



Ed. Note: This issue is dedicated to the Immigration and Refugee Board, to mark the thirtieth anniversary of its creation.

Asylum Policy in Canada

Raphael Girard

Raphael Girard joined what was then the Department of Citizenship and Immigration in 1963 and moved to External Affairs in 1981. Over the span of 40 years in the Canadian foreign service he specialized in refugee and immigration issues, leading the task force on refugee determination which developed the legislation that continues to form the basis of Canada's approach to the protection of persons claiming asylum.



In the years immediately following World War II, growing public recognition of human rights and individual liberties as reflected in international instruments such as the Universal Declaration of Human Rights of 1948 resulted in a weakening of the traditional concept of sovereign territory as it affected people moving from one country to another. Until air travel made it possible for individuals to travel long distances in a short time, however, countries like Canada that did not have borders on politically unstable areas rarely had to deal with refugee claimants appearing spontaneously at their borders.

Consequently, asylum policy was not high on Canada's agenda, nor that of many other developed countries. Canada had had episodes of nascent asylum questions, such as in 1914 when none of the 376 Punjabi passengers of the [Komagata Maru](#) was allowed to land when it docked in Vancouver and in 1939 when the 907 Jewish refugees aboard the [MS St. Louis](#) were denied entry to Canada and had to return to Europe, where many later died in the Holocaust. Such episodes were seen by some historians as an indicator of our lack of readiness to accept refugees, but the more likely cause was deep-rooted racism rather than antipathy toward refugees. At that time there was no real understanding of refugee issues in Canada and there were no international conventions that required countries to address the issue of protection of the oppressed and dispossessed. Episodes involving involuntary migrants were deemed immigration issues in which the rights of individuals seeking entry were subservient to Canada's sovereign right to determine who could enter and remain on national territory.

Beginning in the early 1950s, asylum questions evolved into an international political issue. Post-war initiatives to force the repatriation of Eastern Europeans who had been displaced to Western Europe during World War II provided graphic evidence of the negative consequences of returning individuals to jurisdictions in which they may have held citizenship but could not expect protection. Large-scale, forced repatriation to countries behind the Iron Curtain exposed tens of thousands of individuals to persecution and, in some cases, execution. A groundswell of revulsion and high-level political opposition inspired by opinion leaders such as Eleanor Roosevelt provided the impetus for the UN to sponsor an international conference in Geneva to address the issue. The Canadian delegation, led by consular official Leslie Chance and supported by Professor John P. Humphrey, the eminent McGill legal scholar and drafter of the Universal Declaration of Human Rights, played a crucial role. What emerged was a watershed instrument for the protection of refugees—the 1951 Geneva Convention on Refugee Status, which entered into force in April 1954. With very few exceptions, signatory countries agreed not to return individuals to a country in Eastern Europe where they might face persecution on the grounds of race, religion, nationality, social class, or political opinion—the so called “[non-refoulement](#)” obligation.

Contents

Asylum Policy in Canada	Raphael Girard	1
30 Years of Changes at the Immigration and Refugee Board of Canada	David Vinokur	6
Peter Harder Reminisces about the Early Years of the Immigration and Refugee Board	Peter Showler	12
My Time at the Immigration and Refugee Board	Gail Kirkpatrick Devlin	15
Creation of a Prototype: The IRB Documentation Centre	Susan Brown	16
The Refugee Appeal Division: A New Member's Perspective	Anne Arnott	19
Report of the House of Commons Standing Committee		22
In Memoriam		23
Thanks to a Great Editor	Mike Molloy	23

Despite its delegation's leadership role in creating that protective regime, Canada declined to accede when the 1951 Convention was opened for ratification. The government was not comfortable with the obligations that could flow from signing it. In fact, the government's embarrassment at having its representatives champion a convention it preferred not to sign caused Chance's career in government service to go into an eclipse from which it never recovered. The government sought to save face by pledging to uphold the Convention's non-*refoulement* obligation without formally signing on. In practice, Canada had no difficulty in ensuring compliance with the Convention because from the late 1940s the Immigration Branch had invoked an administrative ban on deportations to any Communist country. Canada realized that signatories to the Convention were surrendering some of their sovereign rights to decide who could enter and remain on their territories. At that point in Canada's history it was not willing to do so. Canada would comply with the 1951 Convention, but only on its own terms.

In 1967, and before it became signatory to the Convention in 1969, Canada for the first time specifically legislated protections against *refoulement* with the passage of the *Immigration Appeal Board Act*, which empowered the Immigration Appeal Board (IAB) to quash a deportation order against a person the IAB determined to be a Convention refugee. This date is congruent with the [1967 New York Protocol](#), which broadened the original Convention definition beyond Eastern Europeans to cover anyone who met the objective criteria in the definition based on race, religion, nationality, social class, or political opinion. However, access to consideration by the Immigration Appeal Board was only available to those who had been ordered deported from Canada. Clearly, Canada had decided to respect the broadened non-*refoulement* obligation but still without ratifying the 1951 Convention and subsequent Protocol.

Following the election of 1968 that brought Pierre Elliot Trudeau to power as prime minister, Canada finally acceded to the 1951 Convention, but no additional protections or processes were embedded in, or sanctioned by, the *Immigration Act* at that time. In the years immediately following accession, an *ad hoc* committee was struck in the Immigration branch (now in Employment and Immigration) to examine sworn statements by persons facing deportation who claimed protection under the Convention. This committee of officials had no standing in law and its findings were not reviewable. Persons whom the committee found to have a well-founded claim to refugee status pursuant to the Convention enjoyed no rights or benefits other than to be protected from being removed to their countries of origin or habitual residence. In practice, however, those who could pass medical and background checks were granted permanent residence in Canada by Order-in-Council since immunity from removal had made them *de facto* permanent residents.

Canadian policy toward asylum seekers in the post-war years was intended only to avoid *refoulement* of those individuals determined by a Canadian authority to comply with the definition of a refugee as found in the 1951 Convention and 1967 Protocol. The *Immigration Act* continued to prevent people from traveling to Canada as visitors to seek refugee status. From the early 1970s onward, when a new source country for refugee claims emerged, Canada routinely imposed visa requirements on that country. This enabled Canadian visa officers abroad to screen travellers and reject those who might want to claim protection as Convention refugees. As well, fines were levied on transportation companies that conveyed people who subsequently claimed refugee status, discouraging carriers from bringing people to Canada who had not obtained appropriate Canadian documentation authorizing such travel.

Focusing on prevention rather than post-arrival enforcement against people on national territory was consistent with the scheme of immigration control since Confederation. Pre-war migration flows by ship had been screened at sea ports and by land at the land border. People found to be inadmissible were not allowed into the country but summarily returned whence they had come. After World War II, the Act required people wishing to come to Canada to get a visa first so that inadmissible candidates could be screened out before arriving at a Canadian port of entry. Exemptions were made by regulation to allow visa-free travel of visitors such as those from the U.S. and the old Commonwealth, but all immigrants and visitors from non-exempt parts of the world had to submit to prescreening. For those who required a visa, lack of one constituted grounds for denial of entry and summary removal from Canada.

In 1967 the government curtailed the policy of prevention by giving visitors the right to apply for permanent residence without leaving the country and giving appeal rights to those ordered deported. This well-intentioned gesture, aimed at putting a more humane face on immigration control, foundered on the reality that the shift from prevention to enforcement of immigration laws against people at liberty in the country is more complicated, much more expensive—and most important, very time consuming. When it takes months, even years, finally to declare a person ineligible to remain in Canada, the individuals concerned have enjoyed a form of *de facto* residence and integration into the Canadian community.

When these people are self-supporting and law-abiding, and perhaps have formed a family, it can be very difficult for a government to justify deportation because they are guilty only of having entered Canada without a visa. However, tolerating a system of what amounts to self-selection in which the government controls neither the qualifications of the

participants nor the number in which they come, is the antithesis of a managed immigration program and risks public anger over the long term.

The [Immigration Green Paper policy review of 1973-1975](#) took place in the shadow of this immigration control breakdown. The fresh memory of thousands of cases appealing deportation and the amnesty that was required to clear them influenced the Green Paper policy consultation and reinforced arguments for preventing the arrival of unscreened intending immigrants. The protection of people claiming refugee status at our borders or within Canada was scarcely mentioned for the same reason. The authors stated simply that Canada did not see itself as a country of first asylum. The recent experience with the IAB and Federal Court backlogs was seen as evidence that no selection process, whether for refugees or for immigrants, could be efficiently conducted from within Canada. The Green Paper noted that Canada would continue to share the burden of supporting refugees internationally through the offshore selection of refugees as immigrants. This contribution to refugee relief was not insignificant. From 1947 to 1952, Canada resettled more than 186,000 refugees from the camps in Western Europe. In succeeding years this resettlement was continued and broadened to include special programs for Hungarians, Czechs, Ugandan Asians, and others.

The reference to refugees in the *Immigration Appeal Board Act* remained the only legal provision applicable to refugees in Canada until 1978. When the *Immigration Act 1976* came into force that year, it recognized Convention refugees as a class of immigrants that could be selected abroad for permanent residence in Canada. The provisions relating to asylum—that is, persons seeking Canada's protection as Convention refugees—found in the *Immigration Appeal Board Act* were subsumed into the new *Immigration Act*. In addition, the long-established *ad hoc* committee for advising the Minister of Immigration on individual refugee claims from people at the border or in Canada was given legal standing. The Refugee Status Advisory Committee (RSAC) would advise the Minister on the merits of claims they had assessed based on a review of statements sworn by claimants before senior immigration officers in Canada and at ports of entry. The RSAC did not hold hearings, and its recommendations to the Minister were not reviewable.

In 1980, the newly appointed Minister of Immigration, Lloyd Axworthy, commissioned a review of refugee policy by a group led by the Vancouver lawyer Gerry Robinson and Professor Ed Ratushny from the University of Ottawa. This initiative had been prompted by growing pressures from NGOs and church groups in Canada. They had lobbied hard for a more transparent and generous means by which refugees could claim asylum in Canada without passing through the immigration removal process. The main concern of these advocates was the lack of an oral hearing in the refugee-claims process and the growing number of dissenting Latin Americans, victims of oppressive governments, who could not find asylum in the U.S. These same governments were being supported by Washington in the guise of combating communism in its hemisphere. Apart from a special outreach to Chilean victims following the 1973 overthrow of President Salvador Allende and a smaller program for Argentinians that together brought some 7,000 refugees to Canada for resettlement, other Latin Americans had little access to Canada's humanitarian programs.

Minister Axworthy used Robinson and Ratushny's findings as the basis for consultations with NGOs and church groups. He reorganized the Refugee Status Advisory Committee, making it clearly independent of his department by appointing his executive assistant, Joe Stern, as chairman and by increasing its budget, thereby allowing it to compile authoritative documentation on refugee-producing situations around the world. Although Minister Axworthy authorized the RSAC to test oral hearings, it continued to function largely as it had since its inception. In the main, there were no hearings involving the claimant and no appeal *per se*, although those facing removal from Canada retained the right to a *de novo* claim before the Immigration Appeal Board. There were still no means available, even to those found to have a well-founded claim, to become permanent residents of Canada other than through an Order-in-Council procedure that was a matter of government discretion rather than a right. Although Minister Axworthy increased outreach to Salvadoran and other Latin American refugees through resettlement, asylum policy remained passive.

