

CROSSING BORDERS AND TELLING STORIES:  
LEGAL AND LITERARY PERSPECTIVES ON THE ASSESSMENT OF ECONOMIC  
APPLICANTS WITHIN THE CANADIAN IMMIGRATION SYSTEM.

by

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## ABSTRACT

This thesis is a comparative analysis of the legal discourse used in two Canadian immigration law cases, *Chen v. MEI*, (FC, 1991 ; FCA, 1993; SCC, 1995) and *Parmjit Singh Mangat v. MEI*, (FC, 1991), and the narrative literary discourse used in M.G. Vassanji's novel *The In-Between World of Vikram Lall*. The focus of this analysis is the way in which each of these discourses discusses and evaluates the discretionary judgment of morality. It covers the history of the use of discretionary judgment in the Canadian immigrant selection process, its relationship to quantifiable methods of assessment, and the curtailment of two key discretionary sections – section 11(3) of the *Immigration Act* and item 9, "Personal Suitability," of the selection criteria used to assess Independent Immigrants – at the end of the twentieth century. It is argued that the form of the law limits its content and that the type of discourse chosen by the law fosters a hermeneutic method which makes impossible the discussion of non-economic considerations within these discretionary sections. This cuts those working within the law off from the larger non-economic aims of the *Immigration Act* itself. The legal preference for logical positivist discourse (and the narrow perception of immigrants, Canadians and Canadian society which results from it) is compared to the discourse used in a work of literature. The techniques both of writing and of reading literary narrative are evaluated in terms of their ability to discuss the issue of morality, and to create a framework within which non-quantifiable issues of this sort can be discussed. It is argued that literary narrative, because of the relationship that it establishes with its reader, and its ability to develop complex general concepts through the discussion of particular events, can provide a clearer picture of what is involved with discretionary judgment. Further, the ability of narrative discourse to articulate these principles and processes may indicate a use for narrative within immigration law itself. It could perhaps serve as a vehicle for legislation pertaining to these types of non-quantifiable assessment criteria.

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## Preface

### An Elegant Interstice: The Overlap Between Legal and Literary Analysis

To say that the way you choose to express yourself, as much as the content of what you say, can affect what you communicate is nothing new. This idea underpins the basic form/content analysis taught in introductory literature classes as well as the more complex theories of communication put forward by Michel Foucault or, in other ways, Marshall McLuhan.<sup>1</sup> While on certain levels this statement no longer holds many surprises, when this staple of literary analysis is allowed to interact with other non-literary discourses – in the case of this thesis, with law – it can yield interesting insights into both types of communication and thought.

In literary analysis, the form/content relationship is held together by the concept of choice; questions like “how do the author’s formal *choices* (rhyme scheme, narrative perspective, tone, type of poem or novel) relate to or elaborate on the content of their work?” play a part in most works of literary criticism. The ideal in this case is envisioned as a synergetic correspondence between these two levels, where both work together to create an effective expressive whole. When applied to law, this type of analysis brings with it this question of choice. But as the freedom to choose a form or type of discourse is much more circumscribed within the law, it also brings us to consider the limits imposed by discourse in a way that the idealized synergetic vision rarely does. Often, those speaking from within the law are communicating through a form predetermined,

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<sup>1</sup> Although I do not directly use McLuhan or Foucault’s critical works in this thesis my general approach has been greatly influenced by them. I am particularly indebted to Foucault for the questions he asks in *The Order of Things*; his way of questioning (more than the answers he provides) has been a useful guide in this endeavour.

chosen, by the interaction of legislative language and the interpretation of legal precedent. The question of choice is thus posed in a different fashion. We ask “who chose?”, “what implicit and explicit goals can be seen in this choice?”, “what type of content does this accepted form facilitate and what type of content does it forbid?” This type of analysis is all the more powerful because it can reanimate this set of questions despite the fact that the chosen discourse of the law in many ways seeks to prevent us from asking these questions. In what follows, we will see what happens when these general observations are used to guide an examination of the principles of Canada’s immigration selection process and the expression of these principles in the narrative discourse of a contemporary Canadian novel.

Law can be seen as a cultural creation alongside art and literature. Our immigration laws serve a dual purpose; they define the immigration process both to outsiders and to ourselves. But, as I will argue, both we and these outsiders are defined by these laws: in defining and classifying outsiders, they also define who and what constitutes the ideal Canadian. All law is implicitly concerned with defining and constructing social identity: the standards declared to be normative in legal decisions are necessarily underpinned by a notion of what constitutes Canadian society. Immigration law foregrounds this aspect of law by demanding an explicit statement of what constitutes a desirable citizen. In doing so, it simplifies the individual to a set of attributes which fit the requirements of the legal form being employed; this definition of the subject by the law feeds back into the law itself. It validates certain types of information while excluding others, thus influencing both the process of legal formation and the outcome of the assessment of individual immigrants. How does the discourse of

the law affect this act of definition; what limits does it impose on the legal vision of Canada of the individual and of the legal system itself?

We will begin with a detailed analysis of two cases, *Mangat v. Minister of Employment and Immigration* and *Chen v. MEI*, and look into the effects of the legal preference for economically based quantifiable discourse and assessment. After this we will turn to a work of literature, M.G. Vassanji's *The In-Between World of Vickram Lall*, for another vision of how one can discuss and evaluate individuals, and we will see how narrative discourse, as employed in a novel, but also more generally, causes us to approach this process in different ways, to value different things and to establish a different relationship with the text.

The growing body of work on law and literature tends to vary both in how scholars perceive the literary nature of the law itself and what role they envision for the literary within the legal system. For example, in her book *Caring for Justice*, American legal scholar Robin West (building on the work of Brook Thomas) adopts the view that literary narrative is something largely foreign to the legal system. In an argument similar to the one I seek to make, she goes on to say that the use of narrative can expose systemic prejudices against marginalized groups such as women and labourers embedded in the language of the law:

...some of the sufferings of daily life...are not simply not compensated by our positivist law, but their very existence is aggressively denied, trivialized, disguised, or legitimated by our legal rhetoric....from a perspective internal to the legal system, such harms can be extremely hard to discern...it has been the contention of at least some practitioners of the

law and literature movement that narrative literature may be one means by which the contours and dimensions of the subjective experiences of persons regulated and governed by law become articulated....one use to which narrative literature might be put, is to give voice to the victims of invisible harms legitimated by law." (219)

Kathryn Abrams picks up this thread to argue that in this way narratives can serve as a powerful force for advocating legal reform. Narratives can provide a new kind of knowledge, a "visceral understanding," which, when used as primary material for legal scholarship, makes judges and legislators aware of the particular effects of laws on individuals. This in turn makes possible legal reform, particularly in areas where both social and legal prejudices block much needed changes (for example, the long standing perception that conjugal violence was a private concern). She argues that narrative should be used as an integral part of feminist legal scholarship because "its pungency and particularity, its inflection with the emotional resonances and factual minutiae of life, narrative may elicit this visceral understanding in a way that more abstract propositions rarely can" (53). In the final chapter of this thesis, we will look more closely at this idea of visceral knowledge and other possible roles that it might play within the legal system.

Beside these scholars who view narrative literature as something external to the law – which can somehow be brought in to supplement or redeem it – there are also those who argue similar points from the position that the law is itself intrinsically literary. In the opening of *Literary Criticisms of Law*, Guyora Binder and Robert Weisberg argue that "we should recognize that the literary is intrinsic to law in so far as law fashions the characters, personas, sensibilities, identities, myths, and traditions that compose our



social world” (18). This awareness of law as a part of cultural formation and the reading of law as a cultural product equivalent to literature brings about an increased attention to the narrative techniques and modes of expression used by the law. Weisberg further develops this point in his analysis of two key cases in American civil rights and abortion law, *Brown v. Board of Education* and *Roe v. Wade*<sup>2</sup>:

*Brown* had to enter, humanistically, into the specific, directly conveyed experience of disadvantaged black people. In large measure, it failed to do so. The justices instead gave their narrative heart to the social scientists. Similarly, *Roe* failed to enter specifically the world of a woman privately struggling with a decision that is intensely personal and often agonizing. *Roe* did not couch its outcome in terms of human autonomy; too much attention is again paid to science, and the opinion reads like a less-than-convincing medical text aimed more at doctors than at women (or even lawyers). To focus on the safety of abortion and the so-called viability of the fetus was to blur – I would argue fatally – the central reality of the situation: a woman’s right to choose among distressing but highly personal alternatives. (10)

The narrative weakness of both cases – the fact that they avoid telling the stories of oppression and struggle which are at their center – and the scientific discourse they chose to adopt, avoided the true conflicts which lay at the core of both cases. The subsequent challenges to these cases derive great strength from the fact that, for example, medical

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<sup>2</sup> *Brown v. Board of Education* (1954) ended the segregation of American schools. The Supreme Court found the “separate but equal” segregated school system to infringe upon the rights of black students guaranteed by the Fourteenth Amendment. In *Roe v. Wade* (1973), the American Supreme Court found that the United States Constitution protects a women’s right to end a pregnancy and to have legal access to abortion. The decision focused primarily on medical evidence regarding the development of the foetus.

science and not the rights of women were at the center of *Roe v. Wade*. The adoption of this discourse situated *Roe v. Wade* in the realm of the calculable, hiding the fact that what truly underlies the case is something that cannot be calculated, but which must be discussed and debated: the rights of women to control their own reproductive capabilities. Ironically, the objective assessment promised by science (so attractive to a legal system which itself aspires to this type of objective assessment) has proved to be a source of weakness; the case is increasingly being challenged by calling into question the validity of its scientific conclusions. This dependence on science has thus created a situation where the underlying principles embodied by *Roe v. Wade* can be completely undermined without ever being directly addressed, thanks to the scientific discourse originally used to put them in place.

These works by Weisberg and Binder provide an interesting complement to the arguments presented by Abrams and West above. They, too, focus on the rhetorical techniques employed by the law and the limits imposed on the strength of legal documents when judges adopt rhetorical approaches which undermine the arguments they wish to make. In both cases the focus is on the relationship between form and content, and the recognition that the form can itself delimit and determine the type of content that can be effectively expressed. We find ourselves squarely within the long tradition, discussed earlier, of literary criticism which makes this connection.

These positions leave some important questions unanswered, however. There exist many types of narrative both literary and non-literary. Are all of them equally suited to legal applications? Can general principles enacted to govern the lives of many really be derived from or expressed through literature that focuses on the particular

experiences of individuals? Aren't narratives far too open to interpretation to provide a basis for the type of organized debate and judgment aimed at by the law?

Like Martha Nussbaum (whose work we will touch on in a moment) I find satisfactory answers to these questions in a certain type of extended literary narrative. Nussbaum focuses on the 18<sup>th</sup> century English novel as embodied by Dickens, and our key text will be a contemporary Canadian novel by M.G. Vassanji, *The In-Between World of Vikram Lall*.<sup>3</sup> Despite using very different literary texts, Nussbaum and I both arrive at similar points thanks to a few key elements present in these novels: the presence of an extended introspective narrative that allows us to trace the evolution of one or many characters from multiple perspectives, the creation of a world within which these characters exist and which provides a context for their thoughts and actions, the creative use of literary language to express the inner thoughts and emotions of specific characters, and a fostering of the reader's role as an active participant and collaborator in the creation of meaning from the text (as opposed to a neutral expositor).

These characteristics can potentially be found in a great many forms of writing from biography and autobiography to collections of stories and epic poetry. And, just as choosing narrative discourse over an expository logical positivist style makes an inherent statement of values and priorities, the choice of genres within narrative also communicates something very real to its audience. For what follows my choice of texts was first guided by the general characteristics outlined above. From there I attempted to find a text which matched as closely as possible the legal concerns at which we will be

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<sup>3</sup> Vassanji, a Kenyan-born writer raised in Tanzania immigrated to Canada in 1978. He has twice won the Giller prize for best English-language novel: once in 1994 for *The Book of Secrets* and again in 2003 for *The In-Between World of Vikram Lall*. He has also studied at MIT and holds a PhD in nuclear physics.

looking. As *Mangat v. MEI* and *Chen v. MEI* deal with the ability to make discretionary judgments about morality within the Canadian immigration selection process, I chose a Canadian novel which dealt with the moral evaluation of its central character in the context of immigration and the relationship between diverse cultures within a single nation. In what follows I will refer often to “the novel” or “narrative” to mean this particular type of narrative which we are investigating, but many of the points I am making can be made for other types of narrative as well.

As we will see, the novel occupies a distinct position between the particular and the general. It creates a world that is both detailed enough to make possible discussions of complex (non-quantifiable) issues such as morality and social responsibility, and circumscribed enough to ensure that all participants in these discussions have clear guidelines to which they can refer. The novel also benefits from the fact that it conveys meaning through immersion rather than explanation. The reader of a novel is placed within the principles it describes, lives them in a limited way, and takes from this experience a concrete understanding of the principle or principles in question. In addition, the interaction that takes place between a text and its reader creates a template for the transformation of the general to the particular, which could be of use when we are trying to translate general legal principles into particular legal applications. Nussbaum describes this transformation saying that:

...while they [novels] do speak concretely about human beings in their varied social contexts, and see social context in each case as relevant to choice, they also have built into their very structure a sense of our common humanity. ... Thus, while it is extremely difficult...to assess

intuitively...an ethical or religious treatise from an extremely different cultural tradition, novels cross these boundaries far more vigorously, engaging the reader in emotions of compassion and love that make the reader herself a participant in the society in question....Thus in their very structure they contain the interplay between the evolving general conception and the rich perception of the particular; and they teach the reader to navigate resourcefully between those two levels. (96)

They represent and communicate complex issues by enacting them and in so doing create a middle ground between concrete action and abstract thought that is ideally placed between the particular and the general to provide guidance in the investigation of some of the most problematic areas of human life. They create an area delimited enough to allay the judges' fears of being presented with the impossible task of "being called upon to evaluate the objective merit of visa officers' subjective assessments" (Robertson J.A. *Chen v. Canada* (1993) para. numbers not given) but detailed enough to allow for the discussion made impossible by strictly quantifiable grounds for discretion, economic or otherwise.

