

Eugenic Echoes: Reverberations of 'Deviancy' in Refugee
Protection Division Hearings

by

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Abstract

Contemporary claims for refugee status have been made to the Immigration and Refugee Board of Canada by women of Romani descent from the Czech and Slovak Republics on the assertion that the applicant faces the threat of forced sterilization in her country of origin. However, within Refugee Protection Division hearings, the claims for asylum by Zaneta Bendigova and Magdalena Gaborova have been denied. An investigation of the elements that construct an understanding of this observation includes the parallels between the historical notions concerning non-Canadian women in immigration policy to the current principles and practices of the Canadian refugee process. Focusing on contemporary refugee claims made by two Romani women - Mrs. Bendigova and Mrs. Gaborova - this essay argues that these women have been denied asylum due to discrimination on the basis of gender and ethnicity. The experiences of Mrs. Bendigova and Mrs. Gaborova illustrate that the claims of these women fall upon deaf ears as eugenic principles involving deviancy continue to echo within decisions made by members of the Refugee Protection Division.

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1 Introduction

Until 1972¹ the province of Alberta had in force the 1928 Alberta *Sexual Sterilization Act* that granted provincial authorities the power to determine who should have children and who should not with the “purpose of improving the human gene pool.”² The legislation was in response to three factors: the eugenics movement of Francis Galton, Mendel’s laws of heredity and the “development of simple, safe surgical techniques for the prevention of procreation.”³ These factors facilitated the objectives of social reformers in Canada who wanted to ensure that “‘fit’ members of society would procreate ... while those ‘unfit’ for reproduction would not.”⁴ Before the Act was repealed in 1972, 4,725⁵ cases of ‘unfit individuals’ were brought before the Eugenics Board and 2, 822⁶ cases were approved for sterilization.

According to two studies⁷, many of the individuals sterilized under this legislation were immigrant women of Eastern European origin. In particular, Christian’s extensive study concludes that 64.7 percent of individuals sterilized were female.⁸ Of these women, 29.7 percent were non-Canadian women of Eastern European descent. This is a

¹ *An Act to amend the Public Health Act*, R.S.A. 1980, c. 87.

² Institute of Law Research and Reform, *Competence and Human Reproduction, Report No.52* (Edmonton, Alberta, 1989) at 21.

³ Law Reform Commission of Canada, *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons Working Paper 24* (Ottawa, 1979) at 24.

⁴ Jana Grekul, “Sterilization in Alberta, 1928-1972: Gender Matters.” (2008) 45: 3 *Canadian Review of Sociology* at 247.

⁵ Canada, *supra* note 3 at 27.

⁶ *ibid.*

⁷ Jana Grekul, "Sterilization in Alberta, 1928-1972: Gender Matters." (2008) 45: 3 *Canadian Review of Sociology*. And Tim Christian, *The Mentally Ill and Human Rights in Alberta: A Study of the Alberta Sexual Sterilization Act*. (PhD Thesis, Edmonton: University of Alberta Faculty of Law, 1988) [unpublished].

⁸ Percentage of Males and Females Sterilized in Five time periods: 1929-33 - Male=22.2; Female=77.8; 1939-43- Male=40.0; Female = 60.0; 1949-53- Male=34.0; Female= 66.0; 1959-63-Male=36.6; Female=63.7; 1969-72-Male=44.4;Female=55.6. These percentages support the statement that the Alberta Forced Sterilization Act resulted in the sterilization of a higher percentage of women than men. Overall statistics amount to: Female=64.7; Male=35.3. From Christian, *supra* 7 at 31.

significant percentage as women from Eastern Europe only amounted to 15.4 percent of the population of the province at the time. The legal justification of these sterilizations focused on constructions of Eastern European immigrant women as 'feeble-minded' and 'undesirable' 'threats' to the Canadian nation. The sexuality of these women's bodies needed to be controlled to ensure that the Canadian gene pool remained viable.

Provincial and federal governing bodies during the late nineteenth and early twentieth centuries linked the principles of the infamous *Alberta Sexual Sterilization Act* to discussions concerning immigration policy. For example, the Empire Settlement Agreement was aimed at controlling the bodies and sexuality of non-Canadian, immigrant domestics who entered into Canada from various ports. Another example includes immigration policies during this time frame which outlined medical and intelligence testing that had to be conducted at all ports-of-departure and ports-of-entry. The results of these culturally-biased tests frequently labeled non-Canadian individuals as 'feeble-minded'. Eugenics no longer has such an overt place in Canadian immigration policy; however, coerced and forced sterilization continues to be a problem for women, particularly in the Czech and Slovak Republics.

International human rights organizations document that Romani women in the Czech and Slovak Republics have been unable to obtain compensation and apologies concerning instances of sterilization from governmental bodies in their countries of origin. In particular, the 2010 Human Rights Report on the Czech Republic compiled by the United States Bureau of Democracy, Human Rights and Labor, outlines mixed responses from the government and legal institutions concerning the sterilization of Romani women. A claim by Romani Helena Ferencikova concerning sterilization was

dismissed in October 2009 by the Supreme Court of the Czech Republic, yet in November 2009 the interim government made an official public apology concerning the practice and policy of sterilization which targeted Romani women.⁹ The same 2010 report concerning Slovakia outlines that the Council of Europe's Committee for the Prevention of Torture (CPT) "urged the government to investigate all allegations of involuntary sterilization of Romani women promptly and thoroughly, and educate doctors about their criminal liability for performing sterilization without consent."¹⁰ However, no Romani victims of "involuntary sterilization or sterilization without informed consent, received financial redress for sterilization in the country's court system."¹¹

In recognizing that the issue of sterilization is still prevalent in discussions concerning human rights in the Czech and Slovak Republics, how is it that members of the Refugee Protection Division of the Immigration and Refugee Board of Canada continue to discount claims of forced sterilization by Romani women during the asylum process? An investigation of the elements that construct an answer to this query must include the parallels between the historical notions concerning non-Canadian¹² women in immigration policy to the current principles and practices of the Canadian refugee process. Focusing on contemporary refugee claims made by two Romani women - Zanita Bendigova and Magdalena Gaborova - this essay uses a socio-legal,

⁹ U.S., Department of State, *Bureau of Democracy, Human Rights and Labor 2010 Human Rights Report: Czech Republic*, April 8, 2011. online: Department of State <<http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154420.htm>>.

¹⁰ U.S Department of State, *Bureau of Democracy, Human Rights and Labor 2010 Human Rights Report: Slovakia*, April 8, 2011. online: Department of State <<http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154450.htm>>.

¹¹ *ibid.*

¹² The term 'non-Canadian' is used through-out this thesis to connote an individual being constructed as on the margins of the Canadian polity based on ethnic/racial/indigenous status, regardless of actual citizenship or location.

interdisciplinary approach to illustrate that the petitions made by these women have been denied due to discriminatory treatment on the basis of gender and ethnicity. The experiences of Mrs. Bendigova and Mrs. Gaborova illustrate that the claims of these women fall upon deaf ears as eugenic principles continue to echo within decisions made by members of the Refugee Protection Division.

This thesis draws attention to and challenges the eugenic echoes that reverberate within legal discourses concerning in particular, the issue of sterilization, and in general the notion of who warrants protection from sexual violation by the Canadian government. Discussions within the House of Commons concerning immigration during the 1920's associate non-Canadian women and their sexuality to inherent 'deviancy'. In the context of current claims concerning sterilization and Romani women, refugee tribunals echo the notions of the past by assuming that these women inherently lack 'credibility' and are 'untrustworthy'. Refugee Protection Division hearings regulate the characteristic of 'untrustworthy' through a standard of consistency that is unattainable for refugee women from the Czech and Slovak Republics. This results in the belief that the testimonies of these women cannot be trusted and thus, have to be held to high standards.

1.1 Areas of Inquiry

Contemporary claims for refugee status have been made to the Immigration and Refugee Board of Canada on the assertion that the applicant faces the threat of forced sterilization in her country of origin. In particular, women of Romani descent from the Czech and Slovak Republics have claimed asylum in Canada on the basis of persecution through, among other things, forced sterilization. However their claims have been

denied by the Refugee Protection Division. In order to unravel the components of this observation, several research areas have been included in this thesis. Chapter Two applies Foucault's premise from *The History of Sexuality* to the Canadian eugenics movement's principles concerning procreation and focuses on how ideas of sex and sexuality were acquired by psychological, academic and medical professionals. Professionals from these fields, as advocates of the eugenics movement, contributed to discriminatory ideas about non-Canadian women and their sexuality by highlighting that individuals' class, gender, and ethnicity determined whether or not they were 'dangerous' and 'deviant'. The characteristics of 'poverty', 'woman', and 'non-Canadian' underpin conclusions about 'deviant' immigrant women and became the primary justification used by the eugenics movement to explain, rationalize and defend the need to control sexuality and reproduction.

The idea of the 'deviant' immigrant woman is carried into Chapter Three through an analysis of the 1928 *Alberta Sexual Sterilization Act* and immigration policy in Canada during the 1920's. The characterization of non-Canadian women as 'deviant' is reflected in who the Eugenics Board ultimately sterilized and who the Canadian government aimed to deny admittance to through section 38 of the Immigration Act of 1919 and the Empire Settlement Agreement. Chapter Three also includes an analysis of House of Commons Debates from 1925 to 1929 which reveals that similar justifications for excluding 'prohibited' classes from Canada through immigration policy are evident in discussions concerning the need for legislating a policy of sterilization in Alberta. Chapter Three expands on issues raised in Chapter Two by focusing on the discussions held by advocates of the eugenics movement within the fields of academia, medicine and

the government. Chapter Four brings these discussions into the realm of contemporary asylum cases in Canada.

The premise of Chapter Four links the historical eugenic principle, that non-Canadian women are inherently 'deviant', to the current high standards of consistency and credibility that are required during Refugee Protection Division hearings. The asylum claims of Mrs. Bendigova and Mrs. Gaborova are analyzed to illustrate that the high standards of consistency and credibility required during these hearings are influenced by the eugenic principle that non-Canadian women are inherently 'deviant' and threaten the Canadian nation. It is essential to delve into an investigation that uncovers the continuity of law's ability to create certain individuals, through discursive means, as deviations from the desired 'norm'.

1.2 Theories of 'Otherness'

This thesis is situated within a major research area that recognizes that the functioning of the Canadian asylum system contributes to particular ideas of 'refugee' and 'woman' that are inherently prejudiced. In particular, the institutional legal principles and standards within the Canadian Immigration and Refugee Board discriminate on the grounds of gender and ethnicity. This is not to say that this discrimination is done on purpose. Rather, historical professional discourses are relied upon that influence the ideas found within this institutional setting. The result is a bureaucratic and judicial process that establishes that the bodies of non-Canadian women should be perceived as 'others' and as threats to the ethical, social and economic foundations of the Canadian nation.

I take as my starting point the term 'pathological homogenisation'¹³, defined by Heather Rae in her book, *State Identities and the Homogenisation of Peoples*.¹⁴ Pathological homogenisation, according to Rae, is a main element in the construction of a state's identity. The main defining element that the state relies upon for the construction of its identity is the ability to implement systems of governance that have, "been constructed in large measure on the exclusionary categories of insider and outsider."¹⁵ According to Rae, "[t]he creation of outsiders is a political process in which 'difference' becomes translated into 'otherness' and therefore a threat to be disposed of in one way or another."¹⁶ The process of converting 'difference' into 'otherness' is evident in discussions concerning 'immigrants as strangers' in the Canadian context.

In her book, *Exalted Subjects: Studies in the Making of Race and Nation in Canada*, Sunera Thobani identifies that the body of the non-European immigrant became constituted as a figure "incommensurable with nationality within the foundational moment of Canadian national formation."¹⁷ Thobani's observation relies on Sara Ahmed's discussion of the 'stranger'. Ahmed rejects the notion that a 'stranger's' existence is acknowledged prior to "its encounter with the national subject."¹⁸ Rather than theorizing a prior independent existence, Ahmed argues "that it is in the national subject's encounter with the 'stranger' who is already known to be strange, that the stranger is

¹³ A term used to denote genocide, ethnic-cleansing, disenfranchisement and expulsion

¹⁴ Heather Rae, *State Identities and the Homogenisation of Peoples*. (United Kingdom: Cambridge University Press, 2002).

¹⁵ Rae, *ibid.* at 14.

¹⁶ Rae, *ibid.* at 3.

¹⁷ Sunera Thobani, *Exalted Subjects: Studies in the making of race and nation in Canada* (Toronto: University of Toronto Press, 2007) at 14.

¹⁸ Thobani, *ibid.* at 15.

brought into being."¹⁹ Within the confines of this encounter, the stranger is "defined as being out of place, as not belonging."²⁰ Furthermore, Ahmed argues that "whether these (differentiated) strangers are fetishized through forms of exclusion as the site of danger or tolerated as sites of diversity, they nevertheless remain ontologized as strangers."²¹

Thobani identifies that this process occurred historically in the Canadian nation through immigration policies that focused on the exclusion of the 'immigrant-as-stranger' based within the idea of "non-preferred races."²² This thesis contributes to Thobani's discussion as it illustrates that historically, the Canadian eugenics movement translated the nation's fear of 'others' and their 'strangeness' into hereditary characteristics such as 'deviancy'. Furthermore, this thesis traces how the notion of innate 'deviancy' developed through proponents of the eugenics movement in Canada within the professional fields of academics, medicine and politics. This thesis highlights that the notion of transmissible 'deviancy' became attached to the bodies of non-Canadian women. While such overt discriminatory practices are no longer prevalent within the Immigration and Refugee Board of Canada, echoes of 'deviancy', as it was historically associated to the bodies of non-Canadian women, are still evident in the hearings of the Refugee Protection Division.

Another prominent academic who researches how 'othering' affects women making claims in the refugee asylum system in Canada is Sherene H. Razack. Razack first began examining how gender asylum guidelines were functioning in the law through empirical data from refugee hearings. Razack uncovered that "the process of

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

'culturalization' that operates in a refugee hearing (the legal operation of cultural difference as a marker of inferiority) requires a disavowal of the ways in which capitalism and racism work to sustain patriarchal violence."²³ Razack's chapter, "Policing the Borders of Nation: The Imperial Gaze in Gender Persecution Cases" identifies that refugee claims involving gender persecution must be decided upon through a much more holistic and inclusive lens. Razack states, "expanding the boundaries of who a woman is also means expanding the boundaries of how she can be persecuted."²⁴ Furthermore, Razack argues that, "the traditional lens through which refugees are viewed,"²⁵ which includes 'othering', must be changed and that the IRB must expand its perspective on "what counts as relevant knowledge."²⁶ This thesis builds on Razack's work in that it expands the lens of gender persecution to include sterilization. Furthermore, it supports Razack's claim that the IRB must expand its conception of 'relevant knowledge' by drawing attention to the narrow interpretations or complete dismissal of country reports in the context of the Refugee Protection Division hearings of Mrs. Gaborova and Mrs. Bendigova.

Other academics that have recently critiqued the Canadian refugee process include Catherine Dauvergne, Leonora C. Angeles and Agnes Huang. In particular, the report *Gendering Canada's Refugee Process*, prepared by Dauvergne, Angeles and Huang examines "how, when and why gender matters in Canada's refugee determination

²³ Carmela Murdocca, "Pursuing National Responsibility in a Post-9/11 World: Seeking Asylum in Canada from Gender Persecution" in Maroussia Hajdukowski-Ahmed, Nazilla Khanlou, Helene Moussa, "ed.," *Not Born a Refugee Woman: Contesting Identities, Rethinking Practices* (United States, Berghahn Books, 2008) at 255.

²⁴ Sherene H. Razack, *Looking white people in the eye: Gender, race, and culture in courtrooms and classrooms* (Toronto: University of Toronto Press, 2001) at 128.

²⁵ *ibid.* at 129.

²⁶ *ibid.*

process."²⁷ An incorporation of over 100 interviews provides an inclusive study that outlines how gender affects the experiences "of a person claiming refugee status in Canada."²⁸ Dauvergne et al. identify that in making claims, women experience specific disadvantages. In particular, informants who partook in the study identify that the initial interview stage has become exceedingly difficult. This difficulty has been attributed to the length of the interviews and the high expectations of interviewing officers that women refugees will have all the supporting documents necessary for their claims. Similarly, one key informant stated that the interviews have a particularly negative effect on women in that they "have a harder time articulating their experience of gender-related persecution"²⁹ due to cultural differences, fear of state authorities, feelings of shock and exhaustion, and experiences of prejudice.³⁰

Another significant gendered issue within the Canadian refugee process is that the claims of persecution experienced by women are predominately linked with their spouse or a male with whom they are making a claim. According to Dauvergne et. al. this is a major issue as the experiences of persecution may differ significantly for the female claimant. Essentially, this results in the omission of valuable information, perspectives, and experiences required by the Refugee Protection Board hearing member to determine whether or not the claimants' testimonies are 'credible.' Any discrepancies between the port-of-entry notes, the Personal Information Form and the testimonies given during a

²⁷ Canada, Status of Women Canada, *Gendering Canada's Refugee Process* by Catherine Dauvergne, Leonora C. Angeles and Agnes Huang (Ottawa, Library and Archives Canada Cataloguing in Publication, 2006) ISBN 0-662-43562-1 at 1.

²⁸ *ibid.*

²⁹ *ibid.* at 33.

³⁰ *ibid.* at 34.

hearing are viewed negatively and construct the claimant, in the eyes of Refugee Protection Board members, as 'untrustworthy'.

The Port of Entry Notes have been identified as a major obstacle for women making refugee claims in Canada. Individuals who were interviewed for the report *Gendering Canada's Refugee Process* repeatedly highlight that, "Board members are obsessed with credibility ..."³¹ and that "Port of entry notes seem to be used to discredit anything a person says; they're often used to point out inconsistencies. But [the Board members] don't take into consideration the constraints [under which the notes are given or taken]."³² This thesis builds on this observation through the experiences of Mrs. Bendigova and Mrs. Gaborova and argues that the consistency of the Port of Entry notes is indeed one of the factors that Refugee Protection Division members rely on to construct their general perceptions concerning the credibility of the applicant.

Yasmeen Abu-Laban and Christina Gabriel's book, *Selling diversity: immigration, multiculturalism, employment equity, and globalization*,³³ highlights how the three policy areas have formalized a sense of 'otherness' based on the needs of the Canadian economy. As Abu-Laban and Gabriel argue, the three policy areas of immigration, multiculturalism and employment equity "have been affected by new rationales that put stress on the language of business."³⁴ Abu-Laban and Gabriel coin this focus on business the 'selling of diversity', "whereby the skills, talents, and ethnic backgrounds of men and women are

³¹ *ibid.* at 61.

³² *ibid.* at 62.

³³ Yasmeen Abu-Laban & Christina Gabriel, *selling diversity: immigration, multiculturalism, employment equity, and globalization* (Canada: broadview press, 2002).

³⁴ *ibid.* at 12.

commodified, marketed, and billed as trade-enhancing."³⁵ Furthermore, the 'selling of diversity' stems from the process of globalization and assumptions related to neo-liberalism.³⁶

In the area of immigration policy, this means that the process of selection and ultimately who is viewed as belonging and deserving of Canadian citizenship, depends largely on the perceived economic contribution that the applicant brings with them, either determined by level of education, employment experience, or general wealth. Abu-Laban and Gabriel state, "from its [Canadian immigration and citizenship policies] inception [they] have been clearly tied to economic criteria, specifically the perceived needs of the Canadian labour market." Furthermore, the Canadian labour market "has been both explicitly and implicitly tied to a vision of who is an 'ideal' or 'model' Canadian citizen."³⁷

A historical example that highlights this is Abu-Laban and Gabriel's discussion concerning Canadian immigration and citizenship policies during 1867 to 1993 in which they emphasize the construction of the Canadian Pacific Railway between 1880 and 1884.³⁸ They note that Chinese and Asian men were admitted into Canada as 'cheap labour' however they were quickly deported or their families were denied admittance because policy makers wanted to ensure that Canada remained a 'white man's' country. Furthermore, "women from these communities were actively discouraged from coming to Canada. The concern for racial purity that was the cornerstone of much of English Canadian nation-building and immigration policy meant that it was not desirable that

³⁵ *ibid.* at 12.

³⁶ Abu-Laban and Gabriel highlight that the assumptions concerning neo-liberalism include "competitiveness, efficiency, choice, and consumerism." *ibid.* at 21.

³⁷ *ibid.* at 37.

³⁸ *ibid.* at 38.

women from the so-called 'lower-races' reproduce."³⁹ While Abu-Laban and Gabriel accentuate how economic forces and globalization influence the perceived suitability of 'outsiders' into the Canadian nation, this project contributes to this discussion by highlighting that the assumptions underlying who is deemed 'suitable' is influenced by eugenic principles that reverberate within the institutions that ultimately hold decision-making authority within the refugee process.

1.3 Methodology

This academic journey originated from a review of forced sterilization cases at the Federal Court level. I noticed that contemporary refugee claims involving Eastern European women who had been forcibly sterilized were being denied. This did not make any sense to me as my understanding was that forced sterilization had been recognized internationally as a human rights violation. The fact that the forced sterilization of these women was not considered a major issue of persecution warranting refugee status concerned me. I wondered how this was possible and on what grounds their claims were being denied. I chose to investigate Canada's role in implementing sterilization policies, and after researching the topic, I found that Canada had legislated two official policies, one in British Columbia and the other in Alberta. These policies then lead to more questions.

In particular, I wondered how these Acts could be justified as “necessary” and I wanted to know about the people who were sterilized under this Canadian legislation. After reading the studies by Jana Grekul and Timothy Christian, I began to draw

³⁹ *ibid.* at 38.

connections between the Alberta *Sexual Sterilization Act* and immigration policy during the late nineteenth and early twentieth centuries. But these connections still did not provide a clear explanation. I realized that I needed to undertake a feminist poststructural critical discourse analysis (FPSCDA) of the perceptions held by immigration decision-makers concerning non-Canadian women.

The material analyzed through this lens includes House of Commons Debates on immigration from the time period of 1925 to 1929. This material is used in order to extrapolate conversations concerning notions of 'deviancy' associated to the sexuality of non-Canadian women prior to and just after the assent of Alberta's *Sexual Sterilization Act*.⁴⁰ Similarly, the *Record of a Hearing* and *Reasons and Decisions* from the Refugee Protection Division trials of Mrs. Gaborova and Mrs. Bendigova are analyzed through this method. This analysis points out the similarities and differences concerning the notion of 'deviancy' that was introduced into the professional fields of academia, medicine and politics during the genesis of the eugenics movement in Canada. Similarities and differences are noted from each period and are then linked to the theoretical framework of multidimensionality to "promote awareness of patterns as well as particularities in social relations by studying in an interconnected way the specifics of subordination."⁴¹ To grasp the complexity of the issues, it is necessary to explain the evolution from poststructural feminism through the lens of critical discourse analysis into feminist poststructural critical discourse analysis (FPCDA). Analysis of historical and contemporary discourse requires an in-depth examination of the exact words used by

⁴⁰ *The Sexual Sterilization Act*, R.S.A. 1928, c. 37 s. 7.

⁴¹ Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, (1998) 75 DENV. U.L. Rev. at 1409, 1415.

decision-makers to establish a knowledge base. The framework of multidimensionality can then be applied to the FPCDA of past immigration policy and current Refugee Protection Division hearings to draw out and delineate aspects of prejudice and illustrate the governmental mechanism through which discrimination continues to occur.

1.3.1 Feminist Poststructuralism

Chris Weedon outlines a conception of feminist poststructuralism in her book, *Feminist practice and poststructuralist theory*. She describes poststructural feminism as “a mode of knowledge production which uses poststructural theories of language, subjectivity, social processes and institutions to understand existing power relations and to identify areas and strategies for change.”⁴² This philosophy was developed in response to the pervasive notions of the liberal humanist tradition. Liberal humanism, Weedon claims, asserts primacy for the notion of common sense and “assumes that individuals share a unique essence of human nature.”⁴³ Furthermore, this perspective places prominence on “rationality and the dignity of the individual and his or her inalienable rights to justice, liberty, privacy, freedom of thought, and the pursuit of happiness ...”⁴⁴ Traditional legal studies and legal analyses have taken on this view of the rational, individualist subject as a primary basis for their philosophies. This has resulted in the creation of a body of knowledge that advocates a “universal and transhistorical”⁴⁵ perspective which results in the marginalization of many voices.

⁴² Chris Weedon, *Feminist practice and poststructuralist theory*. (Oxford: Blackwell, 1987) at 40-41.

⁴³Weedon, *ibid.* at 40-14.

⁴⁴ C. Kitzinger, *The social construction of lesbianism*. (Sage: London, 1987) at 191.

⁴⁵ Nicola Gavey, “Feminist Poststructuralism and Discourse Analysis: Contributions to Feminist Psychology.” (1989), 13 *Psychology of Women Quarterly*, at 461.

Contrary to a 'universalistic' approach, poststructuralism asserts that "experience has no inherent essential meaning,"⁴⁶ and "in so far as it is meaningful, experience is constituted in language."⁴⁷ In her article, "Feminist Poststructuralism and Discourse Analysis" Nicola Gavey emphasizes that this does not mean that experience does not exist, rather the "ways in which we understand and express it are never independent of language."⁴⁸ Essentially, when feminist analyses 'essentialize women's experience' they are, according to Weedon, failing to challenge "patriarchal discourses and power."⁴⁹ Rather, these analyses are simply "supporting the status quo."⁵⁰ Thus, poststructural feminism challenges existing bodies of knowledge by deconstructing the language and the foundations on which this knowledge is based.

A challenge to knowledge is a foundational aspect of poststructural theory as this perspective rejects "absolute truth and objectivity."⁵¹ In relation to feminism, this invokes a challenge to disengage with the dominant, male-focused "conceptions of reality and truth in patriarchal Western society... which perpetuate male power interests."⁵² Poststructuralism emphasizes that knowledge is socially constructed whereby knowledge is created "with definite relations to the social and material world."⁵³ As Gavey states, knowledge is not stable, unchanging, or neutral. Knowledge is maintained and constructed by a variety of mechanisms of power.

⁴⁶Weedon, *supra* note 42 at 34.

⁴⁷ Weedon, *supra* note 42 at 85.

⁴⁸ Gavey, *supra* note 45 at 461.

⁴⁹ Weedon, *supra* note 42 at 110.

⁵⁰ Gavey *supra* note 45 at 462.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ C. Venn, "The subject of psychology" in J. Henriques, W. Hollway, C. Urwin, C. Venn, V. Walkerdine "ed.," *Changing the subject: Psychology, social regulation, and subjectivity* (London: Methuen, 1984) at 150.

According to poststructural tenets, “all meaning and knowledge is discursively constituted through language and other signifying practices.”⁵⁴ Discourses contribute to an understanding of an event, object, or experience. Poststructural feminism associates these understandings, through language and discourse, to the “constitution of subjectivity.”⁵⁵ According to Gavey, the construction of subjectivity “is actively constituted through language and therefore it is neither fixed nor essential.”⁵⁶

Furthermore language, just like knowledge, is generated by dominant perceptions of reality. Language is not simply used as a descriptive or expressive medium; rather it creates a dominant and particular “experience of the world.”⁵⁷ Weedon’s formulation of poststructural feminism is heavily influenced by the work of Foucault, in that it relies on the notion that language and discourse are part of a structural expression of power. For Weedon, “discourse is a structuring principle of society that constitutes and is reproduced in social institutions, modes of thought, and individual subjectivity.”⁵⁸ These changing and complex productions of discourses result in the construction of “subject positions.”