Even though the rights of refugee claimants to hearings and appeals were relatively limited, the administrative machinery to deal with them could not cope, and backlogs continued to accumulate. Professionalism and transparency of decision making had improved markedly with the reorganization of the RSAC, but little was achieved in making the system as a whole more efficient. The IAB had a statutory limit of ten judges but that limitation was not the only bottleneck. In the face of ever-increasing numbers of people claiming to be refugees within Canada and at our borders, the availability of a *de novo* claim at the IAB became an immovable obstacle to early decision making for those rejected by the RSAC, even for cases with no apparent merit. The Federal Court of Appeal was also overwhelmed with requests for judicial review of immigration decisions affecting people facing removal from Canada, including those who had received a negative decision on a claim to refugee status at the IAB. The result of these delays allowed anyone who wanted to stay and work in Canada to do so simply by claiming to be a refugee regardless of the merits, or lack thereof, of such a claim.

By 1983, it was apparent that the Immigration department had once again lost the capacity to remove almost anyone from the country. There was an increasing number of claims from citizens of NATO member countries and other democratic

countries, who were, in effect, using the system to settle permanently in Canada without going through the immigration application process. This prompted John Roberts, who replaced Lloyd Axworthy as Immigration minister, to commission a review by Rabbi Gunther Plaut, an eminent human rights advocate. Plaut's mandate was to develop a formula for determining refugee status that would be fair but resilient enough to withstand the pressure of numbers and avoid backlogs. Professor Ratushny had already submitted his recommendations to Minister Roberts, but they were not acted upon. The government was seeking a credible and legally defensible procedure to determine refugee claims that would also constitute a defence against those who would use the process to work and/or settle permanently in Canada.

In September 1984, before Rabbi Plaut reported his findings, the government changed, bringing the Progressive Conservatives to power and the honourable Flora MacDonald to the Immigration portfolio. Despite her intention to deal quickly with the existing gridlock in the refugee determination system, all hope of a timely resolution was dashed when, in April 1985, the Supreme Court of Canada rendered its decision in the case of [*Singh v. Minister of Employment and Immigration*](#). The seven appellants, six Sikhs from India and one Guyanese of Indian origin, had been rejected by the Minister on recommendation from the RSAC and by the IAB. Madam Justice Bertha Wilson, in writing the majority decision, found that neither the *Canadian Bill of Rights* nor the *Canadian Charter of Rights and Freedoms* made a distinction between citizens and legal permanent residents of Canada on the one hand and persons temporarily in Canada or under examination at a port of entry to Canada on the other. She found that all "persons" on Canadian territory including those seeking entry at the border, could assert a right to due process and a fair hearing regardless of their legal status in Canada. The Court found that since the process for determining Convention refugee status consisted solely of a review *in camera* of written statements, it lacked the essentials of fundamental justice guaranteed by the Bill of Rights and the Charter. The Court stated that nothing short of a full oral hearing before the decision maker(s) would satisfy this norm.

Overnight the only existing body competent to provide an oral hearing before the decision maker, the Immigration Appeal Board, found itself saddled with a backlog of many thousands of refugee claims that outstripped its capacity to provide hearings many times over. What had been an impaired immigration control system due to backlogs had become totally paralyzed. Minister Macdonald's response was to commission a task force, with the objective of introducing a bill to reform the refugee determination system into parliament within six months, taking into account the recommendations contained in Rabbi Plaut's recently tabled report updated at her request in light of the Supreme Court's decision. In the interim, another bill would be rushed forward to lift the numeric cap on the IAB's decision-making membership and to provide additional capacity to remove ineligible immigrants and failed claimants, particularly those guilty of criminal offences.

Because of the urgent need to restore control of the border and the ongoing active dialogue between the department and stakeholders, the government did not launch a new round of public consultations. The Immigration branch formed a task force consisting entirely of departmental personnel and secondees from the Department of External Affairs. The Deputy Minister met with UN Deputy High Commissioner for Refugees William Smyser to elicit advice on what procedural norms would be required by the 1951 *Convention*. A contract was let to the Osgoode Hall Law School to obtain advice on the kind of processes that would satisfy the right to a fair hearing.

As executive head of the task force, my mandate was to weave the expert advice into a resilient fabric within the constraints imposed by the Supreme Court while reaffirming the basic policy of preventing *refoulement* of Convention refugees. The position advanced by NGOs and the churches that Canada should have an efficient, independent determination system to which all who wanted to come to Canada to seek asylum would have unimpeded access was not compatible with the need to conduct determinations in a timely manner. Through our own experience and examining the experiences of other countries, it was clear that the only way to ensure timely decision making in a system with multiple levels of review and appeal was to make sure that the only people who would have access to the refugee tribunal were those to whom Canada would be solely obligated to provide protection if they could demonstrate a well-founded fear of persecution in their country of nationality or usual residence.

To avoid procedural backlogs that would provide opportunities for self-selection by intending immigrants rather than refugees in need of protection, we had to find a way to limit the number of people who could have access to the refugee determination system. The fair-hearing requirement invoked by the Supreme Court indicated only that there be an oral process in which the applicant was made aware of the case against him or her and was given an opportunity to respond to it. It did not specifically mandate a hearing on the merits of a refugee claim or access to any particular kind of tribunal.

These two factors gave rise to the most critical choice the government would have to make in the design of the new determination system. There was no argument against giving a full hearing to those claimants who required protection as refugees. The same argument did not apply to refugee claimants who had either failed to establish a claim or passed up the opportunity to claim in another country signatory to the Geneva Convention because they preferred their chances of being accepted in Canada. This kind of "shopping" for asylum is neither a right of the claimant nor an obligation of the signatory country as long as the "*non-refoulement*" principle is upheld.

Data showed that 70 percent of all claims to refugee status lodged in Canada were made by third-country nationals who had entered Canada from the United States. Our thinking was that if this influx could be diverted away from the tribunal to more conventional forms of immigration enforcement, a great deal of pressure would be taken off the tribunal, enhancing its ability to function without the threat of rapid increases of claims. This thinking gave rise to the “safe third country” mechanism. Provisions in the design of the new system denied a refugee claim to asylum seekers trying to enter Canada from third countries determined as “safe”, to be listed later by regulation. Such claimants were to be returned to those countries after a hearing before an immigration adjudicator but without a refugee determination by the refugee tribunal. In the case of people seeking to enter from the U.S., the government recognized that since U.S. authorities had allowed most of these people on to their territory, it followed that the U.S. should take the responsibility of providing a hearing for those who wished to claim refugee status. Other Convention-signatory countries that provided transit facilities for travellers destined to Canada who did not have valid Canadian documents could also see those travellers returned to their airports. While a number of Western European countries being used by transiting refugee claimants were candidates for the list, the United States was always and by far the most important source.

It took more than a few Cabinet meetings to gain consensus on the policy and design of the proposed new system. Flora MacDonald’s desire to table a bill in late 1985 or early 1986 was not fulfilled. Some of the interventions by NGOs made it clear that they had had access to Cabinet documents to which only a few people in government and certainly no one outside it should have had access. In addition, the Department of Justice had some concerns as to whether the “safe third country” rule would stand the Charter test.

The Immigration department finally received instructions to begin drafting legislation in early 1987. Bill C55 contained devices to screen out ineligible claimants and those claimants subject to the “safe third country” provision without referral to the new refugee tribunal—the Immigration and Refugee Board (IRB)—also created in this bill. The bill was introduced into parliament in May of that year and received second reading before the summer recess. Before parliamentary hearings could be convened to examine the bill, a boat bearing Asian migrants landed in Nova Scotia, prompting the most violent public backlash against asylum seekers that members of parliament had ever experienced. (Reaction to a similar event in Newfoundland involving 155 Tamils the previous year had initially been sympathetic. Public approval for the Tamils turned to outrage when it was discovered that the occupants of the small boats who claimed to have suffered the hardship of a long sea voyage had in fact hired traffickers to transport them to Canada from Western Europe.)

Rather than push Bill C55 to early adoption in parliament, Prime Minister Brian Mulroney summoned ministers to Meech Lake, where it was decided that parliament would be recalled to consider a supplementary and tougher bill dealing with refugee claimants. The Immigration department was given very little guidance as to what should be in the bill other than a way to reassure the Canadian public that no more boats would be arriving on our shores bearing people who had hired traffickers to circumvent Canadian immigration controls. What emerged was a second piece of legislation, Bill C84, “Detention and Deterrents”, which received first reading on 11 August 1987. It allowed for the interception of ships, shipboard refugee hearings by officials before the boats entered Canada’s territorial waters, and the authority to turn those ships back to their ports of embarkation. It also extended powers to detain undocumented asylum seekers, broadened powers of search and seizure, and levied severe penalties on human traffickers.

Bill C84 was not the last word in the saga. It seems that the central agencies of government were not confident that the recently legislated reforms to the refugee determination system would bring some five years of severe impairment to immigration control to an end. In mid-summer of 1988, some senior officials pressed the government to consider invoking the notwithstanding clause of the Charter to limit due process rights for people without permanent residence or citizenship. The issue was debated at least once in Cabinet but how far that discussion got is not clear. It is certain that the then Minister of Employment and Immigration, Benoit Bouchard, opposed such measures as a matter of principle. Bills C55 and C84 received royal assent without amendment other than the addition to Bill C84 of a six-month sunset provision on the interception of ships on the high seas. The bills came into force on 1 January 1989, by which time almost 125,000 claims had accumulated in the backlog. The bulk of these claims was resolved by amnesty to give the new Immigration and Refugee Board a chance to commence its proceedings with a clean slate.

By way of epilogue, I have to concede that the dedication and hard work of the task force was only partially successful. It did bring in a fair system, but resilience and efficiency were not achieved. Bill C55 certainly improved the transparency and function of the process for refugee determination by establishing the Immigration and Refugee Board in law, independent of the Immigration department. Equally important, it gave persons found to be refugees by the IRB the right to apply for permanent residence without having to leave Canada. Although the “safe third country” provisions had been adopted into law, the Cabinet failed to follow through with a regulation creating a list of countries to which claimants could be returned without referral to the IRB, thereby giving almost all claimants unrestricted access to the IRB. Minister of Immigration Barbara MacDougall announced in December 1988 that no countries would be designated as safe and in so

doing ended any possibility that Canada could have an efficient refugee determination process that focused on refugees truly in need of protection.

In failing to agree on a list of countries to which claimants could be returned without a hearing of their claims, the Cabinet discarded the primary defence the system had against overload. It would therefore only be a matter of time before the new system, like the one it replaced, would bog down under an excessive caseload. In the 30 years following the introduction of the new system, this has been a regular occurrence. Delays and backlogs have continued not only at the IRB but in other parts of the refugee determination process, where several thousand cases of failed claimants subject to removal remain at large. This has happened despite several adjustments and amendments to the process, including a modified "safe third country" mechanism that has not lived up to expectations because it inexplicably exempts claimants who enter Canada illegally from the U.S. With the current backlog at the IRB now in excess of 65,000 claims and no let-up in the cross-border flow of claimants, Canada has a significant movement of self-selected immigrants on its hands in addition to a growing number of refugee claimants who come to Canada by choice rather than because of a need for protection. The current situation is the same as it was in the mid 1980s, and the range of solutions available to deal with the issues is not much different. Another thing that has not changed is the attitude of Canadians, who remain opposed to unmanaged immigration. Sooner or later the government will have to deal with this issue once again.