What we are exploring is the difference between modes of writing which aspire to objective analytical meaning and those which take a more subjective phenomenological approach. Fundamental to this distinction are the different roles that these discourses define for their readers. The two cases which we will look at, *Mangat* and *Chen*, give rise to a highly circumscribed image of the reader as a neutral expositor of the text. This vision may in some ways be fostered by the standard form of legal discourse itself. Novelistic narrative needs a more active reader. As we will see, more of the text must be

completed by the reader. In our treatment of Vassanji's novel we will explore a new hermeneutic model which builds from close reading to include a new level of understanding dependent on the reader's ability to experience the text (as described above) and derive meaning from this experience. In some ways this combination of structural and phenomenological elements is similar to the hermeneutic model of German Protestant theologian and philosopher Friedrich Schleiermacher (1768-1834) and the vision of reading developed by Wolfgang Iser (1926- ). Iser summarizes this position nicely:

[M]eaning must clearly be the product of an interaction between the textual signals and the reader's acts of comprehension. And, equally clearly, the reader cannot detach himself from such an interaction; on the contrary, the activity stimulated in him will link him to the text and induce him to create the conditions necessary for the effectiveness of the text. As text and reader thus merge into a single situation, the division between subject and object no longer applies, and it therefore follows that meaning is no longer an object to be defined, but is an effect to be experienced.

(9-10)

It is this merging of the reader and the text that is a precondition for the type of reading experience described by Nussbaum and Abrams; it is necessary for the various applications of narrative envisioned above. Literary narrative encourages this type of relationship, and we will clarify these ideas in the close readings which follow. Iser seeks to show that, more than encouraging a certain type of reading, the text "induces" it. However, I think (with the benefit of deconstructive hindsight) we must acknowledge at

least the possibility that the reader may not be truly induced to read in this fashion. Can we perhaps choose to resist this kind of reading, to read against the text in a way – or, in the same vein, choose to apply this type of reading to other types of texts? I will leave these questions open; for our purpose the essential point is that literary narrative invites immersive empathetic reading and through its form teaches its audience to read in this way.

With this emphasis on the role of the reader comes an acknowledgment of the multiple possible interpretations of any given event or piece of legislation, and of the difficulty inherent in decision-making that a reliance on calculation attempts to avoid or cover up. The ideal rational model for decision making advocates a logical progression from universally valid first principles. By distancing ourselves from and criticizing this ideal via the more indefinite form of reading and reasoning encouraged by the novel we realize that all decisions, while perhaps superficially logical, must in some way fail to live to up and are made outside of a strictly rational framework. They are (in relation to an impossible rational ideal) in some sense insane. Derrida, elaborating on Kierkegaard, argues this as well, claiming that “[The just decision] is a madness; a madness because such decision is both hyper-active and suffered [*sur-active et subit*], it preserves something passive, even unconscious, as if the deciding one was free only by letting himself be affected by his own decision and as if it came to him from the other” (255). This seems like a beautiful description of the position judges and immigration officials find themselves in: caught between their own views and the guidance they receive from the form of system they are working within. I could joke that in some way my argument is for the ‘Better regulation of the immigration process through the measured application

of insanity' if by insane we agree to mean the simultaneous interaction and acknowledgment of multiple possible interpretations and the need to eventually decide (as opposed to calculate) between them. While the influence of individual interpretation and judgment on the legal system is openly acknowledged, in its form legal discourse still aspires to an rational, quasi-scientific ideal that profoundly limits the extent to which the role of the individual decision maker can be discussed within the system itself. This is not a reason to stop deciding, but rather one to do so in full realization and acknowledgment of what we are doing, and to develop a discourse which allows us to do this as clearly and with as much rigor as possible. The interaction between law and literature has the potential to help us do so.

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-- Vancouver, May 2004

## Chapter 1

### Legislating the Ideal Country and the Ideal Immigrant: The Evolution of Discretionary Decision-making in Canadian Immigration Law

This chapter is intended to serve as a general introduction to the use of discretionary decision-making within immigration law. Our attention will be split between two areas: the varied approaches to regulating immigration used during Canada's short history and the implications of two specific sections of the *Immigration Regulations* of 1978: Section 11(3) and item 9, "Personal Suitability," of the selection criteria used to assess Independent Immigrants. In both of these areas we will analyze some of the ways in which immigration policy affects the characterization of individuals, communities and nations within Canada.

Immigration selection is a process of questioning and evaluation. How we ask these questions, the form and language we use to construct them, can greatly influence the conclusions we reach. One powerful example which we will cover is the use of quantifiable traits as an alternative to discretionary judgments. Implicit in the law's embrace of the quantifiable is an elision between measurability and objectivity. While this elision may only be skin deep, we will see that simply by casting essentially discretionary assessments in the form of objectively measurable traits, the law dramatically curtails what it can take into account. The most important question should therefore be what vision of ourselves and the other we construct and defend in the form (as well as the content) of our inquiries.

### Historical Overview

The perception of immigration enshrined at the confederation of Canada in the *Constitution Act, 1867* was a reflection of the colonial imperialist policies of the French and British Governments. In both the British and French colonies immigration had been the primary method of ensuring the occupation, cultivation, possession and domination of newly conquered North American territories. Canada's immigration policy reflected this populate or perish mentality. This is evident in the implicit linking of agriculture and immigration in the new Constitution. Section 95 says in part:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and the Immigration in to all of any of the Provinces. (*Immigration Act, 1872*)

As before, immigrants were conceived of as intimately tied to the settlement and cultivation of North America. But, as this quote illustrates, while the perception of immigration may not have changed, the administrative framework in which it was situated had shifted substantially. New laws, both provincial and federal, could now be enacted. Importantly, these laws would for the first time reflect the goals of a national government instead of a colonial power. As can be seen in the first restrictions imposed on immigration by the *Immigration Act* of 1872, the regulation of immigration began to be perceived as a filter by which governments could construct and maintain their vision of an ideal society. For example, the tenth section of the *Act* explicitly excluded any

“criminal, or other vicious class of immigrants” ( *An Act to amend the Immigration Act of 1869, S.C. 1872, c.28*). This *Act* began the first period of Canada’s immigration legislation in which all but a few groups were free to enter the country. However, for the Chinese, Japanese and Indian peoples who were defined as undesirable, prohibition was harsh and explicit.

A mix of objective criteria and discretionary judgment was employed by federal and provincial officials to construct Canada as a white country and exclude those who threatened this definition. Beginning in 1885 a head tax of fifty dollars was imposed on Chinese immigrant men (women and children were completely barred). By 1903 the tax had increased ten-fold to five-hundred dollars. Unable to discriminate as openly against Japanese citizens because of Japan’s relationship to Britain, a so-called *Gentleman’s Agreement* was negotiated with Japan in 1900. Under this agreement Canada did not impose any restrictions on Japanese immigrants; in return the Japanese government voluntarily restricted the number of Japanese allowed to emigrate to Canada (Jakubowski 14, Galloway 11-12). Both these measures rested to some extent on an empirical (if racist) approach to the assessment of immigrants. One’s admissibility to Canada was determined by evaluation against predetermined criteria based on race. These criteria provide a powerful counter-examples to the government’s implied claims during the later part of the twentieth century that measurable criteria are somehow inherently value free and just.

Canada’s desire to exclude Indian immigrants was more problematic given India’s place within the British Empire. The government solved this dilemma by once again employing objective criteria; this time however the criteria preserved the

government's racist intentions while removing all reference to race. The *Continuous Journey Stipulation of 1908* rested instead on mode-of-transport: all immigrants who arrived in Canada "otherwise than by continuous journey from countries of which they were natives or citizens, and upon through tickets purchased in that country, may be refused entry"( in Jakubowsky 14). The only company providing such transportation from India was the Canadian Pacific Railway, and the government expressly forbid it to sell direct trips from India to Canada. This awkward if effective arrangement was the beginning of the use of empirical methods of assessment to accomplish certain specific goals while hiding these goals from view. This is a practice which arguably continues to this day.<sup>1</sup>

At the same time, however, the Immigration Acts from this period reveal that the federal government was realizing the power of discretionary decisions to accomplish the same aims, perhaps more simply and effectively. In both 1906 and 1910 these acts included increased discretionary powers for the minister and individual officials. The general use of the term "race" in section 38(c) of the *Immigration Act* of 1910 functioned as a catch-all phrase applied to any person deemed not to fit within the desired conception of Canadian values and to jeopardize the construction of an idealized white nation. Among the excluded were:

Any nationality or race of immigrants of any specified class... deemed unsuitable having regard to the climactic, industrial, social, educational,

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<sup>1</sup> One fully developed critique of the biases of the points-based assessment of immigrants can be found in Jakubowski's *Immigration and the Legalization of Racism*. Jakubowski argues that the criteria measured themselves systematically discriminate against specific nationalities. For example, she cites the case of Filipina women applying under the "live-in caregiver" class who were refused, despite excellent qualifications and education, because the type of "formal training" required by the assessment is largely unavailable in the Philippines.

labour [conditions in Canada]...or because such immigrants are deemed undesirable due to their particular customs, habits, modes of life, methods of holding property and because of their probable inability to become readily assimilated....and who consequently prevent the building up of a united nation of people of similar customs and ideals.

*(Immigration Act [1910] 38(c) )*

Given that race was never qualified, immigration officials had an almost unlimited discretion to exclude applicants based on their non-compliance with a vague set of ideal Canadian values and attributes.

It is noteworthy that discretionary decision making in this area entails a discussion of the Canadian nation absent from more empirical forms of assessment. The guiding principles which surround an area of discretion necessarily make room for an account of the larger goal, an account that would be useless if not impossible in the context of objective decision making. The language of section 38 (c) paints a picture of a Canadian nation with a united population governed by a homogenous set of values. Reference to complex concepts such as “customs,” “ideals,” “modes of life,” and a “united nation” would have no place in empirical assessment criteria focused on the quantifiable. I say this not to validate one method or the other, but to point out that different types of legal assessment entail different views of both the object and the aim of the assessment. The language of the law in each case is markedly different, and with this change in language comes a change in what can be considered, discussed and implemented. Although 38(c) does not specify the meanings of any of the terms it employs, these terms create multiple broad sights for the discussion of immigration and

its effects on the Canadian nation. Quantifiable criteria define the area open for discussion much more narrowly. Likewise, once a quantifiable system is set up it creates a closed analytical approach, which does not have to make reference to the founding moral decisions which established the assessment criteria. Near the end of this chapter we will touch on the works of German and French theorists Martin Heidegger and Jacques Derrida to elaborate on the importance of this founding moment and the world it constructs. For the moment though, it is enough to point out that on its face the *Continuous Journey Stipulation of 1908* bears no trace of the racist objectives which put it in place. These racist objectives are much more visible in the language which surrounds 38(c).

In 1923 the character of Canada's immigration laws changed fundamentally, rendering these considerations all the more important as now all immigrants (not just specific racial groups) would be subject to some form of assessment. An Order-in-Council transformed Canada from the generally open destination that it had been to one governed by an exclusionary system which only allowed entry to six narrowly defined categories: "agriculturalists with sufficient means to begin farming; farm labourers with arranged employment; female domestic servants; wives and children under eighteen of those resident in Canada; United States citizens whose labour is required; and British subjects with sufficient means for self maintenance" (Galloway 15-16). All of these categories favoured the continued admission of the British and white Europeans preferred by the national government. In the same year – to further restrict the entry of undesirables who might have qualified as agriculturalists, labourers or servants – Parliament passed *The Chinese Immigration Act*, which explicitly closed Canada's doors

to Chinese immigrants (Galloway 12, 15). As well, the discretionary exclusion of other undesirable races continued under section 38(c), as did the self-definition of Canada as a white northern nation that such laws facilitated.

As Canada emerged from the instability caused by the Depression and the Second World War, this policy remained intact. The principles which guided administrative discretion and the image of Canada which they sought to create were stated clearly by Prime Minister Mackenzie King in his 1947 *Statement on Immigration*:

The people of Canada do not wish, as a result of mass immigration, to make fundamental alteration in the character of our population. Large scale immigration from the orient would change the fundamental character of the Canadian population. (Manpower and Immigration 205)

Even without King to give them voice, the laws of the time would have spoken for themselves; the preservation of section 38(c) in the *Immigration Act* of 1952 made it clear who was and was not welcome in Canada. Adding to this climate of intolerance was the post-war fear of communism in response to which the *Act* created another broad area of administrative discretion aimed at restricting entry to foreign radicals. Once again this area of law served to discuss and define not only those intended for exclusion, but the nature of Canadian society itself. Barred were people “likely to advocate...subversion of democratic government, institutions or processes, as they are understood in Canada” (Whitaker 35). As with “race” in the 1910 legislation, “subversion” was never defined, and once more immigration officials could at their discretion refuse someone entry if they failed to coincide with a certain conception of the ideal Canadian nation (Whitaker 36). This ideal is not defined, but here as in the past the broad terms used to guide the exercise



of discretion acknowledge, and create a space for the discussion of, a more complex vision of both immigrant and nation than would be possible in the language of empirical assessment. It also makes explicitly clear that the selection of immigrants is based on a moral and ideological framework.

Presiding over this system, vested with a higher level of discretion, was the Minister of Citizenship and Immigration. While officials could exercise discretion in the assessment of individual applicants, the *Act* gave the minister total authority over assessment, admissions, and deportations (Hawkins 102-4). With all these discretionary exclusions it is possible to lose sight of the fact that an equally important motivation of immigration policy remained the desire to harness mobile human labour to benefit the economy (Hawkins 91, 117). The immigrant was still viewed as a potential economic asset. But combined with this was a clear realization that they were a social force, one which could challenge the official ideal of assimilation and change the shape of Canada.