These positions create different “identities, behaviors, [and] understandings of the world [which] vary in terms of the power they offer individuals.”⁵⁹ An example of this would be the discourses that support women’s subordination. The association of women to everything that is not male creates a dichotomous relationship between subject positions. Discourse associates attributes such as rational, active, and strong to the meaning of ‘male’ while female attributes are seen as irrationality, passivity and

⁵⁴Gavey, *supra* note 45 at 463.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Weedon *supra* note 42 at 121.

⁵⁹ Gavey *supra* note 45 at 464.

weakness. The discursive creation of ‘male’ and ‘female’ dichotomies consciously places power into the sphere of ‘maleness’ which can then maintain a position of authority and superiority over women.

But, according to poststructural feminism, individuals are able to engage with the discourses that create their subjectivity, thus leaving room for active resistance to oppressive constructions. This active engagement with subjectivity is connected to Foucault’s notion of power. Foucault states that power should not be defined as purely repressive. Rather, “power produces; it produces reality; it produces domains of objects and rituals of truth.”⁶⁰ It also produces subjects and agency. As Foucault states, “the individual is not the vis-à-vis of power; it is, I believe, one of the prime effects... [t]he individual which power has constituted is at the same time its vehicle.”⁶¹

Weedon defines an individual’s subjectivity, as it is constructed through language and discourse, as “conscious and unconscious thoughts and emotions ... her sense of herself and her ways of understanding her relation to the world.”⁶² According to poststructuralism, this understanding is not individually generated. It is constructed through a multitude of different influences such as relationships and institutions. Furthermore, the subject is not unified but rather “fragmentary, inconsistent, and contradictory.”⁶³ This position emphasizes the importance of recognizing how relationships and institutions contribute to the construction of an individual’s subjectivity. Recognizing how an individual’s subjectivity shifts and changes is necessary in order to

⁶⁰ Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans by Alan Sheridan. (New York: Vintage Books, 1991) at 194.

⁶¹ Michel Foucault, “Two lectures: Lecture Two: 14 January 1976” in Colin Gordon, “eds.,” *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*. (Vintage Books: New York, 1980) at 98.

⁶² Weedon *supra* note 42 at 32.

⁶³ Gavey *supra* note 45 at 465.

produce analyses that recognize these diverging sites of power and how they influence the particular person or event being examined. Particular social, cultural, and historical elements must always be considered because the examiner is contributing to an individual or group identification.

In her book, *Feminism and the Power of Law*, Carol Smart explores "how law exercises power and the extent to which it resists and disqualifies alternative accounts of social reality."⁶⁴ Smart identifies that the law is able to assume a "claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses..."⁶⁵ The law, legal institutions and those who hold decision making authority have the ability to disqualify perspectives from other bodies of knowledge. Law's hegemonic power to disqualify, results in very narrow interpretations of events which causes other opinions and experiences to be silenced. Discourse analysis provides a method through which one can "deconstruct the discursive power of law"⁶⁶ by analyzing and including alternate contributing factors of language, power, discourse and subjectivity.

Discourse analysis enables the researcher to identify the "social discourses available to women and men in a given culture and society at a given time."⁶⁷ These social discourses are articulated through many different avenues and contribute to our understanding of ourselves and our positions in life. As such, this methodology permits us to analyze, deconstruct, and re-invent our positions in relation to structures of power.

⁶⁴ Carol Smart, *Feminism and the Power of Law*. (New York: Routledge, 1989) at 4.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at 5.

⁶⁷ Gavey *supra* note 45 at 466.

Weedon states, “these specific analyses ... enable us to explain the working of power on behalf of specific interests and to analyze the opportunities for resistance to it.”⁶⁸

1.3.2 Critical Discourse Analysis

Norman Fairclough, one of the founders of critical discourse analysis (CDA) highlights that this methodology's aim is to:

Systematically explore often opaque relationships of causality and determination between (a) discursive practices, events and texts, and (b) wider social and cultural structures, relations and processes; to investigate how such practices, events and texts arise out of and are ideologically shaped by relations of power and struggles over power.⁶⁹

Similarly, in his book *Critical Discourse Analysis*, Terry Locke sums up CDA as a method which:

- views a prevailing social order as historically situated and therefore relative, socially constructed and changeable;
- views a prevailing social order and social processes as constituted and sustained less by the will of individuals than by the pervasiveness of particular constructions or versions of reality - often referred to as discourses;
- views discourse as colored by and productive of ideology;
- views power in society not so much as imposed on individual subjects as an inevitable effect of a way particular discursive configurations or arrangements privilege the status and positions of some people over others;
- views human subjectivity as at least in part constructed or inscribed by discourse ...;
- views reality as textually and intertextually mediated via verbal and non-verbal language systems, and texts as sites for both the inculcation and the contestation of discourses;

⁶⁸ Weedon *supra* note 42 at 41.

⁶⁹ Norman Fairclough, *Critical Discourse Analysis*. (London: Longman, 1995) at 132.

- views the systematic analysis and interpretation of texts as potentially revelatory of ways in which discourses consolidate power and colonize human subjects through often covert position calls.⁷⁰

For the purpose of this project, CDA provides a means to highlight the historical and contemporary use of discourse as part of the process of constructing 'desired' and 'undesired' individuals involved in the Canadian immigration process and disseminating this information as 'natural' and 'unquestionable'. CDA provides the foundations for a feminist critical discourse analysis, however as Spender recognizes in his book, *Men's Studies Modified: The Impact of Feminism on the Academic Disciplines* there is a need to challenge the foundations of disciplines and include a feminist voice in language and discourse studies.⁷¹

1.3.3 Feminist Critical Discourse Analysis

As the tenets of poststructuralism advocate, it is necessary to challenge the foundations of knowledge production through discourse. The cornerstone of feminist critical discourse analysis (FCDA), according to Michelle M. Lazar, is to "provide a critical perspective on unequal social arrangements sustained through language use, with the goals of social transformation and emancipation."⁷² While feminist perspectives have been included within many branches of discourse studies, Michelle Lazar advocates for a feminist critical lens on three counts. Lazar outlines that the first justification for an expansion in the field of a purely feminist perspective lies in the recognition of a "set of

⁷⁰ Terry Locke *Critical Discourse Analysis* (London: Continuum, 2005) at 2.

⁷¹ Dale Spender, *Men's Studies Modified: The Impact of Feminism on the Academic Disciplines*. (London: Routledge & Kegan Paul, 1985).

⁷² Michelle M. Lazar, "Politicizing Gender in Discourse: Feminist Critical Discourse Analysis as Political Perspective and Praxis" in Michelle M. Lazar "eds.," *Feminist Critical Discourse Analysis: Gender, Power and Ideology in Discourse* (New York: Palgrave Macmillan, 2005) at 1.

distinctly feminist concerns ... [identified by a particular] view of gender relations [which is] motivated by the need to change the existing conditions of these relations."⁷³ Secondly, Lazar advocates that it is necessary "within CDA to establish a distinctly feminist politics of articulation, to theorize and analyze the particularly insidious and oppressive nature of gender as an omni-relevant category in most social practices."⁷⁴ Lastly, a FCDA is necessary in order to provide an avenue that is receptive and conducive to an organized movement and "shared forum"⁷⁵ open to advancement and growth. As Lazar states, "[t]he importance then, of feminist visibility and voice in 'mainstream' CDA scholarship, curiously, also has a political function."⁷⁶ The visibility of a discernible feminist voice contributes to the political function of social transformation and emancipation. This idea of a unified feminist voice is where FCDA adds an additional dimension to CDA.

1.3.4 Feminist Poststructural Critical Discourse Analysis

In this project I use a feminist poststructural critical discourse analysis (FPCDA) to analyze House of Commons Debates from 1925 to 1929 in order to identify how non-Canadian women were constructed as inherently 'deviant' in discussions concerning immigration policy. Furthermore, I analyze the Canadian Refugee Protection Division's *Records of a Hearing* and *Reasons and Decision* of the cases concerning Mrs. Gaborova and Mrs. Bendigova in order to uncover how this legal arena of the refugee process contributes to the discursive production and maintenance of discriminatory ideas concerning Romani women from the Czech and Slovak Republics. My focus on

⁷³ *ibid.* at 3.

⁷⁴ *ibid.*

⁷⁵ *ibid.* at 4.

⁷⁶ *ibid.*

discourse considers how ideas of credibility are used to disqualify the involuntary assertions of sterilization. The emphasis on discourse demonstrates how the tribunal level of the Canadian Refugee Protection Division incorporates a high standard of credibility during this hearing based on the assumption that non-Canadian women are inherently untrustworthy, a notion that has its genesis in the Canadian eugenic movement. The idea that non-Canadian women are inherently untrustworthy originates from beliefs that these women are 'dangerous' and 'deviant'.

For FPCDA, the term 'discourse' extends further than "traditional linguistic notions of 'language above sentence level' or ... 'language in use'."⁷⁷ In his book *The Archaeology of Knowledge and the Discourse on Language*, Foucault uses the term discourses in a plural sense to signify "practices that systematically form the object of which they speak."⁷⁸ In her book, *Positioning Gender in Discourse: A Feminist Methodology*,⁷⁹ Judith Baxter, relying on the work of Chris Weedon, expands on Foucault's notion and states that although there are multiple discourses, each one is a:

for[m] of knowledge - powerful sets of assumptions, expectations, explanations - governing mainstream social and cultural practices. They are systematic ways of making sense of the world by determining power relations within all texts, including spoken interaction[s] ... which are linked with concepts of power ... that constitute[e] and energiz[e] all discursive and social relations.⁸⁰

This thesis recognizes the importance of discourses as a form of knowledge. In doing so, it examines and includes multiple sites of discourses concerning the 'deviant'

⁷⁷ Judith Baxter, *Positioning Gender in Discourse: A Feminist Methodology* (New York: Palgrave Macmillan, 2003) at 45.

⁷⁸ Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (New York: Pantheon, 1972) at 49.

⁷⁹ Baxter, *supra* note 77.

⁸⁰ *ibid.* at 46.

non-Canadian woman, such as the professional fields of academia, medicine, and politics. A second higher order principle that Baxter discusses is that of a micro-analysis of discourse.

A micro-analysis of discourse examines individuals in natural conversation in a variety of settings and an assortment of text such as, for example, newspaper articles. This thesis incorporates a micro-analysis of discourse by including discussions concerning non-Canadian women as 'deviant' in the contexts of provincial and federal political debates, in the professional dialogues of medicine and academics, and the contemporary Refugee Protection Division hearings of Mrs. Gaborova and Mrs. Bendigova. The third principle that Baxter identifies is that of self-reflexivity.

Self-reflexivity is a concept that challenges the writer to become conscious and aware of the fact that he/she is taking an active role by contributing to bodies of knowledge that have been constructed and are based in "human perception and social practices."⁸¹ Furthermore, this principle also highlights that researchers must be aware that social realities are discursively produced and constantly changing due to varying contexts. Additionally, FPCDA takes the notion of self-reflexivity further by asserting that "the business of text-making will constitute the analyst as almost literally an author with a certain control [and ethical responsibility]."⁸² While the author of a project must be fully aware of the representations in their text, there is also a limit to this sense of ethical responsibility in that there are a "limited number of subject positions ... available to researchers according to the range of available discourses determining authorial

⁸¹ *ibid.* at 50.

⁸² *ibid.*

practices."⁸³ This project respects and acknowledges accountability by including a wide range of texts and dialogues.

Moreover, in keeping true to this principle, this project outlines the theoretical positions and assumptions taken throughout. This practice acknowledges that this analysis and interpretation are "constructed, provisional, perspectival and context-driven."⁸⁴ Furthermore, this essay contributes to the FPCDA transformative quest of "represent[ing] the complexities and ambiguities of female experience, and [gives] space to female voices that are being silenced or marginalized by dominant discourses"⁸⁵ by addressing the issue of Romani refugees based on claims of forced sterilization. The final principle to be discussed is that of text and context.

Bervall makes reference to the analytical element of text and context through her statement that discourse analysis must be engaged with the "social settings in which such structures are embedded."⁸⁶ As such, FPCDA takes to a perspective that recognizes text and context as "competing discourses."⁸⁷ The assertion that power is created through discursive measures and operates through "practices that systematically form the objects of which they speak"⁸⁸ relies on an anti-materialist perspective. Essentially each subject position is always changing, "reconstructed and open to redefinition through discourse, not outside it."⁸⁹ Text and context are merged to produce the idea of intertextuality

⁸³ *ibid.*

⁸⁴ *ibid.* at 59.

⁸⁵ *ibid.*

⁸⁶Victoria L. Bergvall, "Constructing and enacting gender through discourse: negotiating multiple roles as female engineering students" in V.L. Bervall, J.M Bing and A.F Freed "eds.," *Rethinking Language and Gender Research: Theory and Practice* (London: Pearson, 1998) 173 at 194.

⁸⁷ Baxter, *supra* note 77 at 52.

⁸⁸Foucault, *supra* note 78 at 49.

⁸⁹ Baxter, *supra* note 77 at 52.

which recognizes that "texts are always infused and inscribed with traces of other texts."⁹⁰

This thesis applies a deconstructionist approach to its analysis with an emphasis on "textual interplay."⁹¹ This approach is particularly relevant to this project in that it challenges and requests that researchers "deconstruct the constructions and structures around us ... in order to release the possibility of fresh juxtapositions and interplay among established and new ideas."⁹² The main goal of my analysis is to identify how Romani women are discursively constructed in order to consider how discourses of unreliability, danger and excessive fertility are used to create a particular 'racialized' conception of Eastern European women. The objective is to illustrate how the prejudiced constructed characteristic of 'deviancy', associated to Romani women making claims for refugee status from the Czech and Slovak Republics, is maintained. Furthermore, this project supports this method in that it contributes to the "quest against the privileging of something over another, for example, one voice over another."⁹³ This is done by challenging the 'authoritative voice' of the Canadian government, media and legal mechanisms and requests that the opinions, perspectives, and voices of Romani women are included in discussions concerning their claims for refugee status.

1.3.5 Multidimensionality

The research goals of this thesis are twofold. The first goal is to highlight how the language and assumptions maintained during the Refugee Protection Division

⁹⁰ *ibid.*

⁹¹ Baxter, *supra* note 77 at 61.

⁹² *ibid.*

⁹³ Baxter, *supra* note 77 at 62.

hearings of Mrs. Gaborova and Mrs. Bendigova contribute to the notion that women from the Czech and Slovak Republics are inherently 'deviant' or 'untrustworthy'. This objective is realized through the above mentioned method of a feminist poststructural critical discourse analysis. However, this thesis also wishes to highlight that the discrimination faced by Mrs. Gaborova and Mrs. Bendigova is based on both their gender and ethnicity within the Canadian refugee process.

"Multidimensionality"⁹⁴ is a name for a type of perspective within the family of 'post-intersectionality' or 'new complexity' theories.⁹⁵ Other names include "symbiosis,"⁹⁶ "cosynthesis,"⁹⁷ "holistic,"⁹⁸ and "interconnectivity."⁹⁹

Multidimensionality theorists are interested in tracing how "oppressions are composed of a vast network of complex, overlapping, interactive, and mutually reinforcing systems that constitute *everyone's* reality."¹⁰⁰ In his article, "Identity Crisis: 'Intersectionality,' 'Multidimensionality,' and the Development of an Adequate Theory of Subordination", Darren Lenard Hutchinson identifies that "the various forms of identity and oppression are inextricably and forever intertwined."¹⁰¹

⁹⁴ Darren Lenard Hutchinson, "Identity Crisis: 'Intersectionality,' 'Multidimensionality,' and the Development of an Adequate Theory of Subordination" (2001) 6 *Michigan Journal of Race and Law* at 285.

⁹⁵ Darren Lenard Hutchinson, "Commentary: New Complexity Theories: From Theoretical Innovation to Doctrinal Reform" (2002) 71 *University of Missouri-Kansas City Law Review* at 431.

⁹⁶ Nancy Ehrreich, "Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems" (2002) 71 *University of Missouri-Kansas City Law Review* 71 at 251.

⁹⁷ Peter Kwan, "Jeffrey Dahmer and the Cosynthesis of Categories" (1997) 48 *Hastings Law Journal* at 1257.

⁹⁸ Elvia R. Arriola, "Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory" (1994) 9 *Berkley Women's Law Journal* at 103.

⁹⁹ Francisco Valdes, "Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities" (1995) 5 *Southern California Review of Law and Women's Studies* at 25.

¹⁰⁰ Kerri Froc, "Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination" (2010) 25:1 *Canadian Journal of Law and Society* at 23.

¹⁰¹ Hutchinson, *supra* note 94 at 310.

The theory of multidimensionality frames the discussion of this thesis as it challenges the narratives found within the *Record of a Hearing and Reasons and Decision* and extracts the discourses which contribute to a body of knowledge that asserts that non-Canadian women are inherently un-credible or 'deviant'. As Kerri Froc states in her article, "Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination," individuals who face subordination at the hands of legal institutions "are deceived into thinking that the illusion, the world the systems create, is the natural world ("the way things are")."¹⁰² This outcome is similar to that obtained through FPCDA, however it goes a step further by including an analysis of how the legal system maintains a system of oppression. This is relevant to this thesis in that it illustrates how the notion of 'deviancy' is maintained through the systems of medicine, academics, politics and law. There is an interplay between each of these arenas which is evident through the historical analysis of the eugenics movement in Canada. Academic proponents of the eugenics movement were supported by medical professionals, while both professional fields and their notions of 'deviancy' then became apparent in political debates concerning immigration policy. Furthermore, research illustrates that unusually high standards of credibility are one of the means through which the Canadian refugee system contributes to the subordination of Mrs. Gaborova and Mrs. Bendigova. As Hutchinson states, multidimensionality provides a lens that identifies and analyzes, alongside intersecting identity markers, "the interaction of systems of oppression."¹⁰³

¹⁰² Froc, *supra* note 100 at 23.

¹⁰³ *ibid.*

2 **The 'Great Strategic Units' and the Foundations of Eugenics**

The aim of this Chapter is three-fold. The first section provides a summary of Foucault's arguments in *The History of Sexuality*. In particular, emphasis is placed on Foucault's thesis that the discursive production of sex and sexuality is linked to professional bodies of knowledge such as these found in the psychological and medical professionals. According to Foucault this has resulted in the creation of bodies of knowledge that label the sexuality of certain groups of people as 'deviant'. Foucault highlights that sex and sexuality are given normalized characteristics so that any unaccepted activities become associated with disease or deviant behavior. This theoretical discussion highlights how professionally constructed bodies of knowledge become known as facts or truth. Once these bodies of knowledge are acknowledged as facts, they become mechanisms of oppression aimed at the subjectivities of minority groups. The second section of this Chapter discusses the genesis of the eugenics movement theorized by Francis Galton.

The second section links to the first section in that it illustrates how, in Foucault's words, a '*scientia sexualis*' began which impacted the reproductive rights of certain groups of individuals in Europe. The main principles of the eugenics movement in Europe are outlined to illustrate how science acquired sex as a subject in order to explain social ills. The third section of this Chapter discusses the transfer of the principles of the eugenics movement from Europe into Canada.

The third section illustrates how the professional discourses of academia and medicine contributed to a knowledge base concerned with deciding who should be a rightful contributor to the creation of the Canadian nation through procreation. Applying

Foucault's strategic units of 'a hysterization of women's bodies' and 'a socialization of procreative behaviour' as an analytical lens, the reasons for how this decision-making arose are exposed. This section highlights that Foucault's great strategic units collide and converge upon the sexuality and bodies of non-Canadian women.

2.1 Foucault and Sexuality

In *The History of Sexuality*, Foucault's interests lie in the "emergence of the 'experience of sexuality' and what processes contribute to the primacy of individuals thinking of themselves sexually."¹⁰⁴ His central thesis challenges the 'repressive hypotheses' which asserted that sex was censored from discussion by the "social, moral and religious prudishness of Victorians."¹⁰⁵ Foucault illustrates that the opposite is actually true. Modern civilization opened the floodgates to examine the preoccupation with sex. It has encouraged conversations on this topic through many different channels with the outcome of "a steady proliferation of discourses concerned with sex ... a discursive ferment that gathered momentum from the eighteenth century onward."¹⁰⁶ By taking sex and sexuality out of the hushed corners of secrecy a '*scientia sexualis*', or a science of sex, has emerged resulting in the creation of a formalized body of knowledge. According to Cousins and Hussain, Foucault's argument progresses along two veins. First, it considers the style of discourses on sexuality, and secondly, it considers the objects of these discourses.¹⁰⁷ The deployment of sexuality "consists in strategies of relations of forces supporting, and supported by, types of knowledge."¹⁰⁸

¹⁰⁴ Mark Vernon, "Following Foucault: the Strategies of Sexuality and the Struggle to be Different" (1996) 5 *Theology and Sexuality* at 81.

¹⁰⁵ *Ibid.*

¹⁰⁶ Michel Foucault, *The History of Sexuality, An Introduction*, vol. 1 trans. by Robert Hurley (New York: Vintage Books, 1990) at 18.

¹⁰⁷ Mark Cousins & Athar Hussain. *Michel Foucault*. (New York: St.Martin's Press, 1984) at 208.

¹⁰⁸ José Guilherme Merquior, *Foucault*. (California: University of California Press, 1985) at 123.

According to Foucault, the body of knowledge concerning sexuality gave rise to four “great strategic unities, which ... formed specific mechanisms of knowledge and power centering on sex.”¹⁰⁹ I am interested in two of these strategic units: the 'hysterization of women's bodies' and a 'socialization of procreative behavior'¹¹⁰ within the context of dialogues circulating in Canada during the late nineteenth and early twentieth centuries.

Foucault identifies that a ‘hysterization of women’s bodies’ was a “threefold process [though which] the feminine body was analyzed – qualified and disqualified – as being thoroughly saturated with sexuality.”¹¹¹ The second stage of the process was to integrate the feminine body into “the sphere of medical practice,”¹¹² while the third process placed the female body into the “social body ... the family space ... and the life of children.”¹¹³ In the social arena, the female body was to ensure the reproduction of children, and in the family space, the female body held a “functional element,”¹¹⁴ that of a worker in the domestic domain. Furthermore, through the association of the female body to the “life of children”¹¹⁵ women and their sexuality were linked to a “biologico-moral responsibility”¹¹⁶ in which a woman's sex determines her set of moral responsibilities. Foucault highlights that professional bodies of knowledge concerning sexuality construct the roles and tasks of parents by their sex. Elizabeth Murphy argues that one example of this is the state regulation of how mothers feed their children.

¹⁰⁹ Foucault, *supra* note 106 at 103.

¹¹⁰ *ibid.* at 104-105.

¹¹¹ *ibid.* at 104.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

Murphy states, that the feeding of infants "exemplifies the imposition upon women, the 'biologico-moral responsibility' for the welfare of children."¹¹⁷ This is done through mechanisms of state intervention such as education and persuasion. According to Murphy "through an elaborate state-sponsored apparatus, a strongly medicalised expert discourse is disseminated to mothers... which seek to render them self-regulating subjects."¹¹⁸ Women who deviate from 'medicalised expert discourses' concerning their biological moral roles in regards to raising children become epitomized in the "negative image of 'nervous woman.'"¹¹⁹

The second great strategic unit of knowledge regarding sexuality is "a socialization of procreative behaviour."¹²⁰ According to Foucault's study an economic socialization was established by focusing on the "fertility of couples."¹²¹ A political socialization was asserted by determining that sex was limited to heterosexual couples who had the responsibility of reproducing according to the needs of their particular society. Medical socialization was created by outlining the possible diseases individuals could suffer from if they did not practice safe and responsible "birth-control practices."¹²² Essentially, this sphere constructs the Malthusian¹²³ couple, meaning a couple that adheres to the social and economic needs of the society as a whole. An example that illustrates the general proposition of the Malthusian couple is that if a society requires an increase in food supply, the couple should comply with this societal need by producing

¹¹⁷ Elizabeth Murphy, "Expertise and forms of knowledge in the government of families" (2002) 51(4) *Sociological Review*, 433 at 433.

¹¹⁸ *ibid.*

¹¹⁹ Foucault, *supra* note 106 at 104.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *ibid.* at 105.

¹²³ The term Malthusian couple was coined in 1798 by Thomas Robert Malthus in *An Essay on the Principle of Population*.

more children. Essentially, procreation should reflect the determined requirements for a healthy society whereby these determined requirements change within different contexts.

Discourses of poverty during the 1900's, articulated by the eugenics movement contributed to the medical socialization that sought to limit the reproductive capabilities of non-Canadian women. Poverty was labeled as an abnormality and as a threat to the nation. Scientific professionals analyzed and studied the danger posed by individuals from lower socio-economic standing which resulted in a body of knowledge that labeled their subjects' bodies as 'deviant' and 'degenerate.' The tenets of medical socialization stressed that this deviancy had to be regulated and controlled through sterilization policies. The result of these discursive bodies of knowledge and power, according to Foucault is the “very production of sexuality ... [which should be understood] as a historical construct.”¹²⁴ Foucault terms these categories as “deployments of alliance ... meaning a system of rules defining the permitted and the forbidden.”¹²⁵

As Foucault states “the deployment of alliance is attuned to a homeostasis of the social body, which it has the function of maintaining; whence its privileged link with the law; whence to the fact that [it is an] important phase for it is ‘reproduction’.”¹²⁶ But from the eighteenth century onwards “Western societies created and deployed a new apparatus which was superimposed on the previous one.”¹²⁷ The new apparatus that Foucault is referring to is the 'deployment of sexuality'. A 'deployment of sexuality' differs from that of a deployment of alliance in that its focus is on “proliferating, innovating, annexing, creating, and penetrating bodies in an increasingly detailed way, and in controlling

¹²⁴ *ibid.*

¹²⁵ *ibid.* at 106.

¹²⁶ *ibid.* at 107.

¹²⁷ *ibid.* at 106.

populations in an increasingly comprehensive way.”¹²⁸ The two 'great strategic unities' discussed above “anchor sexuality” within the domain of the family. The family sphere, according to Foucault, is the “interchange of sexuality and alliance: it conveys the law and the juridical dimension in the deployment of sexuality; and it conveys the economy of pleasure and the intensity of sensations in the regime of alliance.”¹²⁹

According to Jana Sawicki, Foucault describes a process through which “sexuality in the twentieth century came to be understood as a key to self-understanding and human liberation.”¹³⁰ Foucault’s discussion of a deployment of alliance and a deployment of sexuality illustrates how “sex became a target for intervention into family life by medical, psychiatric and governmental experts whose discourses and practices create the divisions’ healthy/ill, normal/perverse, legal/criminal.”¹³¹ Thus, sex and sexuality were applied as tools of social control.

2.2 Eugenics

General principles and ideas of the eugenics movement were entrenched in Canada through the work of Francis Galton, an infamous English Victorian who specialized in the fields of polymath, anthropology, and eugenics. Galton hypothesized that “mental qualities were always determined more by nature than by nurture.”¹³² In his 1869 book, *Hereditary Genius*, Galton forcefully asserted that 'intelligence' was a “scientifically meaningful concept and that it was inheritable.”¹³³ Galton coined the term

¹²⁸ *ibid.* at 107.

¹²⁹ *ibid.* at 108.

¹³⁰ Jana Sawicki, *Disciplining Foucault: Feminism, power and the body* (New York: Routledge, 1991) at 39.