Cover of IRB Brochure

30 Years of Changes at the Immigration and Refugee Board of Canada

David Vinokur

David Vinokur graduated from Osgoode Hall Law School in 1974 and was called to the Ontario bar in 1976. He joined the federal public service in April 1978 as an immigration adjudicator. In 1986 and 1987, he participated in the Bill C-55 Refugee Determination Task Force at the Canada Employment and Immigration Commission; in 1988, he was a member of the transition team that set up the Immigration and Refugee Board. He joined Legal Services of the IRB in 1988 and currently serves as General Counsel and Manager of the Law.

The Immigration and Refugee Board of Canada (IRB) was established in 1989 with two divisions. The IRB currently consists of four divisions: the Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), the Immigration Division (ID), and the Immigration Appeal Division (IAD). Following is a brief summary of events leading to the establishment of the IRB and key changes that have been made since then.

Predecessors to the Immigration and Refugee Board

The IRB was shaped in part by its predecessors, the Immigration Appeal Board (IAB) and the Adjudication Directorate. The IAB was established in 1967 as a court of record, consisting of seven to nine members appointed by the Governor in Council (GIC).¹ The IAB decided family sponsorship appeals and deportation order appeals, based on legal grounds and on humanitarian and compassionate (H&C) considerations. In 1978, public servant adjudicators in the Adjudication Directorate at the Canada Employment and Immigration Commission (CEIC) were given jurisdiction to conduct adversarial inquiries and detention reviews.²

Under the original “Convention refugee” determination process established in 1978,³ the refugee claimant was examined under oath by a senior immigration officer, and a transcript of the examination was sent to the Refugee Status Advisory Committee (RSAC) in Ottawa for consideration.⁴ The Minister decided the Convention refugee claim based on a recommendation from the RSAC. The claimant could then apply to the IAB for a redetermination of the claim; however, the legislation was interpreted to mean that the IAB could grant an oral hearing on the application only if the IAB determined that the application would probably be successful. Therefore, a refugee claim could be rejected without an oral hearing before either the Minister or the IAB.

In 1985, the Supreme Court of Canada held in the “Singh decision” that this process was contrary to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.⁵ The Supreme Court held that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Several studies were made regarding the refugee determination system; in particular, a 1985 study by Rabbi Gunther Plaut⁶ contributed to the development of a new legislative scheme.

1989: Establishment of the Immigration and Refugee Board

The IRB was established in 1989 to replace the IAB, in order to implement a new refugee determination process.⁷ The IRB initially consisted of two divisions: the Convention Refugee Determination Division (CRDD, also called the “Refugee Division”), and the Immigration Appeal Division (also called the “Appeal Division”). The members of both divisions were appointed by the GIC.

The new refugee determination process had two levels. At a first-level hearing, a two-person panel consisting of a CEIC adjudicator and a CRDD member decided “eligibility” and “credible basis”. In port-of-entry cases, “designated counsel” was provided for refugee claimants at first-level hearings at the expense of the Minister for the purpose of avoiding delay in processing claims. The adjudicator presided at the hearing. The Minister was represented by a case presenting officer (CPO). If either the adjudicator or the CRDD member found that the claim was “eligible” to be referred to the CRDD, the panel went on to consider whether in the opinion of either panel member, the claim had a “credible basis”, that is, whether there was any credible or trustworthy evidence on which the CRDD might determine the claimant to be a Convention refugee. If either panel member found that the claim had a “credible basis”, the claim would be referred to the CRDD for a second-level hearing. The two levels were also colloquially called the “initial hearing” and the “full hearing”.

At the second-level hearing, a two-member panel of CRDD members would conduct a hearing into the claim. However, a claim could be heard and decided by a single CRDD member, at the request or with the consent of the claimant. The panel was assisted by an IRB employee called a Refugee Hearing Officer (RHO). A split decision by the two-member panel was considered to be a decision in favour of the claimant.

The CRDD hearing into a claim was usually conducted in a non-adversarial manner, in that the Minister was entitled only to present evidence and could not cross-examine the claimant or make representations. However, if the CRDD was notified that the Minister was of the opinion that matters involving Articles 1E or F of the 1951 Refugee Convention (the so-called “exclusion clauses”) or matters involving cessation of refugee status were raised by the claim, the Minister was then also entitled to cross-examine witnesses and make representations.

In contrast to the public proceedings at the former IAB, CRDD proceedings were normally conducted *in camera*. The CRDD could grant an application for a public hearing if it was satisfied that there was no serious possibility that the life, liberty, or security of any person would be endangered as a result. However, in all cases, the CRDD was required to allow any representative or agent of the United Nations High Commissioner for Refugees (UNHCR) to attend any proceeding as an observer.

The Minister could make an application to the CRDD for cessation or vacation of a person’s refugee status. An application for vacation first required leave (permission) from the Chairperson. The Minister’s application for cessation, or for vacation (if leave was granted), would be heard and decided by a three-member panel of the CRDD, with the decision of the majority governing.

A special refugee claims backlog clearance program was established in 1989 to deal with the over 100,000 claims in the pre-1989 backlog of claims.⁸ There were some variations under the backlog clearance program, but generally a claimant was permitted to apply for permanent residence if the claim was found by a first-level panel to have a “credible basis”.

The IAD took over the IAB’s jurisdiction over family sponsorship appeals and deportation order appeals. The IAD initially used three-member panels, but single-member panels later became the norm.

Other legislative changes in 1989 included the introduction of the concept of requiring an adjudicator at a detention review to continue detention if the Minister certified in writing that an additional period of detention was required for investigation of the person’s identity or security risk. The legislation also included authority for the Minister to direct a ship not to enter Canada’s waters where the Minister believed on reasonable grounds that the ship was bringing any person to Canada in contravention of the Act or Regulations. This provision was subject to a six-month “sunset clause” and was not used before it expired.⁹

1993: Addition of the Adjudication Division

In 1993, the Adjudication Division of the IRB was established when the Adjudication Branch, CEIC, was transferred to the IRB.¹⁰ Adjudicators at the IRB continued to be public servants appointed in accordance with the *Public Service Employment Act*, and they continued to conduct inquiries and detention reviews.

Changes were made to the refugee determination system; for example, first-level panels were abolished, and eligibility to have a claim referred to the CRDD was now decided by a senior immigration officer at CEIC.

The CRDD was now allowed to accept a claim without conducting an oral hearing (colloquially called the “expedited process”). As part of the expedited process, an RHO would interview the claimant and make a recommendation to a CRDD member as to whether the claim should be accepted without a hearing or whether a hearing was needed.

The *Immigration Act* now explicitly provided for the power of the RHO, in accordance with the CRDD Rules, to call and question refugee claimants and any other witnesses, present documents, and make representations.

The IRB Chairperson was given the power to issue guidelines in writing to IRB members. The first set of guidelines issued in 1993 was called “Women Refugee Claimants Fearing Gender-Related Persecution” (colloquially known as the “Gender Guidelines”).

1995: New Enforcement Provisions and Specialized Board of Inquiry Model

New legislative provisions allowed for the suspension of the processing of a claim at the CRDD and for revoking the referral of the claim to the CRDD, if a senior immigration officer determined that the claim was ineligible to be referred to the CRDD.¹¹ These provisions were part of a package of legislative provisions that targeted criminals.¹² For example, Ministerial “danger opinions” were now used as a bar to referring a refugee claim to the CRDD and appealing a removal order to the IAD.

The IRB developed what was sometimes called the “Specialized Board of Inquiry Model”, in which the CRDD members were proactive in pre-hearing file review, preliminary issue identification, claim screening, scheduling hearings, and the acquisition of information necessary for the fair and expeditious determination of a refugee claim. At the hearing, CRDD members elicited evidence when necessary. In performing their responsibilities, CRDD members and staff were governed by the Chairperson’s Instructions.¹³

The position of Refugee Hearing Officer was renamed Refugee Claim Officer (RCO), and the RCOs continued to act in accordance with directions from CRDD members.

2002: Immigration and Refugee Protection Act

In June 2002, the *Immigration and Refugee Protection Act* (IRPA)¹⁴ replaced the former *Immigration Act*, and the *Immigration and Refugee Protection Regulations* (IRP Regulations) replaced the former *Immigration Regulations, 1978*. Compared to the previous legislation, the IRPA was described as framework legislation, with more details to be found in the regulations. The IRPA set out separate objectives with respect to immigration and with respect to refugees. The IRPA also stated that it is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.

IRPA’s enactment led to many changes to the IRB. The CRDD was renamed the “Refugee Protection Division” (RPD); the Adjudication Division was renamed the “Immigration Division” (ID); adjudicators were renamed “ID Members”; the title of the Immigration Appeal Division (IAD) remained the same, however. Provisions were included in the IRPA for an appeal

to the RAD from a decision of the RPD, but these provisions were not proclaimed in force, due to the pending backlog of claims at the RPD.

Various powers of the IRB Chairperson were added or clarified, such as the power to designate coordinating members; to delegate certain powers; to assign GIC-appointees to a division; to take any action necessary to ensure that IRB members carry out their duties efficiently and without undue delay; and, in addition to the power to issue guidelines in writing to members, the Chairperson now also had the power to identify IRB decisions as “jurisprudential guides” to assist members in carrying out their duties.

Single-member panels were the norm for all IRB proceedings, but a three-member panel could be constituted at the direction of the Chairperson (except for the ID, which could only have single-member panels).

The pro-active role of RPD members was recognized in the IRPA in that the RPD “may inquire into any matter that it considers relevant to establishing whether a claim is well-founded”. Also, in addition to the category of “Convention refugee”, a claim for refugee protection could be based on a new category called “person in need of protection”, namely, a person whose removal to their country of nationality would subject them personally to danger of torture, to risk to their life, or to risk of cruel and unusual treatment or punishment.

The IRPA provided that, subject to certain conditions, if the IRB determines a person to be a Convention refugee or a person in need of protection, the person may apply to become a permanent resident of Canada. On the other hand, if the IRB rejects the refugee claim (either the RPD or the RAD if the person had a right of appeal), the person may ask the Federal Court to review the decision. The person may also, in some cases, before being removed from Canada, make an application to the Minister for protection, also called an application for a pre-removal risk assessment (PRRA). A successful PRRA application may lead to the person being allowed to remain in Canada.

The fundamental mandate of the IAD was unchanged, but the following changes were made: appeal rights were now denied to serious criminals (where two years imprisonment was imposed in Canada); a new type of appeal regarding the “residency obligation” of permanent residents was added; in appeals on humanitarian and compassionate grounds, the IAD had to take into account the best interests of a child directly affected by the decision; removal order appeals could be reopened only where the IAD was satisfied that it failed to observe a principle of natural justice (the effect was the removal of the IAD’s ongoing jurisdiction to reopen described in the 1972 decision in *Grillas*¹⁵).

Changes that affected the ID included: detention reviews for refugee claimants were now normally held *in camera* rather than in public; a minor child was to be detained only as a measure of last resort; and the Minister could make an application for non-disclosure of sensitive security or criminal intelligence information during a proceeding at the Federal Court, the ID or the IAD, in the absence of the public and of the permanent resident or foreign national and their counsel (colloquially called a “section 86 application” at the IRB).