Change came. The officially espoused image of Canada underwent a dramatic revision in the 1960s. A new ideology of bilingualism and multiculturalism replaced the vision of a white Canada. Hoping to distance itself from the refusal of Jewish refugees and internment of Japanese Canadians during the Second World War, and motivated by both internal and external pressure to join the international community's condemnation of racism, the Canadian government adopted new policies which recognized and celebrated racial and cultural diversity (Henry 76, Hawkins 389). In 1962 racial background was officially dropped from admissions criteria in immigration regulations (Jakubowski 17). The 1966 White Paper on Immigration proposed uniform entrance standards for all immigrants regardless of race, religion or country of origin, and in 1967, the same year it

signed on to the UN *Convention Relating to the Status of Refugees*, the Canadian government brought in a new points based system for assessing potential immigrants.<sup>2</sup> Guided by a desire for objectivity and fairness, the system rated applicants in nine categories: education and training; personal assessment; occupational demand; occupational skill; age; arranged employment; knowledge of French or English; relatives and employment opportunities. Each of these categories was assigned a point value, which together totalled one hundred. To be successful in their applications, immigrants needed a score of at least fifty, and one point in each category. This system, a variation of which is still in use today, drastically curtailed administrative discretion. A vestige of discretion, however, remained in the personal assessment section. But given that it was one criteria among many, even an extremely low score would not necessarily bar someone from the country (Hawkins 424-25). As mentioned briefly earlier, a byproduct of the use of this type of immigration selection process is that the system of objective calculations that it puts in place can mask the non-objective value judgments that were used to establish the criteria themselves. We will return to this in the following section as we investigate the continued reduction of the role of discretionary judgment.

A new balance between the elimination of racial discrimination and the preservation of discretion was created in the *Immigration Act* of 1976 and the accompanying *Immigration Regulations* which came into force in 1978. The *Act* maintained the points-based assessment system and declared that, "any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate on grounds of race, national or ethnic origin, colour,

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<sup>2</sup>Further discussion of the motivation of individual ministers behind these changes can be found in Hawkins, from 158 on.

religion or sex” (Sect 3(f)). Ministerial discretion was also greatly reduced, much of it replaced by regulations concerning prohibitions, assessments and deportations (Hawkins 378). At the same time, the small space for discretion within the points system was augmented with the introduced of section 11(3), which allowed immigration officials to override the points system in exceptional cases. Section 11(3) of the Immigration Regulations, 1978, reads:

A visa officer may

(a) issue an immigrant visa to an immigrant who is not awarded the number of units of assessment required by section 9 or 10 or who does not meet the requirements of subsection (1) or (2), or

(b) refuse to issue an immigrant visa to an immigrant who is awarded the number of units of assessment required by section 9 or 10, if, in his opinion, there are good reasons why the number of units of assessment awarded do not reflect the chances of the particular immigrant and his dependants of becoming successfully established in Canada and those reasons have been submitted in writing to, and approved by, a senior immigration officer.

The meaning of “successfully established” is initially left open, providing the immigration official with a considerable amount of discretionary freedom. But, the stipulation that reasons be submitted in writing to a senior official makes it clear that the early days of boundless discretion are over. Notably absent as well, are any guiding principles or Canadian ideals presented to guide or justify this discretion. Both of these, the narrowing of discretion and the appearance of ideological neutrality, will continue to

influence the administration of immigration up to the millennium, manifesting themselves again in the *Immigration and Refugee Protection Act (2002)* – the legislation which replaced the *Act* which we are examining. In the next section, we will look specifically at the increasing restriction of the discretionary powers protected by section 11(3) and the “personal assessment” criteria (which will become known as “personal suitability”) between 1976 and 2001. The concept of discretion appears to have been heavily tainted by the racist and anti-communist policies it justified in the past; its removal is often couched in claims of objectivity, fairness and neutrality. We will look critically at these claims, discuss the values of the legal context within which they function, and assess how the change in the language and method of the law affects both what it can discuss and how it functions as a tool for self-definition for both citizens, applicants and the legal system itself.

#### The Evolution of Discretion under the *Immigration Act* of 1976

Between 1976 and 1991 the discretionary areas maintained within section 11(3) and Item 9 of Schedule 1, “Personal Suitability,” of the selection criteria of the *Act* were used often and apparently without incident.<sup>3</sup> In the early 1990s appeals brought before the federal court began to set precedents which influenced the use of these sections of the *Act*. But it would not be until the 1995 Supreme Court of Canada decision in *Chen v. Canada* that a sudden and important limit would be put on the scope of these two sections; in exercising their discretion, it was decided, immigration officials could only

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<sup>3</sup> I base this claim on the lack of appeals from this time being listed in any of the editions of Marrocco and Goslett’s *The Annotated Immigration Act of Canada*, (the standard reference for Immigration case law in Canada).

consider economic aspects of the applicant being assessed. The Court's conclusion in this case rested on a particular vision of how to read the law which prioritized certain intentions and ideals. To understand the significance of these changes a brief look at the use of discretionary practices leading up to them is necessary.

Between 1988 and 1990, 568,160 immigrants were admitted to Canada. Of these 17,357 were admitted as a result of discretion pursuant to section 11(3) (Affidavit of Bonnie Boucher, *Chen v. MEI* 1993). Discretionary judgments therefore represented just over three percent of the total admissions for this period (another 255 applicants were refused on the same grounds). Section 11(3) is only employed when the applicant's points-score is seen by the official to be an inadequate gauge of their suitability (see regulation above). We must therefore also remember that for each and every immigrant processed a degree of discretion was involved in the point-score total itself, and that some of these necessarily passed or failed on the strength of their "Personal Suitability" scores.

Guidance for this important use of discretion came from a variety of sources. The *Charter of Rights and Freedoms* guides the application of immigration law, although the rights it protects apply to varying levels to those attempting to immigrate to Canada. When assessing personal suitability, officials could also turn to the criteria included in Schedule 1 of the *Immigration Regulations* which specified that points should be assigned so as to "reflect the personal suitability of the person and his dependants to become successfully established in Canada based on the person's adaptability, motivation, initiative, resourcefulness and other similar qualities." More generally, officials could also rely on the general tenor of the regulations which clearly emphasizes economic considerations. To use this as a guide, however, the official would first have to determine whether areas of discretion were meant to support this general focus or provide

exceptions to it when necessary. The objectives of Canadian Immigration policy are stated in section 3 of the *Act*, and are nicely summarized in the general guides to immigration law published yearly by the Minister of Employment and Immigration:

The Immigration Act and Regulations are based on such fundamental principles as non-discrimination, family reunion, humanitarian concern for refugees and the promotion of Canada's social, economic, demographic and cultural goals. (MEI 1989, 3)

If these general aims, which appear early in the *Act*, are meant to frame the legislation as a whole, then we have an indication that the economic criteria are one of many lenses used to define this particular vision of Canada. Here, as in 1910, the contextualization of discretion provided room for a discussion of the larger ideals invested in the law and for the depiction not only of desirable immigrants but of Canadians and of Canada itself. Although they pointed towards multi rather than mono-culturalism, here as before the vague terms employed permitted the law to portray, perceive and ultimately permit into Canadian society people on the basis of criteria which could not be measured objectively.

There are three notable differences between the scope and application of discretion at the start of the century and at its end. Most important is the fact that discretion now occurs in a more delimited fashion. Where it once was the main voice of Canadian immigration, it now interacts with a variety of other methods of assessment. Second, while the language of the guiding principles is similar to that used earlier in the century, the multiplicity of interests it represents is markedly different. Compared to the *Immigration Act's* homage to "the building up of a united nation of people of similar customs and ideals" in 1910, the objectives of 1976 seem center-less and it is unclear if

the pieces fit together into a unified whole. Finally, within the legislation a considerable distance separates guiding principles to do with the ideal Canada from those to do with the ideal immigrants themselves. Whereas section 38(c) of the *Immigration Act* of 1910 dramatically played the undesirable traits of certain immigrants off against an idealized vision of Canada, the values which guide discretion in the *Immigration Regulations* of 1978 are contained in the statement of objectives which opens the *Immigration Act* of 1976 or in the *Charter of Rights and Freedoms*. They have been removed from the criteria used to assess immigrants and exist solely in other documents. While this structure may have been intended to give these sections greater influence over the selection system as a whole, as we will see, in combination with a specific approach to reading the law, it has severely limited their use when it comes down to the level specific applications.

The negotiations as to which principles should guide discretion were waged over three consecutive cases which began in the Federal Court in 1991, moved to the Federal Court of Appeal in 1993 and found resolution in a verdict from the Supreme Court in 1995. All three cases stem from Chang-Jie Chen's 1987 application for a permanent resident's visa. Chen's application initially went very well, he was granted an interview, scored well in his points assessment and was informed that his admission now depended solely on successful medical and security checks for himself and his wife and daughter. Due to a series of delays and mix-ups no progress was made for over 15 months and in December of 1988 Chen mailed a Christmas card to his immigration officer Sara Trillo. This card contained \$500 in American currency and a short note thanking her for her continued assistance. He was subsequently re-interviewed by another visa official,

Howard Spunt, and in February of 1989 refused, under section 11(3), because to the visa official's eyes, his attempt to bribe a visa official showed him to be "inherently dishonest" (Affidavit of Respondent Howard Spunt May 28, 1990).

The appeals which followed argued primarily over whether the discretion permitted in the *Act* supported this kind of moral judgment. Strayer's J. decision of the first Federal court case made it explicitly clear which of the factors discussed above should be used to guide discretion:

Given this emphasis on economic factors as identified by both Parliament and the Governor in Council for determining whether an immigrant can become "successfully established" in Canada, it is difficult to read the discretionary power granted to a visa officer by subsection 11(3) of the Regulations as allowing him to ignore the number of units of assessment and to determine, for essentially non-economic reasons, that an immigrant does not have a chance of becoming successfully established in Canada. While the subsection only requires that the visa officer have "good reasons", those reasons must be such as lead him to believe that the immigrant cannot become successfully established in the economic sense. They do not include such reasons as that an immigrant will probably not be a good neighbour, a good resident, or ultimately a good citizen of Canada. (Strayer J. *Chen v. Canada* 1991, 10-11)

As Strayer J. points out elsewhere in his decision, the *Act* defines classes of people who are inadmissible to Canada in section 19, which include various types of criminals. If someone is to be refused for a criminal action it should be under S.19. Chen's actions are



not covered in S.19, and the discretion provided for in 11(3) does not make room for further moral judgments.

Attempting to prevent such a drastic curtailment of its officials' discretionary powers, the Minister of Employment and Immigration mounted a successful appeal.<sup>4</sup> They argued for a broad definition of discretion based on the varied use of the term "successful establishment," and a demonstration of the important place such a broad discretion presently occupied in the admission of immigrants (the figures quoted above were presented to the court in this context). In agreement, Létourneau J.A. found that:

It is true that some of the factors and selection standards mentioned in paragraph 114(1)(a) of the Act, or Schedule I of the Immigration Regulations, 1978, are economic factors and do refer to an immigrant's ability to economically sustain himself or herself in Canada. However, others like age, education, language, other personal attributes and attainments and personal suitability are broader in scope. Although they may be relevant to assess one's ability to economically sustain oneself, they are not so limited. They also refer to social success, that is to say to an immigrant's ability or chances of successfully establishing himself or herself socially in Canada.

Robertson J.A. dissented, expressing a position nearly identical to that delivered by Strayer J. in 1991. It was this dissenting opinion that the Supreme Court favoured in 1995. In a one-sentence decision, the court upheld the decisions of Strayer J. and

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<sup>4</sup> In the affidavit of Bonnie Boucher it is stated that had Chen's assessment been overturned strictly on grounds of procedural fairness, the MEI would not have appealed the decision.

Robertson J.A., effectively limiting the scope of the section 11(3) discretion and the assessment of "Personal Suitability" to strictly economic considerations.

With this decision, the Supreme Court made it essentially impossible for immigration officials to use their statutory discretion to develop the wider social and cultural goals of the *Act* in any meaningful way. By restricting discretion to the economic sphere, the court has substantially limited the ability of immigration officials to implement the other guiding principles stipulated in the *Act* during the assessment of economic-class applicants. In essence, the ruling constructs the *Act* so that these broader notion of Canadian society are virtually redundant. It transforms the discretion into a strictly delimited supplement to the objective points-based evaluation.

In this construction of the *Act*, the discretion merely serves to catch any economic factor that may have been missed; it has become so overwritten by judicial interpretation that it is itself only a shade away from becoming an objectively constructed series of categories. The difference is striking: in less than a hundred years the selection of immigrants in Canada has moved from an almost completely discretionary policy which balanced economic interests with more complex visions of the ideal immigrant and what they could bring to an ideal Canada, to a system which judges immigrants solely on economically based criteria constructed by the law as objective. While this process may be procedurally fair and on the surface devoid of the racism of previous *Acts* – it obscures the fact that immigration policy is a site of social and cultural construction and negotiation, and presents Canada as if it were a self-defining entity.

The form of the system hides the fact that underneath are one or many decisions regarding what is and is not desirable in an immigrant, decision which, unlike the

selection criteria used to apply them, can not be justified by some form of objective calculation. This movement from non-quantifiable decision making to the realm of measurement and calculation creates a second level of assessment, a veneer of objectivity, which makes it difficult to see the values which underpin them. A specific procedure for the assessment of immigrants has been put in place. But, this procedure does not operate un-aided; just as a boat needs water, procedures correspond to and function within a specific vision of the world for which they were designed. Prior to procedures there is a metaphysical decision about what is, and what constitutes knowledge. Heidegger refers to this as the formation of a sphere or – more specifically for the modern age – *Weltbild*, world picture, or conception of the world. Here as elsewhere, procedure and world picture exist in a self-reinforcing relationship<sup>5</sup>: justice and fairness are defined as the proper administration of pre-defined criteria, and the proper administration of these criteria is defined as being just. This simultaneously validates the objectivist empirical methods of reasoning which form the core of this particular metaphysical model. Heidegger argues that this is to be expected: “Where the world becomes picture, what is, in its entirety, is juxtaposed as that for which man is prepared and which, correspondingly, he therefore intends to bring before himself and have before himself” (129). The empirical discourse favoured by Strayer J. and Robertson J.A. is inherently at odds with the non-objective value judgments which first put the criteria in place – they operate with a completely different views of what is, within completely different conceptions of the world and of what constitutes value and

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<sup>5</sup> “Procedure does not mean here merely method or methodology. For every procedure already requires an open sphere in which it moves. And it is precisely the opening up of such a sphere that is the fundamental event in research.” (118)

knowledge. Once it has become the preferred mode of debate it becomes very difficult to revert to the non-empirical to discuss and question these judgments.

