Balancing

(*Submission by David Matas to the House of Commons Standing Committee on Bill C-11, 25 May 2010*)

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I. The five requirements

Bill C-11 is titled the Balanced Refugee Reform Act. It supposedly balances improved protection for refugees with enhanced prevention of abuse.

For the Bill to realize its aim of balance, five requirements must be met. One, there must be a need to improve protection for refugees. Two, the bill must be effective in improving that protection. Three, there must be a need to enhance prevention of abuse. Fourth, the bill must be effective to enhance that prevention. Five, improved protection for refugees and enhanced prevention of abuse must be roughly equivalent, balancing each other out.

II. The need to improve protection

Does the Bill meet these five requirements? It certainly meets the first. There is indeed a need to improve protection for refugees.

Right now there is no appeal from a refugee protection determination and there needs to be. The present system is predicated on the infallibility of the person who decides. The system has no error correction mechanism for errors of fact.

Errors of law can be remedied by the Federal Court. So can errors of fact which are perverse, capricious or without regard to the material before the tribunal. However, errors of fact which do not meet that threshold at present stand uncorrected.

The previous system had a two member panel of the Immigration and Refugee Board deciding a claim which gave the benefit of the doubt to the claimant. A split vote led to a decision in favour of the claimant. The present legislation reduced panels from two to one in exchange for an appeal. But then successive governments went back on the Parliamentary package by not proclaiming the appeal provisions. The result was a falsification of the intent of Parliament, a bait and switch which put real refugees in

peril.

III. The partial remedy

Does the Bill remedy that defect? The answer is, only partially. The remedy is not complete for three different reasons.

Under the present Bill, not every refused claimant can appeal. In particular those from designated countries can not. Claimants from designated countries denied refugee protection in error can not invoke the error correction mechanism of the appeal. For them, the reliance on the infallibility of the first instance decision remains.

Second, even for claimants not from designated countries, there is a potential two year lag in the proclamation of the provisions about the appeal. During those two years, mistakes will be made without hope of correction.

The Bill here is confusing. Its effect is clear; its intent not so clear. The appeal provisions in the present Bill are to come into force immediately[1]. The appeal provisions in the existing legislation are to come into force within two years of royal assent of the Bill[2].

Practically, when part of the appeal comes into force in two years, all comes into force in two years. But the impression the wording leaves was that the drafters of one part of the Bill, about immediate implementation of some components of the appeal, did not have the other part of the Bill, about two years delay in other components of the appeal, in mind.

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1 Section 42 and Interpretation Act section 5(4).

2 Section 31.

Where the left and right hands work at cross purposes, what is the overall intent? It appears that at least one arm of government, the drafters of one part of the Bill, was prepared to accept immediate implementation of the appeal. Any argument that the appeal should be delayed for two years is weakened by that concession.

Third, the system takes away with one hand what it gives with another. Efforts aimed at abuse prevention - the partial elimination of recourse to humanitarian applications, temporary residence permits and pre-removal risk assessment - weaken protection. These changes aimed at preventing abuse will have the effect of denying protection to those who are not abusers and who need Canada's protection.

IV. The claim of abuse

Is there abuse of the system which needs addressing? The government promotional material surrounding release of the bill pointed to delays in the processing of refugee protection claims as encouraging abuse. Because claims take a long time to process, the fear expressed is that people will make claims just for the prolonged access to Canada claims will give them, as well as the work permit eligibility which comes with making a claim.

The notion that people will uproot their lives just for temporary access to Canada is cynical. At the very least, it is hypothetical.

Any system, private or public, is going to have some abuse. Open shelf grocery stores, for instance, allow for shoplifting which would not occur if every grocery item were behind counters and handed over to customers by clerks. We should not shut down all our private and public systems merely because there is the possibility of abuse and some instances of its existence. A system becomes untenable only if the rate of abuse becomes high.