2004: Regulation of Immigration Consultants

From 1978, immigration legislation permitted regulations to be made with respect to the licensing of immigration consultants; however, regulations were not made until after the decision of the Supreme Court of Canada in *Mangat* in 2001, which clarified the paramountcy of federal legislation over provincial legislation in this area.¹⁶ Amendments to the IRP Regulations made in April 2004 provided that only an “authorized representative” may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer, or the IRB. An “authorized representative” meant a member in good standing of a bar of a province, the *Chambre des notaires du Québec*, or the newly established regulator of immigration consultants called the Canadian Society of Immigration Consultants (CSIC).¹⁷

In 2011, Bill C-35—which was originally called the *Cracking Down on Crooked Consultants Act*—amended section 91 of the IRPA: to incorporate the restriction on providing representation or advice for consideration that had previously been set out in the IRP Regulations; to set out specific penalties for contravening this provision; and to establish regulation-making authority regarding information sharing with regulatory bodies.¹⁸ Through regulations made by the Minister of Citizenship and Immigration, CSIC was replaced by the Immigration Consultants of Canada Regulatory Council (ICCRC) as the regulator of immigration consultants.

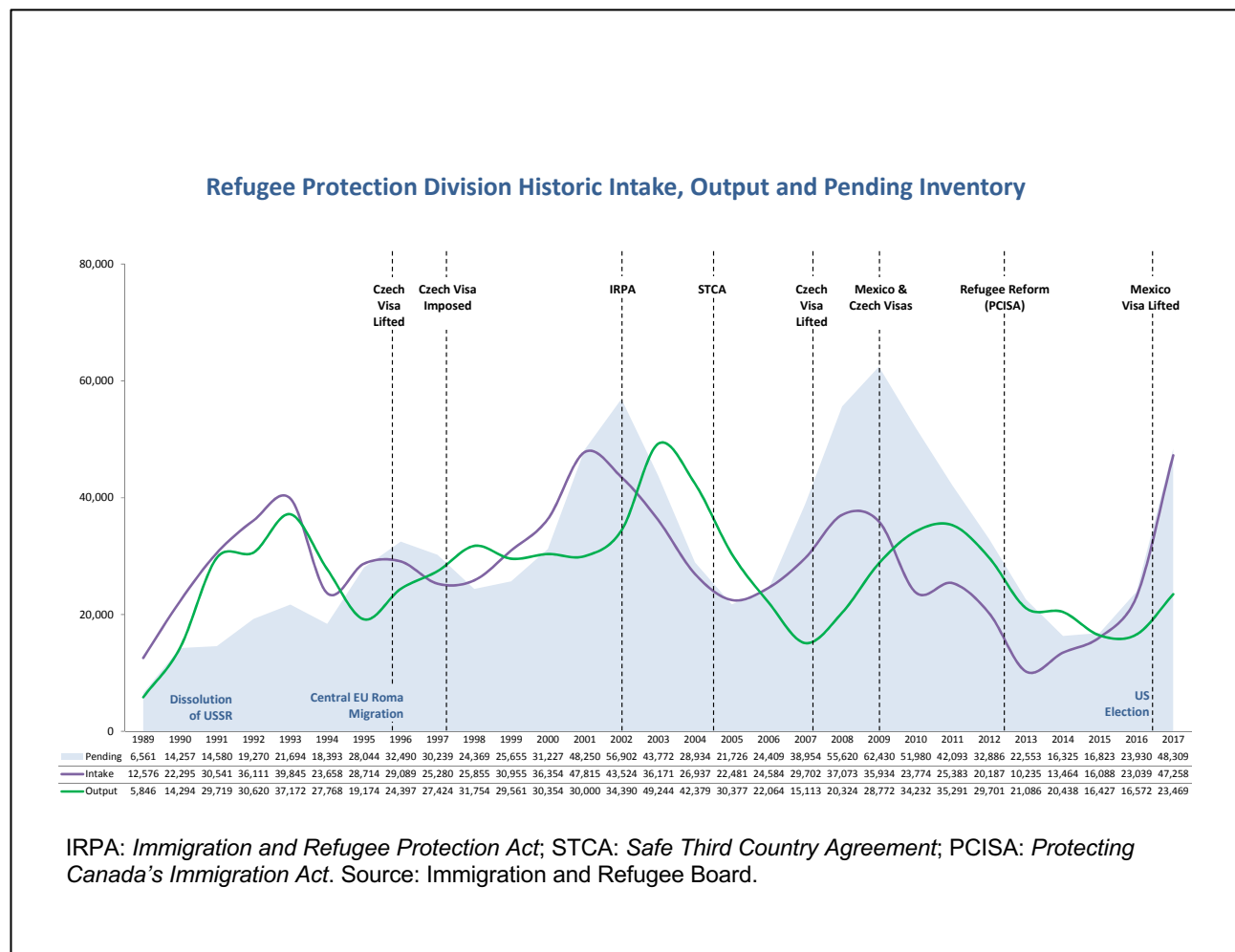
2008: Special Advocates

In response to the decision of the Supreme Court of Canada in *Charkaoui*,¹⁹ a “special advocate” was now appointed to protect the interests of the permanent resident or foreign national during a section 86 application in which sensitive security or criminal intelligence information or other evidence was heard in the absence of the public and of the permanent

resident or foreign national and their counsel.²⁰ The Minister of Justice was required to establish a list of persons who might act as special advocates.

2012: Refugee Reforms

Refugee reform legislation came into force 15 December 2012, making several changes to the IRB.²¹ RPD members were now public servants appointed under the *Public Service Employment Act* rather than being appointed by the GIC. The Chairperson could now assign GIC-appointed members to the RAD or IAD.



In accordance with the RPD Rules, the standard order of questioning in a hearing of a claim for refugee protection was that, if the Minister is not a party, any witness, including the claimant, would be questioned first by the RPD and then by the claimant's counsel. This was a continuation of the procedures in the Chairperson's Guideline 7 on the Conduct of a Hearing, issued in 2003, and approved by the Federal Court of Appeal in 2007.²²

The provisions for a paper-based appeal to the RAD, introduced in the IRPA in 2002, came into force, with the added possibility of submitting new evidence or having an oral hearing in some limited circumstances. The Minister has an unrestricted right to file evidence on appeal to the RAD. A refugee claimant, however, is restricted to submitting only evidence that meets the specified test (i.e. evidence that arose after the rejection of their claim, etc.), unless the evidence is submitted in reply to the Minister's evidence. In *Huruglica*,²³ the Federal Court of Appeal clarified the role of the RAD: with respect to findings of fact (and mixed fact and law) that raised no issue of credibility of oral evidence, the RAD was to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether the RPD erred, as submitted by the appellant.

There were other changes. A foreign national and, with one exception, a permanent resident become inadmissible to Canada if the RPD allows the Minister's application for cessation of refugee protection.²⁴ Various time limits at the RPD and RAD were set out in the *Immigration and Refugee Protection Regulations*. Shorter time limits for the date fixed for the RPD hearing were established for claimants from designated countries of origin (DCOs), compared to other claimants. Claimants from DCOs were also prohibited from appealing to the RAD, but the Federal Court struck down that limitation

as unconstitutional.²⁵ There were certain other prohibitions on appeals including that no appeal could be made if the RPD found that the claim had no credible basis or was a manifestly unfounded claim, that is, clearly fraudulent. If the Minister designated the arrival of a group of persons in Canada as an irregular arrival, the foreign nationals in the group were “designated foreign nationals” (DFN) who were subject to various provisions including mandatory detention and no RAD appeal.

2013: *Faster Removal of Foreign Criminals Act*

In 2013, amendments to the IRPA from the *Faster Removal of Foreign Criminals Act*,²⁶ included the following changes, among others: it lowered the bar on no appeal to the IAD for serious criminality to six months’ imprisonment (from two years’ imprisonment); it permitted the Minister to declare that a foreign national may not become a temporary resident if the Minister is of the opinion that a refusal is justified by public policy considerations; and it provided for mandatory minimum conditions to be imposed on persons released in security cases at the ID, IAD and the Federal Court.

The Future

An independent report about the IRB by Neil Yeates was released in June 2018. It made several recommendations for change.²⁷ At the time of writing this article, it is not known whether the Government will provide a legislative response to the Yeates Report, but the experience of the IRB over the past 30 years is that legislative reform is an ongoing feature of the work of the IRB and that the IRB will continue to evolve.

Notes

¹ *Immigration Appeal Board Act*, S.C. 1966-67, c. 90.

² *Immigration Act*, 1976, S.C. 1976-77, c. 52 (later renamed *Immigration Act*, R.S.C. 1985, c. I-2).

³ “Convention refugee means any 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 ...” That definition was based on the United Nations Convention Relating to the Status of Refugees, signed by Canada in Geneva on 28 July 1951, and the Protocol to that Convention, signed in New York on 31 January 1967.

⁴ The RSAC was established by s. 48 of the *Immigration Act*, 1976, for the purpose of advising the Minister in respect of any case where a person claims to be a Convention refugee. The legislation provided that the Minister shall appoint such persons as the Minister considers appropriate to be members of the RSAC.

⁵ *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177.

⁶ Plaut, W. Gunther, “Refugee Determination in Canada / A report to the Honourable Flora Macdonald, Minister of Employment and Immigration”, 1985.

⁷ An Act to amend the Immigration Act, 1976, and to amend other Acts in consequence thereof, S.C. 1988, c. 35 (Bill C-55). IRB Rules of Practice were made by the Chairperson, subject to the approval of the GIC: *Convention Refugee Determination Division Rules*, SOR/89-103, and *Immigration Appeal Division Rules*, SOR/90-738.

⁸ *Refugee Claimants Designated Class Regulations*, SOR/90-40.

⁹ An Act to amend the Immigration Act, 1976, and the Criminal Code in consequence thereof, S.C. 1988, c. 36 (Bill C-84, the “Detention and Deterrents” bill).

¹⁰ An Act to amend the Immigration Act and other Acts in consequence thereof, S.C. 1992, c. 49 (Bill C-86). New IRB Rules of Practice were made: *Convention Refugee Determination Division Rules* SOR/93-45; *Immigration Appeal Division Rules*, SOR/93-46, *Adjudication Division Rules*, SOR/93-47.

¹¹ An Act to amend the Immigration Act and the Citizenship Act and to make consequential amendment to the Customs Act, S.C. 1995, c.15 (Bill C-44).

¹² Canadian Press, June 16, 1995: “Immigration bill gets assent. Ottawa — Legislation that aims to keep criminals out of Canada — or makes it easier to kick them out if they get in — received royal assent Thursday, the last step needed to become law. Bill C-44, sponsored by Immigration Minister Sergio Marchi, will bar refugee claims by people convicted of serious crimes, tighten parole rules for those under deportation orders and toughen the appeals process against deportation. The legislation responds to public outrage over cases like that of Oneil Grant, charged in the highly publicized 1994 slaying of a Toronto café customer. He had a lengthy criminal record but had been allowed to stay in the country...”

¹³ CRDD Instructions 95-01: *Instructions for the Acquisition and Disclosure of Information*; CRDD Instructions 95-02: *Instructions Governing Extra-Hearing Communication Between Members of the Refugee Division and Refugee Claim Officers*.

¹⁴ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) (Bill C-11). New IRB Rules: *Refugee Protection Division Rules*, SOR/2002-228; *Immigration Division Rules* (SOR/2002-229), *Immigration Appeal Division Rules*, SOR/2002-230; *Oath or Solemn Affirmation of Office Rules* (Immigration and Refugee Board), SOR/2002-231.

