

LEGAL ETHICS AND ILLEGAL MIGRANTS:

THE BOUNDS OF ETHICAL CONDUCT FOR LAWYERS HELPING 'ILLEGALS' BECOME 'LEGAL'

by

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ABSTRACT

This thesis investigates the bounds of ethical conduct for immigration lawyers helping illegal migrants regularize their status in Canada. The field of legal ethics and the phenomenon of illegal migration are independently fascinating areas of inquiry, yet both topics remain largely understudied in Canadian legal scholarship. This paper aims to provide some ethical guidance for immigration lawyers representing illegal migrants in Canada and to offer new insights into how we understand and conceptualize both legal ethics and illegal migration.

The thesis focuses around a hypothetical situation involving a family of 'failed refugees' facing imminent deportation but awaiting a decision on an outstanding permanent residence application based on humanitarian and compassionate grounds. This thesis asks whether it is ethical for a lawyer – even in the most sympathetic of cases – to advise clients not to appear for their removal. This is the kind of question prominent legal ethics scholar, David Luban so eloquently captures with the question, 'can the good lawyer be a bad person?'

Tackling this central question requires an understanding of the phenomenon of illegal migration as well as the field of legal ethics. In terms of illegal migration, this thesis seeks to deconstruct the concept of illegal migration and offer new insights into the so called 'problem' in Canada. This thesis reports the results of a series of *Access to Information* requests filed by the author offering great insight into the extent and kinds of illegal migration in Canada.

With respect to legal ethics, this thesis questions their very nature of the discipline. Are legal ethics to be understood as *legal*, as in the 'law of lawyers' with rules and codes backed by punishment? Or should legal ethics be understood as *ethics*, requiring an 'all things considered' approach free from threat of coercive state punishment. I argue that the answer to the central question of the thesis, depends on how we understand legal ethics. This thesis proposes an approach to legal ethics that is halfway between law and ethics, consistent with William Simon's 'contextual view' of legal ethics, where the bounds of ethical conduct are defined by the underlying merits of the case and allow for 'ethical discretion in lawyering'.

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PREFACE

The Citizenship and Immigration Law section of the Canadian Bar Association is a unique group that has set an example to lawyers practicing in other areas of the law. It is a tightly knit group where the annual CBA Immigration conference is highly anticipated by all 400 or so members. The executive are actively involved with advocacy and government pressure for change. But perhaps the best example of the immigration law section's initiative is the infamous "listserv" – an email group in which immigration lawyers from across Canada (and indeed across the globe) trade stories, secrets and ask questions. Sometimes the questions are pedestrian like "what is the fax # for the embassy in Damascus". Sometimes lawyers forward stories in the news relevant to immigration or recent cases. Other times there is humorous banter about the Minister of Citizenship and Immigration's pizza parties. But perhaps the best part of the listserv was the kind assistance of senior counsel helping less experienced junior lawyers navigating the stormy waters of immigration law.

In my limited years of practicing immigration law I found the listserv's ability to connect the bar as one of my most valuable resources. Unfortunately I was a little disappointed with the responses (or lack thereof) on issues of legal ethics. Practicing immigration law raised a lot of tough ethical challenges. It was not uncommon for clients – young families – who were facing imminent deportation yet waiting for a decision on a permanent residence application – an application with a good chance of success and which they paid good money for me to prepare. After unsuccessfully exhausting all rights of appeal, looking into the eyes of a client whom I believed in, knowing the permanent residence application would likely come through in a matter of

months, but also facing the reality of a letter from the authorities directing the family to appear at the airport on such and such a date at such and such a time for their removal from Canada. Could I advise those clients to disobey the removal order? If I could, just for a minute, step outside of my 'role' as a lawyer that is certainly what I would have said. But as a lawyer, is that not breaking the law? The *Rules of Professional Conduct*? What was I supposed to say to an Immigration officer calling to find out why my client did not appear for removal? Is 'undocumented working' an excusable or understandable form of law breaking – slightly more reprehensible than "J-walking"? What about the outstanding receivable on my client's account? These were the kinds of questions that you don't learn about in law school.

Legal ethics was not a topic I, or most of my colleagues, studied in law school. Formal training in legal ethics was a quick 'do's and don't' kind of lesson in a two week segment during the bar admission course. It wasn't very different than the other two week segments on real estate law, criminal law, family law and others. The difference was that instead of the *Family Law Act* or the *Criminal Code* this course was based on the *Rules of Professional Conduct*.

Lawyers faced with ethical problems typically turn to their colleagues for advice – especially more senior colleagues. For me, the natural choice was the CBA listserv which gave me instant access to nearly all of the top Canadian immigration counsel. On one particular occasion I sent an email to the listserv with a similar fact scenario to the hypothetical story about the family described in the thesis. What was the response? A few emails trickled in but the majority of them went something like this: "Great Post! I have clients in similar circumstances... Please post replies to the listserv!"

Well this indicated a number of things to me. For one, I was on my own. It was my problem and I had to figure it out. Secondly, however, in another sense, I was not alone facing this kind of ethical problem. Thirdly, and perhaps most importantly it indicated to me the kind of problem Allan Hutchinson describes in his book – legal ethics is not the kind of topic many lawyers know much about and not a topic lawyers feel comfortable discussing openly. Legal ethics in Canada is accurately portrayed by Dodek as, ‘a subject in search of scholarship’.

The timing of this was also somewhat ironic. In 2004 the Canadian Society of Immigration Consultants was created. This was an important change and an attempt to regulate the immigration equivalent of ‘paralegals’ who call themselves ‘immigration consultants’ and threaten lawyer’s economic monopoly over the business of providing legal services. Many lawyers had to climb off their high horses and accept that ‘immigration consultants’ were here to stay and in many respects, in the eyes of CIC, a ‘representative’ was a ‘representative’ regardless of whether they are a highly educated lawyer or an approved ‘consultant’ requiring no formal education.

This provides some of the background and inspiration for this thesis. I hope this work will be published and that a shorter version will find its way onto the listserv. I hope it will make a contribution to legal ethics and to the way we think about illegal migration. The very *legal ethical* concerns that lawyers representing illegal immigrants face, are similar and insightful to the *ethical* issues that governments, employers, border guards and policy makers face when dealing with illegal immigrants. As Richard Tur notes, the field of legal ethics may be considered ‘an adventure in applied ethics’. Let us embark on this worthy and important adventure.

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I would also like to thank Professor Wes Pue, who was the Dean of Graduate Studies for... most of the year. Wes has been a source of intellectual inspiration. He made the graduate program what it is and has an incredible 'enthusiasm for ideas'. Wes was instrumental in enriching the graduate program through the 'law and society' program and the LLM seminar. He was always up for a pint at Mahoneys and brought our class together in the best way possible. Wes taught me what graduate school should be and was particularly encouraging and helpful with the legal ethics portion of the thesis.

I want to thank Professor Alvin Esau, my second reader. It is perhaps indicative of the state of legal ethics in Canada that UBC does not have a full time faculty member researching and teaching in this area. Professor Esau, of the University of Manitoba, provided incredibly helpful insight and comments on this thesis. Professor Esau brings decades of experience grappling with the very kinds of questions that this thesis poses and without his help and co-supervision this would have been a much weaker thesis.

I want to thank Professor Michael McDonald of the UBC Centre for Applied Ethics. Professor McDonald provided the necessary guidance for me at the earlier stages of the thesis and helped bring a real expertise in ethics – not just legal ethics – which has made my approach to the topic that much better.

I would like to thank Joanne Chung, the best graduate program advisor ever! Joanne brings real character to the program and makes us feel like a family. You are the best Joanne! I also want to thank my fellow classmates, Tim, Shauna, Anne, Shiva and Christina. The in-class was almost as much fun as the out of class!

Finally I have to thank those closest to me – my parents who this would not have been possible without. Over thirty years ago they were at post-docs at UBC and rather ironically ended up staying in Canada under the 1973 amnesty! Also thanks to my brothers and sisters Miriam & Ewan and Baby Sequoia, William & Julie and the Beezer.

Last but not least I have someone very very special to thank... my loving fiancé. It takes someone special to support your decision to quit your job, leave your home, friends and family and drive out west to go to school. We left a very comfortable life in London in search of adventure and discovery. She made incredible sacrifices and put up with many months of being apart, stressful preceptor searching, getting by with 'free furniture' from craigslist, lots of moving and being thousands of kilometers away from friends in family... all so that I could complete this degree. Joanne I love you so much and your support this year has taught me that marrying you the day after the thesis is due is the best decision I ever made!

Sean Stynes
Vancouver, BC
15 August 2007

PART I – INTRODUCTION¹

This thesis investigates the bounds of ethical conduct for immigration lawyers helping illegal migrants regularize their status in Canada. The narrow question that I attempt to answer is whether a lawyer may ethically advise their client not to appear for removal while awaiting a decision on an outstanding permanent residence application. In order to answer this question however, I will address much bigger issues surrounding the nature of legal ethics and the phenomenon of illegal migration. This work embarks on an ‘adventure in applied ethics’² focusing on a very unique socio-legal context: the professional advice given to illegal migrants.

The field of legal ethics and the phenomenon of illegal migration are, independently of each other, fascinating areas of inquiry. Yet both topics remain largely understudied in Canadian legal scholarship.³ Only a small portion of Canadian legal academics turn their minds to either legal ethics or illegal migration making this is a topic worthy of scholarly investigation. With respect to illegal migration, this thesis includes many original statistics obtained through access to information requests. These statistics help to provide some indication of the extent of the phenomenon of ‘illegal migration’ in Canada. Collectively, this work will have important implications for the

¹ A version of this thesis will be submitted for publication.

² Legal ethics has been dubbed as an ‘adventure in applied ethics’ by Richard Tur. See Richard H.S. Tur “Legal Ethics” *Encyclopedia of Applied Ethics*. Vol. 3, (Academic Press).

³ See for example Alan Hutchinson *Legal Ethics and Professional Responsibility* (Toronto: Irwin law, 1999) at 2-7 and Adam Dodek, “Canadian Legal Ethics: A Subject in Search of Scholarship.” (2000) 50 U.T.L.J. 115. The bleak picture of legal ethics in Canada may not be entirely warranted.

way in which immigration lawyers practice and the way in which policy analysts and scholars understand illegal migration in Canada.

What makes illegal migration such a unique context for legal ethical analysis in Canada is the possibility of applying for permanent residence from within Canada based on 'humanitarian and compassionate' grounds. This is commonly referred to as an "H&C" application and it finds its origin in section 25 of the *Immigration and Refugee Protection Act* ("IRPA").⁴ Section 25 provides immigration officers with the far-reaching discretionary power to exempt anyone from any requirement of the *IRPA* where to do so would be justified on 'humanitarian and compassionate grounds'. Pursuant to this section, Citizenship and Immigration Canada ("CIC") has created a formalized process and unique legal apparatus to facilitate applications for permanent residence based on H&C grounds. There are specific applications forms, fees and an online guide-book on how to apply.⁵ Any foreign national, regardless of their status, is eligible to apply.

As a result, one might consider the H&C application process as offering a kind of ongoing case by case 'amnesty' program for illegal migrants.⁶ This is not to suggest that

⁴ *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, s.25 ("IRPA") provides that "the Minister shall, upon request of a foreign national who... does not meet the requirements of this Act... examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status... if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations."

⁵ <http://www.cic.gc.ca/english/information/applications/handc.asp> [Last Visited: 15 August, 2007]

⁶ Interestingly, in 1983 then Minister of Employment and Immigration, Lloyd Axworthy commissioned a report for Parliament on 'Illegal Migration in Canada'. W.G. Robinson *Illegal Migrants in Canada* (June, 1983) Special Report to the Honourable Lloyd Axworthy, Minister of Employment and Immigration (Ministry of Supply and Services Canada, 1983) ISBN 0-662-12695-5 ("Robinson Report"). This report considered the amnesty declared in Canada in 1973 and rejected a further amnesty and in its stead, a 'case by case regularization scheme' which in nearly all respects reflects our modern H&C application process. Under the previous *Immigration Act*, H&C discretion was found in the combination of sections 114(2) of the former *Act* and section 2.1 of the former *Regulations*. The modern H&C system differs from an 'amnesty' however, in that the H&C process is highly discretionary. Reasonable officers could easily

Canada's H&C system has been designed with this intent, rather it is illustrative of its practical effect. Indeed courts are quick to point out that the H&C process is not designed to undermine Canada's immigration system or encourage illegal migrants coming to Canada.⁷

Critical to the ethical dilemma that this thesis investigates is the fact that merely filing an H&C application does not stay or prevent removal. As will be discussed in greater detail below, the responsibility of granting permanent residence rests with one branch of the government while the responsibility over removals rests with a different branch. The result is that applicants may be removed before receiving a decision on their H&C application.⁸ If it were otherwise, the ethical dilemma I am investigating would disappear as the 'illegal migrant' could not be removed by the government until receiving a decision on their H&C application. From a policy perspective, it comes as no surprise that there is no stay of removal in this situation. If deportation could be avoided by simply filing an application (an application that will take over a year to process) then the government's ability to remove 'illegal migrants' from Canada would be significantly compromised. The Federal Court has jurisdiction to stay removal orders,

differ in opinion on any given case, whereas with an amnesty, once basic criteria are met generally everyone is approved.

⁷ See for example *Canada (Minister of Citizenship and Immigration) v. Legault*, 2002 FCA 125 at para 63.

⁸ An outstanding H&C application may have some impact on whether the Federal Court might stay a removal order. See for example: *Wu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 546; *Harry v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 159 and *Martinez v. Canada (MCI)* 2003 FC 1341.

however that jurisdiction does not typically extend to a consideration of the merits of the outstanding H&C application.⁹

Every year Canada receives a few thousand H&C applications from persons in Canada and approves just under half of them.¹⁰ While the basis and role of one's 'establishment in Canada' is subject to much legal debate, as a general principle the more 'established' one has become in Canada – even by working illegally and overstaying a visa – the stronger the justification of their remaining in Canada.¹¹ This is because the H&C process is more than an 'exemption' from the general rule that applications for permanent residence in Canada must be made outside of Canada.¹²

⁹ The applicant's evidence establishing 'irreparable harm' justifying a stay, however, may (but may not) be the same evidence establishing 'excessive hardship' on the H&C application. The Federal Court's jurisdiction to stay a removal order pending an outstanding H&C application is considered in greater detail below. See generally *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 50 as well as *Toth v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 123 (F.C.A.); [1988] F.C.J. No. 587 (QL).

¹⁰ According to Access to Information requests A-2006-05889 and A-2006-05890 filed by the author in October 2006, by December of 2006, CIC assessed 9,121 H&C applications in 2006, 3,834 of which were categorized as HC1 – a classification we might consider our fact situation falling under. Just under half, 1,801 cases, were approved. In 2005, 1,643 HC1 applications were approved and over 4,000 H&C applications were approved across all H&C categories in that year.

¹¹ The role of 'establishment factors' in H&C decision making requires some qualification and will be discussed in much greater detail in parts III and IV of this thesis. While prolonged stay in Canada may lead to establishment, H&C officers are supposed to consider factors *beyond the applicant's control* and this is highlighted in bold print in the officer's manuals. (See *Immigration Manuals* IP 5 "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" Online: <http://www.cic.gc.ca/english/resources/manuals/ip/ip05e.pdf>). However, it is arguably the *extent* of one's establishment that is more important than how it was obtained. Therefore, those having integrated well into the community, found steady employment, filling labour shortages, having no criminal record, etc... are presumably the more desirable candidates. See the discussions of establishment factors in: *Muoz v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 166 (F.C.T.D) at para 5; *Raudales v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 3 at paras 18 – 19; *Fernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 899; *Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804; *Bansal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 226; *Kim v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1461 at para 28 but see also *Tartchinska v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 373 (F.C.T.D.)(QL).

¹² Section 11 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227, s.11 ("IRPR") requires applicants for permanent resident visas to apply to "the immigration office that serves (a) the country, where the applicant is residing, if the applicant has been lawfully admitted to that country for a period of at least one year; or (b) the applicant's country of nationality...". Waldman notes that, "from its

Justice L'Heureux-Dubé described the more significant role of the H&C process in the seminal decision in *Baker v. Canada (Minister of Citizenship and Immigration)* as follows:¹³

...while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established.

As we might expect, a large body of jurisprudence has developed interpreting the reasonable exercise of discretion based on H&C grounds under section 25. The most significant of which is the 1999 Supreme Court decision in *Baker* where the Court overturned a negative H&C determination involving a Jamaican woman who had been in Canada illegally for over ten years.¹⁴ H&C applications are by their nature, inherently contradictory and paradoxical, yet at the same time, progressive, necessary and life altering for so many of those not fitting into the 'regular' or 'legal' categories of Canadian immigration. H&C discretion is written into section 25 of *IRPA* because of the difficulty of fitting everyone into the restrictive categories of immigration. H&C discretion fills gaps in immigration law avoiding specific cases where removal would be inhumane or cause 'disproportionate hardship'. In the case of illegal migrants however, the H&C process becomes one of the rare circumstances where someone stands to

inception, Canadian immigration policy has been based upon the concept of overseas selection, with the final decision reserved for the officer at the port of entry." Lorne Waldman, *Immigration Law and Practice* 2d ed., vol. 2, looseleaf (Markham: Lexis Nexis Canada Inc., 2007) at 13.1.

¹³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para 15.

¹⁴ *Baker*, *supra* note 13.

benefit from the law as a result of their breaking the law.¹⁵ It is this context that the ethical dilemma facing immigration lawyers is particularly unique.¹⁶

A FACT SITUATION

There are a wide variety of reasons why someone may be in Canada without status and decide to submit an H&C application. It is however, beyond the scope of this thesis to cover all of the variations or situations encompassing 'illegal migrants' in Canada. For this reason, I have chosen a more specific and common fact situation involving a family of 'failed refugees' fighting to remain in Canada and I will analyze the ethical issues lawyers face when acting for such clients and in particular, ethical issues at the point of removal.

The hypothetical fact situation presented below will help to focus this thesis and paint a clearer picture of the problem under investigation. Analysis of legal ethics calls out for case examples as it can be confusing, if not ineffective, to discuss legal ethics in the abstract. I have attempted to be precise enough for the fact situation to be useful, but purposely vague enough so that the analysis will apply to variations beyond this particular example. This fact situation is a familiar one to many immigration lawyers and goes something like this:

¹⁵ One of the other few examples in law would be the doctrine of 'adverse possession' in property law, where someone may establish title to land after trespassing or squatting on that land for a long period of time.

¹⁶ Somewhat related is the private law doctrine of illegality in tort and contract law. Interestingly, Canadian courts have been quite reluctant to invoke the doctrine to bar recovery or entitlement, even where the victim was themselves engaging in illegal activity. Interestingly, one of the leading cases in this area is in *Still v. Canada (Minister of National Revenue)* [1997] F.C.J. No. 1622 (C.A.)(QL) involving a woman who worked without a work permit and the Federal Court of Appeal found that, given the circumstances, this 'illegality' ought not to deny her unemployment insurance entitlements. See *Hall v. Hebert*, [1993] 2 S.C.R. 159 and *Transport North American Express Inc. v. New Solutions Financial Corporation*, [2004] 1 S.C.R. 249..

A young family – a mother, father and 3 year old child, come to Canada from a country with a poor record of human rights and little economic opportunity. Aware of friends from back home who came to Canada and successfully became refugees, this family similarly make a refugee claim in Canada. From start to finish, the refugee determination process takes just under two years to complete and unfortunately, in the end, a decision maker refuses their application for refugee protection in Canada. After this disappointing news, they remain in Canada another year and a half exhausting various other legal options including an unsuccessful judicial review application in Federal Court. Thus far, the provincial legal aid program has paid for their legal fees.

Despite the negative result of their refugee claim, they have managed to find steady but 'unskilled' work which pays the rent, the bills and leaves a tiny bit left over to send back home to their extended family. They have greatly improved their English and their elder child is now entering the first grade, making new friends. They also have had a second child in Canada – now a Canadian citizen. They have become fairly 'established' in Canada, become involved in the community and enjoy life here – even though it is difficult being away from their home country.

After nearly three years in Canada they have decided they want to fight to stay, as leaving at this point seems like a hopeless option. They will be far worse off going home where they have nothing. Primarily because of their jobs, community support and 'the best interests of their children', the family has a decent chance at being accepted for permanent residence based on humanitarian and compassionate grounds ("H&C application"). With the help of their lawyer, they submit an H&C application but it will be at least a year before they get a decision on that application. Included with the

application were over fifty letters from friends, co-workers and members of their church who wanted to lend their support for the family. Their provincial legislative representative even wrote in support of their bid to stay in Canada.

Six months pass until the dreaded day when a removals officer calls them in for an interview and tells them their 'time is up'. The officer informs them that their Pre-Removal Risk Assessment Application ("PRRA") was refused and hands them a letter to appear at the airport next month for removal from Canada. Unsuccessfully exhausting other last minute legal and political pleas to delay the removal until a decision can be made on their permanent residence application, the family has come to the end of the road as it were. If they could just hang on for a few more months their lawyer believes they might receive a positive decision on that outstanding H&C application they filed six months ago.

Their chance of success however, is a matter of speculation as the H&C application is highly discretionary. The family remembers hearing about someone in the news who moved into a church basement for two years, and then got permanent residence, but they don't want to go that far.¹⁷ The family has everything to lose¹⁸ and nothing to gain¹⁹ by showing up at the airport for removal. They have never done anything 'illegal' but want to stay in Canada, keep their jobs and keep their children in

¹⁷ See for example Petti Fong "Iranian refugee granted asylum" *Globe and Mail* February 20, 2007 p. A12 or Allison Hanes "Church refugees win 13-month battle: Palestinians sought sanctuary in basement" *Calgary Herald* [Final Edition] February 28, 2005. p. A.4. See also Randy Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power and Law* (Vancouver: UBC Press, 2005).

¹⁸ The effect of leaving Canada on the H&C application is subject to some debate – that will be discussed in greater detail in part III. For present purposes it is fair to say that leaving Canada will mean the end (although technically not a withdrawal) of the chances of success on the H&C application.

¹⁹ Practically speaking, the odds of the family being arrested and detained are rather slim – although certainly possible. Arrest and detention are considered in greater detail in part III.

school. Their friends and community supporters can't understand why the government would be deporting this family while criminals are allowed to stay. They have invested just over \$1,200 in application fees, plus a further \$2,000 in legal fees for the H&C application that will undoubtedly be refused if they leave Canada and give up their jobs, apartment and say goodbye to their friends. They face the choice of showing up at the airport – ending their hopes of a life in Canada versus not showing up at the airport – resulting in an immigration warrant being issued.

As a lawyer, 'advocacy' means fighting for your clients and helping them obtain 'justice'. But does advocacy stop at failing to appear for removal? It is at this point the lawyer's questions are no longer 'legal' questions. This is a problem not addressed in the lawyer's copy of the annotated *IRPA* or their legal textbooks. The issue rather, is ethical in nature and reasonable lawyers will have differing opinions on the appropriate advice. Some will see an ethical problem even *representing* a client who has (or will) disobey their removal order and might withdraw their representation at this point. Others separate the removal from the H&C application continuing to represent the client on the H&C application and noting that it is the client's decision (not the lawyer's advice) whether to appear for removal.²⁰ Still other lawyers might cautiously 'hint' to their client that leaving on the CBSA officer's terms is not right and they should stay in Canada at least until a decision comes down on their H&C. The lawyer might also hint to the fact that, practically speaking, the CBSA does not have the resources to chase down families such as them – who pose absolutely no risk to the safety or security of Canada and contribute

²⁰ Pointing out that the wrongdoing is that of the client and not of the lawyer might be seen as one of several 'techniques of neutralization'. See Gresham M. Sykes, David Matza "Techniques of Neutralization: A Theory of Delinquency" (1957) 22 *American Sociological Review* (No. 6), at 664-670.

to the economy and their community. Finally, some lawyers may see no problem advising a client not to appear for removal under these circumstances.

MANY QUESTIONS, FEW ANSWERS

The above hypothetical unlocks an abundance of questions – factual, logistical, legal and ethical in nature. For example, why was the refugee claim refused and why did it take two years to refuse it? Does the removal officer have discretion to defer removal? Can they expedite the decision on the humanitarian application? Who decides the fate of the humanitarian application and why don't they communicate with the removal officer? Could the family be detained? What is the status of the Canadian born child? If they decide not to show up for removal, how likely are they to be caught? Can the lawyer continue to represent the family on the H&C application or must they end the solicitor-client relationship? If the lawyer continues to represent the family, is the family's whereabouts confidential? These are only a few questions – there are many more – that arise from this relatively common fact situation.

Arguably, the ethical dilemma exists only because of the H&C application process. If there were no chance of successfully and *legally* regularizing one's status in Canada then, with the exception of rare circumstances, it is difficult to see how a lawyer could ethically advise a client on the run from immigration authorities. That is, absent the H&C process, the ethical advice is not terribly different from the criminal lawyer acting for a 'fugitive' on the run from the law. Criminal lawyers generally agree that while communications are confidential, the lawyer's advice ends at suggesting the client

turn themselves in to the authorities.²¹ With the rarest of exceptions, suggesting that the criminal client continue to lay low would invoke a high ethical cost for the lawyer – compromising the lawyer's duty to the public, the lawyer's role as a 'minister of justice' and the rule of law to a great extent. With H&C applications on the other hand, it seems the more of a fugitive you are, the better your chances of benefiting under the law – albeit a different but related law.²² Moreover, in Canada overstaying a visa or working without a work permit is not generally seen as 'criminal' conduct.²³

The tough cases involve those where the H&C application's chance of success is a probability (and not mere possibility) but the removal officer doesn't seem to agree or care about this assessment of the H&C application. This is perfectly understandable since the removal officer's job is to 'effect removals as soon as practical' and they have no role in the H&C decision. Similarly, a Federal Court judge considering a last minute motion for a stay of the removal order might easily find that the removal officer's failure

²¹ See M. Proulx & D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 196-197.

²² This analogy again requires the same qualification mentioned in note 11, *supra*. While prolonged stay in Canada may lead to establishment, H&C officers are supposed to consider factors *beyond the applicant's control* and this is highlighted in bold print in the officer's manuals. (See IP 5). See also the discussion of establishment factors in Catherine Dauvergne, *Humanitarianism, Identity and Nation* (Vancouver: UBC Press, 2005) at 141.

²³ In the United States, Congress Bill 4437, *The Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005* made it a separate criminal offence to immigrate illegally or even assist someone in immigrating illegally. In Canada, it is worth noting that sections 124 - 126 of the *IRPA*, (*supra* note 4) outline 'offences' including "s. 124(1) Every person commits an offence who (a) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act... or (c) employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed." Prosecutions under this section are rather uncommon. More generally speaking however, one need only consider the *Baker* (*supra* note 13) decision and the hundreds of other cases like it where so called 'illegal migrants' have become 'established in Canada' and been approved for permanent residence. Similarly, the decision in *Still*, *supra* note 16 is directly on point. On rather sympathetic facts, the Federal Court of Appeal held that working without a work permit did not invoke the 'illegality doctrine' in contract law. The *Still* decision received favourable treatment by the majority decision in *Transport North American Express Inc. v. New Solutions Financial Corporation*, *supra* note 16. However, see also *Polat v. Canada (Minister of National Revenue)* [1996] T.C.J. No.1667 and *Sah v. Canada (Minister of National Revenue)* [1995] T.C.J. No. 982.

to exercise discretion to defer removal raises a 'serious issue to be tried' but that no 'irreparable harm' results sufficient to warrant a stay of removal.²⁴

Given the life changing impact of the decision at hand, the slow H&C processing times, the modest success rates and the highly discretionary nature of H&C applications, immigration lawyers are put into a very difficult ethical position acting for 'illegal migrants'. If the client can remain under the radar long enough to get a positive decision on their H&C application, their lives will be forever changed. As a lawyer, you will have fulfilled your duty of 'fearless advocacy' and have fought for justice for your clients. The question is whether 'the ends' of getting permanent residence in Canada, we might say, justifies 'the means' of disobeying a removal order.

What is so wrong with disobeying a removal officer's order?²⁵ What if there has been a clearly poor exercise of discretion? Is the lawyer behaving ethically by merely 'hinting' at the consequences of not showing up but leaving the decision not to appear for removal in the client's hands? Can the lawyer passively go along with it and continue

²⁴ After the decision of the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration, supra* note 9 the Federal Court now accepts jurisdiction to stay removal orders pending applications for leave and judicial review. The applicant bears the onus of establishing the standard tripartite test for an interlocutory injunction from the Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311, that of a serious issue to be tried, irreparable harm and that the balance of convenience favours the granting of a stay. Such relief is sought by way of motion (*Federal Court Rules*, (SOR/98-106), r. 169) pursuant to section 50 of the *Federal Court Act, supra* note 9. Typically, the underlying judicial review application relates to the negative decision on a pre-removal risk assessment application or the decision of the removal officer not to exercise discretion to defer removal, or both. The relevance of outstanding H&C applications is open to debate but certainly looms in the back. See for example *Wu, Harry and Martinez, supra* note 8. These cases and more will be discussed in chapter 5.

²⁵ The commentary in Rule 4.01 "Advocacy" in the Law Society of Upper Canada *Rules of Professional Conduct* calls on the lawyer to "raise fearlessly every issue, advance every argument, and ask every question... which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law..." but continues by noting that "the lawyer must discharge this duty by fair and honourable means, **without illegality** and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect..." [emphasis added]. Online: <http://www.lsuc.on.ca/regulation/a/profconduct/rule4/> [Last visited: 15 August, 2007].

to send in updates on their H&C application? Must the lawyer withdraw their representation at this point? The lawyer walks a fine line between 'honourable and noble advocate' and being an accessory to an illegal act or counseling a misrepresentation contrary to section 126 of the *IRPA*.