There is no compelling evidence that there is a high rate of abuse in the refugee determination system. The government points to rejection rates. Yet, a rejected claim is not equivalent to an abusive claim. A person may have fled what the person sees as a real risk. The claimant, though genuinely afraid, may not fit within the refugee protection definition for legal, technical reasons. Such a claimant is not an abuser of the system.

Long delays, though, are in no one's interest. Even where there is no abuse, delays are problematic because of the obstacles they pose for real refugees. Real refugees have their lives on hold while claims are being processed. Wives are separated from husbands. Parents are kept apart from children, even young children. Schooling is interrupted. Work is necessarily temporary. It is unnecessary to establish abuse to justify ending delays.

However, we must be wary of making the system too short as well as too long. A system which operates too quickly will increase mistakes and weaken refugee protection. Haste makes waste.

Refugee determination takes time. It takes time for claimants to seek advice, to retain counsel, to prepare the written statement of the claim, to collect the evidence. It takes time for those who determine the claim to identify the issues, research the claim, to corroborate the evidence, to gather the country condition information, to reflect on the evidence, to write the reasons. It takes time at the Federal Court on judicial review for the parties to make submissions, for the court to read the submissions and determine whether to grant leave, for the case to be heard if leave is granted and for judgment to be rendered if reserved.

The time necessary to do justice to a claim will inevitably be long enough to attract the imaginary would be abusers the authors of the Bill fear. Put another way, determining

a claim in so short a time that imaginary abusers would be deterred would mean establishing a process that could not possibly do justice to real refugees.

In order to be effective in removing delays, we need to focus in on the cause of delays. Changes in the system which are labelled as abuse prevention but do nothing to address the cause of delays are pointless to prevent abuse and potentially harmful to the protection of real refugees.

V. Removing delay

A. Unnecessary steps

In principle, there are two causes for delays. One is fragmentation of the system. Each step takes time. If there are too many steps, that means too much time. If there are unnecessary steps, time is wasted.

The present Bill does not address this cause of delay. Right now the system has two unnecessary steps, eligibility determination and pre-removal risk assessment. But they still remain.

That is not to say that eligibility and pre-removal risk assessment are irrelevant. But it is important to distinguish between steps and standards. Not every different standard needs a different step.

i) Eligibility

The claimed need for existence of eligibility and post determination confuses steps and standards. With these two steps, every claimant is put through a system which affects only a few in the sense that only a few fail at the eligibility stage or succeed at the post determination stage.

Combining the eligibility step with the claim step would speed up the process. It would

also avoid the need to fill out two sets of forms - one a notice of intention to claim refugee status and two a personal information form, with duplicative information.

Both eligibility and post determination standards should be folded into Board determinations. Existing eligibility standards could be grounds for exclusion by the Board. Alternatively, the Board could use those standards as jurisdictional grounds.

If eligibility determination issues were to be resolved by the Board as part of the claim process instead of as a separate step, the Minister would remain free to engage admissibility procedures at any time. These admissibility procedures could in turn lead to jurisdictional/exclusion determinations by the Board.

ii) Pre-removal risk assessment

Pre-removal risk assessment (PRRA) was preceded, in earlier legislation, by application for membership in PDRCC (post-determination refugee claimants in Canada class). Under the immediately prior system, the Refugee Division of the Immigration and Refugee Board had no torture jurisdiction. PDRCC was created to address Canada's obligations under the Torture Convention. The extended grounds of risk within PDRCC included cruel and unusual treatment or punishment and risk to life.

The present law broadened the jurisdiction of the Refugee Division of the Immigration and Refugee Board to encompass torture, risk of cruel and unusual treatment or punishment and risk to life. So the continuation of PDRCC in the form of PRRA was odd, in effect allowing for the same determination twice, once by the Board and a second time by civil servants. Moreover, the legislation said that only new evidence could be considered in PRRA. However, in most cases, there was no new evidence. So this was a time consuming, resource intensive step with more or less no purpose.

The ostensible justification for the continuation of PDRCC in the form of PRRA was that

some refused refugee claimants could not be removed quickly after refusal by the Board, either because of turmoil in the country of origin, the time necessary to get removal documents, or applications for judicial review. In the interim, conditions might have changed. There had to be a means of dealing with those few cases where there was a change.