¹⁵ *Grillas v. Minister of Manpower and Immigration*, [1972] SCR 577. In *Grillas*, the Supreme Court of Canada held that until a deportation order had actually been executed, the IAB was entitled to reopen an appeal to hear new evidence if it saw fit to do so and revise its former decision because it has a continuing “equitable” jurisdiction to decide if a person should be allowed to remain in Canada. However, s. 71 of the IRPA currently states that the IAD, “on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice”. In *Ye v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 964, the Federal Court confirmed that s. 71 of the IRPA effectively limits the jurisdiction of the IAD to reopen and implicitly excludes the common law jurisdiction to reopen that came from *Grillas*.

¹⁶ *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113, 2001 SCC 67. Since the subject matter of the representation of aliens by counsel before the IRB has federal and provincial aspects, the federal and provincial statutes and rules or regulations in this regard

will coexist insofar as there is no conflict. Where there is a conflict, the federal legislation will prevail according to the paramouncy doctrine.

¹⁷ Section 13.1 of the IRP Regulations as added by the *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-59, s. 3.

¹⁸ An Act to amend the Immigration and Refugee Protection Act, S.C. 2011, c. 8.

¹⁹ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, 2007 SCC 9.

²⁰ An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, S.C. 2008, c. 3 (Bill C-3).

²¹ *Balanced Refugee Reform Act*, S.C. 2010, c. 8 ("BRRA") (Bill C-11). *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17 ("PCISA") (Bill C-31). New rules of practice for the RPD and RAD: *Refugee Protection Division Rules*, SOR/2012-256 and *Refugee Appeal Division Rules*, SOR/2012-257.

²² *Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* (October 2003; amended December 2012). *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 FCR 385, 2007 FCA 198.

²³ *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

²⁴ Refugee protection could cease for any of the following reasons: (a) the person has voluntarily reavailed themselves of the protection of their country of nationality; (b) the person has voluntarily reacquired their nationality; (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality; (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or (e) the reasons for which the person sought refugee protection have ceased to exist. A permanent resident is not inadmissible if refugee protection ceases for reason (e), also sometimes called a "change of country conditions".

²⁵ *Y.Z. v. Canada (Citizenship and Immigration)*, [2016] 1 FCR 575, 2015 FC 892.

²⁶ *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16 (Bill C-43).

²⁷ Neil Yeates: *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum*, April 12, 2018. Neil Yeates served as Deputy Minister of Citizenship and Immigration Canada from 2009 until 2013. The Report recommended: (1) that a systems management approach for the In-Canada Asylum System be adopted; and (2) that this be done: under Option 1, by largely but not entirely, maintaining the current structures (referred to as "system reform") but overseen by an Asylum System Management Board, or under Option 2, by undertaking major structural reform to create an integrated refugee determination system that would integrate as many functions as possible in a single organization (referred to as a "Refugee Protection Agency"), reporting directly to the Minister of Immigration, Refugees and Citizenship. (3) The third fundamental recommendation is to increase the capacity of the system now on an interim basis.

Peter Harder Reminisces about the Early Years of the Immigration and Refugee Board

Ed. Note: On the occasion of the Immigration and Refugee Board's 30th anniversary, Senator V. Peter Harder, the Board's first Executive Director, sat down with Mike Molloy, Gail Kirkpatrick Devlin, and Gerry Maffre to talk about those early days.

Background

Canada ratified the 1951 Refugee Convention and its 1967 Protocol in 1969, and Cabinet considered the implication of ratification at a meeting on 22 July 1970. While the Convention is silent on the question of resettlement, Cabinet agreed to adopt the Convention refugee definition for resettlement purposes, extended the possibility of resettlement in Canada to Convention refugees beyond Europe, decided the point system supplemented by generous application of discretionary authority would be used to determine which refugees could be resettled in Canada, and adopted an "oppressed minority" policy to cover circumstances where oppressed people who had not been able to flee their country could be admitted under the same terms as refugees.

Cabinet did not address the question of how Canada would deal with people claiming refugee status at the border or from within Canada; but Operations Memorandum #17 of 2 January 1971 which spelled out the operational implications of the July resettlement system decisions quietly announced the creation of an "Interdepartmental Refugee Eligibility Committee" to "determine the eligibility of persons applying for refugee status in Canada". Staffed by a chairman and a registrar, the interdepartmental committee initially included a representative of the Department of External Affairs, several immigration officials, and an observer from the UNHCR. Later, distinguished retired Canadians were added to the committee. The committee reviewed transcripts of interviews with claimants (and their legal advisers) conducted by immigration officers across the country. The committee's decisions were reviewed by the director of the new Refugee unit on behalf of the Minister of Employment and Immigration.

Over time, despite official protestations that Canada was a resettlement country and not a country of first asylum, the number of people arriving as visitors and then claiming refugee status increased. This attracted both official and public attention, particularly as the numbers arriving from Latin America climbed and the consultations which ultimately led to the 1976 *Immigration Act* proceeded. Refugee advocates demanded that asylum seekers be accorded an oral hearing before the responsible decision maker. A tentative costing of \$35 million a year for a system with oral hearings was dismissed by the government as far too expensive (IRB 2018/19 budget = \$126M+).

Accordingly, when Bill C24, establishing the 1976 Act was tabled, sections 45 and 46 laid out procedures for “The Determination of Refugee Status”. These included an examination under oath and the referral of the transcript to the Minister of Employment and Immigration to be reviewed by a newly established Refugee Status Advisory Committee (RSAC). The UNHCR, which retained observer status on the RSAC, not only considered the RSAC satisfactory but promoted it as a model to be emulated by other countries.

The system as embodied in the 1976 Act was challenged up to the Supreme Court, and on 4 April 1985 the Court handed down a decision in the case of Harbajan Singh. Valerie Knowles’s *Strangers At Our Gates* provides a succinct explanation of the decision and its impact:

All six justices agreed that fundamental justice requires that a refugee claimant’s credibility be determined by a full oral hearing at some stage of the refugee determination process. ...The Singh decision had profound implications for the refugee determination system because it meant that refugee claimants in Canada must be guaranteed virtually the same social and legal protections accorded to Canadian citizens under the Charter of Rights and Freedoms. (p.226)

The Singh decision sent officials back to the drawing board, and in due course new legislation (Bill C55) established the Immigration and Refugee Board (IRB).

Early Years of the Immigration and Refugee Board

Senator V. Peter Harder, well known to many readers, admitted to some surprise when he was called in 1988 by Jack Manion of the Privy Council Office and asked to leave his private sector position to return to public administration as the Board’s first Executive Director. That he had the endorsement of the honourable Gordon Fairweather, PC, the Board’s first chair, for whom he was a parliamentary intern a dozen years earlier, made his acceptance decision all the easier. Harder was appointed by Order in Council (OIC) that December, and work began in earnest. New ground was broken here in Canada.

Harder described his early responsibilities as managing the mechanics of the Board, whereas Fairweather, with his appointment as chair of the first Canadian Human Rights Commission after his parliamentary career, had experience in decision making in a tribunal setting and in public administration. Fairweather led a young and keen staff who welcomed the opportunity to innovate and who contributed to the team spirit of the nascent IRB.

One of their fundamental objectives in respecting the Supreme Court decision in Singh was to ensure the Board work toward and respect its quasi-judicial status and avoid the trappings of a conventional court system. To this end, Fairweather pushed the idea of brief written decisions and also supported oral decisions. Early on, he made a practice of participating in refugee hearings as a board member at various IRB locations across the country.

Part of this push to solidify the quasi-judicial process was a recognition that success in the determination system would require sound, fast, and fair decisions so that there could be a quick move either to permanent resident status for successful claimants or to removal of rejected claimants. Harder still sees this as a necessary goal of the refugee determination system and recalls early tension between the Board and the Immigration department in trying to keep these numbers in some balance.



Peter Harder in his Senate office

One means to this end was to provide for initial decision making on whether people were, in fact, even eligible to make a claim. The idea was to keep ineligible claimants—war criminals and those with manifestly unfounded claims—from entering the system so that Board members could focus on seemingly more deserving claims. Ultimately this “initial hearing” measure failed because so few people were declared ineligible upon arrival in Canada.

Harder recalled that in January 1989 the Board faced a backlog of some 60,000 cases of pre-existing refugee claims, and a separate system was established to deal with this backlog. It is important to remember that the Board was mandated not

only to deal with refugee claims, but also to absorb and assume the responsibilities of the former Immigration Appeals Board, which dealt with challenges to non-refugee immigration decisions. All former IAB judges were offered appointment to the new Board, albeit with shorter appointment periods.

Board members were selected largely on their ability to write well and to make sound, reasoned decisions. The recruitment drive tapped into, in part, the legal and refugee advocacy communities. Harder and Fairweather travelled Canada to inform stakeholders about the Board and their vision of how it would work. Harder recalled the support they received in those days from very vocal members of the Immigration Bar: Richard Kurland and Lorne Waldman came particularly to mind. This support included assistance in the training of new members. Assistance also came from the Ottawa office of the UNHCR and from Professor Guy Goodwin-Gill. The input of all these contributors reinforced the Board's fundamental structure as a quasi-judicial body.

But members can only make decisions with the right information. That's why there was an early move to set up a Documentation Centre, described elsewhere in this issue.

As the Board staffed up, it opened offices across Canada. Hearings—whether refugee claims or appeals—could be heard in Montreal, Ottawa, Toronto, Winnipeg, Calgary, and Vancouver. As well, members travelled to hear claims in Atlantic Canada or were redeployed in the face of sudden surges of claims. Examples of those surges are Bulgarians in Newfoundland and Labrador and Portuguese claiming persecution in their homeland as Jehovah's Witnesses. Surges like these also demanded that the Documentation Centre immediately research these situations and provide members with background information to inform their decision making.

The growing Board made a point of hiring from Canada's various cultural communities well before this became a watchword in government hiring practice. And as members were brought in, swearing-in ceremonies were arranged—not a usual practice for OIC appointees. At these events the [Nansen Medal](#), awarded to the people of Canada in 1986, was displayed to signify the commitment these new members were taking on.

Harder also talked about the environment of refugee issues and said that in his mind the refugee story is still the same. While source countries change and the grounds for acceptance have expanded from the original Convention, there is still the fundamental need for fair and quick decisions and real consequences for those rejected. The global refugee system challenges nations to work together on root causes so that generosity can be shown to refugees who can't travel to safe havens and make claims, and those same systems don't become the mechanism for responding to overwhelming irregular migration.

Harder is reassured that in Canada the refugee determination system has endured. He points to the ongoing political support for both a determination system that has adapted over time to new types of claimants and an expansive immigration program.

Harder concluded his time with Canadian Immigration Historical Society members with an anecdote about his appointment as deputy minister of the Immigration department. Prime Minister Mulroney had him called out of a tense meeting with Immigration department officials one Friday when he was still with the IRB. He learned only then of his appointment and had to return to the meeting keeping the news to himself. He had to wait until Monday morning before meeting with his new departmental colleagues and made an early point of emphasizing to senior managers that they were now in a more intimate and collaborative relationship.



IRB Ten-Year Anniversary Pin

My Time at the Immigration and Refugee Board

Peter Showler

*Prior to serving as chairperson of the Immigration and Refugee Board, Peter Showler sat as a member of the Convention Refugee Determination Division for seven years. Subsequently, he taught Immigration and Refugee Law at the Faculty of Law, University of Ottawa, where he also served as the director of the Refugee Forum, an academic centre that promoted refugee law reform. Peter Showler is the author of *Refugee Sandwich: Stories of Exile and Asylum*.*



I served as chairperson of the IRB from November 1999 to November 2002. The IRB was and still is by far the largest federal tribunal in Canada. During my time, there were more than 200 decision makers, over a thousand employees, and five regional offices across the country.