Existing scholarship on legal ethics does not provide easy answers to the above questions – rather such works offers theoretical models and differing approaches to legal ethics. Much of David Luban's work debates whether it is the lawyer's role that makes the difference asking whether 'the good lawyer is a bad person?'²⁶ William Simon's writing on legal ethics calls on the lawyer to assess the underlying merits of the case and choose the option most likely to 'achieve justice'.²⁷ Alan Hutchinson calls for a pragmatic and functional approach where the lawyer is not a 'hired gun' but a 'hired hand'.²⁸ Alvin Esau's 'personal moral reasoning in relational context' model is meant to engage the lawyer's 'ability to recognize and reason reflectively and critically on ethical issues as they arise in practice and the ability to arrive at more personally satisfying decisions about what courses of action to take.'²⁹ What do any of these theories or perspectives mean in this context? How do they help to solve our problem?

Similarly, the law society 'rules of professional conduct' or 'codes of ethics' do not provide much help to the practicing lawyer. Most of the provincial law society rules and codes contain similarly vague provisions. For example, each contain a rule

²⁶ David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) and *The Good Lawyer* (New Jersey: Rowman & Allanheld, 1984).

²⁷ William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998)

²⁸ See Hutchinson, *supra* note 3.

²⁹ Alvin Esau, "Teaching Professional Responsibility in Law School" (1987) 11 Dal. L.J. 403 at 416.

something to the effect that ‘the lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.’³⁰ In my view, such provisions do not determinatively ‘answer’ the central question of this thesis. If anything, they invite legalistic questions such as: Is not showing up for removal ‘dishonest’? Is removal equivalent to ‘punishment’? What does ‘assist’ mean in this context? Does it include acquiescence to the client’s disobedience?³¹ Does it extend to assisting with the H&C application?

While not ignoring provincial law society codes and rules, this thesis de-emphasizes their importance. As Gavin MacKenzie has written:³²

...rules of professional conduct have only a limited role to play in enhancing public confidence in the legal profession. The influence that such rules have on lawyers’ attitudes and behaviour, moreover is slight. Little progress is likely to be achieved by continually rewriting those rules.

Moreover, the (self) regulation of lawyers is a matter for each provincial law society and therefore the written codes may vary, albeit slightly, from province to province. To use the example of the rule cited above prohibiting a lawyer from knowingly assisting or encouraging ‘dishonesty’ or illegal conduct, consider that in British Columbia a lawyer would violate the rules from mere ‘acquiescence’ to a client’s dishonesty whereas in

³⁰ See for example, Law Society of Upper Canada *Rules of Professional Conduct* Rule 2.02(5) “Dishonesty, Fraud, etc. by Client”; Law Society of British Columbia *Professional Conduct Handbook* Ch. 4 Rule 6 and Ch. 8 Rule 1(b); Nova Scotia Barristers’ Society *Legal Ethics Handbook*, Ch. 4 “Honesty and Candour When Advising Clients” Commentary at 4.7; Manitoba Law Society *Code of Professional Conduct*, Ch. 3 “Advising Clients” Rule 7, etc... Even the Canadian Society of Immigration Consultants *Rules of Professional Conduct* which largely echo the Ontario *Rules* contain such a provision in Rule 4.2.

³¹ Interestingly in British Columbia the *Professional Conduct Handbook* prohibits “acquiescence” by the lawyer where a client is attempting to do something ‘dishonest or dishonourable’. Law Society of British Columbia *Professional Conduct Handbook* Ch. 8 “The Lawyer as Advocate” Rule 1(b). In Ontario for example, “acquiescence” is not explicitly included in the *Rules of Professional Conduct*.

³² Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (Toronto: Carswell, 2007) at 2 – 3.

Ontario for example, this is not explicitly stated.³³ While the Canadian Bar Association, a national organization, has since 1920 enacted its own “Code of Professional Conduct”,³⁴ if we were to approach the issue from a legal perspective, they are technically not legally ‘binding’ on lawyers in most provinces. Again, however, such legalistic thinking is entirely the wrong way to approach our ethical dilemma.

SOME PRELIMINARY NUMBERS

To provide some very rough figures indicating the frequency of something similar to the above fact situation, consider the following figures that were obtained through requests under the *Access to Information Act*.³⁵ Every year in Canada roughly twenty thousand refugee claims are filed³⁶, seven thousand refugee claims are refused³⁷,

³³ Law Society of British Columbia *Professional Conduct Handbook* Ch. 8 “The Lawyer as Advocate” Rule 1(b).

³⁴ CBA Code of Professional Conduct, Online: <http://www.cba.org/CBA/activities/code/> [Last visited: 15 August 2007]

³⁵ *Access to Information Act* (R.S.C, 1985, c. A-1). Section 4(1) of the *Act* provides, with some exceptions, “every person who is (a) a Canadian citizen, or (b) a permanent resident... has a right to and shall, on request, be given access to any record under the control of a government institution.” Requests were made to the Immigration and Refugee Board (“IRB”), the Canada Border Services Agency (“CBSA”) as well as Citizenship and Immigration Canada (“CIC”). Seventeen separate requests were filed in October and December of 2006 pursuant to the *Act* and include requests for such figures as number of H&C applications filed, approved and refused, the number of refugee claims filed, refused and approved, the number of removal order issued and effected, and various other statistics. For the most part, I have obtained the figures from 1990 – 2005 broken down by nationality or country.

³⁶ Access to Information request A-2006-00107 filed by the author with the Immigration and Refugee Board in December of 2006 provided the number of refugee claims (note that these figures are ‘cases’ not total number of persons) referred (meaning those who have made a formal refugee claim in Canada and were determined ‘eligible’ to make the claim) to the IRB in Canada broken down by country of origin and IRB location. The average number of claims referred annually over 1990 – 2005 was 20,139. The highest number occurred in 2001 when 29,606 claims were referred. The lowest number was 2005 when only 14,312 claims were referred. The 2005 figures may demonstrate the impact of the *Safe Third Country Agreement* which came into force in December of 2004 and with some exceptions, denies claimants appearing at a land border from the USA from making a refugee claim in Canada. These numbers fluctuate annually and the number of claims finalized typically lags a year or two behind the number of claims referred.

over three thousand humanitarian applications will be filed³⁸ with just under half being successful and overall, roughly ten thousand people will be effectively removed from Canada by the authorities.³⁹ These figures certainly do not account for all of the possible situations of 'illegal migrants' but provide some rudimentary indication of the extent, scale and context of the family in the fact situation. The family in the fact situation is part of a very small portion of the overall immigrant population and might be categorized in a subset of the 'illegal migrant' population, 'failed refugees'. However, as will be discussed in part III, defining terms such as 'failed refugees' and 'illegal migrants' with much precision is nearly impossible and it is discourse that carries great political charge. The politicization of illegal migration is also discussed in greater detail in part III.

³⁷ Access to Information request A-2006-00108 filed by the author with the Immigration and Refugee Board in December of 2006 provided the number of refugee claims (note that these figures are 'cases' not total number of persons) refused by the IRB in Canada broken down by country of origin and IRB location. The average number of claims refused annually over 1990 – 2005 was 6,826. The highest number occurred in 2004 when 12,354 claims were refused. The lowest number was 1990 when only 2,356 claims were refused. In 2005 there were 7,878 claims refused. These numbers fluctuate with the number of claims referred and finalized by the IRB annually. The number refused does not include abandoned and withdrawn refugee claims.

³⁸ Access to Information request A-2006-05889 filed by the author with Citizenship and Immigration Canada in October of 2006 provided the number of H&C applications filed, approved and refused (cases not total number of persons) at CIC. The numbers were only provided after the *IRPA* came into force in June of 2002. The numbers are broken down into various H&C categories and the one most resembling our fact situation is "HC1" – Humanitarian and compassionate cases". The other categories, FCH, HC2 and PP1 generally deal with family class/sponsorship cases requiring some form of exemption from the requirements of the *IRPA*. In 2005, there were 3,484 H&C applications (HC1) filed with 1,643 approved and 1,841 refused. In 2004 there were 2,787 filed, 1,151 approved and 1,636 refused. Since *IRPA* came into effect over 5000 cases have been approved.

³⁹ Access to Information request A-2006-02576 filed by the author with the Canada Border Services Agency in December of 2006 provided the number of 'foreign nationals' (as defined in the *IRPA*) effectively removed for the years 1991 – 2005 broken down by country of origin. The average number of people removed from 1991 – 2005 was 8,523. The highest number occurred in 2004 when 12,130 people were removed. The lowest number was 1991 when only 5,621 people were removed. In 2005 there were 11,224 people removed.

THE POLITICAL SPHERE

The lawyer in this context plays two hands with two different branches⁴⁰ of the Canadian federal government: firstly, the Canada Border Service Agency (“CBSA”)⁴¹ falling under the Ministry of Public Safety Canada (“PSC”)⁴², having responsibility for border controls and effecting removal orders. Secondly, the lawyer independently interacts with department of Citizenship and Immigration Canada (“CIC”)⁴³, its own separate Ministry, which determines applications to enter and remain in Canada (ie applications for permanent or temporary residence including H&C applications). The CBSA and CIC share information⁴⁴, however the bureaucratic reality at the street level inevitably means that there will be times when the left hand doesn’t know (or doesn’t care) what the right hand is doing.⁴⁵

In the court of public opinion, immigration law and particularly illegal migration, is a highly politically charged topic. Two people reading the above fact situation might come away with two completely opposite interpretations or opinions of the family. One might see the family negatively – as ‘illegal’, ‘queue jumping’, ‘bogus refugees’ and

⁴⁰ There are two additional judicial or quasi judicial branches that are also involved. Firstly, the Immigration and Refugee Board (“IRB”) and specifically the Refugee Protection Division (“RPD”) is the tribunal responsible for determining their refugee claim. Pursuant to section 72 of the *IRPA*, *supra* note 4, the Federal Court of Canada has jurisdiction, with leave, to hear judicial review applications of decisions in immigration matters.

⁴¹ Online: <http://www.cbsa.gc.ca/> [Last visited: 15 August 2007]

⁴² Online: <http://www.publicsafety.gc.ca/> [Last visited: 15 August 2007].

⁴³ Online: <http://www.cic.gc.ca/> [Last visited: 15 August 2007]

⁴⁴ Inside Canada the shared information database is the “Field Operations Support System” (“FOSS”) and every client shares a unique eight digit client identification number that both departments use to identify the individual.

⁴⁵ See for example *Toth, Wu, Harry and Martinez*, *supra* notes 8 and 9.

choose to highlight the fact that their refugee claim was refused and all the wasted resources dealing with appeals and removals. The 'problem' is 'them' and not 'us' although our government's failure to enforce the law expeditiously needs to be changed. This family is taking advantage of our 'generous' immigration system. Canada's immigration system has become too soft and too generous towards 'refugees' and we need to deal with the problem of illegal immigrants.

Others might see the same family exactly the opposite – as victims, hard working, people in need of assistance and choose to highlight their jobs (particularly where they are filling labour shortages), their contributions to Canada, community support and hope for their children's future. The 'problem' is 'us' and not 'them'. It is our marked division between the wealthiest and poorest nations of the world, through the ascription of 'status' to different 'classes' of people akin to birthright 'feudal privilege'⁴⁶ that is wrong. The system has failed these good hard working people. After all, Canada is built on immigration – we are a country of immigrants.

Somewhere in between these two polar views lies a more realistic picture of this family. There is reason to be sympathetic as much as there is reason to be disdainful. There is an aspect of queue jumping as much as there is no queue for them to enter in the first place. There is an inequality in keeping them out as much as there is one in allowing them to stay. Whether we consider their coming to Canada truly 'voluntary' is open to

⁴⁶ See Joseph Carens, "Aliens and Citizens: The Case for Open Borders" (1987), *The Review of Politics*, Vol. 49, No. 2 (Spring), 251-273. On the ethics of borders generally, see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, Inc., 1983); M. Weiner, "Ethics, National Sovereignty and the Control of Immigration" (1996) *International Migration Review*, Vol. 30, No. 1, Special Issue: Ethics, Migration and Global Stewardship (Spring), 171-197; Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) as well as Catherine Dauvergne, "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall L.J.* 597.

debate. In sum, this 'adventure in applied ethics'⁴⁷ enters a world of contradiction, complexity and controversy.

THE LEGAL SPHERE

Migration law, like legal ethics, is also contradictory, complex and controversial. What are the relevant factors in determining an H&C application? What amounts to 'irreparable harm' so as to justify a stay of the removal order? What is the scope of officer discretion? These are evolving areas of the law and are by no means 'settled' law. Families such as those in our fact situation will likely have a refugee claim before the IRB, a judicial review application before the Federal Court, a Pre-Removal Risk Assessment Application with the CBSA, numerous work and study permit applications with CIC, a further judicial review application in Federal Court possibly surrounding the PRRA and likely a motion for a stay of removal again before the Federal Court. This is without having discussed legal issues surrounding possible detention. Showler criticizes the removal process for failed refugees as 'vague and seemingly indeterminable'.⁴⁸ In order to single out some of the core ethical issues, part III attempts to unpack the complex multiplicity of proceedings involved and outline the 'black letter law' facing the family in our fact situation.

⁴⁷ Tur, *supra* note 2.

⁴⁸ Showler *Refugee Sandwich: Stories of Exile and Asylum* (Montreal: McGill-Queen's University Press, 2006) at 233. This book is a unique collection of thirteen fictional stories that illustrate the difficulties and problems of Canada's inland refugee determination system. Peter Showler is the past Chairperson of the Immigration and Refugee Board.

STRUCTURE AND METHODOLOGY

This thesis is divided into three main parts. Following this introduction, part two develops a theory of legal ethics. Part three deconstructs the concept of 'illegal migrants' and part four brings all of this together in order to tackle the ultimate question with which we began: what are the bounds of ethical conduct for lawyers representing illegal migrants in Canada?

Legal Ethics: *Ethics v. Law*

Part two will develop a theory of legal ethics that engages legal ethics as a discipline, asking whether legal ethics ought to be approached as a *legal* discipline – requiring the examination of rules and principles promulgated by a governing authority and backed up with punishment – or whether legal ethics is an *ethical* discipline – requiring an 'all things considered' approach free from any element of state coercion or formal punishment. Or perhaps legal ethics falls somewhere between law and ethics. Finding a workable theory of legal ethics requires that we first address its nature.

A common theme in legal ethics in Canada is that it is seen as a topic that is understudied, under researched and that this lack of attention is an embarrassment given the importance of ethics and the poor public perception of lawyers.⁴⁹ While this reputation may not be entirely warranted, this chapter seeks to respond to the intellectual call for scholarship in this field debating the very nature of legal ethics, the lawyer's role and the degree of 'ethical discretion' that ought to inform lawyering. This section

⁴⁹ Dodek, *supra* note 3; Hutchinson, *supra* note 3 and in the USA, see Anthony T. Kronman, *The Lost Lawyer: Failing ideals of the Legal Profession* (Cambridge: The Belknap Press of Harvard University Press, 1993).

surveys and builds on the theoretical approaches to legal ethics found in the works of Simon, Hutchinson, Luban, Kronman and others.

Migration Law in Canada

Part three tackles the complex web of migration law in Canada and is divided into three chapters. The first chapter provides 'the big picture' of immigration law in Canada. I examine some the historical context, key principles and main categories of 'legal' migration in Canada. The second chapter provides a more critical analysis of 'illegal migration' looking at its causes, prevalence and policy. This part asks how (and why) we define someone as an illegal migrant and whether the label has any significance. I will report the findings of a number of original requests for information and statistics relevant to illegal migration that were filed pursuant to the *Access to Information Act*.⁵⁰

In the final chapter of part three, I set out what might be referred to as the 'black-letter law' of illegal migration. This is critical to tackling the ultimate ethical problem with which we began. The law surrounding the exercise of discretion under the H&C application process as well as the law of removals and deportation in Canada is considered. As procedural aspects are equally as relevant as the substantive law, these will also be discussed and examined in this chapter.

Putting it all Together

With a theoretical understanding of legal ethics and illegal migration, we are equipped to tackle the original question with which we began – what are the bounds of

⁵⁰ *Access to Information Act*, *supra* note 35.

ethical conduct for lawyers representing illegal migrants? Taking an ethical, rather than legal, approach to legal ethics the answer depends on the amount of ethical discretion that ought to inform lawyering. Using Simon's 'underlying merits of the case'⁵¹ approach with Hutchinson's 'pragmatic and functional'⁵² approach and applying it to the discretionary 'case by case' structure of the H&C application process, we conclude with a very lawyerly answer to the ultimate question: the answer depends on the merits and circumstances of the case.

This conclusion, however, is not as hollow or soft as it might appear. For one, it indicates that it might be possible, with an exceptional set of facts, for a lawyer to ethically advise a client not to appear for removal. This is a logical extension from 'ethical discretion in lawyering' and operates within the Canadian migration system that provides permanent residence to those who we might say have adversely possessed their membership. Secondly, the answer requires outer limits and boundaries. The model of legal ethics developed in chapter two, presents legal ethics on a continuum between ethics and law. A good model will fall closer to the middle of the spectrum and avoid the extreme ends. Some element of the law, including government enforced punishment (ie disbarment) looms in the back of this ethical decision. Similarly, some legal ethical problems have rather straight-forward answers, for example, not counseling a refugee client to fabricate their claim. This thesis concerns 'the middle' or the more difficult problems where reasonable lawyers may differ in opinion. This approach however allows lawyers to bring some sense of justice to their craft addressing Kronman's

⁵¹ Simon, *supra* note 27. See also William Simon, "Ethical Discretion in Lawyering." (1988) 101 *Harvard Law Review*, 1083.

⁵² Hutchinson, *supra* note 3.

concern with the 'lost lawyer'.⁵³ At the end of the thesis, I consider how this analysis might impact policy in Canada related to the regulation of lawyers and illegal migrants.

⁵³ Kronman, *supra* note 49.

PART II – LEGAL ETHICS: AN ADVENTURE IN APPLIED ETHICS

*"The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law..."*⁵⁴

INTRODUCTION

Lawyers are a unique profession who take exceptional pride in promoting an image as an 'honourable and noble profession'.⁵⁵ Ironically, lawyers are also the butt of many jokes, disdain and resentment in popular discourse. Similar to discourse on 'illegal migration', the legal profession is full of contradiction, complexity and controversy. For this reason, legal ethics presents a fascinating and challenging area of inquiry.

One of the more intriguing criticisms of legal ethics is its label as an 'oxymoron'.⁵⁶ In one sense, the suggestion is derogatory – greedy bottom feeding lawyers could not possibly possess ethical judgment! In another more insightful sense however, the label captures a central debate in legal ethics. Are legal ethics really

⁵⁴ Law Society of Upper Canada *Rules of Professional Conduct*, Commentary to Rule 4.01 'Advocacy'.

⁵⁵ The 1797 statute creating the Law Society of Upper Canada (the governing body for lawyers in Ontario), for example, set out to provide the province with a "learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province." See <http://www.lsuc.on.ca/about/a/history/>. Two hundred years later, Hutchinson writes that 'law's image as a noble and honourable profession is in tatters', *supra* note 3 at 3. Anthony Kronman similarly views the profession in a state of 'crisis' and at risk of losing its soul, *supra* note 49 at 1.

⁵⁶ See Hutchinson, *supra* note 3 at 2. See also Dodek, *supra* note 3 at 115. as well as Richard Devlin, "Normative, and Somewhere to Go? (1995) 33 Alta. L. Rev. 924 at 925. The field of 'business ethics' also suffers from this label. See for example: Preston Townley, "Business ethics...An oxymoron?" *Canadian Business Review* 1992, vol. 19, issue 1 at 35.

'ethics' at all? Or are legal ethics just another branch of the law – like family law, criminal law or environmental law – a set of rules and codes to be studied, mastered and manipulated like any other. Should we understand legal ethics to be the 'law of lawyers' governing a particular area of commerce (legal services) or as a field of applied ethics involving deeper questions of how lawyers ought to behave and conduct themselves in their capacity – and unique role⁵⁷ as lawyers?

This is the central focus of this chapter. I set out to develop a theoretical model of legal ethics that asks whether lawyers ought to engage *legal* or *ethical* reasoning – or some combination of the two. To put it another way, when we question how a lawyer ought to advise their client are we talking about a 'legal' ought or an 'ethical' ought? This presupposes that there is a difference between law and ethics and that legal reasoning is somehow distinct from ethical reasoning. This also begs the question of how and why it matters whether we treat legal ethics as ethics or as law – or as something in between.

My central argument is that legal ethics is a branch of ethics and not law. I develop what we might call a 'continuum of legal ethics' that places law and ethics on two ends of a spectrum helping us to visually and conceptually understand what legal ethics are and what they ought to be. I make the case for putting the ethics back in legal ethics, that is, closer to the 'ethical' end of the spectrum. The final part of this chapter takes this model of legal ethics and engages in a more general discussion of the ethical debate surrounding the obligation to obey the law.

⁵⁷ Alternatively, Wasserstrom, Luban and others frame this central debate about the nature of legal ethics within the concept of 'role morality'. That is, whether the lawyer's role is somehow special therefore justifying a kind of exemption from the rules that apply to everyone else. I will address role morality in this chapter but begin with what I find to be a more important question: whether legal ethics ought to be *legal* or *ethical* in nature. See Luban, *The Good Lawyer*, *supra* note 26.

As a final introductory note, I wish to explain my use of the terms 'ethics' and 'morality' interchangeably. Some caution is to be observed as, 'ethics' often refer to a field of study (ie 'moral philosophy') and for others, 'morality', invokes a religious connotation that I do not intend.⁵⁸ The words owe their differences to their historical roots - 'ethics' being derived from the Greek 'ethos' whereas morality comes from the Latin 'mores'. Cooper notes that reference to the ancient root meaning of the words does not necessarily equate to their modern meaning in moral philosophy.⁵⁹ For example, if one describes the 'ethos' of a people or organization one is describing their 'mores'. Finally, we distinguish between applied ethics and meta-ethics, the latter engaging questions about morality, not of morality. The analysis that follows is accurately described as 'applied ethics'.⁶⁰

ETHICS v. LAW

Ask any lawyer about legal ethics and without a doubt the response will have something to do with the law society and their 'rules of professional conduct'. As law school courses on criminal law study the *Criminal Code*, most expect the legal ethics or 'professional responsibility' courses to similarly study the relevant provincial *ethical code*. Lawyers often approach legal ethics just like it was tax law or criminal law and dive head first into the 'codes' and 'rules' promulgated by the self governing provincial law societies.

⁵⁸ Peter Singer, ed., *Ethics* (Oxford: Oxford University Press, 1994) at 3.

⁵⁹ David E. Cooper, Robert L. Arrington & James Rachels Advisory eds., *Ethics: The Classic Readings* (Oxford: Blackwell Publishers Ltd., 1998) at 1.

⁶⁰ Tur, *supra* note 2.

This approach should come as no surprise. Firstly, lawyers are very comfortable dealing with rules, principles, codes and their judicial interpretation. Lawyers have considerable experience manipulating rules and codes attempting to define the types of behaviour that are prohibited or permitted and the punishment for misconduct. Secondly, most professions have developed such rules and codes⁶¹, however, typically these resemble what Dworkin distinguished as 'principles' rather than 'rules'.⁶² Thirdly, lawyers instinctively look to the source of authority – in this case the provincial law societies – and attempt to ascertain the limits and scope of their power including punishment, procedures and street level practices. For many lawyers, the law is what matters and everything else is mere fluff. Rules, principles and codes are the lawyer's domain and methodology. Why should legal ethics be approached any differently?

The reason why legal ethics warrant a different approach is because law and ethics are fundamentally different concepts. Tax law is different from the ethics of taxation. Immigration law is different from the ethics of immigration. Business law is different from business ethics and so on. There are similarities, shared values, interrelation and much overlapping between law and ethics but at their core, there are key differences which result in different modes of reasoning. Legal ethics is not a branch of the law, but a branch of ethics concerning the practice of law.⁶³

⁶¹ Michael Bayles, *Professional Ethics* (Belmont: Wadsworth Inc., 1981) at 23.

⁶² Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth Press, 1977); Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986)

⁶³ David Luban writes that "The study of legal ethics is part of the study of ethics, and the study of ethics is part of the study of philosophy." See David Luban "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics" (1981), 40 Maryland L. Rev. 451 at 451 also cited in Esau, *supra* note 29 at p. 417.

The debate surrounding the relationship between law and morality has an incredibly rich history and there is a wealth of writing, scholarship and thought from moral philosophers and legal theorists debating the nature of law and the concept of legal positivism.⁶⁴ Such works are largely beyond the scope of this inquiry as we are not debating the nature of law – rather the nature of legal ethics. That is, this analysis is interested in the extent that morality ought to inform a lawyer's advice, not whether the law is based in ethics or morality.

Law and ethics differ fundamentally and conceptually in a number of important respects. Some of the more prominent differences are to be found in their purpose or object, their method, their scope of inquiry and finally in their effect. I will consider each of these differences in detail and following this discussion, consider how and why these differences impact on the field of legal ethics.

PURPOSE / OBJECTIVE

Law is concerned with state or governmental restrictions on human behavior. Donald Black defines law in three simple words: governmental social control.⁶⁵ While such a definition represents an arguably narrow view of the law, defining law in this way helps to illustrate its difference from ethics and is, in my view, a more accurate reflection of the everyday meaning of 'law'. Even if we are to define law, as legal pluralists prefer,

⁶⁴ See for example H.L.A. Hart, *The Concept of Law* 2d ed. (Oxford: Clarendon Press, 1994); Lon L. Fuller, *The Morality of Law* Rev. ed. (New Haven: Yale University press, 1964); Robert P. George, *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996); Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986) and David Dyzenhaus and Arthur Ripstein *Law and Morality: Readings in Legal Philosophy* 2nd ed. (Toronto: University of Toronto Press, 2001).

⁶⁵ Donald Black, *The Behavior of Law* (New York: Academic Press, 1976) at 2.

more broadly to include non-governmental social control such as social norms, its difference from ethics nevertheless remains.

What makes Black's definition of law a narrow one is the restriction to 'government' or state authority. Legal pluralists, for example, use a "more far-reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity."⁶⁶ That is, informal social control may (or may not) be necessary to effectively maintain social order. Whether we label the 'social order' that exists in such a society as 'law' depends on the extent to which we believe that the state is necessary to law. It is important not to equate 'law' with 'social order' in this context as 'law' in the narrow sense, is not necessary to maintaining social order. Informal social control may be far more powerful than formal state control in achieving social order. That is, people may refrain from punching a neighbour for example, not because of the fear of arrest or sanction by the state, but because such action would violate social norms and be considered deviant. The social consequences, such as dislike by one's neighbour, may be all that is necessary to maintain social order. In this sense, I prefer to define law as Donald Black has, restricting its ambit to governmental social control.

Regardless of whether we accept a more narrow or broad view of the law however, it will always differ from ethics. Ethics concern broader question of how we ought to behave.⁶⁷ Asking what is ethical, is different in kind from asking what is legal.

⁶⁶ Anne Griffiths "Legal Pluralism" in Reza Banakar and Max Travers, eds., *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002) See also David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001).

⁶⁷ Rhode and Luban quote Socrates on the subject of ethics: "it is not about just any question, but about the way one should live." Deborah L. Rhode & David Luban *Legal Ethics* 2d ed. (New York: The Foundation Press Inc., 1995) at 3 who cite Plato, *The Republic of Plato* 31 (Allan Bloom trans. 1968) 352D. See also Singer, *supra* note 58 who opens his book with the sentence: "Ethics is about how we ought to live." at 1.

Ethics ask what makes an action right, rather than wrong whereas law asks whether the action is permitted or prohibited. These are different types of questions and thus law and ethics serve two different purposes or objectives. While the ethical question of how we ought to act will intuitively ask what is legally or socially permissible, ethics is not at first instance about social control and in particular, ‘*governmental* social control’.

A moral philosopher’s reasoning does not share the bounds or constraints that is fundamental and required of legal reasoning. Ethics therefore engage in broader analysis than the law. Ethics may be defined as the systematic study of norms and values in particular actions (right and wrong), consequences (good and bad), and character (virtue and vice).⁶⁸ This definition will be flushed out in greater detail as we consider the arguments in favour of a model of legal ethics that is more ethical and less legal.

Moral philosophy is generally divided into three parts: descriptive ethics, theoretical ethics, and normative ethics.⁶⁹ The goal of descriptive ethics is to provide an explanation of the values at play with respect to various stakeholders. For example, illegal immigration engages values of humanitarianism, justice and human dignity to name but a few. The values of the legal profession include integrity, advocacy, honesty and public service. Identifying these values is critical to choosing a particular course of action. Theoretical ethics involves the examination of various concepts central to ethics. It is in this respect that we examine the difference between ethics and law and ask how this distinction impacts legal ethics. Finally, normative ethics involves the making of

⁶⁸ See Michael McDonald “Biotechnology, Ethics and Government: A Synthesis” The Canadian Biotechnology Advisory Committee Project Steering Committee On Incorporating Social and Ethical Considerations into Biotechnology. Online: <http://cbac-cccb.ca/epic/site/cbac-cccb.nsf/en/ah00438e.html> at p. 7. See also Rhode & Luban, *supra* note 67 at 11.

⁶⁹ See McDonald, *supra* note 68.

moral judgments – about right and wrong, about what is fair and unfair, about who is virtuous and vicious, about what is conducive to welfare and illfare.⁷⁰ Answering the more narrow question of this thesis will engage normative aspects about the ‘appropriate’ or ‘ethical’ conduct of an immigration lawyer. Consistent with this ‘all things considered’ approach to ethical analysis, this thesis consider values, theory and aspects of normative behaviour surrounding immigration lawyer’s advice to illegal migrants.