Jacques Derrida elaborates on this argument, extending it to the legal system as a whole. He bases his argument on the concept of violence, which includes both physical and interpretive violence (the violence of imposing a certain form of interpretation):

À la place de “juste,” on peut dire légal ou légitime, en conformité avec un droit, des règles et des conventions autorisant un calcul mais dont l’origine fondatrice ne fait que reculer le problème de la justice. Car au fondement ou à l’institution de ce droit, le même problème de la justice aura été posé, violemment résolu, c’est-à-dire enterré, dissimulé, refoulé. (962)

La foundation d’un État “réussie” ... produira après coup ce qu’elle était d’avance destinée à produire, à savoir des modèles interprétatifs propres à lire en retour, à donner du sens, de la nécessité et surtout de la légitimité à la violence qui a produit, entre autres, le modèle interprétatif en question, c’est-à-dire le discours de son auto-légitimation. (992) <sup>6</sup>

It is possible to read against the closed tautological relationship that the law produces, to go beneath the surface and attempt to recover the aims which shape the system. A change in analytical approach can open up the substrata of the law to a researcher. For those within the law however the demands of staying within the hermeneutic surface

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<sup>6</sup> Instead of just one can say legal or legitimate, in conformity with a law, with rules and conventions that authorize calculation, but with a law of which the founding origin ... only defers the problem of justice. For in the founding ... of law or in its institution, the same problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed (963).

The “successful” foundation of a state ... will produce after the fact [après coup] what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretive model in question. (993)

structure of the law (the specifics of the selection criteria for example) can effectively cut them off from articulating or applying this type of approach in a legally meaningful way.

What then is the ideal Canada? Who is the ideal immigrant? Once we scratch below the surface, the story told by the regulations as curtailed after the 1995 *Chen* decision is clear: the ideal immigrant is an economically productive unit easily integrated into the Canadian economy. The ideal Canada is one in which the economy functions smoothly and is supported by the proper government supervision of the supply of necessary goods, including labour. But this narrative is unstable, other aims hang disjointed and unfulfilled. No clear legal expression exists for the now seemingly mumbled promises that it would “enrich and strengthen the cultural and social fabric of Canada” ( section 3(b) ). The erstwhile acceptance that an immigrant can have both social and economic effects has disappeared from the criteria used to assess economic applicants. The only way to produce a more nuanced understanding of the construction of the ideal immigrant within immigration law is to significantly change our analytical point of view as Galloway demonstrates in his discussion of the Minister of Citizenship and Immigration’s annual plan for 1997:

[T]he 1997 plan also reveals that fewer members of the family class will be admitted – 58,000 instead of 78,000 in the previous year – but that there will be a steep increase in the number of independent immigrants – 102,000 instead of 84,000. These changes reflect a significant re-evaluation of priorities, and a reconception of the model of the ideal immigrant.(35)

This type of reading draws attention to the one powerful avenue of discretion that still exists – the discretion of the Minister of Immigration established in section 114 of the *Act* to shape fundamental aspects of immigration policy, including but not restricted to the

right to define “successful establishment” and the right to create classes of immigrants and the selection criteria which will be applied to them. With this far-reaching discretion the minister can (in response to government policy) depict the values and ideals of Canadian society and their expectation they place on immigrants at a structural level by the manipulation of figures and goals.

But these stories are told through the law, not in it. At first glance, fundamental changes in the ideology governing the selection process appear solely as numerical changes. The form of the law makes difficult the type of analysis provided by Galloway and Jakubowski. Galloway’s type of birds-eye-view analysis derives meaning from the movements of the system as a whole in the face of specific legal provisions which are increasingly devoid of overt values. As this analysis of the evolution of the *Immigration Act* reveals, there has been an increasing dissociation of the guiding principles – the ideal of Canada – and the structure of the law. By placing the guiding principles at an ever increasing distance from the regulations designed to apply them, the law has been emptied of expressions of specific goals and ideals. What remains is a structure malleable enough to accommodate the changing nature of political and public opinion on immigration issues. Immigration law has become an empty container into which a wide variety of political content can be put (Dauvergne 24). It is now tied inextricably to the political and social debates that craft the image which it must then manifest. While this may in many ways seem beneficial, it is important to note – as we saw above – that this change comes with a corresponding change in language and form of immigration law and a corresponding preference for objective over discretionary decision making. With the loss of discretionary decision making the *Act* also loses the ability to express itself in the

language of ideals and national character. Without this language it also becomes impossible to perceive others in this light. By narrowing itself down to objective economic criteria and only considering what can be quantified, immigration law has created an arena within which nothing but objective economic evidence can be presented during the normal course of the assessment of an immigrant. As a direct result, it obscures the concept of the nation which underpins it, and prevents both the acknowledgment and detailed elaboration of these ideals.

While the consequences of this are immense for many would-be immigrants, the consequences for Canadians are perhaps equally significant. As the following chapters will demonstrate, if we want to progress beyond a shallow and short-sighted concept of Canadian society, with its dire social and environmental consequences, then we need to create laws that foreground the concept of the individual, the community and the nation which underpin them. Explicitness is essential both so that as citizens we can engage more easily and productively with the issue of immigration and its role in our national identity and so that the immigration process can be seen in a light which more clearly shows and clarifies the non-economic considerations which guide the evaluation of applicants.

## Chapter 2

### The Language of Positivism and the Collapse of Discretion

Building on the background established in the preceding chapter, we will now move on to a close reading of a related case, to see in more detail the transition from a broad vision of legal discretion to the narrow economic view which Strayer J. put in place. Because it was appealed to the Supreme Court, the case of Chang-Jie Chen takes pride of place in terms of the precedent it set for future applications of administrative discretion in this area of immigrant selection. However, Strayer J. decided a similar case, *Parmjit Singh Mangat v. MEI* (1991), in tandem with *Chen*. Both judgments are explicitly linked, and it is in this second case that we get a more explicit view of this transition and of the change which it brought about in the legal identity of potential immigrants, of immigration officials and of Canada. Those used to legal analysis will note that instead of following the usual route outward from the judicial logic behind a given decision to its legislative context, this chapter moves inward to look more closely at the language of both the laws themselves and the people involved with these laws. It is through this analysis of legal discourse – of the form and vocabulary that this portion of the law makes available – that we can see most clearly the difficulties which surround the exercise of non-economic discretion.

Strayer J.'s decision in *Mangat* develops the same vision of discretion put forward in *Chen*. In *Mangat* he also provides his own vision of how discretion should have been applied (briefly putting himself in the position of a visa official) which makes more explicit the split he envisions between immigrant assessment and notions of morality or



national ideals. The result, as we will see, is quite surprising. Particularly interesting in *Mangat* is the transformation of the discourse used by the immigration official (the same Howard Spunt involved in *Chen*) to justify his decision. Documents filed allow us to see how he struggles to defend his negative assessment of the applicant as the definition of discretion becomes increasingly circumscribed over the course of the appeal. This unique perspective also allows us to see how the fact that the larger guiding principles of the Immigration Act of 1976 are placed at a distance from the site of legal assessment makes it difficult for officials to defend a more inclusive, non-economic, vision of discretion. Our analysis of this will be guided by two questions: First, what conditions did Spunt have to fulfill – not to make a correct assessment – but to express his assessment so that it would be recognized as a valid legal statement? Second, how do these formal requirements affect the content of what can be expressed within them? In the next chapter these questions will lead us into an investigation of alternate verbal forms, specifically that of extended literary narrative of the type possible in the novel, and their potential use in the area of immigration law.

Parmjit Singh Mangat applied as an entrepreneur for a permanent residence visa in April of 1988. He scored exceptionally high on his points evaluation and was given an employment authorization allowing him to begin his proposed motel business while the final stages of his application (the medical and security checks) were completed. Soon after his arrival, Mr. Mangat began to work illegally as an immigration counselor. He subsequently lied to and misled various immigration officials regarding his activities,

including Howard Spunt who was assigned to reassess Mr. Mangat's visa application. Spunt denied Mangat's application under the discretion granted him by section 11(3).

Prior to exercising his discretion to refuse Mangat a visa, Spunt was required by law to make a written submission to have his decision approved by a senior immigration official. It is with this written submission that we will begin tracing the transformation of the visa official's discretionary capacities. In it, Spunt prefaces the link between morality and adaptability seen above with an acutely perceptive moral judgment entirely outside the realm of objectively measurable assessment:

In my view, it would be contrary to the Act and Regulations to issue a visa to Mr. Mangat. I am not impressed with [Mangat's] untruthfulness and equivocation, *nor do I believe that he is genuinely contrite. I am not convinced that he is a person who could be trusted to obey Canadian law, and as such, he would not adapt himself successfully in Canada.*

(Affidavit of Mr. Howard Martin Spunt, letter to R.A. Nauman, emphasis added.)

The italicized portion indicates the degree of latitude perceived to be permitted to administrative discretion. With only a vague passing reference to the Act, Spunt argues for the negative use of discretion based on the merits of his subjective opinion of the applicant. The last line also loosely makes reference to both section 11(3) and the "Personal Adaptability" by borrowing language from each to create the hybrid phrase 'successful adaptability.' It is not the severity of the offense which troubles Spunt, but Mangat's behaviour subsequent to it and what it says about him as a person and a potential citizen. This will be developed further.

In any other context Spunt's negative assessment would be unremarkable; Mangat's response when he is confronted with his crime is not very reassuring: "being a businessman, I saw another opportunity which I took in the entrepreneurial spirit"(Affidavit of Howard Spunt para.18). He describes it elsewhere as a "business opportunity" (Affidavit of Parmjit Singh Mangat para.21). Mangat indeed seems to be an unrepentant criminal, which is all the more troubling given that he was illegally acting as an immigration counselor, counseling immigrants on how to approach the very system he was contravening.

But how does this fit into the law? Section 19 bars certain types of criminals from entering the country, but Mangat's acts do not fall within the scope of this section. And as we have seen, the acts themselves are secondary to what Mangat's lack of contrition says about him as a potential Canadian citizen. Where in Canadian immigration law at this point in time was there room to consider whether someone was "genuinely contrite" or not? Only within the area provided by discretion. Genuine contrition is not, unlike net worth or language skills, something that can be tested or measured. It rests on an intuitive form of assessment far more difficult to quantify than these other considerations. In turn, it recognizes that applicants themselves have relevant traits which are not encompassed within the points-score assessment.

In his refusal letter to Mangat, Spunt reiterates the comments sent to Nauman, while clarifying his language slightly to make more explicit the legal basis of his judgement:

I am not convinced that your business in Canada has made or will make a significant contribution to the economy. However, of prime importance, I

am not impressed with your lack of truthfulness in dealing with Canadian immigration and visa officials. Also, I am not convinced that you are a person who could be trusted to obey Canadian law. As such, I do not believe you would be able to successfully adapt and establish yourself in Canada. (Affidavit of Mr. Howard Martin Spunt, Letter from Mr. Howard Spunt to Mr. Parmjit Mangat dated August 14, 1990, pp.2-3)

This judgment relies on three separate elements of the Act and Regulations to establish itself as a legal, and not simply a subjective or personal, statement. By adding the term "establish" to the vague legal references contained in his letter to R.A. Nauman, the language of the last sentence makes clearer reference to both the "successful establishment" criteria of section 11(3) of the Act and the mention of "adaptability" contained in the "Personal Suitability Criteria." More fundamentally but less explicitly, the judgment relies on broader notions of Canadian society and the ideal immigrant discussed in the previous chapter. The scope of the discretion that Spunt is exercising is guided by the objectives stated in section 3 of the Immigration Act, 1976. In particular, it can be tied to sub-sections (b), (i) and (j):

- (b) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;
- (i) to maintain and protect the health, safety and good order of Canadian society; and
- (j) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity.

Without the context provided by these larger national and international ideals, discretion would be limited by the more strictly economic focus of the context surrounding section 11(3) and the "Personal Suitability" criteria. The equivalence that is established in the last line of Spunt's letter between morality and successful establishment could only arise from concerns for the national and international nature of Canada's law abiding "social fabric" as expressed in the *Act's* objectives.

This is precisely the type of reasoning which Mangat challenges in his appeal. In the "Applicant's Outline of Argument" submitted to the court at the beginning of the appeal he advocates a drastically reduced interpretive framework for the use of discretion on two grounds:

a) A review of other sections under the Immigration Act and Regulations where the term "successful establishment" is used lead to the conclusion that this consideration is an economic one and not a broad one which would permit the consideration of the character of an applicant.

b) A review of the inadmissible classes of Applicants leads to the conclusion that a propensity to contravene the law is not a factor to be considered under section 11(3) of the regulations as there are specific provisions which cover criminal character upon which a visa officer is required to consider admissibility.

(Applicant's Outline of Argument, Para 26, Nov.29, 1990)

In both cases, the method outlined for determining the meaning of the terms in question is to relate them to other similar sections, beginning with those most similar and progressing outward until the definition of “successful establishment” and the nature of 11(3) has been determined by the accumulated weight of the other legal sections cited.

In this way, for example, Mangat’s definition of “successful establishment” begins with section 114 of the Immigration Act, moves to section 9 of Schedule 1 of the Immigration Regulations, and concludes with section 7 of the Immigration Regulations. Each is a section of immigration law which explicitly uses the words “successfully established” within a context that in some way includes (but is not limited to) other economic considerations [see Appendix 1]. This form of reasoning from the inside out, relying on simple correspondences of language means that “successful establishment” has been defined well before section 3 of the *Act* is ever reached. The type of questions asked find answers before the level at which these principles exist. Paradoxically, the priority of these principles, their general all encompassing language, and their position equidistant from all other aspects of the law, makes them easier to avoid and discount. The words “successfully established,” for example, are never used in section 3 rendering it in a way invisible when the *Act* is analyzed through an interpretive lens which finds meaning in proximity and explicit linguistic correspondence. Mangat’s argument, condensed, is that within this statute all words have one meaning and that everything has its place. Stray from this meaning, or from this place and – while what you say may still make sense – it won’t make law. From these basic principles, Mangat then defines both the language and the place for discretion within the law as narrowly as possible through an interpretation which selectively emphasizes the economic aspect of other related

sections of the Act and Regulations. If we ask again where in Canadian immigration law at this time is there room to consider whether someone is “genuinely contrite?” Mangat would answer clearly: “Nowhere.”