The board was an awkward, three-humped beast that somehow worked reasonably well and rendered more than 50,000 quasi-judicial decisions per year. Its three humps: the Immigration Appeal Division (IAD), the Adjudication Division (AD), and the Convention Refugee Determination Division (CRDD, now the Immigration Division and the Refugee Protection Division) were dissimilar in size, function, and status.

The CRDD, or Refugee Division, was by far the largest and most controversial of the three divisions. It was internationally renowned for its jurisprudence, country information research, liberal interpretation of the Convention refugee definition, and excellent training documents. Its members, appointed by the federal cabinet, decided whether individual refugee claimants would be given Canada's protection or sent back to possible death, serious physical harm, or arbitrary detention. No judge in

Canada hears cases that could result in the death or torture of the person appearing before them, and yet members of the Refugee Division would hear four to six claims a week, in hearings lasting three hours. It was and is a dire and demanding task.

Nationally, the Refugee Division was less admired. Conservative critics alleged that the CRDD's acceptance rates, usually 40 to 45 per cent, were too high—and they were, in contrast to European asylum systems designed to say “no” to far higher asylum flows. The Board was also legitimately criticized by refugee lawyers and academics who saw gross inconsistencies between the acceptance rate of individual Board members. Because they were Governor-in-Council appointments and part of the government's political patronage, the quality and performance of decision makers ranged from excellent to abysmal. Political patronage and the lack of an appeal were the two weaknesses of an exceptional institution.

During my time, three events deeply affected the work of the Board, particularly the Refugee Division. The first was the arrival of four boats from the People's Republic of China (PRC) off Canada's west coast in the summer of 1999. Of the roughly 600 passengers, 577 made refugee claims. Claimants on the first two boats were treated in the normal manner: they were security screened, interviewed, and released to complete their written claims and await their hearing. Over 85 percent of those claimants abandoned their claims and are believed to have been smuggled into the United States. It became obvious that all four boats were engaged in a people-smuggling scam bringing indentured labour to the U.S. More than 400 passengers on the last two boats were detained to prevent more claim abandonments. Since there was insufficient detention space in Vancouver, the claimants were detained in Prince George. There the Board, with great nimbleness, managed to do detention reviews every 30 days and transfer claimants to Vancouver for their refugee hearings. It was understood that most of the claimants were victims of ruthless smugglers, but most of them were not “refugees”. Only 24 were granted refugee status. Most were eventually returned to China, and no more passenger-laden boats from the PRC arrived in Vancouver harbour.

The second key event was a change in the law. For most of the 1990s, Canada received a pretty consistent annual number of refugees, about 25,000. Our asylum system was relatively generous, buffered as we were by geography—two oceans and the U.S. lying between us and the vast majority of the world's nine million refugees. However, beginning in 1999, annual claims increased to 29,000, then 34,000, and almost 44,000 by 2001. The dreaded “backlog” word re-entered policy discussions. In 2001, the government passed the *Immigration and Refugee Protection Act* (IRPA), which restructured the IRB and allowed a single member of the Refugee Protection Division (RPD), rather than two, to decide each claim. To ensure fairness, a Refugee Appeal Division (RAD) would now review the first-level refugee decisions. The

new RAD would have full appellate powers rather than the limited judicial review powers of the Federal Court. As a tribunal, it would catch mistakes made by the RPD more quickly and more efficiently than the court.

IRPA was passed by the House of Commons in May 2001. Before it could be considered by the Senate in October, the third principal event occurred: 11 September 2001. “Nine/eleven” was a seismic historical event for the entire world. For the IRB, it had particular effects. Rumours abounded that some of the 9/11 bombers were refugees who had entered the U.S. from Canada. Canada, especially its refugee system, was commonly portrayed as the “weak link in North America’s security perimeter”. The Canada-U.S. border was closed. It seemed “Chicken Little” mentality was sweeping through the corridors of power in both countries. It was all nonsense. Apart from [Ahmed Ressam](#), the Millennial Bomber—who had been refused by the IRB—no refugees had been involved in terrorist acts. The U.S. immigration system with its 11 million illegal and undocumented residents was a far greater security threat than the Canadian system, in which refugee claimants were photographed, fingerprinted, and interviewed. However, reason rarely prevails when national security becomes an issue.

We all found ourselves giving up our fingernail clippers at airport security, and the government almost scrapped IRPA to introduce a law much tougher on refugees. Thanks to the common sense and courage of Immigration Minister Elinor Caplan, IRPA was passed by the Senate. However, during implementation of the Act the following spring, the new Immigration Minister Denis Coderre announced at the last minute that the Refugee Appeal Division would be postponed for one year. In fact, the RAD was postponed for 12 years. With single-member panels and very limited and questionable judicial scrutiny, the Board embarked on its greatest time of productivity. But that is another era, for another chairperson.

Creation of a Prototype: The IRB Documentation Centre

Gail Kirkpatrick Devlin, with input from Juan Pedro Unger and Barbara van Baal

*Gail Kirkpatrick Devlin joined the IRB Documentation Centre in January 1989. In 2002 she joined the Intelligence branch of CIC, and in 2003 she became a policy analyst in the Immigration branch, specializing in language testing for federal skilled workers. She retired in 2012, is secretary of the CIHS, and edited *Running on Empty*. Juan Pedro Unger was an IRB research officer from 1989 to 2003. He has been a CIC/IRCC senior policy analyst since 2004 and since 2014 is responsible for international relations for IRCC’s Migration Health branch. Barbara van Baal was Coordinator of Research at the IRB Documentation Centre in 1989 and is now Assistant Director, Strategic Policy and Planning branch, IRCC.*

The Need Identified

In 1985, prior to the establishment of the Immigration and Refugee Board, Rabbi Gunther Plaut advocated the need for the “establishment of a Documentation Division . . . based on the belief that a maximum of knowledge—both of the claimant’s country of origin and of pertinent law—would greatly facilitate reaching fair decisions.”¹ According to Plaut, IRB members, case-presenting officers, refugee-hearing officers, and claimants and their advocates would need access to the very best publicly available information to ensure a fair hearing. They would need reliable information on human and civil rights, military service, cultural and religious practices, government, politics, legal systems, terrorist or other resistance groups, etc., in countries of origin of refugee claimants in order to make their decisions.

Early Days

Sharon Rusu, who had previously served on the Refugee Status Advisory Committee, was appointed as the newly established IRB’s chief of research and tasked with developing a documentation centre, which became known as the “Doc Centre”. A basic library, known as the Resource Centre, had been set up and furnished with relevant publications. This “Resource Centre” consisted of reference books, atlases, specialized journals and encyclopedias, newsletters covering foreign affairs, sociological and cultural studies, and human rights reports—organized thematically and geographically. Sources ranged from well-known organizations like Human Rights Watch and Amnesty International to obscure local publications, and occasionally organizations which themselves were being persecuted. There were some surprising holdings, presumably intended to help provide contextual information, such as an English copy of *A Clarification of Questions* by the Ayatollah Khomeini.

Internet was not yet available, but two researchers were charged with doing specific searches on databases such as Lexus-Nexus. The hunt was on for researchers who could write up the information they found in a coherent manner. Word got around government offices and academic halls that there was a new player in Ottawa and researcher/writers were needed. Within weeks five or six researchers were writing papers for the IRB on refugee claimants’ countries of origin. Our guide was the U.S. State Department’s annual publication *Country Reports on Human Rights Practices*. It was a godsend as some of us didn’t know much about human, civil, and legal rights, nor about refugees other than the pictures we saw on the news of refugee camps in Kenya, Jordan, and other places. Few knew what a Convention refugee was, and those were the refugees about whom we were to research and provide information.

To help ensure that all Doc Centre employees were up to speed, staff had an intensive training session with Guy Goodwin-Gill, a former UNHCR officer and professor at Carleton. The Doc Centre staff also liaised with local and international agencies involved in refugee matters to stay on top of developing issues.

Our staff was diverse from the very beginning. As Peter Harder has noted in his interview, many members of the IRB were chosen from various cultural communities long before diversity became a watchword of governments. The same applied to the Doc Centre. At one time or another, there were researchers from Peru, Romania, Guatemala, Uganda, Rwanda, Russia, Djibouti, Iran, Ethiopia, and Lebanon. The “Canadians” also had diverse backgrounds, having lived abroad as children of foreign service officers and military personnel; studied in Egypt, South Africa and other places; taught English as a second language in China, Japan, or Korea; and volunteered in refugee camps in Latin America and Africa. Nearly everyone was bilingual, but not necessarily in English and French.

The first researcher/writers were hired to write country reports on the countries of origin of Convention refugee claimants. While we used the U.S. *Country Reports* as a guide, we were expected to find other information specific to Canada. This could be important: Canada might view a country that allowed capital punishment differently than would the U.S. I remember one early paper on Fiji that I took over from another researcher. I did my homework, became immersed in the historical background of the various ethnic groups which were then quarrelling with one another, and talked to persons who were working with a Fijian ethnic group in Canada. I wrote the paper, and it was approved and published. It created a great stir in one of the ethnic groups and some of its members complained to the IRB. Fortunately for my reputation and my future, the powers-that-be decided that I must have written something correct as both sides were upset about it!

Strict Rules

My background was in research and writing, but I had gained a lot of editing experience working for External Affairs and so helped to draw up a style guide for the writers. “The “do’s” and “don’ts” were spelled out and made a lot of sense, given the weight our information could carry in the hearing room:

- First Rule: Only public sources of information were to be used in the preparation of Doc Centre products (see Rule Five).
- Second Rule: Never, ever use the word “persecution” unless in a quotation from a reliable source. Even then, introduce the quote as “According to the *New York Times* . . .”. In other words, the Doc Centre was not originating the use of the word “persecution”, a word which would be prejudicial to the case.
- Third Rule: Other judgemental words such as “terrorist” or “torture” should only be used in the “according to” sense.
- Fourth Rule: Every statement must be compared, contrasted, and corroborated, or it must be noted that it was impossible at that moment to do so.
- Fifth Rule: The researcher could not be the source of information. For example, I knew from personal experience and years of study that Intourist kept track of foreign and domestic travellers in the U.S.S.R., but I couldn’t cite myself; I had to call my Russia expert contact at Carleton and run the answer past him. He affirmed the statement and got credit for the response. I did not cite him by name, only by title, but I had to get his consent to make his name public should it be necessary.

In the beginning, the Doc Centre produced lengthy reports that were intended to provide members with information needed to make their decisions. That said, there were always questions for which the reports provided no answer and no guidance. Many of these questions had to do with the credibility of the claimant’s story. A claimant described a particular incident, providing such details as the weather, time of day, mode of transport, and the reason for the rally, but how could the member know whether this story was true or false? The member or refugee-hearing officer would ask the Doc Centre a specific question. One of the early questions, which became an all-time favourite among the researchers, was: what colour are the taxis in Canton? In the beginning, we had no way of responding to these individual inquiries, but that changed with a decision to respond directly to a request for information submitted by a refugee-hearing officer who had exhausted all of his resources. A young Doc Centre researcher from Peru, Juan Pedro Unger, researched and wrote that first Response to Request for Information and hundreds more. He describes the process below.

Juan Pedro Unger and the First Information Request

Thirty years ago, all the research officers in the new IRB Documentation Centre produced 40- to 60-page country reports—overviews of geographic, political and human rights in countries of origin of persons claiming refugee status. Most were recent political science graduates, but I was a foreign journalist, eager to learn, write, and contribute to the larger project that was the new IRB and, implicitly, Canada and refugee protection.

