

After Word: Convention Refugees and the Canadian Asylum System 1

The central theme of these stories is the great difficulty and sometimes impossibility of deciding refugee claims accurately. It is a difficulty shared by the refugee and the decision-maker as well as the other participants within the refugee hearing: legal counsel, the Refugee Claim Officer, the interpreter, although the burdens are not shared equally. The refugee is the central figure, with the most to lose or gain and with the primary obligation to prove her claim. The IRB member, far less fearful than the claimant, still has the immense moral and legal responsibility of making the correct decision.

The hearing itself is a crucible where fact and fiction, communication and miscommunication, fear and courage, passion and indifference, logic and bias, insight and ignorance, intermingle and combine to form a story which may or may not capture the truth of the refugee's experience. Every hearing is a human drama with its players and its outcome, sometimes predictable, often surprising and occasionally shocking. There is great emotional intensity due to the importance and uncertainty of the decision for the refugee and the subject matter of the testimony, much of it concerning persecution and its myriad forms of suffering and humiliation. There may also be a lingering sense of farce when the witness does not appear believable, words and gestures lose their power to persuade and testimony becomes performance, the hearing, a hollow drama with an unavoidable conclusion.

By way of confession, this book has both a didactic and advocatory purpose. The stories seek to convey the realities of the hearing room and implicitly describe the challenges confronting refugees and any institution that must judge them. If Canadians wish to criticize or change their asylum system, whether citizens or parliamentarians, they should first understand it. In contrast to the stories, this Afterword provides a more explicit description of Canada's refugee system, including its strengths and weaknesses. It also argues that there is an urgent need for improvement and proposes some changes that will strengthen the integrity and viability of the system.

The UN Convention relating to the Status of Refugees

The *UN Convention Relating to the Status of Refugees* (“the Convention”) was adopted by the United Nations in 1951¹. The core of the Convention, Article 33, is a promise that the signatory nations will not return any refugee to her home country if she could be persecuted there. In the refugee business, this is known as *non-refoulement*. There is a second series of promises, that the signatory nations will provide a refugee with care and protection such as the right to employment, education, justice, religious freedom and other normal civil rights available to legal residents. The third promise is implied: that the signatory countries will not expel a refugee claimant until they can fairly decide whether or not he or she is a Convention refugee needing protection. Not all countries fully comply with this final provision. With a few exceptions, Canada does.

Canada did not ratify the Convention until 1969. For good reason. With ratification, Canada surrendered its sovereign authority to turn certain foreigners away from its shores whenever it chose to do so. Nations do not like to give up power unless they are getting something tangible in return. A trade agreement for example. You accept my goods, I will accept yours. You recognize my passport, I will recognize yours. Amongst sovereign nations, it’s a tit for tat world. The Convention is different. It is a promise not to turn away strangers from our door if they need protection, not because other nations will accept our refugees in exchange but because it’s the right thing to do.

In that sense, the Convention is a high-minded document. It was drafted in the aftermath of World War II by nations still bruised by post-holocaust guilt, conscious of having denied entry to pre-holocaust Jews. It was also a companion document to the Universal Declaration of Human Rights which celebrated the rights and inherent dignity of the individual in relation to the state. The Universal Declaration also stated that everyone had the right to seek asylum from persecution.²

In 1951, Western democracies were ideologically opposed to the Communist states and were

eager to grant asylum to those few freedom-loving souls who successfully escaped from harsh, totalitarian regimes. That's not the high-minded part. Others will tell you that none of it is particularly high-minded, at least from the view of the European nations. They will say that the Convention is a burden-sharing agreement, the burden being the human detritus of the holocaust and massive displacements related to the Second World War, the thousands of stateless and homeless, still bound in camps or wandering aimlessly over shattered Europe. For most of the original signatory nations, their promise of protection was limited to victims of "events occurring in Europe before 1 January, 1951". Only in 1967, did the signatory nations expand the application of the Convention to anyone fearing persecution anywhere at any time.³

Although the grounds for protection and the duties of the host state in caring for asylum seekers were closely negotiated during the drafting of the Convention, scant attention was given to the evidentiary problems of deciding who was a refugee. Wouldn't it be obvious? The repressive nature of a state and the cruelty of its security apparatus would surely be well known. The claimant, an activist opponent of the state, would have the torture marks or the political reputation to easily explain his or her flight to freedom. Consequently, the Convention says nothing about the *process* of deciding who is a refugee. That was left up to the individual nations.