¹³¹ *ibid.*

¹³² Ruth Schwartz Cowan, "Nature and Nurture: The Interplay of Biology and politics in the Work of Francis Galton" (1977) 1 *Studies in the History of Biology*. (133-208.)

¹³³ Angus McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (Toronto: Oxford University Press, 1990) at 14.

'eugenics' in 1883 to define "the study of the agencies under social control that may improve or impair the racial qualities of future generations, either physically or mentally."¹³⁴ Galton's claims were aimed and targeted at the British upper and middle classes, who at the time were having fewer children than individuals slotted in lower socio-economic standings.

In his book, *Our Own Master Race: Eugenics in Canada, 1885-1945*, Angus McLaren includes a discussion concerning the genesis of eugenics in Britain. McLaren notes that in Britain during this time, it was commonly assumed that the "nation faced 'race suicide' and national degeneration."¹³⁵ Furthermore, McLaren states that British social commentators noted that "if a healthy demographic balance were to be maintained ... it would be necessary to entice the 'fit' to breed or to take measures to restrict the births of the 'unfit.'"¹³⁶ Using scientific observation tables created by Charles Booth and Seebohm Rowntree,¹³⁷ that served in their studies of the "wretchedness of the lives of a substantial portion of the urban working class,"¹³⁸ Galton "graded citizens according to their civic worth - desirable, passable, and undesirable"¹³⁹ with the aim of establishing that certain groups of society were "not fit to breed."¹⁴⁰ Similarly, from these studies Galton concluded that "criminality, alcoholism, and feeblemindedness"¹⁴¹ were characteristics that could also be inherited.

¹³⁴ *ibid.* at 15.

¹³⁵ *ibid.* at 15.

¹³⁶ *ibid.*

¹³⁷ Both prominent sociologists in London, who walked the entire city for the purpose of research concerning poverty. The results are found in their publications, *Life and Labour of the People of London*, and *Poverty: A Study of Town Life*.

¹³⁸ Charles Booth, *Life and Labour of the People of London*, 17 vols. (London: Macmillan, 1902-1904); Seebohm Rowntree, *Poverty: A Study of Town Life* (London: Macmillan, 1901).

¹³⁹ McLaren, *supra* note 133 at 16.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

One of Galton's goals was to create a knowledge base that would support governmental policies with eugenic underpinnings. "Negative eugenics' was Galton's term for policies aimed at restricting the breeding of the unfit; [while the] goal of 'positive eugenics' was to encourage the fertility of the fit."¹⁴² As Galton's ideas spread, eugenicists of the 1900's began forcefully advocating that "decisions on breeding could no longer be left to individual whim or chance; an outside agency was required to monitor actions that affected the entire community."¹⁴³ This led to social beliefs that individuals from lower socio-economic standings had to be contained and controlled as poverty was associated to a hereditary disease. In his article concerning the reproductive rates of British citizens during the 1900's, Richard Soloway states that the general belief at the time was that the "poor were not demoralized; they were degenerate."¹⁴⁴

In his book *Outcast London*, Gareth Steadman Jones observes that the notion that the poor were 'degenerate' placed them in a very precarious position. If poverty was a characteristic passed down from generation to generation on the basis of heredity, no amount of social programs or aid could assist these groups. This outlook challenged "older liberal interpretations"¹⁴⁵ of lower social classes as demoralized but still able to choose to escape this societal position. The eugenics philosophy placed the poor in a terminal position and advocated for the control mechanisms needed to diminish the desire and ability to reproduce.¹⁴⁶ Policies centred on social control of the right to reproduce finally reached an apex in 1901 during the Huxley Lectures when Galton presented his

¹⁴² *ibid.*

¹⁴³ *ibid.* at 18.

¹⁴⁴ Richard Soloway, "Counting the Degenerates: The Statistics of Race Deterioration in Edwardian Britain" (1982) 17 *Journal of Contemporary History*, 137.

¹⁴⁵ *ibid.* at 142.

¹⁴⁶ Gareth Steadman Jones, *Outcast London* (Oxford: Clarendon Press, 1971).

paper entitled, "The possible Improvement of the Human Breed under the existing Conditions of Law and Sentiment" before members of the Royal Anthropological Institute. Galton's paper, which was published in the journal *Nature* and the *Report of the Smithsonian Institute*,¹⁴⁷ called for forceful "negative forms of eugenics, including the segregation and sterilization of the undesirable."¹⁴⁸

2.3 Eugenics in Canada

Dr. Alexander Peter Reid, superintendent for the Nova Scotia Hospital for the Insane, was an early supporter of the idea that the reproductive abilities of certain groups of individuals had to be controlled. While delivering a lecture for the Canadian Institute of Natural Sciences in 1890, Reid pronounced that the country had to take action to "stave off national degeneration."¹⁴⁹ He did so by illustrating that society could be divided into three categories: "the good, the bad, and the irresponsible [and] declared that the ulcerous and diseased outgrowths on society could not be permitted to reproduce."¹⁵⁰ In conjunction with these claims he declared that characteristics responsible for and associated to social ills were inherited. Reid attributed his introduction to eugenics to his university days at McGill where he received his M.D. What is particularly interesting is that institutes of higher education were the main artery that supported and disseminated eugenic notions that traveled from Europe to North America.

What is also particularly noteworthy is that academics and individuals working in the medical field who believed in the principles of eugenics contributed to discourses of

¹⁴⁷ Karl Pearson, *Life, Letters and Labours of Francis Galton*, vol. 3a (London: Cambridge University Press, 1930) at 226. online: < <http://galton.org>>.

¹⁴⁸ McLaren, *supra* note 133 at 23.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.* at 24.

knowledge that justified the actions of discriminatory regimes aimed at the control of the reproductive capacities of non-Canadian women based on their class, race, and ethnicity. This discrimination can be seen through a Foucaultian analysis that highlights the great strategic units of 'the hysterization of women's bodies' and 'a socialization of procreative behaviour'.

2.3.1 The Hysterization of Women's Bodies

E.W. McBride was an infamous academic who forcefully asserted his class biases. The McGill University Strathcona Professor of Zoology¹⁵¹ passionately advocated the principles of the eugenic movement. As he states his hypothesis, "[m]ental defectives were ... a mutation created in the slums. In an earlier age they would have perished, but nowadays, with the growth of a maudlin, unthinking sentimentality, strenuous efforts are made not only to keep all their offspring alive but to allow them to breed at the expense of the more competent members of the community."¹⁵² McBride said that the only way to control the reproductive capacities of these groups and save the nation was through sterilization. A policy of forced sexual sterilization was needed in order to take the burdens of society off the shoulders of the well off. He states, "[a]ll attempts to favour the slum population by encouraging their habits of reckless reproduction in throwing the support of their children on the State places a heavier burden on the shoulders of the Nordic race, who form the bulk of the taxpayers."¹⁵³ It is apparent that Galton's studies, which focused on the degenerate nature of individuals from lower socio-economic standings, influenced common parlance within Canada. The

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ E.W. McBride, *An Introduction to the Study of Heredity* (London: Williams and Norgate, 1924) at 245, 249.

eugenic notion that the reproductive capabilities of the poor had to be controlled was clearly evident in the field of medicine.

A major contributor to discussions concerning the regulation of the reproductive abilities of individuals from lower socio-economic standing was Dr. Helen MacMurchy. MacMurchy was considered an accomplished woman in the fields of academia and medicine, and she focused her efforts on the issues of "infant mortality, maternal mortality, and feeble-mindedness."¹⁵⁴ Based on her studies concerning mortality rates, she concluded that the differences surrounding the issue of infant mortality between classes was due to social inequalities. As she famously states: "The destruction of the poor is their poverty. The rich baby lives, the poor baby dies."¹⁵⁵

After releasing her findings and making the claim that social programs were needed to reduce the death rate of babies of mothers of low socio-economic standing, she then suggested that the mothers of this social group, were to blame. The women's ignorance was to blame for their social standing and the deaths of their children. She argued that "poverty, of course is not a simple but a complex condition. It probably means poor health, inefficiency, lack of energy, less than average intelligence or force in some way, not enough imagination to see the importance of details."¹⁵⁶ This statement creates a main link between poverty and intelligence where a woman from a lower socio-economic status was seen as suffering from a number of problems, was perceived as having low intelligence, and was therefore subject to sexual regulation. In this analysis, importantly, it is not the poor who are targeted, but poor women. These poor women

¹⁵⁴ McLaren, *supra* note 133 at 30.

¹⁵⁵ Helen MacMurchy, *Infant Mortality* (Toronto: King's Printer, 1911) at 4-5.

¹⁵⁶ *ibid.*

experienced the brunt of the violence directed through the efforts aimed at creating a desired 'Canadian' nation.

Furthermore, women who worked outside the home or tried to improve their economic positions were condemned to social stigma. In *Our Own Master Race*, Angus McLaren outlines that the message disseminated to women was that 'ignorant mothers' were responsible for their children's deaths. As such, each doctor in the nation insisted that the mothers' duty "was to remain in the home."¹⁵⁷ As McLaren observes, "[f]or the mother to work or to shirk the nursing of her baby was in effect to 'sign its death warrant'."¹⁵⁸ In addition, according to MacMurchy, "[w]here the mother works, the baby dies. Nothing can replace maternal care."¹⁵⁹

According to McLaren, MacMurchy's "interventionist message naturally won the support of the 'progressives' in the profession [of medicine]"¹⁶⁰ In an article published in the *Canadian Home Journal* in 1932 entitled "The Menace of Maternity," Dr. W. Benge Altee argued that since women had given males the decision-making role, they should "retreat to their primary role of childbearing and rearing."¹⁶¹ Altee states, "[e]very realist will concede that so long as the home is to remain the ideal of this civilization, woman's part in the communal life must be different from man's. It is the man's place to build and subsidize the home; the woman's place to rear the young in it."¹⁶² Professionals took the act of childbirth and the rearing of children into the domain of eugenic discourses by

¹⁵⁷ McLaren, *supra* note 133 at 32.

¹⁵⁸ *ibid.*

¹⁵⁹ MacMurchy, *supra* note 155 at 16-17.

¹⁶⁰ McLaren, *supra* note 133 at 33.

¹⁶¹ *ibid.*

¹⁶² W. Benge Altee, "The Menace of Maternity" (1932) 29 *Canadian Home Journal* at 9.

advocating that women of lower-economic standings were not to be trusted with these tasks.

The targeting of the 'poor' woman's body can be seen as a stage within the Foucaultian analysis concerning the 'hysterization of women's bodies'. The threefold process of the 'hysterization of women's bodies' is realized, by the articulation of professional advocates of the eugenics movement, that 'poor' women produced too many children; that the control of their reproductive faculties belonged in the 'sphere of medicine'; and that they must remain in the family space as the domestic worker. Furthermore, if women deviated from the domain of the home and tried to alleviate their poverty, they were seen as challenging the patriarchal order of the family and society. Foucault highlights that as the professions acquired and constructed bodies of knowledge concerning sexuality, they "penetrat[e] bodies in an increasingly detailed way, and control[ed] populations in an increasingly comprehensive way."¹⁶³ The second great strategic unit regarding sexuality that Foucault identifies, and which is evident in the opinions of professionals who supported the theories of the eugenics movement, is 'a socialization of procreative behaviour.'

2.3.2 Socialization of Procreative Behaviour

Foucault recognizes that sexuality was controlled in this strategic unit through an economic, political, and medical socialization. These tactics are apparent in the discourses of professionals who supported the eugenics movement through their disapproving statements concerning feminist views during the late nineteenth and early twentieth centuries. Galton and Pearson themselves held anti-feminist beliefs which were absorbed into discussions concerning eugenics. In a clear pronouncement against birth

¹⁶³ Foucault, *supra* note 106 at 107.

control, Galton wrote in *Hereditary Genius*, "I protest against the abler races being encouraged to withdraw in this way from the struggle for existence."¹⁶⁴ While John Stuart Mill "defended voluntary motherhood and a women's right to advance as far as her individual capacities admitted, the eugenicists replied that sex differences were based on biological facts that could not be overridden by appeals to justice."¹⁶⁵

In her summary of some of Pearson's thoughts on the right of women to control their bodies and reproductive capabilities, McLaren outlines that a "[w]omen's role was determined by her reproductive function. Biology, not politics, subjected her to man... If she was unhappy the answer was not to wrench her from her natural calling ...the answer was to provide her with the support necessary to permit her to fulfil more adequately her function as childbearer."¹⁶⁶ A federal government medical officer, Dr. Peter H. Bryce held very similar views and blamed women's claims to her body and a declining birth rate in Canada to the neo-Malthusian propaganda spread by some feminist groups. He states:

It is natural that amongst such writers many should be women; some moved thereto, at times, doubtless, from womanly sympathy for their sisters amongst the poor, borne down with the cares of children; others have been urged to speak from the standpoint of the emancipated woman, whose ambition it is to enter the arena of public affairs and dispute the field with men, and yet a still larger number have adopted this new philosophy from the standpoint of personal selfishness, and declare that they will recognize no duty which will deprive them of the right to enjoy the fullest whatever society may bring them of pleasure, and utterly refuse to undergo, if it can be avoided, the pains and inconveniences of maternity, while accepting the social protection, privileges and joys which marriage can bring them.¹⁶⁷

¹⁶⁴ McLaren, *supra* note 133 at 19.

¹⁶⁵ McLaren, *supra* note 133 at 20.

¹⁶⁶ *ibid.*

¹⁶⁷ Ontario, *Ontario Sessional Papers*, 32 (1899) at 20-21.

Any Canadian woman, deemed to be of acceptable stock, who failed to reproduce and denied her reproductive duties was seen as selfish and a challenger to her biological sex and the state. Essentially, a women's body was to be in the service of the nation and only the nation, if she was deemed worthy of producing the next generation of citizens. As Pearson states "[a] women's childbearing activity is essentially a part of her contribution to social needs; that it ought to be acknowledged as such by the State; ... [that] is shall be treated as part of woman's work for society at large."¹⁶⁸ Similar notions were adopted and disseminated within Canada. One notable individual who disseminated Pearson and Galton's thoughts on these matters was Alice Ravenhill.

Prior to World War One, Alice Ravenhill was recognized as Canada's authority on the subjects of "household science and child hygiene."¹⁶⁹ Ravenhill was a fervent advocate for eugenics principles and stated so adamantly at public events and within the pages of the magazine, *Women's Institute Quarterly*. She states: "The next enemies of the Empire will need to be even better prepared than the Germans, for the women are leaving nothing undone. Their soldiers are to be well-born ... They are to be well-bred, for they have their domestic science and they are solving moral problems."¹⁷⁰ From this statement it is evident that the reproductive ability of a women's body was to be controlled, not only on the basis of her gender but also her class and race. If a woman was not deemed a good citizen of the 'Empire', her right to have children and contribute to the population of the country should be severely limited. The great strategic units of 'a hysterization of women's bodies' and 'a socialization of procreative behaviour' converge over the control of the sexuality of non-Canadian women.

¹⁶⁸ Karl Pearson, *The Chances of Death* (London: Edward Arnold, 1897) at 251.

¹⁶⁹ McLaren, *supra* note 133 at 26.

¹⁷⁰ *ibid.*

2.3.3 The Great Strategic Units Collide

Advocates of the eugenics movement were particularly discriminatory towards individuals on the basis of their race. A major contributor to this dialogue about the inferiority of certain groups of individuals identified or labeled by their race was H.B. Fantham. A well-known eugenicist and racist, Fantham worked at McGill during the mid-1930's as the Strathcona Professor of Zoology. Fantham held a negative view of mixed race-relations as his often quoted statement indicates: "When once chromosomes of Bantu origin get mingled in white families they cannot be bred out, ... but will exhibit themselves in unfortunate ways an at unfortunate times throughout the ages."¹⁷¹ These discriminatory notions of the 'unfit race' were also associated to individuals who immigrated into Canada.

Immigrants became a prime target for advocates of the eugenics movement in Canada. Their perspective was that 'racial degeneration' was perpetrated by two main threats. According to McLaren, the first "was the reproduction *in* Canada of the unfit; the second was the immigration *to* Canada of the unfit."¹⁷² This fear of "degenerate immigrants"¹⁷³ was due to the high numbers of settlers entering into Canada during the 1890's. McLaren documents that the influx of three million immigrants into Canada was due to "the closing of the American frontier, the upturn in the Canadian economy, the completion of the transcontinental railway, and the launching of an aggressive immigration campaign by Laurier's Liberal government."¹⁷⁴ The high numbers of immigrants entering Canada's borders created an ideology of "Canadianness" which was

¹⁷¹ H.B Fantham, "Nature" (1928) 14 *The Journal of the Anthropological Society of Bombay* at 89 in McLaren, *supra* note 133 at 25.

¹⁷² McLaren, *supra* note 133 at 46.

¹⁷³ *ibid.*

¹⁷⁴ McLaren, *supra* note 133 at 47.

forcefully maintained through goals of assimilation. Howard Palmer states, "English Canadians assumed that white Anglo-Saxons were racially superior and immigrants were welcomed according to the degree to which they approached this ideal."¹⁷⁵

The discriminatory beliefs concerning the superiority of white Anglo-Saxons resulted in the creation of a hierarchy of those who were considered desirable and those who were labelled a 'threat' to the Canadian nation and its ideals. The hierarchy listed British and American citizens as "the most desirable, next northern and western Europeans, after them the central and eastern Europeans (including the Jews), and last of all the Asians and blacks."¹⁷⁶ An example that illustrates the immigration hierarchy is the historical text, *Canada and Its Provinces (1914-1917)*, by Sir G. Arthur Doughty and Adam Shortt. In this text the "Galicians [are] presented as mentally slow; the Italians as devoid of shame; the Turks, Armenians, and Syrians as undesirable; the Greeks, Macedonians, and Bulgarians as liars; the Chinese as addicted to opium and gambling; and the arrival of Jews and Negroes as 'entirely unsolicited.'"¹⁷⁷

Eugenicists distanced their arguments from pure nationalists regarding the 'degenerate' by asserting that eugenicists possessed the ability to "identify accurately intellectual, moral, and physical strengths ... [when in fact] it was appropriate cultural behaviour that they took as the best indicator of intelligence."¹⁷⁸ While advocating for medical testing of intelligence, MacMurphy states "she paid particular attention to an

¹⁷⁵ Howard Palmer, "Reluctant Hosts: Anglo-Canadian Views of Multiculturalism in the Twentieth Century," in *Multiculturalism as State Policy* (Ottawa: Queen's Printer, 1976) at 4-12.

¹⁷⁶ McLaren, *supra* note 133 at 47.

¹⁷⁷ *ibid.*

¹⁷⁸ McLaren, *supra* note 133 at 49.

apparently dim-witted Scottish boy because she *knew* that Highlanders were shrewd. Eastern and southern Europeans were not given the benefit of the doubt."¹⁷⁹

Another advocate of the eugenic movement, Dr. Charles Hastings, a medical health officer in Toronto, made the claim that Canada was committing "race suicide" by allowing so many 'undesirable' immigrants through its doors. In the *Canadian Journal of Medicine and Surgery* he wrote that the federal government was allocating

... nearly three quarters of a million annually for immigration purposes alone. Thousands are being imported annually of Russians, Finns, Italians, Hungarians, Belgians, Scandinavians, etc. The lives and environments of a large number of these have, no doubt, been such as is well calculated to breed degenerates. Who would think of comparing for a moment, in the interests of our country, mentally, morally, physically or commercially, a thousand of these foreigners with a thousand of Canadian birth?¹⁸⁰

It became a common occurrence in eugenicist circles to associate certain groups of immigrants with 'degenerate' characteristics. Fears arose concerning their abilities to procreate and contribute to the Canadian landscape. As 'degeneracy' or 'defectiveness' was hereditary, these immigrants and their desires to have children had to be stopped. A chief medical officer of the port of Quebec, Dr. J.D Page stated in a meeting of the Public Health Association that the "the proportion of the foreign-born feeble minded was four times as high as that of the native-born"¹⁸¹ while articles in the *Canadian Practitioner and Review* and *Canada Lancet* during 1908 and 1909 asserted that migrants are the "riff-raff from Europe, [creating] colonies of immigrants spreading crime, disease, and ignorance."¹⁸²

¹⁷⁹ *ibid.*

¹⁸⁰ Dr. Charles Hastings, "Medical Inspection of Public Schools" (1907) 21 *Canadian Journal of Medicine and Surgery* at 73.

¹⁸¹ McLaren, *supra* note 133 at 51.

¹⁸² W.B. Hendry, "Maternal Welfare" (1930) 13 *Social Welfare* at 180.

Discussions continued concerning limiting the reproductive rights of immigrants based on the assertion that their 'undesirable' and 'unCanadian' characteristics would come to saturate the nation and produce social ills. Similar to the concerns circling in Britain at the beginning of the eugenics movement, discussions concerning 'race suicide' began to flourish. Dr. Peter H. Bryce, educated at Upper Canada College and the University of Toronto, served the Ontario and federal governments as a medical expert. From 1882 to 1904, he sat as the first secretary of the Ontario Board of Health, while from 1904 to 1921 he was the chief medical officer of the Department of Health. Bryce was extremely concerned about the low fertility rates of 'native' Canadians and the disturbingly high rates of immigrants and held the opinion that not all births were welcome¹⁸³ in the nation. Dr. Charles Hodgetts, Ontario deputy registrar general, held similar views. He reported that immigrant families were often much larger than Canadian born families. He stated, "The modern plan for increasing population seems to be an encouragement by the state of the importation of foreign-born, anything but the 'made in Canada.'"¹⁸⁴ In the article "The Canadian Immigration Policy", published in the *Canadian Magazine* during 1908, historian W.S. Wallace also voiced his concern over the apparent lack of 'Canadian' children within the nation. He stated, "[t]he native-born population, in the face of the increasing competition, fails to propagate itself, commits race suicide in short; whereas the immigrant population, being inferior, and having no appearances to keep up, propagates itself like fish of the sea."¹⁸⁵

Bryce also believed that no immigrants with undesirable or degenerate characteristics should have been granted access to Canada. Furthermore, he advocated

¹⁸³ Ontario, *Ontario Sessional Papers*, 74 (1886) at 128-32.

¹⁸⁴ Canada, *Report of the Registrar General*, 19 (1910) at 6.

¹⁸⁵ W.S. Wallace, "The Canadian Immigration Policy" (1907-08) 30 *Canadian Magazine* at 358.

for active policies to stop the 'unfit' from procreating as a means to regulate the social composition of Canada. Bryce wrote: "If we desire the eradication of the weakling from the race, our action must not be negative, allowing the unfit to die. It must be positive, preventing the unfit to marry and reproduce their kind."¹⁸⁶ In summary, immigrants were not only having too many children and changing the face of the Canadian nation, they were also main contributors to societal ills as degeneracy was inherent within each of them. According to McLaren, by 1914 the "anti-immigration argument was laid out."¹⁸⁷

The anti-immigration argument ran parallel to the arguments by the eugenics movement in Europe concerning the poor, namely that traits were inheritable and no amount of aid would assist in ameliorating their positions. McLaren states, "beginning with the premise that certain inherited traits could not be attenuated by a changed environment, eugenicists proceeded to attribute all social problems associated with the immigrant experience to the innate characteristics of the individual, not to the problems posed by a strange, new homeland."¹⁸⁸ This resulted in much of the immigrant population being labelled 'feeble-minded' and 'deviant' by medical experts. It was believed that this particular characteristic was then passed on to their progeny, causing a continuity of social strains for the young Canada.

This Chapter highlights that the eugenics movement in Canada was supported by individuals in the fields of medicine, academics and politics. Furthermore, the discussion provided in section three of this Chapter highlights that the sexuality of women, and non-Canadian women in particular, was controlled through the 'great strategic units' recognized by Foucault in *The History of Sexuality*. A 'hysterization of women's bodies'

¹⁸⁶ Dr. Peter H. Bryce, "Infant Morality" (1919) 2 *Social Welfare* at 5-6.

¹⁸⁷ McLaren, *supra* note 133 at 55.

¹⁸⁸ *ibid.*

highlights that the processes involved in reproduction, child rearing and family relationships were analyzed and acquired by professional discourses aimed at the regulation and control of sexuality. Furthermore, the great strategic unit of a 'socialization of procreative behaviour' is seen in discussions raised by the eugenics movement concerning feminist beliefs relating to birth control during the late nineteenth and early twentieth centuries. Discussions pertaining to birth control practices generated fears within the eugenics movement and focused on the possibility that some women of 'desirable' stock may choose to not have children. These concerns then collided upon the reproductive faculties of the non-Canadian woman. Anxieties accumulated within eugenic circles concerning the sexuality of these 'deviant' 'unCanadian' bodies.

The eugenics movement was successful in advocating for a policy of sterilization in Canada. Both British Columbia and Alberta went to the lengths of passing legislation that formalized professional concerns regarding the importance of ensuring that only the 'best stock' of Canada procreated and contributed to the national landscape. Essentially, the bodies, reproductive capacities, sexuality, and large families of immigrant women became constructed as threats to the Canadian nation. For the purpose of this project, *The Sexual Sterilization Act*¹⁸⁹ of Alberta from 1928 and immigration policies and House of Commons discussions from the time period of 1925 to 1929 are focused on and examined in the following Chapter to illustrate how the 'deviant' non-Canadian woman was perceived within provincial and federal political discussions.

¹⁸⁹ *The Sexual Sterilization Act*, R.S.A. 1928, c. 37.

3 An Apogee of Discriminatory Discourses: The 1928 Alberta Sexual Sterilization Act and Immigration Policy in Canada

While the previous Chapter provides an overview of how discriminatory eugenics principles became part of the mainstream medical, academic and policy discourses during the early nineteenth century in Canada, this Chapter focuses on political discourses and developments. Section One of this Chapter provides a brief discussion concerning the Canadian eugenics movement prior to 1921 and focuses on how the belief in the sterilization of immigrant women, as a 'reasonable' policy to help the Canadian nation, was constructed. The second section of this Chapter focuses on the 1928 Alberta *Sexual Sterilization Act* and highlights that the "Mental Hygiene Survey of the Province of Alberta" provided leverage to pass of the *Alberta Sexual Sterilization Act*. This section also includes a discussion of the Eugenics Board of Alberta, the deciding authority pertaining to who was to be sterilized under the Act. This discussion lays the foundation for the following section by highlighting the similarities between the groups of individuals being sterilized and those considered a threat within Canadian immigration policy. Essentially, during the early nineteenth century, eugenic principles were invoked in order to support and justify the control of non-Canadian women, mould immigration policy, and create a desired Canadian nation.

The third section of this Chapter focuses on federal discussions concerning immigration policy from 1925 to 1929. It provides an illustration of how eugenic principles targeted the bodies of non-Canadian women through discussions concerning immigration policy in the House of Commons. An analysis of the House of Commons records provides a new perspective through which to demonstrate the concerns of

politicians during the time period 1925 to 1929. This time period was selected in order to examine whether there were shifts in the discussions concerning idealized notions of 'Canadianess' and to understand how the federal parliament perceived the passing of the 1928 Alberta *Sexual Sterilization Act*. Furthermore, analysis illustrates that federal discourses on immigration-related matters drew upon and echoed themes similar to those expressed in more upfront eugenics beliefs.