I was busy working on a country report of Peru when the director announced to the room that a refugee-hearing officer in Toronto had sent a request from the two-member panel hearing a case: they needed to know about a group in Peru called

the Shining Path. A panel was asking for specific information—how unusual. “What exactly do they want to know?” “Anything. Everything. What is it, what do they do?”. Direction on how to proceed was straightforward: do what you are already doing—find reliable sources and “compare, contrast, and corroborate”. I had what remained of the day to finish it. As with any country report, it would have to go to the editors to ensure good writing and sourcing, be returned for any changes, and sent to the director for final review—and time for all this had to be allowed too. My challenge was to confine my writing to what could be done in a few hours and, most crucially, find the sources that provided the logical narrative. It wasn’t too difficult, as I had already spent the last several days going through all the Resource Centre’s holdings dealing with Peru. I also happened to have at my desk a few recent journals from abroad with articles on the current political violence in my home country.

We improvised a format that looked a bit like an email: a heading “Response to Information Request” (the country code and document number, PER 0001, were added later), then the date, the country’s name with a colon and the subject (Peru: Information on a group called Shining Path), then the “sender”, the Immigration and Refugee Board Documentation Centre, and at the end a bibliographic listing of the references.

That “Response to Information Request” came out quite well, considering the time constraints. We did not realize then that we were setting a bar for expectations in the hearing rooms and that this simple task would become a new type of work that would soon take over much of the Documentation Centre! The success was immediate; the refugee-hearing officer who sent that first information request was soon faxing us lots of questions for the hearings taking place. Word spread quickly, and before we knew it, we were receiving requests from across the country, from lawyers representing claimants, from organizations with an interest in cases, and even from overseas. Within a few weeks, most researchers were working on a number of information requests *each day*. This limited how much time could be dedicated to researching and writing (and editing and approving), and new approaches had to be adopted—including the vetting of requests, instructing the regional offices to “do their homework first”, and developing a system for assigning deadlines.

The responses became a vast collection of information that could be readily consulted by those involved in refugee cases or anyone else. Some years later, they worked on the 10,000th response. Even that seems like an eternity ago, not so much for the years that have passed since then, but because the number of responses has continued to grow. I’m told that the 100,000th Response to Information Request has already gone out.

Documentation Centre Outreach

Distribution of Products: By today’s standards, technology to support the Doc Centre’s work was rudimentary. Information was gathered through consultation of printed journals, newspapers, periodicals, and reports as well as by conducting in-person and telephone interviews with experts. Documents were primarily printed and mailed out, though the facsimile machine was used to transmit shorter information requests. Once the national Doc Centre was up and running, three small Doc Centre satellites, each with its own coordinator, were established to provide easier access to information for those preparing for hearings in Montreal, Vancouver, and Toronto. IRB products, including thousands of information requests, were publicly available online and the Documentation Centres were open to the public. IRB products were distributed widely within Canada and abroad to NGOs, universities, and other government agencies working on refugee issues. The Doc Centre also participated in the Country of Origin Information Working Group of the Intergovernmental Consultations on Migration, Asylum and Refugees in Switzerland, liaising with researchers in other member countries.

Fact-Finding Missions: Researchers planning travel to countries-of-origin of interest to the IRB could propose to combine their vacation with a fact-finding mission. Through this type of co-operation, the Doc Centre was able to access first-hand information on Soviet Jews in Israel and Roma in the Czech Republic as well as other groups and countries.

Anticipation of Events: I was one of the researchers who specialized in the former Soviet Union and Eastern Europe. We were taken aback in the early 1990s when a great number of Bulgarians arrived in Newfoundland and claimed refugee status. Apart from the State Department *Country Reports*, we had little information on Bulgaria. We tapped every available resource and soon we were able to provide some information to the hearings, but it was largely a case of playing catch up. The lesson had been learned—we needed to be prepared for unforeseen circumstances.

Setting up Other Documentation Centres: The Doc Centre was a leader in this field and later inspired the U.S. and Russian governments to set up similar centres. IRB personnel not only advised on establishing a documentation centre in Moscow, the IRB sent Doc Centre staff to assist in its establishment.

Notes

¹ Plaut, W.G. *Refugee Determination in Canada* (1985) quoted in: Sharon Rusu, "The Development of Canada's Immigration and Refugee Board Documentation Centre", *International Refugee Law*, Vol. 1, No. 3, Oxford University Press, 1989.

The Refugee Appeal Division: A New Member's Perspective

Susan Brown

Susan Brown was appointed in January 2018 to a three-year term as a member of the Immigration and Refugee Board assigned to the Refugee Appeal Division. Prior to her appointment, she was a commercial litigation partner in a major national law firm and then a volunteer legal counsel with Unitera in Burkina Faso and Mongolia and with the Refugee Sponsorship Support Program.

I knew it would be interesting and challenging to be a member of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) at a time of record-breaking migration flows and intense world interest in immigration and refugee issues. While I knew that the number of refugee claims in Canada was rising, I was not fully aware at the time of my appointment of the place of the RAD in Canada's refugee determination system, how and why the RAD had been established, or that Canada's refugee determination system is currently at a crossroads. In this article, I have tried, very briefly, to put the RAD into context, describe how it functions, and outline the challenges RAD members face.

The Refugee Appeal Division in Context

Canada's refugee determination process is barely 50 years old. A number of important milestones led to the creation of the RAD.

1969	1951 <i>UN Convention on the Status of Refugees</i> and its 1967 <i>Protocol Relating to the Status of Refugees</i>	Canada accedes on 4 June 1969
1978 ¹	<i>Immigration Act</i>	Paper process, with limited appeal rights to the Immigration Appeal Board, predecessor to the IRB
1984 1985	<i>Ratushny Report</i> <i>Plaut Report</i>	Government commissions studies to recommend approaches for a new asylum determination system
1985	<i>Singh Decision</i>	Supreme Court rules that refugee claimants are entitled to fundamental justice under the Charter and the Canadian Bill of Rights that an oral hearing is required when the credibility of a refugee claimant is at stake
1987	<i>UN Convention Against Torture</i>	Canada ratifies on 24 June 1987
1989	<i>Immigration Act</i> changes	IRB is created as an independent administrative tribunal; two-member panels of the Convention Refugee Determination Division, predecessor to the Refugee Protection Division (RPD) are to independently assess the case for refugee protection at an oral hearing
2002 ²	<i>Immigration and Refugee Protection Act (IRPA)</i>	Enacted to provide protection under both UN Conventions; however, the sections of the law giving refugees the right to an appeal to the RAD are not proclaimed into force
2012	<i>IRPA reforms</i>	Legislative changes come into force, creating the RAD to give a new right of appeal for claims heard at the RPD with provisions permitting new evidence and a hearing in some cases
2018	<i>Yeates Report: A Systems Management Approach to Asylum</i>	Independent Review of the Immigration and Refugee Board

How the Refugee Appeal Division Functions

The most recent comprehensive analysis of the IRB is the 2018 report of the independent review headed by Neil Yeates (Yeates Report³) which offers a detailed analysis of the history and performance of the RAD⁴. The *Immigration and Refugee Protection Act* (IRPA), in force in 2002, included provisions for an appeal of Refugee Protection Division (RPD) decisions to a RAD at the IRB. This appeal process was designed to be more extensive than the judicial review process at the Federal Court by providing for a review on the merits of the claim and for substitute decisions. The paper-based process was expected to be quick, to improve the consistency of refugee decision making by developing coherent national jurisprudence in refugee law, and to reduce the number of cases proceeding to the Federal Court. Due to the unprecedented increase in the number of refugee claims at the RPD, the RAD appeal provisions were not brought into force until 2012. In that year the scope of the RAD was modestly enlarged to allow for limited introduction of new evidence and the possibility of an oral hearing in relation to that new evidence. The scope of the original (unproclaimed) RAD was strictly a paper review, with no possibility of new evidence or an oral hearing.

The 2012 amendments to the IRPA⁵ set out the current framework of the RAD. Appeals to the RAD are primarily paper-based.⁶ Oral hearings are the exception and may only be held if the RAD determines there is new evidence⁷ that: a)

raises a serious issue with respect to the credibility of the claim; b) is central to the decision with respect to the refugee protection claim; and c) if accepted, would justify allowing or rejecting the refugee protection claim.⁸ Most decisions are made by a single member⁹. After considering an appeal, the RAD may: a) confirm the determination of the RPD; b) set aside the determination and substitute a determination that, in its opinion, should have been made; or c) refer the matter to the RPD for re-determination, giving the directions to the RPD that it considers appropriate.¹⁰ The RAD reviews RPD decisions on a correctness standard, recognizing that deference may be accorded when the RPD has a meaningful advantage with respect to the assessment of the credibility or weight of oral evidence.¹¹

The introduction of the RAD provided a new appeal body but left access to the Federal Court under prescribed circumstances for some claimants not satisfied with a RAD decision. There are differences between an appeal to the RAD and judicial review at the Federal Court.

	RAD	Federal Court
Leave	Not required. Most RPD decisions can be appealed to the RAD	Required. Is based on a determination on whether the applicant has a “fairly arguable case”
Grounds	Question of law, of fact or of mixed fact and law	Acted without jurisdiction; failed to observe a principle of natural justice; erred in law; erroneous finding of fact made in a perverse or capricious manner; etc.
Standard of review	Correctness, but may show some deference on credibility issues	Reasonableness, but correctness for some issues
Outcome	RAD can <i>inter alia</i> substitute its own decision for a decision made by the RPD	Federal Court can only remit a case to be re-heard by the RPD or the RAD

As an expert adjudicative tribunal, the RAD operates differently from a civil court. The distinguishing structural characteristics of the operational environment in which the RAD functions which differ from a civil court include: an exclusive mandate; a narrow field of rights; and, arising from that narrow field, a large volume of rights disputes.¹² These characteristics are reflected in the IRPA, which states that the RAD “shall deal with all proceedings before it as informally and quickly as the circumstances and the consideration of fairness and natural justice permit.”¹³ These structural characteristics, combined with less procedural and evidentiary formality,¹⁴ support a system that should be “fast, fair and final”. This was argued by Peter Showler, former Chair of the IRB¹⁵, adopted by the Yeates Report as a “useful measure of the asylum system”,¹⁶ and, most importantly, is an integral component of the statutory scheme which governs the RAD.

The Yeates Report is critical of the IRB: “it is clear that the system as a whole today is not meeting its timeliness goals nor goals on finality of negative outcome”.¹⁷ Experience over the past five years suggests that the RAD is not particularly fast, and in 2015 and 2016 cases at the RAD took longer than at the RPD. RAD cases are being referred back to the RPD for redetermination as the RAD is unable to finalize a small but significant proportion of decisions. The vast majority of failed claimants at the RAD then proceed to the Federal Court, “making ‘final’ a somewhat distant goal”.¹⁸ I note that these statistics are now out of date, for example, the percentage of the total of finalized appeals being referred to the RPD by the RAD dropped to 9.5 percent in 2018 from 17.4 percent in 2015.¹⁹

Challenges Facing the Refugee Appeal Division

The Yeates review was commissioned because of lower-than-expected productivity at the IRB before the latest surge of claims. The IRB had already responded with an action plan in 2017 to improve processing efficiencies²⁰ that included initiatives to reduce formalities, improve case management, institute electronic document submission, and implement new staffing and performance management initiatives. This was complemented by a comparative analysis²¹ with other Canadian administrative tribunals and international refugee systems that made additional recommendations for improvements.