The obvious way though to deal with a few cases with a change in circumstances would have been to allow, on application, for reopening of the Board refugee determination, rather than to reconsider every case, the present system. The government actually offered to the Board this option when the legislation was being drafted. But the then Board chair, Peter Showler, asked for more resources to assume this jurisdiction than the government was willing to give. So this reopening jurisdiction never happened.

One could see why Peter Showler took the position he did. The government wanted more or less immediate turn around on reopening applications. That would have meant the Board would have to had to put aside hearing refugee claims to deal with reopening applications.

The request of the government though was unreasonable, because their own PRRA determinations are far from immediate. Indeed, they take so long, the process is self defeating. The delay between the initiation of the PRRA process though a PRRA application and a PRRA determination and the delay between a rejection by the Refugee Protection Division of the Immigration and Refugee Board and the initiation of the PRRA process are similar. Circumstances are as likely to change in one time span as the other.

The Bill recognizes the superfluity of pre-removal risk assessment by abolishing it all together for one year from the date of rejection. With this change, the system would go from one extreme to the other, from pre-removal risk assessment in every case to

pre-removal risk assessment, within the one year group, in no cases. This all or nothing approach creates problems for the system with all and for the individual, as elaborated in the humanitarian section of this submission, with none.

iii) Interviews

The present Bill adds one more step, an information gathering interview[3], potentially generating even further delays. Minister Kenney, when introducing the Bill in Parliament, said that an interview within eight days of the referral of the claim to the Board would be the norm.

Board officers, as a matter of administrative practice, right now review personal information forms, for screening purposes. This review is done internally at the Board without any claimant contact.

The legislation itself does not specify the eight day period. The time spans will be set in the rules of the Board. Those rules are set by the Chair of the Board, not by the Government[4]. There will be an opportunity to comment on the time span before the time span becomes law.

Eight days is too short for a variety of reasons. It is too short for the claimant. It is unrealistic to expect a claimant to fill out a form, put together the narrative and collect the relevant documents within eight days.

Claimants often require both interpretation and translation. Translating the first draft of a written narrative, even if the narrative is written quickly, can take some time. Revisions and elaborations can be done only after the translation.

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3 Section 11.

4 Act section 161.

Setting an eight day limit imposes severe constraints on access to counsel. Many counsel are not available on a few days notice.

Eight days is also too short for the Board. Because these interviews are not done now, the Board would either have to have new resources for these interviews or take funds away from some other activity to fund them.

The logic of the Government is that you have to spend time to save time. The Minister in Parliament said that interviewing officers would be able to identify claims that appear well founded and could recommend expedited processing for them. The present process to identify claims for possible expedited processing is paper screening. Interviewing everyone for the purpose of identifying those who could go into expedited processing is bound to be more resource intensive than paper screening.

Information gathering hearings, in principle, are desirable. They add to the fairness of the process. Yet, we should under be no illusion. They will add to both the time and cost of processing.

The current discussion, about whether the current proposed times spans - an interview eight days from referral and a Board hearing sixty days from the interview (another norm the Minister has proposed) - are too short has an air of unreality about it. Aside from the fact that these times can not be decided by the Minister or the Government but only by the Chair of the Board, aside also from the fact that these time limit proposals are chasing a mirage, that claimants will be deterred by shorter time spans, the time limit proposals ignore practicalities.

The history of this legislation is replete with unworkable and unrealized time spans. One would have thought, by now, that the Government would have known better.

Take, for instance, the three day rule. The legislation dictates that a refugee protection eligibility determination must be made within three working days of the making of a refugee protection claim[5]. Yet, for inland claims, that almost never happens. A person who comes to a local office to make a claim will be given a form and an appointment. The appointment is typically weeks and sometimes months off, rarely just three days away.

