REPORT OF THE COMMITTEE **TUESDAY, October 23, 2001**

The Standing Senate Committee on Social Affairs, Science and Technology

has the honour to present its

NINTH REPORT

Your Committee, to which was referred Bill C-11, An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger, has, in obedience to the Order of Reference of Thursday, September 27, 2001, examined the said Bill and now reports the same without amendment. Your Committee appends to this Report certain observations relating to this Bill.

Respectfully submitted,

MICHAEL KIRBY
Chair

APPENDIX

Observations of the Standing Senate Committee on Social Affairs, Science and Technology on Bill C-11, an *Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*

During the hearings of the Standing Senate Committee on Social Affairs, Science and Technology on Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, the Committee heard from a broad range of individuals and organizations with varying opinions about the Bill.

The Committee recognizes that Bill C-11 represents a major overhaul of Canada's immigration and refugee protection legislation, and it will thus likely set the standard for many years to come. The Committee also fully appreciates that the current context in which the Bill is being considered is one of heightened security concerns following the profoundly tragic events of 11 September 2001 in the United States. In this context the Committee realizes that the Bill must embody a balance that will respect the needs and rights of individuals while simultaneously serving the public interest particularly with respect to security concerns and meeting Canada's international obligations.

Most witnesses emphasized that an underlying and widespread problem is the lack of resources available to effectively implement Canada's immigration and refugee programs. Many witnesses stated the Bill is sufficient to address all security and border control concerns – even given post-September 11th terrorism-related issues – provided the resources available for its administration and enforcement are increased. Events of the last several days in the United States further highlight the critical need for adequate training and resources, especially for all those involved in front-line security and processing.

However, the Committee heard that over the past decade the Department has undergone two rounds of serious downsizing that have reduced immigration staff – including front-line immigration officers – by almost half. Certain witnesses were not convinced it would be possible to implement new increased security measures given that there are insufficient resources to carry out current tasks in an effective manner.

The Committee also heard that the Immigration and Refugee Board has a backlog, or "inventory," of approximately 34,000 refugee claims that have not yet been heard and decided. Also of note was the testimony that about 15 per cent of claims are abandoned, and because Canada does not have exit controls it is unclear whether these people have left the country. Witnesses explained that the Board currently employs 186 decision-makers, supported by 103 refugee claims officers. Once the Department has found a person eligible to make a refugee claim – a procedure that can take up to six months – the person's claim is referred to the Board, where the processing time for each claim is about ten months. Certain witnesses expressed concern about the proposed 72-hour time frame for the initial eligibility processing step. However, other witnesses indicated this would merely ensure the claim was referred to the Board in a timely fashion. They explained that if background checks later turned up information suggesting, for example, the person was a security risk, the claim could be suspended at any time. The Committee was told that the Board would need in the order of 250 decision-makers and another 50 or 60 refugee claims officers to significantly reduce the backlog and processing time.

The Committee heard testimony about events that have occurred at overseas missions – large amounts of money disappearing, bribery, visas going missing – which are allegedly attributable to locally engaged immigration employees. The Committee also heard concerns from witnesses about the qualifications and training of Board members being insufficient to carry out their duties fairly and effectively. Testimony was given that such shortcomings would only be exacerbated by the proposed move in the Bill to single member panels.

The Committee suggests that the Government evaluate the need to invest in additional resources in Canada's immigration and refugee system for more personnel, better enforcement, additional training programs and improved technology. The Committee is of the view that there should not only be new personnel hired to implement reinforced security measures at entry points, but also to process and review new immigration applications and refugee claims.

The Committee also suggests that the Department and the Immigration and Refugee Board evaluate the need to verify the integrity, qualifications and decision-making ability of their personnel, especially locally engaged overseas immigration officers and Board members. As part of this process, the Minister may wish to undertake a review of the appointment process for Board members to make it more professional and to ensure members have sufficient qualifications and training. The desirability of having refugee claims heard by two members of the Board, as opposed to just a single member, could also be evaluated.

The Committee is concerned about the broad regulation-making power the Bill would give to the Department. The Committee recognizes that under clause 5(2) of the Bill, certain proposed regulations would be laid before each House of Parliament, and each House would then refer the proposed regulations to the appropriate Committee of that House.

However, under clause 5(3), once a proposed regulation had gone before each House there would be no need to put it before the Houses again, *even if it had been altered*. Concerns were expressed that this provision makes the whole process of review of the proposed regulations by each House of Parliament illusory, given that changes can be made to proposed regulations without the need for Parliamentary review. The desirability of subjecting the regulation-making power of the Minister to greater scrutiny by the appropriate Committee of each House of Parliament should therefore be examined. This scrutiny could include review of *all* changes to proposed and existing regulations.