3.1 The Eugenics Movement in Canada Prior to 1921

Discussions concerning the sexual sterilization of immigrant women began circulating amongst supporters of the eugenics movement in Canada much earlier than the inception of the Albertan Act itself. A staunch advocate of sterilization was Dr. Helen MacMurchy, a renowned pioneer in the development of mental hygiene and child welfare in Canada.¹⁹⁰ In MacMurchy's, *The Feeble-Minded in Ontario: 2nd Report*, published in 1908, she asserts that, "80 per cent of feeble-mindedness could be eliminated within a generation by segregation, but the ultimate weapon in this battle was sterilization of the feeble-minded."¹⁹¹ Furthermore, in response to a study by Professor A.P. Knight of Queen's University outlining how the Jukes family, an immigrant family in New York procured millions of dollars from public funds through acts of deviancy and degeneracy, MacMurchy stated, "we must not permit the feeble-minded to be mothers of the next generation. Ontario doctors [and] political leaders, advise and beseech us to stop allowing mental defectives to produce children."¹⁹² MacMurchy's claims found support in the medical profession.

¹⁹⁰ Canadian Public Health Association, "Profiles: Helen MacMurchy" online: <<http://cpha100.ca/history/profiles-public-health/macmurchy>>.

¹⁹¹ McLaren, *supra* note 133 at 42 in MacMurchy, *The Feeble-Minded in Ontario: 2nd Report* at 15.

¹⁹² McLaren, *supra* note 133 at 41.

In 1907, R.W. Bruce Smith, Provincial Inspector of Hospitals and Public Charities circulated the opinions of British authorities such as Sir James Barr¹⁹³ and Dr. Ried Rentoul¹⁹⁴ to the Ontario Medical Association.¹⁹⁵ At the time, these British authorities agreed that "'asexualization' could effectively end the propagation of tramps, prostitutes, unwed mothers, and perverts."¹⁹⁶ The opinions of American doctors were also adopted and dispersed. Dr. F. McKelvey Bell of Ottawa frequently adopted the stance of Dr. Lydston in Chicago concerning sterilization. In an article to the *Queen's Quarterly* Dr. McKelvey quoted Dr. Lydston as stating:

Prevention is always better than cure. Institutions which will destroy the disease in its infancy are next in order of importance. Degeneracy underlies to a greater or lesser extent all social disease, therefore it must be our first aim to stamp out the degenerate. To do this we must begin at the beginning, i.e., with the control of marriage amongst criminals, degenerates and lunatics, in order that they shall not be able to procreate their kind.¹⁹⁷

A bill concerning the sterilization of degenerate immigrant women was presented to the House of Commons in 1912 by Dr. John Godfrey, member for West York in Ontario. While the bill was withdrawn, professionals continued to attack the provincial and federal governments. McMurchy was supported by Dr. C.K. Clarke, one of Canada's

¹⁹³ Sir James Barr was one of the founders of the Liverpool Branch of the Eugenics Education Society which adopted and disseminated, within the medical profession and the public, the eugenic philosophies of Francis Galton.

¹⁹⁴ Dr. Robert Reid Rentoul worked in the medical field and was a staunch advocate of the eugenics movement in Liverpool. He was a member of the Royal College of Surgeons in England and was infamous for his written contributions on the subject of eugenics. In his 1906 published book, *Race Culture; or Race Suicide? A Plea for the Unborn*, Dr. Rentoul wrote: "Mental degeneration is shown by insanity, criminality, vice, etc., and the number of cases is estimated at one in fifty, although, perhaps, this is too low. The causes of degeneracy are put as the intermarriage with lunatics, idiots and feeble-minded persons, child marriages, forbidding or restraining the healthy from marriage, encouraging the marriage of the unfit, release of asylum patients before recovery, overwork of the young brain, unsuitable employment for women and children, abuse of alcohol, undesirable immigration, venereal diseases, abortion and sexual excess." Dr. Rentoul, "Race, Culture; or Race Suicide? A Plea for the Unborn" (1907) *The Journal of the American Medical Association*. <http://jama.ama-assn.org/content/XLVIII/20/1697.3.extract>.

¹⁹⁵ McLaren, *supra* note 133 at 42.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

most prominent psychiatrists during the early twentieth century. Dr.C.K. Clarke "castigated the government's policies for promoting the 'survival of the unfittest' and in particular ... efforts to keep families together as promoting the 'raising up of families of imbeciles.'"¹⁹⁸

3.2 The Alberta *Sexual Sterilization Act*

The Alberta *Sexual Sterilization Act* was first introduced on March 25, 1927 by the Minister of Health in the United Farmers of Alberta provincial government, the Honourable George Hoadley. He described his bill as an Act that: "will provide for the sexual sterilization of mentally deficient... which is ... necessary owing to the appalling growth of the mental defectives in the various provincial institutions."¹⁹⁹ Mr.Hoadley's bill did not pass the second reading in the 1927 session, so he proposed to reintroduce the Act in 1928. After gaining sufficient public support concerning the use of sterilization as a medical procedure to curb the reproductive capabilities of the unfit, Hoadley reintroduced the Alberta *Sexual Sterilization Act* in February of 1928 before the Alberta Legislature. Finally, after the third reading the bill proposing the Alberta *Sexual Sterilization Act* passed on Tuesday, March 6, 1928²⁰⁰ and became official legislation on March 21, 1928.²⁰¹

Public support for the Act was gained by a study commissioned by the Albertan government for the purposes of accumulating research on which mental health legislation could be drafted. The study, "Mental Hygiene Survey of the Provinces of Alberta", was conducted by Dr.Clarence Hicks, a professor of Psychiatry at the

¹⁹⁸ McLaren, *supra* note 133 at 44.

¹⁹⁹ Christian, *supra* note 7 at 16 in The Edmonton Bulletin, March 26, 1927.

²⁰⁰ Christian, *supra* note 7 at 17.

²⁰¹ *The Sexual Sterilization Act*, R.S.A. 1928, c. 37.

University of Toronto in 1921.²⁰² The survey was conducted in mental facilities in Alberta and "attempted to examine the relationship between 'mental abnormality and social inefficiency'."²⁰³ The authors asserted their hypothesis that a "causal link between mental abnormality and immorality existed."²⁰⁴ The report states:

They [those who suffer from mental defect or mental disorder] are rightly regarded as a social liability, and when neglected may contribute to criminality, vice and pauperism. When adequate measures are taken by a province to prevent an increase of its abnormal population [careful screening of immigrants and sterilization], and when suitable facilities are employed to control existing cases, there ensues a considerable diminution of social distress and human suffering.²⁰⁵

The immigrant population in Alberta was targeted by the committee preparing the "Mental Hygiene Survey of the Province of Alberta". It is evident that one of the main goals of the committee outlined in the survey was to study the "effect of immigration on the problem of mental abnormality in the province."²⁰⁶ The Committee's findings concerning the effects of immigration are stated as:

While volume in immigration may be desirable, it is nevertheless true that quality is of paramount importance. It should be the aim of Federal authorities to so guard our ports of entry that we do not receive an undue proportion of those who will eventually become a burden to the state. It is particularly desirable to reject the insane and mentally deficient because they often prove a greater menace than any other group ... The following facts relating to the problem of immigration in Alberta will demonstrate the need of increasing vigilance at our ports and gateways of entrance.²⁰⁷

²⁰² Christian, *supra* note 7 at 3.

²⁰³ *ibid.*

²⁰⁴ *ibid.*

²⁰⁵ Alberta, "Mental Hygiene Survey of the province of Alberta" (1921) in Christian, *supra* note 7 at 4.

²⁰⁶ Alberta, "Mental Hygiene Survey of the province of Alberta" (1921) at 42 in Christian, *supra* note 7 at 5.

²⁰⁷ Alberta, "Mental Hygiene Survey of the province of Alberta" (1921) at 16 in Christian, *supra* note 7 at 6.

The Committee's conclusions created clear links between non-Canadians and the notion that if their bodies remain uncontrolled, they would become a great 'menace' on society and a 'burden' on the state. The findings of the Committee illustrated that "recent immigrants, primarily those of Eastern European or Asian decent were socially maladjusted"²⁰⁸ and presented the highest populations in the Ponoka Hospital for the insane, an institution that held individuals "who had been committed on a warrant of a justice of the peace after having been adjudged 'insane and dangerous to be at large.'"²⁰⁹

After the publication of the "Mental Hygiene Survey of the Province of Alberta", Dr.C. M. Hincks, the academic and doctor who had supervised the survey, launched a national campaign in support of the Committee's findings that "the unfit should be sterilized."²¹⁰ The conclusions of the Committee gained support in Alberta from the 1923 Minister of Health, the Honourable R. G. Reid, the political party of the United Farmers of Alberta, and the lobby and advocacy group the United Farm Women of Alberta.²¹¹ While the 1928 Alberta *Sexual Sterilization Act* did pass with support from the findings of the "Mental Hygiene Survey of the Province of Alberta," there were voices of dissent within the Alberta legislature.

The Liberal leader in the House, Captain J. T. Shaw, argued that the passing of the bill was swift and hurried. Captain Shaw also expressed his opinion that those

²⁰⁸ *ibid.* at 7. The following table illustrates the committee's findings with respect to the relative proportion of different ethnic groups represented in the Ponoka Hospital.

	% of Hospital population	% of General population
Canadian Born	27.16%	48.6%
British Isles	25.28%	17.05%
Continental Europe	24.10%	14.6%
Asia	1.13%	0.6%
United States	22.26%	18.4%

²⁰⁹ *ibid.*

²¹⁰ *ibid.*

²¹¹ *ibid.* at 8-10.

"opposed to the Act had not been adequately considered ...[and that] since women would be 'equally affected with men under the Act ... two women instead of one [should] be named' [to the Eugenics Board]."²¹² Captain Shaw also advanced an argument against the Alberta *Sexual Sterilization Act* based on a decision by New York State which found that legislation concerning sterilization was unconstitutional.²¹³ While the majority of Captain Shaw's arguments against the Alberta *Sexual Sterilization Act* were based on logistical elements, Colonel C.Y. Weaver, the Conservative member for Edmonton asserted an ethical argument. He highlighted that "... there was a deep-seated fear among the people of the province that when a person is once committed to an institution for the feeble-minded that no release would be possible until he has submitted to the operation called for under the Act."²¹⁴

3.2.1 The Eugenics Board

The Eugenics Board of Alberta was provided for under section 3 of the 1928 Alberta *Sexual Sterilization Act*. It was initially a four member institution consisting of Dr. E. Pope, Dr. E.G. Madson, Dr. J.M. McEachran and Mrs. Jean H. Field. These individuals were authorized to examine any individuals discharged from a mental hospital upon suggestion by a Medical Superintendent or other officer.²¹⁵ The members of this Board were to determine whether "the patient might safely be discharged if the danger of procreation with its attendant risk of multiplication of the evil by transmission

²¹² *ibid.* at 19.

²¹³ *ibid.*

²¹⁴ *ibid.* in *Edmonton Journal* (7 March 1928).

²¹⁵ *The Sexual Sterilization Act*, R.S.A. 1928, c. 37, s. 3.

of the disability to progeny were eliminated."²¹⁶ The procedure in place to minimize the danger of 'evil transmission of the disability' was sexual sterilization.

According to Korbla P. Puplampu,²¹⁷ MacEachran was viewed by supporters of the eugenics movement as a prominent academic and intellectual. MacEachran's position enabled him to "generate knowledge and [he] had the power and authority to speak on issues relating to how that knowledge could be used in addressing social problems."²¹⁸ MacEachran's interest in eugenics landed him the position as Chair in 1929 on the Eugenics Board of Alberta and his signatory authority resulted in the sterilization orders of over 2,000 people.²¹⁹ MacEachran remained on the Board until 1965 indicating his confidence in eugenics principles and sexual sterilization as a policy. As the University of Alberta was responsible for nominating individuals to the Board, it could not according to Puplampu, "claim a lack of knowledge about the Board's activities ... [thus] underscore[ing] the nature of university-society relations."²²⁰ Academics such as Tim Christian and Jana Grekul have conducted studies examining the discriminatory processes and decisions of the Eugenics Board.

Christian composed a study²²¹ concerning the individuals sterilized by the Eugenics Board of Alberta. In Christian's data review, he verifies a "clear indication of the inequitable application"²²² of the Alberta *Sexual Sterilization Act*. Of the 2,500 persons who were approved for sterilization, based on the decisions of the Eugenics

²¹⁶ *The Sexual Sterilization Act*, R.S.A. 1928, c. 37, s. 5.

²¹⁷ Korbla P. Puplampu, "Knowledge, Power and Social Policy: John M. MacEachran and Alberta's 1928 Sexual Sterilization Act." (2008) 54: 2 *Alberta Journal of Educational Research* 129 at 130.

²¹⁸ *ibid.* at 135.

²¹⁹ D. Wahlsten, "Leilani Muir versus the Philosopher King: Eugenics on trial in Alberta" (1997) 99 *Genetica* at 187-188.

²²⁰ Puplampu, *supra* note 217 at 136-137.

²²¹ Christian, *supra* note 7 at 147.

²²² Christian, *supra* note 7 at 148.

Board 40.9²²³ percent were male while 59.1²²⁴ percent female. However, 35.3²²⁵ percent of men and 64.7²²⁶ percent of women were ultimately sterilized. In 1955 after the last revision of the Alberta *Sexual Sterilization Act*, the Eugenics Board was granted authority to sterilize five different classifications of people: (1) “psychotic patients: (2) mental defectives who suffered from arrested or incomplete development of mind ... (3) individuals suffering from neurosyphilis ... (4) individuals suffering from epilepsy with psychosis or mental deterioration: (5) individuals suffering from Huntington’s Chorea.”²²⁷ The two reasons provided for by the Board for sterilization included a “danger of the transmission of any mental disability or deficiency to offspring, or a risk of mental injury...”²²⁸ However, Christian found that the Board manipulated its power by discriminating against certain groups and classes of individuals under these categories. In particular, Christian suggests that the high number of women sterilized discussed above was due to the fact that the "grounds 'incapable of intelligent parenthood' were applied only to female patients.”²²⁹

Christian's analysis also indicates that the women before the Board were discriminated against based on class. Christian's study specifies that "the number of sterilizations of those not employed was comparatively high and the proportion of domestics sterilized was very high.”²³⁰ Meanwhile, "none of the professionals presented to and passed by the Board [were] sterilized.”²³¹ These findings indicate that the

²²³ Canada, *supra* note 3 at 42.

²²⁴ *ibid.*

²²⁵ *ibid.*

²²⁶ *ibid.*

²²⁷ Canada, *supra* note 3 at 27.

²²⁸ *ibid.*

²²⁹ Canada, *supra* note 3 at 43.

²³⁰ *ibid.*

²³¹ *ibid.*

eugenics movement's principles concerning heredity swayed the opinions of decision makers on the Eugenics Board. As discussed in the previous Chapter, poverty was given the designation of an inheritable disease that could be passed down from generation to generation. It is evident from the judgements that mothers from lower socio-economic standings were viewed as 'feeble-minded' and responsible for their positions in life, and thus should be sterilized.

Another interesting link from the information provided by Christian's study is that "the proportion of domestics sterilized was very high."²³² Ninette and Trebilcock's²³³ work illustrates the majority of domestics entering Canada were immigrants from Britain and Europe.

Another significant factor which appeared to influence the decisions of the members of the Eugenics Board was ethnic background. Christian's paper argued that "[i]n all time periods, a disproportionately small number of persons of British and West European ancestry were presented to the Board or approved for sterilization."²³⁴ Furthermore, a "disproportionately low number of British citizens were actually sterilized."²³⁵ An analysis of the House of Commons Debates from 1925 to 1929 indicates that this is due to the fact that British citizens were the 'ideal type' of immigrant. As discussed in the following section, certain women, men and families were actively sought out through The Empire Settlement Agreement. These schemes were created in favour of British nationals to ensure that the Canadian nation reflected the 'motherland'.

²³² *ibid.*

²³³ Kelley Ninette & Michael J. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 2010).

²³⁴ Canada, *supra* note 3 at 44.

²³⁵ *ibid.*

While Christian notes that a small percentage of Western Europeans were presented to the Eugenics Board, the opposite was true of those individuals from Eastern Europe.

In particular, in the period 1939 to 1943, "[a]lthough citizens of East European ethnic background constituted only 15.4 % of the population of the Province, they constituted 29.7% of the population of patients presented to and approved for sterilization by the Eugenics Board, and they constituted 35.1% of the population actually sterilized."²³⁶ Faced with such discriminatory findings, Christian concludes that these statistics mirror the public opinion of the time. After World War I, many Canadian citizens held anti-Eastern European biases and these opinions became entrenched within the decisions of the Eugenics Board.²³⁷ As Christian states, "[i]n view of the prevalent, chauvinistic, resentment focused on non-British, non-West European residents of the province, and in view of the diagnostic methods employed by Alberta psychiatrists ... it seems a reasonable conclusion that racial bias was a significant factor in the sterilization of East European patients."²³⁸ Christian's study paints a picture of who was deemed 'unfit' for reproduction. The 'typical' individual would have been an immigrant woman, with an ethnic background other than British or Western European, from a lower economic status in society who had been labeled as a 'deviant'. Christian summarizes his findings in the following fashion:

Persons presented to and approved for sterilization by the Board occupied socially vulnerable positions. They tended to be female rather than male, young and inexperienced rather than mature, not employed and dependent rather than self-supporting, employed in the low status rather than prestigious jobs, residents of small towns rather than cities, members of ethnic minorities rather than the dominant ethnic group, single rather than married, and had been defined as sexual deviants. In addition, those

²³⁶ Christian, *supra* note 7 at 89-90.

²³⁷ *ibid.*

²³⁸ *ibid.* at 96.

persons dealt with by the Eugenics Board had been branded with the most socially debilitating label of all - a psychiatric diagnosis.²³⁹

Moreover, immigrants became the target of propaganda that outlined their abnormally high rates of fertility. W.S. Wallace, a proponent for the policy of sterilization states, “the native-born population ... fails to propagate itself, commits race suicide, ... whereas the immigrant population, being inferior, ... propagates itself like fish in the sea.”²⁴⁰

The members of the Eugenics Boards absorbed the belief regarding the 'dangerous' immigrant woman's body and advocated for the sterilization of new settlers into the country. These individuals were deemed “mental defectives who suffered from arrested or incomplete development of mind ...”²⁴¹ Furthermore, as illustrated throughout this project, the professional fields such as medicine, academics and politics, contributed largely to the dissemination of eugenics principles throughout the general populace in order to create an illusion that their acts were justified in the order of 'saving the nation'. Another prominent academic who has conducted studies concerning the Alberta *Sexual Sterilization Act* and the Eugenics Board is Jana Grekul.

Grekul's study²⁴² analyzed the decisions of the Eugenics Board and concludes that gender played a significant role in determining whether an individual was sterilized or not. Grekul suggests that women who challenged prevailing gender norms during the late nineteenth and early twentieth century were targeted and forced to undergo the provincial sterilization procedure. She states that a lack of "mental defective diagnoses

²³⁹ *ibid.* at 123.

²⁴⁰ *ibid.* at 213.

²⁴¹ Canada, *supra* note 3 at 27.

²⁴² Grekul, *supra* note 7.

(and the concomitant ability to consent to sterilization) among women suggests they were perhaps not 'abnormal' in a psychiatric sense, but rather in a social sense: they violated the norms of proper feminine behaviour and therefore would not be suitable mothers ...females who exhibited less publicly dangerous, but more socially dangerous behaviours were presented"²⁴³ to the Eugenics Board.

To support her claim that women who were sterilized were deemed social deviants rather than genetically 'feeble-minded', Grekul discusses the section on the patient presentation summar[y] labelled 'family histories'. The intent of this section was to indicate which of the patients had a history of mental health problems. However, as Grekul concludes, "[i]n only a minority of cases (38 percent) in total was the Board presented with evidence of suspicious or problematic family histor[ies]."²⁴⁴ This finding falsifies the claim that sterilization was being used as a measure to combat mental disability in the future and reinforces the assertion that the Eugenics Board's decisions were discriminatory and aimed at the control of women's bodies and their ability to procreate.

In particular, the case files of women who were sterilized indicate that many had been labelled 'promiscuous'. In 1930, the category 'promiscuous' was utilized 8 percent of the time under the heading of 'family history', while in male cases it was only mentioned once.²⁴⁵ In addition, Grekul notes that the label of 'promiscuity' was used to describe a wide variety of "nonnormative behavioural expectations for women."²⁴⁶ Examples that Grekul employs to illustrate this point include women who were married

²⁴³ *ibid.* at 255.

²⁴⁴ *ibid.* at 256.

²⁴⁵ *ibid.* at 257. The number of cases examined during this time period amounts to 125.

²⁴⁶ *ibid.*

multiple times, had many children from different men, and women who did not marry and assumed a 'common-law' role.²⁴⁷ Clearly, women who strayed from the societal defined structure of a 'normal family' were considered 'deviant'. The structure of this 'normal family' environment varied as social perceptions changed. The label of 'promiscuity' is exceptionally gendered in this context. Other behaviours that became associated strictly to the female body, according to Grekul include hysteria, depression after childbirth, nervousness, anxiety and weakness.²⁴⁸

Like 'family history', a woman's 'sexual history' was also presented to the Eugenics Board and considered a compelling factor for sterilization. In 52²⁴⁹ percent of the cases concerning women brought before the Board, there was deemed to be "nothing wrong sexually with the patient". Phrases such as "normal", "marriage is happy", "the children are normal", and there is "no sex interest" were used to define the parameters of socially acceptable environments and behaviours. Of the remaining 33²⁵⁰ percent of cases concerning women, their patient profiles included references to 'promiscuity', either that which had been documented or that which was expected. Grekul elaborated on her findings from patient reports from the 1930s which read: "History of sex interest and promiscuity; history of two pregnancies; Was admitted previously on account of sex delinquency; Promiscuous: yes. Has been for sometime: Apart from her sexual promiscuity, there is no history of immorality and no complaints of other immoral behaviour; ..."²⁵¹

²⁴⁷ *ibid.*

²⁴⁸ *ibid.* at 258.

²⁴⁹ *ibid.*

²⁵⁰ *ibid.* at 259.

²⁵¹ *ibid.*

3.3 The Immigration Act of 1919

The 1928 Alberta *Sexual Sterilization Act* and Eugenic Board decisions reproduced the beliefs of the 'deviant' immigrant which were then absorbed into Parliamentary debates over immigration policy. In the Canadian House of Commons, heated debates transpired from the representatives of the Western provinces concerning the high levels of 'deviant' immigrants. This concern mirrored the impression that the Western provinces were absorbing the largest numbers of immigrants. Western representatives claimed that this was problematic as the citizens of their ridings were financially accountable for any health care or social assistance that these newcomers to Canada required. In turn, Western representatives pressured the federal government to implement the *Immigration Act* of 1919.²⁵²

Section 38²⁵³ of the *Immigration Act* of 1919 provided a mechanism that "allowed the government to limit or prohibit the entry of undesirable races and nationalities."²⁵⁴ The determination of whether or not an individual was 'undesirable' was based on the medical examinations and intelligence testing of immigrants at ports of entry and departure. The testing²⁵⁵ was done in English, ensuring that immigrants from non-English speaking countries did not score highly. The lower aptitude test results were used to justify the belief held by eugenics supporters that immigrants created and contributed to social problems. Alan Sears²⁵⁶ outlines that "public health officials and policy considerations played a central role in the development of the medical inspection

²⁵² *Immigration Act*, 1919, Chapter 93 or c. 25 R.S. 1927.

²⁵³ *Immigration Act*, 1919. R.S. c. 25, s.13.

²⁵⁴ Canada in the Making, "Immigration Act, 1919" online: Canadiana <http://www.canadiana.ca/citm/specifique/immigration_e.html#1919>.

²⁵⁵ *ibid.* Medical and intelligence testing was first introduced under the Immigration Act of 1910 and then repealed in 1962.

²⁵⁶ Alan Sears, "Immigration Controls as Social Policy: The Case of the Canadian Medical Inspection 1900-1920" (1990) 33 *Studies in Political Economy* at 91.

of immigrants coming to Canada."²⁵⁷ Furthermore, Sears' research of public health and social policy between 1900 and 1920 indicates that one of the main reasons for such an involved procedure was due to the perceived threat of 'race degeneration.'²⁵⁸ As Sears identifies, immigration controls such as aptitude testing were enforced in order to control the landscape of national identity.²⁵⁹

W. Burton Hurd, a professor of political economy at McMaster University, is quoted as saying in 1928, "the country was paying for its immigrants through increased insanity and crime."²⁶⁰ The belief that immigrants are criminal in nature and create social problems is also seen in a conversation between Mr. Herbert Bealey Adshead and Mr. Robert Forke in the House of Commons. Mr. Adshead read out a selected passage of the proceedings from the Chief Constable Association: "With the influx [of immigrants] commencing in 1925 they have been coming to the fore, and unless that influx is checked, Canada will continue to be a haven for the liberated criminal or the wanted one ... The problem is a tremendous one..."²⁶¹ The threat of race degeneration, an increase in social problems and eugenic principles of heredity placed a significant amount of pressure on federal and provincial governments to address the perceived problems.

Heated debates concerning immigration within the House of Commons during the time period 1925 to 1929 outline the apprehensions of politicians concerning the effectiveness of the intelligence and medical testing of immigrants. In response to these concerns, limits were placed and enforced on the entry of those individuals classified as 'undesirable' into the country. In his address to the House on February 10, 1925, Mr.

²⁵⁷ *ibid.*

²⁵⁸ *ibid.* at 92.

²⁵⁹ *ibid.* at 91

²⁶⁰ Ninette & Trebilcock, *supra* note 233 at 213.

²⁶¹ *House of Commons Debates*, Vol. 182 (22 May 1929) at 2755 (Hon. Herbert Bealey Adshead).

Millar argues, "if you look over the reports with respect to the nationality of inmates of gaols, or of hospitals where unmarried mothers go at times, you will find that the percentage of immigrants there is alarmingly high."²⁶² According to Mr. Millar, the high rates were due to the fact that these 'deviant' individuals were slipping through the mechanisms in place to limit the entry of such people into Canada. As Mr. Millar states, this "indicates that there has been too much laxity in respect to the admission of immigrants; that the feeble minded, delinquents, and those having defects of various kinds have been admitted when clearly they should not have been allowed entry into Canada."²⁶³ Similarly, with regards to the numbers of unwanted immigrants entering the western provinces, Mr. Woodsworth proclaimed to the House of Commons on April 6th, 1927 "I sometimes wish that the government would dump into the eastern provinces as many people and of the same class as they have dumped into the west. It would not be long before we had some decided protest from the east with regard to the immigration policy of the government."²⁶⁴ In addition to support from politicians in the House of Commons, the implementation of section 38 of the Immigration Act 1919 was maintained by proponents of the eugenics movement in the medical community.

An analysis of the Federal House of Commons Debates concerning immigration between 1925 and 1929 illustrates that the federal government of Canada was not ready to forcefully advocate the position of the eugenicist movement until public opinion reached a point of general acceptance of its principles. What does become apparent, however, is that in 1928, when the Alberta *Sexual Sterilization Act* was finally adopted, the tone of the federal government changed dramatically. The expertise of the medical

²⁶² *House of Commons Debates*, Vol. 165 (15 February 1925) at 81 (Hon. Millar).

²⁶³ *House of Commons Debates*, Vol. 165 (15 February 1925) at 81 (Hon. Millar).

