that, with respect to strangers who are economically needy, mutual aid is satisfied if a state simply provides economic assistance to poorer states, exporting its superfluous wealth, while refusing membership to economically needy strangers. Thus, Walzer distinguishes the economic migrant, from the genuine “refugee”, who he defines as a “necessitous stranger” needing membership itself, rather than any economic good or territory. As I argue in the next Chapter, the distinction between economic migrants and genuine refugees is an important aspect of Canadian refugee law.

Moreover, not only does Walzer distinguish between economic migrants and refugees, for Walzer, even with respect to genuine, non-economically motivated, refugees, the

because of the indeterminacy of these limits as defined by various theorists and, ultimately, various communities, who are, after all, responsible for identifying their own core values: Gibney, supra 62 at 173. I would argue, nonetheless, that the key point to take from liberal communitarians is the assertion that there are moral limits on refugee admissions, and that such limits are defined by the community’s needs, and not the refugees’ rights. 72 Walzer, supra note 18 at 42-51.
community's obligations are limited to assisting only those with whom it shares an affinity, or common values:

Toward some refugees, we may well have obligations of the same sort that we have toward fellow nationals. This is obviously the case with regard to any group of people whom we have helped turn into refugees. The injury we have done them makes for an affinity between us...

we can also be bound to help men and women persecuted or oppressed because they are like us. Ideological as well as ethnic affinity can generate bounds across political lines...

The repression of political comrades, like the persecution of co-religionists, seems to generate an obligation to help, at least to provide refuge for the most exposed and endangered people. Perhaps every victim of authoritarianism and bigotry is the moral comrade of a liberal citizen: that is an argument I would like to make. But that would press affinity too hard, and it is in any case unnecessary. So long as the number of victims is small, mutual aid will generate similar practical results; and when the number increases, and we are forced to choose among the victims, we will look, rightfully, for some more direct connection with our own way of life.\textsuperscript{73}

Thus, in the Walzerian moral paradigm, the only genuine refugees are those with whom the state can identify a sense of relatedness and mutuality, an affinity. The purpose of this limitation is to protect the nation-state by ensuring that the national identity, the sanctity of the nation's territory, and the adequacy of the nation's resources, are unharmed by migration. As Walzer suggests, in the case of the liberal state, there is an affinity with the involuntary victims of totalitarian governments. Thus, this aspect of the Walzerian moral paradigm implies a distinction between refugees, who are involuntary migrants forced to flee authoritarian regimes, and migrants who voluntarily depart their home state simply to seek "a better life". As I argue in the next Chapter, the Canadian refugee regime reflects this distinction.

\textsuperscript{73} \textit{Ibid.} at 49
Similarly, Canadian migration laws as a whole also reflect the second characteristic of the communitarian moral paradigm, differential treatment of those who are outside, as opposed to within, the nation-state's geographic territory. That is, Canada treats immigrants, who are physically within Canada's borders, differently from non-residents. The Canadian nation-state has no legal obligation to grant membership to those outside its territory beyond the very limited obligations prescribed by mutual aid, and perhaps even less than those obligations. Non-residents who wish to become members of the Canadian nation, to migrate to Canada, must first seek permission to do so at a Canadian government office outside of Canada.

The Chinese Migrants, who accessed Canada's territory without first obtaining permission from the Canadian state, challenge this aspect of Canada's migration law. They became present in Canada's territory, without first having been granted permission to access membership. Clearly, from a liberal communitarian moral perspective, the Chinese Migrants posed a threat to the nation, as most of them would not have met the standards for membership set out in Canada's immigration laws. However, as de facto territorial "members", ought not they too have been permitted to

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74 Under the IRPA, the obligation to those refugees outside Canada seeking permanent residence is limited by the potential economic impact of the refugee claimant. That is, refugees may be denied residence if they cannot demonstrate adequate economic prospects – either through self-support or the support of a third party – in Canada: IRPA, supra note 38. Arguably, this is an obligation even less than that mandated by the principle of mutual aid, which principle prioritizes affinity over such economic considerations.

75 That is to say, become conditional members (permanent residents as opposed to citizens).

76 Section 11 of the IRPA requires that all non-residents seek and obtain the appropriate visa outside of Canada before entering Canada. Individuals who are non-residents but otherwise present in Canada may attempt to apply to the Canadian government within Canada to remain in Canada as permanent residents but such an application is only granted if the applicant is the legally visiting spouse of a Canadian citizen or resident (that is, already effectively a member of the Canadian community) or is effectively a refugee claimant, seeking protection from persecution or other hardship that he or she would face if obliged to leave Canada: IRPA, supra note 38.
participate in the public discourse resulting in the “national identity”? Fundamentally, the Chinese Migrants, like other irregular migrants, demonstrate the reality that national borders are permeable; this permeability poses a problem for the liberal communitarian.

Walzer struggles with this problem. At one point he argues that it is immoral for a liberal nation to expel an asylum-seeker who is within the territory of that nation, where the asylum-seeker is at risk of a serious human rights violation if expelled. Walzer states that to do so would be fundamentally illiberal as it would “require us to use force against helpless and desperate people”. However, he also assumes that the numbers of such people would be small and suggests that if this were not the case, such persons could possibly be legitimately expelled:

the numbers likely to be involved, except in unusual cases, are small and the people easily absorbed (so we would be using force for “things superfluous”). But if we offered a refuge to everyone in the world who could plausibly say that he needed it, we might be overwhelmed.

... actually to take in large numbers of refugees is often morally necessary; but the right to restrain the flow remains a feature of communal self-determination.\textsuperscript{77}

I suggest, however, that there is a legal mechanism whereby this problem may be avoided: through the legal fiction of persons who are “outside” the nation despite being physically present in it. Migration laws may distinguish between “legitimate” and “illegitimate” migrants; that is, between “immigrants” and “refugees”, who are

\textsuperscript{77} Walzer, \textit{supra} note 18 at 51. Walzer may be right in arguing that the numbers of asylum-seekers are, in fact, very small, at least with respect to Canada. For example, in the year 1999-2000, the year the Chinese Migrants arrived, Canada's Immigration and Refugee Board received only 31,000 claims. This may be compared with the 189,816 new immigrants (including 24,367 refugees from both outside and inside Canada) who received immigrant (“permanent resident”) status in 1999: Canada, Department of Citizenship and Immigration, \textit{Facts and Figures 1999, Immigration Overview}, (Ottawa: Minister of Public Works and Government Services Canada, 2000) at 3; Canada, Treasury Board of Canada Secretariat, \textit{Immigration and Refugee Board: Departmental Performance Report 2000-2001}, (Ottawa: Minister of Public Works and Government Services Canada, 2001).
legitimately present in Canada and therefore are protected from expulsion, as opposed to “illegal migrants”. As I argue in the next Chapter, Canadian migration laws articulate this distinction. Asylum-seekers are presumed “illegal migrants” unless they are selected by the Canadian Government as “refugees”. Thus, the asylum-seeker is effectively in the position of Walzer’s necessitous stranger, residing in a geographical fiction created by a law that treats her as though she is outside of Canada’s physical territory and therefore subject to the limited moral obligations defined by the principle of mutual aid.

Walzer’s articulation of his dilemma also alludes to another important element of Canadian refugee laws: the notion of the “desperate”, “helpless” asylum-seeker. Walzer appears to be saying that the liberal state’s obligation not to expel asylum-seekers extends only to those who are without volition (“helpless”), or alternatives (“desperate”). Insofar as an asylum-seeker is a voluntary, as opposed to forced, migrant, she does not have any claim to membership.

1.4 Conclusions

As Canada is a liberal state, Canadian migration law ought to reflect liberal morality. However, I have argued that liberal morality with respect to migration, and asylum-seekers, is inherently conflicted. In particular, the human rights based moral approach to migration advocated by Dummett and Carens is in sharp contrast to the liberal communitarian and realist views of Woodward, Miller and Walzer. The latter approach places primacy on state sovereignty and existing state members’ interests over the claims of non-members. The state’s obligation to asylum-seekers is circumscribed by the principle of “mutual aid”, namely only to those with whom the state’s existing members already have an affinity, generally, politically motivated forced migrants.
There is no obligation to those who have migrated because of economic need, as economic migration is within the sphere of “immigration”, which the state controls so as to ensure that immigration results in a net benefit to the state’s economy. On the other hand, the broader human-rights approach to migration is based on the recognition of universal, individual human rights that create corresponding state obligations. Consequently, this approach mandates an open-door to migration, whether by asylum-seekers or others, based on a universal right to freedom of movement. However, from the perspective of asylum-seekers, it is not simply that one approach mandates an “open-door” to migrants while the other permits selectivity; rather, the crux of the difference in moral paradigms is that communitarian/realists determine migration policies on laws based on the answer to the question, “What is in the nation/community’s interests?”, while the human rights based approach asks, “What rights of the asylum-seeker are engaged?”.

If one considers this distinction alone, perhaps one can identify an alternative to Canada’s present approach to asylum-seekers that does not imply a completely open door to all would-be migrants, but that is nonetheless informed by the human-rights based approach. Earlier in this Chapter I suggested two possible approaches to understanding asylum claims from a human-rights perspective, while excluding a right to freedom of movement. I proposed that engagement of either one of a core list of human rights, or all human rights other than freedom of movement, might give rise to a claim to asylum. Although, as I pointed out, both approaches are fundamentally communitarian, in that they are not truly universal, I maintain that they are preferable to the present communitarian/realist paradigm that dominates Canadian migration law. Moreover, insofar as contemporary refugee law and jurisprudence in Canada incorporate a human-rights discourse, there may be space in Canadian migration law
for either of these limited human rights based approaches. Unfortunately, as the 
Chinese Migrant Children's' cases illustrate, the potential for this paradigm shift in 
Canadian migration law has yet to be realized.
CHAPTER II

CANADIAN MIGRATION LAW: IRREGULAR MIGRANTS, REFUGEES AND LEGITIMACY

Legitimate (a)
transf. Genuine, real: opposed to 'spurious'

Oxford English Dictionary\(^78\)

applications for protection and residence are honoured or refused according to rules and regulations into which the refugee has no input. In other words, he or she has to play the game according to imposed rules. Once the Dutch official considers the “flight story” to lack plausibility, the applicant is branded a “pseudo”. His or her name is eliminated from the application procedure and the “subject” turns administratively into an “illegal” and thus “undesirable”. The individual dies a bureaucratic death. No papers, and thus no existence.\(^79\)

Philomena Essed and Rianne Wesenbeek

For many commentators, the most inflammatory aspect of the Chinese Migrants’ arrival was their irregular migration. Minelle Mahtani and Alison Mountz’s media review with respect to the Chinese Migrants documents headlines like, “Immigration Line-Jumpers Not Welcome”, “Enough is Enough” and cartoons depicting the Chinese Migrants as “selfish, perpetuating an image of the migrant as taking advantage of a too-Liberal immigration system”.\(^80\) Despite their asylum-claims, the Chinese Migrants were perceived as non-genuine, illegal migrants, and Canadian migration law reinforced this

\(^80\) Mahtani & Mountz, supra note 49 at 28.
perception by, ultimately, deeming them illegitimate refugee claimants and, therefore, illegal migrants.

In Chapter I, I presented two competing liberal moral paradigms with respect to migration: communitarianism/realism and a human rights based approach. I argued that, while the latter gives precedence to the human rights claims of asylum-seekers over the state’s interests, the former is characterized by its emphasis on the state’s control over migration, the “outsider” status of irregular migrants, and a limited obligation to admit asylum-seekers to membership in the state. Another way to think of these characteristics is to articulate them in terms of the distinctions that may be found in migration law: immigrants vs. illegal migrants; legitimate refugees (forced migrants) vs. economic (voluntary) migrants. In this Chapter, I will explore some of these distinctions as they present in Canadian migration legislation and jurisprudence, and as they affected the Chinese Migrants, especially the Children.

2.1 Historical Migration Policy and Legislation

Before deconstructing Canadian migration law, one must challenge the assumption that explicit migration legislation is necessarily a consequence of the nation-state’s existence. I have already challenged this assumption from a theoretical perspective in Chapter I, where I explained that a human rights based approach to migration mandates the virtual absence of migration controls. However, it is also relevant to think in terms of Canada’s history, during which the regulation of migration was a key element of Canadian nation-building, but explicit migration legislation only emerged in the 1900’s. That is not to say that the Canadian Government ignored migration. To the contrary, the Government was keenly interested in attracting what it perceived as “desirable” migrants, and excluding “undesirable” migrants. However, the mechanisms
whereby the Government controlled migration were not migration laws, but rather economic incentives/disincentives and, in some cases, active recruitment of immigrants.81

For example, in 1792 John Simcoe, Lieutenant Governor of Upper Canada, tried to encourage residents of the former Thirteen Colonies in America to immigrate to Upper Canada by offering them generous grants of free land. This economic incentive was replaced by a disincentive after the War of 1812, when policymakers felt that excessive American migration posed a threat to Upper Canada’s security. Land grants to American migrants were discontinued and an order was made that no land grants be made to “subjects of the United States”. Instead, Lord Bathurst, British secretary of state for war and the colonies proposed that the British government encourage Scottish Highlanders to settle in Canada, by offering government assistance to those who agreed to do so. In 1815, the British government lured numerous such highlanders to immigrate to Canada by offering free passage, 100 acres of land, and free supplies for six months. This approach of enforcing migration policies through economic measures continued to dominate until the beginning of the twentieth century.82


81 There have been laws prohibiting undesirable migration since the late 1800’s. For example, in 1872 the first Canadian Immigration Act, An Act Respecting Immigration and Immigrants, S.C. 1869, c.10, was amended to prohibit the entry of criminals and other “vicious classes”, and in 1879 an Order-in-Council was passed excluding paupers and destitute migrants: An Act to Amend the Immigration Act of 1869, S.C. 1872, c.28. Similarly, since 1889, there have been laws permitting the return of undesirable migrants. However, the 1906 Immigration Act was the first Canadian federal legislation to officially sanction to deportation of such undesirable migrants. This legislation also significantly increased the number of categories of undesirable migrants: Immigration Act 1906, R.S.C. 1906, c.93. Notably, some pre-1900’s Canadian migration legislation was with respect to the registration of aliens and limitations on their activities and movements within Canada. As with economic incentives and disincentives, this is
In their results economic and social incentives and disincentives may impact migration flows. For example, the Chinese "head tax" imposed in the late 1800's and raised to $500 in 1903, essentially an economic disincentive for Chinese migration, was described by one political observer of the time as having "effectually restricted the inflow [of immigrants] from China". Thus, it was arguably tantamount to a law restricting migration from China. However, managing migration through economic measures is qualitatively different from controlling the state's membership by restricting admission through migrant selection criteria, and by removing undesirable migrants. The former may achieve policy goals associated with migration, but the latter approach explicitly asserts the nation-state's sovereign control over the composition of its members. That is, the latter approach strongly reflects the communitarian moral paradigm I described in Chapter I. Canada's constitution has always contemplated the regulation of migration through explicit legislation with respect to migrant selection and exclusion, although this approach came to dominate Canadian migration policy only in the twentieth century.

a mechanism whereby the state can regulate its membership without actually pre-selecting potential immigrants. Knowles, ibid, at 27-33, 49-50, and 82-83.


Knowles, supra note 81 at 51, quoting Sir Joseph Pope, former private secretary to Sir John A. MacDonald, Canada's first Prime Minister. The Chinese head tax raises the question of the moral justifiability of economic disincentives in a liberal state.

This mirrors the development of migration legislation in much of the Western world. One of the interesting questions this raises is whether and how the development of explicit migration legislation may have been linked to the development of international norms requiring that states not discriminate amongst their members. As the Chinese head tax illustrates, economic incentives and disincentives may be inherently discriminatory.
The *Constitution Act, 1867*\textsuperscript{86} established formal governmental control over migration.\textsuperscript{87} Power over immigration to Canada in general was given to the Federal Government, although provinces retain jurisdiction over migrant settlement and migration into specific provinces.\textsuperscript{88} Initially, the federal government continued to focus on economic laws creating disincentives for migration over any legal prohibition of undesirable migrants. The exceptions to this were prohibitions on paupers, the ill and those who were "immoral".\textsuperscript{89} Nonetheless, over the course of the twentieth century, this approach gradually shifted to become one of selection of those migrants who were deemed desirable, by deeming undesirable migrants legally "inadmissible to Canada". Federal legislation defined those who were inadmissible to Canada; border controls were used to enforce migration restrictions.\textsuperscript{90} Immigration legislation also provided for the expulsion, deportation, of illegal migrants.

By the time of the Chinese Migrants' arrival in the summer of 1999, Canadian migration policy was effected solely through this selection and deportation based approach.