While much of classical moral theory is not pluralistic in approach, pluralism has increasingly received support in most intellectual circles. Luban and Rhode explain the modern approach arguing that the “deepest level of our moral experience is pluralistic, with different pieces of our moral life best expressed by different principles.”⁷¹ Most ethical theorists have generally rejected the notion that there exists, or could possibly exist, a single correct answer or a single overarching ‘knock out’ theory that trumps all others.⁷² It does not follow that there is an absence of mid-range convergence on crucial principles and values or, similarly, divergence on radical or extreme points of view, however, generally speaking ethical debates are informed by multiple perspectives.⁷³ In making moral choices however, two general approaches stand out: ‘consequentialist’

⁷⁰ See McDonald, *supra* note 68.

⁷¹ See Rhode & Luban, *supra* note 67 at 12 who cite Stuart Hampshire *Morality and Conflict* (1983), *Innocence and Experience* (1989) and Isaiah Berlin *The Crooked Timber of Humanity* (1991) on pluralistic approaches.

⁷² See McDonald, *supra* note 68 at 12. On this point McDonald quotes Will Kymlicka’s view that “moral philosophers have not yet discovered a knockout argument for or against these different theories” in Will Kymlicka (1993), “Approaches to the Ethical Issues Raised by the Royal Commission’s Mandate” in *New Reproductive Technologies* Ethical Aspects, Royal Commission on New Reproductive Technologies Research Studies, vol. 1, Ottawa, Supply and Services Canada, p. 13 as well as John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1971) at 578-9.

⁷³ See Beauchamp and Childress *Principles of Biomedical Ethics* (Oxford: Oxford University Press, 2001).

approaches that consider whether 'the ends justify the means' and 'deontological' approaches that consider whether 'the means justify the ends'.⁷⁴

METHOD

Many ethical theories promote an 'all things considered' approach where norms, values, consequences and character are all analyzed, weighed and considered with varying perspectives.⁷⁵ While good legal analysis does not ignore its social context, at the centre of legal reasoning are fixed 'sources' of inquiry complete with a unique hierarchical ranking of order. An introductory lesson to the law typically begins with a discussion of the 'sources of law' and their relative ordering.⁷⁶ In the Canadian legal system for example, the constitution trumps statutory law which in turn trumps common law decisions which in turn trump customary law and so on. Within the judicial system the principle of *stare decisis*⁷⁷, creates a hierarchical structure where lower courts are 'bound' to follow the decisions of higher courts.⁷⁸ Thus the law in effect carefully and

⁷⁴ See Hutchinson, *supra* note 3 at 45, Rhode & Luban, *supra* note 67 at 8 – 9 and Peter Singer, *Practical Ethics* 2d ed. (Cambridge: Cambridge University Press, 1993) at 3.

⁷⁵ See McDonald, *supra* note 68 at 7. McDonald cites Thomas Hurka "Ethical Principles" in *Ethics and Climate Change*, Harold Coward and Thomas Hurka, (Waterloo: Wilfrid Laurier University Press, 1993) at p. 23 as a good example of an 'all things considered' approach to ethical analysis. It is important to note however, that within varying ethical theories, like the law, there is a rank ordering of considerations. For example, utilitarianism ranks the consequences over the method. However, unlike the law, there are varying approaches. Law (at least domestic Canadian law) will always rank statutes above legal academic literature. Ethics by contrast present varying perspectives and are not bound to choose one over the other.

⁷⁶ See for example, "The Sources of Canadian Law" Chapter 2 in Neil Boyd, *Canadian Law: An Introduction*, 2d ed. (Toronto: Harcourt Brace, 1998) at 44 – 56.

⁷⁷ This is the abbreviated version of the maxim *stare decisis et non quieta movere* meaning "stand by decisions and do not move that which is quiet". Peter Hogg explains *stare decisis* as the principle by which a precedent or decision of one court binds courts lower in the judicial hierarchy. P.W. Hogg *Constitutional Law of Canada*, (2d ed) (Toronto: Carswell, 1985) at 183.

⁷⁸ See for example the discussion of this matter in *R. v. Northern Electric Co.* (1955), 24 C.P.R. 1 at p. 19, [1955] 3 D.L.R. 449, [1955] O.R. 431 (H.C.), where McRuer C.J.H.C. stated: "Having regard to all the rights of appeal that now exist in Ontario, I think Hogg J. stated the right common law principle to be

purposefully orders what is to be considered and what is not. Law does not have as expansive a range as ethics. It would be nonsensical and undermine ethical analysis to require for example, that the consequences of an action are considered first and foremost, followed by deontological concerns. Such a rank ordering would be considered absurd to moral philosophers. The idea of being 'bound' by some other authority is contrary to ethical reasoning. This is a key difference between law and ethics.

SCOPE OF INQUIRY

Related to the method is the scope of inquiry. For law, its foundation is authority whereas for ethics, it is reason. Law appeals to authority such that normative questions of *why* we have to pay taxes, or *why* foreigners must apply for a work permit are answered with reference to their statutory instrument. As law appeals to authority, we pay taxes or apply for work permits because Parliament has said we must do so. The answer lies in the *Income Tax Act* or the *Immigration and Refugee Protection Act* not in the abstract. Law appeals to the state authority.

Ethics, by contrast, are said to appeal to reason. Ethical analysis does not end at the point of state authority, it exists independently of authority. What matters is not what the government has said or not said, but what is right or wrong, good or bad, virtuous or vicious and those may or may not be the same in any given time and jurisdiction. An act may be considered unethical but completely legal. Consider, as an example, the Chinese

applied in his judgment in *R. ex rel. McWilliam v. Morris*, [1942] O.W.N. 447 where he said: 'The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock says, in his *First Book of Jurisprudence*, 6th ed., p. 312: 'The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and, though not absolutely binding on courts of co-ordinate authority nor on that court itself, will be followed in the absence of strong reason to the contrary'.'"

“head tax” imposed on Chinese immigrants in Canada in the early twentieth century. Charging the modern equivalent of two years wages on the basis of ethnicity was highly unethical but perfectly legal. Similarly we could say it is unethical to sit idle in front of a drowning baby – yet the legal system may not impose any legal duty to rescue or help others.⁷⁹ If however, such a legal duty was created by statute or judicial authority, then lawyers would have no problem saying there is a duty to rescue. This is illustrative of the binding nature of the law verses the more expansive scope of ethical inquiry.

Conversely, an act might be prohibited by law but ethically justified. As an example, consider a teacher photocopying a brilliant and inspiring book for his or her underprivileged students. The act of copying may breach relevant copyright laws but the noble intention and positive effect of learning for the children could easily be considered ethical conduct based on consequentialist or utilitarian principles. Or imagine a law requiring all police officers to either wear no head covering, or conversely, mandating a particular police hat. For a devout Sikh required by his or her religious beliefs to wear a head covering in accordance with religious doctrine, he or she might be ethically justified in not following such a law.

Whether and to what extent there is a moral obligation to obey the law is itself a philosophical debate with important practical implications. This is discussed in greater

⁷⁹ See Lewis N. Klar, Q.C., *Tort Law* 3rd ed. (Toronto: Carswell, 2003) at 171 – 199. As a general principle, Klar cites cases such as *Osterlind v. Hill* 160 N.E. 301 (Mass., 1928); *Yania v. Bigan*, 155 A. 2d 343 (Pa., 1959); *Handiboe v. McCarthy*, 114 Ga. App 541 (1966) as well as *Buch v. Amory Mfg. Co*, 69 N.H. 257 (1898) for the authority that the law imposes no duty to assist others. In *Buch v. Amory Mfg. Co* the court held “With purely moral obligations the law does not deal....” So called ‘Good Samaritan Laws’ exist in certain jurisdictions in specific contexts, however as a general principle, in the British common law tradition, there is no duty of care to help or assist others. Ironically the Ontario *Good Samaritan Act*, 2001 S.O. 2001, CH 2 and the British Columbia *Good Samaritan Act* [RSBC 1996] CH 172 both apply only to ‘health care professionals’ and exists only to *limit the liability* of those health care professionals who cause further damage in attempting to assist someone. This is a far cry from the legally imposed duty to assist others.

detail at the end of this chapter. The fact that it is debated outside of an authoritative structure is, however, what makes it an ethical question rather than legal one. Ethics do not ignore the law, but are not 'bound' by it. Fundamental to the 'rule of law', however, is its supremacy and authority. This is another important difference between ethics and law.

PUNISHMENT

Legal punishment is the means by which states enforce or coerce social control. The existence of such formal, coercive, state punishment is a final significant distinguishing feature of law and ethics. Good ethical decision making cannot operate under threat of coercive punishment whereas a law without punishment is said to be no law at all.⁸⁰ This is not to suggest that more informal (and arguably formal) social control is absent from ethics. Praise and blame form an important component of ethical judgment. Indeed in some settings, informal social blame will be far more severe than any state imposed penalty. However, legal blameworthiness carries a much more coercive punishment that operates *in addition* to any informal consequences.

Imagine for example a nurse working in an abortion clinic. In the presence of a law prohibiting abortion and accepting that there is a general obligation to obey the law, then the nurse, according to the law, has no choice. Putting the nurse's moral perspective on abortion aside, threat of punishment dictates what she ought to do. Legal punishment is in no way perfect social control – one might very easily accept the legal punishment in advancement of what they see to be the greater good. However in doing so, they are

⁸⁰ See Hart, *supra* note 64 at 20 – 25.

using judgment or analysis beyond the constraints of the law. In such a case, they are making an *ethical* decision to disobey the law.

This is not to suggest that sanctions play no role in ethical analysis or that informal sanctions play no role in the law. Grasmick and Bursik, for example, argue that conscience and peer groups 'function as potential sources of punishment which, like state-imposed legal sanctions, vary in both their certainty and their severity.'⁸¹ My argument is that legal punishment adds another layer. It is in addition to the informal sanctions. If we accept that there is a general obligation – not an absolute – but more of a *prima facie* obligation, then the law will have add an extra or additional force that influence what we ethically ought to do. Deciding on a course of action where the state has legislated (and therefore not chosen to ignore) adds a further obstacle to the analysis as the decision maker must now break the moral obligation (assuming there is one) to obey the law. To put it another way, ethics can exist outside of a system of formal punishment whereas the law could not.

THE IMPORTANCE OF DIFFERENCE

The analysis thus far has focused on the difference between law and ethics and set out several nontrivial ways in which the two concepts differ. This list is by no means exhaustive – there are other differences.⁸² Moreover focusing on the differences is not intended to ignore the similarities. Arguably law and ethics share more in common than

⁸¹ Harry G. Grasmick and Robert J. Bursik Jr., "Conscience, Significant Others and Rational Choice: Extending the Deterrence Model" (1990), 24 *Law and Society Review* 837 as quoted in Stewart Macaulay, Lawrence M. Friedman & John Stookey, eds., *Law and Society: Readings on the Social Study of Law* (New York: WW Norton and Company, 1995) at 461.

⁸² See for example the discussion in McDonald, *supra* note 68 at p. 8 who cites Kurt Baier, *The Moral Point of View* (Cornell University Press, 1957).

in opposition.⁸³ Similarly, as Wendel argues, “the separability of law and morals does not mean that moral values can never be incorporated into law.”⁸⁴ However, the significant reasons why law and ethics differ, beg the questions of how and why, if at all, drawing this distinction matters to legal ethics. What is the effect of this distinction on legal ethics? Is it important?

Ethical decision making requires the consideration of interests other than one’s own self interest.⁸⁵ In this way, ethics conflicts with the law. As discussed above, the common law system imposes no duty to help others or to consider the interests of others beyond a minimal standard of care.⁸⁶ The ideals of professionalism and ethical conduct for lawyers centre around public service, assisting others, not taking advantage of weaker parties, and in sum, putting another’s interests above one’s self. There are exceptions to this, as in the law of fiduciary obligations and trust relationships, acting in another’s best interest is central. Moreover, most Canadian codes of professional ethics also contain provisions designed not to protect the lawyer from the client, but the other

⁸³ The manner in which we define law plays a significant role in whether we see the concepts as different. The view of law presented here is a very positivist one. A ‘command back by force’ is much more different from ethics than say Dworkin’s concept of legal ‘principles’ or a natural law perspective. Moreover, the law of fiduciary obligations and trust relationships impose legal duties to act in another’s best interest.

⁸⁴ W. Bradley Wendel, “Legal Ethics and the Separation of Law and Morals” (2005) 91 Cornell L. Rev. 67 at 101. Wendell further argues that “Lawyers functioning in a representative capacity have no greater power to act on the basis of an all-things-considered moral judgment than do their clients. If clients are bound by the law, then lawyers are bound to advise them on the basis of the law, not on the basis of the lawyer’s own judgment about what the best “forward-leaning” social policy would look like” at 127.

⁸⁵ Kurt Baier *The Moral Point of View* (Cornell University Press, 1957).

⁸⁶ Civil law jurisdictions typically go further than the common law in terms of the duty to rescue which brings into question the applicability of this approach beyond the common law. However, even in civil law systems, the duty to assist others is only marginally more significant than in the common law. I know of no civil law jurisdiction that imposes a legal duty to give money to the poor, or open its borders to those without clean drinking water or medical care – which might be regarded as unethical. The so called ‘good Samaritan laws’ and the legal duty to rescue have limits in civil law jurisdictions.

way around.⁸⁷ However, generally speaking, the legal system is far less concerned with looking out for other's interests than it is with protecting one's own. Choosing a 'law of lawyers' model of legal ethics is therefore wholly inconsistent with the underlying values of the legal profession. Consider Michael Bayles argument with respect to the one dimensional aspect of professional codes of ethics:⁸⁸

Although codes claim to be fairly complete statements of professionals' ethical obligations, they chiefly comprise statements of obligations of individual professionals. This constitutes a fundamental defect since such codes fail to adequately cover obligations of a profession as a whole... For example, professions are often said to have an obligation to provide services to all those who need them. However, individual professionals do not have an obligation to serve all those who are in need.

Let us take a descriptive ethics approach and examine the values that underpin the legal profession.

PROFESSIONALISM AND THE LEGAL SYSTEM

Roscoe Pound, Brian Dickson and others have all highlighted that dedication to public service is the mark of a professional.⁸⁹ One of the often cited early canons of ethics approved by the Canadian Bar Association holds that:⁹⁰

The lawyer is more than a mere citizen. He is a minister of justice, an officer of the Courts, his client's advocate and a member of an ancient, honourable and learned profession. In these several capacities, it is his duty to promote the interests of the State,

⁸⁷ The Rules respecting fees are an example seen in most provincial law society ethical codes: Law Society of Upper Canada *Rules of Professional Conduct* Rule 2.08 "Reasonable Fees and Disbursements"; Law Society of British Columbia *Professional Conduct Handbook* Ch. 9 Rule 1, etc...

⁸⁸ Bayles, *supra* note 61 at 23-24.

⁸⁹ Roscoe Pound from "What is a Profession? The Rise of the Legal Profession in Antiquity" (1944) Part 1 Notre Dame Lawyer 203 at 204 as cited in W.W. Pue "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20 Man. L.J. 227 at 228; The Honourable Mr. Justice Brian Dickson "The Public Responsibilities of Lawyers" (1983) 13 Man. L.J. 175 at 175.

⁹⁰ "Canons of Legal Ethics" (1920), 5 *Proceedings of the Canadian Bar Association* 261 at p. 261.

serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself.

This ideal of professionalism holds the lawyer somehow apart from a 'mere citizen'. The difference involves the various capacities and duties that call upon the lawyer to serve interests other than his or herself. These include duties owed to the Courts, to justice, to the client and to fellow lawyers. These duties find their way into most provincial codes of ethics.

Presumably then, a 'mere citizen' does not owe such duties. The mere citizen has a duty to obey the law, but the duty stops there and no such role as 'minister of justice' is required compared to the lawyer's. There is something special about the lawyer's role that requires something better than what the law imposes. 'Mere citizens' do not have duties to the Courts, to justice, to a client and to fellow lawyers in the way that the lawyer does.

This difference translates into a potential danger with a more legalistic model of legal ethics. The 'law of lawyers' model may lead to thinking that so long as conduct is not illegal, then it is perfectly good or appropriate conduct. After all, if it were 'wrongful' or 'bad', wouldn't it be illegal? The danger is that the lawyer – a professional – might act as a mere citizen. That the 'good lawyer might be a bad person'.⁹¹ Since, under our legal system, a 'mere citizen' is not legally required to act ethically, the only requirement is to act legally. Quite aside from any *legal* obligation flowing from the role as lawyer, here I am referring to the extra-legal or purely ethical obligations applying to lawyers.

⁹¹ Luban, *The Good Lawyer*, *supra* note 26.

Thus non-legal duties associated with acting in the interests of others are more accurately considered ethical duties. These duties, for example, the duty to take on pro bono work⁹², are not the kinds of duties for which breach leads to disbarment. They are not commands backed up by force. They are ideals – “failing” according to Kronman – of a profession. Again, in some circumstances, the law imposes similar duties⁹³, however, conceptually ethics *always* requires the consideration of another’s interests whereas the law requires a lower standard of care in the vast majority of contexts. Lon Fuller points out that there is an important difference between performing something out of ‘obligation’ rather than ‘aspiration’.⁹⁴

For this reason, overwhelmingly, legal scholars describe and advocate for a model of legal ethics not based in rules, codes or authority. Allan Hutchinson makes perhaps the strongest argument against the ‘law of lawyers’ approach warning that lawyers may easily slip into the ‘fallacy of equating law with ethics’ and thereby reasoning that ‘so long as conduct is not illegal, it is ethical.’ Professor Hutchinson writes:⁹⁵

The traditional emphasis on code-based morality breeds a mentality that is concerned with delineating how far a lawyer can go without engaging in unethical conduct: it tends to privilege social conformity over efforts to build moral character. It is important that lawyers do not internalize the view that it is ethical to do whatever is not prohibited by the professional rules; this is an impoverished and thin view of professional responsibility and legal ethics.

⁹² Duncan Webb, “Why Should Poor People Get Free Lawyers” (1998) 28 Victoria U. Wellington L. Rev. 65.

⁹³ Fiduciary duties, trust relationships and acting in the best interest of children are all examples. See also Lewis N. Klar, Q.C. *Tort Law* 3rd ed. (Toronto: Carswell, 2003) at p. 177 – 199.

⁹⁴ See Lon Fuller *The Morality of Law*, Rev. Ed. (New Haven: Yale University Press, 1969) as cited in Hutchinson, *supra* note 3 at 48.

⁹⁵ Hutchinson, *supra* note 3 at 48 – 49.

Buckingham et al similarly advocate against a legalistic approach to legal ethics:

In our view, legal ethics is not a matter of “black-letter” rules that obviate the need for independent reflection. Rather it is a vital area of study that calls for the development of critical, reflective judgment about professional roles and responsibilities. This approach to legal ethics presupposes a broader and deeper context than is often found in volumes on professional responsibility.

Richard Tur similarly writes:⁹⁶

A respectable case can be made either way and legal ethics can be taught merely as just another set of “black letter rules” to be mastered and manipulated by legal practitioners. However, critical reflection on the values inherent in legal practice and reflective engagement with the moral mission of lawyering certainly contributes to our understandings of the lawyer’s predicament, and may improve the ethical quality of the legal profession.

This is not to suggest that this viewpoint is universal. Ross Cranston raises an important argument in support of the ‘law of lawyers’ perspective. The problem with legal ethics may not be with the rules of professional conduct per se, the problem may be the way the rules themselves are drafted. He writes:⁹⁷

There are grave problems... in putting ethical thought to the fore, not least lawyers’ own unfamiliarity with this field. That does not mean it has no role to play, just that it cannot be determining. There is also another possibility. In important respects the present professional codes are too vague. In some especially difficult areas lawyers are given no guidance as to how they should act...

No doubt immigration law is one of those difficult areas that Cranston refers to being ‘without guidance’. Thus a plausible argument can be made for improving legal ethics – and answering my ultimate question – based in more complete codes of ethics.⁹⁸

However, an initial caution is needed when one considers Pue’s assertion that

⁹⁶ Tur, *supra* note 2.

⁹⁷ Röss Cranston ed., *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995) at 5.

⁹⁸ See for example F. Zacharias “Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics” (1993) 69 Notre Dame L. Rev. 223 and S. Sponkin, “The Need for Separate Codes of Professional Conduct for the Various Specialities” (1993) 7 Geo. J. Legal Ethics 149.

historically, codes of legal ethics may be seen as serving the interests of the elite, protecting the monopoly over legal services.⁹⁹

... research has revealed that codes of professional ethics do not advance ethical visions that are traditional, timeless, consensual, or revealed. The social construction of “professional ethics” is heavily influenced by the social location of the drafters.

But what could a law society properly do or say in a code of ethics that would guide lawyer conduct and answer the ultimate question of this thesis? What help would it be if the codes said ‘only in very rare circumstances may a lawyer advise their client not to appear for removal’? What if the code says ‘a lawyer must never advise their client to break the law and this includes immigration lawyers advising a client not to appear for removal.’ Even clear and specific codification of ethical problems offers little in the way of addressing the big picture or the individual complexities of a given case. Ethical analysis is an ‘all things considered’ approach tackling multi-dimensional problems. There is no easy simple answer to the tough ethical dilemma and it is ill conceived to aspire to solutions found in legalistic codes.

Moreover, the kind of legal advice relevant to this analysis occurs behind closed doors, inside of law firms and under the greatest protection of privilege than any other form of communication. This communication is unlikely to ever find its way in front of the law society disciplinary committee. Perhaps even more concerning is that open debate about the bounds of appropriate conduct will similarly remain a privileged secret leaving young lawyers starting out in immigration law with little or no guidance.

Many lawyers instinctively point to the law societies as being responsible for a top-down training of younger lawyers – particularly on issues of ‘professional

⁹⁹ Pue, *supra* note 89 at 231.

responsibility'. In practice this translates to expensive 'continuing legal education' programs that might be hosted by a law society, but are run in a bottom-up fashion by fellow lawyers. Canadian law societies typically fulfill their mandate with the same legalistic thinking referred to above. For example, the 'character requirements' for call to the bar in reality means a criminal background check with the missing premise being 'so long as you're not a criminal (or at least have not been caught) then you are of good character'.¹⁰⁰ Similarly, disciplinary proceedings primarily deal with ethical misconduct involving lawyers stealing money from their clients – either through over-billing or misappropriating trust funds. In this context, codes need not be complex: don't steal money from your client; don't over bill. The ethical analysis of such conduct is relatively simple as those rules are equally prohibited by law and ethics.

Ethical conduct surrounding the advice given to illegal migrants on the other hand is not ordinarily cut and dry. It requires digging deeper, asking questions about the role of the lawyer, the ideals of professionalism, the relevant legal procedures, substantive law, social context, competing interests and complex questions about 'justice' and 'fairness'. Advising a client to disobey a removal order inherently calls into question the 'values inherent in legal practice' to which Hutchinson refers and reinforces his labeling of the legalistic model of legal ethics an 'impoverished and thin view' of legal ethics.¹⁰¹

¹⁰⁰ Interestingly, Gavin MacKenzie notes that historically, the "character requirements" were used as a basis to exclude women and racial minorities from the legal profession. MacKenzie, *supra* note 32 at 23-4.

¹⁰¹ Hutchinson, *supra* note 3 at 48 – 49.

TOWARDS A MODEL OF LEGAL ETHICS

Legal ethics scholars engaging in the debate about the nature of legal ethics and competing models of legal ethics almost universally end up with some kind of 'contextual model' or 'pragmatic and functional approach'. Most scholars arrive somewhere in the middle between cookie-cutter models favouring the interests of the client and the interests of the public. Modern theoretical approaches to legal ethics are placing greater emphasis on 'case by case' reasoning rather than a 'one size fits all' model. This is the pragmatic, functional, contextual approach to legal ethics. Let us examine some of the important contributions in this respect.

SIMON – THE PRACTICE OF JUSTICE

Professor Simon outlines three independent models of legal ethics: the 'dominant view', the 'public interest view' and a third approach he develops called the 'contextual view'. The dominant view embraces the lawyer's duty to the client. Under this view, "the lawyer must – or at least may – pursue any goal of the client and assert any non-frivolous legal claim so long as it is arguably legal, however immoral it may be."¹⁰² Lawyers follow the rules of professional conduct holding client confidentiality and advocacy as their core values. A second model, "the public interest view" collects and unites the critics of the dominant view. In this model, the lawyer's duty is to the public, to the court and there is greater emphasis on interests other than the client's own. While I am very reluctant to make such a hasty generalization, it is fair to say that the 'dominant

¹⁰² Simon, *supra* note 27 at 7.

view' is more representative of more widespread American ideals of legal ethics while the 'public interest view' seems more consistent with legal culture in Canada.¹⁰³

Simon illustrates the effect of the competing perspectives, with an example involving a divorce proceeding. To spice up the example, the names of the lawyers representing the parties are two prominent supporters of these competing views: Monroe Freeman, representing the dominant view and Geoffrey Hazard, representing the public interest view. The fact situation involves a divorce proceeding in which lawyer #1 is representing the breadwinner spouse and learns of the client's secret income stash – which is unknown to the other 'stay-at-home' spouse. Lawyer #2, who represents the 'stay-at-home' spouse, has quite the reputation for being a litigation "terminator" – a fearless advocate that will stop at no end to serve the interests of his/her client and who is determined to get as much money as possible for his/her client regardless of how it may leave the breadwinner spouse at the end of the day. According to Monroe Freeman and the dominant view, the answer for lawyer #1 is "do not disclose". The rule being followed is the rule of client confidentiality. By contrast, according to Geoffrey Hazard and the public interest view, arrive at the opposite conclusion: "disclose". The rule being followed here is the procedural one requiring disclosure of all income.

Simon takes a third perspective – what he calls the contextual view. He writes:¹⁰⁴

... I will defend an approach to ethical decision making in which decisions often turn on "the underlying merits." We can call it the Contextual View. Its basic maxim is that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.

¹⁰³ See D.M. Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dal. L.J. 267

¹⁰⁴ Simon, *supra* note 27. at 9.

The problem with this contextual view however, is Simon's reliance on the troubling notion of 'justice'. In our illegal migration fact situation, it seems unjust for the family to be removed from Canada as much as it does for them to be able to benefit from their illegality. Aristotle makes a classic distinction between two different spheres of justice: *corrective* justice and *distributive* justice.¹⁰⁵ Within them, we find two different ways to define 'justice'. Aristotle's concept of corrective justice has been explained as follows:

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Corrective justice deals with the relationship of doer and sufferer of a wrong. From the standpoint of corrective justice, the two parties are equals, and justice consists in vindicating their equality. The doer's unjust treatment of the sufferer disturbs this equality, leaving the doer with a gain and the sufferer with an equivalent loss. To reestablish the initial equality, corrective justice requires the doer to repair the loss by returning the gain to the sufferer. Thus, a single operation eliminates both the gain and the loss.

Thus, according to corrective justice, we may consider the illegal migrant family in our fact situation as the doer of a wrong (illegally migrating to Canada) and the state as the sufferer. Corrective justice demands that the doer return to the sufferer what they have taken and seen in this light, the lawyer could certainly not assist the family in furthering their wrong. Quite the opposite, the lawyer in choosing a course of action that seems "likely to promote justice" would be working towards re-establishing the parties to their position before the wrongful act – which at a minimum means effecting the removal order and the family leaving Canada.

Aristotle's second sphere of justice is that of distributive justice. Distributive justice concerns the distribution of things that fall to be divided among those who share

¹⁰⁵ Aristotle, *Nicomachean Ethics* V. 4. 1131^b at 25 to 1132^b at 20 (Ingram Bywater ed., 1894).

¹⁰⁶ E. Weinrib. "The Gains and Losses of Corrective Justice" (1994) 44 *Duke L.J.* 277 at 280. See also Ernest Weinrib *The Idea of Private Law* (Harvard University Press, Cambridge, 1995).

in the constitution, that is, those who are part of the community. A distribution is just if it is proportional based on some agreed upon ground of distribution. For Aristotle, distribution ought to be based on merit, however, the word merit is meant in its broadest sense. Aristotle writes:¹⁰⁷

...awards should be 'according to merit'; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence.

Much of the literature on 'justice' concerns distributive justice rather than corrective justice. Rawls¹⁰⁸, Nozick¹⁰⁹, Walzer¹¹⁰ were all concerned with how to distribute that which is to be distributed. Rawls, for example, questioned how to distribute 'primary social goods' which for him, includes: "rights, liberties, and opportunities, and income and wealth."¹¹¹ Walzer's related concept of 'social goods' includes: "security, wealth, honor, office and power."¹¹² It is unlikely that Simon intended his contextual view to engage ideas of corrective justice, rather than distributive justice, but in this respect he is not clear. Simon acknowledges that the way in which one conceives a concept like justice will impact the analysis although it is uncertain whether such a dichotomous conception of justice as Aristotle presents supports Simon's 'contextual view'. Simon, rather states that:

¹⁰⁷ Aristotle, *supra* note 105.

¹⁰⁸ Rawls, *supra* note 72.

¹⁰⁹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

¹¹⁰ Walzer, *supra* note 46.

¹¹¹ Rawls, *supra* note 72 at p. 79.

¹¹² Walzer, *supra* note 46 at 6 – 10 and 63.

Justice, as I use the term, is not an extra-legal concept. I follow the Preambles to the ABA [American Bar Association] codes in taking justice to represent a basic normative premise of the legal system.

Another weakness of this concept of justice is the question of justice for whose perspective? That is, the perceived sense of justice for one client may be very different from that of an opposing party, or the public in general. It is easy for the immigration lawyer to approach the problem from the same perspective as the client who is paying them. The lawyer has an inherently biased perspective making it easier to place greater emphasis on the client's interest at the expense of his or her role as 'minister of justice'.¹¹³

While his conception of 'justice' is surprisingly weak relative to its importance to the 'contextual view', Simon's 'contextual view' of legal ethics is nevertheless encouraging. Its strength is its connecting of the merits of the case to the ethical analysis. This is consistent with the 'all things considered' approach of a good ethical model. This also takes into consideration the relevant institutional and doctrinal basis of the practice of law. Within our illegal migration fact situation, the institutional issues surrounding removals and immigration in Canada as well as the jurisprudence surrounding H&C applications and stays of deportation orders are highly relevant to the ethical analysis. Embracing the 'merits of the case' and advocating for 'ethical discretion in lawyering',¹¹⁴ Simon brings an ethically defensible approach to legal ethics.