²⁶⁴ *House of Commons Debates*, Vol. 176 (6 April, 1927) at 2011 (Hon. J.S. Woodsworth).

community was called upon to clarify the relationships between immigrants, sterilization and 'deviancy'. Medical opinions were used to support the racist and gendered underpinnings found in section 38 of the *Immigration Act*, 1919 and the Alberta *Sexual Sterilization Act*, 1928.

In his address to the House of Commons on February 9, 1928 the representative for Frontenac, Mr. Edwards, attacked the Minister of Immigration and Colonization, Mr. Forke, by outlining cases in which immigrants who had been categorized at Canadian borders as belonging to the 'prohibited class' had been granted leave into the nation.

According to Mr. Edwards, a summary of these cases included:

a boy of nine years of age who because of deafness, was unable to pass the medical examination; Patrick McGorman, an Irishman ... he was certified at the port of entry as being feeble-minded and illiterate; Mrs. Mary Holt ... she had a mental breakdown from which she was under treatment in Scotland; ... Evelyn Crozier, ... suffering from psychopathic inferiority or emotional instability; ... [and] a woman with an unpronounceable name, ... who came from Poland. She was reported by the doctors as having valvular disease and being of poor physique generally.²⁶⁵

In addition to associating immigrants to the classification groupings 'prohibited class' and 'defective' outlined in the Immigration Act of 1919, based on an individual's perceived physical or mental difficulties, Mr. Edwards also promotes the principles of the eugenics movement through his sarcastic tone underlying a discussion concerning Angelo Castenello. Castenello was a "Spaniard ... reported as being dull mentally and suffering from several diseases, probably inherited. He is a fine type of citizen to allow to remain in this country! ... We are getting a wonderful population in this country, are we not?"²⁶⁶

²⁶⁵ *House of Commons Debates*, Vol. 177 (9 February, 1928) at 318 (Hon. Edwards).

²⁶⁶ *House of Commons Debates*, Vol. 177 (9 February 1928) at 318 (Hon. Edwards).

The categorizations created by the medical examinations that immigrants were forced to undergo resulted in many of these individuals being placed under the watchful eyes of the nation. In particular, a large number of these individuals were categorized as members of the 'prohibited classes' at western ports of entry and then placed in mental facilities. Hon. Mackenzie King, a representative of the Kootenay riding, clearly states that immigrants, such as those discussed above, were still entering Canada despite negative test results and that this was a cause of concern for the provinces as they bore the financial responsibility for these individuals. To support his point, Mr. King referred to previous House of Commons debates in which the opinions of professionals in the medical field, who observed the phenomenon of the mental facilities being overrun by immigrants, could be found.

Mr. King relies upon medical statements to support his argument in the House of Commons concerning the burden caused by disproportionately high numbers of immigrants who were deemed 'degenerate'. Dr. Laidlaw, a former officer of the Department of Health of Alberta stated in 1928: "We have at the present time in our mental hospitals in the province of Alberta 1,076 out of a population of 588,000. Of these roughly speaking, 70 per cent were foreign born. Of this 70 percent, 29 per cent came from Europe and 40 per cent from Great Britain, Ireland and the United States."²⁶⁷ Dr. Seymour, a recognized man in "public health circles"²⁶⁸ stated that Saskatchewan was "very similar with the exception that ... the proportion of foreign born in ... mental institutions in Saskatchewan is a little larger."²⁶⁹ Similar statements were made by Dr. Desloges from the public health service in Quebec which were invoked by Mr. King. Dr.

²⁶⁷ *House of Commons Debates*, Vol. 177 (1 March 1928) at 909 (Hon. Mackenzie King).

²⁶⁸ *House of Commons Debates*, Vol. 177 (1 March 1928) at 909 (Hon. Mackenzie King).

²⁶⁹ *House of Commons Debates*, Vol. 177 (1 March 1928) at 909 (Hon. Mackenzie King).

Desloges stated that in the "St.Jean de Dieu insane hospital, there were 93 foreign born patients whose mental abnormality could have been detected prior to embarkation"²⁷⁰ while an extract of a British Columbia report of mental hospitals from the year 1924 illustrates that individuals born in other countries amounted to 70.3 per cent of the institution's population.²⁷¹

In addition to using the statements of medical professional in the House of Commons to strengthen arguments outlining the inherent risks of allowing those from the 'prohibited classes' to propagate, certain members of the House advocated for the use of propaganda to sway public perceptions towards the use of sterilization. Mr. King believed that the declarations and reports of the Canadian National Committee for Mental Hygiene could be used as propaganda to sway the Canadian population who felt that a national policy of exclusion and a provincial policy of sterilization were unacceptable. In a discussion concerning a \$10,000²⁷² yearly federal monetary grant to the Canadian National Committee for Mental Hygiene,²⁷³ Mr. King offered support:

this committee has also gathered valuable information as to the mental condition of many of the immigrants to this country, and from their same publications are strengthening public opinion in support of the government's efforts to exclude the mental misfits from Canadian citizenship... The committee is composed of prominent men. Dr. Charles F. Marting, of Montreal, is president of the organization, and the executive officers are scattered throughout the various provinces. Undoubtedly they have done a very good work in stimulating public interest in the character of the work that is being done in the provincial asylums ... We cannot do anything more than subsidize an organization like this, which through propaganda and education is doing a very good work in Canada, work that the federal government might not be able to do. The people are sensitive

²⁷⁰ *House of Commons Debates*, Vol. 177 (1 March 1928) at 909 (Hon. Mackenzie King).

²⁷¹ *House of Commons Debates*, Vol. 177 (1 March 1928) at 910 (Hon. Mackenzie King).

²⁷² *House of Commons Debates*, Vol. 179 (5 June 1928) at 3784.

²⁷³ This committee conducted research throughout Canada with an emphasis on "investigations of the mental conditions amongst school children, prisons and asylums at the request of the authorities and report their findings to municipal and provincial governments with a view to the correction of conditions where necessary. *House of Commons Debates*, Vol. 179 (5 June 1928) at 3784.

in regard to suggestions in the matter of health and their home affairs, and especially sensitive of government interference, but men like Dr. Bates can through their organization and through the country and municipal councils carry on an effective campaign which is undoubtedly improving the condition in Canada...²⁷⁴

This statement illustrates that Canadian representatives in the House of Commons relied on the medical professions to aggressively support and promote campaigns targeting immigrants, by relying on their elevated status and professional designations in society. Supporters of the eugenics movement within the professional fields of academia, medicine and politics all pointed to the immigrant body as a cause for their society's ills.

3.3.1 Dropping birth rates, immigrant women, and the Empire Settlement

Agreement

While racism played a clear role in anti-immigration and eugenicist beliefs, at the same time there were socio-political forces that contributed to fears of the immigrant. These socio-political factors included a recovering economy and immigration schemes aimed at recruiting suitable immigrants. In their book, *The Making of the Mosaic: A History of Canadian Immigration Policy*, Ninette Kelley and Michael Trebilcock outline the social and political landscape of Canada from 1497 to 2008. In 1921, the House of Commons gained a new leader and a new political philosophy. Arthur Meighen "lost the federal election to Mackenzie King, leader of the Liberal party, which retained power for the rest of the decade."²⁷⁵ After the postwar recession, under King's leadership Canada's economy began to recover.

²⁷⁴ *House of Commons Debates*, Vol. 179 (5 June 1928) at 3785 (Hon. Mackenzie King).

²⁷⁵ Ninette & Trebilcock, *supra* note 224 at 190.

This growth was attributable to "an increase in international trade and improved prices for agricultural products and minerals."²⁷⁶ As Canada began to regain its economic standing, provincial legislatures in the House of Commons began putting pressure on the federal government to lessen immigration regulations. Canada's growing economy and the exodus of Canadians to the United States led to dropping population numbers and a growing demand for wage earners.

The large emigration of Canadians to the United States was due to a 1921 reformulation of American immigration policy which "imposed quotas on European immigrants but left immigration from Canada unrestricted."²⁷⁷ According to Kelley and Trebilcock, more than one million "people emigrated from Canada to the United States"²⁷⁸ during the 1920's. This development was frequently referred to in House of Commons debates leading up to the inception of the 1928 *Alberta Sexual Sterilization Act* and afterwards. A conversation concerning emigration to the United States, between Mr. Forke and Mr. Manion, both representatives in the federal legislature, illustrates that the number of Canadians leaving for the United States surpassed the number of immigrants entering Canadian borders.²⁷⁹ While the eugenics movement created a sense of fear concerning 'race degeneration' in Canada, the stagnant and dropping population was in part due to changes in the immigration policies of America.

Another contributor to dropping Canadian birth rates was the low number of women in Canada. As Mr. A.D. McRae, the representative for Vancouver North, states

²⁷⁶ *ibid.*

²⁷⁷ *ibid.* at 191.

²⁷⁸ *ibid.*

²⁷⁹ Canadians leaving Canada for the United States amounted to 159,058 in 1924, while in 1928 it amounted to 70,000. Note these figures in comparison to the number of immigrants who entered Canadian borders. In 1924, 148,560 individuals immigrated to Canada while in 1928 166,722 individuals were accounted for.

in the House of Commons concerning the Budget on March 9, 1928, "[o]ne of the greatest problems in our immigration is practically disregarded. I refer to our unbalanced population - the excess of men over women - a situation that is rapidly getting worse."²⁸⁰

In particular, Mr. McRae makes note of the large sex imbalance in the three Prairie Provinces. He noted that "in 1921 there was 185,000 more men than women. Today it exceeds 200,000."²⁸¹ Mr. McRae described the situation:

Anyone who travels through our prairie provinces; sees the desolate looking bachelor shacks by the hundreds from Winnipeg to the mountains, if he notes the adjacent more prosperous-looking homes of the farmer with a family will realize what this unbalanced population is costing the country. On the farm one married settler is worth to the community as much as three or four bachelors ... It is much more important to-day to bring a hundred thousand women to the prairie provinces than it is to bring 100,000 men ... Nevertheless, a real effort must be made to get more women immigration.²⁸²

What is apparent is that Canadian officials were actively trying to recruit immigrant women into Canada. However, only certain women were desired. Efforts aimed to control the sexuality and reproductive capabilities of immigrant women for "fear that the foreign stock resident in Canada would soon be out of a safe proportion to the native stock."²⁸³ The perceived high fertility rates of immigrant women were challenging the future of the "white man's country."²⁸⁴ An effort to address the lack of women in Canada is seen in The Empire Settlement Agreement.

The Empire Settlement Agreement was based on the 1922 *Empire Settlement Act*, with which the British government entered into agreements with various members of the

²⁸⁰ *House of Commons Debates*, Vol. 178 (9 March 1928) at 1167 (Hon. A.D. McRae).

²⁸¹ *House of Commons Debates*, Vol. 178 (9 March 1928) at 1167 (Hon. A.D. McRae).

²⁸² *House of Commons Debates*, Vol. 178 (9 March 1928) at 1167 (Hon. A.D. McRae).

²⁸³ *House of Commons Debates*, Vol. 175 (14 December 1926) at 83 (Hon. Michael Luchkovich).

²⁸⁴ *House of Commons Debates*, Vol. 176 (8 April 1927) at 2132 (Hon. Church).

Commonwealth to resettle female domestics, agriculturalists (farmers and farm labourers) and juveniles."²⁸⁵ According to Ninette and Trebilcock, this agreement was met with relative success "with respect to the emigration of British household workers."²⁸⁶ Under this arrangement, "household workers from the British Isles were given passage assistance, guaranteed work ... [or] adequate care and supervision until suitable work situations were found."²⁸⁷ In addition to this, Canadian families could "apply directly to the Department of Immigration and Colonization for a domestic servant or nominate a relative friend for domestic work."²⁸⁸ While relatively small in comparison to the amount of men granted immigration into Canada, 22, 000 women entered the nation through this proposal.

In 1920, the Women's Division of the Department of Immigration and Colonization was created to further the recruitment of suitable mothers for the nation. This Division oversaw two main elements concerning the relocation of British women. It "was in charge of overseeing the arrival and settlement of all unaccompanied women immigrants ... [and] ensure[d] that special care might be given to unaccompanied women coming to Canada from the British Isles."²⁸⁹ In relation to its second task, the Division sent female immigration officers to Britain "to conduct interviews with prospective immigrants and select the 'type of girl who will settle here and become a good Canadian."²⁹⁰ In order to control the 'type' of women coming into Canada, the Division constructed a permit system that was based on a passing grade of an examination in order

²⁸⁵ Glen Wright and Library and Archives Canada, "Settlement Schemes." <<http://www.collectionscanada.gc.ca/immigrants/021017-2441-e.html>>.

²⁸⁶ Ninette & Trebilcock, *supra* note 233 at 194.

²⁸⁷ *ibid.*

²⁸⁸ *ibid.*

²⁸⁹ *ibid.* at 194-195. .

²⁹⁰ *ibid.* at 195.

to "prevent the migration 'of girls who will ultimately become public charges or unsatisfactory citizens."²⁹¹

Further management was imposed upon immigrant women and their bodies during their travels to their prospective employment through "ship [and train] conductresses [who] exercise[d] supervision over unaccompanied female travellers."²⁹² Throughout the 1920's the mandate of the Division grew to include other tasks of surveillance and monitoring. "Hostels and local welfare agencies would send regular reports to the division ... [while] the division [would send] letters to employers of foreign domestics to monitor how their employment was proceeding, [and] to see how many women accepted for domestic work assumed other employment following their arrival."²⁹³ These security measures for the nation were put in place to catch those women "who transgressed moral conventions [as they] were liable to be deported."²⁹⁴ Departmental records illustrate that between 1926 and 1933 approximately 700²⁹⁵ British domestics were deported.

The public mores that were recorded in Departmental records warranting the deportation of these women included "bearing an illegitimate child, contracting venereal disease, living with a man out of wedlock, and having more than one sexual partner."²⁹⁶ In their analysis of these Departmental records, Ninette and Trebilcock note "that there appears to have been no corresponding accountability for the men associated with such transgressions [which] reveals the discriminatory treatment more generally faced by

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ *ibid.*

²⁹⁴ *ibid.*

²⁹⁵ *ibid.* at 196.

²⁹⁶ *ibid.*

immigrant women."²⁹⁷ Ninette and Trebilcock's findings complement those of Tim Christian discussed in the previous section of this Chapter.

This Chapter illustrates that the eugenic principles concerning the 'deviancy' of immigrant women saturated and influenced provincial and federal political discussions. The 1928 Alberta *Sexual Sterilization Act* and the functioning of the Eugenics Board resulted in the sterilization of a high proportion of women with an Eastern-European background. The attempt to control the sexuality of Eastern-European women within these provincial mechanisms is reflected through parallel discussions within the federal House of Commons concerning immigration policies that extended the eugenic belief that immigrants were inherently deviant and that their reproductive capacities had to be controlled in order to save the nation. Furthermore, both provincial and federal discussions illustrate a heavy reliance on medical discourses to ground these ideas of deviancy and promote the policy of sterilization within the Canadian population.

While the *Sexual Sterilization Act* was repealed on June 2, 1972 by the Alberta government, the following Chapter illustrates that contemporary trials concerning Romani women making claims for asylum based on accusations of forced sterilization from the Czech Republic hold similar notions and constructions concerning the control of 'foreign' women's bodies and their reproductive abilities. In particular, the trial minutes involving Mrs. Gaborova and Mrs. Bendigova are examined to find similarities and differences to the eugenics principles discussed above. The argument advanced in this section is that Refugee Protection Division Board hearings and decisions concerning Romani women and claims of forced sterilization illustrate that the discriminatory principles advanced by the eugenics movement are still present within the grounds of

²⁹⁷ *ibid.*

gender and ethnicity. Essentially, Romani women do not fit into the image of a 'desired' refugee body, thus they represent a threat to the image of a desired Canadian citizen.

4 He said, She said: Mrs. Gaborova, Mrs. Bendigova and The Refugee Protection Division

This Chapter applies a feminist poststructural discourse analysis to the Refugee Protection Division's *Records of a Hearing* and *Reasons and Decision* concerning the cases of Mrs. Gaborova and Mrs. Bendigova in order to highlight that in facing the Board members, these women face discrimination on the grounds of ethnicity and gender. It is argued that demanding irrationally high standards of consistency and credibility in refugee claims is the lever through which Board members contribute to and reinforce the body of knowledge originating from the eugenics movement that views non-Canadian women as inherently 'deviant'.

Section One provides a brief historical and contemporary discussion outlining the story of forced and coerced sterilization of Romani women in the Czech and Slovak Republics. Just as in the historical context, the current contributions of certain professionals in the fields of academics, medicine and politics invoke echoes of the eugenics movement, namely that Romani women are inherently 'deviant'. This is evident through an analysis of the perceptions of individuals in the fields of academics, medicine, and politics relating to the reproductive rights of Romani women. Section Two provides an outline of the experiences of sterilization sustained by Mrs. Gaborova and Mrs. Bendigova. Section three critically examines the cases of Mrs. Gaborova and Mrs. Bendigova in relation to the principle of corroboration, while sections four and five highlight the standards of consistency and chronology. The central argument of this Chapter is that the representation of non-Canadian women as 'deviant' has evolved into 'untrustworthy'. The development of the characteristic of 'deviant' into 'untrustworthy' is

perceived through an analysis of Refugee Protection Division hearings and decisions of Mrs. Gaborova and Mrs. Bendigova.

4.1 History of the Sexual Sterilization of Romani Women

The current practices of coerced and forced sterilization that Romani women from the Czech and Slovak Republics endure have a long history beginning from the Nazi Regime in Germany. Commissioned by The Center for Reproductive Rights and Poradna, the report *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia*²⁹⁸ by Christina Zampas (legal adviser for Europe), Sneha Barot (legal fellow in the International Legal Program of the Center for Reproductive Rights), Barbora Bukovska, (executive director of Poradna), and Ina Zoon (an expert consultant on minority rights issues) links the suffering of Romani women to the once-held German beliefs of a superior race. Between 1933 and 1945²⁹⁹ the Roma population was singled out and persecuted on the grounds of their identity. The Roma population was viewed as a group of "asocials and considered ... to be racial 'inferiors.'³⁰⁰ This resulted in a law³⁰¹ that permitted the forced sterilization of individuals who were identified as Romani based on the premise that associated their ethnicity to "undesirable"³⁰² characteristics which flourished from generation to generation due to heredity. Discrimination against the Roma population spread to Czechoslovakia. In Czechoslovakia, the Roma were viewed "as diseased and forcibly

²⁹⁸ The Center for Reproductive Rights and Poradna, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom* (Slovakia: The Center for Reproductive Rights and Poradna, 2003) online; <<http://www.reproductiverights.org/en/document/body-and-soul-forced-sterilization-and-other-assaults-on-roma-reproductive-freedom>>. [Body and Soul]

²⁹⁹ *ibid.* at 41.

³⁰⁰ *ibid.*

³⁰¹ *ibid.* This law was passed on July 14, 1933 -

³⁰² *ibid.*

sterilized ... to prevent the spreading of their disease by reproduction."³⁰³ Discrimination against the Romani and policies of forced sterilization continued after World War II and into the communist era.

In particular, "after the communist take-over in February 1948"³⁰⁴ the government took the position that "the Roma did not constitute a national minority but, at best, a socially backward ethnic group."³⁰⁵ These perceptions resulted in social policies aimed at "integrating and assimilating [Roma populations] into mainstream society."³⁰⁶ Specifically, policies of sterilization were implemented in "attempts to lower the 'high unhealthy population' of Romanies."³⁰⁷ As a result, Helsinki Watch concludes that during the communist era "a significant number of Romany women were sterilized."³⁰⁸ Many of the sterilizations were performed during a caesarean section or abortion, without consent, and were initiated through the influence of government social workers and health workers. While a Public Decree on Sterilization, issued by the Ministries of Health of the Czech and Slovak Socialist Republics was enacted in 1972,³⁰⁹ it was broadsided by the government who "reportedly took specific steps to encourage the sterilization of Romany women in order to reduce the 'high unhealthy' Romany population."³¹⁰ This resulted in a disproportionately high proportion of Romany women being sterilized despite the safeguards outlined in the Public Decree on Sterilization which provided "rights to non-

³⁰³ *ibid.* at 42.

³⁰⁴ Human Rights Watch, A Helsinki Watch Report, *Struggling for Ethnic Identity: Czechoslovakia's Endangered Gypsies*. (United States of America: Human Rights Watch, 1992) at 9. [Struggling for Ethnic Identity]

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

³⁰⁷ *ibid.*

³⁰⁸ *ibid.* at 19.

³⁰⁹ *ibid.*

³¹⁰ *ibid.*

discrimination on the basis of ethnicity or sex."³¹¹ The Czechoslovakian human rights organization, Charter 77, found that the "sterilization of Romany women was a 'planned administrative policy' and that 'at internal meetings [regarding the Public Decree on Sterilization] the success of the workers [government social and health workers] is assessed according to the number of Romany women whom they have persuaded to be sterilized."³¹²

Helsinki Watch obtained a July 1977 document by the Secretariat of the Government Commission for Questions of Gypsy Inhabitants of the Slovak Socialist Republic in which the authors state: "Health indications which will enable the possibility of sterilization are not being taken into account... in practice, the gypsy citizens have not been influenced enough until now to use the possibility of sterilization... In cases when further pregnancy endangers the health of further descendants."³¹³ Government documents from this time testify that monetary incentives for sterilization were used to entice Romani women due to their dire economic and social positions. The policy became even more enticing as the monetary incentives were increased, and finally in September 1988 "an official policy was initiated which allowed one-time financial grants for women who underwent an operation in 'the interest of the health of the population."³¹⁴

In their report, *Struggling for Ethnic Identity: Czechoslovakia's Endangered Gypsies*, Helsinki Watch conducted interviews that illustrated that Romani women were targeted by health care officials for sterilization. The reproductive abilities of Romani women were seen as 'dangerous' based on eugenic notions that they produced too many

³¹¹ *ibid.*

³¹² *ibid.* at 20.

³¹³ *ibid.*

³¹⁴ *ibid.* at 21.

children with genetic defects, and that they were biologically weaker than other Eastern Europeans and were an economic burden that abused social programs. Some of the researchers for Helsinki Watch asked questions to informants concerning the influence that the monetary compensation had on a Romani woman's decision to undergo the procedure of sterilization. Dr. Okosoa, who currently works at Rimavska Sobota, and who worked in a department responsible for the care of families and children during the communist era stated:

Most of the Roman women here go about 26,000 Crowns to be sterilized. The majority of women who were sterilized were Romanies, mostly because they wanted the money. I can't say how many of them were sterilized here because nobody wanted to talk about it. The sterilization was done to lower the Roma population because there were too many of them. The parents didn't look after them; they didn't go to school. It made no sense to have so many more Gypsy children born under these conditions.³¹⁵

Similarly, another interview conducted by Helsinki Watch indicates that Romani women and their families were seen as threats to the social fabric in Czechoslovakia. Elena Jenaseva, a social worker in Banska Bystrice states: "We started [the sterilization] because the population of undesirable families was starting to rise. It was based on our finding that they have unhealthy children, and undesirable population. It was shown that these families didn't care about health."³¹⁶ Similarly, the notion that Romani women and their families were genetically inferior was expressed by medical professionals during the communist era. A Prague gynaecologist who requested anonymity outlines an argument that he had with a fellow colleague at a conference concerning the right to sterilize Romani women in Slovakia. He states that the colleague suggested that the birth weight

³¹⁵ *ibid.* at 25.

³¹⁶ *ibid.* at 27.

of 'Gypsy' children was less than that of other non-'Gypsy' children because "they (the children or the mothers?) have a lower intelligence quotient and therefore take care of their children less because they are stupid..."³¹⁷ From the interviews that Helsinki Watch conducted for their report, it is postulated that eugenic principles from the Nazi era influenced the perceptions held by some individuals in the health care professions.

The fear of Romani women's sexuality and the high birth rates of this population resulted in official policies aimed at curbing and limiting these women's reproductive right to have children and ultimately resulted in the coerced and forced sterilization of a large percentage of this demographic. According to Dr. Posiuch and Dr. Posluchova in their article, "The Problems of Planned Parenthood among Gypsy fellow-citizens in the Eastern Slovakian Region," "25.8 percent of the women who underwent sterilization in 1983 were Romanians; by 1987, this figure had risen to 36.6 percent."³¹⁸ However, these numbers may be higher due to the possibility, as the statement by the anonymous gynaecologist illustrates, that a large number of the sterilizations performed were not reported.

Since the fall of the communist regime in 1989, many other Romani women have come forward with claims of sterilization that occurred either in the Slovak or Czech Republics. Human rights organizations such as Amnesty International and United Nations bodies such as the Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination continue to document and report that the issue of sterilization in Slovakia and the Czech Republic is still very much alive. Similarly, government policies continue to target Romani women.

³¹⁷ *ibid.* at 28.

³¹⁸ *ibid.* at 29.

While the laws in the Czech and Slovak Republics permitting the sterilization of the Romani population have been repealed³¹⁹, racist and gendered "assumptions about Romani procreation and attempts to control Romani women's reproductive lives thrive under the same rhetoric that drove the coercive policies under communism."³²⁰ Researchers from the Center for Reproductive Rights (CFRR's) presume that the high fertility rates of Romani women continue to be an issue of public and political concern and debate in Slovakia. In particular, CFRR's report *Body and Soul* documents that "politicians have publicly expressed their concern over the growing numbers of Roma, encouraging fears that in the coming decades the Romani population will outnumber and overtake the Slovak population."³²¹ The fear expressed is that if Romani women are allowed to continue reproducing, the general health and quality of the populations in Slovakia and the Czech Republic will decline.

For example, an OSI report from the early 2000's quotes the member from the Slovakia Ministry of Health as stating, "If we do not succeed in integrating the Romani population and modify their reproduction[,] the percentage of non-qualified and handicapped persons in the population will increase."³²² Other government officials, such as Robert Fico, head of the Social Democracy or SMEAR party suggested on June 6, 2000 that Slovakia must cut social benefits to Roma families with more than three children. In 2001 Fico supported his proposal for cutting social benefits for Roma families by stating;

³¹⁹ Elements of the law concerning sterilization were repealed by Decree No. 590/1990 of the Coll.L. Decree of the Ministry of Labor and Social Affairs of the Slovak Republic from 20 December 1990, On the Amendment and Modification of the Decree of the Ministry of Health and Social Affairs of Slovak Socialist Republic No. 151/1988 of the Coll.L.

³²⁰ *Body and Soul*, *supra* note 298 at 46.

³²¹ *ibid.*

³²² Ina Zoon, *On the Margins: Slovakia - Roma and Public Services in Slovakia* ed. by Mark Norman Templeton (New York: Open Society Institute, 2001) at 67.

we have however a great mass of Romanies who don't want anything, just to lie in bed on social support and family benefit. These people have discovered that, because of family benefit, it is advantageous to have children. When a family has thirteen, fourteen children it is a source of income for them all. We can't close our eyes to that.³²³

The CFRR's report *Body and Soul* similarly documents that "local officials and government health-care personnel also support measures aimed at controlling the Romani population."³²⁴ A deputy mayor of Rudnanay, a town in eastern Slovakia with one of the poorest Romani settlements in the country, stated publicly that a "Chinese fertility program" was needed in order "to curb the Romani population."³²⁵ Similarly, a Romani woman who was sterilized reported that one doctor yelled at her saying, "You dirty blacks, are you not ashamed to have that many children..."³²⁶ Individuals in the political and medical professions continue to contribute to discriminatory attitudes about Romani women's fertility and sexuality. The fears that persist assume that these women have too many children, they are promiscuous, they will infect the European population with children who display undesired characteristics, and that they are a strain on the well-being of the nation due to their reliance on social benefits.³²⁷

In spite of this, Romani women making refugee claims in Canada based on allegations of sterilization and persecution from their country of origin have been denied asylum through the tribunal process of the Refugee Protection Division as shown in an analysis of the following cases of Magdalena Gaborova and Zaneta Bendigova. I am not suggesting that all claims of persecution made by Romani women have been denied,

³²³ The Guide to the Slovak Republic, "Coalition With HZDS Minus Meciar Possible, Says Fico" Slovakia.Org online: Slovakia.Org <<http://www.slovakia.org/news/0105-4.htm>>.