The MEI attempts to counter this interpretation in their “Statement of Facts and Law,” by beginning with a dictionary definition of the terms in question and then moving directly to the general aims of the *Act*: “It is submitted that the object of the Immigration Act and Regulations is to provide a comprehensive scheme for the immigration to Canada of individuals who can make a positive contribution to Canadian society ... consider: s.3, Immigration Act” (12). From there they work their way in, using these aims to shape their interpretation of the specific sections they cite, the majority of which are those also cited by the appellant.

Nowhere in any of these sections is it clearly or explicitly stated that discretion should or should not be based on economic considerations. At most one could say that where discretion is discussed economic factors are discussed, along with many other factors both specific and general. Section 114(1) of the Act for example, mentions both “labour market conditions” and “other personal attributes and attainments.” Despite this, Mangat’s argument has two strengths: it creates a veneer of coherence which covers up the gaps and inconsistencies in the law and makes it appear as though it was formed all of a piece, and it creates a definition which is easily reviewable, which therefore fits nicely with the mechanisms available to validate and enforce it. The judiciary’s concern that overbroad discretion will be impossible to accurately review was nicely stated by Robertson J.A. in the second *Chen* appeal (*Chen v. Canada* 1993): “My concerns are also

rooted in the prospect of being called upon to evaluate the objective merit of visa officers' subjective assessments" [para. numbers not given].

Apparent in Roberston's comments, and the visible discomfort that discretionary judgment causes Strayer J., is an underlying affiliation to the logical positivist or empirical ideal that every rationally justifiable assertion can be scientifically verified or is capable of logical or mathematical proof. It is a prioritization of calculation, or the appearance of calculation, over discussion which, like the *Continuous Journey Stipulation* of 1908 (discussed in chapter one) serves to mask the fact that beneath these calculations are value judgments and moral arguments about what is and is not desirable that themselves lie outside of the realm of calculation and are just as dependent on received notions of value and worth as the racist ideals that guided immigration policy during the first half of the twentieth century (and arguably still do now, only better dissimulated under exactly the kind of discourse we are presently discussing).

The decision to calculate is just that, a decision. In Derrida's words, "si le calcul est le calcul, la decision de calculer n'est pas de l'ordre du calculable, et ne doit pas l'être"<sup>7</sup> (962). But once in place, the system of calculation acts to hide this fact and preserve itself by cutting off access to exactly the type of non-calculating discourse upon which it is founded. Coupled with this is the related hermeneutic ideal that the correct application of the law can also be accomplished with the same level of scientific precision through the exact use of language and the vigilant adherence to coherent meaning across multiple pieces of legislation. Mangat's arguments mesh perfectly with

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<sup>7</sup> "if calculation is calculation, the decision to calculate is not of the order of the calculable, and it must not be so" (963 ).



these ideals and easily overpowers the equally valid, but more problematic, assertion made by the MEI.

That the MEI's claims should be problematic itself says a lot. The reference they make to the guiding principles of the *Act* is perfectly reasonable – this portion of the legislation provides a general interpretive framework for the statute as a whole. As we will see this reference is completely ignored in Strayer's J. decision and, when it is compared to those portions of the statute that are deemed relevant, it seems that it is ignored solely because it does not include the words "successful establishment" in its text. This is despite the fact that it arguably presents considerations very relevant to defining these terms. That Strayer J. refuses to make this link is telling.

Being aware of this extreme interpretive timidity helps us more clearly define the hermeneutic strategies at play here. They embody a perception of the nature of reading and interpretation which invests the text with ultimate authority and denies the role of the individual in the creation of meaning from the text. It is important to note how finely this distinction is being made in this case. Within the context of hermeneutic philosophy the vision of analysis proposed by both Mangat and the MEI falls squarely into the field of Enlightenment approach to interpretation which was guided by a pursuit of unitary truth through rational logical analysis. Transplanted into the world of literary theory which has seen the collapse of structuralism and the growth of deconstruction, both Mangat and the MEI would seem very conservative in their formalist analytical practices. Within the context of the case however Spunt is cast as a much more active interpreter, solely because he dares to go past a simple matching of terms to a discussion of the principles communicated by these terms. He is willing to openly acknowledge the moral

underpinnings of the law that the more objectivist reading favored by the courts keeps hidden.

Attempting to defend his position in his affidavit, filed shortly after Mangat's argument, Spunt had already considerably recast his decision to fit the Appellant's more constricted vision of how legal statements should be made, and how terms are to be defined. While refuting the appellant's narrow definition of discretion, he attempts to show that he is proceeding by the same underlying principles of internal coherence. As a whole, the affidavit is a more self-consciously legal document than either the refusal letter or the memo. For the first time, Spunt makes reference to section 9(3) of the Act which requires applicants to truthfully answer the questions posed by immigration officials. He also mirrors the language used in the Regulations themselves in describing his decision, and drops the term adaptability in favor of "successfully established" thus placing his discretion firmly in section 11(3) of the regulations:

In my judgment, Mr. Mangat knew that he was flagrantly abusing immigration law while in Canada and was not genuinely contrite thereafter. He had lost the credibility required of an immigrant under Section 9(3) of the Immigration Act.... it was my opinion that Mr. Mangat did not display the characteristics Canada expects from an independent applicant and that the units of assessment awarded did not accurately reflect Mr. Mangat's chances of becoming successfully established in Canada. (Affidavit of Howard Martin Spunt sworn January 9, 1991)

Spunt has preserved the core of his objections: the lack of contrition and the equivalence between morality and success as an immigrant. He has also preserved his overall vision

of how an immigrant should be perceived by the immigration system. By assessing applicants in this way he is making the claim that immigrants are more than economic entities and as such can add (or take-away) from Canadian society as well as the Canadian economy. But he has clearly situated these views within section 11(3) in a way which reflects a changed understanding of what is accepted as legal reasoning. Instead of a confident use of broadly-based discretion grounded in passing references to the law, we now have a legal discourse which makes explicit reference to particular regulations and solidifies its legality by borrowing key terms and phrases from the legislation. Note in particular the final sentence which mimics section 11(3) almost word for word. Using the language of accepted legislation effectively invokes the power of coherence and stability valued by the interpretation of the law which seems to dominate here. The use of section 11(3) rather than the Personal Suitability component of Schedule 1 is significant because it places Spunt's decision in the best possible place for it to be accepted, firmly in an uncontested area of discretion removed from the quantifiable realm of points-based assessment. The intuitive, moral and non-quantifiable judgment that Mangat is a bad person is still present at the center of this document, but it is expressed in a different form in an attempt to satisfy the more circumscribed approach to discretion that Spunt and the MEI are confronting in the appeal. This approach becomes a hermeneutic spider's web which catches Spunt and the more he interacts with it, the more it restricts his rhetorical movements. As we will see in the cross-examination of Spunt, how he must speak and the conventions he must adopt in order for his statements to be recognized as valid legal statements, undermine not only what he wants to say, but his relationship to the selection process itself.

During the course of the cross-examination Spunt tries unsuccessfully to sustain this approach, struggling to express his moral judgments in the language of accepted legal concepts and guidelines such as “personal suitability” and “adaptability.” This collapse of Spunt’s attempt to see Mangat as a moral as well as an economic entity is prefigured in the cross-examination by an undermining of the intuitive, non-objective, non-quantifiable assessment which he used. Mangat’s lawyer (Ms. Jackman) focuses on two related points: the difficulty of ever accurately or scientifically assessing someone’s state of mind and the difficulty of accurately assessing someone of a different culture, without the use of explicit agreed upon standards of evaluation. In the first instance, Spunt is questioned on his ability to assess genuine remorse, specifically, he is asked whether he has any training in psychology. The government’s lawyer (Mr. Keene) steps in to question the relevance of this inquiry and the response clearly exemplifies the underlying bias in favor of the objective and the scientific:

Ms. Jackman: Well. Mr. Keene, he’s indicated on different occasions Mr. Mangat was not contrite. He concludes at the end that he showed no real remorse. Those are all conclusions based on a person’s demeanor and manner. I’m just trying to get a sense of how, what kind of, if he has any kind of training that would assist him in drawing those kinds of conclusions. (55)

With this one comment the Appellant narrowly delimits the space of discretion to the scientific, implicitly denying the value of judgments of character that are not based in some form of empiricism. The shadow of doubt deepens when Ms. Jackman moves on to the theme of cross-cultural miscommunications:

Would you accept, Mr. Spunt, that there can develop misunderstandings between people of different cultures merely because they are unfamiliar with the cultural norms of the signals or the symbols used in a difficult culture? (60)

With both these questions Ms. Jackman plays up the idea that uncertainty is unavoidable once we step outside of the strict empirical assessment made possible by fixed economic criteria. Implicit in this critique of uncertainty is an appeal to an ideal vision of the Law as a discourse founded on certainty, where only the relevant is considered and considered accurately. Even though it turns out that Spunt has both a degree in psychology and training in the management of cross-cultural communication this is not enough to redeem the type of judgment he seeks to make. Because of the fact that the terms of the legal discussion have been defined by those cross-examining him to end prior to the broad area created by section 3 of the Act, even if his moral judgments can be shown to be based in some form of scientific assessment they remain irrelevant. And, as long as they are deemed irrelevant, they will not be discussed, making it difficult if not impossible for Spunt to challenge the limits imposed on him. The very perspective that Spunt could use to introduce evidence that might challenge the strictly economic vision of discretion is the one he is prevented from adopting.

This failure is interesting precisely because it demonstrates how, despite the broader objectives of the Act, the resources which the Regulations make available to officials at the specific sites of discretion do not in fact keep open any meaningful administrative freedom in the face of the legal preference for strict linguistic coherence

and a denial of the interpretive role of the individual in constructing meaning from a text.

Three-quarters of the way through his cross-examination Spunt is asked:

Q. Now, in paragraph 31, you indicate, [...] "Mr. Mangat did not display the characteristics Canada expects from an independent applicant."

Again, where do you draw from the Act and Regulations the characteristics? Is it also under personal suitability? In Schedule 1?

(135)

Before replying to this question Spunt asks to see something, it is unclear from the transcript what he requests, perhaps (given what follows) it was a copy of Schedule 1. He then attempts to convey his judgment of Mangat exclusively in the vocabulary provided by the Regulations. In so doing he continues to embed himself deeper within the rhetorical and hermeneutic strategies of law which rest real power in the ability to express oneself in the language of preceding laws. For what he says to be accepted as a valid legal statement, he is under pressure to limit himself to this pre-approved vocabulary. Spunt begins his reply with an almost exact repetition of the guidelines set out in Schedule 1:

A. As regards to personal suitability, the elaboration is made on the basis of the person's adaptability, motivation, initiative, resourcefulness and other similar qualities.

In my judgment, based on the provision that is given to me in the schedule to the Regulations, I consider that someone who flagrantly abuses authority and who essentially has breached his confidence, is not personally suitable – is not personally suitable for admission to Canada.

I consider that behavior maladaptive. And I consider that that person would not adapt. (135)

In these general statements the cracks in the mold are already beginning to show. The form that Spunt is trying to employ can not shape or contain the judgment which he has made. He opens with an almost exact quotation from the Item 9 of Schedule 1. But the flagrant abuse of authority and breach of confidence which trouble Spunt are quite distinct concerns from adaptability. His attempt to elide this distinction is made obvious by the awkward repetition of "personal suitability" and "adaptive" as if these fragments of accepted legal discourse could somehow act as a shield, or cloak to protect or hide Spunt's decision from criticism. As soon as he attempts to become more specific he spills out of the language of the Schedule and back into the foreign realm of non-empirical moral judgments:

Putting it more bluntly, if I have to choose between equally qualified independent immigrants, I would choose the one that is not a liar or who exhibits these sort of tendencies, who has not convinced me that this is a mere incidental portion of his character.

I was convinced that this was an engrained aspect of Mr. Mangat's personal suitability. (135-6)

While this type of judgment might serve to uphold considerations for the health of the legal and social fabric of Canada represented in the objectives of the Act, it is not supported by the specifics of the Regulations. Truthfulness is not one of the criteria mentioned to determine how administrative discretion is used. As we will see shortly in Strayer J.'s decision, dishonesty could in fact be a positive indicator of adaptability and

personal suitability. More importantly though, this rigid use of language makes impossible the personal perspective that Spunt has unsuccessfully sought to defend.

In his decision, Strayer J. displays an example, both tragic and comic, of the type of reasoning preferred by the law: "If one were really to apply the criteria listed under "personal suitability" to Mr. Mangat in relation to his untruthfulness or his disregard for Canadian law, one might have to assess him positively in respect of "initiative" (in opening a second business), and "resourcefulness" (in carrying it on as long as he did)" (9-10). Although he acknowledges that the validity of these conclusions are open to question, the emphasis that this thought experiment places on a specific form of reasoning shows that, as argued by Mangat, the ideal form of legal argument is the one that relies exclusively on the criteria immediately related to the decision at hand, to the exclusion of those larger aims which supposedly govern both the exercise of discretion and the system as a whole.

Strayer J. also adopts the Appellant's claim that linguistic coherence, the ability to express yourself in the specific language of the legislation, determines the legal value of your argument: "Counsel for the respondents have not demonstrated to my satisfaction from *the language* of the Act of the Regulations that section 11(3) of the Regulations was intended, or can be lawfully construed, to authorize a visa officer to make such broad judgments as to who is suitable for Canadian society"(emphasis added, 9). This specific reference to the language of both the Act and the Regulations is telling. Strayer J. is not pointing to the substance of the law; he is not saying that the meaning or the content of the legislation does not permit the type of discretionary decision Spunt made. As we saw earlier, the content of the sections cited by both sides could be interpreted in many ways.