¹¹³ I am grateful to Alvin Esau's suggestion of this argument.

¹¹⁴ See also Simon, *supra* note 51..

LUBAN – ROLE MORALITY AND THE GOOD LAWYER

In contrast to Simon's approach, Luban frames legal ethics with the following intriguing question: can the good lawyer be a bad person? This question calls out for pause and critical reflection and unlocks a larger debate surrounding 'role morality'. Role morality asks whether it is one's social role that dictates ethically appropriate conduct. Is it the fact that the lawyer is a lawyer that enables him or her to behave in a way that a non-lawyer could not? For Luban, role morality is an 'institutional excuse' premised on the belief that the role is morally desirable and assuming that it is, that the moral responsibility for actions falls on the role (or the institution that creates it) and not on the individual or 'role agent'.¹¹⁵ Role morality is further explained by Wasserstrom as follows:¹¹⁶

When trying to decide what constitutes the right way to behave...a very common and familiar way of reasoning is employed... This reasoning places weight upon the role that the person occupies and locates concerns about how one ought to behave within a context of what is required, expected, or otherwise appropriate of persons occupying that role. Such reasoning is often used to deflect or defuse potential moral criticism by explaining that the role constitutes a sufficient reason for doing or not doing something that would otherwise be objectionable, criticizable, or morally wrong to do or not to do.

We know that lawyers are a unique group with unique roles and responsibilities. We also know that the adversarial system plays an important role in legal ethics. As Luban points out:¹¹⁷

...lawyers are professionally obligated to do things on behalf of their clients that would be immoral if done by nonlawyers... They must make truthful opposing witnesses look like liars or fools if they can; they must fight for their client's 'right' to oppress and exploit, if the client wishes it; they must defeat just claims

¹¹⁵ Luban, *Lawyers and Justice: An Ethical Study*, *supra* note 26 at 129.

¹¹⁶ Richard Wasserstrom "Roles and Morality" in Luban, *supra* note 26 at 25-26.

¹¹⁷ Luban, *The Good Lawyer*, *supra* note 26 at 1-2

on technicalities if it can be done; they must keep information confidential though it means ruination for a hapless third party.

The unique role of lawyer within the adversarial system is an important consideration that Luban's work highlights. But ultimately rejecting role morality Luban argues that it creates two types of morality – one for the lawyer and one for everyone else. Luban deconstructs the logic of role morality using the "Fourfold Root of Sufficient Reasoning" pointing out the weaknesses in the chain of premises required to justify a course of action because of 'my station and its duties'.¹¹⁸ The question for Luban however, ought not to be whether the role is morally justified, but how strongly it is justified. Luban ties the role morality argument to the justifications of the adversary system, which Luban criticizes as being justified only insofar as it is not demonstrably worse than other systems.¹¹⁹

Moreover, ideas of right and wrong are more universal and not necessarily connected to the rightness or wrongness of an institution or role. Wasserstrom, for example, suggests that if all human beings are members of the same moral community then there is no moral reason to accord lawyers – or any other unique role-occupying people – different status within the moral community.¹²⁰ Whether there is a 'universalistic dimension of morality' is subject to much debate but it captures a

¹¹⁸ Luban, *Lawyers and Justice: An Ethical Study*, *supra* note 26 at 132.

¹¹⁹ Luban, *Lawyers and Justice: An Ethical Study*, *supra* note 26 at 68 and 92-93. Luban offers the following 'pragmatic justification' for the adversary system at page 92: "first, the adversary system, despite its imperfections, irrationalities, loop-holes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights. None of its existing rivals, in particular the inquisitorial system and the socialist system, are demonstrably better, and some, such as trials by ordeal, are demonstrably worse... second, some adjudication system is necessary. Third, it's the way we have always done things."

¹²⁰ Wasserstrom, *supra* note 116 at 29

legitimate criticism that there should not be one set of morality for one person and another set for someone else.¹²¹

Hutchinson brings the role morality debate back to the more central debate about reliance on 'codes' and 'rules' in place of ethical reasoning. He argues that in the professional role, "lawyers are required to treat morality in the same way that they deal with law – as an exhaustive body of rules that can be formally applied to resolve the most recalcitrant of difficulties and dilemmas."¹²² Such an approach, according to Hutchinson, leaves 'little space for reflection or engagement'.¹²³

Regardless of whether we adopt a 'universal dimension of reality' or not, it is possible to engage legal ethics without the central focus being the lawyer's role. The reason why the role is important is because it brings with it a unique set of values. These values are what are critical to the ethical analysis. Descriptive ethics require an analysis of competing values and accordingly, we must examine not only the values of the lawyer, but of other stakeholders. In this sense, the importance of the role diminishes as it is the values that matter to the analysis. Most agree that certain values ought to be uncompromised by lawyers – confidentiality, integrity, advocacy, honesty, competence and discretion. These inform the lawyer's role as much as what makes the lawyer's conduct right and wrong, fair and unfair, virtuous and vicious and conducive to welfare and illfare. It is in this sense that role morality does not add considerably to the final analysis. Role morality looks to the values inherent in the role in the same way that

¹²¹ Wasserstrom, *supra* note 116 at 28.

¹²² Hutchinson, *supra* note 3 at 40.

¹²³ *Ibid.*

descriptive ethics considers the values at stake. The strength of the 'role morality' approach is to draw attention to the importance of these values placing them at the forefront.

KRONMAN – THE LOST LAWYER

Kronman starts his book on the premise that the legal profession is in danger of losing its soul. The lawyer has grown significantly in power and monetary terms but has lost its ideals. The reasons that law school applicants list for wanting to pursue legal education – effecting social change, fighting for justice and equality and so on are being lost. The ideal of the 'lawyer-statesmen' seen on the law school application personal statements is dying and Professor Kronman sets out to firstly bring back the 'lawyer-statesmen' ideal – making it relevant and appealing in the modern legal system, and secondly to explain how it is that the ideal has become threatened with all but extinction. Professor Simon finds Kronman's practical reason not too far from his own 'contextual judgment'.¹²⁴ Kronman's approach highlights the values that legal ethics ought to strive towards. He captures these in the ideal of the 'lawyer-statesmen' and discusses how legal education and legal practice need to be changed if lawyers are to avoid losing their soul.

HUTCHINSON – PRAGMATIC AND FUNCTIONAL APPROACH

Hutchinson is one of the few scholars who refuses to treat the legal profession as a homogenous and uniform group. To do so, Hutchinson explains, runs contrary to empirical data revealing a 'fragmented profession'.¹²⁵ Examining statistics

¹²⁴ Simon, *supra* note 27 at 23.

¹²⁵ Allan Hutchinson, "Legal Ethics for a Fragmented Profession" (1998) *Int'l J. of the Legal Profession*. Vol 5, Nos. 2/3 at 175 – 192.

demonstrating an increase in the number of lawyers, an increase in the socio-economic, ethnic and religious diversity of the profession and changes in the way in which lawyers organize themselves (big firms vs. solo practitioners) brings a context Hutchinson calls a 'fragmented profession' with the effect that legal ethics start to lose the appeal of universal models, rules and practices. Rather, the focus must be about "developing a transformative and pluralistic practice that respects the contingent and the particular, and allows for diverse answers and appreciations."¹²⁶

Like Simon and others, Hutchinson approaches legal ethics somewhere in the middle between law and ethics. It places greater emphasis on 'case by case' reasoning. It recognizes an inequality among clients, lawyers and the legal process. Responding to such inequality requires flexibility, discretion and it follows, strong moral character. It becomes increasingly more important to identify and consider adverse interests and competing values. This is the pragmatic, functional, contextual approach to legal ethics.

THE CONTINUUM OF LAW AND ETHICS

A continuum or spectrum, in my view, is the best model for understanding legal ethics. This is because the contextual approaches have emerged out of a response to two prior and unsatisfactory approaches. To use Simon's categories, the dominant view, placed too much emphasis on the client's self interest and this came at the expense of the public interest. The dominant view was too legalistic and less ethical. Similarly, the public interest view was criticized for the opposite reasons. The dominant and public interest views, as well as the role morality debate represent zero sum terms. They create "either or" categorical mentality. Either your on your client's side or the public's side.

¹²⁶ Hutchinson, *supra* note 3 at 48.

Either the role matters or it does not. Such all or nothing reasoning is inflexible and it was the desire for greater flexibility that Professor Simon created the 'contextual view', Hutchinson the 'pragmatic and functional approach' and so on.

What these contextual views have that the others do not is the ability to consider all of the relevant factors in the decision making process. The idea of an 'all things considered' approach is one of the core values of good ethical decision making discussed earlier in this chapter. Law and ethics and not 'all or nothing' concepts. Rather, they exist on a continuum which may be illustrated as follows:

Ethics	Law
[-----]	

The relationship is presented as a continuum to avoid dichotomous or categorical approaches. The main reason however, for placing the two concepts on a continuum is because as we move from right to left along this continuum, several of the variables in which we used to distinguish law and ethics, begin to correspondingly change. Moving from an ethical model on the left, towards a legal model on the right, changes occur to the method and scope of inquiry, the relationship with power and the role of formal punishment.

Firstly, as we move from left to right along the continuum, the method changes from an 'all things considered' to a greater focus on rules, statutes and codes. Legal ethics become more about the law of lawyers and less about ethical theory. Secondly, the scope of the inquiry changes as we move along the spectrum. Less emphasis is placed on reason and more emphasis is placed on authority. Thirdly control or discretion begins to shift from the state to the lawyer. The ethical model of legal ethics diminishes the

coercive upper hand of state power in the exercise social control empowering the lawyer who might – in rare circumstances – decide it is ethical to act outside the law.

In our illegal migration context, if we adopt a model of legal ethics further to the left of the continuum, the lawyer in effect takes some of the power to decide the client's fate away from the immigration authorities. The lawyer in effect usurps the removal officer's authority deciding instead whether the client is going to leave Canada. By advising the client not to appear for removal the lawyer is attempting to shift the discretion to remove from the state to the lawyer. This raises obvious alarms as it threatens to undermine the rule of law. Presenting law and ethics on a continuum, however, addresses this concern. A good ethical model for lawyers will inevitably fall somewhere closer to the centre of the continuum. Too far to the left may undermine the rule of law, too far to the right eliminates ethical discretion. Reasonable lawyers will differ in their own view of where they stand – and where they feel the bar as a collective ought to stand. The benefit of the continuum is to provide a visual illustration to understand ethical decision making for the lawyer. The final variable is punishment. As we move from left to right formal punishment plays a greater role.

Thus critical challenge then becomes placing legal ethics on this continuum. There are advantages and disadvantages to each end of the continuum. In a sense, disbarment is needed for gross misconduct. In another sense it coerces ethical judgment. Thus hovering somewhere in the middle seems to be a more ideal and practical situation. Placing legal ethics closer to the right, at the 'law of lawyers' end of the spectrum is, with respect to control and discretion, an attractive option. The rule of law dictates that power ought to rest with the state. Such power is not absolute, and lawyers perform an

important role by monitoring the exercise of government power. Thus when the removal officer exercises his or her authority in a perverse or capricious manner or without regard for the material before him or her or acts beyond his or her jurisdiction or fails to observe a principal of natural justice, procedural fairness or other procedure he or she was required by law to follow, then the lawyer is there to provide supervision over the exercise of power. If the lawyer goes too far, the rule of law is undermined. Thus with respect to the variable of power we want to be closer to centre but clearly to the right of centre. It is the method and scope of the inquiry that tip the scales back on the side of a more ethical model. Appealing to reason rather than authority is obviously to be preferred in legal ethical decision making and adopting an 'all things considered' approach is similarly more desirable to that of a consideration based on fixed, hierarchical 'sources of law'. This results in a concept of legal ethics just left of centre between ethics and law – closer to the ethical end of the spectrum.

Again, reasonable lawyers will differ. A 'fragmented profession' will bring a multiplicity of perspectives. My position is that lawyers ought to place themselves within a moderate range of the middle of the continuum. The extreme positions are less desirable. The extreme ends return us to what Simon categorized as 'the dominant view' vs. the 'public interest view'. The middle of the continuum is, in my view, a more effective way of understanding the 'contextual view'. It recognizes diverging opinions and provides flexibility – flexibility that is necessary depending on the merits of a specific case. Lawyers can shift along the continuum relative to the merits of the case.

How then do we use this model in order to answer the central question of this thesis? Is it ethical for a lawyer, to advise a client to break the law and not appear for

removal? The continuum provides the guide or roadmap for answering this question and this will be the focus of the final chapter of this thesis, after we have completed a consideration of 'all things' in chapters three, four and five.

This model provides for the ethical discretion and case by case analysis advocated for by many legal ethics scholars. In the middle, there is a blending of the two concepts and the continuum tells us why and how we resolve ethical problems in the practice of law. As Rhode and Luban explain, integration of the two competing perspectives in an admirable pursuit:¹²⁷

The study of codified ethical rules apart from broader ethical principles runs the risk of superficiality: legal codes of personal conduct that ignore the moral commitments of the people they govern are doomed to irrelevance. On the other hand, a purely philosophical study of legal ethics that ignores the institutional and doctrinal basis of law practice cannot succeed. Our aim is to integrate both dimensions of ethical analysis.

IS IT UNETHICAL TO BREAK THE LAW?

To recap the argument of this chapter, we began setting out the difference between law and ethics. Following this we worked towards a model of legal ethics that is more ethical than legal and invoked more ethical modes of reasoning. The final portion of this chapter seeks to take the contextual, merit based approach and use it to review the ethical debate surrounding the obligation to obey the law, asking whether it is ever ethical to break the law, and if it is ever ethical for a lawyer to advise breaking the law?

It is premature to attempt to answer the central question of our fact situation without having the benefit of chapters three, four and five which set out the unique context of illegal migration. Nevertheless, this section will survey some of the general scholarship and philosophical writings on the issue of 'civil disobedience' or whether it

¹²⁷ Rhode & Luban, *supra* note 67 at 3.

is ethical to break the law. From Henry David Thoreau to Mahatma Gandhi to Ronald Dworkin and Noam Chomsky, this is a topic that has fascinated scholars and has played a critical role in modern history.

Using our continuum model of legal ethics, breaking the law is nearly impossible to justify at the 'law' end of the spectrum. Appealing to authority requires submission to that authority. Acts of civil disobedience are inconsistent with this approach. Given the lawyer's duty to uphold the law and the duty to the administration of justice, advising a client to break the law, no matter what the circumstances, is inconsistent with the law of lawyers end of the continuum. The ethical approach that I advocate, left of centre along the continuum, may leave open rare circumstances in which breaking the law might be justified. The ethical model I propose finds support among scholarship and moral philosophy surrounding 'civil disobedience'.

Law is ultimately a social construction and in any given situation law is made by fellow human beings, not by some abstract notion of 'government'. As human's are prone to make mistakes, Ronald Dworkin places special importance on this factor. He writes:¹²⁸

A citizen's allegiance is to the law, not to any particular person's view of what the law is, and he does not behave improperly or unfairly so long as he proceeds on his own considered and reasonable view of what the law requires.

Dworkin continues to qualify and expand this proposition and is therefore worth reproducing at greater length:¹²⁹

Let me repeat (because it is crucial) that this is not the same as saying that an individual may disregard what the courts have said. The doctrine of precedent lies near the core of

¹²⁸ Ronald Dworkin "Civil Disobedience" in John Arthur and William H. Shaw "Readings in the Philosophy of Law" 2nd ed. (New Jersey: Prentice Hall, 1993) at p. 11.

¹²⁹ *Ibid.*

our legal system, and no one can make a reasonable effort to follow the law unless he grants the courts the general power to alter it by their decisions. But if the issue is one touching fundamental personal or political rights, and it is arguable that the Supreme Court has made a mistake, a man is within his social rights in refusing to accept that decision as conclusive.

Dworkin's comments on civil disobedience are highly relevant to the illegal migration context as there are so many 'legal determinations' made by single human actors. For starters, the Refugee Board Member may have made a mistake. Indeed many refugees become caught in what Showler calls the 'refugee sandwich', that is, people who may be legitimate refugees but who are failed by a refugee determination system with institutional or individual Board Member bias and/or incompetence.¹³⁰ At the Federal Court level, again single judges and restrictive 'leave' requirements mean that only a very small portion of judicial review applications are ever heard. Perhaps most importantly then, the removal officer holds the major decision of whether to defer removal. To recall Dworkin's argument, the obligation to obey the law is to the law, and not one removal officer's interpretation of what the law is. This may provide a justification – in rare circumstances – for disobeying a removal order. The analysis however, is more complex than simply the Refugee Board Member, the Federal Court judge and the removal officer. There are other players, including lawyers for the government, the H&C application decision maker and so on. After setting out the law in this area in chapter five, the more complex nature of the analysis can be given proper consideration.

¹³⁰ Showler, *supra* note 48.

Rhode and Luban provide a well reasoned account of the lawyer's ethical obligation with respect to obedience to the law:¹³¹

...there is always the question of whether to comply with the law or to engage in conscientious disobedience. That issue is philosophically controversial and continues to be debated – but no serious theory on the question suggests that disobedience is *never* permitted. On those (hopefully rare) occasions when settled legal rules clearly demand a course of action that the lawyer finds morally repugnant, serious soul searching should accompany whatever decision the lawyer makes. To say, 'that's not a question of morality, because the law is clear' is a poor rationalization. [emphasis in original]

Rhode and Luban's rationale highlights the usefulness of the ethical model of legal ethics developed on the continuum. In effect, they have rejected the more legalistic model noting firstly that "no serious theory on the question suggests that disobedience is *never* permitted" and secondly, and more directly that "to say, 'that's not a question of morality, because the law is clear' is a poor rationalization". Rhode and Luban's perspective on the ethical obligation to obey the law provide good reason to adopt an approach to legal ethics that is closer to the middle of the spectrum, somewhere between law and ethics.

Interestingly, Simon devotes a chapter of his book discussing the duty to obey the law. For Simon, this issue boils down to how we define 'law'.¹³² If we define law in narrow Positivist terms, then we cannot provide plausible reasons why someone should obey a norm just because it is 'law'. However, the answer, for Simon, accordingly depends on how we define the 'relation of law and justice'. Simon argues if we define law narrowly to exclude important dimensions of justice, then the duty to obey the law becomes indefensible. If we define it more broadly, we can justify a duty, but the duty is

¹³¹ Rhode & Luban, *supra* note 67 at 7.

¹³² Simon, *supra* note 27 at 77.

inconsistent with the dominant view and possibly the public interest view as well.¹³³

This leads us back to the original criticism of Simon's conception of 'justice'.

The moral obligation to obey the law will be discussed in greater detail after the relevant discussion of illegal migration is complete. This brief introduction has been presented in order to illustrate the impact of the ethical model of legal ethics developed along the continuum of ethics and law. For present purposes it is useful to note that the more ethical view of legal ethics is the perspective that provides for an exception to the obligation to obey the law. Thus if one's concept of legal ethics differs from the approach that I advocate – aligning itself closer to the legal end of the spectrum, then the lawyer's ability to disobey the law diminishes considerably if it doesn't disappear. There is, however, a general consensus that civil disobedience plays some role in democracy and therefore can – with extreme caution – be a healthy part of democratic values and the quest for a more (distributively) just and equal society.

A final and critical point to take from the exception to the general obligation to obey the law is that it is reserved for rare and unique contexts. It is dangerous and prone to possible abuse and should be considered carefully by a profession that the public already holds in a poor esteem. It almost seems a disservice to the profession to afford the topic so much attention. Nevertheless the fact situation involving illegal migrants brings legal disobedience to the forefront. Breaking the law in very rare circumstances fits with the general theory of legal ethics that places slightly left of centre on a spectrum of ethics and law.

¹³³ *Ibid.*

CONCLUSION

This chapter set out with the task of providing an ethical methodology with which lawyers may use to tackle the ultimate question of the bounds of ethical conduct for lawyers representing illegal migrants in Canada and specifically, whether a lawyer could ever advise their client not to appear for removal. To answer this question we began at the very beginning, critically examining the nature of legal ethics, asking whether it is a legal or ethical field of study and what are the differences between law and ethics.

Highlighting several of the critical ways in which law and ethics differ, the analysis then turned to an examination of which model – legal ethics as ethics or legal ethics as the law of lawyers – was more appealing and after placing these models on a continuum, I argued that legal ethics belong somewhere in the middle – and in my view closer to the ethical end of the spectrum. Reasonable and highly ‘ethical’ lawyers might not share my perspective on the precise location of legal ethics along the continuum. However, understanding legal ethics within a range surrounding the middle, provides a universal model for legal ethics. Finally, this chapter investigated the exception to the general obligation to obey the law setting the foundational tools necessary to address the ultimate question of this thesis. In the next part, we begin the ‘all things considered’ approach and turn to the topic of illegal migration.

PART III – ILLEGAL MIGRATION IN CANADA

The preceding chapter set out an approach to legal ethics from the perspective of a philosopher rather than a lawyer. While this approach advocates moving legal ethics away from the law, the argument never suggested ignoring the law. The law forms an important part of the ethical analysis. The central claim is that it should not be determinative and that legal ethics ought to engage an all things considered approach of which the law is one of several factors – albeit an important factor.

The substantive law surrounding H&C applications and removals is therefore highly relevant to the ethical analysis. Understanding the substantive law in this area is critical if we are to apply Simon's 'underlying merits of the case' approach to legal ethics. Part two of the thesis will therefore consider the law of removals and H&C applications. This part is divided into three chapters: the first will overview the structure and extent of legal migration and its control in Canada, the second will analyze discourse on illegal migration in Canada and the third will provide the 'black letter law' surrounding removals and H&C applications in Canada.

CHAPTER III - REGULATION AND CONTROL OF MIGRATION IN CANADA

MIGRATION AT COMMON LAW

Traditionally, at common law the power over decisions of who may enter and remain inside the state's borders, including the conditions attached to one's sojourn, rest with the Crown. Lord Atkinson, illustrated this view in *A.G.(Canada) v. Cain*¹³⁴ where he wrote:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.

Lord Denning, similarly stated in *Schmidt v. Secretary of State for Home Affairs*¹³⁵ that:

I have always held the view that at common law no alien has the right to enter this country except by leave of the Crown: and the Crown can refuse leave without giving any reason.

Lord Denning in *R. v. Governor of Pentonville Prison*¹³⁶ even went so far as to say that:

[immigration questions] are not a justiciable matter for the courts. It is an administrative matter for the Secretary of State. It is very like his discretion to remove aliens, which has never been questioned in our long history.

The common law relating to immigration, however, has very little legal relevance in modern times as migration is heavily regulated and controlled by statute. The result is that migrants are afforded much greater substantive and procedural rights than exist at common law. Nevertheless, the common law tradition does influence modern immigration law. Recently Justice Sopinka brought such foundational common law ideas

¹³⁴ *A.G.(Canada) v. Cain* [1906] A.C. 542 (P.C.)

¹³⁵ *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149 (C.A.) at 168.

¹³⁶ *R. v. Governor of Pentonville Prison* [1973] 2 All. E.R. 741 (C.A. Civ. Div.) at 753.

into the statutory context in *Canada (Minister of Employment and Immigration) v. Chiarelli* where he noted that “the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country”.¹³⁷

REGULATION OF MIGRATION IN CANADA

Under Canada’s constitution, immigration¹³⁸ has shared jurisdiction between the federal and provincial governments, however, in practice it is dominated by federal regulations. In Canada, nearly everything to do with immigration is set out in the *IRPA*¹³⁹ and its corresponding *Regulations*¹⁴⁰. The *IRPA* came into force in the summer of 2002 and marked a significant change in several respects from its predecessor, the *Immigration Act*.¹⁴¹ The *IRPA* sets out a number of broad objectives including: “to permit Canada to pursue the maximum social, cultural and economic benefits of immigration” and “to enrich and strengthen the social and cultural fabric of Canadian society...”¹⁴²

The *IRPA* provides for a number of important distinctions between ‘classes’ or ‘status’ of persons. As already mentioned, on one level, the *IRPA* distinguishes between

¹³⁷ *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at 773. This quotation is also cited in Anna Pratt *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) at 59.

¹³⁸ Canadian discourse on the movement of people across national boundaries typically invokes the term ‘immigrant’. The legislation dealing with migration is the “Immigration” and Refugee Protection Act. This Act replaced the previous “Immigration Act”. I prefer the term migrant as it captures both permanent and temporary movers – whereas an ‘immigrant’ refers only to permanent movement. For example, a foreign student would not be considered an ‘immigrant’ but would be considered a migrant. Other countries such as Australia, use the term ‘migration’ in legislation – *Migration Act 1958* (Cth).

¹³⁹ *IRPA*, *supra* note 4.

¹⁴⁰ *IRPR*, *supra* note 12.

¹⁴¹ *Immigration Act*, R.S.C., 1976-77, c. 52

¹⁴² *IRPA*, *supra* note 4, s. 3(1)(a) and (b). Note there are another 10 or so objectives listed in the *IRPA*.

temporary and permanent residency and on another level between other forms of classes of people: citizens, permanent residents and foreign nationals.¹⁴³ Citizens of Canada are those who have acquired that status under the *Citizenship Act*¹⁴⁴ and its corresponding *Regulations*¹⁴⁵. Generally speaking, people acquire citizenship in one of two ways: through birth or through naturalization. With some exceptions, birthright citizens include those born in Canada or born outside Canada to a parent who is a Canadian citizen.¹⁴⁶ Conversely, naturalized citizens must first become permanent residents who are, again with some exceptions, typically eligible to apply for citizenship after three years of residency in Canada.¹⁴⁷ Once someone becomes a citizen, they have the ultimate right to enter and remain in Canada¹⁴⁸ and are therefore of little or no relevance from an immigration perspective. Because citizenship is such an important status on the immigration hierarchy and because permanent residence typically results in citizenship, the government takes the granting of permanent residence quite seriously.

The bulk of *IRPA* and its *Regulations* therefore are concerned with 'permanent residents' and 'foreign nationals' and set out the criteria for admissions, application procedures and govern loss of status and removal from Canada. 'Foreign national' refers

¹⁴³ *IRPA*, *supra* note 4, s. 2.

¹⁴⁴ *Citizenship Act*, R.S.C., 1985, c. C-29.

¹⁴⁵ *Citizenship Regulations*, 1993, S.O.R. / 93-246.

¹⁴⁶ *Citizenship Act*, *supra* note 144, s. 3.

¹⁴⁷ *Citizenship Act*, *supra*, note 144, s. 5. On the issue of establishing 'residency' for citizenship purposes see *Papadogiorgakis (Re)*, [1978] 2 F.C. 208 (F.C.T.D.) and *Koo (Re)*, [1993] 1 F.C. 286 (T.D.). Section 5 of the *Act* also requires a knowledge and language requirement.

¹⁴⁸ See section 6(1) of the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982* enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11..

to anyone other than a citizen or permanent resident of Canada.¹⁴⁹ Once a person becomes a Canadian citizen they cease to be a permanent resident and by definition, cease to be a foreign national. Permanent residents are in fact nationals of countries other than Canada, but for the purpose of *IRPA* 'foreign national' does not include permanent residents of Canada. With some exceptions¹⁵⁰, permanent residents are what we might consider 'legal immigrants'. It also follows that in Canada, an illegal migrant must refer to a 'foreign national' and not a Canadian citizen or permanent resident. These socially constructed labels are the result of the state's assertion of control over who may enter and remain in Canada.

THE KEY GOVERNMENT DEPARTMENTS

There are four important branches of the Canadian federal government relevant to understanding illegal migration. Firstly, the Canada Border Service Agency ("CBSA")¹⁵¹ falling under the Ministry of Public Safety Canada ("PSC")¹⁵² which has responsibility for border controls and effecting removal orders. Secondly, the department of Citizenship and Immigration Canada ("CIC")¹⁵³, its own separate Ministry, determines applications to enter and remain in Canada including applications for permanent or temporary residence. Two additional judicial or quasi-judicial branches

¹⁴⁹ *IRPA*, *supra* note 4, s. 2.

¹⁵⁰ As will be discussed in greater detail below, a difficulty arises in classifying permanent residents who successfully obtained such status through misrepresentation and without detection. Permanent resident's may also be issued removal orders due to an inadmissibility and have the right to appeal such a removal order, with some exceptions, under s. 63 – 64 of the *IRPA*, *supra* note 4. Pursuant to sections 46 and 49(c) of the *IRPA*, inadmissible permanent residents retain their status however, until their appeal is dismissed.

¹⁵¹ CBSA, *supra* note 41.

¹⁵² PSC, *supra* note 42.

¹⁵³ CIC, *supra* note 43.

might also be involved. The Immigration and Refugee Board (“IRB”)¹⁵⁴ and specifically the Refugee Protection Division (“RPD”) is the tribunal responsible for determining inland refugee claims.¹⁵⁵ Finally, pursuant to section 72 of the *IRPA*, the Federal Court of Canada¹⁵⁶ has jurisdiction, with leave, to hear judicial review applications of nearly all decisions affecting illegal migrants. With so many bureaucratic players it is not too difficult for illegal migrants to get lost – whether purposefully or not – within the system.¹⁵⁷

‘LEGAL’ MIGRATION IN CANADA

Professor Hiebert highlights how Canada is uniquely identified both domestically and internationally with immigration: “Along with only a handful of other countries, Canada has a long history of active programs encouraging immigration and facilitating settlement.”¹⁵⁸ Each year Parliament sets a target number of immigrants for Canada to accept. For the past decade this number has generally ranged between 200,000 – 250,000 people, made up primarily of economic class migrants, followed by family class migrants and then by ‘protected persons’ or refugees. A fourth ‘other’ category includes

¹⁵⁴ Online: <http://www.irb-cisr.gc.ca> [Last visited: 15 August, 2007].