³²⁴ *Body and Soul*, *supra* note 298 at 47.

³²⁵ *ibid.*

³²⁶ *ibid.*

³²⁷ *ibid.* at 47.

however an examination of twenty-five cases from the Federal Court of Canada illustrates that of these twenty-five cases examined, it was my impression that the issue of forced sterilization was not perceived as grounds for asylum. This statement is difficult to qualify with statistics as the Immigration and Refugee Board does not keep sex aggregated information of asylum cases, so this thesis focuses on the mechanisms and dynamics of discrimination rather than official figures.

In the following section, I examine the records of these two asylum cases as they involve, as part of the claim of persecution, the issue of forced sterilization. I am not suggesting that these two cases are necessarily representative of all cases concerning Romani asylum cases in Canada. Rather my point is to use these cases to track how formal legal rationalities are used in ways to dismiss and delegitimize the voices of Romani women. I suggest that while there is no direct link on the record between these two cases and the eugenics movement in Canada in the 1920's, the apparent ease with which reports of sterilization as human rights abuses are dismissed by these legal proceedings resonates with the historical associations of non-Canadian women with 'deviancy'.

The cases of Mrs. Gaborova and Mrs. Bendigova are examined through the theoretical 'three C' lens adopted from a study done by Carol Bohmer and Amy Shuman for their book, *Rejecting Refugees: Political Asylum in the 21st Century*.³²⁸ Bohmer and Shuman's 'three C' lens provides a framework that helps illustrate that Romani women are facing discrimination on the basis of their gender and ethnicity in the Canadian asylum

³²⁸ Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political asylum in the 21st century* (New York and Canada: Routledge, 2008).

process due to unobtainable, high levels of consistency and credibility required in the Refugee Protection Division Hearings.

In approaching these two claims, my analysis is influenced by Sherene Razack's approach which shifts the scholar's gaze from the racialized objects -- those seeking refugee protection -- to the decision makers in immigration hearings, on to lawyers, on to legislators, and on to journalists.³²⁹ An emphasis is placed on the decision makers as they are "the describers and the imaginary elites whose gaze construct asylum seekers from the Third World either as unworthy claimants or as supplicants begging to be saved from the tyranny of their own cultures, communities, and men."³³⁰

This Chapter focuses on the actual transcripts of the Refugee Protection Division Hearings as the members listening to the claims of Mrs. Gaborova and Mrs. Bendigova take part in establishing whether their stories are credible. In the context of these cases, the sterilization component adds a complex layer to this analysis as it highlights a sense of public-ness whereby the claims made by these two applicants implicate that a state government, viewed as 'western' in its EU membership and its ostensibly 'democratic form', is initiating the violence. The sterilizations of Mrs. Gaborova and Mrs. Bendigova occurred at the hands of the state through discriminatory practices and were performed in the medical community in accordance with public policy.

This leads the Refugee Protection Board members to be particularly critical of Mrs. Gaborova's and Mrs. Bendigova's persecution claims as they run counter to the democratic perception of Eastern European countries. This is evident in statements made by the Minister of Immigration and Citizenship Jason Kenney in 2009: "although like

³²⁹ Razack, *supra* note 24 at 88.

³³⁰ *ibid.*

every other democracy it has its challenges and its shortcomings it is hard to believe that the Czech Republic is an island of persecution in Europe."³³¹ Similarly, Embassy Magazine quotes Minister Kenney referring to the issue papers prepared for the Czech Republic by the board: "if someone comes in and says the police have been beating the crap out of them the IRB panellists can then go to their report and say, well actually there has been no evidence of police brutality."³³² Former Chair of the Immigration and Refugee Board, Peter Showler states: "Mr. Kenney has absolutely introduced institutional bias into the refugee board's decision-making process. Mr. Kenney's comments have caused a significant amount of danger to individual refugee claimants from Mexico and the Czech Republic as well as to the judicial process."³³³ While the Immigration and Refugee Board is an independent agency, its members "are appointed by Governor in Council, ... based largely on recommendations from the immigration minister."³³⁴ Experts say Mr. Kenney's disrespect of the principle of independence is of grave concern because it introduces external political factors into the members' decision-making process. Audrey Macklin, an associate professor at the University of Toronto's Faculty of Law offers her opinion:

When the minister pronounces on the validity, or lack thereof, of refugee claimants from any country without having heard the particular case and knowing the individual circumstances, there is the risk that individual decision makers whose jobs ultimately depend on the minister's decision to appoint and reappoint them, will be unduly influenced. They might be fearful when their time comes up for reappointment that he will examine

³³¹ Immigration and Refugee Board of Canada, Refugee Protection Division, Record of a Hearing: Robert Zupko et. al. RPD File No. TA9-00558; TA9-00594; TA9-00595; TA9-00596; TA9-00597; TA9-00598. Toronto, Ontario. Feb. 11, 2010 at 5 line 22. [Record of a Hearing, Zupko]

³³² *ibid.* at 5 lines 23-27.

³³³ Michelle Collins, "Political Interference Crippling Refugee Board: Former Chair" *Embassy Magazine* (July 22, 2009). online: [embassymag.ca <http://www.embassymag.ca/page/view/political_interference-7-22-2009>](http://www.embassymag.ca/page/view/political_interference-7-22-2009).

³³⁴ *ibid.*

their acceptance rates from the countries where he has deemed refugee claimants to be bogus, and penalize them.³³⁵

Because individuals in positions of authority do not find the Czech and Slovak Republic institutions to be discriminatory, claims of forced sterilization from these countries are found to be un-credible.

Rather, Mrs. Gaborova and Mrs. Bendigova are 'outsiders', a term highlighted by Sunera Thobani in her book, *Exalted Subjects: Studies in the Making of Race and Nation in Canada*.³³⁶ According to Thobani, "the outsider, on the other hand, cast in the trope of the stranger who 'wants' what nationals have, is a figure of concern. Popularly defined as devoid of the qualities and values of the nation - as being quite alien to these - the stranger provokes anxiety, if not outright hostility..."³³⁷ Thus, the statements by Mr. Kenney may be evaluated through a new lens as a prominent Canadian national depicts the 'outsider' "as making unreasonable claims upon the nation and its precious finite resources."³³⁸ Furthermore, examining the cases of Mrs. Gaborova and Mrs. Bendigova uncovers that the 'outsider' is also depicted as inherently deviant.

Unchallenged perceptions of the 'outsider' make it easier for bodies of knowledge which are fundamentally discriminatory to be believed and absorbed into the consciousness of decision-makers. Discriminatory suppositions about Romani women from the Czech and Slovak Republics include the following: they have too many children; they are promiscuous; they will infect the European population with children that display undesired characteristics; and they are a strain on national well-being due to

³³⁵ *ibid.*

³³⁶ Thobani, *supra* note 17.

³³⁷ *ibid.* at 4.

³³⁸ *ibid.*

their reliance on social benefits. These characteristics run counter to the Canadian "master narrative of the nation, which takes as its point of departure the essentially law-abiding character of its enterprising nationals, who are presented (for the most part) as responsible citizens, compassionate, caring, and committed to the values of diversity and multiculturalism."³³⁹ Similarly, as illustrated in Chapter Three, the historical characterization of immigrants from Eastern Europe as 'deviant' provides a foundation on which contemporary discriminatory discourses can be built.

4.2 The experiences and claims of sterilization by Magdalena Gaborova and Zaneta Bendigova

Magdalena Gaborova

On May 8, 2009 the claimants Miroslav Gabor, Magdalena Gaborova, Bianka Gaborova, and Magdalena Gaborova Junior had their refugee claim, under sections 96³⁴⁰ and 97³⁴¹ of the *Immigration and Refugee Protection Act*³⁴² heard before the Refugee Protection Division in Toronto, Ontario. Mr. Gabor is a citizen of the Czech Republic, while Ms. Gaborova and her two daughters hold citizenship in the Slovak Republic. Mr.

³³⁹ *ibid.*

³⁴⁰ *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, s. 96.: A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

³⁴¹ *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, s.97.: 97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

³⁴² *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, s. 96 and 97.

Gabor and Ms. Gaborova both claimed that they experienced multiple instances of persecution based on their ethnicity.³⁴³

Mrs. Gaborova's claim of persecution also notes that she "was involuntarily sterilized when she attended the hospital to have a cyst removed."³⁴⁴ When Mrs. Gaborova asked the doctor why he sterilized her, the doctor "... stated 'you already have two kids, you do not need anymore, and we have enough gypsies in the country.'"³⁴⁵

The presiding member of the *Refugee Protection Division*, K. Atkinson found that the claim of the Gaborova family, and Mrs. Gaborova's experience in particular, did not classify as cause to find the claimants "convention refugees or persons in need of protection, [and therefore] rejecte[d] the[ir] claims for refugee protection."³⁴⁶ K. Atkinson concluded that the Gaborova family "do not have a well found fear of persecution in either the Czech or Slovak Republics."³⁴⁷ Furthermore, K. Atkinson determined that Mrs. Gaborova's claim of sterilization did not amount to persecution. K. Atkinson states, "I, therefore give greater weight to the documentary evidence than the statements of the fourth claimant and I conclude that there was no forced sterilization without informed consent."³⁴⁸

On appeal, the Federal Court of Canada ordered a re-hearing. The Honourable Mr. Justice Russell found that K. Atkinson's conclusion that "there was no forced sterilization without informed consent" constituted a material error. Justice Russell

³⁴³ Reasons for Judgment and Judgment. *Miroslav v. The Minister of Citizenship and Immigration* 2010 FC 383 (CanLII) Docket: IMM-3466-09 at para. 2. [Reasons for Judgment, Miroslav]

³⁴⁴ Reasons for Judgment and Judgment. *Gabor v. The Minister of Citizenship and Immigration* 2010 FC 383 (CanLII) Docket: IMM-3466-09 at para. 7 [Reasons for Judgment, Gabor]

³⁴⁵ *ibid.*

³⁴⁶ Immigration and Refugee Board of Canada, Refugee Protection Division, *Reasons and Decision: Miroslav Gabor et. al.* RPD file No. TA8-07234, TA8-07259, TA8-07260, TA8-07261, Toronto, Ontario, June 19, 2009 at para. 29. [Reasons and Decision, Gabor]

³⁴⁷ *ibid.* at para. 13.

³⁴⁸ *ibid.* at para. 25.

allowed the application for a leave of stay and ordered that the case of Mrs. Gaborova and her family be "reconsidered by a differently constituted RPD [Refugee Protection Division]"³⁴⁹ A second hearing with the Refugee Protection Division has not yet taken place.

Zaneta Bendigova

Zaneta Bendigova made a claim for refugee status with the rest of her family Robert, Kamila, Sara, Ester and Robert. Their hearing before the Refugee Protection Division member B. Volpontesta was heard on February 11, 2010 in Toronto, Ontario. The family sought protection in Canada under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*.³⁵⁰ Mrs. Bendigova testified at the hearing that when she went to the hospital to give birth to her fourth child, prior to her admittance into the delivery room, a staff member at Ceska Lipa hospital³⁵¹ told her to sign some documents. She was told that she would have to sign the documents prior to being allowed in the delivery room. She testified that there was no explanation of the documents and she was unaware of the document contents. After the birth of her child, Mrs. Bendigova discovered that the doctors had tied her fallopian tubes, effectively making her sterile.

Due to the shock caused by this unexpected sterilization, Mrs. Bendigova sought psychiatric help. She also inquired why she had been sterilized, to which the doctor who performed the sterilization replied that she "was only a guinea pig."³⁵² While under treatment with the psychiatrist, Mrs. Bendigova's tubal sterilization became infected. This resulted in the need for a complete hysterectomy. Mrs. Bendigova explains: "After

³⁴⁹ Reasons for Judgment, Gabor, *supra* note 344 at 17 line 1.

³⁵⁰ *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA).

³⁵¹ Record of a Hearing, Zupko, *supra* note 323 at 26 line 39.

³⁵² *ibid.* at 30 line 33-34.

that they tied my tube, they told me I need another surgery because I got an infection in my womb and then I had to go for a big surgery when they took everything, all my femininity was taken out."³⁵³

The Refugee Protection Division member found that Mrs. Bendigova and her family did "not have a well-founded fear since there is not a serious possibility of persecution ... [thus] the claimants are neither Convention Refugees nor persons in need of protection."³⁵⁴ In the handling of the allegation of sterilization by Mrs. Bendigova, the tribunal member B. Volpontesta, highlighted that Mrs. Bendigova's testimony was not credible because she failed to include her experience of sterilization on her initial Personal Information Form. The member also referred to the inability to obtain medical records to support Mrs. Bendigova's claims. Mrs. Bendigova's application of judicial review to the Federal Court of Canada was dismissed by Madam Justice Snider on the basis that there was no material error on the record.³⁵⁵

An analysis of the Refugee Protection Division hearing *Records, Reasons and Decisions* and in the case of Mrs. Gaborova, the Federal Court *Reasons for Judgment and Judgment*, illustrates that the high standard of credibility that Romani women have to uphold creates a barrier that limits their abilities to be granted refugee status within Canada. The refugee system in Canada is seen to discriminate against Romani women on the grounds of gender by not placing enough emphasis on the claims of sterilization themselves as well as on the grounds of ethnicity by not recognizing that sterilization has

³⁵³ *ibid.* at 30 lines 5-7.

³⁵⁴ Immigration and Refugee Board of Canada, Refugee and Protection Division, *Reasons and Decision: Robert Zupko et. al.* RPD File No. TA9-00558; TA9-00594; TA9-00595; TA9-00596; TA9-00597; TA9-00598. Toronto, Ontario, March 16, 2010 at para. 34. [Reasons and Decision, Zupko]

³⁵⁵ Reasons for Judgment and Judgment. *Zupko v. The Minister of Citizenship and Immigration* 2010 FC1319 (CanLII) Docket: IMM-2091-10. [Reasons for Judgment, Zupko]

occurred to a disproportionately high number of Romani women from the Czech and Slovak Republics. This discrimination is partly due to the belief that immigrant women are inherently deviant and thus innately untrustworthy which originated from the eugenics movement in Canada. The resulting hearing and trial decisions are influenced by echoes of eugenic and prejudiced beliefs regarding the bodies of immigrant women as discussed and highlighted in Chapter 3.

4.3 Credibility: Sharing the experience

Supporters of the eugenics movement in Canada during the late nineteenth and early twentieth century held the belief that women of certain ethnicities or nationalities, due to their genetic predispositions, were prone to acts of deviancy or criminality. In particular, the analysis from Chapter 3 illustrates that in the Canadian context, professionals in academia, medicine and politics contributed to the creation and implementation of the Alberta Sexual Sterilization Act. These individuals held the belief that immigrant women were prone to deviancy, criminality and irrationality. The link between deviancy, criminality and irrationality and immigrant women was substantiated by the high percentage of these women found in mental facilities. In the contemporary Canadian context, an analysis of the experiences of Mrs. Gaborova and Mrs. Bendigova illustrate a shift that associates deviancy, criminality and irrationality to a lack of credibility.

In their book, *Rejecting Refugees: Political asylum in the 21st century*, which is a comparative analysis of the systems in the United States and United Kingdom for asylum, Carol Bohmer and Amy Shuman note that an emphasis by decision makers on the matter of credibility has become misconstrued. Bohmer and Shuman state that the

refugee system and "the law allows adjudicators to require corroboration of otherwise credible testimony, and allows them to deny asylum on a number of factors related to credibility, including demeanour, plausibility, and inconsistencies."³⁵⁶ Essentially, Bohmer and Shuman highlight that an applicant can't win an asylum case unless the story has three Cs: corroboration, consistency, and chronology. The 'three C' characteristics required for a successful refugee claim, highlighted by Bohmer and Shuman, are also evident in the Canadian context.

The refugee system in Canada places an elevated emphasis on the principles associated to consistency, and tribunal members of the Refugee Protection Division and judges from higher courts are encouraged to follow these high standards. Rather than recognizing that such high standards of proof and consistency are in many contexts unrealistic and unobtainable, tribunal members and judges are unable to deviate from bodies of knowledge that underpin the notion that individuals making claims for refugee status are inherently untrustworthy. This narrows the analytic scope of decision makers and limits the possibilities of providing a decision that recognizes, in the context of the sterilization of Romani women, that many of these women face persecution on the grounds of their ethnicity and gender. Thus, rather than recognizing the multi-layered and interconnected elements and systems of discrimination that Romani women encounter in their country of origin, the Canadian system contributes to the stereotypes associated with and attached to these women's bodies.

4.3.1 Corroboration

4.3.1 Paper Trail: Mrs. Gaborova

³⁵⁶ Bohmer, *supra* note 328 at 132.

The first of Bohmer and Shuman's 'C's, corroboration, includes three ways in which authentication of an act is affirmed: the paper trail, experts and associates, and country reports.³⁵⁷ The paper trail is revered as a source of "objective evidence that reassures us that a narrative is 'true'"³⁵⁸ according to Bohmer and Shuman. Similarly, the report *Still No Reason at All*,³⁵⁹ by Jennifer Monahan and Alasdair Mackenzie for *Asylum Aid* outlines that without these documents of truth, the claims of refugees are granted little significance or importance:

Documentary evidence to support the asylum claim is, in practice, not an option but a pre-requisite. The standard of proof is thus already set at a level that is hard to achieve in circumstances of flight, and often well-nigh impossible at long-distance. It can be extremely hard for asylum-seekers to obtain any sort of documentary evidence from often war-torn or unstable countries where mail may be monitored and official records of [for instance] police activities are more or less non-existent. Indeed, if any asylum-seeker were to come equipped with all the necessary documentary evidence, he or she would might [sic] be said to be more, not less, suspect.³⁶⁰

The observations by *Asylum Aid* are relevant to the case of Mrs. Gaborova and her discredited claim of involuntary sterilization. In particular, the *Record of a Hearing* illustrates that the tribunal authority, K. Atkinson, directs his questions towards Mrs. Gaborova in order to reveal whether she was able to obtain documents of authority from the police and the hospital in which her unauthorized sterilization took place. During the dialogue between Atkinson and Gaborova concerning the sterilization procedure that Mrs. Gaborova was forced to endure, Atkinson makes repeated implied references that documentary evidence is essential to prove the claim. The transcript reads:

³⁵⁷ Bohmer, *supra* note 328 at 115-133.

³⁵⁸ *ibid.* at 116.

³⁵⁹ Asylum Aid, *Still No Reason At All* (London: Asylum Aid, 1999) online: <http://www.asylumaid.org.uk/data/files/publications/46/Still_No_Reason_At_All.pdf>.

³⁶⁰ *ibid.* at 23.

PRESIDING MEMBER: And the sterilization was tying the fallopian tubes?
FEMALE CLAIMANT: Yes.
PRESIDING MEMBER: Do you have any medical records for that?
FEMALE CLAIMANT: No they did not give me absolutely anything.
PRESIDING MEMBER: Did you ask for them?
FEMALE CLAIMANT: Yes³⁶¹

Similarly, the *Reasons and Decision* of the Gaborova case demonstrates that Atkinson used the lack of documentary evidence as a lever to justify his decision that the sterilization did not take place. Atkinson states, "[i]n addition, the fourth claimant did not provide any corroborating evidence in regard to her claim of forced sterilization."³⁶² Essentially, the lack of documentary evidence delegitimizes Gaborova's voice in the Refugee Protection Division tribunal and in the eyes of tribunal member, K. Atkinson. However, the country reports that Atkinson relied on to understand situations of persecution occurring in both the Czech Republic and Slovakia outlined that obtaining official documents was difficult for members of the Roma community.

In particular, the evidence submitted by Mrs. Gaborova's counsel, George J. Kubes, included the 2008 and 2009 US Department of State, Bureau of Democracy, Human Rights and Labour reports for the Czech Republic and the 2007³⁶³, 2008³⁶⁴ and

³⁶¹ Immigration and Refugee Board of Canada, Refugee Protection Division, *Record of a Hearing: Miroslav Gabor et al.* RPD File No. TA8-07234; TA8-07259; TA8-07260; TA8-07261 Toronto, Ontario May 8, 2009 at 36 lines 34-44. [Record of a Hearing, Gabor].

³⁶² *Reasons and Decision, Gabor, supra* note 346 at para. 24.

³⁶³ Amnesty International, *2007 Country Report*. online: <<http://www.amnesty.org/en/region/Czech-republic/report-2007>>.

³⁶⁴ Amnesty International, *2008 Country Report*. online: <<http://www.amnesty.org.en/region/Czech-republic/report-2008>>.

2009³⁶⁵ Country Reports produced by Amnesty International. Each of these documents outlines that the Roma community face discrimination in the area of healthcare and through legal mechanisms. Amnesty International included specific instances illustrating how the Roma community continuously faced ill-treatment by the police. Similarly, the 2009 United States Bureau of Democracy, Human Rights and Labor *Human Rights Report* states "while law enforcement bodies were generally effective, corruption remained a problem." The government of the Czech Republic has instituted the position of the Interior Ministry, whose task is to "overse[e] police actions and ... investigat[e] allegations of police misconduct [however] [o]bservers believed that the ministry often whitewashed wrongdoing or prematurely terminated investigations of units under its control."³⁶⁶

Similar outcomes were reported concerning the relationship between the police force and the Romani populations in Slovakia. For example, the 2007 report on Slovakia compiled by the US Department of State details, "[t]he government generally respected the human rights of its citizens; however, there were problems in some areas. Notable human rights problems included some continuing reports of police mistreatment of Romani suspects."³⁶⁷ Mistreatment of the Romani population in Slovakia by law enforcement agencies continued to be a concern in the US Department of States reports for the years of 2008³⁶⁸ and 2009.³⁶⁹

³⁶⁵ Amnesty International, *2009 Country Report*. online: <<http://www.amnesty.org/en/region/Czech-republic/report-2009>>.

³⁶⁶ U.S. Department of State, Bureau of Democracy, Human Rights and Labor. *2009 Human Rights Report: Czech Republic*. online: <<http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136027.htm>>.

³⁶⁷ U.S. Department of State. Bureau of Democracy, Human Rights, and Labour, *2007 Country Reports on Human Rights Practices: Slovak Republic*. online: <www.state.gov/g/drl/rls/hrrpt/2007/100584.htm>.

³⁶⁸ U.S. Department of State. Bureau of Democracy, Human Rights, and Labour, *2008 Country Reports on Human Rights Practices: Slovak Republic*. online: <<http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119104.htm>>.

Police ill-treatment and corruption creates an environment that is not conducive to helping those within the Roma community obtain documentation and reports that may incriminate state institutions. As Mrs. Gaborova states during the tribunal hearing, "the police takes Roma population as dirt and they don't put effort to help these people."³⁷⁰ Obtaining the documentation required to file a successful refugee claim is almost impossible. Thus, Mrs. Gaborova's claim that she was unable to obtain records concerning the procedures that the hospital performed without consent are also not unfounded.

Just as police reports are difficult for Romani to access, so too are hospital records. Mrs. Gaborova states during the *Refugee Protection Division* hearing that she went into the hospital "because of female issues."³⁷¹ After a consultation with a medical professional, she was told that she would have to have an operation to have a cyst removed.³⁷² She explained that after the operation, the doctor told her that she had been sterilized and implied that the procedure had been performed because there were already too many Romani children in Slovakia.³⁷³ While Mrs. Gaborova did attempt to obtain medical records from the Dunajska Streda hospital, the fact that she was unable to do so has been noted as a systemic problem in Slovakia.

The report *Body and Soul* illustrates that Romani women in Slovakia face physical and verbal abuse within the health care system and are repeatedly denied access to their medical records. This conclusion is based on a fact-finding mission undertaken

³⁶⁹ U.S. Department of State. Bureau of Democracy, Human Rights, and Labour, *2009 Country Reports on Human Rights Practices: Slovak Republic*. online: <<http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136057.htm>>.

³⁷⁰ Record of a Hearing, Gabor, *supra* note 361 at 35 lines 18-19.

³⁷¹ *ibid.* at 33 line 27.

³⁷² *ibid.* at 33 lines 31-32.

³⁷³ *ibid.* at 33 lines 48-49 and at 34 lines 5-23.

in eastern Slovakia between August and October 2002. In their report, CFRR and Poradna found that "[h]ospital administrators, doctors and nurses openly express racist views to their Romani patients, whom they regards as morally defective, unable to provide for their children and unworthy of medical services. Many health-care workers complain about the fertility rates of Romani women and see these births rates as a direct threat to Slovakia."³⁷⁴

An interview with a Romani woman from Rudnany illustrates an example of such abuse. She states: "Nurses and doctors are cursing us, call us Gypsies and tell us 'you only have children', 'you are stinky,' 'you have lice' and 'you give birth only to get money ...'"³⁷⁵ Another Romani women from Nad jazerom, Golianova Street, Kosice also shares her experience with CFRR and Poradna during a group interview. She states: "The nurses call us 'Cigani' [Gypsies], they tell us that we are dirty and too young to have sex. They call teenagers 'young whores' ... When they see us pregnant they say: 'You are here again! How many children do you want? We already had enough of you!'"³⁷⁶

In relation to the inability of Romani women to access their medical files, CFRR and Poradna summarize that their "research team, with the women present or with a power-of attorney, attempted to access Romani women's medical records, to further our investigation of forced sterilization practices, hospital authorities impeded these efforts."³⁷⁷ The report *Body and Soul* concludes that although the law in Slovakia³⁷⁸ grants all patients the right to view their medical files, "Romani patients are arbitrarily and unjustly denied this right and are also not allowed to learn about the medical

³⁷⁴ *Body and Soul*, *supra* note 298 at 16.

³⁷⁵ *ibid.* at 83.

³⁷⁶ *ibid.* at 84.

³⁷⁷ *ibid.* at 16.

³⁷⁸ *Zakon o zdravotnej starostlivosti* [Health Care Act], 277/1994 Coll. LL (1994).

procedures performed on them. Appointed and qualified legal counsel for Romani patients are also not permitted to view medical records on behalf of their Romani clients."³⁷⁹

The Health Care Act of Slovakia was enacted in 1994, however CFRR and Poradna's research indicates that "hospitals apply the law in an arbitrary manner" and many health care professionals are not even aware that one of the principles of the Act allows patients to access their health records. During interviews conducted in hospitals in Eastern Slovakia, a wide variety of responses to questions regarding the Act were obtained. The chief gynaecologist of New Maternity Presov stated: "There is a lot of law and I do not know which one is the right one. I am not here to study the law; I have to provide health care,"³⁸⁰ while doctors at other hospitals seemed to believe that rules concerning the release of medical records was up to the discretion of the independent institution. The director of Krompachy hospital states: "We have internal rules on this issue ... It is not possible [for you to see them]."³⁸¹ While these statements indicate a lack of knowledge and pomposity, other health care professionals demonstrated clear discriminatory and racist attitudes towards Romani women. For example, a nurse in Saca hospital "refused to look for a record, saying, "I will not look for a file of a Gypsy."³⁸²

In conclusion, despite all of the fact-finding reports and documentary evidence before the Refugee Protection Division member indicating that the release or even creation of such documents is near impossible, K. Atkinson still determined: "In addition, the fourth claimant did not provide any corroborating evidence in regard to her

³⁷⁹Body and Soul, *supra* note 298 at 17.