This practice is reflected in the Immigration Manual which states

> "Whenever possible, the entire front-end screening process should be completed as per Section 5.1 above at the time of the claimant's initial visit to the office. At inland offices where it is not feasible to examine the claimant right away, an appointment should be made within two weeks for the claimant's admissibility and eligibility examination with an officer designated to accept claims for refugee protection."[6]

Note the reference to two weeks and not three days. Inland offices start the three day clock running from the time the interview begins, not from the time the claimant shows up at the office.

Or take the ninety day time span limit in the statute for the scheduling of a hearing of a Federal Court case for which leave is granted[7]. If one looks at the time lags between the granting of leave and the scheduling of hearings, it would seem that the ninety day rule is respected. Nonetheless there is a marked variation in the timing of the decisions which are decision ready at the same time depending on whether the decision is a granting or denial of leave.

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5 Section 100(1).

6 Manual PP1 section 8.2

7 Section 74(b).

The Court, understandably, has developed the practice of withholding the formalizing of the granting of leave decisions until it has the Court availability to respect the ninety day window. It is hard to see how the Court could behave differently. Again the ninety day clock starts ticking from the time when the required time limit can be met.

The Chair of the Board, in making the rules consequent on this Bill, if it passes in its present form, may take the bull by the horns and simply ignore the Minister's suggestions of eight and sixty days. However, if the Chair pays nominal respect to the Minister's wishes and inserts the eight and sixty day proposals into the rules, experience suggests that the reality will be something altogether different: the eight and sixty day clocks will start ticking from the time when the Board can respect those requirements and not before.

On the assumption of no new resources, existing resources will have to be diverted from existing tasks to complete the interview task. How much this new step will add to the overall time of the process is speculative. But it is likely to be substantial.

iv) Humanitarian applications

One step which does not cause delays, but which the authors of the Bill seem to think does, is an application for permanent residence on humanitarian grounds or for a temporary resident permit. The Bill proposes that a humanitarian application cannot be made pending a refugee protection determination claim[8]. Where a humanitarian application would succeed and a refugee protection claim would not, it is perverse to insist that the system spend time and money on a refugee protection claim before getting to the humanitarian application.

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[8] Section 4(1).

The Bill also proposes that a person making a permanent residence humanitarian application may not raise matters which are taken into account in a refugee protection claims or applications. This requirement is not tied to refugee protection claims or applications. So a person in theory may have made no refugee protection claim or application and still not be allowed consideration of risk under a permanent resident humanitarian application.

There is the odd case where a person is ineligible to make a refugee protection claim or application. The Bill adds a ground of ineligibility for pre-removal risk assessment, people whom, with certain exceptions, less than 12 months have passed since their claim for refugee protection was last rejected [9]. A ground of ineligibility for pre-removal risk assessment is, in principle, always a bad idea, because people ineligible for pre-removal risk assessment are presumably also ineligible to make a claim for refugee protection.

The Minister has the power to exempt classes of persons from this ineligibility provision. However, the Minister does not have the power to exempt individuals from this provision.

How does the system deal with an individual change of circumstances? The answer seems to be, it doesn't. These same claimants can not make humanitarian applications. A person who can not make either a claim for refugee protection or an application for pre-removal risk assessment or a humanitarian application would, depending on the circumstances, have a compelling case that his or her rights under the Canadian Charter of Rights and Freedoms were being violated.

As well, refugee protection determination does not cover off all risk. There are

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[9] Section 15.

elements of risk not encompassed by the refugee protection system now picked up through permanent residence humanitarian or temporary resident permit application[10]. The proposed change would create a gap in the Canadian system of protection.

Why are the authors causing all these problems for temporary resident permits and permanent resident humanitarian applications? An application for a temporary resident permit or a permanent resident humanitarian application does not stop the removal clock.

Removal of an applicant for a temporary resident permit or humanitarian permanent residence with a pending application can be stopped only by a court ordered stay of enforcement of the removal order. To obtain a stay, the court must be satisfied that a tripartite test is satisfied, that the application raises a serious issue, that removal would inflict irreparable harm and that the balance of convenience favours the applicant. To repeal the possibility of an application for a temporary resident permit or humanitarian permanent residence simply to get at these stay applications means allowing for the removal of people on whom irreparable harm would be inflicted, hardly a compelling justification for legislative change.