¹⁵⁵ This is not to suggest that there is any necessary link or connection between ‘refugees’ and ‘illegal migration’ but as will be discussed below the two subjects often appear next to each other.

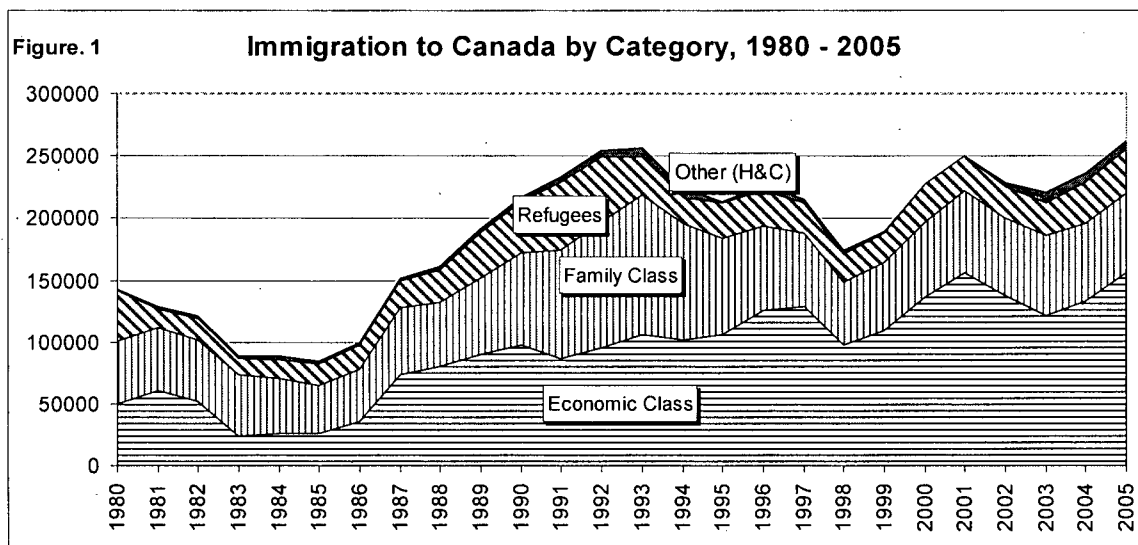
¹⁵⁶ Online: <http://www.fct-cf.gc.ca> [Last visited: 15 August 2007]

¹⁵⁷ To use a highly publicized, extreme and almost amusing example, the case of Harjit Singh involved a man who single handedly managed to take down former Minister of Citizenship and Immigration, Judy Sgro, after remaining in Canada for over ten years exhausting various legal avenues and falsely alleging that the Minister promised him ‘status’ in Canada in exchange for delivering pizza to election events! *Harjit Singh v. Canada (Solicitor General)*, 2005 FC 159 at paras 1 – 2 and 6 – 8. See also Marina Jiménez “Canada’s Welcome Mat Frayed and Unravelling” *Globe and Mail* 16 April 2005, Page A8.

¹⁵⁸ Daniel Hiebert “Skilled Immigration in Canada: Context, Patterns, and Outcomes” (2006) *Australian Review* 182-291 at 182.

applications for permanent residence from inside Canada based on humanitarian and compassionate grounds (“H&C Applications”) which will be discussed in great detail in the final part of this paper.

Figure 1 below shows the number of permanent residents admitted to Canada by immigration category for the years 1980 through to 2005:¹⁵⁹



Economic migrants are admitted to Canada based on their social or ‘human capital’.¹⁶⁰ They are admitted in order to provide economic benefits for Canada.¹⁶¹ Family class migrants are admitted based on a family relationship to a Canadian citizen or permanent resident for the sole purpose of family reunification. Refugees are admitted to Canada because they have a well founded fear of persecution in their country of

¹⁵⁹ Source: CIC Facts and Figures, 2005: <http://www.cic.gc.ca/english/pub/facts2005/permanent/01.html>

¹⁶⁰ Douglas Massy, et al. “Theories of International Migration: A review and Appraisal” (1993) *Population and Development Review*, Vol. 19, No. 3. pp 431 - 466 at p. 453

¹⁶¹ *IRPA*, *supra* note 4, s. 3(1)(a) and (b). Note there are another 10 or so objectives listed in *IRPA*.

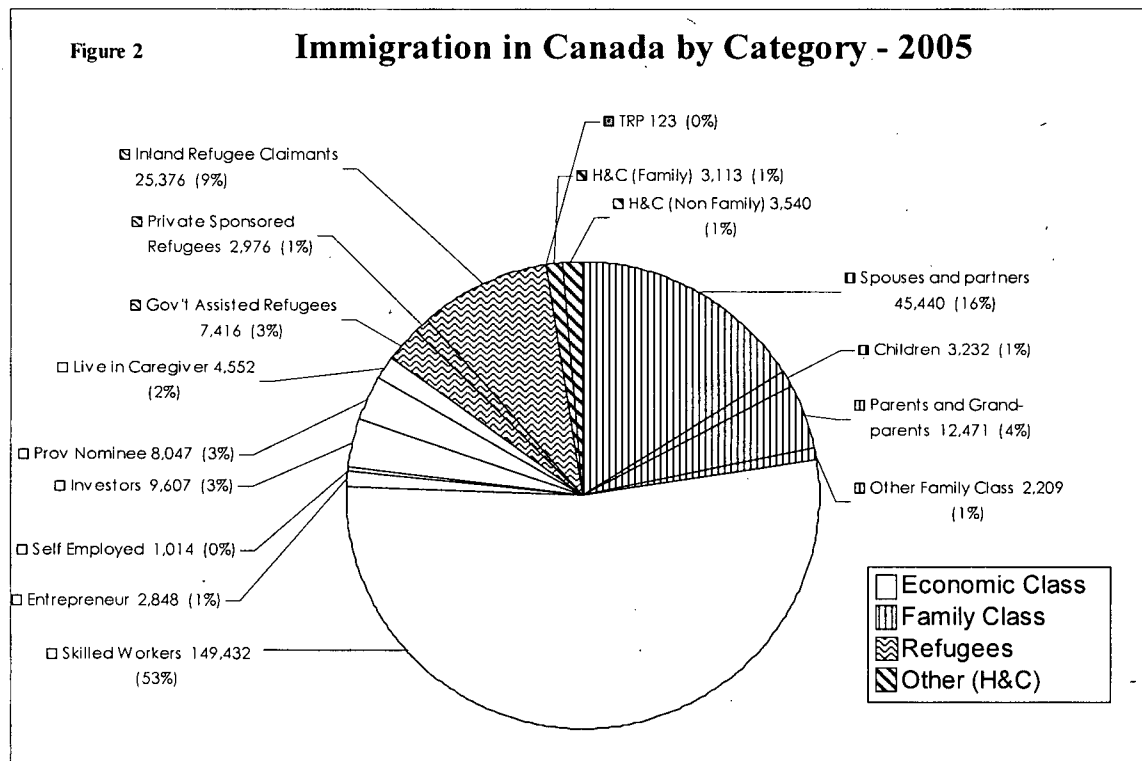
origin. As figure 1 above shows, in recent years roughly 60% of all immigrants come under the economic class, 25% in the family class, 13% refugees and just over 2% in the 'other' category which includes H&C Applicants.¹⁶² Hiebert, however correctly points out that of the roughly 150,000 economic class immigrants that come to Canada each year, only about one third (ie 50,000) represent the actual 'economic migrant' or 'principal applicant' who was selected under the applicable economic criteria. The remaining two thirds (or approx 100,000 people) represents the dependant family members of the principal economic applicant. We might therefore more accurately consider two thirds of the economic class as family class immigrants that have been selected at the same time as the principal applicant.¹⁶³

Within the broad categories of 'economic class', 'family class', 'refugees' and 'other', there are several sub categories which are represented in Figure 2 below. The three major categories of admission are skilled workers (53% of all immigrants), spouse/common law partner sponsorships (16%) and finally refugees (9% of all immigrants. These three categories represent nearly 80% of all immigrants to Canada.

¹⁶² Source: CIC Facts and Figures, 2005:

<http://www.cic.gc.ca/english/resources/statistics/facts2005/index.asp> [Last Visited: 15 August 2007].

¹⁶³ Hiebert, *supra* note 158 at 184.



THE ECONOMIC CLASS

As Figure 2 above illustrates, and subject to Hiebert's observation noted above, the majority of Canada's immigrants qualify under the economic class. Within the economic class it is the 'skilled worker' category that is most prevalent. Economic class applications operate on a 'points system' where points are awarded for varying levels of human or social capital. The points system was created in the 1960's as a way to bring in objective requirements and modernize immigration law from the racially repugnant practices of the past.¹⁶⁴ Presently, the points system in the skilled worker category assigns points to potential applicants based on the following six factors set out in Table 1 below:

¹⁶⁴ See Valerie Knowles *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540 – 1997*, rev. ed. (Toronto: Dundurn Press, 1997).

Table 1 – Skilled Worker Points System in Canada

Selection Criteria	Max Points	IRPR Section¹⁶⁵
Education (Masters/PhD)	25	s. 78
Language (English/French)	24	s. 79
Work Experience (4 yrs)	21	s. 80
Age (21 – 50)	10	s. 81
Arranged Employment	15	s. 82
Adaptability	10	s. 83
Total Possible Points	100	

The current pass mark is set at 67 although this number has varied over the years. These selection criteria favour highly educated and highly experienced young professionals. A typical applicant who meets the 67 points might have a 4 year university bachelors degree (earning 20 points), two years of professional work experience (earning 17 points), excellent English language skills (earning 16 points), be over the age of 21 but under the age of 50 (earning 10 points) and have a spouse who also has a bachelor's degree (earning 4 points under adaptability) and on that basis would have a total of 67 points.

Within the context of illegal migration, there are some important observations to make of the skilled worker point system and the economic class in general. For starters, the example above of a 'typical applicant' who might qualify involved a married couple where both adults held university level qualifications. The large portion of points allotted to educational credentials (25% of the possible points) helps to exclude the majority of the world from qualifying for immigration. What is ironic is that once in Canada, many immigrants face difficulties having their credentials recognized.

¹⁶⁵ IRPR, *supra* note 12.

Secondly, the work experience must be sufficiently 'professional' in order to qualify. Section 80(2) of the *IRPR* provides that the work experience must be "listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* ("NOC") matrix".¹⁶⁶ Without going into detail of the NOC categories, it is suffice to say that only higher level, managerial type work would count. Picking fruit, fixing cars and laying hardwood floors are not listed in these skill groups. Under NOC, most trade work, despite being in heavy demand in Canada's labour market, is termed "low skill work" and does not count towards the point system. This is yet another barrier that acts to exclude so many people from *legally* coming to Canada.

As we might expect, the so called "high skilled" type of work experience that qualifies under Reg. 80 has been heavily criticized. It is a far turn from immigration policy in 1867 under Sir John A. McDonald that actively recruited "men of good muscle who are willing to hustle".¹⁶⁷ The present policy is criticized for being out of touch with the demand for foreign workers in key sectors of the Canadian labour market.¹⁶⁸ Recent longitudinal studies have demonstrated poor economic performance for economic class immigrants.¹⁶⁹

¹⁶⁶ *IRPA*, *supra* note 4, s. 80(2). For more on the NOC coding system see: <http://www23.hrdc-drhc.gc.ca/2001/e/generic/welcome.shtml>

¹⁶⁷ See Knowles, *supra* note 164 at 48 who also notes that "Not so welcome were individuals with professions, clerks, or other prospective immigrants of sedentary occupation." Knowles cites H. Gordon Skilling, *Canadian Representation Abroad: From Agency to Embassy* (Toronto: Ryerson Press, 1945), p. 15 for the quotation "men of good muscle who are willing to hustle" coming from the then assistant superintendent of immigration.

¹⁶⁸ The previous *Immigration Act*, *supra* note 141, structured the economic class in a way that awarded points to occupations identified in high demand. This approach was abandoned when the government became unable to keep up with rapidly changing labour market demands. The modern approach is premised on the belief that high skill level is transferable and therefore preferable over the long term.

¹⁶⁹ Hiebert, *supra* note 158. For a discussion of the political economy of Canada's economic class immigration program see Daniel Hiebert, "Winning, Losing, and Still Playing the Game: The Political

The remaining economic class categories of 'business immigrants' are even more out of reach for the average person. Hence just over 10,000 people, less than a half a percent of the total number of immigrants, were landed in the business immigrant categories in 2005. The entrepreneur category requires a minimum net worth of \$300,000 and the investor, a minimum net worth of \$800,000. Both categories require at least two years experience either running a successful business and in the case of the entrepreneur, permanent residence is granted conditionally on the immigrant setting up a business in Canada and create at least one full time job for a Canadian citizen or permanent resident other than a family member of the entrepreneur.¹⁷⁰ The self employed category is a difficult category in which to qualify and is typically reserved for high level, professional athletes and entertainers.

Overall, the economic class immigration program provides a disincentive for many to apply legally as most will not qualify. Those wishing to start a new life in Canada are often left without any option for legal migration. The system favours the wealthy and the highly educated, euphemistically termed 'the best and the brightest' by the Canadian Government. As a further disincentive, the incredibly long processing times for economic class applications for permanent residence also act to encourage illegal migration. Currently, it takes three and four years on average for many economic class applications to process and even longer for the business class. A backlog of

Economy of Immigration in Canada" Tijdschrift voor Economische en Sociale Geografie – 2006, Vol. 97, No. 1, pp. 38–48. Hiebert argues that the 'declining economic fortunes' of economic class immigrants helps to explain why Canada has resisted the nearly universal trend of anti-immigrant politics. That is, if the problem of declining fortunes were solved, Canada might start to see 'deep-seated antipathy to newcomers who were culturally different from the mainstream' gaining political support as occurs in most other countries.

¹⁷⁰ IRPR, *supra* note 12, s. 98(1)

applications continues to build. Thus the criticism of illegal migrants 'queue jumpers'¹⁷¹ neglects the fact that there really isn't a queue for many illegal migrants to jump.¹⁷² The selection criteria in the economic class favours so called 'highly skilled' professionals to the detriment of those with the 'muscle and hustle'.¹⁷³

FAMILY CLASS

Whereas the economic class is designed to improve Canada's economy, the objective behind family class immigration is family reunification. Family reunification is limited however to particular family members – what we might refer to as 'immediate' family members. With some exceptions, the family class includes spouse and common law partners, parents, grandparents and children. Brothers, sisters, cousins, aunt and uncles are, with few exceptions, not part of the family class despite the critical role many of these extended family members play in many cultures.

The majority of family class applications are spouses or common law partners and these are given top priority and offer the fastest processing times of any immigration category.¹⁷⁴ Common law partners are those who have lived together for at least one

¹⁷¹ This view is captured in the letter from John Dowell where he writes, "Why should illegal immigrants be allowed to attain citizenship in Canada? What about the immigrants who play by the rules? Is it fair to them to have a bunch of cheaters suddenly jump ahead of them in line? ...Enforce the law... Change it with open debate in Parliament, if it is unenforceable. Do not, however, arbitrarily decide when the law will be enforced and when it will be ignored. If you do that you become a far greater danger to our society than any number of illegal immigrants." Appendix E to the 1983 Robinson Report to Parliament "Illegal Migrants in Canada", *supra* note 6. Letter from John Dowell of Kanata, Ontario dated December 30, 1982 addressed to the Hon. Lloyd Axworthy, then Minister of Employment and Immigration who invited public input on the issue.

¹⁷² Pratt, *supra* note 137 at 121.

¹⁷³ Knowles, *supra* note 164.

¹⁷⁴ There is also a third category known as 'conjugal partners' which acts as an exceptional category for those who are in a marriage-like relationship but for reasons beyond their control are unable to marry or live together for a year.

year. Family class applications work on a 'sponsorship' system, requiring a Canadian citizen or permanent resident to agree to sponsor their family member for permanent residence in Canada. Whereas all economic class applications must be processed outside of Canada, in the family class, an exception to this rule is made for spouses and common law partners, which may be processed from inside Canada. Because of this, the spouse and common law partner becomes a likely option for illegal migrants living in Canada. Love may bloom quickly for an illegal migrant in Canada and those in a genuine relationship with a legal immigrant or citizen may find an easier, faster and much less discretionary route to permanent residence in Canada through the family class.

As mentioned above, the family class application process is premised on the objective of family reunification. An applicant must therefore demonstrate that the family relationship is 'genuine'. Officer's have the discretion to refuse applications, even from legally married spouses where they believe the relationship was entered into in order to gain status under the *IRPA*. In February of 2005, important amendments to the spouse or common law partner in Canada class provided in effect a blanket exemption based on H&C grounds for those who 'lack status' in Canada.¹⁷⁵ This important development in immigration law represents the progressive yet inherently contradictory acknowledgement of legal rights for illegal migrants. It also represents a return to the practice pre-*IRPA* suggesting that the policy shift encouraging spousal sponsorship applications to be processed outside of Canada was ineffective and out of touch with reality.

¹⁷⁵ See "Good News for Spouses and Common Law Partners" Media Release from CIC, Online: <http://www.cic.gc.ca/english/department/media/releases/2005/0504-e.asp> [Last visited: 15 August 2007].

PROTECTED PERSON / REFUGEE CLASS

Refugees are people who have a well founded fear of persecution in their country of origin based on grounds such as political opinion, race and religion enumerated in the 1951 *Convention Relating to the Status of Refugees*.¹⁷⁶ As a signatory to the convention, Canada has agreed to protect people with well founded fears of persecution for reason of their political opinion, race, religion, ethnicity, or membership in a particular social group. The Convention obligates Canada to protect people in Canada by not returning them to the country with which they fear persecution. Outside of the Convention's obligations, the IRPA provides for some other limited grounds for protection.¹⁷⁷ Canada also accepts UNHCR refugees from outside of Canada for resettlement in Canada.

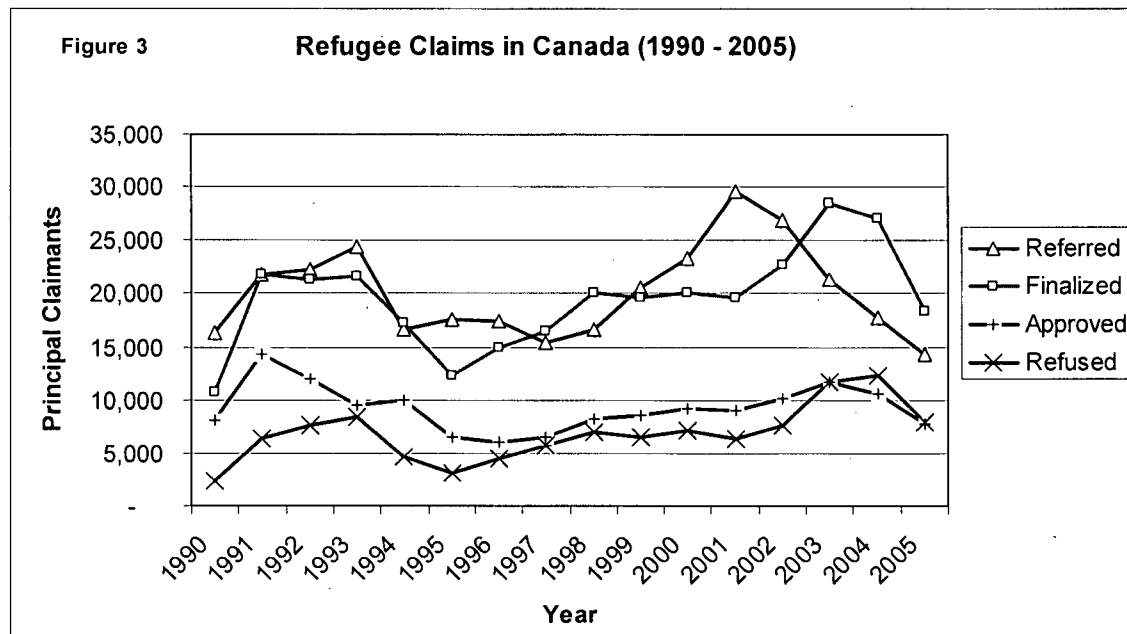
Over the past 15 years, roughly 20,000 claims to refugee protection were filed in Canada every year.¹⁷⁸ These figures were obtained through requests under the *Access to*

¹⁷⁶ *Convention Relating to the Status of Refugees, 1951*, U.N.T.S. 150 (entered into force 22 April 1954).

¹⁷⁷ *IRPA*, *supra* note 4, s. 97.

¹⁷⁸ Access to Information requests A-2006-00107 and A-2006-00108 filed by the author with the Immigration and Refugee Board in December of 2006 provided the number of refugee claims (that is, cases not total number of persons) referred (meaning those who have made a formal refugee claim in Canada and were determined 'eligible' to make the claim), finalized (meaning a final determination was made by the IRB), accepted and refused by/to the IRB in Canada broken down by country of origin and IRB location. The average number of claims referred annually over 1990 – 2005 was 20,139. The highest number occurred in 2001 when 29,606 claims were referred. The lowest number was 2005 when only 14,312 claims were referred. The 2005 figures may demonstrate the impact of the *Safe Third Country Agreement* which came into force in December of 2004 and with some exceptions, denies claimants appearing at a land border from the USA from making a refugee claim in Canada. These numbers fluctuate annually and the number of claims finalized typically lags a year or two behind the number of claims referred. The average number of claims refused annually over 1990 – 2005 was 6,826. The highest number occurred in 2004 when 12,354 claims were refused. The lowest number was 1990 when only 2,356 claims were refused. In 2005 there were 7,878 claims refused. These numbers fluctuate with the number of claims referred and finalized by the IRB annually. The number refused does not include abandoned and withdrawn refugee claims. As is to be expected, counting the total number of claims, rather than the total number of persons, results in somewhat smaller aggregate numbers.

Information Act.¹⁷⁹ Figure 3 below outlines the number of refugee claims referred to the Immigration and Refugee Board (“IRB”), finalized, approved and refused for the years 1990 – 2005.



CONCLUSION

This chapter provided a big picture perspective on immigration in Canada. What is significant to take from this analysis for the purpose of this thesis is that the bulk of Canadian immigration policy is driven by economics and family reunification and therefore the other categories such as refugees, failed refugees and other humanitarian applicants represent only a small fraction of immigration in Canada. The full impact of these numbers, however, will be considered in greater in the next chapter, as we consider who are illegal migrants, how many are there and why these questions matter.

¹⁷⁹ *Access to Information Act*, *supra* note 35.

CHAPTER IV - ILLEGAL MIGRATION DISCOURSE IN CANADA

With a primary understanding of legal migration in Canada and how it helps create illegal migration, we are better equipped to discuss the phenomenon of illegal migration. This section begins with an examination of the concept of 'illegal migration' answering the question of whom exactly are we referring to when we talk about illegal migrants?

DEFINING ILLEGAL MIGRANTS

According to Düvell, "the birth of the idea of 'illegal immigrants' can be associated with the emergence of the post-First World War modern nation-state."¹⁸⁰ Early uses of the terminology of 'aliens illegally present in the country' can be found in the US during the 1920s¹⁸¹, but in Europe, very few examples of immigrants being labeled "illegal" can be identified prior to WWII."¹⁸² In Canada and elsewhere, migration control has historically favoured British and European migrants and sought to exclude Asian migrants, particularly the Chinese, who were arguably treated akin to being 'illegals' as far back as the late 1800's.¹⁸³

¹⁸⁰ Franck Düvell, ed., *Illegal Immigration in Europe: Beyond Control?* (New York: Palgrave MacMillan, 2006) at 24.

¹⁸¹ Düvell, *supra* note 180 at 24 who cites Ngai, Mae "The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the US, 1921-1965" (2003) *Law and History Review*, 21(1): 69-107.

¹⁸² Düvell, *supra* note 180 at 24.

¹⁸³ Knowles, *supra* note 164 at 48 – 50, 70, 87, 107 – 112. See also the *Chinese Immigration Act* of 1923 that barred entry to Chinese people with some exceptions. Orders in Council also created the Chinese "head tax" which in 2006 the Canadian government officially apologized for and offered compensation to surviving members who paid the head tax in Canada. See also Düvell, *supra* note 182 at 22.

Illegal migration is a term nowhere to be found in any migration laws or legislation. Rather, it is a term used in the media and popular discourse. Illegal migrants however, are defined in reference to the law.’¹⁸⁴ Broadly speaking, the label attempts to capture those who live and work in Canada without the lawful authority to do so. The discourse used in referring to illegal migrants, however varies considerably. Terms such as ‘illegal immigrants’, ‘undocumented workers’, ‘irregular migrants’, have all been used in various settings.

Terms describing illegal migration typically involve two words. The first word is an adjective describing the second word, a noun. The purpose of the adjective is to demonstrate and describe how the noun is different from the norm – they are irregular, undocumented or illegal. This may be contrasted with those who are the norm – the regular, documented and legal. As we learned in part one, the ‘regular’ people are generally the wealthy and well educated. It follows then that poor people are generally ‘illegal’. ‘Irregular’ and ‘undocumented’ are softer or more euphemistic terms as compared with ‘illegal’ which often implies ‘criminal’ behaviour.¹⁸⁵ The choice of words tells us a lot about one’s political orientation towards ‘illegal migrants’.

The second word in the set, a noun, then indicates the purpose or intention of the person who has entered the state’s borders. ‘Immigrant’, ‘migrant’, ‘resident’ and

¹⁸⁴ Catherine Dauvergne “Making People Illegal” Chapter 5 in Peter Fitzpatrick and Patricia Tuitt *Critical Beings: Law, Nation and the Global Subject* (Aldershot: Ashgate Publishing Company, 2004) at 94.

¹⁸⁵ Interestingly in the United States, being illegal has been made ‘criminal’. . The controversial US Congress Bill 4437, *The Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005* made it a separate criminal offence to immigrate illegally or even assist someone in immigrating illegally. Undoubtedly the logic behind this approach is deterrence and denunciation. Massey has been highly critical of increased enforcement and demonstrates how greater enforcement on the US-Mexico border has lead to fewer apprehensions, greater costs, a higher death toll and a disincentive for existing illegal migrants to leave. See Douglas Massey “Backfire at the Border: Why Enforcement without Legalization Cannot Stop Illegal Immigration” (Centre for Trade and Policy Studies) June 2005. <http://www.freetrade.org/pubs/pas/tpa-029.pdf> [Last visited: 15 August 2007].

'worker' have different implications and connotations. 'Worker' for example implies that the person's sojourn is for a very specific purpose – to work – which may or may not be the case for all illegal migrants. Working is generally seen as a good thing – far from being 'criminal' behaviour. Thus using terms like 'undocumented or irregular worker' is quite different from 'illegal immigrant'. Which of these terms, if any, is appropriate?

Düvell, who has written and researched extensively on the topic of illegal migration, writes:¹⁸⁶

... the concept of 'illegal migration' is a legal political and social construct of the twentieth century, which has only gained prominence during the latter third. It is a blurred concept; it is loaded with ideological import; it is highly practised; and political intentions lurk behind its application and can occasionally be an iron too hot to touch. In fact, 'illegal migration' has become a kind of war cry, to be found worldwide in policies as diverse as trade agreements, development policies, military strategies and international relations.

For Dauvergne, the label 'illegal' is 'empty of content'.¹⁸⁷ She points out how in Australia for example, in 2001, the largest group of 'illegals' were *British* visitors who had overstayed their legal welcome – hardly who comes to mind when we think of 'illegals'.¹⁸⁸ Dauvergne explains the label in terms of identity and nation:¹⁸⁹

We imagine illegals as desperate and needy and other. The label obscures differences among the individuals it is applied to, even those differences that matter to the law which could, for example, carry an entitlement to remain as a refugee. Homogenizing individual identities under this label which has so little attributes we desire... The desperation of the illegal other appears in contrast with our prosperity as a nation. We 'have' and they 'have not'; entitlement to membership is ours to bestow...

¹⁸⁶ Düvell, *supra* note 180 at 29.

¹⁸⁷ Dauvergne, *supra* note 184 at 93.

¹⁸⁸ Dauvergne, *supra* note 184. See also Dauvergne, *supra* note 22.

¹⁸⁹ *Ibid.*

For Heckmann, the state's knowledge of the existence of an illegal migrant is a critical factor in developing a typology of 'illegal immigrants'. He describes three categories of illegal immigrants which he firstly divides into those who cross the border with the knowledge of the state and those who do not. Those crossing with the knowledge of the state are then subdivided into those with genuine documents and those with false documents.¹⁹⁰

For the second word – the noun – I prefer the term 'migrant' over 'immigrant' or 'worker' as 'migrant' captures the full range of possible scenarios we might consider 'illegal', 'irregular' or 'undocumented'. For the first word – the adjective – I prefer the term 'illegal' mainly because of its legal reference. Caution is necessary not to equate 'illegal' with 'criminal' and illegal is therefore meant in its most literal sense.

However, even with some basis for choosing the term 'illegal migrant' we are no better off in identifying the kinds of persons we might classify as being 'illegal migrants'. This remains very unclear. For example, do we include someone who overstays their visa by only a few days? What about those attempting to sneak into the country but who are apprehended and denied entry? Imagine the following five scenarios:

1. A citizen of a South American country comes to Canada as a visitor. His/her status expires in July but he/she plans to stay an extra month to help out working on a friend's landscaping business and then return home in September.
2. A citizen from a Central American country whose claim to refugee protection is refused and he/she remains in Canada awaiting a decision on an application for leave and judicial review of this refugee decision in the Federal Court.

¹⁹⁰ Friedrich Heckmann, "Illegal Migration: What Can We know and What Can we Explain" Ch. 10 in Y. Michal Bodemann and Gökçe Yurdakul *Migration, Citizenship, Ethnos* (New York: Palgrave Macmillan, 2006) at 199.