\textsuperscript{87} Canadian law has focussed on controlling immigration, rather than controlling emigration. The notable exception, of course, is illegal migrants, who are subject to expulsion, that is, forced emigration.
\textsuperscript{88} *Constitution Act, 1867*, supra note 86. Donald Galloway remarks on the close link between economic development and immigration, as reflected in the fact that immigration and agriculture are dealt with the same section of the *Constitution Act, 1867*: Galloway, *supra* at 9.
\textsuperscript{89} This may be contrasted to the provinces, notably, British Columbia, who passed a series of statutes restricting the entry of Chinese immigrants, which took the form of both outright prohibitions of and qualifications (such as linguistic qualifications) for immigration. However, British Columbia also used economic disincentives to reduce the flow of Chinese immigration. Much of this legislation was ultimately disallowed by the Court as exceeding British Columbia's provincial jurisdiction to legislate with respect to immigrant settlement and immigration promotion. Galloway, *ibid.* at 10-12.
\textsuperscript{90} For example, the *Immigration Act, 1910* allowed the Governor in Council to designate any racial or national group "inadmissible" due to its unsuitability or undesirability. That legislation also formalized a process whereby undesirable immigrants could be deported, including those who had become undesirable by virtue of being on public welfare or undesirable political views (advocating a change of government in any British possession): *Immigration Act, S.C. 1910*, c.27. See also N. Buchignani and D. Indra, "Vanishing Acts: Illegal Immigration in Canada as a Sometime Social Issue" in D. Haines and K. Rosenblum, eds., *Illegal Immigration in America* (Westport: Greenwood Press, 1999) 415.
2.2 Contemporary Migration Legislation

The Chinese Migrants arrived in Canada the summer of 1999. At that time, the central Canadian legislative instruments with respect to migration control were the *Immigration Act* and the *Immigration Act Regulations*. However, many of the Chinese Migrants were still in Canada, and the subject of processes under Canadian migration law, on June 28, 2002. On that date, the *Immigration Act* and *Immigration Act Regulations* were replaced by the *Immigration and Refugee Protection Act* and the *Immigration and Refugee Protection Regulations* ("IRPA"). Both the *Immigration Act* and IRPA entrench key elements of the communitarian/realist paradigm. First, the *Immigration Act* and IRPA emphasize the Canadian Government's control over the selection of migrants. Migrants are selected, before being admitted to Canada, based primarily on economic criteria. Irregular migrants, like the Chinese Migrants, are treated as outsiders, despite their physical presence within Canada's borders. The illegitimate, spurious, characterization of irregular migrants is accomplished by making them subject to peremptory expulsion, detention, and criminal conviction, all as a consequence of their irregular migration. Second, the *Immigration Act* and the IRPA both incorporate the "refugee" definition in the 1951 *United Nations Convention Relating to the Status of Refugees* and the 1967 Protocol thereto ("Refugees Convention"). Under the *Refugees Convention*, states' obligations to grant membership to refugees are subject

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92 IRPA, supra note 38 and *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPA Regulations].
93 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954). Although the *Refugees Convention* initially applied only to refugee claims resulting from a pre-1951 event in Europe, this temporal and geographic limitation was removed by the 1967 *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 8791 (entered into force 4 October 1967). Canada is a signatory to the both the Convention and the Protocol. In this paper, when I refer to the *Refugees Convention*, I am referring to the *Refugees Convention* as amended by the Protocol.
to limitations that reflect the communitarian/realist paradigm. In particular, the *Refugees Convention* (i) is state-centric; and (ii) restricts protection to those asylum-seekers who are able to satisfy the Government that they are “forced migrants”, motivated to migrate because of political oppression, rather than voluntary, “economic migrants”.

### 2.2.1 Distinguishing Immigrants from Illegal Migrants

Both the *Immigration Act* and the *IRPA* contemplate the pre-selection of migrants by the Canadian Government. This is accomplished through visa and border controls. First, the legislation requires that every non-citizen who intends to enter Canada first obtain permission, in the form of a permanent resident or visitor visa, to do so. Visas for entry are issued only to those prospective migrants who meet selection criteria set by the Canadian Government.\(^94\) Moreover, with very narrow exceptions, visas are only available at Canadian Missions, embassies and consulates staffed by Canadian Government officials, all of which are outside of Canada. At Canadian Missions, Canadian Government officials assess visa applications based on selection criteria that are set out in migration legislation. Under both the *Immigration Act* and the *IRPA* the primary selection criteria for prospective permanent residents are designed to assess the extent to which a visa applicant will contribute to the Canadian economy.\(^95\) Further, foreign nationals who have undesirable traits, such as criminal histories or medical

\(^{94}\) *Immigration Act*, supra note 38 at ss. 4-6, and 9; *IRPA*, supra note 38 at ss. 11, 19. Temporary residents (visitors, students, and temporary workers) may also enter Canada; however, they, too, have to obtain permission to do so before traveling to Canada. This permission specifies the period of time (usually a year or less) which the person may remain in Canada, after which he or she is considered an illegal migrant: *IRPA*, supra note 38 at s. 11; *Immigration Act*, supra note 38 at s.26; *Immigration Act Regulations*, supra note 91 at s.13.

\(^{95}\) For example, the *IRPA* sets out several classes of permanent residents, all of whom are pre-selected outside Canada. In the case of the economic class, the Convention refugee class, and a portion of the family class, prospective permanent residents must demonstrate their ability to be economically self-supporting. Moreover, the economic class is restricted to foreign nationals who are likely to create a net contribution to the Canadian economy: *IRPA Regulations*, supra note 92 at ss. 73-115. The *Immigration Act* contained similar provisions: *Immigration Act*, ibid. at ss.8-11.
conditions that could unduly tax Canadian resources, are considered "inadmissible" and
cannot qualify for a permanent resident visa or, in some cases, a visitor visa. In
addition to migrant selection criteria, the *Immigration Act* and the *IRPA* establish border
controls, thereby ensuring that only those permanent residents who have visas are
permitted entry. All persons entering Canada must present themselves for
"examination" by a Canadian Government official at the border, or "port of entry". Thus, by legislating a pre-selection mechanism for prospective migrants to Canada, and
controlling the border in order to ensure that only those migrants who are pre-selected
enter Canada, Canadian migration legislation defines the parameters of the legitimate
"immigrant", and distinguishes him or her from the "illegal migrant".

The Chinese Migrants, who were irregular migrants, challenged this migration regime.
From the perspective of Canadian migration legislation, the Chinese Migrants should
not be in Canada as they were not pre-selected for migration. Consequently, they are
outsiders and non-members, despite living within Canada's borders. Irregular migrants
are de-legitimized, because the legislation contemplates that genuine migrants have
been pre-selected. Moreover, irregular migrants are placed in a legislative stream with
the explicit purpose of expelling them. Under the *Immigration Act* and the *IRPA* any
migrant who enters Canada without having been pre-selected may be issued a
"removal order" requiring his or her prompt voluntary departure or deportation from
Canada. Thus, immediately upon arrival, the irregular migrant is told that his or her
presence in Canada is illegitimate such that he or she must either leave or be forcibly
expelled. This is true with respect to asylum-seekers, as well. A migrant who enters
Canada and states that he or she is seeking asylum, may be issued a removal order,

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96 *IRPA*, supra note 38 at ss. 33-42; *Immigration Act*, ibid. at s.19.
97 *IRPA*, ibid. at s.18; *Immigration Act*, ibid. at s.12.
98 *IRPA*, ibid. at ss.44-45; *Immigration Act*, ibid. at ss.21, 23.
although in such cases the removal order is conditional and will be voided if the migrant is able to satisfy the Government that he or she is a refugee, or acquires permanent resident status, before being deported.99

In addition to de-legitimizing irregular migrants through the automatic issuance of removal orders, Canadian migration legislation also criminalizes irregular migrants. They are not only irregular, they are “illegal”. Criminalization is accomplished both indirectly, by making irregular migrants liable to detention, and overtly, by deeming the means by which most irregular migrants enter Canada criminal offences. The *Immigration Act* and the *IRPA* contemplate that irregular migrants, including asylum-seekers, may be detained until such time as they are either legitimized - by being granted protected (asylum) or permanent resident status - or ready for deportation.100 Of the three grounds for detention under the *Immigration Act*, which were carried over to the *IRPA*, two clearly implicate migrants who enter Canada without having been pre-selected: (i) detention on the basis of inability to prove identity, and (ii) detention on the

99 *IRPA*, *ibid.* at ss. 49(2), 51; *Immigration Act*, *ibid.* at s. 32.1. In addition to “refugee” or “protected” status, an irregular migrant may acquire the right to remain in Canada if he or she is granted discretionary permission to do so on the basis of “humanitarian and compassionate factors”: *IRPA*, *ibid.* at s. 25; *Immigration Act*, *ibid.* at s. 114(2). This permission is discretionary, although the Canadian Government provides guidelines to immigration officers determining such “humanitarian and compassionate” applications. Interestingly, those guidelines suggest that it is a negative factor if a migrant came to Canada by irregular means; that is, if he or she was not pre-elected as an immigrant or visitor. Canada, Department of Citizenship and Immigration, *IP-5: Immigration Applications in Canada Made on Humanitarian and Compassionate Grounds* (Ottawa: Citizenship and Immigration Canada, June 2005). See also *Canada (Minister of Citizenship and Immigration) v. Legault*, 2002 FCA 125. The intersection of the humanitarian and compassionate application process and irregular migration is a broad subject, one that is beyond the scope this paper.

100 *Immigration Act*, *ibid.* at s. 103; *IRPA*, *ibid.* at ss. 54-57; *IRPA Regulations*, *supra* note 92 at ss. 244-249. Although the Chinese Migrants were, for the most part, detained, it should be noted that detention of asylum-seekers is the exception rather than the rule in Canada at present. However, this is likely a consequence of the lack of adequate facilities, rather than evidence of an absence of governmental commitment to migration control. In its 2002 report and recommendations arising out of the Chinese Migrants’ arrival, the Department of Citizenship and Immigration commented that, “CIC should continue to use detention as one tool to counter the risk that irregular migrants may flee” and “[t]here was general consensus that some form of permanent [immigration detention] facility was required in the Lower Mainland”: *Marine Arrivals Lessons Learned*, *supra* note 2 at 17-18.
basis that the migrant will be a flight risk in that he or she will not appear for future proceedings under migration legislation or will avoid efforts to effect his or her expulsion from Canada. With respect to the former, a migrant without an immigrant or visitor visa is very likely to be undocumented, or to possess false documents. Similarly, as I outlined above, all irregular migrants including asylum-seekers are subject to removal orders; they are all potentially subject to future expulsion from Canada.

Furthermore, the "flight risk" ground for detention underscores the prominence of the state's interests in Canada's migration regime. Migrants who avoid their migration proceedings - whether a refugee hearing or deportation - deprive the state of the opportunity to screen them for membership. However, the public costs associated with long-term detention of those migrants who might evade state selection and control are significant. The detention provisions in the Immigration Act and the IRPA suggest that, from the Canadian Government's perspective, the ability to control its membership is sufficiently significant to warrant such costs.

The effect of the Immigration Act detention provisions on the Chinese Migrants was profound. Of the 476 men, women and children on the second through fourth boats, all but a few of the adults were detained from the moment of their arrival in Canada, with most of that detention time spent in institutions operated by the British Columbia Corrections Branch (that is to say, jails), until they were either found to be Convention refugees, or were deported. For the most part, the alleged basis for detention was

\[101\] In dollar terms, those costs can be substantial. For example, the cost of one detention centre alone that was used for detention of many but not all of the adult male Chinese Migrants in Prince George, British Columbia was over $19 million: Marine Arrivals Lessons Learned, ibid.

\[102\] Most of the Chinese Migrants from the first boat were not detained; however, after almost all of them failed to attend subsequent migration proceedings, the Department of Citizenship and Immigration adopted a policy of detaining all of the adults on the subsequent three boats. The
that the Chinese Migrants were not able to provide satisfactory identification documents and, later, that, if released, they would become part of the underground community of status-less migrants generally, such that the Canadian Government would not be able to deport them. The Federal Court upheld detention of the Chinese Migrants for periods of as long as several years under the *Immigration Act* and the *IRPA*, and the Immigration Department expressed satisfaction that detention was effective in achieving the Department’s goal of retaining the state’s ability to pre-select immigrants for membership, and to keep out (by deporting) those who have not been selected:

The success of the marine arrivals operation was, in part, credited to the decision to detain the migrants. Detention proved to be an effective tool that prevented migrants on the last three boats from fleeing, and ensured that the detainees were available for all proceedings and removal, as necessary.

... By detaining illegal and undocumented migrants who appear to pose a potential flight risk, CIC can increase the integrity of the refugee determination process.

Although most of the Chinese Migrant Children were not detained, they were housed in two institutional facilities, operating as “group homes”, and housing 67 and 25 children, respectively. These were all Children from the second, third and fourth boats,

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103 In cases challenging the prolonged detention of the Chinese Migrants while their refugee claims and other immigration applications were processed, the Federal Court generally upheld that detention, and overturned administrative tribunal decisions releasing Chinese Migrants. See *e.g.*, *Canada (Minister of Citizenship and Immigration) v. Ke* (12 April 2000), Vancouver Registry No. Imm-1425-00 (F.C.T.D.). In 2002, Joshua Sohn, an immigration lawyer who represented many of the Chinese Migrants commented that he knew of some detentions that were 18 or 19 months long: *Human Smuggling Challenges*, supra note 3 at 15.

104 *Marine Arrivals Lessons Learned*, supra note 2 at 17.

105 18 boys, whom the Department of Citizenship and Immigration argued were associated with the smugglers who had arranged the Chinese Migrants’ emigration from Fujian Province, were detained for seven months, after which they were released into the care of the British Columbia Ministry for Children and Families.
as the 18 children from the first boat had been placed in Chinese-speaking foster homes. Three-quarters of the children subsequently "fled" the foster and group homes,\(^{106}\) and did not appear for any further migration and removal proceedings.\(^{107}\) That the Department of Immigration considered this a failure on their part to satisfactorily apply Canadian migration legislation is evident from the fact that in 2000 and 2001 two subsequent groups of unaccompanied Chinese children who were irregular migrants, were detained by the Department of Citizenship and Immigration, in some cases for several months.\(^{108}\)

Finally, contemporary Canadian migration legislation explicitly criminalizes the means by which a migrant can enter Canada without having been pre-selected. For example, the following acts were all explicitly defined as criminal offences in the *Immigration Act*: entering Canada without first reporting to an immigration officer at the border; remaining in Canada beyond the expiry date of a visitor visa; entering Canada with false immigration documentation; returning to Canada without explicit governmental consent after having been deported; and organizing the entry into Canada of migrants who were not pre-selected overseas.\(^{109}\) The *IRPA* not only carried over these offences, but it increased the range of penalties to include substantial fines and terms of imprisonment. For example, under the *IRPA*, a migrant who enters Canada using a fraudulent

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\(^{106}\) In the case of the Victoria group home, all 25 children left in one night: *Human Smuggling Challenges*, supra note 3 at 37.

\(^{107}\) *Marine Arrivals Lessons Learned*, supra note 2.


\(^{109}\) *Immigration Act*, supra note 38 at ss. 94, 94.1. These are offences under the *IRPA*, as well, although they are not as explicitly laid out. Rather, the *IRPA* contains a general offence provision that captures these acts, while its more specific provisions are directed towards those who assist irregular migrants: *IRPA*, supra note 38 at ss. 114-124.
passport is liable to a term of imprisonment of up to 14 years. Clearly, the intent of the legislation is to criminalize irregular migrants, like the Chinese Migrants.\textsuperscript{110}

\subsection*{2.2.2 Distinguishing Legitimate Refugees from Illegal Migrants}

Thus far, I have focused on the provisions of Canadian migration legislation that de-legitimize and criminalize irregular migrants, that is, on the distinction between immigrants and illegal migrants. I have argued that this distinction evidences the communitarian/realist approach to migration, as it reflects and reinforces the state’s sovereign power over the selection of new members. However, I have not yet addressed the place of asylum-seekers in Canadian migration legislation, except insofar as asylum-seekers are irregular migrants and therefore, \textit{prima facie}, illegal migrants and not immigrants.

For the purposes of this paper, I have defined an “asylum-seeker” as an “irregular migrant who is seeking to remain in Canada and who is at risk of a human rights violation if she is expelled to her home country.”\textsuperscript{111} Consequently, even the limited human rights-based approach to migration (one that excludes freedom of movement from the list of universal human rights) I suggested in my conclusion in Chapter I would mandate that most asylum-seekers be permitted to remain in Canada. Arguably, this

\textsuperscript{110} IRPA, ibid. at s.123. Interestingly, under section122 of the IRPA, if a person is found in possession of a fraudulent, blank or incomplete document, there is an evidentiary presumption that he or she intends to use that document to contravene the IRPA. In practice, the IRPA and \textit{Immigration Act} criminal provisions are not always enforced. However, I maintain that this does not reflect any de-criminalization of irregular migrants, any more than the failure of the state to enforce, in every instance, legislation criminalizing the sale of tobacco to minors necessarily reflects the de-criminalization of that act. Rather, the failure to prosecute is likely a consequence of the costs involved, and the fact that, ultimately, irregular migrants are subject to expulsion. Also, it should be noted that, if an irregular migrant is able to satisfy the Government that he or she is a “refugee”, his or her use of fraudulent documents, or otherwise irregular means, to enter Canada will not constitute a criminal offence, IRPA, ibid. at s.133; \textit{Immigration Act}, ibid. at s. 95.1.

\textsuperscript{111} Supra note 17.
would have included the Chinese Migrant Children. As Stasiulis acknowledges, there is a compelling argument that the Children's rights as children, under the *United Nations Convention on the Rights of the Child*,¹¹² and as victims of smuggling/trafficking, were engaged by the prospect of their expulsion and return to Fujian Province.¹¹³ However, in most of the Children's cases, they were found not to be "refugees", and were therefore denied asylum in Canada.

I argue that the Chinese Migrant Children were denied asylum because Canadian refugee law is not human-rights based. Instead, Canadian refugee law reflects the communitarian position that the state's obligations to asylum-seekers are limited to non-removal of "refugees": involuntary migrants, who are, as Walzer said, "helpless" and "desperate" and who have emigrated because they are fleeing state oppression.¹¹⁴ Asylum-seekers who may be described as having emigrated voluntarily, motivated by the desire to improve their economic circumstances, are illegal, economic migrants. The Chinese Migrant Children were, in the main, found to be economically-motivated, voluntary migrants. They were illegal migrants, not refugees. I suggest that this aspect of Canadian refugee law is a consequence of, *inter alia*, the incorporation of the *Refugees Convention*, which articulates the distinction between voluntary/economic migrant and involuntary/political refugee, in Canadian migration legislation.¹¹⁵

¹¹³ Stasiulis, *supra* note 12 at 520-526. This was the argument made by the Children's advocates before the Immigration and Refugee Board, and in Federal Court, as well. I articulate this argument in more detail in Chapter III.
¹¹⁴ I use the term "state oppression" recognizing that Canadian refugee law contemplates that a legitimate refugee may be fleeing oppression by a non-state actor; however, in such cases the asylum-seeker is not able to reasonably access protection from his or her state with respect to the non-state actor. Thus, in this limited sense the state is indirectly responsible for the oppression.
¹¹⁵ However, as I argue later, the *Refugees Convention* can be read more broadly than the Canadian Courts and Government have thus far been willing to do. In other words, the communitarian moral paradigm is not a consequence of the *Refugees Convention* alone, but
2.3 Canadian Asylum Law and Policy Prior to the Immigration Act, 1976

In order to understand the significance of the *Refugees Convention* in Canadian asylum legislation, it is useful to consider the history of Canadian asylum legislation and policy, beginning with the twentieth century.\(^{116}\) Before World War II, Canadian migration legislation was not, in the main, concerned with the issue of asylum. Rather, Canadian migration officials focused their efforts on determining whether prospective migrants were inadmissible due to race or ethnicity, and whether they would be of economic benefit to Canada.\(^{117}\) Even after World War II, the Canadian Government's forays into formal asylum laws, done by way of Orders in Council, treated those seeking asylum also of judicial and governmental interpretation and application of that Convention. As well, note that I do not discuss the expanded obligation to grant membership to asylum-seekers that arises out of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, which obligation is partially affirmed in section 97 of the *IRPA* and at common law: *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984 23 I.L.M. 1027 as modified, 24 I.L.M. 535 (entered into force 1987) [Torture Convention]; *IRPA*, supra note 38 at s.97; *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. That expanded obligation did not have an impact on the Chinese Migrant Children's refugee determinations; therefore, I deal with this issue in detail in my conclusion, where I briefly discuss the potential for a human rights based moral paradigm in Canadian migration law.\(^{116}\)

I have already explained earlier that, before the 1900's, Canadian legislation did not explicitly differentiate between immigrants and illegal migrants. Consequently, in this paper I do not address the legal status of migrants claiming asylum in Canada before the 1900's. Nonetheless, it should be noted that the British North American colonies did contemplate that some migrants might seek asylum. For example, from 1775 to 1784 between 40,000 and 50,000 United Empire Loyalists migrated to British North America and Nova Scotia, where many of these migrants settled, passed what was effectively asylum legislation in the form of: *An act for the ready admission of His Majesty's Subjects in the Colonies of the Continent, who may be induced to take refuge in this Province, from the Anarchy and Confusion there, and for securing the Peace, and preserving the Loyalty and Obedience of the Inhabitants of this Province*, S.N.S. 1775, c.8. I do not purport to provide a comprehensive history of Canadian asylum law in this paper. Instead, I have relied largely on secondary sources, especially Knowles, Galloway and Howard Adelman. Knowles, *supra* note 81; Galloway, *supra* note 81; H. Adelman, "Canadian Refugee Policy in the Postwar Period" in H. Adelman, ed., *Refugee Policy: Canada and the United States* (North York: York Lanes Press, 1991) 172.