³⁸⁰ *ibid.* at 91.

³⁸¹ *ibid.*

³⁸² *ibid.* at 92.

claim of forced sterilization."³⁸³ Furthermore, in relation to the culpability of surgeons in Slovakia performing the procedure of sterilization or holding discriminatory attitudes towards Romani women, K. Atkinson states: "Surgeons who practice in the area of women's operations would certainly be aware of the law. It is implausible that a surgeon would make a statement suggesting that they perform a sterilization of a woman without informed consent and then state that there were already enough gypsies in the country and risk criminal charges."³⁸⁴ Nevertheless, as discussed, discriminatory attitudes towards Romani women and their reproductive rights are prevalent within the health care communities in Slovakia.

The Paper Trail: Mrs. Bendigova

The *Record of a Hearing* of Mrs. Bendigova's case illustrates that the paper trail is also a major factor that tribunal member B. Volpontesta relied upon in determining Mrs. Bendigova's credibility. However, rather than being present in the dialogue between the member and Mrs. Bendigova, the legal counsel, Max Berger knowingly questioned her in regards to her lack of documentation. The transcript illustrates that Mrs. Bendigova's legal counsel, M. Berger addresses all the reports necessary to collaborate with Mrs. Bendigova's account in his questioning.

COUNSEL: One. Okay. Now, I guess you do not have any medical report from that psychiatrist who was treating you, do you?

MRS. BENDIGOVA: No.

COUNSEL: If you asked for a report from him or her, do you think you would get it?

MRS. BENDIGOVA: From the Czech psychiatrist?

COUNSEL: Yes.

³⁸³ Reasons and Decision, Gabor, *supra* note 346 at para. 24.

³⁸⁴ Record of a Hearing, Zupko, *supra* note 331 at para. 24.

MRS. BENDIGOVA: No, I do not know if he would give it to me.

COUNSEL: Okay. The document that you signed during your labour, did you ever get a copy of that document or ask for a copy of that document?

MRS.BENDIGOVA: I wanted a copy of that document because I wanted to complain but they never gave it to me ... (inaudible) that the document is filed in some filing room but they never gave it to me.

COUNSEL: So you asked for it?

MRS.BENDIGOVA: Yes, I did.³⁸⁵

While the Refugee Protection Division member B. Volpontesta did not directly question Mrs. Bendigova about the medical records, it is clear that a lack of authoritative documentation influenced his findings.³⁸⁶ As B. Volpontesta states, "The female claimant did not have any documents to support her allegation of tubal ligation ... I draw a negative inference from the fact that the female claimant did not try to obtain documents that could support her allegation, that because she is a Roma, doctors performed an unnecessary tubal ligation that might have led to a hysterectomy."³⁸⁷ However, B. Volpontesta failed to take into consideration the impossibility of obtaining such documentation, just as K. Atkinson did in the case of Mrs. Gaborova. Furthermore, with regard to the lack of documentary evidence concerning the tubal ligation, Mrs. Bendigova did approach hospital staff with a request to obtain a copy of the document that she had signed. However, as medical personnel did not respect her request, B. Volpontesta concludes that "At the time the claimant did not obtain a copy.... She explained that the hospital did not give it to her at the time so she did not believe they

³⁸⁵ Record of a Hearing, Zupko, *supra* note 332 at 25 line 25-49 and at 26 line 5-11.

³⁸⁶ Reasons and Decision, Zupko, *supra* note 354.

³⁸⁷ *ibid.* at para. 18-19.

would give it to her now, but she did not try."³⁸⁸ On appeal to the Federal Court of Appeal, Mrs. Bendigova's legal counsel, Max Berger argued that the way in which the member outlines the "reasons create[s] the impression that the female applicant simply did not bother requesting a copy of document at the material time which is not what the female applicant stated in her oral evidence."³⁸⁹ This led Mr. Berger to submit that the Board made a "capricious finding of fact."³⁹⁰

In addition to misinterpreting the statement by Mrs. Bendigova concerning her ability to obtain medical records, B. Volpontesta does not give any importance to the fact that Romani women have a particularly difficult time obtaining medical records in the Czech Republic. This point was illustrated previously in the discussion concerning Mrs. Gaborova. B. Volpontesta attributes a sympathetic demeanour to the Mrs. Bendigova's psychiatrist and states "that some information could be obtained from that person."³⁹¹ However, the tribunal member does not take enough factors into account. Perhaps the psychiatrist could not be reached. Perhaps Mrs. Bendigova's family did not have any means to contact her, or seeing as the Romani population's general perceptions of those in the medical community is one of fear, it is conceivable that Mrs. Bendigova was scared to ask for help. This particular explanation seems to be the most plausible as Mrs. Bendigova states in her *Affidavit* that she was overcome with ignominy after she found out that she had been sterilized and would no longer be able to have children. She states, "After this happened I was so ashamed. I did not even tell my common law spouse right away... I was only too ashamed to mention the tubal ligation and the subsequent

³⁸⁸ *ibid.* at para. 18.

³⁸⁹ Memorandum of Fact and Law, *Robert Zupko v. The Minister of Citizenship and Immigration*, Part III: The Law at para. 8.

³⁹⁰ *ibid.*

³⁹¹ Reasons and Decision. *Zupko*, *supra* note 354 at para 19.

hysterectomy that I endured."³⁹² Mrs. Bendigova's statement and need for psychological treatment clearly illustrate that she suffered from severe emotional trauma after she became aware of the sterilization. It seems perfectly plausible that she would not be psychologically capable of obtaining documents that would involve facing the individuals that caused her distress.

4.3.2 Experts and Associates

The second factor highlighted by Bohmer and Shuman as influencing issues of refugee credibility is the use of experts and associates. This requirement outlines that the story of an applicant can only be verified through the "word of others, either those who know the applicant personally or experts who know the situation in the country from which she comes."³⁹³ A refugee lawyer interviewed by Bohmer and Shuman noted that legal counsel will routinely bring in outside witnesses to provide substance to the story of their clients. Greenberger states:

I want to bring witnesses ... many judges said, 'I don't believe anything they say; I won't grant asylum.' It's very hard to overturn that. I would insist on bringing witnesses. One judge who hates granting asylum ... the client was giving testimony, I brought the client, and his aunt who knew of the events, she gave evidence under oath... I was able to get asylum granted...³⁹⁴

Legal counsel in the Gabor case had the brother, Joseph Sarkozi, and the sister, Rosania Shapgazuva, of Mrs. Gaborova give evidence at the hearing to support the applicants' claims of persecution. Joseph had successfully obtained refugee status in Canada in

³⁹² Immigration and Refugee Board of Canada, Refugee Protection Division, *Affidavit of Zanet Bendigova*. Registry No. IMM-2091-10.

³⁹³ Bohmer, *supra* note 328 at 124.

³⁹⁴ *ibid.* at 125.

1998.³⁹⁵ During the hearing, Joseph Sarkozi was asked by K. Atkinson to express his perceptions and opinions concerning the treatment of Roma in the Czech and Slovak Republics to which he replied:

Right now it seems skin heads and other racist groups they are more organized and also in politics lots of racism and hate towards gypsies... Basically the situation ... it's getting worse and worse because the situation, the economic situation is getting worse and unfortunately gypsies are the first ones who are blamed for all kinds of problems in society. And the hate toward the gypsies is so deeply rooted in the minds of Czech Slovak people that it will take generations and generations to change that, if it will be even possible which I doubt.³⁹⁶

Joseph also testified that he would not feel safe if he ever had to return to either the Czech or Slovak Republic. Ms. Gaborova's sister, Rosalia, who had obtained refugee status in Canada in 2001,³⁹⁷ was also asked the same questions to which she replied that the situation in Czech and Slovak Republic is "very, very, very, bad there. Very bad."³⁹⁸ She also stated that she would not feel safe in either of the two countries and would not consider returning.³⁹⁹ However, K. Atkinson did not grant any weight to the statements of these two witnesses in his *Reason and Decision*.

Additionally, Mr. Kube, the legal counsel for the applicants referred to the successful refugee claim of Miroslav Gabor's brother Karel. Karel was granted refugee status under sections 96, 97(1)(a) and 97(1)(b) under the *Immigration and Refugee Protection Act*.⁴⁰⁰ In this case, the panel of the Refugee Protection Division found that the failure of the medical system to provide Karel with care, and the "systemic

³⁹⁵ Record of a Hearing, Gabor, *supra*. note 361 at 8 line 27.

³⁹⁶ *ibid.* at 9 line 15 and 25.

³⁹⁷ *ibid.* at 11 line 7.

³⁹⁸ *ibid.* at 11 line 33.

³⁹⁹ *ibid.* at 11 lines 35-42.

⁴⁰⁰ Immigration and Refugee Board of Canada. Refugee Protection Division, *Reasons and Decision: Karel Gabor* RPD File No. TA8-02912, Toronto, Ontario February 12, 2009. [Reasons and Decision, Karel Gabor]

discrimination, harassment and physical abuse"⁴⁰¹ he had to endure amounted to persecution. The evidence before the panel was substantiated by "the standard package on the Czech Republic, [which] indicates that there is objective basis to the claims of the Roma and that the reason for this abuse is their skin color and ethnicity."⁴⁰² Furthermore, the panel for Karel's case found that the Roma population in the Czech Republic face "near total impunity for racial discrimination"⁴⁰³, lack adequate state protection and have no viable Internal Flight Alternative.⁴⁰⁴ However, once again, the sitting member of the panel for the Refugee Protection Division, K. Atkinson, failed to take into consideration in the *Reasons and Decision* the evidence submitted for the claimants which support their declarations that their experiences amount to persecution.

Experts and Associates: Mrs. Bendigova

Mrs. Bendigova's legal counsel, Max Berger, approached the requirement of expert testimony differently than Mrs. Gaborova's legal counsel, K. Atkinson. K. Atkinson focused his legal strategy on bringing in testimonies of individuals from the claimants' families who had come from and had knowledge of the situation in the Czech and Slovak Republics. These individuals also had successful refugee claims. Max Berger, on the other hand, brought in medical expert testimony in an attempt to illustrate the validity of Mrs. Bendigova's claim to sterilization. Bohmer and Shuman recognize that the legal approach of bringing in medical testimony is common during asylum trials, however the tactic does not always result in positive outcomes. Bohmer and Shuman

⁴⁰¹ *ibid.* at 2.

⁴⁰² Record of a Hearing, Gabor, *supra* note 361 at 41 lines 31-36.

⁴⁰³ *ibid.* at 41 line 44.

⁴⁰⁴ *ibid.* at 41 lines 45-48.

state that this is due to interpretation as "the authorities may claim that the injuries could have been caused in some other way, despite the doctor's report."⁴⁰⁵

The report obtained by Mrs. Bendigova was prepared by Abraham I. Hirsz, M.D on March 3, 2010 and reads: "I examined Mrs. Bendigova on March 1, 2010. Physical examination revealed a classic midline incision that is compatible with abdominal hysterectomy."⁴⁰⁶ However, in the Reasons and Decision of Refugee Protection Division board member, B. Volpontesta, the medical doctors' opinion is delegitimized. B. Volpontesta states, "The Canadian doctor makes no conclusions, nor could he, about the reasons for the hysterectomy."⁴⁰⁷ It appears that B. Volpontesta is only prepared to accept documents of authority or expert testimony from the individual who had actually performed the surgery. However, this expectation is unreasonable as it would require contacting the medical professionals and persuading them to produce documentation that would incriminate their decision to sterilize Mrs. Bendigova.

4.3.3 Country Reports: Mrs. Gaborova

The third element of corroboration emphasized by Bohmer and Shuman concerning the credibility of a claimant's story is country reports. These reports outline the environment in the applicant's home country, and are compared to the appellant's narrative. The major information sources that the Canadian Refugee Protection Division relies on are the US State Department Condition reports, Amnesty International Country Reports, Human Rights Watch, media sources from the countries of origin, expert non-governmental publications and internal Department of Immigration and Refugee documents. While the information contained in the reports outlines some of the human

⁴⁰⁵ Bohmer, *supra* note 328 at 130.

⁴⁰⁶ Abraham Hirsz, M.D. Letter to Max Berger Re: Zaneta Bendigova, Dated March 3, 2010.

⁴⁰⁷ Reasons and Decision, Zupko, *supra* note 354 at para 18.

rights violations in the countries of origin, it is not possible or feasible to assume that all are included. Similarly, an interview conducted by Bohmer and Shuman outlines that lawyers question the content of some of the authoritative reports. Colin Yeo, a lawyer and academic in the field of asylum cases in the UK's report, *Country Guidelines Cases: Benign and Practical?*,⁴⁰⁸ argues "that the State Department reports are sometimes unduly kind to friendly or allied regimes, which means that they don't report the human rights abuses that are claimed by the applicant."⁴⁰⁹ Another problematic issue that arises with country reports relates to interpretation. The interpretation of a text can be misconstrued or taken out of context.

In the instance of Mrs. Gaborova's claim of forced sterilization, her counsel, Mr. Kube, submitted for evidence the 2008 Amnesty International *Country Report* for the Czech Republic. This document quotes a United Nations report that states "[t]he human rights committee deplored a practice of forced sterilization and called on the Czech Republic to take the necessary measures to prevent involuntary and coercive sterilization of Roma."⁴¹⁰ Furthermore, the document outlines Amnesty's fact-finding mission and states "Roma continue to suffer discrimination at the hands of both public officials and private individuals including in the areas of housing, education, healthcare, and employment."⁴¹¹ Mr. Kube also drew K. Atkinson's attention to Amnesty International's statement that "some women have been subjected to sterilization procedures without their full and informed consent. It says a high proportion of whom are Roman women."⁴¹²

⁴⁰⁸ Colin Yeo, *Country Guidelines Cases: Benign and Practical?* (London: Immigration Advisory Service, 2005).

⁴⁰⁹ Bohmer, *supra* note 328 at 132.

⁴¹⁰ Record of a Hearing, Gabor, *supra* note 361 at 42 line 50 and at 43 lines 5-6.

⁴¹¹ *ibid.* at 43 lines 9-11.

⁴¹² *ibid.* at 43 lines 17-19.

Mr. Kube also presented the Department of State report for Slovakia placing emphasis on the situation of sterilization concerning Romani women. Similarly, the Amnesty International *Country Report* for Slovakia clearly outlines that forced sterilization of Romani women is an issue of great concern. Mr. Kube summarizes this report in the following manner: "The constitutional court demanded the reopening of inquiring to the forced sterilization of Roma women. Previously Slovak authorities refused to admit the existence of forced sterilization, however three women were awarded money so they had to admit that it happened."⁴¹³

In the *Reasons and Decision*, K. Atkinson makes his judgment using the same documentary evidence, however, he interprets it in a completely opposite way from Mr. Kube. Atkinson states that the documentary evidence found in the Department of State 2008 Report⁴¹⁴ indicates that the law in Slovakia makes it impossible for forced sterilizations to take place. Atkinson declares: "Documentary evidence states that since 2005 the law of the Slovak Republic requires that a patient must have submitted a written request at least 30 days before the sterilization is performed; and it appears that if this is not done then criminal charges can be laid."⁴¹⁵

K. Atkinson dismisses the claims concerning forced sterilization of many Slovak women with this statement. Essentially, he believes that the law is implemented as it has been written down. However, Romani Slovak women, and human rights organizations illustrate that the coerced and forced sterilization of Romani women still occurs even though laws prohibit the practice. Completely different interpretations illustrate that Mr. Kube and K. Atkinson read the same documents and came to very different conclusions

⁴¹³ *ibid.* at 45 lines 28-31.

⁴¹⁴ US Department of State, *supra* note 360.

⁴¹⁵ *Reasons and Decision*, Zupko, *supra* note 354 at para. 20.

concerning the human rights situation in the Slovak and Czech Republics, particularly with regard to the issue of sterilization. This leads K. Atkinson to conclude that Mrs. Gaborova falsified her statements concerning the procedure that led to her sterilization under the hands of health care professionals at Dunajska Streda hospital. K. Atkinson states: "I therefore, give greater weight to the documentary evidence than the statements of the fourth claimant and I conclude that there was no forced sterilization without informed consent."⁴¹⁶

Country Reports: Mrs. Bendigova

The case of Mrs. Bendigova is a particularly interesting example of the use of country reports. The Refugee Protection Division member B. Volpontesta does not once mention or compare Mrs. Bendigova's narrative and testimony to documentary evidence. Legal counsel, Max Berger, submitted as evidence the June⁴¹⁷ and July 2009⁴¹⁸ Issue Papers, generated by the Canadian Immigration and Refugee Board concerning the situation and treatment of Roma in the Czech Republic to support the claims of Mrs. Bendigova. However, as seen in Mrs. Gaborova's case, these Issue Papers appear incomplete as there are no direct discussions concerning sterilization or the relationship between medical personnel and the Romani population. A lack of discussion on the issues of sterilization and the attitudes of medical professionals seems profoundly troublesome as human rights organizations such as Amnesty International and Country Reports by the US Department of State stress that the issue is pressing.

⁴¹⁶ *ibid.* at para. 25.

⁴¹⁷ Immigration and Refugee Board of Canada. *Issue Paper, Czech Republic: Fact-Finding Mission Report on State Protection* June 2009. online: <www.irb-cisr.gc.ca:8080/Publications/PubIP_DI.aspx?id=3894&pcid=5900>.

⁴¹⁸ Immigration and Refugee Board of Canada. *Issue Paper, Czech Republic: Fact-Finding Mission Report on the Situation and Treatment of Roma and Potential for Internal Relocation*, July 2009. online: <http://www.irb-cisr.gc.ca:8080/Publications/PubIP_DI.aspx?id=3896&pcid=5911>.

The 2009 Amnesty International Czech Republic *Country Report* states that "Czech authorities acknowledged that some cases of sterilization of Romani women had in the past not strictly complied with Ministry of Health law and guidelines."⁴¹⁹ Furthermore, the report continues with an overview of an incident involving Iveta Cervenakova, whose monetary compensation of 500,000 korunas was taken away due to the Ostrava Regional Court decision being overturned by the Olomouc High Court.⁴²⁰ Furthermore, the 2008 Amnesty International *Country Report* for Czech Slovakia highlights that "sterilizations without the informed consent of women were carried out as late as 2004."⁴²¹ Despite the information provided in reports by Amnesty International and other organizations working in the Czech Republic to chronicle testimonies and collect evidence indicating that the issue of coerced and forced sterilization is still a major problem, B. Volpontesta does not mention that he referred to or considered this body of knowledge in his *Reasons and Decision*, thus delegitimizing Mrs. Bendigova's story and experience.

4.4 Consistency

The next 'C' that Bohmer and Shuman recognize as essential for a successful refugee claim is that of consistency. Bohmer and Shuman acknowledge that consistency, in criminal and rape trials, has determined whether an accused individual is acquitted or a rape victim's experience is believed. This is due to the fact that "legal authorities assume that normal people with normal memories can remember details consistently, and that, if the details they give differ, they are lying."⁴²² These ideas, firmly entrenched in criminal

⁴¹⁹ Amnesty International, *supra* note 356.

⁴²⁰ *ibid.*

⁴²¹ Amnesty International, *supra* note 355.

⁴²² Bohmer, *supra* note 328 at 134.

proceedings, also appear to saturate tribunals concerning claims for refugee status within Canada. This can be understood by checking and rechecking the consistency of the claimants' narratives. While these seemingly unproblematic processes appear simply as part of a trial, when blended together, the results are damaging to asylum claims. The rechecking of facts remains a main indicator of credibility in refugee hearings, however research⁴²³ indicates that "retold stories change with each retelling."⁴²⁴ In an interview with Judge Gossart that academic Christopher Einolf conducted for his book, *The Mercy Factory: Refugees and the American Asylum System*, it is noted how legislative authorities evaluate credibility. Judge Gossart states:

... particularly in cases where no documentary evidence is available to support a claim. "A person can be a truthful witness, or an untruthful witness who's very good at being untruthful. For example, I can tell you a story. And if I tell you a story that makes sense, and I tell it in a very convincing fashion, because I'm good at that, I can make a successful claim of asylum. So there's a lot of things that come into play."⁴²⁵

This interview indicates that so much emphasis is placed on consistency that it emerges as the most important factor in a refugee status claim. This is evident in the case of Mrs. Gaborova whose statements from the port of entry all the way to the hearing are unflinching. During each stage of the refugee process, Mrs. Gaborova testifies that she was sterilized without consent, which demonstrates the desired characteristic of consistency.

⁴²³ Juliet Cohen, "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers" (2002) 13: 3 *International Journal of Refugee Law* at 293-309.

⁴²⁴ Bohmer, *supra* note 328 at 134.

⁴²⁵ Christopher Einolf, *The Mercy Factor: Refugees and the American Asylum System*. (Chicago: Ivan R. Dee, 2001) at 163.

In response to the port of entry interview question: "What are you afraid of if returned to your country and why?"⁴²⁶ Mr. Gabor replied, "First reason is the racism. My wife is young and was sterilized because they did not want a large population of Romas in our country."⁴²⁷ Similarly, in the translated Declaration statement from the Port of Entry notes, M. Gabor wrote, "My wife was sterilized in order not to give birth to any more Gypsies."⁴²⁸ Furthermore, in the section 31 *Narrative* section of the *Personal Information Form* that individuals complete after successful entry into Canada through a port of entry as a requirement of their claim, M. Gabor writes:

Last year my wife had some women problems (a cyst). She had to go to the hospital to surgery. After the surgery we found out that the doctor sterilized her. I was asking why it was necessary and he said "What do you want, you already have two kids, you don't need any more, and we have enough gypsies in this country." I could not do anything.⁴²⁹

M. Gabor's testimony in the *Record of a Hearing* continues to highlight the same version of Mrs. Gaborova's sterilization. A lengthy presentation of the tribunal record is provided below to illustrate that M. Gabor's testimony during questioning is consistent with that of Mrs. Gaborova's. This section of the hearing record outlines the questions and responses by M. Gabor to K. Atkinson's queries concerning the sterilization of Mrs. Gaborova.

PRESIDING MEMBER: Any other matters that you want to tell me about?

MALE CLAIMANT: About my kids, about my wife?

⁴²⁶Immigration and Refugee Board of Canada, *Immigration Interview Notes*: FOSS ID: 5985-6573, Date: 19 April 2008. Immigration Officer C. Corbier 15859, Interpreter: R.Kavan Question 3: What are you afraid of if returned to your country and why?

⁴²⁷ *ibid.*

⁴²⁸ Immigration and Refugee Board of Canada, *Statement from Port of Entry: Declaration*. Miroslav Gabor.

⁴²⁹ Immigration and Refugee Board of Canada, *Personal Information Form, Section 31-Narrative*. Miroslav Gabor, at 10-11.

PRESIDING MEMBER: Anything that would show persecution.

MALE CLAIMANT: My wife she is sick, she has epilepsy and maybe two years ago she was in the hospital. She was there because of feminine reasons, female issues. When I went there to visit her Dr. Thecatorola [ph] told me they had to sterilize her. When I asked why she told me I have two kids and they have enough Gypsies in Slovakia, what do I want?

PRESIDING MEMBER: And that's the reason they gave you?

MALE CLAIMANT: Yes. She told me straight.

PRESIDING MEMBER: Did you ask for any other reason?

MALE CLAIMANT: No, yes I was asking she told me this reason and that she said it like, that was the main reason.

PRESIDING MEMBER: Did you go to any other person in the hospital or any authority as a result of this?

MALE CLAIMANT: Yes

PRESIDING MEMBER: Who did you go to?

MALE CLAIMANT: There was one more chief in the hospital. He sent me away, he told me the Dr. is Miss Thecatorola [ph] and that's her doctor. She sent me away, he didn't want to talk to me.

PRESIDING MEMBER: Did you ask for any medical records?

MALE CLAIMANT: Medical records no, they did not give me any.

PRESIDING MEMBER: Did you ask for any?

MALE CLAIMANT: No, she just said to me this is the reasons why we did it. And in Slovakia it was kind of normal procedure to sterilize females and then they got 10,000 Slovak Coronas because they sterilize them. We were not the first or the last case, it was pretty much normal there.

PRESIDING MEMBER: Did you ever consider going to a lawyer or anybody else to see what you could do about this?

MALE CLAIMANT: The life is different there. Roma people, the Roma population they don't have any rights there. You have nowhere to complain because everybody kicks you out.⁴³⁰

⁴³⁰ Record of a Hearing, Gabor, *supra* note 361 at 19 lines 10-50 and at 20 lines 5-9.

M. Gabor's testimony establishes the following: Mrs. Gaborova was not asked whether or not she wished to undergo the procedure of sterilization; that obtaining medical records is difficult; the medical community performed sterilization procedures on many other Romani women; and there is no effective remedy for women who are sterilized without consent. Mrs. Gaborova's testimony in the *Record of a Hearing* contains similar elements and points to the same conclusions as those of M. Gabor during the questioning by Mrs. Gaborova's legal counsel M.Kube.

COUNSEL FOR CLAIMANTS: You[r] husband mentioned something about you got some female problems recently in Slovakia.

FEMALE CLAIMANT: Yes.

COUNSEL FOR CLAIMANTS: Can you tell us about that?

FEMALE CLAIMANT: I went to the hospital because of female issues.

COUNSEL FOR CLAIMANT: When was that?

FEMALE CLAIMANT: Maybe a year before we came here. They told me I have a cyst and I have to have an operation done.

COUNSEL FOR CLAIMANT: What city was that in?

FEMALE CLAIMANT: Dunajska Streda.

COUNSEL FOR CLAIMANT: Go ahead.

FEMALE CLAIMANT: After the operation we went to doctor to find out results and what exactly was the problem and there she told us I was sterilized.

COUNSEL FOR CLAIMANTS: Did you expect to be sterilized when you went to the hospital?

FEMALE CLAIMANT: No.

COUNSEL FOR CLAIMANT: Did you hear of other women who had been sterilized in Slovakia?

FEMALE CLAIMANT: Yes I heard.

COUNSEL FOR CLAIMANT: What did you hear?

FEMALE CLAIMANT: I heard about these females were sterilized without their knowledge and when they found out they wanted to legal action, the hospital gave them \$10,000 so they keep quiet.

COUNSEL FOR CLAIMANT: And who are these women?

FEMALE CLAIMANT: Roma.

COUNSEL FOR CLAIMANT: And how did you hear about these women?

FEMALE CLAIMANT: Because I was trying to seek legal help and complain but they told me don't do it, they're just going to give you \$10,000 and that's it, that's the end of the thing for them.

COUNSEL FOR CLAIMANT: \$10,000?

FEMALE CLAIMANT: 10,000 Coronas, sorry.

COUNSEL FOR CLAIMANT: What office did you got to try to complain?

FEMALE CLAIMANT: The Ministry of Health

COUNSEL FOR CLAIMANT: Could you go anywhere else to complain or try to put in a complaint?

FEMALE CLAIMANT: No, not even there I was admitted.

COUNSEL FOR CLAIMANTS: Where?

FEMALE CLAIMANT: The Ministry of Health in Bratislava.