3. A citizen of an Asian country appears at the airport inspection line with a false passport and therefore might be either:
 - a. caught with the false passport and denied entry; or
 - b. given a stamp in the passport and told to enjoy his/her stay in Canada.
4. A citizen of a European country applied for and received permanent residence based on a fraudulent marriage to their friend's cousin. The marriage was entered into for the purpose of immigration but the applicant successfully fooled the immigration officer examining their application.
5. A citizen of an African country without any passport enters Canada in a shipping container. He/she is living with his/her romantic partner who is a permanent resident. They plan to live together for a year and then apply for permanent residence in the common partner in Canada class. Although it is doubtful he/she will be able to obtain a passport.

In each of the above situations there is one common thread: all of them have done something in breach of the *IRPA*. However, does that alone qualify them as an 'illegal migrant'? If so, Dauvergne's example of British citizens overstaying their visas in Australia, or the first example above, potentially cast the net of 'illegal migrants' far wider than the term often implies. For these people the difficulty is that their intention is likely to leave in the very near future – whereas 'illegal migrants' must imply a greater sense of permanence, shouldn't it?

Another difficulty is whether it matters that the authorities have (or do not have) knowledge that someone is in fact inside the country illegally. In the above five situations, from the Canadian government's perspective, the only persons that the government would be aware are #2 and #3a. The others may easily be counted as 'legals' or simply remain undetected even though they may be far more morally culpable than the 'illegals'. Moreover, this highlights the fact that the government has no count, check or tracking mechanism for those exiting Canada.

The refugee claimant in situation #2 illustrates a third difficulty in defining illegal migrants. This person may in fact fit the definition of a refugee, but simply one Board Member on a given day found otherwise.¹⁹¹ While awaiting a decision on the judicial review application, are they an illegal migrant? This suggests that one's 'status' as an 'illegal' may fluctuate in and out of being 'illegal'. As situation number 5 illustrates, the common law partner in Canada makes them eligible for permanent residence in Canada. Before, during and after the application, they might be 'illegal' one day and instantly 'legal' the next. If so, how do we count or estimate the number of illegal migrants?

These scenarios are only a few illustrations of the trouble in defining 'illegal migrants'. In this sense, Dauvergne's suggestion that the term is 'empty of content' is warranted. It follows then, if defining illegal migrants with any precision is problematic, the 'estimations' of how many 'illegal migrants' are inside the country must be even more problematic. Who from the above five situations is included in a count of illegal migrants? Let us examine the prevailing estimate of the number of illegal migrants in Canada.

HOW MANY ILLEGAL MIGRANTS ARE THERE IN CANADA?

The short answer to the question of 'how many' is that even with a clear definition of who is and who is not an illegal migrant', no one has the faintest idea how many illegal migrants are in Canada.¹⁹² Despite this, in Canada, a magical estimation

¹⁹¹ See for example Showler, *supra* note 48.

¹⁹² This was the "shameful" answer that the British Director of Enforcement and Removals in the Home Office Immigration and Nationality Directorate provided the media with in May of 2006. Such realism is commendable for its accuracy. See Alison Little "Now we give up chasing illegals; immigration chief's

that pops up in the media and even government statements from time to time is 200,000.¹⁹³ In this section I will demonstrate why this number has no scientific basis and after an examination of some key figures, why it is dangerous as Düvell warns, to equate ‘refugees’ with ‘illegal migrants’.¹⁹⁴

Perhaps the best example of why Canada’s ‘200,000’ estimate is so unscientific is the fact that this is the same number that the government estimated to exist in the early 1970’s.¹⁹⁵ One might have expected this number to change in the last 40 years. It was the 1983 Parliamentary report (the “Robinson Report”) entitled ‘Illegal Migrants in Canada’ that would reject the government’s estimate of 200,000 and recommended a *maximum* figure of 50,000 ‘illegal migrants’ to be in Canada.¹⁹⁶ While the Robinson Report did not claim any accuracy with their 50,000 estimate in 1983, the Report arrived at this conclusion after considering several important indicators. For example, the report noted that only 15,000 – 18,000 illegal immigrants came forward during the 1973 amnesty.¹⁹⁷ While certainly ‘amnesty’ programs never bring out as many ‘illegals’ as expected (for a

shameful confession” The [UK] Express (17 May 2006) 1; “Illegal immigration: removed from reality” The [London] Guardian (18 May 2006) 36 as cited in Dauvergne (Forthcoming) – Ch. 2 “on Being Illegal”.

¹⁹³ See for example: Marina Jimenez “200,000 illegal immigrants toiling in Canada’s underground economy” *Globe and Mail* Saturday, November 15, 2003, Page A1

¹⁹⁴ Düvell, *supra* note 180 at 28. Note also the infamous online encyclopedia, “Wikipedia” which presently states the following with respect to “illegal immigrants”: “Some illegal immigrants enter a country legally and then overstay or violate their visa. For example, most of the estimated 200,000 illegal immigrants in Canada (perhaps as high as 500,000), are refugee claimants whose refugee applications were rejected but who have not yet been ejected from the country.” Online: http://en.wikipedia.org/wiki/Illegal_immigrant. [Last visited: 15 August 2007] Note however that Wikipedia’s information may be changed and altered by its viewers.

¹⁹⁵ Robinson Report, *Illegal Migrants in Canada*, *supra* note 6 at 23.

¹⁹⁶ Robinson Report, *Illegal Migrants in Canada*, *supra* note 6 at 26.

¹⁹⁷ Robinson Report, *Illegal Migrants in Canada*, *supra* note 6 at 23-24.

variety of reasons)¹⁹⁸ it was nevertheless a relatively low number. The Robinson report also considered provincial studies on the topic, the number of “Minister’s Permits” granted during the previous decade as well as the number of people apprehended and removed in each province.

Düvell highlights the impossibility of ascertaining the exact size of the phenomenon of illegal migration and the need for estimates to be treated with the ‘utmost of caution.’¹⁹⁹ Common figures in the United States or the European Union – where more scientific studies have occurred²⁰⁰ – place the estimated number of illegal migrants at 10-12 million in the United States²⁰¹ and between 4 – 7 million in Europe²⁰². Düvell has calculated the sum of all international research on illegal migration worldwide, suggesting that there are at least 22 – 44 million undocumented immigrants worldwide.²⁰³

Examining the number of removals, failed refugees and the number of H&C applications, there is very good reason to be highly skeptical in 2007 of the 200,000 estimate. It is likely an overestimate, but again, it begs the question of how ‘illegal

¹⁹⁸ See for example, Düvell, *supra* note 180 at p. 25.

¹⁹⁹ Düvell, *supra* note 180 at 19.

²⁰⁰ See, for starters, Douglas Massey “Measuring Undocumented Migration” (2004) *International Migration Review* 38(3): 1075 – 1101. See also Douglas Massey “The Ethnosurvey in Theory and Practice” (1987) *International Migration Review* 21(4): 1498 – 1522. Düvell provides an excellent summary, criticism and collection of major quantitative and qualitative studies attempting to count the number of illegal migrants in various countries in Düvell, *supra* note 180 at 34 – 38.

²⁰¹ Pew Hispanic Centre which estimates the ‘unauthorized migrant’ population of the USA to be between 11.5 and 12 million. Jeffrey S. Passel, “The Size and Characteristics of the Unauthorized Migrant Population in the U.S. Estimates Based on the March 2005 Current Population Survey” Pew Hispanic Center, March 7, 2006, p. 1. Online at <http://pewhispanic.org/files/reports/61.pdf> [Last visited: 15 August 2007].

²⁰² Düvell, *supra* note 180 at 17.

²⁰³ Düvell, *supra* note 180 at 19.

migrants' are defined? Let us examine some of the data collected through *Access to Information* beginning with 'failed refugees'.

FAILED REFUGEES

In popular discourse on illegal migration, there is a dangerous tendency to equate refugee claimants or asylum seekers as synonymous with illegal migration.²⁰⁴ The 'danger' in doing this is to mischaracterize genuine asylum seekers from non-genuine people and to suggest that those fearing persecution are somehow in the wrong. For so many, nothing could be further from the truth. Linking the two concepts also presupposes a false sense of faith in the refugee determination system. Indeed many refugees become caught in what Showler calls the 'refugee sandwich', that is, people who may be legitimate refugees but who are failed by a refugee determination system with institutional or individual Board Member bias and/or incompetence.²⁰⁵ It is the goal of refugee determination systems to determine exactly this issue: who are the genuine asylum seekers and who are not. However, as many successful judicial review decisions at the Federal Court evidence, the IRB does not always get it right. Acknowledging they may not be perfect, or even far less than perfect, the IRB nevertheless has legitimacy as a determination system and accordingly some failed refugee claimants who refuse to leave Canada might, nevertheless, be considered 'illegal migrants'.

An interesting question arises: at what point does a failed refugee become an illegal migrant? Have they been illegal migrants all along but no one knew until the IRB

²⁰⁴ See the reference to "Wikipedia", *supra* note 194. For this reason I was reluctant to use a family of so called failed refugees as the central focus for this ethical analysis, however they were chosen because they are common, heavily regulated and accordingly provide for more relevant legal analysis.

²⁰⁵ Showler, *supra* note 48.

determined the claim? Once the claim was refused, do they become 'illegal' rather than 'legal'? What then about those who are accepted? All refugees are issued a removal order at the time when they make their claim and their eligibility is assessed.²⁰⁶ This removal order is, however, an 'unenforceable removal order'.²⁰⁷ After being determined eligible to make the refugee claim the file is referred to the IRB where the determination of whether they are a refugee or not is made. If accepted, the claimant becomes a 'refugee' and thus a 'protected person in Canada'.²⁰⁸ Protected persons are eligible to apply for permanent residence in Canada in their own separate class.²⁰⁹ If the claim is refused, however, the removal order will come into force 15 days after receiving the decision, if the claimant does not leave Canada enforcement procedure begins.²¹⁰

However, with some exceptions²¹¹, if a failed refugee applies for leave and judicial review to the Federal Court of the negative refugee decision, the removal order is stayed.²¹² For this reason alone it is in a failed refugee's interest to apply for judicial review. Worth noting is that a related ethical concern may arise for a lawyer at this point if the judicial review of the refugee decision has questionable merit. Judicial review is limited in scope such that it is not an 'appeal' of the merits of the refugee claim. The

²⁰⁶ *IRPR*, *supra* note 12, s. 228(3).

²⁰⁷ *IRPA*, *supra* note 4, ss. 48 and 50.

²⁰⁸ *IRPA*, *supra* note 4, s. 95(2).

²⁰⁹ *IRPA*, *supra* note 4, s. 21(2) and *IRPR* s. 175

²¹⁰ *IRPA*, *supra* note 4, s. 49.

²¹¹ If the IRB makes a finding that there was "no credible basis" for the refugee claim, there is no stay of the removal order. See *IRPA* s. 107(2) and *IRPR*, s. 231(2)

²¹² *IRPR*, *supra* note 12, s. 231.

benefit of receiving a statutory stay for a mere \$50 fee²¹³ however, provides a great incentive to file an application for leave and judicial review with the Federal Court. A lawyer's ethical duty as an advocate is to advance only non-frivolous legal proceedings and not to abuse the legal process. Thus a lawyer would be on shaky ethical ground if he or she were to file an application without merit for the sole purpose of obtaining a stay. Typically applications for leave and judicial review of negative refugee determinations are dismissed without a hearing and without any reasons. This typically occurs within six months of filing the application. Therefore, if the failed refugee plans on submitting an H&C application, it should be done sooner rather than later as the decision on the H&C application can take over a year and removal, which is initiated soon after the Federal Court application is dismissed²¹⁴, may be less than a year away.

If leave is granted a hearing will follow within 90 days and the stay remains in effect until the judicial review is determined. However, as most application for leave will be refused without any reasons, despite the theoretically low legal threshold for leave²¹⁵, the removal process begins after leave is denied and assuming that the failed refugee decides not to leave on their own accord.²¹⁶ The removal order remains unenforceable until a final application – the Pre Removal Risk Assessment (PRRA) – is determined.

²¹³ This represents the Court's filing fee required to initiate an application in Federal Court pursuant to section 1(1)(d) in Tariff A in the *Federal Court Rules*, S.O.R./98-106. Of course, any experienced litigant would point out that the actual cost of pursuing such an application would be much more when the lawyer's fees and disbursements are considered.

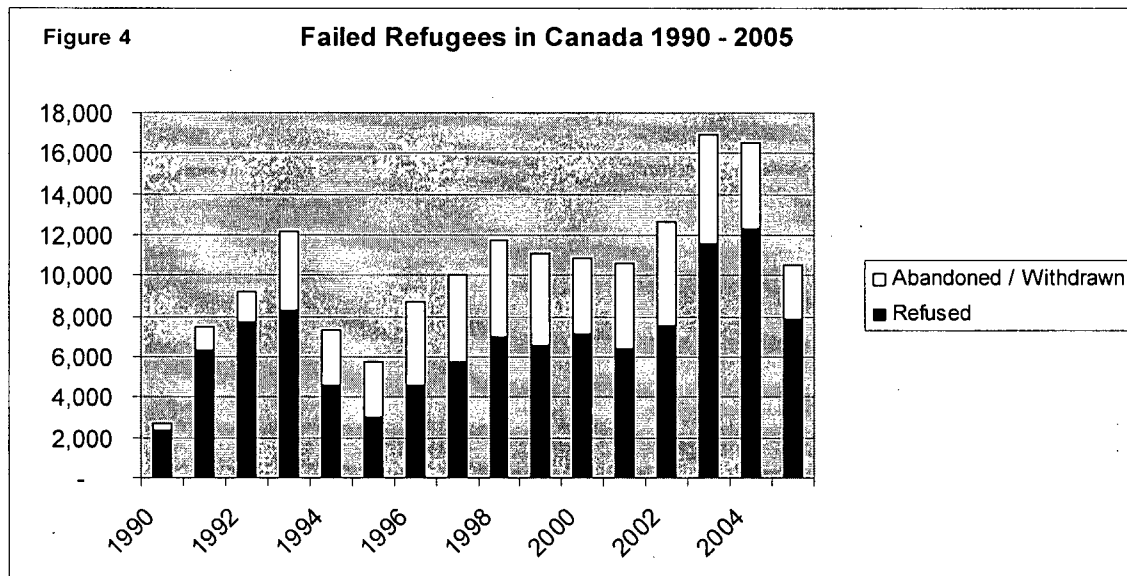
²¹⁴ The statutory stay referred to in, *surpa* notes 8 and 9, *surpa*, ends when the Federal Court application is dismissed.

²¹⁵ See for example *Wu*, *surpa* note 8, *Kurniewicz v. Canada (Minister of Employment and Immigration)* (1974), 6 N.R. 225; and *Capelos v. Canada (Minster of Employment and Immigration)* (1991), 43 F.T.R. 280 (F.C.T.D.).

²¹⁶ See notes 211, 212 and 213, *surpa*.

Thus the critical point with which we might accurately call a failed refugee an ‘illegal migrant’ is the point at which they become eligible for a PRRA. Failed refugees might become a kind of ‘illegal migrant’ when their application is refused but they nevertheless intend to remain in Canada.

Figure 4 below reports the annual number of failed refugees in Canada from data obtained through a request pursuant to the *Access to Information Act*.²¹⁷

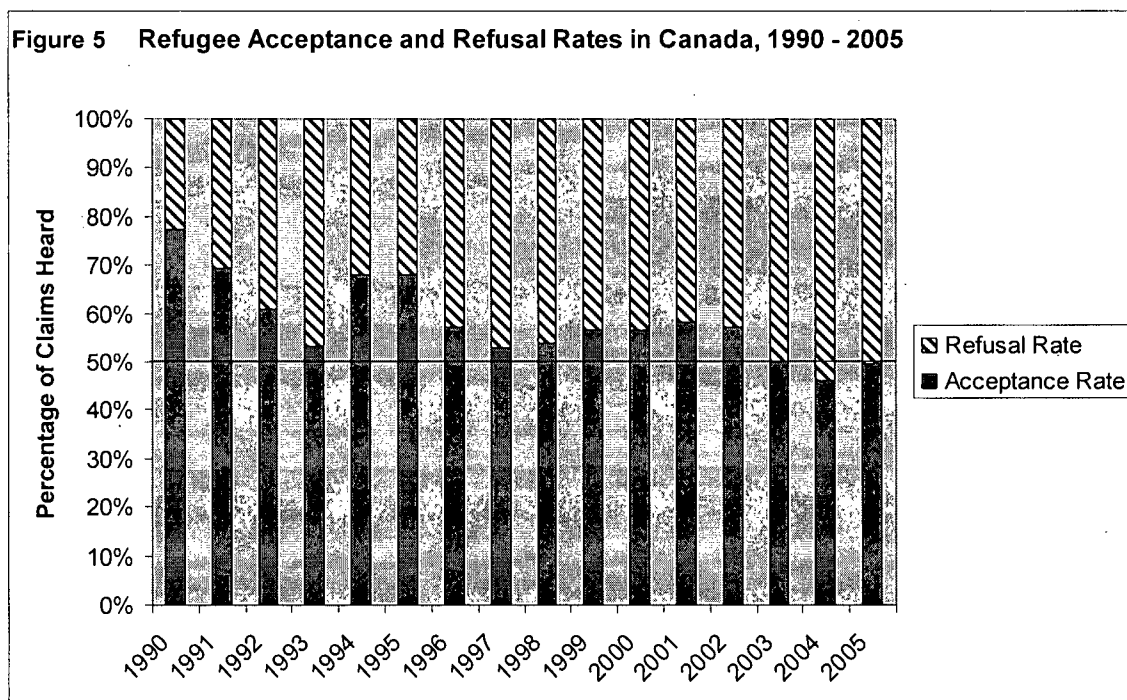


The aggregate number of ‘failed refugees’ is not exceptionally high, especially when considering the bigger immigration picture. Most years approximately, 10,000 people, less than half a percent of all immigrants, are ‘failed refugees’. Of this number some will leave Canada on their own accord, some will be removed by the CBSA, some will successfully have their claims re-opened or judicially reviewed. Still others will become permanent residents either through the family class or through H&C. A small portion will become landed in the Pre Removal Risk Assessment (PRRA) class.

²¹⁷ See note 35, *supra*.

According to CIC, just over 20,000 failed refugees have filed H&C applications between 1990 and 2005.²¹⁸

The acceptance and refusal rates of the IRB are shown below in Figure 5. These figures represent the percentage of claims accepted and refused as a percentage of the claims heard, rather than finalized, so as not to skew the data with variations in the number of claims abandoned or withdrawn. The data was similarly obtained through a request pursuant to the *Access to Information Act*.²¹⁹



From the chart above, it might be tempting to say that refusal rates are on the increase, however, a critical variable is the country of origin. Claims from Burundi or Somalia have a much higher success rate than, say Ecuador or Turkey. Thus fluctuations

²¹⁸ According to Access to Information requests A-2006-05889 and A-2006-05890 filed by the author in October 2006, by December of 2006, CIC assessed 9,121 H&C applications in 2006, 3,834 of which were categorized as HC1 – a classification we might consider our fact situation falling under. Just under half, 1,801 cases, were approved. In 2005, 1,643 HC1 applications were approved and over 4,000 H&C applications were approved across all H&C categories in that year.

²¹⁹ See note 35, *supra*.

in where refugee claimants are coming from may tell us much more about the rates than any other variable. For the past 15 years the most claims to refugee protection have overwhelmingly come from Sri Lanka. Table 2 below shows the top 10 countries in terms of claims referred to the IRB:

Table 2 Refugee Claims Filed in Canada from 1990 – 2005 – Top 10 Countries

Country	Total claims Referred	Average Annual Claims
Sri Lanka	35,669	2,229
China	23,618	1,476
Pakistan	18,179	1,136
India	15,408	963
Somalia	14,291	893
Mexico	11,778	736
Iran	11,734	733
Colombia	7,458	466
Nigeria	7,398	462
Congo-DR (Ex Zaire)	7,111	444

The countries of origin fluctuate annually, for example, in 2005, Mexico had the highest number of claims referred that any other country with 1,932 claims, but in 1990 it was one of the lowest with only 2 claims referred. In terms of acceptance and refusal rates, the overall acceptance rate of claims heard by the IRB over the period from 1990 – 2005 was 58% and the refusal rate was 42%. These numbers, however, as we might expect vary significantly from year to year and more importantly from country to country. Thus, to speak in aggregate terms is not terribly useful. Table 3 below shows the acceptance rates for the top 10 countries of acceptance by the IRB from 1990 – 2005.

Table 3 Refugee Claims Approved in Canada from 1990 – 2005 – Top 10 Countries

Country	Claims Approved	Approval Rate (% of Finalized Claims)	Approval Rate (% of Claims Heard by IRB)
Sri Lanka	28,093	81%	86%
Somalia	12,689	85%	92%
China	8,479	38%	49%
Iran	8,201	69%	77%
Pakistan	7,683	43%	54%
Colombia	4,673	69%	78%
Congo DR (Ex Zaire)	4,274	62%	67%
India	4,158	28%	38%
Lebanon	3,812	53%	61%
Turkey	2,689	60%	69%

Similar information is shown in Table 4 below with the top 10 refusal countries by the IRB from 1990 – 2005.

Table 4 Refugee Claims Refused in Canada from 1990 – 2005 – Top 10 Countries

Country	Claims Refused	Refusal Rate (% of Finalized Claims)	Refusal Rate (% of Claims Heard by IRB)
China	8796	39%	51%
India	6886	46%	62%
Pakistan	6549	37%	46%
Sri Lanka	4635	13%	14%
Mexico	4628	46%	70%
Nigeria	3361	48%	58%
El Salvador	3021	45%	55%
Romania	2667	48%	60%
Israel	2560	56%	78%
Iran	2471	21%	23%

Several observations are noteworthy from the data reviewed thus far. Firstly, the number of inland refugee claims that Canada receives – and in particular refuses – is only a very small portion of the bigger immigration picture. Secondly, the aggregate number of refugee claims has fluctuated considerably since 1990 however the average

has hovered more or less around 20,000 claims per year. Thirdly, while tempting to conclude that the IRB is becoming gradually less sympathetic with the success rate falling steadily from a high of 77% in 1990 to a low of 46% in 2004 where the refusal rate surpassed the success rate for the first time since 1990 – this might be explained with other variables. Most notably an increase in claims coming from Mexico and surrounding central American countries where the success rate is quite low. The success rates vary considerably by country of origin with countries such as Somalia having success rates of 90% and other countries such as Costa Rica having success rates of 7%. Thus as the number of claimants fluctuates by country of origin from year to year, so do the rates.

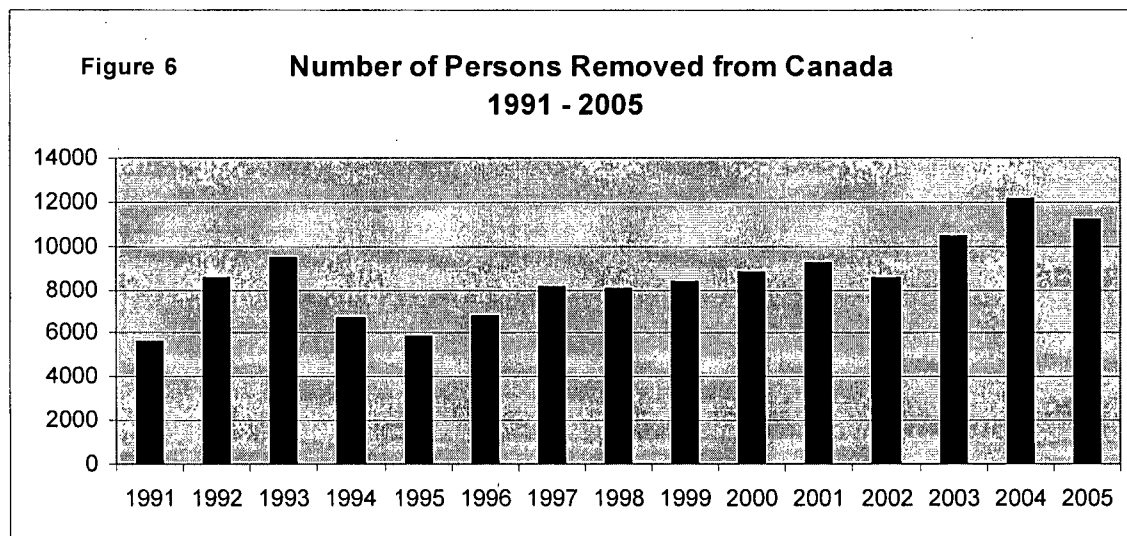
In aggregate terms there are only about 10,000 refugees refused each year. While removal is slow, anyone remaining in Canada more than 5 years after their refugee claims probably stands a good chance of remaining on humanitarian and compassionate grounds, which as I have emphasized in the introduction and will expand upon in the next chapter, considers one's 'establishment in Canada' and specifically, prolonged stay in Canada for reasons beyond the applicant's control.

REMOVAL ORDERS

The number of removal orders issued by the Canada Border Services Agency helps to shed some light on the number of illegal migrants in Canada. Consider first that Canada successfully removes approximately eight to ten thousand people annually.²²⁰

²²⁰ Access to Information request A-2006-02576 filed by the author with the Canada Border Services Agency in December of 2006 provided the number of 'foreign nationals' (as defined in the IRPA) effectively removed for the years 1991 – 2005 broken down by country of origin. The average number of people removed from 1991 – 2005 was 8,523. The highest number occurred in 2004 when 12,130 people

This does not include those who leave voluntarily but those who Canada removes by order. If there really are 200,000 illegal migrants then the fact that only 10,000 (or 2.5% of 200,000) are removed each year would indicate that illegal migration is either a low priority in Canada or that enforcement is ineffective – or both. However, in my view the more likely scenario is that the 200,000 estimate is an overestimate. Figure 6 below shows the number of persons who were in fact effectively removed by the CBSA and its predecessors.

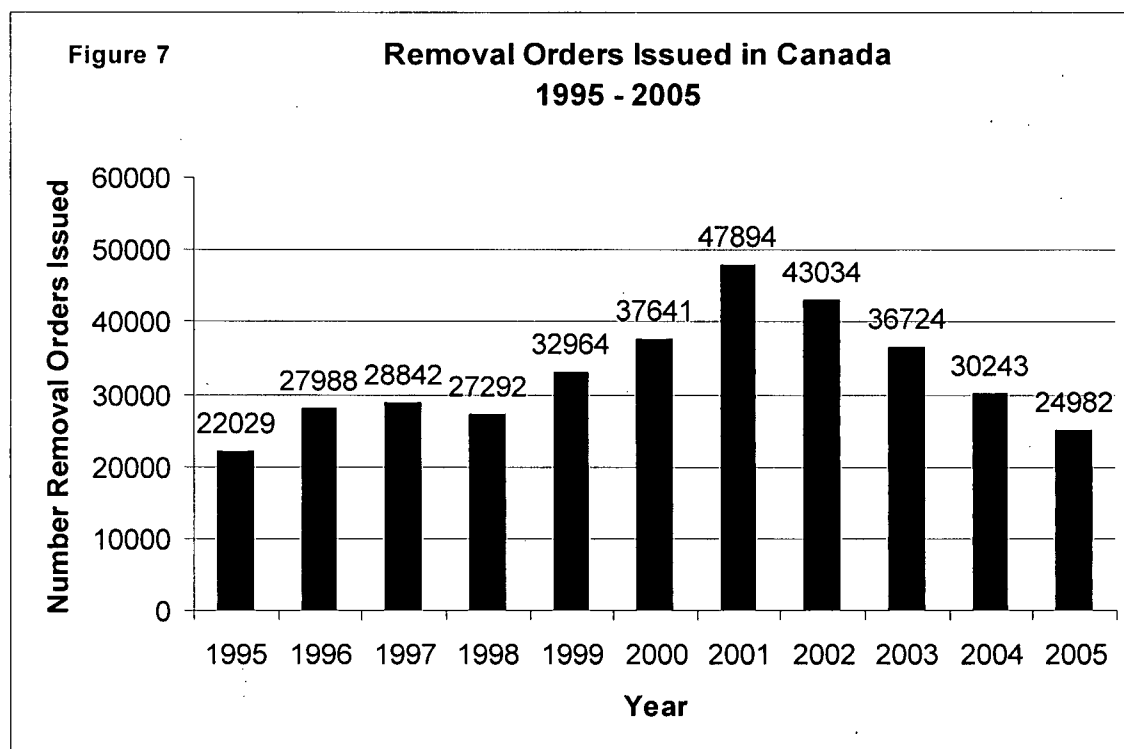


Thus in the past fifteen years, Canada has removed over 125,000 people and on average just over 8,500 people with the numbers increasing slightly in recent years. Such numbers do not indicate how many of these are failed refugee claimants but presumably some significant percentage would be failed refugees as their whereabouts are largely known and tracked by the government.²²¹

were removed. The lowest number was 1991 when only 5,621 people were removed. In 2005 there were 11,224 people removed.