The fact that both parties cited the same passages makes it even clearer that this is not a conflict of explicit legal principle. Rather, Strayer's J. decision emphasizes that it is the language itself that is the deciding factor. He is completely adopting the hermeneutic strategies covered earlier in Spunt's "Record of Motion." The legislation is approached as a word list which includes "economic" but not "contrition," "morality" or "truthfulness." Therefore it is argued, the vocabulary made available by the legislation cuts off the personal discretionary perspective needed by Spunt to make the type of judgment he wants to make. The language of the law has no words for what he wants to say, despite the fact that the general principles of the Immigration Act seem to support him.

What of the latitude seemingly protected by section 3 of the Act? Asked above where he grounded his interpretation of what characteristics were valued by the immigration assessment system, Spunt completely overlooks section 3. Likewise, despite mentioning it in their "Record of Motion," this section is not mentioned in the cross-examination of Mangat by his counsel; their cross-examination focuses solely on the economic details of Mangat's activities in Canada and makes no mention of the concepts of lawfulness and positive social contribution that section 3 invites. And again in Strayer J.'s decision, all mention of section 3 is omitted. I can think of no other way to read this than as an indication by all those involved that the hermeneutic habits of law favour the inner-to-outer literal reading performed by Mangat and his counsel. It indicates a prioritization of a certain type of reasoning and expression that makes almost impossible access to principles placed at a distance to the sight of assessment.

Of all the words that Spunt should have discarded if he wanted to fit into the model of accepted legal discourse, "I" should have been first on his list. The formal

limits imposed on vocabulary by such a delimited literal form of legal analysis bring with them a particular model of the relationship between the subject (in this case the visa official) and the law. Two basic questions, one hermeneutic and the other formal, underlie the debate over discretion which we have been investigating: Where do you look for meaning? or Where is truth within the legal system? And: How do you express truth in a legally meaningful way? Mangat's answer to these questions embodies a vision of the law as a quasi-automated system within which individuals exist solely to clarify and apply legal principles. Truth is to be uncovered by a strict, formalist analysis of legal language, and expressed using this same language so as to further the principle of coherence upon which this entire system is based. The concept of discretion is itself fundamentally at odds with this approach. There is no room for the individual to supplement the legal system. He or she is to act as a flexible link between disjointed elements of the system, and to apply established legal principles to the situation at hand.

Through this analysis of *Mangat* I have exposed in more detail examples of the struggles which surround the use of discretion in immigration law. First, through Spunt's struggles we have seen how a strictly economic and literal view of discretion limits what can be said and disregards a significant amount of relevant information. Second, it illustrates how the distancing of guiding principles from the sites of discretion makes difficult a defense of broad based discretion when opposed by extremely narrow literal analysis of the statute. Third, it draws our attention once again to immigration law's claim that the quantifiable is objective. The details of Strayer's J. decision cause us to question these claims, and how adequately the interests of both immigrants and

Canadians are represented by them. Are we satisfied to have a system completely unable to take even the most simple moral issues (such as deliberately ignoring Canadian laws) into account? The challenge of addressing these issues is to create a legal form which permits the discussion and evaluation of more complex perceptions of the individual. What options are available to us? What other discourses are there that could treat the values which underlie Canadian laws both more openly and more clearly? In the next chapter we will see how narrative, in particular the type of extended, introspective narrative possible within a novel, deals with the issues of morality and economics which have guided our discussion of legal discourse so far. The differences between this narrative discourse and legal discourse will give us a better understanding of the type of discretionary decision-making Spunt attempted to engage in and which Strayer J. forbade. At the same time they will allow us to speculate on whether the adoption of narrative by the law, and the use of this type of discourse as a vehicle for certain legal principles could allow us to reclaim a space within law for an open discussion of decisions and judgments that lie beyond and outside of calculation.

### Chapter 3

#### A Map, a Border, and a Voice: How Literary Language and the Novelistic Form Could be Used to Guide, Protect and Express Discretionary Judgments in Immigration Law.

What we have been unable to do so far is to maintain a discussion of morality or social responsibility in the immigration selection process, specifically in the area of discretionary judgment. As we saw in chapter one, different types of legal discourse may serve to mask prejudices and moral judgments that underpin legal decisions. The *Mangat* and *Chen* cases are interesting specifically because they work against this current and show people within the law (Spunt and the MEI) attempting to be explicit about the moral judgments they are making and to discuss them in a legally meaningful way. I have argued that this fails in large part because the discourse of the system elides the implicit morality of economic assessment (and of the selection process as a whole) and does not provide those involved with the language necessary to discuss these issues. In other words, the form employed by immigration law limits the content of what can be said by those involved with it. And, importantly, these limits render inexpressible legal principles, like those contained within the objectives of the *Act*, which are not based on quantifiable criteria such as economic success.

Our theoretical tools so far have been based in part on the works of Heidegger, Derrida, and to a lesser extent Foucault. All three describe the way in which areas of study define their own visions of reality, filter it, and develop a method which both renders this world intelligible and reinforces it as it is applied. The challenge now is to develop the appropriate procedure or method to compliment a world view within which morality and discretionary judgment are seen as real and valuable. A method perhaps

more appropriate to the challenge of defining and fostering the growth of an organic entity like Canada. Heidegger's comments comparing the limits of the fields of Physics and History nicely summarize the transition we are about to make, "A living thing can indeed also be grasped as a spatiotemporal magnitude of motion, but then it is no longer apprehended as Living. The inexactitude of the historical humanistic sciences is not a deficiency, but is only the fulfillment of a demand essential to this type of research" (120). So far we have charted the ascendancy of a near-scientific vision of the assessment of economic immigrants. We will now see whether we are comfortable with the costs of meeting the demands of a more humanistic view of this part of the legal system.

The aims of the *Immigration Act* briefly make visible the moral aims of immigration law, but the rest of the system seems to work against their realization, denying in its form, in its method of speaking, that there is any kind of moral agenda to immigration law. The contested area of discretionary judgment which we have been investigating provides one possible exception to this. If it is to be preserved as an explicitly moral area for non-economic, non-quantifiable decision making, and if we are to understand more clearly how this type of decision making operates, then we must find a vocabulary, a style, or a form which reflects this type of thinking. We must, I will argue, turn to a specific form of narrative fiction.

So, for the case at hand what kind of narrative do we need? One which articulates a more defined vision of the general aims of the *Act*, shows these values in relation to economic values, and provides a model for the exercise of discretion outside of the arena

of economic discourse. We need a narrative that will provide someone in Spunt's position with an understanding of the larger non-economic principles that guide discretion and the language to express and defend these values if her decision should be appealed. Through this narrative a discretionary context will be constructed to clearly articulate how discretion is to be exercised, and what is relevant and irrelevant to it. This will be defined both by the content of the work and by the relationship that its form establishes with the reader.<sup>8</sup>

To test this principle let us look at M.G.Vassanji's novel *The In-Between World of Vikram Lall*. As we shall see, it is ideally suited to provide a model of discretion which revitalizes the discussion of the areas ruled inaccessible in *Chen* and *Mangat*: an elaboration of the objectives of the *Act* and the idea of the Liberal individual that they embody; the social dimension of the criteria used to describe personal suitability; and the view of the applicant as a moral agent (outside of the strict confines of section 19) which arises from them. The novel is set in Kenya during its transition from British rule to independence in the last half of the twentieth century. In this violent and uncertain time Vikram Lall, the novel's eponymous main character, attempts to isolate himself from the events which surround him. Faced with the violent uprisings and harsh repression of the final days of British rule, and the murderous greed and corruption of the early years of independence, Lall adopts a position of complete moral disengagement, limiting himself to what he perceives to be the morally neutral ground of finance:

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<sup>8</sup> French social theorists and critics Jean Baudrillard and Maurice Blanchot both articulate similar concepts in their works. We are hypothesizing a work which, as Blanchot says of all works of art, "gives us a present of the organ we need to welcome it; each one 'gives' us the eye and the ear we need to see and hear it" (192), and I would add, the mouth we need to speak it. Or, in reference to Baudrillard, a form which, like genetic code, passes along to its audience the ability to reproduce its content for themselves (56-58).

The game of money requires the presence of someone such as me, the neutral facilitator.

Does a bank need be moral? Or a croupier? Or indeed a genie of the fabled lamp, as I sometimes say myself?

I have said that I could not engage morally in my world. Without actually looking for it, or even desiring it very much, for I am not one of extravagant habits or needs, I found myself on an easy path under the patronage of he who matters most in our land. (343)

This supposed moral neutrality – a more developed form of the rationale presented earlier by Mangat<sup>9</sup> – in some ways works to Lall's advantage, and he makes a fortune serving directly under the new country's president Jomo Kenyatta, facilitating the embezzlement of foreign aid by top members of the government. However Lall's attempts to eschew morality are not successful. The failure of the distinction he attempts to make between money and morality make his story the ideal vehicle for the elaboration of the principles of social morality which preoccupy us. *The In-Between World of Vikram Lall* functions as a parable, arguing both that prioritizing economic success is itself a moral decision and that other types of morality, such as our commitments to those around us and to our society, are equally if not more important. It is necessary at this point, before we embark on a close reading of the text, for me to mark the fact that I am not arguing for this particular articulation of these values. My focus is on the ability of this specific type of extended introspective narrative possible with a novel to communicate these values.

While I think this form of narrative particularly well suited to the communication of these

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<sup>9</sup> Underlying Lall's comments is the same morally absent entrepreneurial spirit which guided Mangat: "being a businessman, I saw another opportunity which I took in the entrepreneurial spirit." ("Affidavit of Howard Spunt," para.18w).

types of principles, I make no argument that these principles are themselves correct. That discussion must be saved for another time.

The act of reading is itself a model for the exercise of discretionary judgment. *The In-Between World of Vikram Lall* makes this process explicit. Each of the characters has their fate affected by the judgments that others pass on them: wife judges husband, mother judges daughter, family judge friends and racial groups judge other racial groups. At the center of the novel is Vikram Lall who lives caught between multiple states of being, in an “in-between world,” because he is judged variously as arch criminal, symbol of corruption, valued friend and much loved brother. He lives suspended between numerous conflicting judgments of his character, which co-exist in an uneasy world of moral in-betweenness. We as readers have the privileged position (deprived even to Lall) of seeing all these states simultaneously. Lall insists on the reader’s prerogative to judge him:

It was that short innocent meeting with a childhood friend ... that set me off on my life’s path and the career that I have followed. There are doubtless those who will say that, intrinsically corrupt as I am, I would have no doubt reached the same degenerate end through some other means. You will judge for yourself. (253)

However, the content of *The In-Between World* is simply drawing our attention to something that is inherent in the form of the novel and the relationship it creates between reader and text. Any act of reading necessarily involves the exercise of discretionary judgment. We, as reader, are placed in a position to judge the content of the document before us. In character-driven works of fiction this is even more apparent, as a large part



of the experience of reading consists of forming relationships with the characters. We like one, dislike another and judge them each in one way or another. The reading process presents us with a simplified version of the types of character judgments that we make on a daily basis.

I say simplified because these literary judgments occur within a heavily controlled environment that guides us to our conclusions. We come to know the characters in a world created by the author, and this world also provides us with the framework through which we judge them. Social context, cultural values, alternative options and individual motivations are all carefully provided for us. Never in the real world would we have access to this nicely assembled package of all the factors necessary to understand a character. This simplified world is doubly useful because not only does it provide the guidelines for our assessment of the characters of in the novel, but as a whole the simplified world of the novel also provides guidelines for the discussion of specific issues which affect the world outside of the text. The movement from particular to general happens throughout the novel: Watching the development and slow collapse of Lall's attempt to maintain his role of neutral facilitator and the effect that his supposedly neutral actions have on those around him and on himself, we experience in an intimate way the fallacy of attempting to keep economic considerations isolated from morality. This visceral knowledge comes from the immersive quality of the text – something that cannot be reproduced in a selection of brief excerpts. It is gradual and intricate; each event and detail builds on those that preceded it. In what follows, I will attempt to trace the outline of this process.

Throughout *The In-Between World* the moral repercussions of Lall's supposedly neutral actions are continually making themselves felt. Increasingly, his actions harm and isolate him from his loved ones. Through it all, he attempts to deny this and to isolate his conscience from the effects of his actions. Even the assassination of his closest friend Njoroge (his sister's true love) – murdered while attempting to uncover the very corruption that Lall was facilitating – fails to change his perception of himself. It is from this point on that the reader truly begins to judge Vikram Lall. The murder is graphic, cruel and so closely linked to Lall's own actions that we cannot react otherwise:

This was their private moment away from the eyes of the world ...

She said later that they were intimate and close to each other, when hell's gates burst open upon them and two gunmen were suddenly inside. One of them covered her with his gun, wrenching her roughly away by the arm, and the other shot Njoroge at point blank range, once, twice, three times, and the two escaped through the back door to a waiting car.

Deepa screamed, loud and recklessly, missing an angry bullet from the escaping thugs, and people rushed inside.

She was photographed, her mouth open in a long wail of grief, kneeling on the floor of her shop, Njoroge's head on her lap, her white sweater dark with blood, her raised hand dripping with it. (353)

This shocking crime (which is even more vivid for the reader who has spent the past 353 pages developing close attachments to these characters) awakens our critical eye, and it is then opened wider by the shallowness of Lall's reaction to the assassination. While he feels pain and loss, he refuses to acknowledge his own involvement in his friend's death.

In the past his appeals to moral neutrality have carried a certain amount of weight, but faced with this tragedy we, as readers, can no longer go along with his morally detached perspective of the events to which he has contributed. We are not without guidance in this judgment, however; the novel as a whole functions as an interpretive framework. Vassanji provides many different elements that act as signposts to direct us. The most powerful of these is the voice of Vikram Lall himself, looking back on these events years later in a hide-away safehouse in Canada. He is our Virgil. Lall's first-person retrospective narration guides us through both the happiness and the hellish details of his past.