COUNSEL FOR CLAIMANTS: The Dr. who was your doctor in the hospital what did she tell you exactly?

FEMALE CLAIMANT: She told me there was not really a reason for me getting sterilization but what else do I want, like I have two kids and there is no more need for more Roma kids to be born.

COUNSEL FOR CLAIMANTS: And so how do you feel?

FEMALE CLAIMANT: Very bad.⁴³¹

Questioning by the presiding member of the Board, K. Atkinson also illustrates that the elements of Mrs. Gaborova's narrative were unflinching and constant in relation to the information provided by her and M. Gabor. K. Atkinson's questioning focuses on Mrs. Gaborova's ability to obtain official documents to corroborate her narrative concerning sterilization.

PRESIDING MEMBER: And the sterilization was tying the fallopian tubes?

FEMALE CLAIMANT: Yes.

PRESIDING MEMBER: Do you have any medical records for that?

FEMALE CLAIMANT: No they did not give me absolutely anything.

PRESIDING MEMBER: Did you ask for them?

FEMALE CLAIMANT: Yes.

PRESIDING MEMBER: When you went to the lawyer what did the lawyer say to you?

FEMALE CLAIMANT: The lawyer told me there not a chance to take them anywhere or to complain or to get anywhere with this issue.

PRESIDING MEMBER: Why not?

FEMALE CLAIMANT: He did not explain to me why not. He just told me there is no ... we cannot do anything about it.

PRESIDING MEMBER: Did you ever think of going to another lawyer for an opinion?

FEMALE CLAIMANT: No.

PRESIDING MEMBER: Why not?

FEMALE CLAIMANT: I realized back then that I cannot do anything in that country.⁴³²

⁴³¹ Record of a Hearing, Gabor, *supra* note 361 at 33 lines 20-49 and at 34 lines 5-49.

⁴³² Record of a Hearing, Gabor, *supra* note 361 at 36 lines 34-49 and at 37 lines 5-16.

The narratives provided during the *Port of Entry Interviews*, in the *Personal Information Forms* and the *Record of a Hearing* illustrate that the experience of Mrs. Gaborova's sterilization was articulated in a consistent manner. However, the high level of consistency that adjudicators are expected to uphold in the Refugee Protection Division results in K. Atkinson focusing on a minute detail from Mrs. Gaborova's *Declaration* in the port of entry notes. In Mrs. Gaborova's *Declaration* she writes, "I have medical problems and nine years ago I was sterilized in hospital, without knowing so."⁴³³ Rather than writing 'approximately one year ago,' which would have been consistent with the rest of her testimonies, Mrs. Gaborova wrote 'nine.'

Bohmer and Shuman note "the checking and rechecking of facts is based on the assumption that truth telling is connected to remembering information, including numbers and dates, clearly and consistently, a questionable assumption even in the case of those who have not had to flee persecution."⁴³⁴ However, research⁴³⁵ illustrates that the memory's ability to store details such as dates and times is particularly unreliable.⁴³⁶ In particular, Bohmer and Schuman state that in the context of the United Kingdom, it would appear as though the system checks and rechecks for discrepancies as "part of an effort to limit the number of successful applicants by discrediting as many as possible, rather than to determine credibility. For that reason, hearings focus extensively on details."⁴³⁷ In Mrs. Gaborova's case and the high levels of consistency required for refugee claimants in general, it appears that the observations by Bohmer and Schuman

⁴³³ Immigration and Refugee Board of Canada, *Declaration, Port of Entry Notes*. Magdalena Gaborova.

⁴³⁴ Bohmer, *supra* note 328 at 135.

⁴³⁵ Cathy Caruth (ed.) *Trauma: Explorations in Memory* (Baltimore, MD: Johns Hopkins University Press, 1995) at 8.; Christopher Einolf, *The Mercy Factory: Refugees and the American Asylum System* (Chicago: Ivan R. Dee, 2001) at 150; John S. McIntyre and Fergus I.M. Craik, "Adult Age Differences of Item and Source Information." (1987) 41 *Canadian Journal of Psychology* at 175-92.

⁴³⁶ Bohmer, *supra* note 328 at 135.

⁴³⁷ *ibid.* at 137.

apply to the Canadian system as well. The transcript below is taken from the *Record of a Hearing* and outlines K. Atkinson's questioning of Mrs. Gaborova concerning the unaccounted for 'nine' on her *Declaration* discussed above which was written right after her arrival into Canada during her port of entry interview.

PRESIDING MEMBER: In the statement that you gave, the written statement that you gave when you made your refugee claim it says that I had medical problems and 9 years ago I was sterilized in a hospital without knowing so.

FEMALE CLAIMANT: No, I had those medical problems for a long time. But the sterilization was like a year before I came here.

PRESIDING MEMBER: Why would it be translated as 9 years ago I was sterilized at the hospital?

FEMALE CLAIMANT: Maybe I made a mistake I put the number 9 on a different place...⁴³⁸

The counsel for the claimants presented several reasons that could explain the mistaken 'nine' including tiredness, confusion, anxiety, trauma, or even a mistranslation.

However, K. Atkinson dismisses these plausible reasons and focuses on the inconsistent number despite clear evidence of Mrs. Gaborova's plight.

Consistency: Mrs. Bendigova

Mrs. Bendigova's hearing illustrates a completely different pattern than Mrs. Gaborova's. While Mrs. Gaborova's testimony illustrated elements of consistency throughout, the entire refugee application process of Mrs. Bendigova appears to be riddled with holes. Mrs. Bendigova did not submit her own Section 31 *Narrative* in the Personal Information Form. Rather she relied on the submission of her husband which made no mention of the fact that his wife had been sterilized. Refugee Protection Division member, B. Volpontesta highlights that the lack of information on Mrs.

⁴³⁸ Record of a Hearing, Zupko, *supra* note 332 at 37 lines 18-28.

Bendigova's Personal Information Form was one of the deciding factors in establishing Mrs. Bendigova's credibility. B. Volpontesta writes in the *Reasons and Decision*, "The female claimant did not mention this traumatic event in her Personal Information Form (PIF) narrative. In fact the claimants all adopted the narrative of the male claimant."⁴³⁹

Furthermore, B. Volpontesta dismisses Mrs. Bendigova's claim that she was too ashamed to mention that she had been sterilized. To avoid an erroneous claim, B. Volpontesta suggests that if she was too ashamed, then the male claimant should have put this information in his Personal Information Form narrative. B. Volpontesta concludes:

The female claimant explained that she was very ashamed of the whole situation. Taking into the special circumstances that women sometimes find themselves and how this may affect their ability to provide evidence, I am willing to accept that this is true and may explain the omission if it were not for the fact that the male claimant was aware of the traumatic incident, and still makes no mention of it. Does the shame extend to the male claimant?⁴⁴⁰

While the shame was endured by Mrs. Bendigova, perhaps M. Zupko was respecting her request to refrain from sharing the knowledge of her sterilization. This can be deduced from the fact that Mrs. Bendigova did not mention the experience of her sterilization to her legal counsel Max Berger until two days prior to the Refugee Protection Division hearing. In a letter directed to the Immigration and Refugee Board of Canada, Max Berger writes, "I was not counsel who prepared the PIF for the above captioned and have now been advised of a significant event with respect to the female claimant. Mr[s]. Bendigova was sterilized without her knowledge or consent following the birth of her youngest child."⁴⁴¹

⁴³⁹ Reasons and Decision, Zupko, *supra* note 354 at para. 20.

⁴⁴⁰ *ibid.*

⁴⁴¹ Max Berger, Letter to the Immigration and Refugee Board, February 9, 2010.

Similarly, in her *Affidavit* sent as evidence to the Federal Court, Mrs. Bendigova says the omission from her Personal Information Form was due to the fact she thought that the other forms of persecution that her and her family had endured would be sufficient in producing a positive outcome through the refugee process. Mrs. Bendigova testifies:

I was only too ashamed to mention the tubal ligation and the subsequent hysterectomy that I endured. I thought that my family and I had suffered enough in the Czech Republic and our history of persecution with respect to physical attacks from skinheads, and discrimination at school, at work and in public areas would be sufficient for us to be given refugee-protection... It took me a long time to even tell my lawyer about it and at my refugee hearing I was trembling and crying when I described these events.⁴⁴²

Bohmer and Shuman identify that the omission of facts or the inability to share information concerning traumatic events of this nature is very common. Bohmer and Shuman state, "[f]or many asylum seekers, some things are just too terrible to describe, at least in the early stages."⁴⁴³ Furthermore, as illustrated in the case of Mrs. Bendigova, some refugees do not understand just how pertinent the omitted information would be to their claims. A lawyer who specializes in claims for asylum in the United States stated: "No matter how well you prepare your client, there are always surprises... They leave out incredibly relevant facts... It comes up that the guy's sister was gang raped. 'Why did you never tell me? 'It wasn't about me.'"⁴⁴⁴ Another element at work within the claim of Mrs. Bendigova is that she did not fill out her own forms, but rather submitted her refugee claim under her husband.

⁴⁴² Affidavit, Bendigova, *supra* note 383.

⁴⁴³ Bohmer, *supra* note 328 at 139.

⁴⁴⁴ *ibid.*

Catherine Dauvergne, Leonora C. Angeles and Agnes Huang highlight in their 2006 Status of Women Canada report, *Gendering Canada's Refugee Process*, that "as more women will be joined to their partner's claims as secondary claimants than vice versa, it seems likely that more women will be ineligible, because of claims that did not relate primarily to their own circumstances or evidence."⁴⁴⁵ Mrs. Bendigova's husband did not want to include her experience of forced sterilization due to the shame she felt regarding the procedure. Dauvergne and al. include the testimony of a key informant who shares the story of a woman from Angola whose claim was denied. The key informant states, "[This woman] never had a voice; she was lumped in with her partner. This is a clear denial of her rights. She has her own refugee story, but now because she was found not to be a Convention refugee she has no right to file a claim."⁴⁴⁶ The omission of information from Mrs. Bendigova's claim results in B. Volpontesta concluding that her story is fabricated even though a more holistic approach to the case reveals that there are many other ways to interpret the situation. However, the standard of credibility coupled with the general fear and association of deviancy to Mrs. Bendigova's character reveals that B. Volpontesta's decision is influenced by echoes of the eugenics movement. The final major element that Bohmer and Schuman emphasize as essential for a successful refugee claim is chronology.

4.5 Chronology

Bohmer and Schuman use the heading 'chronology' to highlight that some misunderstandings occur within the refugee system due to cultural differences. This occurs because decision makers in positions of authority situate their notions of what is

⁴⁴⁵ Dauvergne, *supra* note 27 at 40.

⁴⁴⁶ *ibid.*

acceptable behaviour or common knowledge onto the refugee claimants who hold different perceptions or understandings of a situation or element within their claim.

Chronology: Mrs. Gaborova

The main cultural assumptions that create problems in the context of Mrs. Gaborova's claim of forced sterilization are those of emotion and plausibility. The research conducted by Bohmer and Shuman illustrates that lawyers routinely need to "educate the applicant in the expressing of 'suitable' (i.e acceptable to Western ideas) emotion when describing the story."⁴⁴⁷ If a story is expressed with too little or too much emotion, decision makers will find that the sentiments or reactions expressed are not "suitable expression[s] of the trauma being described."⁴⁴⁸

Mr. Kube's questioning invites Mrs. Gaborova to express her sentiment by asking how she felt after realizing that she was sterilized. Mrs. Gaborova's two word reply of "very bad" could be interpreted as lacking emotion. K. Atkinson may have expected a different answer depending on preconceived notions of 'appropriate' reactions to forced sterilization. However, Mrs. Gaborova's seemingly distanced and unelaborated response may have been due to acute discomfort in sharing her sentiments about a procedure that targeted her sexuality and her ability to have children. John Conley and William M. O'Barr's book, *Just Words: Law, Language, and Power*, highlights that in the case of rape trials, a women's credibility is judged based on the level of emotion that she displays during the trial.⁴⁴⁹ In the context of refugee hearings, judgment of emotionality is doubly potent as cultural mores concerning appropriate behaviour undoubtedly influence the

⁴⁴⁷ Bohmer, *supra* note 328 at 149.

⁴⁴⁸ *ibid.*

⁴⁴⁹ John Conley and William M. O'Barr, *Just Words: Law, Language, and Power* (Chicago: University of Chicago Press, 1998).

behaviour of a claimant when being questioned about sexual matters. The second cultural aspect that may have influenced K. Atkinson's decision concerning Mrs. Gaborova's credibility is that of plausibility.

Bohmer and Schuman state that decision makers include the notion of plausibility in their definitions and requirements of credibility. Essentially, adjudicators must be able to believe or conceptualize that logically, the violent act or discrimination could have taken place. However, as Bohmer and Schuman point out, "the way they decide a narrative is plausible is very closely connected to Western ideas of what is likely and what is not."⁴⁵⁰ This is particularly evident in the *Reasons and Decision* of K. Atkinson in paragraph 24 where he states "[s]urgeons who practice in the area of women's operations would certainly be aware of the law. It is implausible that a surgeon would make a statement suggesting that they performed a sterilization of a woman without informed consent and then state that there were already enough gypsies in the country and risk criminal charges."⁴⁵¹ The connection that K. Atkinson makes to law and citizens abiding by the law does not apply in all contexts. As stated in the report *Body and Soul*, the 1994 Slovak Health Act⁴⁵² was rarely considered by medical professionals when decisions concerning the sterilization of Romani women were made. The inability of the legal system to properly account for or understand the horrors that individuals face under repressive regimes has been well documented.

Ian A. MacDonald and Frances Webber's book, *Immigration Law and Practice* outlines this problem in the context of the British asylum system. They state:

⁴⁵⁰ Bohmer, *supra* note 328 at 150.

⁴⁵¹ *Reasons and Decision*, Gabor, *supra* note 346 at para. 24.

⁴⁵² *Zakon o zdravotnej starostlivosti* [Health Care Act], 277/1994 Coll. LL (1994).

Since it is not in the nature of repressive regimes and societies to behave reasonably, the strange or unusual cannot be dismissed as incredible or improbable ... and decision-makers should constantly be on their guard to avoid implicitly recharacterising the nature of the risk based on their own perceptions of reasonability.⁴⁵³

As in the case of Mrs. Gaborova, the tribunal member K. Atkinson decided on what was plausible based on his own experiences of the world rather than placing himself within the reality of discrimination that Romani women face every day in the Czech and Slovak Republics.

Chronology: Mrs. Bendigova

An analysis of the documents concerning Mrs. Bendigova's Refugee Protection Division hearing illustrate that misunderstandings concerning emotion are also relevant to her case. However, rather than showing too little emotion, Mrs. Bendigova shared her sentiments in a very unobstructed and uninhibited manner. Bohmer and Shuman state that depending on the judge, showing too much emotion can also lead to negative inferences of credibility: "On the other hand, telling the story with 'too much' emotion will also have a negative impact because the interviewer may dismiss the claimant as simply hysterical."⁴⁵⁴ Bohmer and Shuman elaborate on this notion and conclude that "some asylum applicants use language that is very dramatic and therefore 'unsuitable' for our legal system."⁴⁵⁵

This claim is relevant to the case of Mrs. Bendigova as she was "trembling and crying"⁴⁵⁶ during the Refugee Protection Division hearing. Similarly, within the Record

⁴⁵³ Ian A. McDonald and Frances Webber, *Immigration Law and Practice*, 6th ed. (London: LexisNexis Butterworths, 2005) at 815.

⁴⁵⁴ Bohmer, *supra* note 328 at 149.

⁴⁵⁵ *ibid.*

⁴⁵⁶ Affidavit, Bendigova, *supra* note 383.

of a Hearing, Mrs. Bendigova becomes very sentimental during B. Volpontesta's questioning. The hearing record reads:

MEMBER: Alright, thank you. Is there anything else that you wanted to say?

MRS.BENDIGOVA: I just want to say that my children are for the first time happy children. And the first time we came outside in Canada my seven ... even we first came out on the street, outside, my seven year old daughter recognized that people are really nice here.⁴⁵⁷

Other incidents that illustrate Mrs. Bendigova's use of emotional language include the discussion that she had with Refugee Protection Division member B. Volpontesta concerning her experiences and treatment at the medical facility in which she received psychiatric help. During the questioning B. Volpontesta inquires as to why she was being treated, to which Mrs. Bendigova replies: "I was in... they said mental health because I also had a hormonal problem and I was really bad, I thought I am going to kill myself."⁴⁵⁸ Furthermore, B. Volpontesta may have thought that the fact that she sought psychiatric help contributed to his perception of her as an overtly distraught and emotional female.

In conclusion, this Chapter illustrates that in the context of the experiences of Mrs. Gaborova and Mrs. Bendigova during their hearings with Refugee Protection Division Board members, K. Atkinson and B. Volpontesta, uphold a body of knowledge that views Romani women as inherently untrustworthy. This unfair perception is perpetrated through unattainably high standards of credibility which claimants are expected to meet as the corroboration, consistency and chronology of their claims are judged by the board members.

⁴⁵⁷ Record of a Hearing, Zupko, *supra* note 332 at 31 lines 35-39.

⁴⁵⁸ *ibid.* at 31 lines 12-13.

Conclusion

This thesis highlights that the issue of forced and coerced sterilization is still prevalent in discussions concerning human rights abuses in the Czech and Slovak Republics. This thesis questions how members of the Canadian Refugee Protection Division continue to discount claims of forced sterilization by Romani women during the asylum process. In order to grasp the social, political and legal implications at work within the statement that the Canadian Refugee Protection Division fails to properly address the claims of forced sterilization by Romani women from the Czech and Slovak Republics, this thesis examines the parallels between the historical notions of non-Canadian women in immigration policy to the current principles and practices of the Canadian refugee process. Focusing on contemporary refugee claims made by two Romani women - Zanita Bendigova and Magdalena Gaborova - this thesis uses a socio-legal interdisciplinary approach to illustrate that the petitions made by these women have been denied due to discriminatory treatment on the basis of gender and ethnicity. The experiences of Mrs. Bendigova and Mrs. Gaborova illustrate that the claims of these women fall upon deaf ears as eugenic principles continue to echo within decisions made by members of the Refugee Protection Division.

This thesis draws attention to and challenges the eugenic echoes that reverberate within legal discourses concerning, in particular, the issue of sterilization, and in general the notion of who warrants protection from sexual violations by the Canadian government. Discussions within the House of Commons concerning immigration during the 1920's associate non-Canadian women and their sexuality to inherent 'deviancy'. In the context of current claims concerning sterilization and Romani women, refugee

tribunals echo the notions of the past by assuming that these women inherently lack 'credibility' and are 'untrustworthy'. Refugee Protection Division hearings regulate the characteristic of 'untrustworthy' through a standard of consistency that is unattainable for refugee women from the Czech and Slovak Republics. This results in the belief that the testimonies of these women cannot be trusted and thus, have to be held to high standards.

The material examined for this thesis was read through a feminist poststructural critical discourse analysis. This data includes House of Commons Debates on immigration from the time period of 1925 to 1929. While this time period could have been larger, for the purpose of this thesis it did suffice, as The House of Commons Debates were analyzed in order to extrapolate conversations concerning notions of 'deviancy' associated to the sexuality of non-Canadian women prior to and just after the assent of Alberta's *Sexual Sterilization Act*.⁴⁵⁹

Similarly, the *Record of a Hearing* and *Reasons and Decisions* from the Refugee Protection Division trials of Mrs. Gaborova and Mrs. Bendigova are analyzed through the method of a feminist poststructural critical discourse analysis. While these two claims are not necessarily representative of all cases concerning Romani asylum applications in Canada, I use these cases to track how formal legal rationalities operate in ways that dismiss and delegitimize the voices of Romani women. There is no direct link on the record between these two cases and the eugenics movement in Canada in the 1920's, however the apparent ease with which reports of sterilization as human rights abuses are dismissed through the Refugee Protection Division hearings resonates with the historical associations of non-Canadian women to 'deviancy'.

⁴⁵⁹ *The Sexual Sterilization Act*, R.S.A. 1928, c. 37.

Finally, the analysis of these materials points out the similarities and differences concerning the notion of 'deviancy' that was introduced into the professional fields of academia, medicine and politics during the genesis of the eugenics movement in Canada. These similarities and differences are noted from each period and were then linked to the theoretical framework of multidimensionality. Multidimensionality highlights that the association of 'deviancy' to non-Canadian women was constructed through an interconnected process, directed at their gender, ethnicity, and socio-economic standing.

Applying Foucault's premise of a 'scientia sexualis', Chapter Two illustrates how the eugenics movement's principles concerning heredity and the sexuality of women were acquired by psychological, academic and medical professionals first in Europe and then in Canada. Professionals from these fields, as advocates of the eugenics movement, contributed to discriminatory ideas about non-Canadian women and their sexuality by highlighting that an individual's class, gender, and ethnicity determined whether or not they were 'dangerous' and 'deviant'. The characteristics of 'poverty', 'woman', and 'non-Canadian' collided into a subjectivity regarding 'deviant' immigrant women and became the primary justification used by the eugenics movement to explain, rationalize and defend the need to control their sexuality and propagation.

The targeting of the 'poor' non-Canadian woman's body is exemplified through a Foucaultian analysis concerning the 'hysterization of women's bodies'. The threefold process of the 'hysterization of women's bodies' is realized is articulated and facilitated by professional advocates of the eugenics movement. 'Poor' non-Canadian women produced too many children; the control of their reproductive faculties belonged in the 'sphere of medicine'; and they were expected to remain in the family space as the domestic worker.

Furthermore, if women deviated from the domain of the home and tried to alleviate their poverty, they were seen as challenging the patriarchal order of the family and society.

Foucault's 'great strategic unit', a 'socialization of procreative behaviour', was also examined. Foucault emphasizes that sexuality was controlled within this strategic unit through an economic, political, and medical socialization. These tactics are apparent in the discourses of professionals who supported the eugenics movement through disapproving statements about feminist views during the late nineteenth and early twentieth centuries regarding birth control and the health policies of the Canadian government aimed at the regulation of motherhood, child rearing and other domestic matters.

The idea of the 'deviant' non-Canadian woman is carried into Chapter Three through an analysis of the 1928 Alberta *Sexual Sterilization Act* and immigration policy in Canada during the 1920's. It is illustrated that the characterization of non-Canadian women as 'deviant' is reflected in who the Eugenics Board ultimately sterilized and who the Canadian government aimed to deny admittance through section 38 of the Immigration Act of 1919 and the Empire Settlement Agreement. Chapter Three also includes an analysis of House of Commons Debates from 1925 to 1929 which reveals that similar justifications for excluding 'prohibited' classes from Canada through immigration policy are evident in discussions concerning the need for legislating a policy of sterilization in Alberta. Chapter Three expands on issues raised in Chapter Two by focusing on the discussions held by advocates of the eugenics movement within the fields of academia, medicine and the government.

Chapter Four links the historical eugenic principle, that non-Canadian women are inherently 'deviant' discussed in Chapters Two and Three, to the current high standards of consistency and credibility that are required during Refugee Protection Division hearings. This Chapter highlights that the issue of forced sterilization is still very much a reality in the lives of Romani women from the Czech and Slovak Republics and there is widespread discrimination against the Romani population in general within public and governmental institutions. The second major element of this Chapter adopts the '3 C lens' developed by Carol Bohmer and Amy Shuman to the asylum cases of Mrs. Bendigova and Mrs. Gaborova in order to frame a discussion concerning corroboration, consistency, and chronology.

An analysis of the elements concerning corroboration illustrates that both Mrs. Gaborova and Mrs. Bendigova were seen as 'untrustworthy' because they were unable to obtain official documents to substantiate their allegations of sterilization. In relation to the use of experts and associates during refugee board hearings it is illustrated that in Mrs. Gaborova's case, the statements of her family members were ignored, while in Mrs. Bendigova's hearing, the expert medical letter that she obtain was disqualified. With regards to the use of country reports as evidence in refugee trials, the case of Mrs. Gaborova highlighted that varied interpretations that emphasize or exclude certain information can occur. Mrs. Bendigova's trial illustrated a different element, of disregard. The information provided in the country reports concerning human rights abuses for the Czech Republic were not ever referred to the in the *Reasons and Decision* transcript from the Refugee Protection Division.

The other component that is essential for successful asylum cases is consistency. While Mrs. Gaborova's claim of sterilization was consistent thorough out the refugee process, Refugee Protection Division board member Atkinson emphasized one misplaced word, 'nine'. The misplaced 'nine' was emphasized and used as a factor that discredited Mrs. Gaborova's experiences of persecution. Mrs. Bendigova's trial was the complete opposite to that of Mrs. Gaborova's. Mrs. Bendigova failed to include her experience of sterilization in her refugee claim until two days before her hearing. During the hearing, Mrs. Bendigova testified that this was due to the fact that the sterilization caused her extreme grief and disgrace. However, the Refugee Protection Division board member slighted this explanation.

The final component highlighted by Bohmer and Schuman is chronology. Mrs. Gaborova and Mrs. Bendigova's testimonies were both scrutinized based on emotion. This thesis demonstrates that Mrs. Gaborova was perceived as emotionless while Mrs. Bendigova was type cast as the 'hysterical' female. The displays of emotion illustrated by Mrs. Gaborova and Mrs. Bendigova occupied opposite ends of the spectrum, but resulted in the same conclusion: their testimonies lacked credibility.

In addition, the hearing of Mrs. Gaborova included the element of plausibility. It is highlighted that Refugee Protection Division board member Atkinson held reservations over Mrs. Gaborova's testimony concerning sterilization. In particular, Atkinson clearly stated that he found it implausible that a surgeon would perform a forced or coerced sterilization when the surgeon knew that he/she could be held legally responsible for the procedure. Summarizing all of these parts illuminates that the high standards of consistency and credibility required during these hearings are influenced by the eugenic

principle that non-Canadian women are inherently 'deviant'. These findings contribute to current academic research that seeks to uncover the continuity of law's ability to create certain individuals, through discursive means, as deviations from a desired Canadian 'norm'.

Chapter Four also relies extensively on the theoretical framework of FPCDA discussed in Chapter One of this thesis. In particular, this lens emphasizes that an examination of discourses is essential to understanding how mechanisms of discrimination are still at play within particular discursive sites. FPCDA places importance on 'how' an individuals' subjectivity is constructed rather than, for example, on the conclusions of decision makers from the Refugee Protection Division. The Refugee Protection Division members did deny the asylum claims of Mrs. Bendigova and Mrs. Gaborova. However what is important, as I demonstrate in this thesis, is how discursive constructions of refugee claimants as untrustworthy and racialized 'others' is maintained through technocratic processes - such as standards of proof - and through the deployment of enduring ideologies about racialized others.

This thesis leads to openings for further research. In particular, this thesis initiates queries concerning other eugenic principles that continue to reverberate within the mechanisms and decisions of the Canadian refugee process. It is important to uncover these instruments of discrimination so that the bodies of knowledge, from which they gain their authority, may be challenged and disassembled. Furthermore, this project disputes the claims of neutrality declared by asylum mechanisms in Canada and challenges other researchers to examine whether other ethnic communities experience similar hardships during the course of their refugee claims. This thesis examines the

asylum cases of Mrs. Bendigova and Mrs. Gaborova through the Refugee Protection Division hearings and establishes that the high standards of consistency and credibility are unfairly unattainable for these women. Furthermore, it has been illustrated that these high standards echo the notions of the 1920's eugenics movement in assuming that these Romani women are inherently 'deviant' and lack 'credibility'.

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