The Committee was told that the family class set out in clause 12(1) should be explicitly defined in regulation to ensure that no currently recognized categories of the family class are excluded. In particular, the Committee would suggest that "grandparents" be included in the family class by regulation. The Committee recognises that a commitment to do this was made by the Minister in her testimony.

The Committee also agrees with witness suggestions that the family class regulations to the Bill should explicitly define "common-law partner" to include same sex partners.

The Minister indicated to the Committee that the Department is "fast-tracking" implementation of a new fraud-resistant permanent resident card. The Minister did not state when the card would be in place, but noted that it would definitely be before the 2003 date initially envisioned. The Committee requests an update from the Minister on this issue at the earliest possible opportunity.

Various witnesses expressed concern about the Bill's lack of definitions of "terrorism" and of what constitutes being a "member" of a terrorist organization. The concern derives largely from the use of these terms in clause 34, the provision dealing with inadmissibility on security grounds. The Committee was told that without explicit definitions, the decision whether a person is a "terrorist" would be a subjective one left to the discretion of immigration officers.

The Committee recognizes that the international community has hesitated to endorse a precise definition of terrorism because the term is so ambiguous and open to political manipulation. However, the Committee heard that workable definitions of terrorism do exist, such as that set out in the United Nations Convention against the Suppression of Financing of Terrorism. Some witnesses suggested using the definition of "threats to the security of Canada" set out in the *Canadian Security Intelligence Act*. This could be done in the regulations that would apply to Bill C-11.

The Committee was also told that the term "terrorism" should not be used in legislation, because it is too amorphous and may thus target the wrong people. Rather, it was suggested that reference be made to "international crimes," as enunciated in United Nations treaties, and as they relate to the many discrete terrorism-related offences set out in Canada's Criminal Code.

The Committee recognizes the importance of defining the term "terrorism," and supports the idea of including such a definition in legislation or in regulation. The Committee wishes to stress, however, that the same definition of "terrorism" should be used in all relevant Canadian legislation. The Committee highlights the definition of "terrorist activity" in clause 4 of Bill C-36, the *Anti-terrorism Act*, which is currently before the House of Commons. A similar definition – adapted to the context of Bill C-11 – should be considered for the regulations that would apply to Bill C-11.

The potential application of clause 64 of the Bill also raised certain concerns during proceedings. Non-governmental witnesses questioned several aspects of this provision, which would remove the right of a permanent resident convicted of a "serious crime" – defined as any offence for which a sentence of at least two years was imposed – to appeal his or her deportation to the Immigration Appeal Division. Thus, if an immigration officer reported a permanent resident to an adjudicator as inadmissible on this basis, the permanent resident would automatically face deportation regardless of other extenuating factors. Many witnesses expressed the view that clause 64 goes too far and would be subject to a great number of legal challenges.

The Committee was told that currently the Immigration Appeal Division is permitted to hear such appeals. Circumstances considered at these hearings have been enumerated in a 1985 case called *Ribic* v. *Canada (MEI)* and include:

- The seriousness of the offence;
- The possibility of rehabilitation;
- The length of time spent in Canada and the degree to which the appellant is established here;
- The appellant's family in Canada and the dislocation to the family that deportation would cause;
- The support available to the appellant, not only within the family but within the community; and
- The degree of hardship that would be caused to the appellant by his/her return to the country of nationality.

The Committee heard that clause 44 of the Bill is permissive in that an officer who is of the opinion that someone is inadmissible *may* prepare a report to send to the Minister, which report *may* be referred to an admissibility hearing. Thus, there would be no obligation to prepare a report and certainly no obligation on the officer to consider the above-noted *Ribic* criteria. The Committee also understands that clause 53 would grant the Governor in Council the authority to make regulations concerning the circumstances set out in clause 44.

Several witnesses suggested completely removing clause 64 from the Bill. The Committee acknowledges this suggestion, but understands that the clause 53 regulation-making power could be used to address the concerns raised by clause 64. The Committee makes three suggestions to this effect.

First, the Committee suggests including in the regulations a requirement that the immigration officer, or a senior immigration official, consider *all* circumstances of the permanent resident's case under clause 44 when deciding whether or not to issue a report.

The Committee's second suggestion is to explicitly include the *Ribic* criteria in the regulations that would govern whether or not a permanent resident convicted of a "serious offence" is referred to an adjudication hearing.

Finally, evidence before the Committee suggests enacting a domicile provision in the regulations to allow access to the Immigration Appeal Division for permanent residents who meet a threshold establishment in Canada. For example, permanent residents who had maintained their permanent resident status for *five years* before being reported under clause 44 could be exempt from the application of clause 64. This would amount to an automatic right of appeal for those who had been permanent residents for at least five years.