B. Backlogs

The other cause of delay besides unnecessary steps is backlogs. If the system gets overwhelmed, there is queuing.

Right now the refugee determination system suffers from both problems, unnecessary steps and backlogs. So, in principle, there is scope for reform.

The backlog problem is not necessarily an abuse problem. There can be abuse and no

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[10] See *Pinter v. M.C.I.* 2005 FC 296

backlogs. As well, there can be no abuse and big backlogs.

What causes backlogs in the system is numbers of claimants relative to capacity to process claims. If numbers making claims are large and the capacity for processing claims is small, there will be backlogs, abuse or no abuse. If numbers making claims are small and the capacity for processing claims is large, there will be backlogs, again abuse or no abuse.

Right now we have a backlog, a number of claims higher than the capacity of the system to have processed them. Why did this backlog develop?

i) Appointments

One explanation is the strange history of the Board appointments system. There was a lot of political noise, mostly coming from the Tories, about patronage appointments to the Board at the time Judy Sgro was the Minister. She reacted to the criticism by changing the appointment system so that patronage became impossible.

But then the Conservatives got into power and had second thoughts about a system of appointments that was so impervious to patronage that they could not penetrate it. So they decided to change the appointment system yet again to open it up to the possibility of patronage, and not appoint anyone in the meantime until the system was changed.

Before the Tories started fiddling with the appointment system, Jean-Guy Fleury, as Chair of the Board, had been able, through astute management, to get the Board up to date. But with the Conservative government fiddling, the Board developed a substantial vacancy rate and fell far behind. When the Government stopped appointing members to the Board and undermined his efforts, Fleury resigned in protest. So did every member of the non-partisan appointments advisory Board.

Now the appointments system has been rejigged the way the Tories want it. And they have managed to get the Board back to close to its full complement. But the Board still has the backlog left behind from all these shenanigans. The problem here then has nothing to do with the refugee protection system and everything to do with the hypocrisy of politicians and their appetite for patronage.

The Bill addresses this sorry history, in a way, by replacing the Refugee Protection Division order in council appointments with civil servants[11]. In historical context, the change is a remarkable admission. The appetite for patronage of the Government, it seems, is satiable and has been satiated. The change is, nonetheless, the wrong lesson to draw.

Because of patronage appointments, some order in council appointees are neither independent nor expert. Right now the Board is a lottery. Some members know what they are doing and others do not. Some members are uniformly negative; others are not.

Even if decisions by civil servants can pass legal scrutiny, civil servants do not bring the same degree of independence or potential expertise to these decisions as order in council appointees do.

Civil servants making refugee protection determinations develop a culture of saying no, in part because they become infected with government enforcement, demographic, economic, political and diplomatic considerations which in principle should be none of their business. The problem with civil servants' deciding refugee claims is not just that they develop the culture of the government as a whole. They are, either before or

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[11] Section 26

after they get into refugee determination, normally part of the government as a whole.

Civil servants who decide refugee claims typically come from and go to other parts of the government. For a civil servant who decides refugee claims to diverge too dramatically in those decisions from government enforcement, demographic, economic, political or diplomatic policies can be a career limiting move.

Moreover, the most difficult component of a refugee claims decision, bar none, is determining credibility. Refugee claimants normally do not flee their countries with documents and witnesses in tow. The most common cause of false negatives is mistaken implausibility findings based on the false assumption that events abroad unfold much the way they do in Canada. For those without a refugee or foreign experience, extrapolation of the Canadian experience is the typical fall back. Attempting to teach those without a refugee or foreign experience the reality of the world beyond Canada's borders is forlorn.

Yet, hiring civil servants means doing that. Those with first priority for civil service jobs are those already in the civil service. There are, of course, people in the civil service with refugee or foreign experience as part of their government experience. However, that experience has blinkers; it is cosseted in a Canadian government environment, delivering Canadian government policies. It is not an experience working with refugees in an environment where the person has to cope with the foreign environment on his or her own.