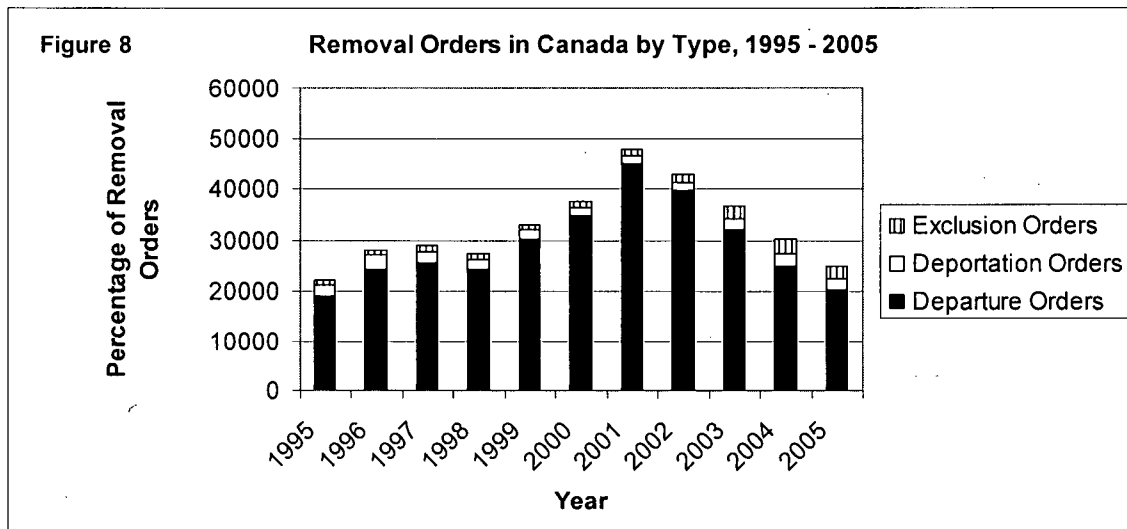
²²¹ It is interesting to note that if we were to add the total number of failed refugees for the past five years, the total number of cases is only 77,991. If we were to assume that all of the people effectively removed in the last 5 years have made refugee claims that were either refused or abandoned, then this would reduce the 77,991 figure to 17,709. Even if we assumed only half of the people removed in the last 5 years had

In contrast to the number of people actually removed, Figure 7 below lists the number of removal orders *issued* between 1995 and 2005 against foreign nationals. Removal Order here includes 'departure orders', 'deportation orders' and 'exclusion orders'.



The number of removal orders issued does not tell us much by way of estimating the number of illegal migrants in Canada. For starters, with the exception of a peak in 2001, Canada typically issues just under 30,000 removal orders each year. Secondly, when we examine the type of removal orders they are overwhelmingly 'departure orders' which in the scale of removal orders, are the least serious. Figure 8 below show the removal orders in Canada by type.

made refugee claims, this would still reduce the maximum number of failed refugees in Canada to likely 47,850. For this reason, the figures such as those mentioned in Wikipedia in note 194 are grossly exaggerated.



The peak in 2001 corresponds to the similar peak in refugee claims. As every refugee claimant in Canada receives a departure order at the time of making their claim²²², the peak in refugee claims in 2001 follows the very same trend as the number of departure orders. This leads us then to question the number of refugee claims in Canada as failed refugees, at some point in the process, may become ‘illegal migrants’.

CONCLUSION

The statistical analysis above has been provided primarily by way of background in order to help provide some context on the extent of illegal migration in Canada. The information however, begs the question of whether illegal migration is really a ‘problem’ in Canada. This will in turn effect the ethical analysis because if it is not really a ‘problem’ in Canada, arguably breaking the law to allow a family such as the one in our

²²² *IRPR*, *supra* note 12, s. 228(3).

fact situation to remain in Canada does not invoke a major ethical cost – at least from a consequentialist perspective.

At the outset, the political charge of illegal migration was highlighted. That is, two people learning of a family of ‘failed refugees’ in Canada might react with two completely opposite interpretations or opinions of the family. One might see the family negatively – as ‘illegal’, ‘queue jumping’, ‘bogus refugees’ and choose to highlight the fact that their refugee claim was refused and all the resources that were likely wasted dealing with processing, social assistance, appeals and removal of the family. From this perspective, the ‘problem’ is ‘them’ and not ‘us’ although our government’s failure to enforce the law expeditiously may call for immigration reform. This family is taking advantage of our ‘generous’ immigration system – a system that has become too soft and too generous towards ‘refugees’ and we need to deal with the problem of illegal immigrants. This is one view of ‘illegal migration’.

The other view might see the same family of failed refugees exactly the opposite – as victims, hard working, people in need of assistance and choose to highlight their contributions to Canada (particularly where they are working and filling labour shortages), community support and hope for their children’s future (if any). From this perspective the ‘problem’ is ‘us’ and not ‘them’. It is our marked division between the wealthiest and poorest nations of the world, through the ascription of ‘status’ to different ‘classes’ of people akin to birthright ‘feudal privilege’²²³ that calls out for reform. The system has failed these good hard working people. After all, Canada is built on

²²³ See Carens, Walzer, Weiner, Gibney and Dauvergne, *supra* note 46.

immigration – we are a country of immigrants. This is another view of ‘illegal migration’.

Somewhere in between these two polar views lies a more realistic picture of the situation. It would be foolish to ignore this socio-political context in the ethical analysis. There is reason to be sympathetic to our family of so called illegal migrants as much as there is reason to be disdainful. There is an aspect of queue jumping as much as there is no queue for them to enter in the first place. There is an inequality in keeping them out as much as there is one in allowing them to stay. Whether we consider their coming to Canada truly ‘voluntary’ is open to debate. In sum, discourse surrounding illegal migration enters a world of contradiction, complexity and controversy.

Given the political charge of the terms and policies surround illegal migration it is of utmost importance that discussions be transparent and informed. This thesis seeks to put issues of illegal migration as well as legal ethics out in the open for discussion. This chapter attempts to provide some factual basis or context on the ‘problem’ of illegal migration. Thus a few years down the road, when the government decides it is going to ‘take action’ or ‘combat’ illegal migration Canadians may be better equipped for critical and informed reflection about the discourse surrounding illegal migration. Hidden behind these words and numbers are political views of what is ‘mine’ and what is ‘yours’, views of the ‘kinds’ or ‘status’ of people that are desirable members of the community and conversely of the kinds of people that are undesirable. These issues must all come to the table if any discussion of illegal migration is going to be worthwhile or productive.

CHAPTER V-

APPLYING FOR 'STATUS' AND STALLING REMOVAL IN CANADA

As the Canadian government has divided up the responsibilities for removals and permanent residence status between the CBSA and CIC, so too will the analysis presented in this chapter. I will deal separately with the law of removals and the law relating to migration in Canada. For the family in our fact situation, both areas of the law are critical. Many families like the one describe unfortunately dwell on their refugee claim and focus efforts to prevent removal. In my view it does no good to stall the removal if they are unable to secure some sort of permanent resident status. This is why the H&C application is so critical. As demonstrated in chapter 3, our family is unlikely to qualify in any of the 'legal' categories of migration and the inland H&C application becomes their best – and only – hope of a life in Canada.

The previous chapters set out the broad categories of migration in Canada; the various classes and socio-legal context of illegal migration. In this chapter, we dive into the finer legal details of those categories and how they apply to the family in our fact situation. Beginning with permanent and temporary residence options, the analysis will focus on the few options for applying for permanent residence from inside Canada. Following this, I consider the law of removals and motions for stays of removal.

TEMPORARY RESIDENCE OPTIONS IN CANADA

Temporary residence applications including visitor, student and work permits are not particularly helpful for the family who has, and want to continue to make Canada

their home.²²⁴ Temporary resident permits are, as their name suggests, temporary. Typically they are for one or two years duration. One of the critical requirements and indeed one of the primary reasons temporary residence applications are refused, is satisfying an officer that you will leave Canada upon the expiration of your permit.²²⁵ For those who do not satisfy an officer of this requirement, their temporary resident applications will be refused.²²⁶ Justice von Finckenstein in *Murai v. Canada* considering a judicial review application of an overseas visa officer's refusal to issue a temporary resident permit articulated the legal principle of temporary entry as follows:²²⁷

The Officer in question asked himself the wrong question. Rather than asking himself "will she leave Canada once given ingress?" as he did ... he should have ... asked himself "will this person stay illegally in Canada if not successful under the program?"

Thus for those wishing to stay in Canada permanently, the temporary residence provisions have been drafted so as to preclude their entry into Canada. While several policy analysts have advocated for some kind of temporary status for illegal migrants, presently nothing exists. It is unclear how temporary permits will combat illegal migration when the underlying issue is that the family has become 'established' in Canada – they have made Canada their home and wish to remain on a permanent basis

²²⁴ Many policy analysts – both in Canada and the US – however recommend temporary work permits as a 'solution' to illegal migration.

²²⁵ *IRPA*, *supra* note 4, section 20(1)(b) provides that "every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish... (b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay." Subsection 179(b) of the *IRPR* provides that "An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national... (b) will leave Canada by the end of the period authorized for their stay..."

²²⁶ See for example *Boni v. Canada (MCI)* 2005 FC 31; *aff'd* 2006 FCA 68 but see also *Murai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 186.

²²⁷ *Murai*, *supra* note 226 at para 16.

so as to not cause further disruption to their lives and that of Canadians whom their presence benefits. We therefore turn to permanent residence options in Canada.

PERMANENT RESIDENCE OPTIONS IN CANADA

Permanent residence in Canada is therefore the goal for many 'illegal migrants'. They desire the opportunity to continue to live, work and study in Canada where they have already done so successfully – albeit illegally. From an immigration law perspective, the first important factor to consider in the quest for permanent residence is the requirement to apply for the visa from overseas. Waldman notes that, "from its inception, Canadian immigration policy has been based upon the concept of overseas selection, with the final decision reserved for the officer at the port of entry."²²⁸

Section 11 of the *IRPR* requires applicants for a permanent resident visa to apply to "the immigration office that serves (a) the country where the applicant is residing, if the applicant has been lawfully admitted to that country for a period of at least one year; or (b) the applicant's country of nationality...". This requirement only compels the applicant to *apply* from outside Canada. It does not require the applicant to *reside* outside Canada. Thus there is nothing preventing an applicant from remaining in Canada while their application for permanent residence sits in queue at an overseas embassy. The problem however, is where the applicant remains in Canada without temporary status. Overstaying one's visa is a contravention of the *IRPA* and has the effect of

²²⁸ Waldman, *supra* note 12.

making the person inadmissible to Canada.²²⁹ We consider this inadmissibility in the next section.

INADMISSIBILITY UNDER S. 41 AND TEMPORARY RESIDENT PERMITS

In the case of someone inadmissible under section 41 of *IRPA* for having been previously deported from Canada, the appropriate procedure is to apply for a “Temporary Resident Permit (“TRP”) which is, as the name indicates, a temporary class, like students, workers or visitors. The TRP replaced ‘minister’s permits’ under the previous *Immigration Act*. TRPs find their authority in section 24 of the *IRPA* which provides that:²³⁰

Temporary resident permit

24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

TRPs may be issued where the need to enter or remain in Canada is compelling and sufficient to overcome risk and the risk to Canadians or Canadian society is minimal. The factors relevant to a decision to issue a TRP are not terribly different in nature than the criteria for approving an H&C application. TRPs may be issued from inside or outside of Canada. In the case of persons who have been previously deported, they may be allowed to re-enter Canada pursuant to a TRP. However, Waldman notes

²²⁹ *IRPA* section 41. See also Waldman, *supra* note 12 at para 13.106 where he notes “The inadmissible classes set out in section 41 of the *IRPA* also contemplate that persons who have been previously ordered deported from Canada are inadmissible to Canada.

²³⁰ *IRPA*, *supra* note 4, s. 24. According to section 6.4 of the Manuals (IP 1 “Temporary Resident Permits”) “A TRP is a discretionary document that may be issued to inadmissible persons or persons reported or who may be reported for violation of the *IRPA* allowing them to come into or remain in Canada, where justified by exceptional circumstances. The temporary resident permit combines two authorities which previously existed under the *Immigration Act* of 1976: the Minister’s permit and discretionary entry.”

that “this situation might arise when the prescribed authorization under s. 52(1) of the *IRPA* (Authorization to Return to Canada or “ARC”) is not sufficient to permit the issuance of a temporary resident visa because of an applicant’s continuing inadmissibility. In such circumstances the person must apply for a TRP.”²³¹

The “Authorization to Return to Canada” finds its way into the *IRPA* through section 52 which provides that:

52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

and a critical subsection to our ethical analysis:

(2) If a removal order for which there is no right of appeal has been enforced and is subsequently set aside in a judicial review, the foreign national is entitled to return to Canada at the expense of the Minister.

Subsection 52(2) applies to our family as they do not have a right of appeal to the Immigration and Refugee Board, Immigration Appeal Division under section 63 of the *IRPA*. The fact that the legislation provides for the lawful return of someone – at the expense of the minister – whose removal has been overturned on judicial review places the lawyer on very shaky ground advising their client not to appear for removal. The lawyer ought to pursue the legal option of setting aside the removal order.

The ethical problem however arises long before any judicial review of the removal order will ever be heard. More likely it will be denied leave. It is considered in a summary way during a motion to stay the removal order as the applicant must establish a ‘serious issue to be tried’. Nevertheless, legally speaking, until the judicial review application is dismissed, there is a lawful mechanism for return to Canada provided for in the *IRPA*.

²³¹ Waldman, *supra* note 12 at para 14.265 on p. 14-114 to 14-115.

POWERS OF ARREST, DETENTION AND PROSECUTION

The *IRPA* provides, “officers with broad enforcement power, including the power to arrest, to detain, to order a person’s release from detention subject to terms and conditions, and, ultimately, the power to remove a person from Canada.”²³² The power to arrest is found in section 55 of the *IRPA* and in the case of foreign nationals, the power is given to officers to arrest without a warrant. Section 55(2) provides that:

55. ... (2) An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,

(a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or

(b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

As Waldman notes:²³³

In practice, warrants are routinely issued in cases where persons fail to appear for inquiries, and for removal. The warrants are entered in the Canadian Police Information Centre [CPIC] computer so that, if a person is stopped anywhere in Canada and that person has been made the subject of an immigration arrest warrant, a routine check of a police computer will provide police with the necessary information to arrest that person pursuant to the immigration warrant.

Section 55 provides both the power to arrest and to detain. Detention remains a reality for the family. If detained by an officer, as foreign nationals, they have the right to a review of that detention within 48 hours of the detention. Section 57 provides that:

56. An officer may order the release from detention of a permanent resident or a foreign national before the first detention review by the Immigration Division if the officer is of the opinion that the reasons for the detention no longer exist. The officer may impose

²³² Waldman, *supra* note 12 at para 12.3 on p. 12-1.

²³³ Waldman, *supra* note 12 at para 12.7 on p. 12-2.

²³⁷ *IRPR*, *supra* note 12, s. 245.

any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary.

57. (1) Within 48 hours after a permanent resident or a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

The detention review will be before the Immigration and Refugee Board ("IRB"), however a separate division from the Refugee Protection Division ("RPD"). The review is before the Immigration Division ("ID") which is not to be confused with the third branch of the IRB, the Immigration Appeal Division ("IAD"). In a detention review hearing, the Board Member will decide whether to continue the detention or to release the foreign national with or without a bond, terms and conditions. Continued detention is only authorized where the government establishes that:

- (a) the person is a danger to the public;
- (b) or is unlikely to appear for an examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under s. 44(2);
- (c) the Minister is taking reasonable steps to inquire into a reasonable suspicion that the person is inadmissible on grounds of security or for violating human or international rights;
- (d) or the Minister is of the opinion that the identity of the foreign national has not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing his or her identity or the Minister is making reasonable efforts to establish his or her identity.

Of the four reasons for detention above, it is the second – the so called 'flight risk' that comes into play in the present analysis. The *IRPR* further set out the criteria for Board Members to consider in determining whether a foreign national represents a 'flight risk'.²³⁷

(a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

(b) voluntary compliance with any previous departure order;

(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

(g) the existence of strong ties to a community in Canada.

It will be difficult for the family to defend themselves that they are not flight risks. Thus if the family are detained they risk the real possibility of remaining in detention until they are removed. One final point of law on detention is the Federal Court in *Sahin v. Canada (Minister of Employment & Immigration)* where the Rothstein J (as he then was) held that a Member of the ID must consider all alternatives to detention and should only detain if he or she is satisfied that there is no alternative.²³⁸

Recently, the Supreme Court of Canada in *Charkaoui v. Canada*²³⁹ considered the constitutionality of the detention provisions in the *IRPA* in the context of security certificates.²⁴⁰ Security certificates are infrequently used and highly controversial provisions reserved primarily for the indefinite detention in serious cases of alleged terrorism. As such they are highly unlikely to be at issue for the family in our fact situation. Nevertheless the Court's general comments on detention under immigration

²³⁸ *Sahin v. Canada (Minister of Employment & Immigration)* [1994] F.C.J. No. 1534 (T.D.); (1994), 85 F.T.R. 99.

²³⁹ *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9.

²⁴⁰ See sections 77 – 84 of the *IRPA*, *supra* note 4.

law are noteworthy. The Court held that the principles of fundamental justice and the guarantee of freedom from cruel and unusual treatment require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. The person must be accorded meaningful opportunities to challenge his or her continued detention or the conditions of his or her release.²⁴¹

HUMANITARIAN AND COMPASSIONATE CASES

In 1983, ten years after Canada's first and only Canadian immigration amnesty, the Minister of Employment and Immigration at the time, Lloyd Axworthy commissioned a report on 'Illegal migration in Canada'. The mandate of this "Robinson Report" was "...to undertake a study of illegal immigrants in Canada, analyze the origins and extent of the problem, and provide [the Minister] with suggestions..."²⁴² Among its findings, the report rejected the approach of amnesty, instead recommending a case by case approach. The benefits of a case by case approach were that it would allow for greater flexibility, ensure that only desirable illegal migrants were permitted to stay, and finally it would presumably avoid the concern of those opposed to amnesty – avoiding the encouragement of illegal immigration. This case by case approach recommended in the Robinson report is, in my view, reflected in the modern H&C application process.²⁴³

²⁴¹ *Charkaoui*, *supra* note 239 at paras. 97, 98, 105 and 107.

²⁴² Robinson Report, *supra* note 6.

²⁴³ As noted in the introductory chapter, my labeling of the modern H&C process as kind of a case by case amnesty is not to suggest that the system has been designed with this intent, rather it is illustrative of its practical effect. Courts are quick to point out that the H&C process is not designed to undermine Canada's

The authority for the H&C application comes from section 25 of the *IRPA* “Humanitarian and compassionate considerations” which provides that:²⁴⁴

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

As argued in the introductory chapter, the Canadian H&C application process acts like a “case by case amnesty”. It enables anyone in Canada, regardless of their status or inadmissibility²⁴⁵ to apply for permanent residence based on humanitarian and compassionate grounds. However, rather than offering a blanket amnesty to everyone, the H&C process attempts to filter deserving migrants from undeserving ones. This begs the question of who is deserving of a humanitarian and compassionate exemption from the requirements of permanent residence? Let us examine the factors that officers consider in assessing H&C applications as these factors greatly influence the ethical approach as the lawyer attempts to examine the merits of the case.

The legal standard that the applicant must meet in order to establish sufficient H&C grounds is that of ‘unusual, undeserved or disproportionate hardship’. The applicant must demonstrate why their “personal circumstances are such that having to

immigration system or encourage illegal migrants coming to Canada. See *Legault, supra* note 7 at para 63. A qualification on the use of the analogy is necessary however in that the H&C system differs from an ‘amnesty’ because it is a highly discretionary process. Reasonable officers could easily differ in opinion on whether to approve or refuse a given H&C request, whereas when we think of an amnesty, so long as basic criteria are established, a less discretionary and more ‘rubber stamp’ approval process is envisioned.

²⁴⁴ *IRPA, supra* note 4, s. 25.

²⁴⁵ Whether s. 25 can overcome inadmissibility is a contentious issue. CIC takes the view that it does not but any plain reading of section 25 does not support this view.

obtain a permanent resident visa from outside of Canada would cause unusual and undeserved or disproportionate hardship.” In assessing H&C applications officers consider a wide range of factors including, the best interest of any children involved, whether the applicant has family in Canada (in particular, immediate family), the degree of establishment in Canada, and less significantly any risk factors the applicant would face if removed from Canada.²⁴⁶

BEST INTERESTS OF THE CHILDREN

After the *Baker*²⁴⁷ decision the ‘best interests of the children’ were brought to the forefront of H&C applications and many other areas of immigration law including stays of removal²⁴⁸ and deportation appeals.²⁴⁹ Section 25 of IRPA now specifically refers to the best interest of children. *Baker* involved a Jamaican citizen who had been in Canada for 11 years working illegally as a live in caregiver. She had four children (all Canadian citizens) while she was in Canada. She also suffered from mental illness and had received social assistance while in Canada. She was “was ordered deported in December 1992, after it was determined that she had *worked illegally in Canada and had overstayed her visitor’s visa*.” An immigration officer refused her application for permanent residence based on H&C grounds and the case went all the way to the

²⁴⁶ See *Immigration Manuals* IP 5 “Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds” Online: <http://www.cic.gc.ca/english/resources/manuals/ip/ip05e.pdf> [Last visited: 15 August 2005]. Risk factors are typically unsuccessful on H&C applications as the H&C officers refer the portion of the application dealing with risk to the same CBSA officers who determine PRRA applications. Recall that PRRA applications have a less than 5% approval rate. Building an H&C application on risk alone is very likely to fail.

²⁴⁷ *Baker*, *supra* note 13.

²⁴⁸ See for example *Martinez*, *supra* note 8.

²⁴⁹ See for example *Eugenio v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1192.

Supreme Court of Canada where the Court held the officer's decision to be biased and unreasonable and failed to consider the best interests of the children. Subsequent decisions of the Federal Court of Appeal in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*²⁵⁰ and *Legault*²⁵¹ have reinforced the importance of the best interests of the children in immigration decisions.²⁵² This is not to suggest, however, that having a child in Canada translates into a right to remain in Canada. Indeed in *Legault* Decary J.A. noted that:²⁵³

It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada.

This line of reasoning has similarly been invoked in the context of a removal officer's decision whether to defer removal while an outstanding H&C decision. Madam Justice Snider in *John v. Canada (Minister of Citizenship and Immigration)* discussed the limits of the best interests of the children with respect to the *Charter*:²⁵⁴

This Court has confirmed on a number of occasions that the fact of having Canadian children does not confer any *Charter* right on parents to remain in Canada and that these children have no *Charter* right to demand that the Canadian government not apply to their parents the penalties provided for violation of Canadian immigration law (*Naredo v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 867 (C.A.) (QL); *Alouache v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 562 (C.A.) (QL)).

²⁵⁰ *Hawthorne v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No.1687.

²⁵¹ *Legault*, *supra* note 7.

²⁵² See for example *Ahmad v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 826 (T.D.); *Raposo v. Canada (Minister of Citizenship and Immigration)* 2005 FC 118; *Del Cid v. Canada (Minister of Citizenship and Immigration)* 2006 FC 326; *Love v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1569 and *Munar v. Canada (Minister of Citizenship and Immigration)* 2006 FC 761

²⁵³ *Legault*, *supra* note 7 at para 12.

²⁵⁴ *John v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 583 (T.D.) (QL) at para 32.

Thus, while the 'best interests of the children' may be the immigration lawyer's best argument on an H&C application such interests do not necessarily trump the state's removal mandate nor do they guarantee a positive H&C determination.

FAMILY IN CANADA

The existence of close family members in Canada is also a critical factor. In February of 2005, CIC announced a significant change in policy relating to the spouse or common law partner in Canada class.²⁵⁵ In effect, then Minister of CIC, Joe Volpe gave a blanket H&C exemption from the requirement that one must be 'in status' in Canada to qualify in the unique in Canada spousal category. 'Lack of status' was excusable given the overriding right of family reunification for spouses. 'Lack of status' is a great euphemism for 'illegal migrant' used in the policy change. Moreover lack of status due to working illegally was also exempted under the policy which remains in effect today. This important policy change was long overdue and returned the law to its pre-*IRPA* form for spouses in Canada. Because of the immigration advantages of being married, there are a host of other ethical issues that may arise in this context for the immigration lawyer. Moreover, scrutiny over such applications might alarm many civil libertarians who believe that the government does not belong inside the bedrooms of the nation. Immigration officers seem to have an exemption from this principle.

²⁵⁵ See <http://www.cic.gc.ca/english/department/media/releases/2005/0504-e.asp> [Last visited: 15 August 2007].

ESTABLISHMENT IN CANADA

In terms of establishment, the Immigration Manuals set out five questions for assessing the degree of establishment and these have generally received acceptance with the Federal Court. Note that the Manuals do not have the force of law, rather they are indicative of government policy. These 'establishment factors' include:

11.2 Assessing the applicant's degree of establishment in Canada

The degree of the applicant's establishment in Canada may include such questions as:

- Does the applicant have a history of stable employment?
- Is there a pattern of sound financial management?
- Has the applicant integrated into the community through involvement in community organizations, volunteer or other activities?
- Has the applicant undertaken any professional, linguistic or other study that show integration into Canadian society?
- Do the applicant and family members have a good civil record in Canada (e.g. no interventions by police or other authorities for child or spouse abuse, criminal charges)?

The longer one has spent in Canada – even illegally – the more established one may have become and therefore the stronger the H&C factors. Under the previous *Immigration Act* a unique category known as “Deferred Removal Order Class” (DROC). The purpose of the DROC regulation was to permit failed refugee claimants who had been living and working in Canada for a lengthy period of time with no criminal record, without having been removed, to apply to become landed. Among the criteria for membership in that class, was that 3 years must have elapsed since the time when the applicant was determined not to be a convention refugee.²⁵⁶ Establishment under section

²⁵⁶ See the discussion of the DROC program in *Alexander v. Canada (Minister of Citizenship and Immigration)* (1996), 115 F.T.R. 258 (T.D.).

25 incorporates similar logic. Recognizing the difficulty most economic class migrants have becoming established, it is thus counterproductive to remove migrants who have found steady employment and done everything we expect of immigrants. Officers look to a record of steady employment, payment of taxes, volunteer work, involvement in the community, building of relationships and friendships, etc... These sorts of economic factors, particularly steady employment, are often critical considerations in the decision. Dauvergne notes how such economic factors are really at odds with any commonsense understanding of 'humanitarianism' or 'compassion'. She writes:²⁵⁷

Intuitively we reserve our compassion for those who are the most needy. Equally, money is our most common way of quantifying and comparing need. We might expect, therefore, that the benefit of a humanitarian and compassionate legal provision would go to those with the most need. Canadian courts treat economic factors in a variety of ways, none of which correspond closely with a commonsense understanding of compassion.

Nevertheless, establishment factors are critical to making out a strong H&C application. These 'establishment' factors raise a central and important question for the ethical analysis: ought an illegal migrant to benefit from their own wrongdoing? This is both a tough ethical question as well as a legal one. According to the Manuals:²⁵⁸

Positive consideration may be warranted when the applicant has been in Canada for a significant period of time due to circumstances **beyond the applicant's control**. [emphasis in original]

The emphasis put in the manuals for officers to consider factors *outside the control of the applicant*, is indicative of the government's concern with people abusing

²⁵⁷ Dauvergne, *supra* note 22 at 141.

²⁵⁸ See *Immigration Manuals* IP 5 "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" Online: <http://www.cic.gc.ca/english/resources/manuals/ip/ip05e.pdf> [Last visited: 15 August 2007] at section 5.21. While the Manuals are not binding authority, they are indicative of CIC policy.

humanitarianism. As we saw at the outset, such rights do not exist at common law, and they were created to deal with exceptional cases. As we will discover later in the ethical analysis, these are critical factors a lawyer may consider in assessing the underlying merits of the case and consequently the bounds of their ethical conduct.

Dauvergne further cites the Federal Court decision in *Muoz v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 166 (F.C.T.D) where Justice Muldoon held:²⁵⁹

The exhibited documents attached demonstrate what valuable members of Canadian society are the applicants, parents and children alike. From praiseworthy accomplishments in employment to praiseworthy accomplishments in education and praiseworthy participation in their general residential community, it is evident that Canada is the better for their presence here... From the evidence which the Court sees herein, it would be astonishing if their h.&c. assessment [sic] were not positively favourable.”

Similarly, Justice Dawson in *Raudales v. Canada (MCI)* held that:²⁶⁰

In my opinion, on all of the evidence before him, the officer made a patently unreasonable finding of fact in determining that Mr. Figueroa Raudales had not established himself in Canada more than would any other high school student. In circumstances where the community is donating funds and directly providing the wherewithal to cover Mr. Figueroa Raudales' living and education expenses, where the city council wrote to the Minister of Immigration to support the application, and where the principal and superintendent of schools wrote to support the H & C application, it cannot be said that Mr. Figueroa Raudales' establishment in the community is not significant and is no different than that of any other student. The finding is contrary to the overwhelming weight of the evidence.

Establishment is, pursuant to the Minister's guidelines as found in Chapter 5 of the Inland Processing Manual, a relevant factor to consider when assessing an H & C application. Absent a proper assessment of establishment, in my view, a proper determination could not be made in this case as to whether requiring Mr. Figueroa Raudales to apply for permanent residence from abroad would constitute hardship that is unusual and undeserved or disproportionate.

²⁵⁹ *Muoz v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 166 (F.C.T.D) at para 5 as cited in Dauvergne, *supra*, note 22 at 141.

²⁶⁰ *Raudales v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 3 at paras 18 – 19.

The Federal Court has not hesitated to intervene in cases where immigration officers hastily dismissed the significance of establishment factors.²⁶¹ This is not to suggest that establishment factors are the be all and end all. Justice Rouleau in *Nazim v. Canada (Minister of Citizenship and Immigration)* held that:²⁶²

[15] The humanitarian and compassionate process is designed to provide relief from unusual, undeserved or disproportionate hardship. The test is not whether the applicant would be, or is, a welcome addition to the Canadian community. In determining whether humanitarian and compassionate circumstances exist, immigration officers must examine whether there exists a special situation in the person's home country and whether undue hardship would likely result from removal. The onus is on the applicant to satisfy the officer about a particular situation that exists in their country and that their personal circumstances in relation to that situation make them worthy of positive discretion.

Similarly, Décary JA in *Canada (Minister of Citizenship and Immigration) v. Legault* held:²⁶³

The objectives of Canadian immigration policy cannot be viewed as an encouragement to foreigners that they should enter this country illegally and remain therein illegally so as to increase their chances of obtaining permanent residence.