\(^{117}\) Dirks writes that, in general, before World War II, "the reasons for people's departures from their homelands seldom interested officials responsible for processing those who wanted to settle in Canada. Instead, migrants from abroad were looked at for what they had to offer in terms of satisfying labour market needs, supplying capital and know-how for job creating projects, or simply settling the land."; G.E. Dirks, *Controversy and Complexity: Canadian Immigration Policy During the 1980's* (Montreal: McGill University Press, 1995) at 61.
like other migrants, selecting them based on the same criteria. For example, from 1947-1952, Canadian Government officials selected from amongst the many European displaced persons based primarily on economic, ethnic, religious, and cultural preferences.\textsuperscript{118} Knowles quotes one historian's description of the qualities that itinerant teams of Canadian immigration officials looked for when they interviewed potential immigrants at camps for displaced persons:

\begin{quote}
their mission was to select able-bodied refugees 'like good beef cattle, with a preference for strong young men who could do manual labour and would not be encumbered by aging relatives'\textsuperscript{119}
\end{quote}

Howard Adelman notes that, during this same time period, Canada had the worst record of any Western state with respect to the acceptance of Jewish refugees, a consequence of the anti-Semitic attitudes of key Canadian immigration policy-makers.\textsuperscript{120} In other words, although the Canadian government purported to be establishing an asylum or refugee admissions policy, in reality the approach to migrants seeking asylum was no different than the approach had been to other migrants; only those who were pre-selected, primarily based on ethnic and economic considerations, were given asylum. Migrants who had not been pre-selected, even if they were genuinely at risk in their home countries, were, in law, subject to expulsion, including expulsion at the border. A lucky few were able to obtain status as immigrants after arriving as irregular, and therefore illegal, migrants; however, this was effectively at the Canadian Government's whim.\textsuperscript{121}

\begin{flushright}
\textsuperscript{118} Buchignani & Indra, supra note 90 at 424
\textsuperscript{119} Knowles, supra note 81 at 132.
\textsuperscript{120} Adelman, supra note 116 at 188.
\textsuperscript{121} Thus, for example, around 1948-1950 approximately 1700 Estonians, who had fled the Russian occupation of their country, arrived by boat at Canadian ports. They were admitted by Order in Council waiving usual immigration requirements. Buchignani & Indra, supra note 90 at 423-424.
\end{flushright}
The *Refugees Convention* was drafted in 1951; however, Canada did not sign it until 1969, and did not incorporate it into Canadian migration legislation until 1978, when the *Immigration Act, 1976*\(^{122}\) came into force. Between 1969 and 1978, Canada did admit several groups of migrants that were described as “refugees”, including several thousands of Ugandan Asians fleeing Idi Amin. Nonetheless, as Adelman points out, in each case the Canadian Government pre-selected these migrants for immigration to Canada and did so based on the Canadian polity’s priorities and interests, and not the severity of the migrants’ needs.\(^{123}\) Adelman and Hathaway both attribute the Canadian Government’s reluctance to adopt and adhere to the *Refugees Convention* to a general reluctance to relinquish any sovereign control over the ability to pre-select migrants based on the Canadian state’s interests.\(^{124}\)

Thus, prior to the statutory incorporation of the *Refugees Convention* in the *Immigration Act, 1976*, both migrants and outsiders seeking asylum in Canada were legally no different from all other migrants and prospective migrants. Insofar as Canada granted asylum to some groups of migrants whom it described as “refugees”, this was done based on the interests of the Canadian state with respect to migration generally, and did not reflect any obligation to protect some or all asylum-seekers from expulsion.


\(^{123}\) Adelman, *supra* note 116 at 190-199.

2.4 The 1951 *Refugees Convention*

The *Refugees Convention* answers both the question "who is entitled to asylum?" and "what rights does 'asylum' entail?". First, the *Refugees Convention* defines a "refugee", as follows:

*Any person who ... Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.*

Second, the *Refugees Convention* articulates a signatory state's obligations to refugees who are present within its territory, regardless of whether they are irregular migrants. For example, a signatory state must allow refugees freedom of movement within the state, and access to certain public services, such as access to public elementary education. Moreover, a refugee cannot be *refouled*, or returned to the country of persecution, so long as his or her life or freedom would be threatened upon return on account of his or her race, religion, nationality, membership in a particular social group or political opinion. Many developed states, including Canada, extend this right to a

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125 *Refugees Convention*, supra note 93 at Article 1A(2). I have not included the text of the exclusions from the definition of refugee set out in Articles 1E and 1F of the *Refugees Convention*, as they were not relevant to the Chinese Migrant Children's cases. It should be noted that other world regions have established more expansive bases for asylum, as have individual states. For example, the *Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, defines as a refugee, "any person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.": *Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, supra note 27.

126 *Refugees Convention*, *ibid.* at Article 33. There is an exception to the right of non-refoulement with respect to refugees whom there are reasonable grounds to believe are a danger to the community in or security of the country of asylum.
right to seek and obtain permanent resident status in the state of refuge, once an individual has been found to be a refugee.\textsuperscript{127} Thus, the \textit{Refugees Convention} affirms that refugees are legitimate members of the state; they are entitled to the same benefits of membership as those accorded immigrants.\textsuperscript{128}

The \textit{Refugees Convention} definition of a refugee, as well as the prohibition on \textit{refoulement}, has been incorporated verbatim into contemporary Canadian migration legislation.\textsuperscript{129}

On its face, the definition of “refugee”, and the principle of \textit{non-refoulement}, are not inconsistent with a human-rights based approach to asylum-seekers. The use of the phrase “well-founded fear of being persecuted” suggests that the central inquiry in the refugee determination process will be the extent to which an asylum-seeker is at risk of a human rights violation, and the seriousness of the potential violation, if he or she is expelled. Indeed, the Canadian Supreme Court linked “persecution” with human rights violations in both \textit{Ward v. Canada (Minister of Employment and Immigration)}\textsuperscript{130} and \textit{Chan v. Canada (Minister of Employment and Immigration)},\textsuperscript{131} and the United Nations High Commissioner for Refugees (“UNHCR”) advocates this linkage in its \textit{Handbook on

\textsuperscript{128} Essed & Wesenbeek, \textit{supra} note 79 at 54. Moreover, under Canadian legislation, most refugees are entitled to apply for and obtain permanent resident status: \textit{Immigration Act}, \textit{supra} note 38 at s. 46.04; \textit{IRPA}, \textit{supra} note 38 at s. 25).
\textsuperscript{129} \textit{Immigration Act}, \textit{ibid.}; \textit{IRPA}, \textit{ibid.}
\textsuperscript{130} \textit{Canada (Minister of Employment and Immigration) v. Ward}, [1993] 2 S.C.R. 689 (Unanimous decision written by LaForest, J.).
\textsuperscript{131} \textit{Chan}, \textit{supra} note 20 at 593 (Minority judgment written by LaForest, J.).
Procedures and Criteria for Determining Refugee Status. However, the Refugees Convention requires that "persecution" be by reason of "race, religion, nationality, membership in a particular social group or political opinion". As interpreted by the Refugee Convention's framers, the UNHCR and in Canada, and applied to the Chinese Migrant Children, this qualification of "persecution" shifts refugee determination away from an inquiry into the nature and extent of an asylum-seeker's objective risk of a human rights violation upon expulsion, to an assessment of whether he or she has emigrated irregularly in order to escape ethnic, racial, religious, or other political oppression. In this sense, refugee determination may subsume an asylum-seeker's human rights into an inquiry into his or her motivations for migration. Thus, the Refugees Convention reflects a communitarian, and not human rights based, paradigm with respect to migration. In my analysis below, I focus on some of the characteristics of the Refugees Convention that I argue are indicative of this paradigm, including the state-centricism of the Refugees Convention, and the Convention's implication of a distinction between involuntary/political and voluntary/economic migrants.

2.4.1 The Refugees Convention is State-Centric

Although it has been described by the Supreme Court of Canada as a human rights document, the Refugees Convention is, essentially, state-centric. It is a compromise document, drafted by states who recognized that displaced peoples had to go somewhere and be accorded some status, but who were leery of exposing themselves to mass influxes of potentially undesirable migrants. For example, the Refugees Convention explicitly excludes from refugee status the most undesirable migrants –

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133 Pushpanathan, supra note 20 at para. 56-58 (Bastarache, J.).
criminals, terrorists, and those who are seen as undeserving of asylum—regardless of the risk they may face if expelled.\textsuperscript{134} As well, there is no individual complaints process under the \textit{Refugees Convention};\textsuperscript{135} therefore, states have leeway to interpret the scope of the refugee definition, and the obligation not to expel asylum-seekers, as broadly or narrowly as meets the state's own interests and migration priorities. The \textit{Refugees Convention} also expressly limits signatory states' obligations to migrants, those who are within the state's territory, allowing states to rely on border controls, visa requirements, overseas migration control officers, and even interception and turning away of vehicles transporting would-be migrants to their borders.\textsuperscript{136} Hence, the \textit{Refugees Convention} does not challenge the state's authority to \textit{prima facie} de-legitimize and criminalize irregular migrants, including asylum-seekers.\textsuperscript{137}

\subsection*{2.4.2 Refugees as Migrants Fleeing Political Oppression}

Many Canadians also "genuinely wish to provide haven for the persecuted"—conditional on individuals' being "true," deserving, political refugees who have gone through proper procedures to secure refugee status.\textsuperscript{138}

Norman Buchignani and Doreen Indra's expression of the Canadian polity's intent to limit asylum to genuine, "political refugees" echoes the Refugee Convention's drafter's understanding of the Convention's purpose, and the text of the Convention itself. The

\begin{itemize}
\item \textsuperscript{134} \textit{Refugees Convention}, supra note 93 at Articles 1F, 33.
\item \textsuperscript{135} Thus, the \textit{Refugees Convention} differs from the \textit{International Convention on Civil and Political Rights} and the \textit{United Nations Convention Against Torture and Other Cruel and Unusual Treatment or Punishment}, both of which have an individual complaints process: \textit{International Covenant on Civil and Political Rights}, 19 December 1966, 999 U.N.T.S. 171; \textit{Torture Convention}, supra note 115.
\item \textsuperscript{136} Some refugee law scholars argue that the latter measure ("interdiction") is prohibited by the \textit{Refugees Convention}, but this remains debatable. See \textit{e.g.} Goodwin-Gill, \textit{supra} note 29 at 141-145.
\item \textsuperscript{137} Nevzat Soguk has written a detailed analysis of the state-centricism of refugee law and policy, including the \textit{Refugees Convention}, based on a historical analysis: N. Soguk, \textit{States and Strangers: Refugees and Displacements of Statecraft}, (Minneapolis: University of Minnesota Press, 1999).
\item \textsuperscript{138} Buchignani & Indra, \textit{supra} note 90 at 431.
\end{itemize}
origins of the *Refugees Convention* are in the various inter-war and post World War II refugee conventions, including the *Constitution* of the *International Refugee Association*. Initially, "refugees" were defined as internationally displaced people who were denied status by their state of origin, regardless of their reasons for migration. Subsequent accords, however, began to incorporate inquiries into motivation for migration. For example the *1938 Convention on German Refugees* defined as refugees all those who were not protected by the German government (i.e. displaced people), but expressly excluded "persons who left Germany for reasons of purely personal convenience".

In 1938 a prominent international scholar, Sir J.H. Simpson, commented on the definition of "refugee", linking it to politically-motivated migration:

> [the essential quality of refugee is someone] who has sought refuge in a territory other than that in which he was formerly resident as a result of political events which rendered his continued residence in his former territory intolerable or impossible.

Similarly, the constitution of the International Refugee Organization specified classes of "refugees" by the regimes which had oppressed them, for example, victims of the Nazi and Fascist regimes, although it also incorporated the notion that individuals might have "valid objections" to return to their country of origin because of "persecution or fear"

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140 *1938 Convention concerning the status of refugees coming from Germany*, 4 July 1936, 171 L.N.T.S. 4461.

based on reasonable grounds of persecution because of race, religion, nationality, or political opinions" or "objections of a political nature judged by the IRO to be valid".\textsuperscript{142}

By 1951, this approach to refugee law - protection of asylum-seekers fleeing political oppression - was firmly entrenched. Hathaway summarizes the Western focus and bias in the development of the refugee definition during the drafting of the \textit{Refugees Convention}:

It was understood that the concept of "fear of persecution" was sufficiently open-ended to allow the West to continue to admit ideological dissidents to international protection.

Second, the precise formulation of the persecution standard meant that refugee law could not readily be turned to the political advantage of the Soviet bloc. The refugee definition was carefully phrased to include only persons who have been disenfranchised by their state on the basis of race, religion, nationality, membership of a particular social group, or political opinion, matters in regard to which East bloc practice has historically been problematic. Western vulnerability in the area of respect for human rights, in contrast, centres more on the guarantee of socio-economic rights than on respect for civil and political rights.\textsuperscript{143}

Thus, the history of the development of the refugee definition in the \textit{Refugees Convention} demonstrates an emphasis on protection of individuals who were motivated to migrate in order to escape political oppression. These "refugees" may be contrasted with migrants whose migration is motivated by economic need.

For example, the \textit{UNHCR Handbook} juxtaposes economic migrants, who are not "refugees", against victims of political persecution, who are "refugees":

\begin{itemize}
  \item \textsuperscript{142} G. Goodwin-Gill, \textit{supra} note 29 at 6.
  \item \textsuperscript{143} J. Hathaway, \textit{supra} note 139 at 8.
\end{itemize}
62. A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

63. The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear.

... what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.

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Before leaving his country, before "pulling up stakes," a claimant must have taken all the necessary and appropriate measures to determine whether he could continue to live in his country of origin without fear of persecution by reason of his race, religion, nationality, etc. Everything in the claimant's testimony focuses on his work. The members of this panel therefore conclude that the claimant is an economic migrant. He is not a member of any particular group and was not the victim of racially motivated acts per se on the part, generally, of all the citizens or a good portion of the citizens of his own country. Rather, the claimant was motivated by a desire for change or by other reasons of a personal nature which he did not indicate to the panel.

Counsel for the claimant cited a passage from a Law Reform Commission paper quoted in Singh et al v. M.E.I. [(1985) 1 S.C.R. 177, page 207] and argued that the claimant had the right to security of his person, which meant "not only protection of one's physical integrity, but the provision of necessaries for its support..." In this document, the Law Reform Commission was referring to the Universal Declaration of Human Rights (1948), which naturally states that "Everyone has the right to a standard of living adequate for the health and well-being of himself..." [Article 25, paragraph 1]. However, there is nothing in the
The exclusion of economically motivated migrants from the refugee definition has been incorporated explicitly into Canadian domestic refugee jurisprudence. In *Ward v. Canada (Minister of Employment and Immigration)* the Supreme Court of Canada stated:

> The need for "persecution" in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e. individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.  

The disjunction between economic migrants and legitimate “refugees” was also a recurring theme in the Immigration and Refugee Board’s decisions with respect to the Chinese Migrant Children. In *Re: Li, et. al.*, the Board found that one of the Children, X.C., likely faced a lengthy detention and other punishment by Chinese authorities upon his return, as he had exited China illegally. The Board held that, because X.C.’s emigration was motivated by economic considerations, and not political opinion, he was not a “refugee”:

> In these claims [including X.C.’s], there is no finding that the claimants have a real or perceived political opinion or are members of a particular social group in conflict with the government of China. I do not accept their illegal departure per se to be a political statement but rather an act driven primarily by economic considerations.

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Immigration Act that permits him to link this “right to security” to the definition of a “Convention refugee”.

145 *Ward, supra* note 130.
In my view, he [X.C.] left a second time again for economic reasons, not for a Convention reason. There continues to be no nexus to the definition of Convention refugee.\textsuperscript{146}

Hathaway suggests that, in some case, discriminatory state implementation of socio-economic rights ought to constitute "persecution" for the purposes of the refugee definition; however, this has not been the approach adopted in Canadian refugee jurisprudence, except with respect to cases of economic proscription, where an individual is entirely barred from work because of her civil or political status. In any event, Hathaway emphasizes that the deprivation of socio-economic rights in itself, absent discrimination on a Convention ground, does not constitute "persecution" for the purposes of the refugee definition.\textsuperscript{147} In contrast, a serious deprivation of fundamental civil and political rights will almost always constitute persecution.\textsuperscript{148}

\textsuperscript{146} Re : Li, et. al., supra note 14. The Immigration and Refugee Board relied on the Federal Court of Appeal's decision in Valentin v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 390 (C.A.), which I discuss in further detail in my analysis of the distinction between voluntary and involuntary migrants in refugee law. However, at this point, it is worth noting that the Board cited the following passage from Valentin, which suggests that the punishment X.C. would likely face as a consequence of his illegal exit would have been "persecution", for the purposes of the Refugees Convention, if he had left China for political reasons:

\begin{quote}
Neither the international Convention nor our Act, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application. I would add, with due respect for the very widely held contrary opinion, that the idea does not appear to me even to be supported by the fact that the transgression was motivated by some dissatisfaction of a political nature ... because it seems to me, first, that an isolated sentence can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heart of persecution, \textit{but particularly because the direct relationship that is required between the sentence incurred and imposed and the offender's political opinion does not exist}. [emphasis added by the Board].
\end{quote}

\textsuperscript{147} Hathaway, supra note 139 at 117-121.