At the very least, if members of the Refugee Protection Division of the Immigration and Refugee Board are to be civil servants, two requirements should be met. The appointments should not be restricted to persons within the public service. Second persons within the public service should not be given priority. Both these principles should be legislated by establishing an external appointment process within the

meaning of the Public Service Employment Act.

The order in council appointment process remains for members of the Refugee Appeal Division of the Immigration and Refugee Board. Why have two different appointment procedures for the two different refugee related divisions of the Board? The existence of each throws into question the other.

If patronage is problematic for the Refugee Protection Division, it is presumably problematic for the Refugee Appeal Division. If the Refugee Appeal Division needs the flexibility of an appointment process unconstrained by the rigours of the Public Service Employment Act, then so, presumably, does the Refugee Protection Division.

That is not to suggest that either should become like the other. The criticism of both implied by the maintenance of the two appointments systems is justified. The problems for the Refugee Appeal Division posed by patronage have not been addressed. Nor have the problems posed for the Refugee Protection Division by staffing with career civil servants.

The answer to too much patronage is less patronage. Removing the possibility of appointing to the Refugee Protection Division of the Board people from the private sector who know refugees, who work with them, who are familiar with foreign countries and their human rights situations means taking refugee protection out of the Refugee Protection Division.

ii) Non-visa countries

The background material to the Bill produced by the Government points to another cause for the backlog, the large number of claims from the Czech Republic and Mexico before visas were imposed on those countries. Superficially that problem is gone, since visas have been imposed on those two countries. Eventually the claims made before

the visa impositions will be processed and the backlog will recede. So why do anything?

The backgrounder goes on to state, cryptically and elliptically, that "Visas, however, are not a permanent solution to the systemic challenges faced by Canada's asylum system." The implied logic of this statement is that the goal of the Bill is to develop a refugee determination system which would function effectively even if Canada imposed visa requirements on no country whatsoever.

Yet, it hard to imagine that this could happen, that Canada could lift visa requirements on all countries and still keep the number of claims at the level the system can currently process without developing a backlog. No matter how short the system became, lifting visa requirements on all countries would quickly overwhelm the current system or any variation of it with constant resources.

Removing a backlog can be done in one of two ways. One is to reduce the number making claims. The other is to increase the capacity for processing claims. For cost reasons, the government has little appetite for increasing capacity to process claims. So the answer becomes, reduce the number of claimants.

Shortening the system may deter some of those who make a claim just for the time in Canada the claim buys. It will not necessarily though deter all such claimants. The fraud, like any criminal, thinks he can get away with his wrongdoing. Moreover, people who are really afraid back home, whether they will eventually get recognized or not, will make claims no matter how short the time span for the claim.

The government of Canada, understandably, felt uncomfortable imposing a visa requirement on the Czech Republic, because it is part of the EU, and Mexico, because it is part of NAFTA. Although the backgrounder is generalized, this is, in substance, the

subject matter the Bill addresses.

This Bill then is an attempt to square that circle, to change the refugee determination system so that the visa requirements on the Czech Republic and Mexico can be lifted. The theory of the drafters of the Bill is that claims from the Czech Republic and Mexico were abusive. Abusers were attracted by the prolonged nature of the Canadian system. Shorten the system and the visa requirements on these two countries can be lifted.

One can see this logic at play not only in the backgrounder but also in the designated country exception for appeals. In abstract, the notion of a designated country exception for appeals works at cross purposes with refugee protection. Since the purpose of an appeal is error correction, why would one want to correct errors made in claims of nationals of some countries but not others?

That question can be answered by examining the bill from the optic of the desire of the government to lift the visa requirements for the Czech Republic and Mexico. If those countries are designated, then the claims process is shorter for claimants from those countries. If would be claimants from those countries are discouraged by a system which determines claims quickly, then the enactment of the Bill into law would mean that the visa requirements from those countries could end.