In this case, one understated sentence reveals Lall's own understanding of his guilt. Speaking to a friend about Njoroge's son he says quietly: "He doesn't know yet, but we killed his father" (355). This one quiet "we" powerfully communicates Lall's inclusion of himself among Njoroge's killers and his understanding that his attempt to live by the rules of money, not morality, were both futile and tragic. From this point on we witness the collapse of Lall's attempts at self-justification. Lall tries and fails to discard morality and to insulate his conscience from his actions. Ultimately, Vassanji's protagonist is driven by his guilt to return to Kenya in an attempt to reconcile himself with those he has wronged. This too fails. The final tortured and lonely moments of his life provide a closing demonstration of the fact that it is necessary to link money and morality from the beginning. The context provided by these events reinforces our perception of Lall's guilt and imposes a powerful limit on what we can say about him. While readers may disagree on the finer points of Lall's life, and at what point he became a criminal, Vassanji leaves little doubt that he is guilty and that his fault lies in his failed

attempt to separate money and morality. A reader could still hold the opposite view (could claim, for example, that Lall had acted correctly) but their view would not be supported by the text. This is a key point: the text provides clear guidance for the reader by creating an interpretive framework which limits their conclusions as effectively as a more standard expression of legal principle. All the elements outlined above, from Lall's belated admission of guilt to the general course of Lall's life, emphasize the negative interpretation of his actions. I emphasize the limits imposed by literary texts because these limits and clear statements of principle are needed to make meaningful debate possible and legal texts are widely perceived to have a monopoly on this type of communication. This is not to say that literary texts could somehow simplify the application of the law. Just as much debate and interpretation would be involved if we were to begin using narrative as an accepted form for legal principles. The scope of this debate would change considerably, however, with the introduction of a form better suited to the elaboration of complex non-quantifiable ideals.

But how then do we move from this tale, so bound up in the particulars of one character's life, to something more general, something which – in the context of immigration law – would clearly establish the role of broadly based discretion as a supplement for strictly economic assessment? In the fashion described by Nussbaum and myself above, *The In-Between World of Vikram Lall* simultaneously develops both a general and a particular vision of this issue. The genre of the novel is built from the particularities of place, personality and plot, which contribute to the thoughts and actions of the characters. Many of these may be unfamiliar to us. Most, for example, have never been in a position to launder hundreds of thousands of dollars for the government of an

African nation. However, the process of reading is a constant process of boiling down such particulars, establishing relationships of similarity and difference among them that allow us to derive from them something more general. Nussbaum describes this as a “loving conversation” between the novel and the reader, one which asks us to “imagine possible relations between our own situations and those of the protagonists, to identify with the characters and /or the situation thereby perceiving those similarities and differences. In this way their structure suggests, as well, that much of moral relevance is universalizable” (95). The idea of universalism is too closely linked in my mind with the concept of universal truth for me to feel entirely comfortable with it; I prefer to argue, in a more restrained manner, that this type of “conversation” has the power to create a keen understanding of general principles. Let’s look at this production of understanding in more detail.

A book always wants to talk to you. It often addresses you personally, as we have seen in some of the examples quoted above. But even if it does not, the intimacy of the information relayed by a novel makes the exchange a personal one. This is unlike other genres like news articles or laws which, despite the fact that their contents may affect you personally, do not establish this type of relationship with their readers and do not communicate on this level. Through the following excerpt, we will see how this intimate form of communication is established and look at how this type of communication facilitates the shift from particular to general. The excerpt itself is quite lengthy, almost four complete pages of the original text. I could accomplish my analysis with less but have chosen such a long quote so that my reader may experience the exchange for themselves and so better judge the arguments I will make. The demands

that this excerpt make on you as a reader are quite different from those of reading an academic article, and you will notice that this reading experience differs considerably from the one you have had in reading this essay up until now:

My family ran a provision store at this Valley Shopping Centre, which was ten minutes' walk from the Asian development where we lived. We sold Ovaltine and Milo ... and other such items that the Europeans and the rich Indians who emulated them were used to.

....

One morning just before noon a green Ford pickup drove up and parked outside our store; from it emerged a tall and slim white woman, with brown curls to her shoulders and trousers that seemed rather broad at the hips. She had a long and ruddy face with a pointed chin. She paused to scrutinize the shops in the mall and, I thought, stared severely for a moment at me and my companions, before bending to say something to the two children who were in the passenger seat. The door opened on the other side and out tumbled a boy of my age and a young girl who could have been six; from the back jumped out with some flair an African servant – well dressed in expensive hand-me-downs, as the more favoured servants of the Europeans usually were, much to the envy of other servants. This one sported a brown woolen vest and a tweed jacket. The woman escorted her two children to Arnauti's [café], where they sat at a table outside and in loud voices ordered from the waiter who had come running out to attend, and then she went over to my father's shop. Soon our own barefoot servant hurried out to hand the European woman's servant a bottle of Coke.

When she had finished her shopping, her servant was called and he carried her two cartons of purchases to the back of the pickup. Then Mrs. Bruce, as was her name, returned to Arnauti's patio and joined a table with two other women and a man. Her two children came out, where Njoroge, Deepa, and I, upon seeing them, now somewhat self-consciously continued our preoccupations with each other and our cart. The boy and girl stood quite still, outside the guardrail, staring at us.

Do you want a ride? I asked the boy suddenly.

Without a word he came and sat in the cart and we pushed him away at top speed with hoots and growls to simulate various engine sounds. When we stopped, after a distance, having gathered up a cloud of dust across the parking lot, the boy got out and dusted himself off as his sister whined, Now me, Willie, it's my turn.

He paid her no attention but shook Njoroge's and my hands solemnly, saying, William – call me Bill, and pleased to meet you.

We shook hands wordlessly, then pointed to my friend and said hesitantly: Njoroge.

....

Now he in turn pointed to me and said: Vic – Vikram.

Well then – jolly good, Bill said. Let's give those girls a ride –

He wore shorts of grey wool, with rather fine blue checked shirt. His hair, like that of his sister, was a light brown. And both wore black shoes and white socks. The girl was in red overalls, and two ribbons of a like colour tied her hair in clumps at the back. We drove the two girls with speed right to the line of shops, as they hung on, clutching for dear life, screaming for joy.

The boy and girl came every alternate week like clockwork, and we awaited them with anticipation, for they represented something out of the ordinary and exotic, and Bill always imaginative and original in his play and Njoroge and I learned much from him. Sometimes we were a Spitfire raining bullets on enemies; other times a racing car, or an Empire Airways plane, or the *Titanic* or the *QE2*, or the *SS Bombay*, the boat that regularly plied the ocean between Bombay and Mombassa.

They had rather refined accents, their language sharp and crystalline and musical, beside which ours seemed a crude approximation, for we had learned it in school and knew it to be the language of power and distinction but could never speak it their way. Their clothes were smart; their mannerisms so relaxed. But these barriers of class and prestige were not so inviolable or cruel at our level, and we did become friends. Mrs. Bruce would drop them off at our shop first thing before going off for her other chores on the main street, and return an hour or so later.

Njoroge and Deepa continued to have that closeness, their bond of protector and dependent; I deferred to Bill, because he was a little older, and also because he simply was a leader in our midst.

And the girl? – her name was Annie, and I came to think I was in love with her, and she with me. Ours was a natural pairing. We found each other like magnets, and we could watch the world together with laughter in our eyes.

And so when flight captain William Bruce went bang-banging in his Spitfire, shooting down Germans or Japs or Eyeties as he self-propelled with his feet, and went tumbling over, the handcart dragging him ignominiously in the dust like a fallen charioteer, who should catch my eye than Annie, wrinkling her nose a few times in an expression of bemusement and glee, which I returned with a wide grin, before we rushed to Bill's rescue and clicked appropriately at the grazed knees. And when the fisherman Njoroge, at Bill's instigation, took Deepa in his boat, Bill serenading with a mock guitar, Annie slipped her arm casually in mine and we stood behind watching. So many such moments I could recall, gentle as dewdrops, transient and illusory like sunbeams, charming as a butterfly's dance round a flower. (6-10)

Let us pick up where we left-off: a discussion (first) of the intimate for of communication which can be created through a particular application of the view points, devices and structure made available by the form of the novel (then) of the shift from specific to general that this type of communication both demonstrates and teaches. From the beginning of the excerpt, it is clear that Lall is sharing with you something that is uniquely his: his memories of an important event in his childhood. The first-person possessive pronouns (our, my) go beyond their strict grammatical function (illustrating the relationship between the young Lall and certain elements in his environment) and make clear the relationship that exists between the reader and the text: these personal recollections belong to Vikram Lall, and we enter by them because he invites us. They also act as markers for something that is inherent in this type of narrative; even without the use of the first person the reader is, as already mentioned, always positioned to have access to the private and the personal. The perspective that we are given on events, the limited telepathy which allows us to perceive both the actions and the thoughts of a given character make this type of novel an inherently intimate genre. It is from this position that we are able to observe the transition that occurs between the specific and the general. This is a process which takes place for both characters within the text and between the text and the reader.

The first such transition in the excerpt involves the idea of exoticism. In the first half we are shown Lall's views of both his everyday surroundings and companions, and of Bill and Annie. Differences of manner, dress and language establish Annie and Bill as something different and unusual. Small observations ("both wore black shoes and white socks") accumulate and create something greater than themselves, moving both children



beyond their limited and personal identities and transforming them into a symbol. They move from being represented to being representative. As Lall tells us, "they represented something out of the ordinary and exotic" (8-9). It is clear to the reader that "exoticism" does not reside in white socks worn with black shoes (or any of these other specific attributes); it is the product of all of these traits in relation to the context that surrounds them.

The above passage builds on the rhetorical tradition's emphasis on the importance of metaphor and metonymy. Through a series of implicit similes to understood concepts, we observe Lall arriving at an understanding of the exotic, and we arrive at one with him. In their most simplified forms these similes would read: "the exotic is like clean white socks in a dusty parking lot" ; "the exotic is like the crystalline voices native English speakers heard in conversation with voices formed by the languages of India and Kenya." The form of the simile: "the exotic is like..." and that of its sibling the metaphor: "the exotic is" both draw relationships between the known to give meaning to the unknown. We come to understand the meaning of a term like exoticism (or love, as we will see shortly) through the accumulation of specifics, none of which embodies the entirety, but each, like a simile, emphasizes an aspect and contributes to our understanding of the whole by relating it to the already known. By completing this transformation, we as readers go beyond the text, completing it in our mind in much the same way that the children complete their cart and transform it into "a racing car, or an Empire Airways plane, or the Titanic or the QE2, or the SS Bombay, the boat that regularly plied the ocean between Bombay and Mombassa" (9). We are guided in our construction of meaning by the explicit materials given to us by the text (the known parts of these

similes) but driven to go beyond them and complete them to unveil their implicit meaning, that which is left unsaid (or which perhaps cannot be said explicitly).

Iser develops similar ideas on the guided process of creative interpretation and the point at which it take place in *The Act of Reading*: "Communication in literature, then, is a process set in motion and regulated not by a given code but by a mutually restrictive and magnifying interaction between the explicit and the implicit, between revelation and concealment ... To sum up, then, the asymmetry between text and reader stimulates a constitutive activity on the part of the reader; this is given a specific structure by the blanks and negations arising out of the text and this structure controls the process of interaction" (169-70). This interaction in some sense is the loving conversation described by Nussbaum.

It is in this way that we also come to an understanding of the simple form of love that joined Annie and Vikram. The difficulty of defining love is apparent from the fact that some of the specifics that we are given are themselves similes: "we found each other like magnets" (9), for example. Clearly though something is lost in the schematic outline provided above. I think it will be clear to my reader that despite the fact that this basic structure underlies these movements from specifics to general principles, the strength of the experience is not captured by it. An itemization of the similes that build up the general concept of love in this passage would not account for the feeling that the reader derives from these similes. Like any schematic diagram it shows how something works, but it itself does not do what it explains. If this were not the case I would have little reason to argue for the importance of the richly detailed and immersive quality of the

text. The emphasis belongs on the experience of reading itself and the completion of the text by the reader, not on my explanation of the mechanics of the text.

This completion of the text by the reader is discussed in more detail by Schleiermacher. He describes the part of meaning making that derives from the active mental generations of the reader as the “organic” element of knowledge and thought. It is, as we have seen here, indissociable from making sense of a text. He would describe the type of analysis done above as a balance between “grammatical” and “technical” interpretation. Grammatical interpretation is where “the person...disappears and only appears as organ of language” (this is the type of interpretation that Strayer ostensibly employs in the *Mangat* and *Chen* cases) while in technical interpretation “language with its determining power disappears and only appears as the organ of the person, in the service of their individuality” (as with the expression of a subjective opinion) (94). True understanding is seen as a balance between the grammatical and the technical. For Schleiermacher, this balance corresponds to the movement between general and particular; truth and understanding reside in the “oscillation between the determinacy of the particular and the indeterminacy of the general image” (272). Clearly, this model denies the possibility of unitary incontrovertible meaning. However, the balance between the particular and the general, and the grammatical and the technical, does provide enough of a shared understanding to make discussion and debate possible. In words that echo Schleiermacher’s and that I in turn echo, contemporary hermeneutist Donald Davidson expresses the result of this balance quite nicely: “The method is not designed to eliminate disagreement, nor can it; its purpose is to make meaningful disagreement

possible, and this depends on a foundation – *some* foundation – in agreement” (196-7).

Let us continue to apply this method.

When Annie, and her entire family, are later killed by Kenyan freedom-fighters our visceral understanding of her importance to Lall allows us to understand something else, something central to the novel: his disillusionment and moral myopia. During the struggle that preceded independence, Lall’s uncle supplied Kenyan rebels with supplies, including a gun that he stole from Lall’s father. He is the novel’s one outspoken example of a morally engaged individual. He is also indirectly responsible for Annie’s death: she is killed with a gun which he stole. The effect on Lall is long-lasting:

Moral judgments, therefore, I shied away from, and this became the secret to my success. As an eight-year-old I had seen my beloved Mahesh Uncle take up a moral cause. He desired a different world and ended up abetting the slaughter of my friend Annie and her family and being responsible for much more. I never recovered from the shock of those events.... I

therefore prefer my place in the middle, watching events run their course.

(306)

We have already seen the problems with this position; the views established by one murder lead to another murder. Through this intricate interaction between specifics and generalities we have come to understand both love and amorality, as well as Lall’s progression between these two states. Up to this point his story functions as a negative parable providing many examples of how one shouldn’t live.