\textsuperscript{148} Hathaway, \textit{ibid.} at 111-113.
2.4.3 Refugees are Forced, not Voluntary, Migrants

Thus far, I have explained that the *Refugees Convention*’s definition of “refugee” juxtaposes migrants who are fleeing political oppression, “refugees”, from migrants who are seeking economic betterment, “economic migrants”. Nonetheless, the existence of this distinction does not in itself support my argument that the refugee determination process subsumes an assessment of the human rights risk of the asylum-seeker in an inquiry into his or her motivations for migration, and volition. One could assert that the exclusion of “economic migrants” from the scope of “refugees” simply reflects the primacy of civil and political rights over socio-economic rights. Consequently, the distinction between economic migrants and political refugees might be consistent with the limited human-rights based approach to asylum-seekers that I proposed in Chapter I. However, the cases of the Chinese Migrant Children suggest otherwise. Their refugee determinations turned on their *motivation*, not on the nature of the rights they said were at risk. I argue that the centrality of the Chinese Migrants’ motivations was a consequence of: (i) the Refugee Convention’s orientation towards the protection of individual asylum-seekers, and not migrant groups; (ii) the linkage of “persecution” to the five listed grounds in the *Refugees Convention*’s definition of a “refugee”; and (iii) the emphasis on “forced migration” in refugee discourse.

2.4.3.1 Individuals and not Groups

I would not be able to sustain my argument that motivation is central to the refugee determination process, but for the fact that the *Refugees Convention*’s definition of “refugee” focuses on individual asylum-seekers, and not group migrants. The individualized nature of refugee determination is apparent from the Convention’s text: a refugee is “any person” not “a people”. Further, unlike some regional asylum
conventions, the *Refugees Convention* does not list amongst the grounds for protection war, massive human rights violations, or a state of serious public disorder, all phenomena that can trigger group migration. Consequently, as Atle Grahl-Madsen points out, the *Refugees Convention* allows a state to decline asylum to large groups of migrants fleeing general country conditions, based on the state’s inability to identify any individual as being necessarily at risk:

In the case of a mass-exodus, however, the rank and file will demonstrate fear and anguish, but to the cool spectator it would nevertheless seem that to any particular one of them, the risk of personally becoming a victim of persecution would be minuscule.

... In such a situation, the term "economic refugee" has a tendency to pop up. If a 100,000 persons are returned, nothing is likely to happen to 90,000 of them, except that they will be back in the same miserable conditions [poverty and general oppression] and perhaps even a little worse off than before.  

While not definitive, the *Refugees Convention’s* emphasis on individuals, rather than groups, is consistent with a refugee determination process based on an asylum-seeker’s motivation for having migrated by irregular means.

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149 See e.g., Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, supra note 27; OAS, 1984 Cartagena Declaration on Refugees, OAS/Ser.L/VII.66/Doc.10,rev.1,op.190-193. The UNHCR advocates that the *Refugees Convention* be applied to group migrants who have migrated in circumstances suggesting that the group’s members might otherwise be individual “refugees” by way of “group determination”, whereby every member of the group is *prima facie* deemed a refugee: UNHCR Handbook, supra, note 132.

2.4.3.2 Risk of “Persecution” Alone is not Sufficient

Both the Supreme Court of Canada and the UNHCR have linked the concept of “persecution” to human rights violations. In other words, a risk of a serious human rights violation is likely a risk of “persecution”, for the purposes of the *Refugees Convention*. However, the text of the “refugee” definition clearly requires not only a risk of persecution, but that this persecution be “for reasons of” one of the five enumerated Convention grounds: race, religion, nationality, political opinion, or “membership in a particular social group”. In *Ward*, the Supreme Court of Canada recognized that a risk of persecution alone is not sufficient under the *Refugees Convention*, and explained that the purpose of the Convention grounds is to restrict states’ obligations to asylum-seekers:

As explained earlier, international refugee law was meant to serve as a “substitute” for national protection where the latter was not provided. For this reason, the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals.

... 

Similarly, the drafters of the Convention limited the included bases for a well-founded fear of persecution to “race, religion, nationality, membership in a particular social group or political opinion”. Although the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups, this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of these bases would have been

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151 *Ward, supra* note 130; *Chan, supra* note 20; *UNHCR Handbook, supra* note 132 at para 51.

In this paper, I will not engage in a discussion of what human rights violations are “serious”, as opposed to “minor”, except insofar as I have pointed out that the very act of cataloguing human rights, with a view towards minimizing certain human rights violations where it is non-members who are at risk of those violations, reflects a communitarian/realist moral paradigm.

152 Canadian refugee law refers to this aspect of the “refugee” definition as the requirement that there be a “nexus” between the persecution feared and a Convention ground.
superfluous; the definition of "refugee" could have been limited to individuals who have a well-founded fear of persecution without more. The drafters' decision to list these bases was intended to function as another built-in limitation to the obligations of signatory states.  

The requirement that an asylum-seeker establish something more than a risk of a serious human rights violation in order to be deemed a “refugee”, and the intent of the Convention’s drafters that this aspect of the refugees definition limit states' obligations to asylum-seekers, lends support to my argument that the refugee determination process is informed by a communitarian moral paradigm.

Moreover, this requirement had significant implications for the Chinese Migrant Children’s refugee claims. As I explained in my Introduction to this paper, the Children argued, *inter alia*, that they were at risk of being smuggled or trafficked back to North America if they were to return to China. However, the Children were not able to link this risk to their nationality, religion, race, or political opinion; therefore, they relied on the “particular social group” ground. Because of the way in which Canadian jurisprudence has defined this ground, the Children’s voluntary participation in their irregular migration from Fujian Province to North America was put in issue.

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153 Ward, *ibid*. See also Hathaway, *supra* note 139.

In *Ward*, the Supreme Court stated that a “particular social group” is defined by its members' involuntary membership, that is, members of such groups share characteristics that they either cannot change or ought not to be required to change. Writing for the Court, LaForest, J. elaborated that one may articulate the difference between the shared characteristics of members of a “particular social groups” and members of other associations as the distinction between what one “is” and what one “does”. Hence, particular social groups comprise:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3. groups associated by a former voluntary status, unalterable due to its historical permanence.

Notably, the Court also held that the defining characteristic of a “particular social group” must be something other than its members' shared risk of persecution. Otherwise, as the Court explained, the *Refugees Convention*’s requirement that a “refugee” link his or her risk of persecution to one of the Convention grounds would be redundant.

In the Chinese Migrant Children's cases, the limitations of the “particular social group” ground placed the “voluntariness” of their irregular migration at issue, as illustrated by

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155 In his minority judgment in *Chan*, with which L'Heureux-Dube, J. and Gonthier, J. concurred, LaForest, J. cautioned that the “simplified distinction” between what one is and what one does was not intended to displace the three categories of social groups identified in *Ward*. He also reiterated that the *Ward* categories were a “working rule” and not an “unyielding deterministic approach”. However, LaForest, J.’s minority opinion in *Chan* was not referred to by the Immigration and Refugee Board or the Federal Courts in the Chinese Migrant Children's cases. *Chan*, supra note 20.
156 *Ward*, supra, note 130.
Zhu v. Canada (Minister of Employment and Immigration).\textsuperscript{157} In Zhu, the Federal Court (Trial Division) upheld the Immigration and Refugee Board's determination that 16 of the Chinese Migrant Children were not "refugees" as defined in the Refugees Convention. The Board made this determination after a hearing into 23 of the Children's refugee claims. Of those 23, the Board determined that two, Z.L. and Y.Z., were refugees.\textsuperscript{158} The Board's determination that the Zhu applicants were not refugees turned, inter alia, on its finding that, because they voluntarily emigrated from Fujian Province by means of human smugglers, they were not members of a "particular social group". Therefore, they did not have a nexus to the "refugee" definition in the Refugees Convention. The Federal Court affirmed this approach to the "particular social group" ground:

The primary reason that the tribunal held that applicants [sic] were not Convention refugees was that there was no nexus between their fear of persecution and an enumerated ground under the refugee definition. This finding was reasonably open to the tribunal.

It is the intent of the persecutor which is relevant in determining whether the harm which an individual fears is related to a Convention ground. Here, the alleged persecutors are the snakeheads who smuggle or traffic people from China to other countries, or the parents of the applicants who arranged for the applicants to travel to Canada.

The applicants also argue that the tribunal confused particular social group with aspects of persecution when it stated that the applicants had consented to their carriage to Canada. The respondent submits that the issue of consent was of central importance to whether minors from the Fujian province consist [sic] a particular social group. The intent of the alleged persecutors is key, and here, the

\textsuperscript{157} Zhu v. Canada (Minister of Employment and Immigration), 2001 FCT 884.  
\textsuperscript{158} See Canada v. Li (Minister of Citizenship and Immigration), 2001 FCT 374. Five of the Children lost contact with the Immigration and Refugee Board and the Department of Citizenship and Immigration before the Board could finally determine their refugee claims.
intent was profit. When the tribunal determined that all the applicants had voluntarily exited China, the intent of the parents was irrelevant to the issue of a particular social group.\textsuperscript{159}

Similarly, the Board's determination that Z.L. and Y.Z. were refugees was predicated on its finding that they had not voluntarily migrated to Canada by irregular means.\textsuperscript{160} However, in \textit{Canada (Minister of Citizenship and Immigration) v. Li},\textsuperscript{161} a decision separate from \textit{Zhu}, the Federal Court set aside the Board's determination that Z.L. and Y.Z. were refugees. The Court held that the Board's oral reasons in Z.L. and Y.Z.'s case erroneously suggested that “minor children who are sent from China into servitude and who fear incarceration upon return” could comprise a “particular social group” under the \textit{Refugees Convention}. The Court relied on \textit{Ward} to the effect that a “particular social group” cannot be defined solely by the persecution that its members risk.\textsuperscript{162}

Nevertheless, \textit{Li} and \textit{Zhu} can be reconciled. That is, but for the Board’s failure to clearly state in its reasons in \textit{Li} that the “particular social group” was the same as that identified in \textit{Zhu} (namely, children who had been smuggled to Canada), the Board’s analysis on the issue of “particular social group” was consistent with \textit{Zhu}. Thus, with respect to the centrality of the Children’s consent to their irregular migration in

\begin{footnotesize}
\begin{enumerate}
\item \textit{Zhu}, supra note 157 at para. 38-42. See also \textit{Xiao v. Canada (Minister of Citizenship and Immigration)}, 2001 FCT 195.
\item \textit{Li}, supra note 158.
\end{enumerate}
\end{footnotesize}
determining whether their asylum claims raised a nexus to a Convention ground, Zhu and Li were consistent.\textsuperscript{163}

Further, the requirement that persecution be linked to a Convention ground affected the manner in which the Immigration and Refugee Board dealt with the Chinese Migrant Children's risk of punishment by the Chinese authorities. The Children had emigrated from China by irregular means, thereby contravening China's exit laws. The Board based its determination of whether this risk comprised persecution on a Convention ground on whether the Child in question had voluntarily emigrated. Thus, the Children's voluntariness, and motivations, for having migrated to Canada by irregular means were central issues before the Board.

The Board's approach was consistent with Canadian jurisprudence, and the UNHCR's guidelines, with respect to the issue of penalties for illegal exit. The UNHCR suggests that, under the \textit{Refugees Convention}, an asylum-seeker whose claim is based on such penalties is only a "refugee" if his or her migration is otherwise linked to one of the five Convention grounds.\textsuperscript{164} The Federal Court of Appeal took the same position in \textit{Valentin v. Canada (Minister of Employment and Immigration)},\textsuperscript{165} holding that, absent such a link an illegal exit penalty is not persecution but rather the consequence of a "law of general application".\textsuperscript{166} However, the Federal Court of Appeal also suggested that this is only

\begin{itemize}
\item \textsuperscript{163} See \textit{e.g.}, \textit{Re: Li, et. al., supra} note 14. The Federal Court has upheld this approach to unaccompanied, smuggled, Chinese children: \textit{Zheng v. Canada (Minister of Citizenship and Immigration)}, 2002 FCT 448.
\item \textsuperscript{164} UNHCR Handbook, supra note 132 at para. 61
\item \textsuperscript{165} \textit{Valentin, supra} note 146 at para. 8-9.
\item \textsuperscript{166} This issue is sometimes articulated as the question of "law of general application" or "prosecution" vs. "persecution"; although, as I have explained, it is essentially one aspect of the larger question of nexus to the enumerated grounds in the \textit{Refugees Convention.} 
\end{itemize}
the case where an asylum-seeker has himself or herself "created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application". Consequently, an asylum-seeker who is at risk of a penalty for illegal exit is a legitimate "refugee" if he or she did not voluntarily exit illegally.

The *Refugees Convention*’s requirement that an asylum-seeker’s risk of “persecution” – defined as a serious human rights violation – be linked to one of the six enumerated grounds had profound consequences for the Chinese Migrant Children’s refugee determination process. Because of the nature of the risk the Children faced – being re-smuggled/trafficked and punishment under China’s illegal exit laws – they could not establish this link without satisfying the Board that their irregular migration was involuntary, forced upon them by either their parents or criminal people smugglers/traffickers. In this way, the text of the *Refugees Convention*, as interpreted by Canadian asylum jurisprudence, shifted the Children’s refugee determination process from an inquiry into the seriousness of the human rights violations they risked if expelled from Canada, to an assessment of whether they had “voluntarily” assumed those risks in search of economic betterment. As the Immigration and Refugee Board stated with respect to a group of ten unaccompanied children from Fujian Province who were arrested trying to cross the Canada/United States border:

> If we find volition in a particular claimant and that she averted to a risk of harm of her own will, then we may find that she is a voluntary economic migrant taking risks to secure a better living for herself and perhaps her family, rather than, as claimants’ counsel would have it, a

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167 *Valentin*, supra note 146 at para. 8.
2.4.3.3 “Forced Migrants” in Refugee Discourse

In my discussion above, I have emphasized the text of the “refugee” definition and its role in shifting the focus of the Chinese Migrant Children’s refugee determinations to the Children’s motivations for migrating from Fujian Province to North America. However, in applying the “refugee” definition in the Refugees Convention, the Board is not merely interpreting a bare legal text, it is participating in a larger discourse around the question of asylum-seekers generally. To a significant extent, that discourse conceives of “refugees” as forced, rather than voluntary, migrants.

For example, Hathaway writes:

When refugees are grouped together with all other manner of migrants, be they legal or illegal, skilled or unskilled, law-abiding or undesirable, the fundamental distinction between refugees and other migrants, namely the involuntary nature of the refugee’s journey, is lost. Advocates have demanded that governments take steps actively to remind the public that refugees are not like other immigrants because they have been forced to flee their homes. [emphasis added]

168 Re: T.Z.U., (20 October 2000), Toronto Registry No. TA0-03660 (C.R.D.D.). T.Z.U. was a 18 year old girl from Fujian Province who emigrated from China with the assistance of smugglers, and the goal of going to the United States. She was arrested by Canadian immigration authorities at the Ontario border along with 9 other Chinese children. T.Z.U. was not one of the Chinese Migrants, however, her circumstances and refugee claim mirrored theirs. The Board treated T.Z.U.’s claim as a lead case with respect to issues common to the group of ten.

Similarly, the UNHCR – arguably the world’s predominant refugee advocacy organization – clings to this discourse of the refugee as an individual forced to migrate by political oppression, as opposed to the voluntary, economic migrant. In 1991 the then United Nations High Commissioner for Refugees, Sadako Ogata stated:

I would like to emphasize that refugees and migrants are distinct categories, requiring different responses. In the case of migrants there is an element of choice and planning in their movement. A refugee on the other hand is forced to flee from political conflict to save his life and freedom, and therein lies the basis for protection.\textsuperscript{70}

Further, even scholars who acknowledge the complexity of motivations for migration, and the potential impact of structural factors on migration, emphasize the "coerced" or "forced" nature of "refugee" migration.\textsuperscript{171} As well, the distinction between economic/voluntary migrants and refugees/involuntary migrants pervades contemporary political discourse about migration. Although historically, the developed world has integrated large numbers of immigrants, the political landscape has shifted and migrants from developing nations are less welcome.\textsuperscript{172} The developed world has begun to use the rhetoric of "genuine refugee" (as opposed to a voluntary migrant) to justify border controls, interdictions of migrants at sea, return of migrants to safe third

\textsuperscript{70} S. Ogata, "Refugees in the 1990’s: Changing Reality, Changing Response" (Lecture at Georgetown University, 25 June 1991). The \textit{UNHCR Handbook} reinforces this discourse, as it explicitly refers to the importance of an individual’s motives for emigration: \textit{UNHCR Handbook, supra} note 132 at para.39-40.

\textsuperscript{171} See, e.g., S. Martin, "Averting Forced Migration in Countries in Transition" (2002) 40(3) International Migration 25. David Turton recognizes the inherent complexity of the phenomenon of migration, and the consequent difficulty of identifying "forced" migrants, but argues that there is a meaningful role to be played in migration studies by the concept of the refugee or "forced migrant": D.Turton, "Refugees, Forced Resettlers and Other 'Forced Migrants': Towards a Unitary Study of Forced Migration" (September 2003) Working Paper No. 94, UNHCR.

countries and other efforts to prevent migrants from reaching their territory. For example, Canada and the United States have negotiated for return of refugee claimants who come to Canada from Central and South America to the United States, as well as the return to the United States of almost all refugee claimants who attend at the Canada/United States land border. Similarly, the United States has intercepted ships carrying migrants, many of who are seeking asylum, at sea and returned the migrants to their country of origin without determination of any refugee claims.\textsuperscript{173} In the case of the Chinese Migrants, the Canadian Minister of Immigration took pains to explain that the government of Canada would distinguish the "genuine" refugees from the "illegal migrants".\textsuperscript{174}

Given the ubiquitous nature of the concept of the refugee as a forced, politically motivated migrant in academic writing and advocacy with respect to "refugees", it is unsurprising that the Chinese Migrant Children's refugee determination process turned on the voluntariness of, and therefore motivation for, their migration from Fujian Province to North America.