So this Bill is predicated in part on the assumption the refugee protection claims from Mexico and the Czech Republic made before the visa requirements were imposed were abusive. Yet, if one actually examines the claims on the Czech Republic and Mexico made before the visa requirements were imposed, instead of fixating on hypothesis, one can see that this was often not so. The cases from these countries show that many of the claimants, recognised as refugees or not, had genuine reason to fear.

We saw so many refugee protection claimants in Canada from Mexico because Mexico has been unable to control organized crime. Its victims, knowing they could not get the protection of the state, instead came to Canada. These claimants are often denied refugee protection in Canada, even though they have a well founded fear of persecution, even though there is an absence of state protection, because they do not meet the nexus requirement, that is to say, the persecution they fear is not by reason of race, religion, nationality, political opinion or membership in a particular social group.

The overwhelming bulk of the claims for refugee protection from the Czech Republic were Roma. For the Czech Republic before the visa imposition, the acceptance rate was quite high. The rate was 85%, when you look at only the expedited and those cases which were finally decided after a full hearing. So the acceptance rate itself belies the notion of abuse.

If one considers the claims as they are, rather than as they are hypothesised to be, one has to acknowledge that shortening the process for claims will do nothing to deter these claims. Lift the visa requirements for Mexico and the Czech Republic, even with the Bill system, even with the Czech Republic and Mexico as designated countries, and the numbers of claimants from those countries will again increase. The only effective way to deter the numbers is to improve the situation back home in these countries, to combat discrimination and worse against Roma in the Czech Republic, to restore law and order to Mexico.

It is questionable whether protection for real refugees should be weakened for the sake of preventing abuse. However, when the weakening does nothing to prevent abuse, then the change becomes truly pointless. Yet that, I suggest, is the nature of this Bill, weakening protection for real refugees in pursuit of the goal preventing an imaginary abuse.

The Czech government wants to end discrimination against Roma. It has just not been effective in doing so. The Mexican government wants to restore law and order to Mexico. Again the failure is one of implementation rather than of political will.

The time and effort the Government of Canada has spent on this Bill would be far better spent on assisting in these two governments in realizing their aims. For Canada to assist the Czech government in combatting discrimination against Roma and the Mexican government in restoring law and order would do far more to end claims from those countries to Canada than fiddling with the steps and time lags in the Canadian refugee determination system.

VI. The Balance

The Bill fails the test of balance, on its own terms. Even if one could think of the various provisions of the Bill as balancing each other off, the staging of implementation, with the decrease in access to humanitarian and temporary resident permit applications coming into force immediately and the Refugee Appeal Division of the Immigration and Refugee Board coming into force as much as two years later, falsifies the balance.

The Government has been promoting the reforms as a package. Staged implementation means that they are not being implemented as a package. The reforms coming into force at once are unjustifiable in the abstract, without the implementation of the Refugee Appeal Division of the Immigration and Refugee Board. The whole notion of balance, in the title of the Act, is falsified, if there is imbalance now and balance only later. Starting off imbalanced is not balanced.

However the problems with the Bill are deeper than that. In 1989 I wrote a book with Ilana Simon titled *Closing the Doors: The Failure of Refugee Protection*[12]. The theme

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[12] Summerhill Press.

of that book was that governments accept refugee protection in principle but deny it in practice because the political will to accept refugees does not match the number of refugees needing protection. Consequently, governments develop a number of evasive devices to reduce numbers artificially. The book and a subsequent article I wrote[13] went through a number of these evasive devices, including unfair refugee determination procedures, narrow interpretations of the refugee definition, making the lives of claimants so miserable that many would rather leave, and scepticism leading to unfounded credibility determinations.

This Bill adds "balancing" to that lexicon. In the name of balancing, this Bill erodes refugee protection. It is not uniformly bad. It is rather one step forward, two steps backward. The net result, though, is deterioration. I encourage Parliament to make the necessary changes so that the net result is enhanced refugee protection.

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13 "Credibility of Refugee Claimants" 1994 Immigration Law Reporter Second Series Volume 21 page 134