It is clear that in order to effectively play its role in the refugee determination system, the RAD must improve its performance. To that end the RAD’s objectives for 2019 are:

- Foster a culture that is national, informal, strategic and committed to achieving the RAD’s mission of simple, fast, fair, and final decisions;
- Build a RAD-RPD culture that respects the independence of each division yet leverages their proximity to maximize the efficiency and efficacy of refugee determination at the IRB;
- Deliver on its mandate to correct errors in RPD reasons and build a cohesive body of refugee law jurisprudence that improves the consistency and quality of RPD and RAD reasons; and
- Increase productivity to match or surpass the number of finalizations that parliament anticipates given annual funding levels.

During the year I have been a RAD member I have witnessed changes in the areas of information technology, jurisprudence, appointments, and staffing—all designed to promote RAD productivity. The RAD is making better use of information technologies in many areas. My work is a good example. I work exclusively with electronic files. The evidentiary records of the RPD and the appellant are scanned, with both audio recordings and transcripts of the RPD hearings. I can easily access the necessary databases (IRB and external) to ensure review of important support documentation, including: current and archived National Documentation Packages; IRB Chairperson's Guidelines; RAD and Federal Court jurisprudence; and legislation, regulations, rules and practice notices.

The RAD is building its jurisprudence. "Reasons of interest" are decisions that the IRB deems noteworthy for meeting one or more of the following criteria: model a practical or expedient approach to an issue; demonstrate a novel or evolutionary approach to an issue; thoroughly assess a complex issue; model excellence in reasons writing; or respond to a timely or emerging issue. "Jurisprudential guides" are policy instruments that support consistency in adjudicating cases which share essential similarities and serve to build a division's jurisprudence. The RAD added three more reasons of interest in 2018, for a total of seven decisions and one more jurisprudential guide for a total of four.²²

A significant number of new Governor-in-Council appointments have been made, and the RAD hopes to have a full complement of 76 decision makers for the first time by mid-2019. To support new members, highly qualified staff have also been hired, including legal counsel, refugee support officers, and assistants to members. The opportunity is ripe for culture change and innovation at the RAD.

Members are encouraged to check out the International Metropolis Conference, which will take place at the Shaw Centre in Ottawa from 24 to 28 June 2019. Its theme is "[The Promise of Migration](#)".

PAFSO is holding a development day on 13 June 2019 at the Shaw Centre in Ottawa. It is free, but prior registration is required. Contact info@pafso-apase.com

As a RAD member, I am committed to promoting the integrity of the refugee determination system by improving my personal productivity and writing simple, fast, fair, and final decisions. Given the depth and breadth of experience of my member colleagues, new and old, and the quality and quantity of decisions we are producing, I am convinced that RAD members can meet the challenge of increasing our productivity while maintaining the high quality and fairness of our decisions.

Notes

¹ The Act was originally titled *the Immigration Act, 1976*, but it did not come into force until April 10, 1978.

² Bill C-11 was passed in 2001, but the substantial provisions came into force on June 28, 2002.

³ Neil Yeates, *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum*, 10 April 2018 (Yeates Report).

⁴ *Ibid.*, pages 74 and 75.

⁵ *Immigration and Refugee Protection Act (IRPA)*.

⁶ *Ibid.*, section 110(3).

⁷ *Ibid.*, section 110(4).

⁸ *Ibid.*, section 110(6).

⁹ *Ibid.*, section 163 unless the Chairperson thinks that a three-member panel is necessary.

¹⁰ *Ibid.*, section 111(1).

¹¹ *MCI v. Huruglica*, 2016 FCA 93

¹² S. Ronald Ellis, *The Corporate Responsibility of Tribunal Members*, 22 C.J.A.L.P., p. 9.

¹³ IRPA, section 162(2).

¹⁴ Several provisions demonstrate less procedural formality, for example: IRPA, sections 165, 171(a.2) and 171(a.3) and RAD Rules 52 and 53.

¹⁵ Peter Showler and Maytree, "Fast, Fair and Final: Reforming Canada's Refugee System", September 2009, <https://maytree.com/wp-content/uploads/FastFairAndFinal.pdf>

¹⁶ Yeates Report, page 24.

¹⁷ *Ibid.*, page 36.

¹⁸ *Ibid.*, page 25.

¹⁹ <https://irb-cisr.gc.ca/en/statistics/appeals/Pages/index.aspx>.

²⁰ IRB Plan of Action for Efficient Refugee Determination, July 2017.

²¹ D. Ewart, *The IRB in Context: Comparing Tribunal Efficiency across Subject Matter and Jurisdictional Lines*, September 30, 2017 (Ewart Report).

²² <https://irb-cisr.gc.ca/en/decisions/Pages/index.aspx#rad-tab>.

Report of the House of Commons Standing Committee on Citizenship and Immigration “Responding to Public Complaints: A Review of the Appointment, Training and Complaint Processes of the Immigration and Refugee Board”

Anne Arnott

Anne Arnott is a retired immigration foreign service officer with 34 years of service in the immigration field, 16 of them spent abroad.

Between February and September 2018, the House of Commons Standing Committee on Citizenship and Immigration (CIMM) reviewed the appointment, training and complaint process of the Immigration and Refugee Board (IRB). In [its summary report](#), CIMM states:

Decision makers of the IRB are expected to produce fair decisions quickly. They are also subject to codes of conduct that obliges [*sic*] them to act professionally, fairly and with integrity. Recently, cases have surfaced of board members violating these behavioural guidelines. Along with violations, there have been allegations of insensitivity of members and a complaint process that has been reported to be lacking consistency and transparency.

The review resulted in eight recommendations, to which the government has responded, stating that it strongly supports the report and recommendations, “acknowledging that it must work hard with the IRB to maintain the high expectations placed on the Board.”

In its recommendations, CIMM supports the current IRB appointment process in which merit-based appointees are screened and then hired as public servants for the Refugee Protection Division and the Immigration Division, and as Governor-in-Council (GIC) appointees for the Refugee Appeal Division and the Immigration Appeal Division, but it suggests that this practice be reviewed in three years. The [government response](#) notes the benefits of the new approach for GIC appointments introduced by the government in 2016.

Other recommendations focus on improving the personal suitability of proposed members, in terms of their awareness and understanding of discriminatory conduct and the standard of behaviour that they must model. The government notes that this objective will be further reinforced by updating members’ selection process and probation tools, emphasizing that significant attention in hiring is already paid to personal suitability and open-mindedness, ethical standards, integrity, and impartiality in multicultural and gender issues. CIMM recommends that the Privy Council Office (PCO) make all possible speed in filling vacancies on the Board. Improved, continuous training is the focus of other recommendations. The government supports these goals, stating that work is under way to “accelerate improvements to sensitivity training, cultural training, credibility assessments, reason writing, and oversight and governance of the learning function for decision makers”, and notes that all decision makers are subject to annual performance objectives and reviews.

The report further recommends that the PCO establish an independent federal review board to address complaints against all federally appointed adjudicators. The government supports this point in principle but notes that changes to the IRB complaints review process were introduced in December 2017 and that, as quasi-judicial decision makers, members must be able to make decisions without influence or bias (and without the appearance thereof). CIMM also recommends that the code of conduct for IRB members be amended.

The report concludes with an instruction to the IRB to report back to the committee in February 2019 on the status of complaints against members brought under the current complaints process. The IRB is also to conduct a comprehensive review of the current complaints, “with an emphasis on the need for independence in the complaints investigation and adjudication process within three years”. The government agrees that the former complaints mechanism was unclear and confusing, highlighting again that it had been replaced in December 2017. The government will ensure that the requested review is carried out by 2021-2022.

The [full texts of the report and the government response](#) can be found on the House of Commons website for the 42nd Parliament, 1st Session.

Annual General Meeting, Thursday 17 October 2019

The 2019 CIHS annual general meeting will be held at St. Anthony's Soccer Club, 523 St. Anthony Street, Ottawa. St. Anthony Street runs off Preston immediately north of the Highway 417 overpass. The club is wheelchair accessible and has free parking. Guest speaker to be announced.

A cash bar will be open at 6:00 pm, and the meeting will come to order at 7:00 pm. The meeting will be accompanied by an excellent Italian buffet at the cost of \$40. Students are particularly welcome and pay half price. We are looking forward to greeting new members and old and extend a special invitation to any members from outside the National Capital Region who happen to be in Ottawa.

Please RSVP rgirard09@gmail.com, info@cihs-shic.ca or call 613-241-0166.

In Memoriam

Cross Jim

Remembered by Ian Glen

I was sad to read that Jim Cross has died. He was such a gentleman and did so much to lead staff on the preparatory work for the *Immigration Act*, 1976.

Vines, Murray

Remembered by Rob Vineberg

Murray Vines, one of the foreign service class of 1973, passed away on 29 December 2018, at the age of 68. Murray was posted to Manchester before he resigned from the foreign service. He had studied psychology and returned to this field. Early in his career, he taught at the Northern Alberta Institute of Technology in Edmonton and then at the Southern Alberta Institute of Technology in Calgary. Later in his career, he specialized in Industrial Organization and Career Transition. He established his own consulting firm and taught in the Business and Management Certificate Programs at the University of Calgary. Murray was diagnosed with pancreatic cancer in September and his health deteriorated quickly. However, he was able to hold on long enough to celebrate Christmas with his wife, Lynne Cunliffe, his two children, Erin and Chad, and his four granddaughters.

Thanks to a Great Editor

Mike Molloy

On behalf of the Board and Bulletin readers, I want to thank Valerie de Montigny for her editorship of our flagship publication since 2013. Valerie took up the challenge when the Bulletin needed to change its approach and production values. She worked diligently to see the lay-out changes through in collaboration with our webmaster, Winnerjit Rathor. We now have a stronger editorial approach to preparing each issue, and Valerie has worked well with a wide range of contributors to ensure articles of quality that are often complemented by visual elements adding substance to the stories told. And like "newsies" of old, she saw through the distribution of each Bulletin to readers, and worked with Winnerjit to ensure that the on-line version was searchable. Valerie has also been an active member of the CIHS board and will continue on as a member. We thank her for this much appreciated contribution to the Society!

At the same time, I am pleased to announce that Diane Burrows will take over the Bulletin editorship. Diane has been a CIHS member for some years and recently retired from IRCC. We welcome her to the team.

CIHS thanks its corporate members - IRCC, P2P and Pier 21 - for their significant support as well as its life and annual members. All these contributions allow us to pursue our objectives and activities.

The Canadian Immigration Historical Society (www.CIHS-SHIC.ca) is a non-profit corporation registered as a charitable organization under the Income Tax Act.	The society's goals are: - to support, encourage and promote research into the history of Canadian immigration and to foster the collection and dissemination of that history, and - to stimulate interest in and further the appreciation and understanding of the influence of immigration on Canada's development and position in the world.	President - Michael J. Molloy; Vice-President - Anne Arnott; Treasurer - Raph Girard; Secretary - Gail Devlin; Editor - Valerie de Montigny; Members at large – Diane Burrows, Brian Casey, Roy Christensen, Peter Duschinsky, Charlene Elgee, Kurt Jensen, Gerry Maffre (Communications), Ian Rankin and Robert Shalka Member emeritus - J.B. "Joe" Bissett IRCC Representative - Randy Orr Webmaster: Winnerjit Rathor; Website translations: Michel Sleiman
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