2.5 Conclusions

Deconstructing Canadian migration legislation reveals the communitarian/realist moral paradigm on which that legislation is based, and the consequences of this paradigm for the Chinese Migrant Children. First, as irregular migrants, the Children were de-legitimized and criminalized. This is a consequence of the legislative distinction


\textsuperscript{174} \textit{Supra} note 8. This is intended to be a brief sampling of some of the political discourse around "refugees"; a comprehensive analysis is beyond the scope of this paper.
between "immigrants", whom the Government has pre-selected for membership based on primarily economic criteria, and "illegal migrants". That distinction reflects the prominence of the Canadian state's sovereign control over the selection of its members. Second, Canadian migration legislation incorporates the "refugee" definition that is in the *Refugees Convention* for the purpose of defining the scope of the state's obligation to grant membership to asylum-seekers. Key aspects of the *Refugees Convention* reinforce the communitarian moral paradigm. In particular, the *Refugees Convention* is state-centric, and it implies a distinction between political/involuntary migrants, who are refugees, and economic/voluntary migrants, who are not. From the perspective of the Chinese Migrant Children, this distinction was something other than the prioritization of civil and political rights over socio-economic ones; it was an aspect of the communitarian/realist moral paradigm. The application of the *Refugees Convention's* definition of "refugee" to the Chinese Migrant Children, shifted the focus of the refugee determination process away from an assessment of their human rights claims to an inquiry into the voluntariness of, and therefore individual motivations for, their irregular migration from Fujian Province to Canada. Thus, the overwhelming majority of the Children, who had "willingly" assumed the risks associated with being smuggled to Canada, in the hopes of economic betterment for themselves and for their families, were not "refugees"; they were illegitimate, illegal migrants.

This approach not only entrenched the moral communitarian paradigm, at the expense of the Children's human rights claims, but it was also disjunctive with a nuanced, contemporary understanding of the phenomenon of the Children's migration from China. I will explain this in the next Chapter.
However, before doing so, it should be noted that my analysis of Canadian refugee law has focused exclusively on the interpretation and application of the *Refugees Convention*, as incorporated in the *Immigration Act* and *IRPA*. I did so because the almost all the Children's refugee claims were determined before June 28, 2002; consequently, it was only that Convention, and its limited definition of "refugee", that defined the scope of Canada's obligation not to refoule asylum-seekers. Under the *IRPA*, since June 28, 2002, Canada has had a legislative obligation not to expel some asylum-seekers who, although they do not meet the definition of "refugee" in the *Refugees Convention*, are nonetheless at risk of torture, death or cruel and unusual treatment or punishment in their home country. As I argue in my Conclusion, this expansion of the scope of "non-refoulement" sustains an argument that Canadian migration law bears the potential to shift towards a human rights based approach towards asylum-seekers, although, to date, this has not been the case in practice.

175 The only exception I found was the case of Y.Z., whose refugee claim was re-determined after the Federal Court set aside the Board's original decision finding that he was a "refugee". At that time, however, Y.Z. was no longer a child. Nonetheless, I will deal briefly with the Board's findings under the IRPA "expanded definition" in Y.Z.'s second refugee determination later in this paper: *Re: P.F.Q.*, [2003] R.P.D.D. No. 5 (R.P.D.) (QL).
CHAPTER III

THE CHINESE MIGRANT CHILDREN'S MIGRATION AS A STRUCTURAL PHENOMENON

In Chapter II I argued that the dominant communitarian moral paradigm in Canadian migration and refugee law resulted both in de-legitimizing and criminalizing the Chinese Migrant Children, as illegal migrants, and in subsuming their human rights claims as children into an inquiry into their motivations for migration. That is, the Children's refugee determination processes before the Immigration and Refugee Board focused on whether the Children consented to being smuggled, in order to achieve economic betterment, such that they were not refugees but rather illegal, economic migrants. In this Chapter, I look to contemporary scholarly work with respect to Fujian emigration, and migration generally, as well as the Children's particular circumstances, for some insight into the inconsistencies and incoherence in the Board's approach. I argue that the Children's migration is best understood as a structural phenomenon, but that this understanding is disjunctive with an inquiry into each Child's individual motivations for migrating from Fujian Province to Canada.

3.1 Assessing "Volition": the Case of Y.Z.

In order to understand the disjunction between the Board's approach in the Children's refugee determinations and a nuanced and contemporary understanding of their migration, it is useful to review one example of the Board's decision-making process. Y.Z. was a teenager who came to Canada on August 13, 1999, arriving on the third boat from China. Y.Z. came to Canada alone, without parents or a guardian. He made a refugee claim, and on November 23, 1999 he testified before a two member panel of
the Immigration and Refugee Board, during a refugee hearing into claims made by a total of 24 of the Children. Y.Z. told the Board that he left China after his father made arrangements for his emigration with the assistance of criminals specializing in facilitating irregular migration, “snakeheads”. His lawyers submitted that all 24 Children would be at risk of retribution from the snakeheads, imprisonment by the Chinese government, and being re-smuggled/trafficked, if they were expelled from Canada to China. Ultimately, the Board determined that only two Children, Y.Z. and Z.L., were genuine “refugees” under the *Refugees Convention*.\(^{176}\)

It is clear from the Board’s reasons that their finding was based on Y.Z. and Z.L.’s evidence that they migrated “involuntarily”:

> it is when I review the testimony of other minor refugee claimants that, for me, has distinguished your situation from theirs. Their testimony was that the journey to North America was an adventure, one they encouraged their parents to organize, or that they were pleased to be presented with the opportunity to go. Some claimants considered it their only hope for a better life, to gain access to the economic opportunities in North America not available to them in Fujian province. Other minor claimants were attempting to join family members or village contacts already in North America who would assist in organizing work and accommodation.

> ... [you] stated that you were pressured to go to North America with little choice. Your testimony was that you were not psychologically prepared to leave your family. You felt pushed out and expressed surprise at your father’s decision [to arrange your emigration].\(^{177}\)

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\(^{176}\) Of the remaining 22, 5 claimants were severed from the claim before the panel made its final decision in their refugee claims. In some cases, the claimants gained the age of majority, in others, they lost touch with the Board and their counsel.

\(^{177}\) *Re: Li and Zhang, supra* note 160.
Notably, upon application by the Canadian Minister of Citizenship and Immigration, the Federal Court set aside the Board's decision, and remitted Y.Z.'s refugee claim for reconsideration. The Court did not criticize the Board's emphasis on Y.Z.'s individual volition in matters of migration. To the contrary, the Court directed that the panel reconsidering Y.Z.'s refugee claim turn its mind to whether Y.Z. might actually be old enough to act independently of family pressures:

It may be that the Respondents [Y.Z. and Z.L.] will legally be adults and free of their parents' control by the time they return or soon after their return... I think the Board will need information about the existence and meaning of the age of majority in China before it can adequately address the Respondent's claims.178

By the time the Immigration and Refugee Board re-heard Z.L.'s claim, he was 18 years old. This time, the Board found that Z.L. was capable of consenting to re-emigrate. Moreover, the Board distinguished "smuggling" from "trafficking"; finding that the former is not "persecution" because it is consensual.179

178 Li, supra note 158 at para. 19. In the same case, the Federal Court also made an important finding reinforcing the state-centric and limited nature of refugee protection in Canada. In particular, the Court criticized the panel's determination that "minor children who are sent from China into servitude and who fear incarceration upon return due to their illegal exit" was a "particular social group" under the refugee definition in the Refugees Convention. The Court emphasized that a "particular social group" could not be defined by persecution alone. In other words, the Court reinforced Canadian jurisprudence to the effect that mere risk of a human rights violation, regardless of severity, is not sufficient to legitimize migration. The risk to the migrant must be grounded in discrimination, on the basis of one of the categories of discrimination that are recognized by liberal societies.

179 The Immigration and Refugee Board's decision with respect to another group of the minor Chinese Migrants (I.C.R. et. al.) demonstrates another way in which volition was a central issue in the Chinese Migrants' refugee determinations. In that case, the Board focussed on whether a minor Chinese Migrant who faced a jail term in China as a result of his illegal exit, was a legitimate "refugee" under the Refugees Convention. The Board decided that he was not a refugee, because his motives for leaving China were economic, "xxxxx may face punishment if he is returned to China because he has been returned once before after an illegal exit....However, in my view, he left a second time for economic reasons, not for a Convention reason. There continues to be no nexus to the definition of Convention refugee. While the treatment he may receive cannot be condoned, it is not sufficiently serious within the context of the claim to constitute persecution." Re: I.C.R., [2000] C.R.D.D. No. 199 (C.R.D.D.) (QL) at para. 157.
Several aspects of the Immigration and Refugee Board’s approach to Y.Z. are relevant to a consideration of whether it is consistent with a contemporary and nuanced understanding of the Children’s migration:

- The Board focused on each of Y.Z. and Z.L.’s migration from Fujian Province to Canada, and the motivations therefore, as an individual act.

- At the first hearing, the Board relied primarily on the Children’s testimony about why they had emigrated, and whether they felt “pressured” to emigrate, that is, the words the Children used to describe their individual feelings about their migration (who were testifying through an interpreter), were more important than an objective understanding of Fujian emigration as a whole.

- The Board’s first decision distinguished the other Children, who were not “refugees” from Y.Z. and Z.L. based on their desire, or lack thereof, to emigrate.

- During the hearing into the Children’s refugee claims, and in its decision rejecting sixteen of them, the Board characterized those sixteen Children’s migration as “an act driven by primarily by the economic considerations of themselves and their families.”

As I argue below, these elements of the Immigration and Refugee Board’s approach are not coherent when considered in light of a contemporary, nuanced understanding of the Children’s migration.

3.2 The Chinese Migrant Children's Circumstances

In researching the Children's circumstances, I reviewed publicly available information from the Department of Citizenship and Immigration Canada ("Canada Immigration"), the British Columbia Ministry of Children and Family Development (formerly the Ministry for Children and Families), as well as portions of the Federal Court records with respect to the Children's refugee claims and subsequent Court proceedings, where those proceedings took place. However, my review was not comprehensive, in that I was not able to access information with respect to all of the Children. First the actual number of Children is not clear. I have seen two different numbers attributed to the Canada Department of Citizenship and Immigration: 98 and 131. However, another Canadian Government official has stated that the Children represented just ten percent of the Chinese Migrants (which would make the number 59). As well, there is almost no information available with respect to the Children who arrived on the first boat, which arrived in Nootka Sound, British Columbia on July 20, 1999. This is because the passengers from that boat, who were not detained, did not keep Canada Immigration advised of their whereabouts, and did not, for the most part, attend their refugee and migration hearings. The total number of passengers on that boat was 123, and it is believed that 13-18 of them were likely Children. Nonetheless, I was able to find some substantive information with respect to the balance of the Children, as most of them were housed in two large institutions operated by the British Columbia Ministry for Children and Families. In particular, I was able to access the refugee claim documents,

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181 I have defined the Chinese Migrant Children as those Chinese Migrants who were aged 17 or younger and who arrived in Canada without their parent or parents. In the case of all the Children except one boy whose mother died during the voyage to Canada, they had traveled to Canada alone, as well.
182 Supra note 4.
183 CBC Radio, supra note 2; Human Smuggling Challenges, supra note 3 (In this document, Robin Pike of the British Columbia Ministry for Children and Families states that there were 18 such Children).
including the Personal Information Forms, refugee hearing transcripts, Immigration and Refugee Board decisions, and Federal Court decisions with respect to 33 of the Children, and the Immigration and Refugee Board's decisions with respect another three of the Children. Thirty-one of the Children whose cases I reviewed were boys, and five were girls. All of these documents were publicly available in either the Federal Court Registry or, in the case of the Immigration and Refugee Board decisions and Federal Court decisions, electronic and print case reporters.

In my review, I focused on what I saw as the key aspects of the Children's migration histories: place of residence in Fujian Province; family circumstances (age, siblings' ages, economic circumstances); education (including reasons for having left school, where that had occurred); employment (of both the Children and their parents); and the Child's evidence as to his or her reasons for leaving Fujian Province to come to Canada. To the extent that I relied on documents the Children filed in support of their refugee claims, and their testimony at the hearing of those claims, I acknowledge that it is possible that some of the Children lied about some of this information. Insofar as the Immigration and Refugee Board found that a Child's testimony about some aspect of his or her circumstances was not credible, I have taken it into account in my summary below.

3.2.1 Place of Residence

All of the Children were from Fujian Province, and most were from villages in counties that have been associated with irregular Chinese migration to North America in
migration literature. In particular, 14 of the Children were from the area of Changle County, three were from Ma Wei, a district of Fuzhou City separated from Changle by the Mingjiang River; nine were from Liangjiang County, and one was from Minhou. All of these regions are in close geographic proximity to each other and are on the Northeast coast of Fujian Province. Fujian Province itself is on the Southeast coast of China, adjacent to the Taiwanese Strait.

Although, as is evident from their description of their family, employment and educational circumstances, the Children’s families are not wealthy, Fujian Province itself is one of the wealthiest provinces in China. Along with Guangdong Province, it is the geographic heart of the "South China miracle" - exceptional economic growth in the coastal states of South China. Fujian and Guangdong Provinces were the subjects of Deng Xiao Peng’s post-Mao economic reform initiatives, commencing in 1978/1979. In 1979, Fujian and Guangdong were released from central economic authority and given autonomy in trade and investment. They were also given authority to establish special export zones, along the model developed by other Asian economies. Fujian Province established Xiamen as such a Special Economic Zone, one of the original four such

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184 Z. Liang and W. Ye, “From Fujian to New York: Understanding the New Chinese Immigration”, in D. Kyle and R. Koslowski, eds., Global Human Smuggling: Comparative Perspectives (Baltimore: John Hopkins University Press, 2001) 187. See also Chin, supra note 5; Kwong, supra note 11. It should be noted, though, that this literature is with respect to Fujianese migration to the United States only. As Pieke, Nyiri, Thuno and Ceccagno found, when they conducted empirical research of Fujianese immigrants in Europe, the United States literature does not necessarily correspond to the circumstances of Fujianese migration elsewhere: F. Pieke, P. Nyiri, M. Thuno anhd A. Ceccagno, Transnational Chinese: Fujianese Migrants in Europe (Stanford: Stanford University Press, 2004).

185 Two stated that they were from "Nanjiang", which is in the South end of Fujian Province. With respect to the remaining three Children, this information was not available.

186 T. Lyons, Poverty and Growth in a South China County: Anxi, Fujian 1949-1992 (Ithaca: Cornell University, 1994) at 1 states: "Since the late 1970's, China's southeastern coastal provinces have grown more rapidly than any other region in the world, a "South China miracle" hailed in both the popular press and scholarly analysis."
zones in the South China region. In 1984 fourteen South China coastal cities were
given autonomy over trade and investment, including the capital of Fujian Province,
Fuzhou City, where Ma Wei District is located, and the Mingjiang River Delta in Fujian
Province was identified as an "Open Economic Region". As the economy moved
from a centralized model to an open, market economy, foreign investment in Fujian
Province increased substantially. The new, open economy encouraged such
investment through incentives such as duty-free importing of materials. The result of
this dramatic economic shift, achieved through political change, has been substantial
growth of manufacturing and foreign investment in the South China region: from 1979
to 1994, 42 percent of all realized foreign capital investment in China went to the South
China region, and by 1995 Fujian Province was the 15th highest ranking province in
gross national manufacturing output, as compared to its rank as 21st in 1981.

The second aspect of market reforms undertaken by Deng Xiao Peng in the late 1970's
was the reorganization of agriculture from communal to family-based farming (de-
collectivization). Collectives were dismembered, land was allocated to households
under long-term contracts and households were permitted to sell any output beyond the
amount specified in production contracts signed with the state in free markets.
Households were able to determine for themselves the crops they intended to grow,
following market trends. As pressure on limited land resources grew, the state also

187 The other three are Shenzhen, Zhuhai and Shantou, in Guangdong Province: Y. Sung, The
Fifth Dragon: the Emergence of the Pearl River Delta (Singapore: Addison Wesley Publishing
Company, 1995) at Chapter 2.
188 G. Lin, Red Capitalism in South China (Vancouver: UBC Press, 1997) at 64-67. There is a
good summary of economic changes in Fujian Province in Lyons, supra note 186 at Chapter 3.
189 Lin, ibid. at 64-67
190 Ibid. at 66.
Women in the Age of Economic Transformation (London: Routledge, 1994)
encouraged diversity in production methods, allowing households to lease or sell land and encouraging the development of cash crops. The state also encouraged the establishment of private rural industrial enterprises - "township and village enterprises", in order to provide employment opportunities for individuals displaced from the land as a result of agricultural reforms.\(^\text{192}\)

From a macro perspective, rural Fujianese have benefited from economic reform, and the transition to what some economists consider to be one of China's "laissez-faire" provinces.\(^\text{193}\) The per capita income for Fujian Province's rural households rose by 168 percent between 1978 to 1988, compared to 146 percent for rural China as a whole. In 1992, rural households in Fujian Province had the eighth highest per capita income in all of rural China. Moreover, in 1993 in Changle County and Lianjiang County, where 18 of the Children lived, the per capita income was greater than that in Fujian Province as a whole.\(^\text{194}\) However, these optimistic statistics do not tell the whole story. As Liang and Ze note in their assessment of the causes of Fujianese emigration, Fujian Province's rapid transition to a market oriented economy has resulted in overall income inequality, that is, in what Liang and Ze term "relative deprivation". Families may address this deprivation by relying on additional income from remittances by overseas family members.

Similarly, Pieke notes that in the Northern Fujianese counties where the Children resided, significant economic growth resulting from economic reforms began in the 1990's, as Fuqing was not made an open economic zone until 1987. These enterprises

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\(^{192}\) J. Lin, ibid at 232.

\(^{193}\) Liang & Ye, supra note 184 at 195.