Despite this, H&C applications leave illegal migrants with an option in Canada.

It is not always the most ideal option: decisions can take years²⁶⁴, and there is no stay of

²⁶¹ See *Fernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 899; *Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804; *Bansal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 226 and *Kim v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1461 at para 28.

²⁶² *Nazim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 125 at para 15.

²⁶³ *Legault*, *supra* note 7 at para 63.

²⁶⁴ Current processing times are listed on CIC's website: http://www.cic.gc.ca/english/information/times/canada/process-in.asp#perm_res. [Last visited: 15 August 2007] In November of 2006, this was listed at 16 – 17 months. By August of 2007 it was listed as 8 – 9 months for processing in Vegreville, Alberta – which represents only the first part of the process. As noted on the CIC website, the majority of H&C applications are referred to local CIC offices for processing and this may cause “further delay” which can range from a further 6 months to a year delay on average. The Federal Court is more likely to favour a stay of the removal where the H&C application has been outstanding for a considerable amount of time and is relatively close to a decision and has *prima facie* merit/chance of success. That is, an application closer to reaching a decision might tip the balance of convenience in favour of granting a stay – certainly moreso than an H&C application that was filed the day before filing for a stay application.

a removal order while the application is pending²⁶⁵ and many are ultimately refused by unsympathetic officers.²⁶⁶ The application is highly discretionary and thus the system is only as humane and compassionate as the officer deciding the application. The application has its own set of forms, and the same fees, as other types of applications for permanent residence.²⁶⁷

There is no limit to the number of times one may apply nor is there any prohibition from on who may apply. Ironically, there is some truth to the idea that the more illegal one is, the stronger the H&C application. Castles argues that contradictory migration policies are typical of western democracies.²⁶⁸ Contradiction will be a central theme relevant to the ethical analysis that follows.

Many scholars call for humanitarianism in migration law and policy.²⁶⁹ In my view, the option or possibility of obtaining permanent residence in Canada regardless of status or illegality embodies humanitarianism even if the criteria for selection may be other than a commonsense understanding of compassion or humanitarianism. The H&C application process is one of the strongest, most progressive and most enlightened approaches to illegal migration among western liberal democracies. Its contradictory

²⁶⁵ *IRPR*, *supra* note 12, s. 233 provides that the stay is only effective if there has been a positive H&C determination.

²⁶⁶ According to an Access to Information Request, in 2005, Canada received approximately 3500 H&C (non family) applications and approved just under half. *Supra* note 38.

²⁶⁷ *IRPR*, ss. 66 – 69. See also: <http://www.cic.gc.ca/english/information/applications/handc.asp> [Last visited: 15 August 2007].

²⁶⁸ Stephen Castles, "The Factors That Make and Unmake Migration Policies" (2004) *International Migration Review* 38(3), 852-884.

²⁶⁹ See for example Gibney, *supra* note 46, Dauvergne, *supra* note 22 and Carens, *supra* note 46.

nature gives rise not only to peculiar substantive decisions, but also the ethical dilemmas for lawyers attempting to advocate for clients in such an uncertain environment. The existence of the H&C application and this inherent contradiction is what will underlie the final ethical analysis in Part 4.

STAY OF REMOVAL ORDER

After the decision in *Toth v. Canada (Minister of Employment and Immigration)*²⁷⁰ the Federal Court has accepted jurisdiction to stay removal orders pending applications for leave and judicial review. The applicant bears the onus of establishing the standard and conjunctive tri-partite test for an interlocutory injunction from the Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*²⁷¹. The applicant must establish that there exists:

- (a) a serious issue to be tried,
- (b) irreparable harm; and
- (c) the balance of convenience favours the granting of a stay.

Such relief is sought by way of motion²⁷² pursuant to section 50 of the *Federal Court Act*. Typically, the underlying judicial review application relates to the negative decision on a pre-removal risk assessment application or the decision of the removal officer not to

²⁷⁰ *Toth*, *supra* note 9.

²⁷¹ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311

²⁷² Rule 169 of the *Federal Court Rules*, *supra* note 24.

exercise discretion to defer removal, or both. The relevance of an outstanding H&C application is open to debate but certainly looms in the back.²⁷³

In *Martinez*, Justice Simpson considered whether the existence of the undecided H&C Application obligates the removal officer to defer the removal of the Applicants where the completion of the H&C assessment is required to fulfill Canada's obligations under the *United Nations Convention on the Rights of the Child*²⁷⁴ which has been incorporated into the *IRPA* under section 3(3)(f).²⁷⁵ Justice Simpson granted a stay where the best interests of the child were at stake and there was an outstanding H&C Application pending. In assessing whether there was a serious issue, the Court in *Martinez* considered the removal officer's failure to apply and construe the *IRPA* in a manner that "complies with international human rights instruments to which Canada is a signatory"²⁷⁶. The *UN Convention on the Rights of the Child* provides that:

Article 3

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration [emphasis added].

Article 7

²⁷³ See for example *Wu, Harry and Martinez*, *supra* note 8.

²⁷⁴ *United Nations Convention on the Rights of the Child*, GA Res. 44/25, UN GAOR, 20 November 1989 [the "*Convention on the Rights of the Child*"]

²⁷⁵ *Martinez*, *supra* note 8. The Federal Court of Appeal however, in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, restricted the scope of section 3(3)(f) of the *IRPA*, holding that unlike the *Canadian Bill of Rights*, section 3(3)(f) does not render an inconsistent section of the *IRPA* inoperative. Comparing the *Canadian Bill of Rights* Evans J.A. held at para 60 that, "...it is one thing to conclude that Parliament intended a statute embodying essential civil rights to prevail over legislation derogating from those rights. It is quite another, however, to interpret the "construe and apply" provision in paragraph 3(3)(f) as giving priority over *IRPA* to "international human rights instruments" which are not specifically identified in *IRPA*, may not have been subject to Parliamentary scrutiny, and, indeed, may not even have existed when *IRPA* was enacted."

²⁷⁶ *Martinez*, *supra* note 8 at para 8.

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents [emphasis added].

Article 9

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or where one parent is living separately and a decision must be made as to the child's place of residence [emphasis added].

Thus the issue in *Martinez* was whether the Removals Officer was under a duty to defer the removal pending the outcome of the H&C Application in order to give effect to Canada's obligations under Article 3(1) of the *Convention*. The Court answered this question in the affirmative. Simpson J. found that it is through the H&C Application that the best interests of the child can be fully addressed and treated as a primary consideration.

The decision in *Martinez* is surprisingly favourable and subsequent decisions have been reluctant to stretch the law as far as Justice Simpson. Stay motions are hit and miss and certain judges of the Federal Court rarely, if ever, grant this kind of last minute interlocutory relief. Most stay motions fail on the issue of irreparable harm. In *Ghanaseharan v. Canada (Minister of Citizenship and Immigration)*²⁷⁷ Justice Evans of Federal Court of Appeal in denying a last minute motion for a stay of the removal order heard by teleconference held that:

The social and economic roots that the appellants have started to put down in Canada during the nearly four years that they have legitimately pursued all legal means of obtaining permanent residence status cannot in themselves provide the basis for a

²⁷⁷ *Ghanaseharan v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 261 at para 15.

finding that the appellants' removal before their appeal is decided will cause them irreparable harm. If their appeal is successful, they will probably be permitted to return to Canada pending the new determination of their PRAA application.

And further on the balance of convenience Evans JA echoes Showler's concern regarding the 'seemingly interminable' multiplicity of proceedings exhausted by failed refugees:²⁷⁸

...They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.

The frustration of both sides of the illegal migration debate can be seen in the jurisprudence surrounding stays. Those who are less sympathetic to illegal migrants are justifiably frustrated by the 'seemingly indeterminate' legal process and what seems to be a colossal waste of judicial resources determining multiple applications and appeals from a family with absolutely no right to remain in Canada in the first place. The *Harjit Singh*²⁷⁹ decision is one of the more colourful examples of someone making a mockery of the immigration system.

By contrast, the other more sympathetic camp is equally justifiably frustrated in the 'ivory tower' decision making on stay applications. For the Court to neutralize the decision to kick an established hard working family out of their home on the basis that 'if their appeal is successful, they will probably be permitted to return to Canada pending the new determination of their PRAA application' is weak at best. The reality is that once a

²⁷⁸ *Ghanaseharan*, *supra* note 277 at para 22.

²⁷⁹ *Singh*, *supra* note 157.

family leaves Canada, abandon their jobs, their apartment, their furniture and their friends, they are in all likelihood never coming back. Moreover, what would be the point of returning the family to re-determine a *Pre-Removal* Risk Assessment application that has a 95% chance of being refused anyway?

The stay motion represents the last ditch effort to remain in Canada pending a decision on the outstanding H&C application. It represents the critical procedural step in this analysis because if successful, there is no longer any ethical issue for the lawyer – for the time being. If unsuccessful however, it causes the ethical issue of potentially having to advise the client not to appear for removal or alternatively, continuing to act for them if they disappear on their own accord. When stays are refused for seemingly procedural or legalistic kinds of reasons it is even more wrenching. In a 30 minute hearing a family's entire future and home can be taken from underneath them. When this happens to undeserving clients, a lawyer cannot help but lose faith in the rule of law.

PART IV

APPLYING THEORY TO PRACTICE: CONCLUSION AND DISCUSSION

CHAPTER VI - ALL THINGS CONSIDERED

This thesis set out to investigate the bounds of ethical conduct for immigration lawyers helping illegal migrants regularize their status in Canada. Using a family of failed refugees as a hypothetical fact scenario this chapter now attempts to answer the question whether a lawyer may ethically advise their client not to appear for removal while awaiting a decision on an outstanding application for permanent residence based on humanitarian and compassionate grounds ("H&C Application"). A brief summary of the main points thus far is needed.

I will summarize the discussion of legal ethics. Part two of the thesis debated whether legal ethics are ethical or legal in nature, presupposing a difference between law and ethics and their respective modes of reasoning. I outlined a spectrum or continuum of legal ethics placing law and ethics at polar ends of a spectrum and attempted to place legal ethics somewhere in between law and ethics. Given the nature of professionalism, the unique role of the lawyer in the legal system, I proposed a model of legal ethics that is more ethical than legal. This approach is consistent with many existing scholarly models of legal ethics including William Simon's 'contextual view', Allan Hutchinson's 'pragmatic and functional approach' and several others. Under this model, the bounds of ethical conduct are defined by the underlying merits of the case and allow for 'ethical discretion in lawyering'.

Adopting a more 'law of lawyers' approach to legal ethics means that the lawyer will have far less discretion in advising the client. This is because all rules of professional conduct generally prohibit advising a client to break the law. Most of the provincial law society rules prohibit the lawyer from knowingly assisting in or encouraging any dishonesty or illegal conduct, or from instructing the client on how to violate the law and avoid punishment.²⁸⁰ Under the *Alberta Code of Professional Conduct* 'suggesting to a client or other person that evasion of the law is acceptable' would constitute disregard for the administration of justice prohibited under Chapter 1, Rule 3.²⁸¹ In light of such 'ethical rules' it is hard to justify outright advice to a client to break the law in almost any case. Moreover, it would seem very peculiar if the rules were written any other way. This is the limit of the 'lawyer's law' model of legal ethics.

However, if the detailed discussion of the complexity of illegal migration has taught us anything, it is that a one size fits all kind of rule is likely going to be inadequate. While provisions in ethical codes may rightly preclude a lawyer from say, drafting a legal opinion letter to the family in our fact situation recommending that they not appear for removal, they generally fall silent on "acquiescence" to the client's disobedience and continuing to act for the client on the H&C application. Again, the H&C application can, and often does, overcome irregularities and even illegalities and it

²⁸⁰ See for example, Law Society of Upper Canada *Rules of Professional Conduct* Rule 2.02(5) "Dishonesty, Fraud, etc. by Client"; Law Society of British Columbia *Professional Conduct Handbook* Ch. 4 Rule 6 and Ch. 8 Rule 1(b); Nova Scotia Barristers' Society *Legal Ethics Handbook*, Ch. 4 "Honesty and Candour When Advising Clients" Commentary at 4.7; Manitoba Law Society *Code of Professional Conduct*, Ch. 3 "Advising Clients" Rule 7, etc... Even the Canadian Society of Immigration Consultants *Rules of Professional Conduct* which largely echo the Ontario *Rules* contain such a provision in Rule 4.2.

²⁸¹ Law Society of Alberta *Code of Professional Conduct* Ch. 1, Rule 3.

therefore follows that a lawyer must be able to advance a claim for their client despite the ongoing illegality.

As with acquiescence, it is equally unclear whether a lawyer breaches their ethical obligations by not withdrawing in this circumstance. That is, continuing to act for a client on their H&C application when they have deliberately disobeyed their removal order would not, in my view, by itself constitute 'encouraging' or 'assisting' the client's illegal conduct. Again, the nature of H&C applications provide for permanent residence despite irregularities or illegalities. Advocating that 'establishment factors' or the 'best interests of the children' overcome such illegalities can hardly be seen as encouraging the illegality. Rather the lawyer accepts it as fact and tries to demonstrate that all things considered, the H&C factors warrant a positive decision.

Provincial ethical codes all contain provisions dealing with inappropriate circumstances in which to withdraw legal representation. There are some circumstances giving rise to mandatory withdrawal and others providing permissive withdrawal. Underlying these rules is the fact that a client has the right to terminate the lawyer's retainer at any time, but the lawyer does not enjoy the same right. Particularly in the criminal context, withdrawal on the eve or in the middle of a trial would severely prejudice the client.

In Ontario, mandatory withdrawal is required if the client is guilty of dishonourable conduct in the proceedings or if the lawyer's continued employment will lead to a breach of the rules.²⁸² In British Columbia the lawyer is required to withdraw if "instructed by the client to do something inconsistent with the lawyer's professional

²⁸² Law Society of Upper Canada *Rules of Professional Conduct* Rule 2.09(7).

responsibility, including the duty to the court.”²⁸³ In New Brunswick, withdrawal is required when the client is “guilty of dishonourable conduct in the matter.”²⁸⁴

The lawyer may take the position that the client’s failure to appear is morally wrong, but that there are nevertheless good reasons why the family ought to be granted permanent residence based on humanitarian and compassionate grounds. To put it another way, failing to appear for removal cannot always negate a positive H&C determination. H&C decisions consider a broad range of factors, including the best interests of the children. It is not difficult to image a situation where those interests clearly outweigh the ‘dishonest’ or ‘illegal’ act of not showing up for your own deportation. Indeed, in such circumstances, showing up for removal may be highly detrimental to the best interests of the children.

Given that the very nature of an H&C is the fact that the client does not comply in some way with the law it is difficult to support an argument for mandatory withdrawal. While some may find it dishonourable to not appear for removal, this interpretation may be less accurate depending on the merits of the case. It is in this light that a theoretical approach to legal ethics, focusing on the merits of the case, offers somewhat better guidance than a legalistic analysis of rules and codes.

MERITS OF THE CASE

The starting point for good legal ethical analysis is the underlying merits of the case. However, in this multiplicity of cases, which ‘case’ are we referring to? The most

²⁸³ Law Society of British Columbia *Professional Conduct Handbook* Ch. 10 Rule 1(b)

²⁸⁴ Law Society of New Brunswick *Code of Professional Conduct* Ch. 10, Rule 3(a)(ii). The nearly identical provision appears in the Manitoba Law Society *Code of Professional Conduct*, Ch. 12 Rule 4(b)

important 'case' arguably surrounds the H&C application. To recall Justice L'Heureux-Dubé in *Baker* "in cases like this one, [the H&C] determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established."²⁸⁵ The refugee claim is really irrelevant at this point, as is the PRRA application. If the family has been in Canada for over four years, whether they stay or go will likely be determined through an H&C application.

It would seem logical that the greater the merits of an H&C then the greater the justification is for taking a liberal approach to legal ethics and adopting a broader interpretation to the professional codes, erring on the side of the client. The less meritorious H&C application, by contrast, would rightly require the lawyer to stay more in line with the professional codes prohibiting 'assisting' with 'illegal conduct'.

It follows then that ethical discretion leaves open the possibility of supporting a client in their decision not to appear for removal. However, the threshold in terms of the merits of the case would be extremely high. It would take the kind of facts in the *Baker* case to warrant a lawyer advising the client to disobey the removal order. Moreover, given the numerous procedural opportunities including the possibility of obtaining a stay in Federal Court, such a situation would be so rare as to require the exercise of exceptionally poor discretion by several different immigration decision makers. Nevertheless, it may be possible.

The important conclusion from this thesis is that in the regular course of practice, with the majority of clients, lawyers would invoke too high an ethical cost and risk compromising too much if they were to outright advise their client not to appear for

²⁸⁵ *Baker*, *supra* note 13.

removal. Such advice flies in the face of the rules of professional conduct but more importantly put the lawyer in too close a proximity to the wrongful or immoral actions of disobeying the law. With the exception of very unique facts, a lawyer advising the client to break the law undermining the values of professionalism and particularly the rule of law.

Turning to the family in our fact situation, they have been in Canada for a considerable period of time, but not excessive or out of the ordinary. It is not, for example, as much time as Mavis Baker spent in Canada. What is ironic here is that if they were a little more illegal – or had been illegal for a few more years, their application would arguably be stronger. The family in our fact situation have been in Canada long enough to become established, however they cannot be said to have become firmly entrenched in Canada as they only arrived four years ago.

The family's work history and positive contributions to the economy work in their favour – however in our example, their jobs are more or less dispensable. It is not the case that their employers would suffer 'excessive hardship' although they would hate to see such a nice family have to leave. They are reliable and honest workers and the kind of people that Canada needs.

These arguments are strong, but not the kind of facts that in my view justify out of the ordinary kind of ethical judgment. The family's best hope, however, is crafting their argument based on the 'best interests of the children'. The interests of their elder daughter in particular, is their strongest H&C argument. While the younger child is a Canadian citizen, removing a baby – even a Canadian citizen – does not necessarily

constitute excessive hardship in law.²⁸⁶ The child is so young it really does not matter considerably where they live. Their older daughter, however, is in school now and making friends. She would likely have completed the first grade and developed excellent English language abilities. That development may come at the cost of her mother tongue and she would be disadvantaged being sent back to her country of birth to start school at this time. A psychological report, while potentially expensive, might be critical to evidencing her best interests and giving more merit to their case.

Placing the fate of the family's case on the shoulders of a six year old girl raises additional ethical concerns. There may be undue pressure on the child to exaggerate their harms to a psychologist in order to obtain a report saying there would be hardship. A prudent lawyer would suggest that the family try to obtain a report, however being extremely cautious not to exert any undue influence on the child. Perhaps an assessment of her language ability might also help if it was to demonstrate she was behind similarly situated kids her own age in her home country. Taking such action is good advocacy in the unique context of the H&C application.

These factors are all variable – this hypothetical is not terribly detailed but we can see how important the merits of the case are to the ethical analysis. All things considered the family has a decent chance but again, not the kind of case that in my view would justify 'civil disobedience' on the part of the lawyer. The *prima facie* duty to the administration of justice does not seem to be outweighed by the merits of the case on these facts. If there were more children – and they were older, and one had long standing psychological issues surrounding attachments to people in Canada or fear of returning to

²⁸⁶ *Legault*, *supra* note 7 at para 12.

their home country, then the conclusion might be different. However, the ethical analysis would be the same. Yet the model of legal ethics as ethics would allow for it in rare circumstances. By contrast, the 'lawyer's law' model of legal ethics does not seem to give the same results.

THE RULE OF LAW AND PUBLIC POLICY

The rule of law is not compromised by putting ethics back into legal ethics and allowing lawyers to have ethical discretion. By contrast, the rule of law is enhanced in the best way possible; by adding the lawyer as final layer of review. Through the last resort of ethical discretion, the immigration lawyer has some options to intervene when there has been a serious, improper exercise of power. Nothing could be more consistent with the rule of law.

There is clearly a danger with departing from the 'lawyer's law' model. It is not difficult to imagine how a lawyer might abuse their ethical discretion and advise or support disobedient actions in a case that may not warrant such actions. In order to protect the rule of law therefore, a *prima facie* obligation to obey the law is necessary. Moreover, in order to be ethical and the legal system to properly function, the lawyer must exercise humility and accept unfavourable decisions. The lawyer must know the bounds of his or her own conduct and act accordingly. The lawyer must be able to objectively assess the merits of the case as much as possible.

CIVIL DISOBEDIENCE & THE LAW SOCIETY

There are no Canadian cases disciplining an immigration lawyer for advising the client not to appear for removal. This is the kind of ethical issue that is unlikely to be

reported and unlikely to be detected. Immigration lawyers have been disciplined for conduct such as improper handling of a client's money²⁸⁷, over-billing legal aid, failing to file an application as instructed²⁸⁸, deserting a client during a refugee claim,²⁸⁹ or advising clients to make false refugee claims.²⁹⁰ In typical discipline cases it is the client complaining about the lawyer's poor service. That is, the immigration lawyer gets into trouble for not caring enough, rather than caring too much.

In cases where 'cause lawyers'²⁹¹ have zealously used the courts to advanced noble causes provincial law society have frowned on the lawyer's civil disobedience.²⁹² It comes as no surprise that provincial law societies do not condone civil disobedience

²⁸⁷ *Law Society of Upper Canada v. Buzaglo* [2006] L.S.D.D. No. 65

²⁸⁸ *Law Society of British Columbia v. Poschmann* [2001] L.S.D.D. No. 43

²⁸⁹ *Law Society of Upper Canada v. Levinson* [1996] L.S.D.D. No. 62

²⁹⁰ *Law Society of Upper Canada v. Sainaney* [1991] L.S.D.D. No. 84

²⁹¹ Austin Sarat & Stuart Scheingold *Cause Lawyering and the State in a Global Era* (Oxford: Oxford University Press, 2001). Scheingold and Sarat's define 'cause lawyering' as situations where lawyers "deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources." Cause lawyers "choose clients and cases in order to pursue their own ideological and redistributive projects." While a lawyer advising a family not to appear for removal may be seen as a kind of 'cause lawyer', it is more perhaps more likely that the lawyer is simply attempting to further the client's individual 'cause' and not necessarily a bigger political cause against the immigration system as a whole.

²⁹² In *Law Society of Upper Canada v. Clark* [1995] L.S.D.D. No. 199 the Ontario Law Society Discipline Committee considered a unique case involving an aboriginal rights activist. The Discipline Committee held that: "The lawyer must not subvert the law by counselling or assisting in activities which are in defiance of it. The lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. That does not mean that the lawyer should not hesitate to speak out against an injustice, but the admission to and the continuance in the practice of law implies on the part of the lawyer a basic commitment to our judicial institutions." The Tribunal also noted that "If the solicitor wishes to act as a private citizen, it may be that some of the conduct complained of is open to him. In many respects, it is akin to civil disobedience, but civil disobedience of a kind practiced by the solicitor is not open to him while he wishes to maintain his status as a solicitor."

by lawyers. Advancing test cases are one thing,²⁹³ advising the client to break the law or breaking it themselves is quite another.

It also comes as no surprise that academic writing on the topic of lawyer disobedience generally disagrees with the narrow law society approach. Arguments in support of disobedience include the inherent value of dissident voices²⁹⁴, the fact that lawyers are better positioned to understand the legal system's unfairness,²⁹⁵ and as one scholar has pointed out, Ghandi (who was a lawyer) used civil disobedience to effect positive social change.²⁹⁶

On the ultimate question of whether a lawyer may advise a client not to appear for removal, my conclusion is that it should be avoided but for the most egregious and serious of cases. The answer thus depends on the merits of the case. However, given the importance of the lawyer respecting the rule of law, such conduct would seem permissible in only the rarest of cases. The more likely scenario, is where the client decides not to appear on their own volition, with clear warning from the lawyer as to the

²⁹³ Most of the provincial ethical codes make exception for advancing legitimate test cases. In Ontario, the *Rules of Professional Conduct* commentary to rule 2.02(5) provide that "A bona fide test case is not necessarily precluded by subrule 2.02(5) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case." In Manitoba, a similar rule provides that "A bona fide test case is not necessarily precluded ... so long as no injury to the person or violence is involved... the lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and this can most effectively be done by means of a technical breach giving rise to a test case. In all such situations the lawyer should ensure that the client appreciates the consequences of bringing a test case." *Code of Professional Conduct* Ch. 3, Rule 8

²⁹⁴ Martha Minow "Breaking the Law: Lawyers and Clients in Struggles for Social Change" (1991) 52 U. Pitt. L. Rev. 723.

²⁹⁵ David Luban "Legal Ideal and Moral Obligations: A Comment on Simon (1996) 38 *Wm. & Mary L. Rev.* 255.

²⁹⁶ Robert M. Palumbos "Within Each Lawyer's Conscience a Touchstone: Law, Morality and Attorney Civil Disobedience" (2005) 153 *U. Pa. L. Rev.* 1057

consequences of such action. This latter point requires emphasis. The lawyers job is to advise the client of the consequences of their actions. When a client decides to do something illegal, it is incumbent on the lawyer to advise the client of the consequences. In the context of an H&C and the decision not to appear for removal however, the client's illegality does not, in my view, warrant mandatory withdrawal and as such the lawyer may continue to ethically represent the client with respect to the H&C application.

ETHICAL PRINCIPLES FOR THE IMMIGRATION LAWYER

The following three principles will help guide the immigration lawyer faced with the ethical dilemma of how to advise their client who is ordered to appear for removal while awaiting an outstanding H&C application. It goes without saying that a lawyer ought to do what is practical in the situation including requesting the H&C decision be expedited and pleading with the removal officer to exercise some discretion. However, these ethical principles go beyond such action. Moreover, these are not to be considered hard and fast rules, rather they are broad guiding principles.

1. The merits of the H&C application dictate the bounds of ethical conduct.

The greater the merits of the H&C application, the wider the bounds of ethical discretion a lawyer may employ in advocating for permanent residence for their client. Conversely, the less meritorious of a case, then the stricter the ethical discretion a lawyer should employ. The lawyer must be mindful of the inherent bias they have towards the client resulting from their economic relationship. The lawyer ought to be respectful of

the role of the state in determining who may enter and remain in Canada and the lawyer must accept that the decision of who gets to stay and who must go rests with the state and not with the lawyer. The lawyer's role is to advocate for those deserving to stay.

2. The lawyer should generally avoid conduct that may be seen as 'encouraging' or 'supporting' the evasion of removal.

Advising or hinting to the client not to appear for removal is to be avoided. In cases where the client decides not to appear for removal, the lawyer ought to be clear to the authorities and the client that they play no role in the continuing decision to break the law. Only in the most egregious and rarest of cases where the merits are so objectively strong as to warrant unusually wide ethical discretion, should the lawyer ever consider deviating from this principle. The decision to appear or not is that of the client and the lawyer ought not to take part in this decision.

3. The withdrawal of representation is optional not mandatory in the context of an H&C application

Given the nature of H&C applications it is not necessary for a lawyer to withdraw their representation of a client who has decided not to appear for removal. Subject to the second principle above, the lawyer may continue to update the client's H&C application. The lawyer ought to make the client's decision known to the H&C decision makers and explain the reasons, necessity and possible justifications for the client's actions. The lawyer ought to advise the client that their decision to evade removal may result in detention and that the lawyer may be prejudiced from representing the client in a

detention review hearing and arguing that the clients would not be a 'flight risk' in support of their release.

Finally, it is important to stress that all of the above principles were tied to the H&C application. It is because of the H&C application that the lawyer's ethical obligations are changed. This is what makes the immigration context so unique. As mentioned earlier, outside of the H&C application, the client may be no different from the fugitive criminal. If the client has no reasonable prospect of permanent residence, then disobeying a removal order is simply running from the consequences of illegal entry. If a client receives a grossly unjust negative H&C determination this does not alter the ethical analysis. Assuming the H&C decision was grossly unjust then it follows that an application for leave and judicial review ought to have a strong chance of success. We therefore revert to the all things considered approach and the first principle above that holds that the greater the merits of the case (in this case now it is the judicial review of the negative H&C) then the greater the bounds of ethical discretion. Absent strong merit on the H&C application (whether decided or pending), the justification for representing a client who is breaking the law begins to diminish.

CONCLUSION

This thesis has attempted to unravel some of the complications, contradictions and complexities surround illegal migration and H&C applications. Focusing on the ethical issues facing a lawyer representing 'illegal migrants', I argued that the bounds of ethical conduct depend on our understanding of legal ethics. As legal ethics find their basis is in ethics (a branch of philosophy) and not law, it follows that a lawyer ought not

to be 'bound' or restrained entirely by the law. This is not to suggest that ethical analysis is above or outside the law, rather the law is an important consideration among others. Considering the law of H&C's, the law of removals and the overlapping procedures of both, barring exceptional circumstances it would seem unethical for a lawyer to advise their client not to appear for removal. In rare circumstances however, it may be possible and it is the merits of the case that determine the ethical bounds.

The narrow question of this thesis concerns advice that occurs mainly behind closed doors, out of the public eye. It therefore serves no useful purpose to suggest or propose amending or adding to the 'rules of professional conduct' something to the effect of the recommendations above. Rather, what this thesis hopes to achieve, is some positive change within the minds of lawyers and citizens alike. Change in the way we understand legal ethics and change in the way we understand illegal migration.

Ethics at the point of removal is a topic that surprisingly immigration lawyers tend not to discuss in the open. In this sense this thesis will hopefully spark some open discussion. My hope, however, is that this thesis will have as much relevance to non-lawyers as it does to lawyers. As immigration lawyers deal with illegal migration on the street-level, a particularly insightful perspective can be gained from this ethical analysis. Many have perhaps never considered illegal migration from the perspective of legal ethics. Illegal migration is not going to go away; nor is the variety of ethical issues facing lawyers. Understanding both topics therefore stands only to benefit from this 'all things considered' approach.

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