What shape does this shadow lead us back to? For both Lall and the reader, it takes only the slightest push to transform these traits into their opposites and use them to

develop another general concept. In this case it is a comment from Lall's friend and lover:

Perhaps Seema is right in her liberal attitudes; they may be simplistic but contain a germ of Gandhian truth. If enough people cared, she explained to me ... Cared, and did what, I challenged. She blushed, then said cautiously: Cared and did little things that perhaps could add up? (344)

Who is this Gandhian liberal individual? How do we come to understand what is meant by this short passage? We (like Lall) understand this brief description in relation to his past; it is everything that he was not: an individual aware of their connection to those around them and conscious of the effects of their actions. Someone who is not motivated by ambition or anger but by caring and who expressed this concern in their every action. This is the positive to Lall's negative. He judges himself against it, which motivates his return to Kenya and his attempts at reconciliation. We also judge him, using this new model as a point around which to coalesce all our previous thoughts and judgments.

This literary analysis has shown us the ins and outs of another way of discussing and judging morality. Looking at concerns that are remarkably similar to those which preoccupied the immigration system in the previous chapters, the fictional narrative of Lall's life has brought us to very different conclusions. The type of reading that this kind of text encourages is drastically different from that of the law and embodies a different conception of what is relevant. As a point of comparison it allows us to see more clearly what legal discourse does and doesn't do. It is possible that it could do more.

Perhaps, *The In-Between World of Vikram Lall* could serve as a solid foundation for creating a model for discretionary judgment which occurs outside of a strictly

economic context, one which can articulate the larger aims of the act, in a way that Spunt was prevented from doing by the original formulation of the discretionary sphere. It may not have the irrefutable accuracy of a scientific classification or the reliability of a mathematical proof (and I would argue that no law does), but it provides enough substance to sustain the type of debate required by the law. Of course, all readers may not envision this positive model in the same way, or understand Lall's guilt in precisely the same manner: each will complete the text in their own fashion. The essential interpretive nature of law remains, and within this interpretive system we could gain a way of talking and expressing principles of judgment and morality that makes possible interpretation and debate that is more nuanced than that seen in the *Spunt* and *Mangat* cases.

To create a serious proposal for how the laws which govern the immigration selection process (or the legal system more generally) could be adapted to use narrative discourse would be a huge undertaking. Let me conclude instead with a starting-off point for that kind of endeavor, a thought experiment or piece of academic fiction that might at some point provide the beginning for a more developed vision of the legislative use of narrative.

To be fully taken advantage of narrative would have to become an accepted part of the language of the law itself, not something brought in from the outside to supplement it occasionally on a case by case basis. Laws, or sections of laws would be written in narrative form. Just as there are specialists who draft legislation, so too could we have authors employed to write narratives which embodied specific legal principles which are less suited to standard legal prose. Section 11(9) of the *Immigration Act* for example

would be expressed in a narrative, a story, perhaps similar to Vassanji's *The In-Between World of Vikram Lall*. Then an official like Spunt, when seeking to exercise his discretionary judgment would have this work to rely on. It would serve both as a model of the specific values or principles that the legislature had decided should guide the application of discretion, and of discretionary judgment more generally. The relationship which such a text establishes with its reader outlines how to move from specific laws or actions to a more general understanding of legal principles or of an individual's character.

In many ways, Spunt's approach to immigration law, which we covered in chapter two, was based on a hermeneutic method similar to the one fostered by the reading of narrative: he actively elaborated on the text of the law to reach an understanding of what values motivated the selection process and did not hesitate to read *Chen* and *Mangat* in the same way. This had its weakness however, and having a legally recognized narrative to refer to would have changed things considerably. Spunt was asked during his cross-examination where he derived his understanding of the specific values which guided his assessment of individual applicants.<sup>10</sup> As we saw, he was unable to convincingly anchor his answer in the text of the law. A narrative such as *Vikram Lall* would have provided him with specific characteristics and values to refer to, as well as a way of explaining how his understanding of both *Mangat*'s actions and of immigration law related to these values.

In his assessment of *Mangat*, Spunt moves from *Mangat*'s specific crimes to a more general judgment of his character, and it is this more general picture which forms

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<sup>10</sup> "Q. Now, in paragraph 31, you indicate, [...] 'Mr. Mangat did not display the characteristics Canada expects from an independent applicant.' Again, where do you draw from the Act and Regulations the characteristics? Is it also under personal suitability? In Schedule 1?"(135)

the basis for his exercise of discretion. Just as Bill and Annie come to represent exoticism, Mangat comes to embody dishonesty; it is an “engrained aspect” of Mangat’s character (*Spunt, Cross-Examination* 135-6). Furthermore, the relevance of this general knowledge is made clear by the understanding of the general legal context within which it exists. This legal context is itself a product of a similar transition from specific to general. As we saw, Spunt moves from his knowledge of the specifics of the legislation to a more general understanding of the type of person deemed desirable by the *Act*:

Based on the provision that is given to me in the schedule to the Regulations, I consider that someone who flagrantly abuses authority and who essentially has breached his confidence, is not personally suitable – is not personally suitable for admission to Canada. (*Spunt, Cross-Examination* 135)

This active completion of the text by its reader is scuttled by Mangat’s lawyers, and perhaps rightly so. As we have seen, Spunt clearly does not have the resources necessary to fully articulate his vision of the *Immigration Act* or of Mangat; as a result both are vague and seem overly subjective. With a narrative in place to guide these judgments, it is possible that Spunt would be able to articulate his position more clearly, that the values written into the legislation would be more clear to him, and that instead of fearing the effects of subjective judgments, lawyers and judges would find in the type of extended narrative possible in a novel a middle ground between the subjective and the objective within which to discuss issues which fit less easily into the tightly defined boxes of quantifiable assessment.

While the position I am advancing shares common elements with the conclusions reached by Nussbaum, Weisberg, Abrams and West, covered in the introduction, there are also some important differences. The place I envision for the novel within law is far



greater. If certain sections of the law were written in the form of novels – if the form of the novel was accepted into legal discourse and used to convey those principles which fit less easily into the objectivist economic frame – then perhaps we could respond more effectively to many of the challenges we face in the maintenance of a more inclusive area for discretion within an economically structured selection process. This is particularly true because immigration law is an area of administrative law; administrative officials are delegated the power to apply the laws which govern immigration. Only a relatively small number of cases ever go before a judge, and as such immigration law is largely cut off from the process of active interpretation and clarification that results from the accumulation of case law. Even more problematic is the fact that only appeals ever go to court, and as such immigration case law (and as a result the public record and the pool of information available for this thesis) only includes a very limited picture of the application of immigration law. Only the negative application of discretion is visible. As it is unlikely that an applicant would ever appeal a decision based on the fact that they were accepted for the wrong reasons, the system will continue to have access only to negatives.

This situation makes it extremely difficult to maintain any areas within the law that go against the general economic hermeneutics of immigration law. As we saw, the large number of immigrants accepted under the original broadly defined version of discretion used by the MEI did not set a precedent for this type of selection. It had so little weight that it did not figure in any of the decisions given in the *Chen* or *Mangat* cases. Therefore, if the legislature wished to create such an area of discretion, expressing it via narrative could clearly set it apart from the hermeneutic system which surrounds it,

define this new area concretely enough to both satisfy the judiciary's need for clear reviewable legislation, and communicate the aims of the legislation clearly to those entrusted with enforcing it. Unlike Nussbaum, Weisberg, Abrams and West, I see narrative as a possible vehicle for the primary texts of the law – the laws themselves. Narrative is useful not only to make judgments stronger or to encourage legal reform, but to facilitate the communication, interpretation, and application of immigration laws.

In the title for this chapter I refer to the novel as a map, a border, and a voice for the application of immigration law. By this I mean that the novelistic form could guide the application of specific legal principles, establish certain clearly defined boundaries for the interpretation of these principles, and provide the language necessary for expressing and defending this process. The map formed by *The In-Between World of Vikram Lall* locates key principles that could underlie a more inclusive vision of discretionary judgment: the primacy of a moral sense as demonstrated by the negative example of Vikram Lall and the positive example of the Gandian liberal individual, the fallacy of the moral neutrality of economic actions and the importance of an engaged moral sense to all aspects of life. This map also traces the roads which link these concepts and the relationship they have to one another. It teaches us how to move from the specific sites of moral judgment to more general regions of assessment that can be widely applied. These roads are lines, borders in a way, and by defining these specific concepts they also limit them. Another limit comes from the map's self-interpretation; it has a key which alerts us to the significance of the principles contained within it ( the strongest voices of this interpretive context are those of the retrospective Lall and his lover Seema).

Together these limit us both to the specific area of discretionary judgment and to the specific interpretation of this type of judgment put forward by the novel. Finally, this text gives us the vocabulary we need to discuss and defend the interpretation of discretion and morality it puts forward. The words it uses are ours to use, and by discussing these issues it teaches us how to discuss them. These are the verbal tools that Spunt lacked in his cross-examination.

As important as what the text brings, is what it elicits from the reader. As we have seen, hand in hand with this way of speaking comes a way of reading, one which demands a more active participation on the part of the reader. The place that has been created for interpretation is bigger than one would expect in an area of discretionary judgment. The complexity of the ideas we are trying to discuss demands this type of active involvement, and, as I hope to have shown, the balance that the novel achieves between the particular and the general provokes a corresponding balance between technical objective interpretation and a phenomenological reader-based approach. This balance could broaden the horizons of what the law can consider and drastically change how people are defined by it. We are addressed in a new way, and with this new form of address come new forms of analysis and communication which open up entirely new areas of discourse. With these new words the exercise of discretionary decision making outside of the logical positivist framework that surrounds it might finally be possible, and with it a renewed recognition both of the fact that Canadian society is more than just its economy, and that immigrants themselves are not simply economic units but people who can contribute far more than economic productivity.

It is difficult to see what effect such pockets of narrative within the law would have on the system as a whole. Narrative discourse and standard legal discourse are, as we have seen, very different. How would these two discourses and their respective hermeneutic structures interact? Would they bleed into each other? Would reading one portion of the law as narrative encourage the same relationship between text and reader at other (non-narrative) points in the legislation? Would Spunt, for example, then gain easy access to the general aims of the *Act* because this form of reading allows one to go beyond simple correspondence of vocabulary, or would he still be cut off from them and only allowed to use this more active form of interpretation in explicitly narrative sections? How would the relationship between points-score assessment and discretionary judgment be managed? How would the use of narrative affect the perceived validity and authority of Canadian immigration law? These are difficult questions whose answers are necessarily beyond the starting-off point that I have provided by way of conclusion.

I do feel, however, that even the thought process involved with considering the legal use of narrative allows us to see beyond the binary perception of discretionary judgment as inherently subjective and biased and quantitative assessment as value-neutral and objective. We gain a clearer understanding both of what each form of assessment is and how it functions, and of what is left out when we choose one type over the other. As we have discussed, law is inherently tied up with defining and constructing social identity. Immigration law perhaps more openly than other areas of law because it has the task of deciding who is and is not a desirable addition to Canadian society, and must therefore also articulate a vision of that society. Neither form of assessment can escape from the values which underlie immigration policy. But discretionary decision making

guided by narrative might provide the opportunity for both a more open articulation of these ideals as well as an expansion of what types of ideals can be successfully articulated in legal discourse. This is not simply an argument for transparency and clarity; the use of narrative could change what the legal system is able to do, not simply for show what it is doing more clearly. It would lead us down a strange road between the binary of hermeneutic systems that are either completely open, multiple, subjective and un-decidable and those which are closed, singular, objective and self-justifying. By exploring the interstitial space between these two we could perhaps establish it as a thing in itself: a new system which could both Calculate and Decide openly and without dissimulation.

Appendix 1

- Section 114(1) of the *Immigration Act*:

114(1) The Governor in Council may make regulations:

(a) providing for the establishment and application of selection standards based on such factors as family relationships, education, language, skill, occupational experience and other personal attributes and attainments, together with demographic considerations and labour market conditions in Canada, for the purpose of determining whether or not an immigrant will be able to become successfully established in Canada.

(c) exempting members of the family class from any of the requirements of the regulations and prescribing, in substitution for those regulations, special regulations for the purpose of determining the ability and willingness of persons who sponsor applications for landing to assist those members in becoming successfully established.

- Section 9 of Schedule 1 of the *Immigration Regulations*:

9. Personal Suitability: Units of assessment shall be awarded on the basis on an interview with the person to reflect the personal suitability of the person and his dependants to become successfully established in Canada based on the person's adaptability, motivation, initiative, resourcefulness and other similar qualities.

- Section 7(1) of the *Immigration Regulations*:

7(1) Subject to section 11.1. where a visa officer has determined that a person is a Convention refugee seeking resettlement, the visa officer, for the purpose of determining whether that Convention refugee and that Convention refugee's dependants will be able to become successfully established in Canada shall take into consideration

- (a) each of the factors listed in column 1 of Schedule 1;
- (b) whether any person in Canada is seeking to facilitate the admission or arrival in Canada of that Convention refugee and his accompanying dependants; and
- (c) any other financial or other assistance available in Canada for such Convention refugees.

Appendix 2

Excerpt from the Cross-examination of Parmjit Singh Mangat  
March 12, 1991  
Court File No. T-3161-90

179. Q. Nevertheless you are a shareholder in the business.

A. But nothing was done in my name. It was similar to what the arrangement was for the motel thing – okay? – so monies were not paid out to me.

180. Q. I appreciate that, but I would just like to look at – and I am not interested in your brother's business in Vancouver.

A. It was all under his name. It was like a trust within us, and he took care of the whole thing.

181. Q. Are you trying to tell me there were no records of transactions involving the Mississauga office?

A. They are all kept by ---

[....]

183. Ms. Jackman (for the Applicant): I'm not sure of the relevance of why these documents are helpful to you?

Mr. Vaissi Nagy (for the Respondent): I think they are helpful to me to indicate the kind of business that Mr. Mangat was doing, the kind of time he spent on it, the kind of money he may or may not have taken out of it.

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