\(^{194}\) Ibid, at 196.
differed from those that had developed ten years earlier in Southern Fujian, around Xiamen. There, economic reform had allowed households to set up enterprises using their household income and remittances from overseas family members. In Northern Fujian, economic reforms led to the establishment of large-scale foreign and overseas ethnic Chinese owned enterprises that generated employment for skilled blue-collar workers and managers, but not for unskilled peasants. The unskilled jobs for which local peasants would have qualified tended to be taken by a mobile temporary workforce from outside Fuqing. Thus, peasants in the region found their circumstances worsened by economic reform.195

In addition to its unique economic position, Fujian Province has a history of emigration. Myers writes:

Chinese migration from just two coastal provinces, Fujian and Guangdong, has provided the source for the majority of the 55 million Overseas Chinese living in virtually every country today. Throughout the course of more than 500 years of migration the motivating force has been the pursuit of foreign economic opportunity. From the 15th to the 17th centuries many were entrepreneurs and in the 18th, and for much of the 19th centuries, most were coolies who served the labour needs of European colonial powers.196

195 Pieke, supra note 184 at 44-45. "Township and village enterprises" emerged in rural Fujian Province in the 1960's, but it is only since the 1980's that they have experienced considerable growth in numbers. Furthermore, non-state-owned enterprises are a recent innovation, resulting from economic policy shifts in Fujian Province: de-collectivization, openness to foreign investment, encouragement of product diversification, access to technological advances (through global market and communications connections.) Employment opportunities in these enterprises are not always reliable, and many such enterprises have not been able to compete with urban-centred, technologically advanced enterprises financed by foreign capital.

Indeed, the particular counties where the Children resided have been identified as significant producers of international migrants. In 2000, Fujian Province was second only to Yunnan Province in China as a source of emigrants; according to official Chinese census data, 17.63% of Chinese emigrants were from Fujian Province. Changle County in particular has a significant culture of emigration. For example, in 1994, more than 220,000 Chinese living abroad could trace their origins to Changle and so many men have emigrated from Houyu Township in Changle that the area is known as "women village", after the number of wives, daughters and mothers living there while their male family members live abroad.

Arguably, these elements of the economy and history of the Children's former place of residence were significant influences on their emigration from Fujian Province.

3.2.2 Family Circumstances

At the time of their arrival in 1999, the Children ranged in age from 13 to 17. All of the Children for whom this information was available had siblings. The vast majority of the Children were the eldest children in their families. In several cases, those who were not the eldest child overall were either the eldest male child, the eldest unmarried child, or had older sibling(s) who were physically unable to emigrate. All of the Children stated that they felt a responsibility to their families to provide for them economically. In several cases, the Children explicitly stated that their parents were getting older, and needed the Children's economic support. The role of the eldest child, and particularly

197 Chin, supra note 5; Kyle & Laing, supra note 5 at 10.
the eldest male child as a provider in rural Fujian culture is well-documented. Wolf discusses the structure of the rural Chinese household as an income-earning unit, under the direction of the senior male head of the family. She explains that the role of adult children is to earn an income, which is paid directly to the head of the family. In this way, children support their family’s economic success.

Children also support a family’s reputation, and have obligations to maintain the family’s “face”. Chin writes that, among the Fujianese emigrants in New York whom he interviewed, most were more concerned with their family’s well-being than their own. Having a family member overseas is a source of pride and enhances the family’s reputation. It is therefore unsurprising that one of the Children, B.C., told the Immigration and Refugee Board that, as she is from a family of four sisters, she wanted to emigrate to enhance her family’s reputation in the village. Similarly, F.L. told the Immigration and Refugee Board that his family was new in his village and poor, and therefore people looked down on them. He felt obligated to assist the family to overcome their reputation.

Finally, the peculiar circumstances of the female Children, the girls, cannot be ignored. Two of the girls told the Immigration and Refugee Board about persistent family discrimination in favour of boys in her community. This circumstance was likely true of all of the female Children, and is corroborated in accounts of Chinese family life:

200 M. Wolf, Revolution Postponed: Women in Contemporary China (Stanford: Stanford University Press, 1985) at Chapters 5-6. It should be noted that the Revolutionary Government in China has attempted, through substantial propaganda and legislative efforts, to alter the role of women in Chinese society, and to decrease the emphasis on the patrilocal family unit. However, in rural areas in particular, these reforms have not succeeded in shifting social structures in relation to family organization.

201 Chin, supra note 5 at 18,22.
every male was - and still is - expected to have sons and continue his patriline ... in traditional China a wide range of customary forms of marriage evolved primarily in response to the need to provide a male child.\textsuperscript{202}

The cultural preference for sons stems from the pre-Revolutionary practice of vitrilocal marriage - where a bride is recruited into the household of the groom's family. Thus, a daughter would grow up only to leave the family - her sole economic contribution the "bride price" she earned upon marriage, while a son would continue to reside with the family for all his life, and would be a source of support in old age.\textsuperscript{203} Despite attempts by the Revolutionary government to alter this cultural perception, scholars report that it persists, particularly in rural areas. Indeed, as a result of recent economic reforms, it may be argued that the importance of a large, patrilocal family unit has increased with the dislocation of social welfare.\textsuperscript{204} Further, in rural areas, China's single-child family policy has worsened the social position of daughters.\textsuperscript{205}

It is evident from their testimony during their refugee hearings, and the evidence in their Personal Information Forms, that the Children had a clearly defined economic role in the family unit by virtue of their position, in most cases, as eldest son or daughter. Further, the Children's responsibility to provide economic support for their families, and to maintain and enhance their family's reputation, is a critical characteristic that cannot be ignored in an analysis of the Children's migration.

\textsuperscript{203} E. Croll, \textit{Changing Identities of Chinese Women} (Hong Kong: Hong Kong University Press, 1995) at 93-96.
\textsuperscript{204} Palmer, \textit{supra} note 202 at 124.
\textsuperscript{205} Croll, \textit{supra} note 203 at 168.
3.2.3 Employment

Only a few of the Children had been employed in China. Most assisted their families in farming. All of the Children who had been employed stated that their wages were inadequate for survival. Indeed, Y.W., who worked as a cook for one year before coming to Canada told the Immigration and Refugee Board that he worked twelve hour days, but was considered an apprentice and therefore was not paid. A few of the Children, like R.L. who worked odd jobs at a grocery store, X.O. who worked as a bartender and dishwasher, and J.Y who worked as an unlicensed street-seller, were able to find jobs locally but those jobs were not steady or long-term. In other cases, the Children worked in distant factories as unskilled labourers (eg. F.L., R.L. and S.X.). For these Children, working conditions were unfavourable. For example, F.L., who was 15 when he came to Canada, worked as a loader and delivery person at an asbestos factory. The factory was located in Shandong Province, and was a 30 hour bus-ride away from his home village. F.L. began working at the factory at age 14. When asked by the Immigration and Refugee Board where he slept at night, F.L. said, “I just lay down a piece of mattress on the floor of the factory and I just then slept there”. F.L. eventually quit that job when his parents told him that he would have an opportunity to leave China. Notably, the Immigration and Refugee Board found that F.L.’s job prospects were not poor in China, because he had been able to find a job at an asbestos factory in Shandong Province: “neither could he readily explain, if poor job prospects caused him to depart, why he quit at the asbestos factory.” However, F.L.’s circumstances demonstrate the lack of unskilled employment in and around the Fuqing area (F.L.’s family resided in Changle) despite significant foreign investment in the region. This is consistent with Pieke’s findings, above, and also reveals that

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206 Re: Y.D.J., supra note 180 at para. 38.
emigration is in many cases inevitable for young Fujianese seeking employment. From F.L.'s perspective, his ability to visit with his family was no different whether he was in North America or in a seven-day a week factory job in Shandong province.

The Children who were not employed, and some of those who were, were supported by family (primarily parental) income. Eleven of the Children\textsuperscript{207} stated that their families were supported by farming, although some of those supplemented the farming income with additional income from other ventures – in one case driving a tricycle taxi, in another construction labour, and in others fishing or sailing. M.Z.'s family had been farmers in Changle, but were displaced from their household when it was taken for the construction of an airport. J.Z.'s family relied on farming income until 1996, when his father began to work in a factory. That job did not last and J.Z's father then entered into an unsuccessful venture to start a steel manufacturing factory. J.Z. told the Immigration and Refugee Board that he left Fujian in order to earn money to pay the family's debt to loan sharks arising out of this failed business venture. Two of the Children relied almost exclusively on remittances from family members overseas for income. Although a few of the Children had one parent who did not work, none had two unemployed parents.

The Children's evidence that their families are largely from rural, agrarian backgrounds but that their farming employment has been displaced is consistent with migration research. Liang and Morooka recently reviewed data from population censuses and the 1995 1 Per cent Population Sample Survey conducted in China, and found that, by the mid-1990's Fujianese emigrants were predominantly rural, not urban. Liang and Morooka found that in 1995, 65.65% of Fujianese emigrants were rural in origin, as

\textsuperscript{207} In ten of the Children's cases, information about their family's employment was unavailable.
opposed to being from cities or towns. However, Liang and Morooka also found that only 14.63% of emigrants were employed in agriculture, with the majority being manufacturing workers (37.5%) or service workers (38.11%).

The Children’s reports of their family’s employment history reveals their families’ vulnerability to the opening of the market. To a significant extent, their families were farmers and fishers, and as discussed below, agrarian reforms continue to cause profound economic displacement. The situation of those Children who were employed in China, like F.L., R.L. and S.X., all of whom had to move away from home and who effectively lived at their places of employment, exposes the insecure and unsatisfactory nature of the new employment opportunities for young Fujianese, resulting from agrarian reform.

3.2.4 Education

All of the Children for whom education information was available had completed some schooling, six of them 5 years or less. The rest had at least one year of junior high (middle) school. Almost all of the Children who had not graduated junior high and were not in school at the time they emigrated had left school because their families could no longer afford their school fees. The notable exception was Q.W. who left school after three years to begin private English lessons because, as he told the Immigration and

208 Liang & Morooka, supra note 198 at 157, 159. Liang and Morooka also note that some commentators have stated that as much 25% of China’s rural population is surplus.
210 While they were in Canada, all of the Children were enrolled in school, as they were under the care of the British Columbia Ministry for Children and Families and the Ministry insisted that they attend school.
Refugee Board “they [my mother] said English would make much money”. Similarly, Z.W., who had graduated junior high school and subsequently attended one year of a private “telecommunications school” had a father and brother who had emigrated to New York, United States.

The Children’s educational status suggests that their families are not absolutely destitute, as their families would have had to pay fees for any schooling they did obtain. Liang and Ye reach this conclusion, based on Liang and Ye’s 1995 survey of Fujian emigrant and nonemigrants’ sociodemographic characteristics:

Almost 16 percent of nonemigrants, but fewer than 1 percent of the emigrants, have no formal education. Nearly half of the emigrants have junior high school education, whereas close to 50 percent of the nonemigrants have only an elementary school education. Thus, if education is used as a proxy for socioeconomic status, it is clear that emigrants from Fujian are not at the bottom of the socioeconomic hierarchy.

However, it should be noted that several of the Children stated that their families could not afford their school fees, but borrowed money in order to pay the fees. For example, T.T. told the Immigration and Refugee Board that he is one of three children, two of whom are in secondary school and one of whom is in primary, such that it costs his family more than 1000 yen to pay school fees each semester, a substantial sum. T.T. explained that because his family valued education, they would borrow the money. Yet he also told the Immigration and Refugee Board that he had emigrated in order to make money to help pay his family’s debts.

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211 Q.W.’s father had emigrated to the United States in 1991, and Q.W. and his mother were both on the second boat to come to Canada. His mother died en route.

212 Liang & Ye, supra note 184 at 200-201
Many of the Children also told Canadian immigration officers who interviewed them upon arrival, that they had come to Canada "to study". The extent to which access to education is a contributing factor to Fujianese emigration is not clear. Nonetheless, the increasing inability of rural families to pay school fees for their children is documented by scholars of Chinese family life. This is especially so with respect to girl Children, where rural families are both unable and, in many cases reluctant to pay their daughters' school fees. Croll ascribes this reluctance both to the traditional preference for sons, and also to the increased economic emphasis on the family as a unit of production, and daughters as labourers.

Thus, it may be argued that, for many of the Children, especially the girls, economic reforms have reduced their local educational opportunities.

3.2.5 Leaving Fujian Province

One the most interesting aspects of the Children's testimony to the Immigration and Refugee Board was in response to the Board's questions about why and at whose instigation they had left Fujian Province. Almost as many of them said that is was their own idea to leave (15) as said that it was one or both their parents' (16). All of the Children also stated that, regardless of who had first suggested their move to Canada,

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213 Pieke's survey of one Fujianese village revealed that, in that village, remittances from overseas migrants had resulted in increased educational opportunities. However, instead of pursuing educational opportunities at home, young adult villagers chose to emigrate because that was seen as a more certain way of attaining "success": F. Pieke, supra note 184.


215 Croll, supra note 203 at 135-136.

216 With respect to three of the Children this information was not available. One Child described the decision to emigrate as a joint decision.
they all wanted to leave Fujian Province for, as most of them put it, "a better life". As set out below, refugee law is founded upon the distinction between voluntary travel motivated by a desire for a "better life" and involuntary emigration, caused by political oppression. However, as I have pointed out with respect to education and employment opportunities, regardless of the Children's perception of the voluntary nature of their travel, it is apparent that their choices in Fujian Province were limited by economic and social changes beyond their control.

Furthermore, upon closer examination of several of the Children's evidence on this point, it is apparent that they were motivated by a desire to create a better life not for themselves, but for their families. For example, Z.H. (age 17), who said that it was his idea to leave, testified that "being a son, I have the obligation to support my parents." Similarly, F.L. (age 15) said that it was his father's idea that he leave and when he was told arrangements had been made for him, "My feeling then, that is when I could not have my family and love while I was in China, actually. So I felt that I did have the need to go out of the country. [In order to help your family?] That's right. ... So I could come out and work and then money can be remitted back home. Then later to sponsor them to come up." C.Y. (age 15) had similar evidence: he said that his father told him "you have to go" and he did not ask why because he knew that he had been asked to go because he is the eldest child and the family needs money. Indeed, almost all of the Children stated that they intended to work in North America and send money home to their families. None of the Children stated that their purpose in leaving Fujian Province was to separate from their families, and none said that they intended to work but would not remit their earnings.
Even more telling was the evidence of those 14 Children (including several who stated it was their "own idea" to leave) who told the Canadian Government and/or the Immigration and Refugee Board that the specific reason why they had migrated from Fujian Province to Canada was to earn money in order to pay off debts that had been incurred by one or both parents. The Children spoke of debts that had been incurred because of failed business ventures, government taxes on small businesses (such as J.Y. whose family could not pay the permit fee to operate a market stall), medical debts (like that owed by X.O.'s family to loan sharks as a result of having borrowed to pay for medical treatment), and money borrowed from loan sharks and relatives to pay for the day to day necessaries of life, like school fees. C.L. (age 16) told the Immigration and Refugee Board that her father, who no longer lived with her and her mother, had promised her hand in marriage to a mentally disabled man from a wealthier family, who would pay her father's debts as part of the "bride price".\textsuperscript{217} She left China with her mother's assistance to escape this marriage. H.O.H. was in similar circumstances; she said that her parents had promised her to an older, wealthy man whom she did not wish to marry. The Immigration and Refugee Board noted that this is a common family strategy where alternative economic opportunities are limited:

> Arranged marriages are common in China. They appear to be one way in which parents attempt to extricate themselves from the cycle of poverty. While the family would prefer a son, a daughter might at least marry well, thus proving some benefit to the family.

Given the evidence presented on filial piety in China, it is likely that the vast majority of young girls in Fujian would accept the arranged matches. The claimant would not say that she would refuse her parents' wishes in the future.

\textsuperscript{217} The "bride price" or \textit{caili} is a gift that is made by the groom's family to the bride's family upon engagement. It is the property of the bride's family, but must be returned if the bride dies or backs out before the marriage is concluded. A second gift of money, the \textit{houchengli}, is made by the groom's family to the bride herself, which she keeps. For a discussion of the caili and houchengli, see Wolf, \textit{supra} note 200 at 174-180.
She certainly does not strike us as being a strong-willed, independent thinker who might defy a cultural law on political or other grounds. When pressed as to consequences of refusing the marriage, the claimant alleged she feared abandonment and/or being beaten by her parents.\textsuperscript{218}

Some of the Children also spoke of bettering their families' reputations by emigrating. As well, in all but one case where the information was available, the Children's travel arrangements, including payment of the smugglers' fees, were made by their family members, and not by the Children themselves. In every case, the Children were to either repay the smugglers' fees from their earnings in North America, or the funds to pay the smugglers' fee had been or were to be borrowed from "relatives". These factors suggest that the Children's motivation to migrate is related to their position in the family, familial obligations, and, in many ways, is an attempt to better the family's circumstances as a whole.

However, many of the Children also stated that they had left China because of what may be characterized as a generally oppressive human rights environment. Seven of them were concerned about the possibility of conscription, four described religious oppression, and six cited corrupt government authorities and generalized human rights abuses in China as contributing reasons for their departure. Some, like H.O.H. and D.L., each of whom who said she was fleeing an arranged marriage, and T.E.K. who said she was not free to have a relationship with her boyfriend in China, cited reasons

\textsuperscript{218} Re: H.O.H., [2000] C.R.D.D. No. 109 (C.R.D.D.) (QL) at para. 16-17. Notably, the Immigration and Refugee Board ultimately found that HOH's fears were speculative, and doubted the credibility of her claim to be at risk of an arranged marriage.
personal to them. In many instances, the Board found that these additional reasons for emigrating were not credible.  

Finally, few of the Children whose cases I reviewed had a detailed plan for his or her life in North America, but many had an idea as to their destination. Eleven of the Children had either themselves been smuggled before, or had relatives who had been smuggled. Many of these had relatives who were living in North America and some, like S.J. who had “more than ten” such relatives in the United States, and Z.W. whose father and brother had already irregularly migrated to the United States, intended to join those relatives. Further, although all of the Children whose cases I reviewed stated that they had intended to “work” in North America, none had a job in mind. For example, F.L. stated that he intended to work at “hard labour” but that he was not sure in what capacity. Y.A. said he would get a “factory job” but admitted he had never done such work before, and could not be more specific about his intended employment.