The Committee is of the opinion that any of these three regulatory provisions could address the concerns caused by clause 64, i.e., that long-term permanent residents with strong ties to Canada and who are a low risk to re-offend would face deportation based solely on the fact of their conviction and sentence. The Committee suggests that the Department address the issues raised by clause 64 by enacting one of these suggested regulatory alternatives.

The Committee also heard testimony about the need to regulate immigration consultants. Currently, anyone can claim to be an immigration consultant, regardless of his or her training and experience in immigration law. Witnesses spoke of how regulation would prevent dishonest and incompetent persons from holding themselves out as immigration practitioners as they make unrealistic promises to clients and charge them exorbitant fees.

The Committee was informed that over the past decade detailed representations have been made to the Department suggesting a self-governing regulatory regime that would not offend provincial jurisdiction. The Committee urges the Department to evaluate the desirability of using its statutory power – which exists under the current Act and is present in clause 91 of Bill C-11 – to regulate immigration consultants.

Clause 101(1)(e) of Bill C-11 would exclude from the refugee determination system those who have passed through a prescribed country on their way to Canada, unless that country was their place of nationality or former habitual residence. These "safe third countries" would be designated by the regulations and asylum seekers would be expected to make their claims there. Similar provisions exist in the current *Immigration Act* and have existed for some time. However, no country has ever been designated for this purpose.

The Committee heard evidence that anywhere from one third to one half of refugee claimants in Canada enter our country from the United States. Testimony also indicated that many European countries have "safe third country" provisions in their immigrations laws. Concerns were expressed, however, that such provisions must ensure that the asylum seeker receives a hearing in accordance with the Refugee Convention and international law. The potential exists, it was noted, for claimants to be deported to a "safe third country" which would then deport them to another "safe third country" and so on, until they were eventually returned to the country where they fear persecution. It was also indicated that the Europeans are not currently satisfied with the way their "safe third country" system functions at this time.

The Committee heard that United Nations High Commissioner for Refugees guidelines exist that could be considered in determining whether the return of an asylum seeker to a particular country should take place. The conclusion of formal agreements between nations, it was indicated, has the potential of enhancing the orderly protection of refugees. However, the Committee was informed that there have been difficulties in establishing an agreement with the United States. Evidence was put before the Committee that the Canadian refugee determination system may be "more generous" than the American.

The Committee is of the view that consideration should be given to the definition of "safe third countries". The issue could be further examined by the Government, particularly with respect to the negotiation of an agreement of shared asylum processing with the United States. The Committee suggests that the Government work toward implementing the safe third country provision.

A number of members of the Committee are also concerned that Bill C-11 effectively purports to be retroactive in its application. For example, the new inadmissibility guidelines would apply in respect of acts that took place before the Bill would be proclaimed into law. Witnesses made specific reference to the "serious criminality" provision of clause 64 that would preclude a permanent resident from an appeal of deportation if he or she were sentenced to two years or more for a criminal offence. In effect, people who may not be removable under the current Act would become removable when C-11 is proclaimed.

Processes that have begun under the current legislation would automatically become subject to the new legislation. Although the Minister stated that applicants who have been interviewed under the current law would be processed according to the current law even after the new legislation takes effect, it was not clear that others who have not reached the interview stage would be subject to the rules that were in place when they made their application. Thus, applicants who have spent large sums of money on the assumption that they meet the immigration criteria could discover that they suddenly do not meet the new criteria when the new law takes effect. The non-refundable fee per adult applicant is usually $500; even higher fees are charged for business class applicants.

The potential for legal challenges to the retroactive application of a new act was also mentioned in testimony before the Committee .

A number of members of the Committee suggest that Bill C-11 should not force those whose processes have commenced under current legislation to be automatically subject to the new law. At the very least, they should have the choice of which legislation would apply.

Although under clause 94 the Department would already be obliged to submit an annual report to Parliament on the operation of the legislation, the Department should also be obliged to report back to the appropriate Committee of each House of Parliament on the implementation of the Bill, especially in relation to points raised in these Observations.

Finally, in light of the various issues highlighted during these hearings, the Committee is of the opinion that the Senate should consider doing an in-depth study of all aspects of Canada's immigration and refugee protection system. As one specific example of the issues that need to be addressed, the Committee heard important testimony about the difficulties faced by female refugee claimants subject to deportation orders who, upon removal, are separated from their Canadian-born children. There are many other similar examples of issues that indicate the timeliness and desirability of an examination of Canada's immigration and refugee protection system. Such a study should define the fundamental issues and include a review and analysis of previous governmental studies on the Canadian immigration and refugee systems.

The Committee intends to ask the Minister to respond in writing to these observations six months after the legislation is proclaimed.

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