Kwong and Chin’s research of irregular Fujianese migration to North America suggests that the Children would have become part of an extensive underground labour force, although both note that they likely would have been first kidnapped by their smugglers (“snakeheads”) until they had either paid or worked off the debt owed for their passage to North America. In particular, Chin found that most of the Fujianese migrants he interviewed in New York City worked in the food, garment and construction businesses. Chin suggests that the former is usually in the nature of a take-out Chinese restaurant, whose customers would be more likely to be cost-conscious, and where the low wages

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219 Ibid.
220 Kwong, supra note 11 at 81-82, 207-233; Chin, supra note 5 at 115-121.
typically paid to underground workers would facilitate the restaurant owners’ ability to provide cheap food. Chin also noted that a significant number of Fujianese women migrants in New York City work in the garment industry, where work conditions are notoriously poor but, again, clients demand that costs be kept low.\textsuperscript{221}

3.2.6 Conclusions with Respect to the Children’s Circumstances

It is not possible to draw firm conclusions about the circumstances of the Chinese Migrant Children as a whole from my review of only 36 of their cases. Nevertheless, my review does suggest some common elements in the Children’s circumstances:

- The Children and their families had been affected by the opening of the Fujian economy.

- The Children had been exposed to emigration in Fujian Province, and some had family connections to North America.

- The Children had specific gender and family-position determined economic responsibilities to their families.

- The Children’s educational and employment opportunities in Fujian were constrained by economic dislocation, and, in the case of the girl Children, by culturally entrenched discrimination against daughters.

- The Children’s power over decision-making with respect to migration issues was subject to the influence of their families, and familial expectation.

\textsuperscript{221} Chin, \textit{ibid.} at 121. See also Kwong, \textit{ibid}; B. Chiswick, \textit{Illegal Aliens: Their Employment and Employers} (Kalamazoo: Upjohn Institute for Employment Research, 1988). Unfortunately, no scholar has yet done a study of Fujianese children who are irregular migrants in North America, so it cannot be said with certainty that Chin and Kwong’s findings can be extrapolated to the Children. Skeldon does suggest, however, that some such children, especially girls, may end up as prostitutes: R. Skeldon, “Myths and Realities of Chinese Irregular Migration” No. 1, IOM Migration Research Series (Geneva: International Organization for Migration, 2000).
• If they had remained in North America as illegal migrants, as opposed to refugees, the Children likely would have become part of an irregular, underground labour force providing low-cost labour in poor working conditions.

My review of the Children's circumstances suggests the incoherence of thinking about their migration in terms of "voluntariness". For many of the Children, their economic opportunities and migration options - the decision to stay or go - were profoundly affected by external factors such as education, displacement of typical venues for labour, instability of new employment opportunities, familial expectation, and familial control over personal choices. Moreover, assessing migration in terms of "voluntariness" or "motivation" reflects an understanding of migration that is based on neoclassical economics. This approach does not sustain the complexity of the Children's circumstances, and of their migration from Fujian Province to North America.

3.3 Neoclassical Economics and Migration

Until recently, neoclassical economic theory dominated migration discourse. Neoclassical economic theories of migration are compelling in their simplicity and apparent reasonableness; however, they are not consistent with empirical evidence of migration flows, and they are not adequate to explain complex, multi-faceted migration flows, such as the Children's migration from Fujian Province to North America.
Massey, Arango and Hugo describe both micro and macro neoclassical economic theories that attempt to explain migration.\textsuperscript{222} The macro-level theory applies only to labour migration. This theory posits that labour migration is the result of international differences in the supply of and demand for labour. Where labour is in excess supply, wages are down. Where labour is in excess demand, wages are up. Labour moves from areas of low wages to high wages and, subject to restrictions on the movement of labour, this occurs until equilibrium is reached. This theory distinguishes between labour and human capital - human capital follows investment capital from capital rich countries to capital poor countries. Thus, the movement of human capital, in the form of skilled labour, may be in the opposite direction to labour migration.\textsuperscript{223}

The obvious weakness of this approach is that it overlooks the influence of significant political and social differences between emigration and immigration states, since it focuses solely on wage differentials. Furthermore, this approach has proved inconsistent with empirical studies of migration flows.\textsuperscript{224}


\textsuperscript{223} Massey, Migration Theories, ibid. at 433.

\textsuperscript{224} For example, migration often increases despite a decrease in the wage difference between emigration and immigration countries, migration may occur even when there is no wage gap at all, and that migration does not necessarily always occur whenever there is a wage gap, as economic growth increases, so that wages increase, emigration can increase, as well. Indeed, both Hermele and Lucas note that, in fact, economic development tends to encourage international migration, as households acquire sufficient funds to finance international migration. R. Lucas, "International trade, capital flows and migration: economic policies towards countries of origin as a means of stemming migration" in A. Bernstein and M. Weiner, eds., Migration and
The micro-level neoclassical approach describes migration as an individual decision based on a cost-benefit calculation made by rational, individual actors informed by perfect information about the social, economic and political conditions in the place of emigration and the place of immigration. Thus, individuals migrate when the costs - including the cost of travelling, the risk of deportation from the country of immigration, and the effort involved in learning a new language and adapting to a new culture - are less than the expected benefits - usually described as expected earnings (monetary benefits) but sometimes taking into account increased safety, family ties, and other (non-monetary) benefits.225

Micro-level neoclassical economic migration theory resonates with the Board’s approach to the Children’s refugee determinations. First, this approach emphasizes the role of the individual as the migration decision-maker. Second, a micro-level analysis with a focus on costs and benefits implies that a migrant is able to identify, separate, and evaluate the benefits she anticipates as a result of migration. This sustains the Board’s inquiry into whether the Children’s migration was motivated by the anticipation of “economic benefit”, as opposed to “persecution”.


225 Massey, Migration Theories, supra note 222 at 434-435; G. Malmberg, "Time and Space in International Migration" in Hammar, Brochman & Tamas, supra, note 222, 21. This approach has been refined by several theorists. Todaro addressed the issue of imperfect information by focusing on expected, as opposed real, earnings differences between the country of emigration and the country of immigration: M. Todaro "Internal Migration in Developing Countries: A Survey" in R. Easterlin, ed., Population and Economic Change in Developing Countries (Chicago: University of Chicago Press, 1980) 361. Wolpert focuses on individual behaviour, and argues that migration occurs when there is a gap between a person’s satisfaction with the country of emigration and that person’s aspirations: J. Wolpert, "Behavioural Aspects of the Decision to Migrate" (1965) 15 Papers, Regional Science Association 159.
However, contemporary migration theorists acknowledge the flaws in neoclassical economics migration theory:

- The approach assumes that migration decisions are made by individuals, and ignores constraints on decision making imposed by family ties and household obligations.
- The approach overemphasizes the influence of the country of emigration on the cost/benefit analysis and ignores the influence of gender, class and other non-geographic influences.
- In practice, migrants do not have perfect or often even moderately accurate information about the country of immigration or the opportunities in the country of emigration.
- The approach ignores the influence of international networks between migrants, and the role of historical migration on present-day migration levels.
- The approach fails to integrate economic, social and political restructuring into the factors which influence migration.\textsuperscript{226}

Moreover, the very notion of choice, fundamental to any form of analysis based on individual motivations, is a product of the developed world, and many in the developing world lack choice altogether:

One of the attributes of advanced Western consumer society is that it does offer a range of choice to those groups wealthy enough to exercise that right. The ability to take decisions is part of the Western ideal, even though it may not be the reality for many poorer groups in these

\textsuperscript{226} Malmberg, ibid.; Skeldon critiques the preoccupation of neoclassical migration theorists with individual decision-making in R. Skeldon, Population Mobility in Developing Countries (London: Belhaven Press, 1990) at 128-131.
societies. Among pre-industrial groups there is a definite lack of choice not only with regard to material goods but also in the matter of life-affecting strategies, such as when to plant or commence the harvest, or when to marry. These 'decisions' are dominated by those with supernatural powers, whose ways are conditioned by highly formalized ritual practice. One might speculate that decision-making models may in fact be culture-specific and more appropriate to middle-class Western groups than to any other group.227

Thus, any form of analysis that focuses on the individual, or even on household "choices", is inadequate, and based on Western cultural assumptions.

The weaknesses of micro-level neoclassical economic theory are further revealed when one attempts to explain the Children's migration in terms of this theory. The Children are not well-informed, individual utility-maximizers. To the contrary, the Children were poorly informed: none of them had anything more than a rudimentary plan as to where and what they intended to do upon arrival in North America. Few of the Children acted as individuals; in most cases, their migration decisions were clearly influenced, and in some cases actually made, by family members. Furthermore, for most of the Children, migration was related to their family position as older son or daughter, and cultural expectations inherent in that role. Their circumstances in Fujian Province were substantially affected by external factors, including access to education and employment opportunities. Micro-level neoclassical economic migration theory does not capture the complex interplay of these factors, and is not adequate to explain the Children's migration from Fujian to Canada.

227 Skeldon, ibid. at 130-131.
Several theoretical approaches have been developed to address the shortcomings of the neoclassical micro and macro explanation for migration. I do not propose to review them all. However, I suggest that two in particular shed light on the Children's migration, and illustrate the disjunction between a refugee determination process that focuses on individual migrants' motivations and the complex nature of the Children's migration from Fujian Province to North America.

3.4 New Economics of Migration

The new economics of migration is a micro explanation for migration based on the assumption that households, not individuals, make migration decisions and that these decisions are a means of household economic risk management. This approach is particularly useful in explaining migration decisions in developing states, where formal risk management mechanisms are not available. For example, a farming household may manage its risk of economic loss caused by crop failure through the migration of a member of the household to a place where that member may be able to find other employment, thus earning an additional income that will secure the household's future should the primary source of income - the harvest - fail. The household may also use the income of the migrant member to fund capital acquisitions, such as new farm equipment. Migration is a means of diversifying the household's economic resources, avoiding the risks associated with excessive specialization. Furthermore, in this approach, the household decision to send a worker abroad is also affected by relative income differentials between households, and is not necessarily a function of absolute income levels.

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228 Massey, Migration Theories, supra note 222 at 436.
229 Ibid. at 438.
Several elements of this approach correspond with characteristics of the Children's migration to Canada. The concept of the family as a decision making unit, and an economic unit of production, captures the Children's filial obligation to their families. The Children are members of a production unit, and they have an obligation to make an economic contribution to that unit, either by repayment of family (parental) debts, earning an income which is then remitted to their families in Fujian Province, or, in the girls' cases, attaining a high bride price. The Children's families reside in an area that is undergoing rapid economic shift and change, and where opportunities are limited. It is cogent to explain that the Children's households are managing their economic risks in a climate of rapid structural change by sending family members abroad to earn an income.

Similarly, based on interviews with irregular Fujianese migrants in New York City, Chin found that many of the migrants explained their decision to move in terms of minimizing the risk associated with the perceived unpredictability of Chinese economic or political policies. When read in light of new economics of migration theory, Chin's finding reveals the weakness of the distinction between politically motivated and economically motivated migration. Is migration economic or political if it is motivated by a desire to minimize the risk to one's household's economic well-being associated with an unpredictable, authoritarian regime in one's country of origin? Is it voluntary or involuntary?

230 K. Chin, supra note 199 at 47-49; see also D. Davin, Internal Migration in Contemporary China (Great Britain: MacMillan Press, 1999) at 74-77.
Moreover, Skeldon points out that the very pliability of the question: "why did you migrate?", renders it useless as a tool to understand or explain migration.\textsuperscript{231} It is a trivial point that all migrants have migrated in order to "have a better life", and the various factors in the decision to migrate are often so complex and intertwined, incorporating political, social and economic elements, that any response to the question, "why did you migrate?" will be at best, incomplete, and, at worst, incoherent or misleading. Yet, as I pointed out with respect to the Board’s hearing in Y.Z.’s refugee claim, the question “why did you migrate?” was central to the Board’s determination of whether Y.Z. was a refugee as defined in the \textit{Refugees Convention}.\textsuperscript{232}

3.5 World Systems Theory

World systems theory is highly relevant to the Children’s circumstances, as it incorporates the economic and political structural changes in the Children’s place of origin. It also places the Children’s individual migrations in the context of a larger migration flow.

World systems theorists posit that the spread of global capitalism to the developing world results in migration due to dislocation and disruption that inevitably occurs in the process of capitalist development.\textsuperscript{233} Disruption occurs in the agricultural system of production: mechanization of labour; a movement to cash crops; surplus agrarian labour due to increased production efficiency, and weakened links within agrarian communities and social security networks due to changes in land tenure. Paid labour opportunities

\begin{footnotes}
\item[231] Skeldon, supra note 10
\item[232] See Part 3.1, above.
\item[233] Massey, Migration Theories, supra note 222 at 444-447; see also S. Sassen \textit{The Mobility of Labour and Capital: A study in International Investment and Labour Flow} (Cambridge: Cambridge University Press, 1988).
\end{footnotes}
are created for (formerly unpaid) peasants in construction and in raw materials production. This disrupts traditional social and economic roles and creates labour markets based on notions of individual capital gain. In areas like South China's Special Economic Zones, foreign firms take advantage of investment incentives and create demand for factory workers. However, much of this work is feminized, so that employment opportunities for men are reduced. Ironically, the work is so demanding and poorly paid that women are only able to work for a few years, so that ultimately, employment opportunities for both men and women are limited. Further, local industry often cannot compete successfully with new manufacturing plants financed by foreign capital. In order to facilitate economic integration and links, foreign capital invests in improved transportation and communication links. These links create cultural ties that enhance the spread of consumer culture along with the spread of consumables, and encourage migration between the developed core and the developing periphery. The spread of capitalism, and consequent industrial development, is also environmentally disruptive. It can involve massive industrial projects: dams, the construction of industrial centres on former agricultural land, rapid industrialization with attendant pollution problems, and the consequent displacement of hundreds or thousands of people.234

In support of world systems theory, there is ample empirical evidence that the reduction of trade barriers between countries leads to increased migration, at least in the short term.235

234 Some refugee law scholars propose that individuals displaced by such factors be considered "environmental refugees": see, e.g., S. Cooper, "Environmental Refugees" (1998) 6 New York Univ. L. J. 480. However, such individuals clearly do not fall within the confines of the Refugees Convention definition of a refugee.

The world systems approach is particularly applicable to migration flows from Fujian Province. Fujian is one of two South Chinese provinces at the forefront of the development of a market economy in China. Since 1978, Fujian Province has developed close links to foreign capital, and there has been substantial foreign investment in Fujian Province, particularly in the Special Economic Zones and Open Regions, which include Fuzhou City. Furthermore, agrarian reforms in China since 1978 have profoundly altered the nature of rural life in Fujian Province. However, reports as to the degree of dislocation caused by market reforms differ widely.

For example, with respect to the displacement of agricultural workers, most China scholars acknowledge that market reforms have led to a surplus of agricultural workers, many of whom have migrated from rural areas of China to urban centres in search of temporary work and, arguably, some of whom will seek or have sought opportunities abroad. Surplus agricultural labour is caused by the very factors identified by world systems theory. For example, the shortage of arable land in China is exacerbated by: agricultural reforms which create a preference for soil-depleting cash crops, the growth of which is facilitated through the use of soil-deteriorating chemical fertilizers. As well, the growth of township and village enterprises has increased environmental pollution and degradation; this has affected the quality of farmland. Further; there is now a market for the sale and leasing of farmland to foreign-owned industrial enterprises who convert that land from agricultural to industrial use. Other elements in agricultural reform and global economic ties that contribute to surplus labour include: increased productivity through the development of agricultural technology, which has decreased the demand for human labour; cash crops; and the disintegration of the former social
welfare system. One estimate is that, as a result of this dislocation, China has 200 million surplus rural labourers.\textsuperscript{236}

However, Lin argues that many surplus labourers are absorbed by employment opportunities in township and village enterprises, urban industry, and urban construction. Nonetheless, he acknowledges that development in the South China region has led to environmental degradation, which may have an impact on the availability of employment opportunities.\textsuperscript{237} Furthermore, surplus laborers within Fujian Province, and especially the Fuzhou City region, must compete with internal migrants from other provinces and regions for positions in urban industry and construction. They are not necessarily successful in doing so.\textsuperscript{238} Finally, those rural industries that are not financed by foreign capital are not as economically viable or successful as those that are in the urban centres, and use technologically advanced machinery acquired with foreign capital.\textsuperscript{239} Most significantly, post-Mao economic reforms in Fujian Province have increased income and production disparities between various counties in Fujian; Fujian Province is a more prosperous province as a whole, but this prosperity is not evenly distributed. For example, there is a gap in the aggregate output between Fuzhou City, and Liangjiang County. Indeed, the disparity between Fuzhou City and Changle County, increased between 1984 and 1994.\textsuperscript{240} Thus, despite the general prosperity of Fujian Province, the effects of economic reform have been uneven, and

\textsuperscript{237} G. Lin, supra note 188 at 136-147.
\textsuperscript{238} K. Chin, supra note 199 at 50; Kwong, supra note 11.
\textsuperscript{239} Kwong, \textit{ibid.} at 50-51, see also A. Khan, K. Griffin and C. Riskin, "Income Distribution in China During the Period of Economic Reform and Globalization" (1999) 89 Population Economics 296 for a discussion of the inability of state-owned enterprises to compete with foreign capitalized industries.
have resulted in substantial dislocations in particular geographic, social and economic sectors. Economic reforms have also created an important role for foreign capital. Migration from Fujian Province to North America and Europe is a means of acquiring that capital through remittances.

It is illustrative to consider the economic integration, and the spread of capitalist reforms on the girl Children in particular. Both Lin and Summerfield argue that employment opportunities for women, particularly in the Special Economic Zones and newly established village (rural) enterprises, have increased.241 However, Croll disagrees, arguing that women's traditional employment as field cultivators on rural farms has declined as opportunities for both men and women have been reduced due to de-collectivization.242 Regardless of whether short-term opportunities have increased, most scholars agree that long-term opportunities have not. Summerfield emphasizes the temporary nature of work in the Special Economic Zones and, most significantly in the case of the girl Children, notes that, while, because of internal rural/urban migration there are more women working in agriculture, the influence of the patriarchal household structure has increased with the emphasis on the household as a unit of production, so that women's control and independence has decreased.243 Furthermore, economic reforms have increased the cost of education; consequently, daughters, whose education may be seen as secondary to that of sons due to longstanding gender discrimination, have fewer educational and thus social and economic, opportunities.

241 Summerfield, supra note 191; J. Lin, supra note 191.
242 Croll, supra note 203 at 168.
243 Summerfield, supra note 191. However, Summerfield also states that opportunities in rural industries may offset this effect. J. Lin states, "The family responsibility system disintegrated the collective team as the basic unit of production in the rural areas and provided women more opportunities for personal development, but it also took away the collective shield of protection for them.": J. Lin, supra note 191 at 239.
Lack of education restricts access to positions in the new factories of the Special Economic Zones and township and village industries. It can thus be argued that the intersection between economic change and gender roles has led to a lack of control over migration decisions by rural girls. The changes facilitate migration, especially the out-migration of "extra", uneducated, costly, daughters.

World systems theory challenges the notion that migration is a question of "choice", and that an individual's motivations for migration can be categorized and quantified. In particular, world systems theory demonstrates that the political realm and the economic realm are not easily separable, and migration cannot be said to be caused by any one factor, political or economic, over another. Further, world systems theory demonstrates that individual acts can be explained as the consequences of structural shifts; thus, voluntariness is not a relevant, or comprehensible, notion. Similarly, world systems theory enables us to understand migration as a population flow, and not as a series of individual migration decisions and movements. Finally, world systems theory emphasizes conditions in and connections between places of immigration and places of emigration, and approaches migration flows within this global context.

3.6 Conclusions

Upon reviewing the Children's circumstances, it becomes evident that their migration is a complex and multi-faceted phenomenon that is not readily explicable in terms of choice, voluntariness, or motivation. However, it is those very terms that were central to the Immigration and Refugee Board's determinations of the Children's refugee claims.

244 Chin, supra note 199 at 50.
have argued that the Board's approach is consistent with the assumptions inherent in a neoclassical micro economic theory of migration, with its focus on individual motivations and cost/benefit migration decisions. Thus, the Board turned its attention to whether each Child migrated for economic benefit, as opposed to political reasons, and whether he or she chose to migrate voluntarily. However, despite its compelling simplicity, micro-level neoclassical economic migration theory is flawed, and provides an incomplete understanding of migration, especially the Children's migration.

By moving beyond the assumptions and analytical framework of micro neoclassical economic migration theory, we gain an understanding of migration as a consequence of forces operating in both the developed and developing world; in particular, the spread of global capitalism and the increase of community, social, economic and political linkages between countries of emigration and countries of immigration. Applying the new economics of migration and world systems theory, results in a nuanced and complex understanding of the Children's migration as a globalized and structural phenomenon, rooted in economic and political restructuring and displacement, historical migration networks, gender roles, and familial roles. Moreover, these theories reveal the incoherence of the distinctions between political and economic motivations for migration, and voluntary and involuntary migration. Thus, they challenge the cogency of the Immigration and Refugee Board's approach in the Children's refugee determinations, which turned on these distinctions.
CONCLUSION

SHIFTING THE MORAL PARADIGM TOWARDS HUMAN RIGHTS

The trip was very hard. I was put at the bottom of the boat in a small room with fifty other people. I was very frightened because there was a high possibility of perishing at sea. The boat broke down in the middle of the sea. I had hardly anything to eat during this journey. I was given a half-cup of rice as my only meal of the day, and a liter of water, which had to last five days. I was not provided with showers or any other means to clean myself.

- Q.L., age 15

I began this research because I was compelled by the Chinese Migrant Children's stories: their harrowing journeys, their vulnerability to the snakeheads who smuggled them, their persistence with respect to emigrating from Fujian Province. The Children's stories were about human rights – the rights of children and the rights of the victims of smuggling and/or trafficking. Yet, the public discourse around the Chinese Migrants, including the Children, was, for the most part, not about human rights. Instead, it was about illegal, economic migrants making spurious refugee claims. Further, as the Immigration and Refugee Board began to hear, and determine, their refugee claims, it appeared that the legal discourse around the Children mirrored the public one. I set out to understand this apparent disjunction between the Children's stories, and the legal discourse around them.

I have argued that, in a liberal state like Canada, there are two competing moral paradigms with respect to migration: communitarianism/realism and human rights. The
communitarian/realist version of liberal morality expressed by Woodward, Miller and Walzer emphasizes state sovereignty, and the interests of the state’s existing members, with respect to the selection of new members. In the communitarian/realist moral paradigm, economic migration is within the sphere of “immigration”, not asylum, and the state controls immigration to ensure that new members provide a net economic and social benefit to the extant polity. The state’s obligation to admit asylum-seekers is limited by Walzer’s principle of “mutual aid”. That is, it is limited to those asylum-seekers with whom the liberal state’s existing members already have an affinity, those asylum-seekers who are fleeing political oppression. In contrast, the human rights moral paradigm is based on the recognition of universal individual human rights that create state obligations. Under this approach, states’ obligations to asylum-seekers are not determined by the community’s interests, but rather by the asylum-seekers’ human rights claims. As articulated by Joseph Carens and Ann Dummett, this approach prohibits most restrictions on the free movement of individuals between states, because free movement is a universal human right. However, I have proposed a limited human rights paradigm, one that recognizes the primacy and universality of certain core rights, such that a state is obligated to protect an asylum-seeker who is at risk of suffering violations of such core rights if expelled. While I acknowledge that this approach is somewhat communitarian, as it does not affirm the universality of all human rights, I maintain that it is preferable to the strong communitarian/realist paradigm that presently dominates Canadian migration law.

The disjunction between the Chinese Migrant Children’s human rights stories, and the public discourse characterizing them as illegal, economic migrants as opposed to legitimate refugees echoes the disjunction between the human rights and
communitarian/realist moral paradigms. Indeed, the communitarian/realist paradigm may be articulated in terms of the distinctions between immigrants and illegal migrants, and between legitimate refugees (forced migrants) and economic (voluntary migrants).

In Chapter II I deconstructed Canadian migration law, revealing these distinctions, and the dominance of the communitarian/realist paradigm, in Canadian migration law. For the Chinese Migrant Children, who were irregular migrants, the legislative distinction between “immigrants”, who are pre-selected by the Canadian Government for membership based primarily on economic criteria, and “illegal migrants” resulted in their de-legitimization and criminalization. Moreover, the Chinese Migrant Children were profoundly affected by aspects of the Refugees Convention that reinforced the communitarian/realist paradigm. As I explained in Chapter II, the Refugees Convention, which is the centerpiece of Canadian asylum law, implies a distinction between political/involuntary migrants, who are refugees, and economic/voluntary migrants, who are not. Consequently, the focus of the Chinese Migrant Children’s refugee determinations before the Canadian Immigration and Refugee Board was not their human rights claims, but rather whether their migration from Fujian Province was voluntary, and economically motivated. However, in Chapter III I demonstrated that an inquiry into the Chinese Migrant Children’s “volition” with respect to their migration is not coherent. It conflicts with a contemporary, nuanced understanding of their circumstances, and the complex reasons for their migration. Both new economics of migration theory and world systems theory provide such an understanding of the Children’s migration, revealing that it is a structural phenomenon - a consequence of globalization generally - which is not reducible to questions of “choice”, “voluntariness” or “motivation”.
Thus, the disjunction between the Chinese Migrant Children’s human rights stories, and the legal discourse characterizing them as illegitimate refugee claimants and illegal, economic migrants results from the moral paradigm that informs Canadian migration law. That paradigm is fundamentally contradictory to a rights-based approach to migration and to asylum-seekers. I have answered my initial question, but the answer is disheartening. From the perspective of rights advocates, especially children’s rights advocates, the effect of the communitarian/realist moral paradigm on the Children was profound and unsatisfactory. Yet that paradigm appears entrenched in Canadian migration law.

It may be that this result is unavoidable. Niraj Nathwani’s recent proposal to re-interpret the *Refugees Convention* suggests that rights advocates have no alternative but to accommodate of the communitarian/realist moral paradigm.\(^{245}\) Nathwani acknowledges that the preferred approach to asylum-seekers is one based on human rights, but advocates an interpretation and application of the “refugee” definition that is contrary to the human rights paradigm, as it is limited by the principle of necessity (analogous to the notion of “duress” in criminal law). In defending her proposal, Nathwani explicitly states that, because states will be reluctant to adopt a human rights paradigm, limited protection based on necessity “is better than nothing at all.”\(^{246}\)

I do not agree. In Canada, the choice is not necessarily one between limited protection, and “nothing at all”. Rather, I suggest that there may be a space in Canadian migration law for the development of the limited human rights based moral


\(^{246}\) *Ibid.* at 22-26, 45
paradigm I outlined earlier. In the last 20 years, and especially since the arrival of the Chinese Migrants, there has been a growing human rights discourse around "refugees" in Canadian Supreme Court jurisprudence and in recent migration legislation. Although that discourse has proved shallow thus far, in that the dominant moral paradigm in decisions of Canada's Immigration and Refugee Board and of the Federal Courts still does not reflect a human-rights based approach, there is at least the potential for adoption of a human rights based approach. Although a detailed review of this jurisprudence and legislation is not possible within the confines of this paper, I will briefly review some key developments.

First, since the creation of the *Charter of Rights*, the Supreme Court of Canada has increasingly used the language of human rights in connection with "refugees", although that language is often equivocal. For example, Wilson, J.'s majority judgment in *Singh*, framed the right of refugee claimants to have their claims heard in terms of the claimants' right under section 7 of the *Charter of Rights* not to be deprived of security of the person:

> "security of the person" must encompass the freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right under s.55 of the Act no [sic] to be "...be removed from Canada to a country where his life or freedom would be threatened...". In my view, the denial of such a right must amount to a

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247 *Charter of Rights*, supra note 23.
248 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 178. Even before *Singh* in his dissent in *Ernewein v. Canada (Minister of Employment and Immigration)*, with respect to the then *Immigration Act* provisions giving the Immigration Appeal Board the power to deport immigrants who had been found to be refugees under the Refugee Convention, Pigeon, J. held that it was improper for the Canadian government to deny to refugees "the rights contemplated in the Convention" [emphasis added]. However, Pigeon, J. also suggested that, had Parliament used clear legislative language denying those rights, this denial would not have been improper, despite international human rights norms otherwise (*Ernewein v. Canada (Minister of Employment and Immigration)* [1980] 1 S.C.R. 639).
deprivation of security of the person within the meaning of s.7.\textsuperscript{249}

However, Wilson, J. ultimately reinforced the state's sovereignty over matters of migration, and thus the communitarian/liberal moral paradigm, in holding that the claimants' asylum rights arose out of Canadian migration laws. That is, she found that the claimants were denied security of the person because they were not allowed to access refugee protection, as defined by the Canadian Government. Wilson, J. left it open to the Canadian Government to limit the scope of "refugee" such that those who face the threat of a human right violation outside of Canada, but do not happen to meet the definition of "refugee", do not have any claim to remain. Nonetheless, Singh provides the beginnings of a human rights discourse around asylum-seekers.

In its subsequent decisions in \textit{Canada (Attorney General) v. Ward} \textsuperscript{250} and \textit{Pushpanathan v. Canada (Minister of Citizenship and Immigration)},\textsuperscript{251} the Supreme Court continued to describe refugees using human rights language. Moreover, the Supreme Court also relied extensively on international human rights law materials, although it did so solely for the purpose of interpreting provisions of the \textit{Refugees Convention} that were explicitly incorporated in the \textit{Immigration Act}. That is, as in Singh, the Court confirmed that the Government's power to expel migrants at risk was limited because Canada had chosen in its migration legislation to exercise its power to expel migrants in a manner consistent with the \textit{Refugees Convention}, not because asylum-seekers have a free-standing human rights claim to non-expulsion under the \textit{Charter of Rights}, or as a result of Canada's international obligations.

\textsuperscript{249} \textit{Ibid}, at 207.
\textsuperscript{250} \textit{Ward}, supra note 130.
\textsuperscript{251} \textit{Pushpanathan}, supra note 20.
However, in *Suresh v. Canada (Minister of Citizenship and Immigration)* the Court took the remarkable step of moving away from a purely state-centric approach to migrants at risk. In that case, the issue before the Court was whether the appellant's section 7 right under the *Charter of Rights* not to be deprived of security of the person, except in accordance with the principles of fundamental justice, would be breached if he were deported to Sri Lanka, where he was at risk of torture. The Court held that, in all but exceptional cases, a migrant in Canada, regardless of his or her legality, may not be refouled if he or she is at risk of torture in his or her home country. In doing so, the Court relied on the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *International Covenant on Civil and Political Rights*. Canada is a party to both treaties, and both treaties prohibit refoulement of migrants where they would be at risk of torture if expelled.

*Suresh* provides a road map for shifting the paradigm in Canadian migration law towards human rights. First, *Suresh* suggests that the *Charter of Rights* may facilitate such a shift, as asylum-seekers may rely on the *Charter of Rights* to argue that Canada's obligations towards them are broader than those set out in the *Refugees Convention*, and that those obligations are a consequence of asylum-seekers' human rights claims. Second, the Court relied on international human rights treaties other than the *Refugees Convention* in defining the scope of asylum-seekers' human rights claims.

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252 *Suresh*, supra note 115.
253 *Torture Convention*, supra note 115.
254 *International Covenant on Civil and Political Rights*, supra note 135 at Article 7. Although Article 7 of the *Civil and Political Rights Covenant* does not explicitly address non-expulsion ("non-refoulement"), merely prohibiting torture and cruel, inhuman or degrading treatment, the Human Rights Committee stated in its General Comment No.20 (1992) "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement": United Nations Human Rights Committee, General Comment No. 20 (28 July 1994) HRI/HEN/1/Rev.1 at para. 9.
Thus, *Suresh* suggests that the discourse around Canada's obligations to asylum seekers can, and perhaps should, shift to a discussion of the substance and significance of rights identified in international treaties to which Canada is a party. That is, to a discussion of whether those rights are core rights that should "trump" the Canadian Government's sovereignty over membership.

Unfortunately, thus far the Immigration and Refugee Board, Federal Court and the Federal Court of Appeal have been reluctant to follow this road map. For example, in *Re: Xiao Ling Zheng*, Re: *Chao He*, and *Chen v. Canada (Minister of Citizenship and Immigration)* the Immigration and Refugee Board and Federal Court rejected the refugee claims of several unaccompanied minors who had been smuggled to Canada from Fujian Province. Although the claimants did not rely on *Suresh*, they had argued, based on section 15 of the *Charter* (the equality rights provision) that the “refugee” definition was underinclusive, because it did not protect the rights of all asylum-seekers who were at risk of human rights violations upon expulsion, but rather only those who could link their risk to one of the five enumerated grounds. The Board and the Court rejected this argument. However, as these cases did not raise either section 7 of the *Charter of Rights*, or *Suresh*, with respect to the “refugee” definition, they do not conclusively reject a shift towards a human-rights centred approach.

In addition to the development of a human rights discourse in Canadian refugee jurisprudence, in the *Immigration and Refugee Protection Act (IRPA)*, which replaced the *Immigration Act* in 2002, Parliament specifically identifies the objectives of the *IRPA*

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257 *Chen v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1059.
with respect to refugees in terms that, to a significant extent, appear to recognize
refugees as having a rights-based claim to protection from expulsion:

3 (2) Objectives – refugees – The objectives of this Act with respect to refugees are

(a) to recognize that the refugee program is in the first
instance about saving lives and offering protection to the
displaced and persecuted;
(b) to fulfill Canada’s international legal obligations with
respect to refugees and affirm Canada’s commitment to
international efforts to provide assistance to those in need
of resettlement;
(c) to grant, as a fundamental expression of Canada’s
humanitarian ideals, fair consideration to those who come
to Canada claiming persecution;
(d) to offer safe haven to persons with a well-founded fear
of persecution based on race, religion, nationality, political
opinion or membership in a particular social group, as well
as those at risk of torture or cruel and unusual treatment or
punishment;
(e) to establish fair and efficient procedures that will
maintain the integrity of the Canadian refugee protection
system, while upholding Canada’s respect for the human
rights and fundamental freedoms of all human beings;
(f) to support the self-sufficiency and the social and
economic well-being of refugees by facilitating reunification
with their family members in Canada;
(g) to protect the health and safety of Canadians and to
maintain the security of Canadian society; and
(h) to promote international justice and security by denying
access to Canadian territory to persons, including refugee
claimants, who are security risks or serious criminals.258

However, despite this apparent rights discourse, in the substantive IRPA provisions
setting out Canada’s obligations to refugees, those obligations largely echo the
Refugees Convention. Nonetheless, the few sections of the IRPA expanding Canada’s
legal obligations to refugees beyond the scope of the Refugees Convention, particularly
section 97 which expands protection to persons at risk of torture, death, or cruel and

258 IRPA, supra note 38 at s. 3(2). Similarly, IRPA s.3(3)(f) explicitly requires that Canada’s
immigration legislation be applied in a manner that accords with internationally recognized
human rights. Notably, in the Immigration Act, the objective of the legislation with respect to
refugees was not articulated in terms of refugee rights, but rather solely in terms of Canada’s
“humanitarian tradition”: Immigration Act, supra note 38 at s.3.

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unusual treatment or punishment, may reflect a more genuinely human-rights based moral paradigm. Notably, however, with respect to Y.Z., the sole Chinese Migrant Child whose refugee claim was assessed under section 97 of the IRPA, the Immigration and Refugee Board's determination turned on the fact that he had turned 18 since arriving in Canada, and was therefore able to consent to being re-smuggled or trafficked. That is, despite IRPA section 97, the Board maintained a communitarian/realist approach to refugee determination.

Despite its ambivalence and nascence, the human rights discourse in Canadian migration law and jurisprudence provides at least the potential for a paradigm shift. I do not suggest that, if there is such a shift, all unaccompanied child asylum-seekers will be, or should be, granted asylum. Rather, I maintain that what is needed is for Canadian lawmakers, tribunals, Courts, human rights advocates, and the public, to engage in a discussion about the rights claims of asylum-seekers, rather than subsuming those claims in a communitarian/realist moral paradigm. If we do not do so, we risk losing the Chinese Migrant Children's human rights stories - and the stories of those like them - in a fundamentally anti-migrant legal discourse.

259 Re: P.F.Q., supra note 175. The Immigration and Refugee Board also found that, as an adult, Y.Z. could seek the protection of the Chinese state.
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