Currently there are 141 signatory nations to the UN Convention. Some have no formal system for deciding refugee status, some have rudimentary systems dispensing extremely rough justice based as much on government policy as on the merits of the refugee claim, some, in particular some of the African nations, have rudimentary systems that are extremely practical and effective in dealing with immense volumes of refugees, and some, including all of the Western industrialized nations of the world, have highly developed refugee systems based on complex administrative structures and quite legalistic interpretations of the Convention refugee definition. Unfortunately legal sophistication does not ensure a just result and is sometimes the means by which nations engineer unjust results.

The definition of a Convention refugee

Most people understand the common definition of a refugee: someone who flees harm in search of refuge. The literal meaning contains two separate notions: running away from harm and seeking protection. Some people think of legally-recognized refugees as those fleeing political persecution. That assumption is much too narrow. There are many kinds of refugees fleeing many different forms of harm. On the other hand, the legal grounds for granting protection are not limitless. Not all who legitimately fear harm and seek protection are given it. For the purposes of granting asylum, countries define refugees in various ways but the primary ground for granting protection is based on the definition contained in the UN convention.⁴ The convention definition forms the primary basis for granting refugee protection under Canadian law.⁵

The Convention contains a legal definition of a refugee that includes some asylum seekers and excludes others. Essentially, the definition states that a refugee is someone outside her home country who fears persecution because of her race, nationality, religion, political opinion or membership in a particular social group (for example, a labour union). The definition contains several limits on who merits protection. Four are particularly important:

1) The nature of the harm. The concept of “persecution” requires that the harm be serious and persistent. It does not necessarily have to be death or torture but it cannot be minor.

2) The reason for the persecution. It is not only necessary for a claimant to prove that she would be persecuted but it must be for one of the five reasons contained in the definition. I fear being arrested or shot *because* I am a member of a particular tribe, religion, political party, etc. Those fleeing natural disasters such as flood, famine, drought or personal disputes would not qualify. In some countries, those fleeing civil war and culturally accepted forms of violence would not be accepted.

3) Future harm. The claimant must prove that there is a reasonable possibility she *could be* persecuted if she returned to her country. Protection is only offered to prevent future harm, not

compensate for past harm. It is not even necessary the refugee has suffered persecution on the past. A threat of persecution is sufficient if it reasonably possible that the threat would be carried out.

4) State protection. Even if a refugee fears persecution, she must always show that her home country is unable or unwilling to protect her. This is a particularly important element when the persecutor is a non-state agent.

Here is the full definition. It may strike you as legalistic, complex and even incomprehensible. If it is difficult for you, think of refugees without education or English/French language skills who try to understand whether or not their fear of persecution fits within the acceptable legal categories.

A Convention refugee is any person who:

a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, or by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

b) has not ceased to be a Convention refugee by virtue of subsection (2)

Subsection (2)

A person ceases to be a Convention refugee when

(A) the person voluntarily re-avails himself of the protection of the country of his nationality;

(B) the person voluntarily reacquires his nationality;

(C) the person acquires a new nationality and enjoys the protection of the country of that new nationality;

(D) the person voluntarily re-establishes himself in the country that the person left, or outside of which the person remained, by reason of fear of persecution; or

(E) the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist.

Subsection (3)

A person does not cease to be a Convention refugee by virtue of paragraph (2)(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution.⁶

To add to the complexity, not all refugee-receiving countries interpret the definition in the same way. The differences are profound, affecting large volumes of claimants. Both the Canadian courts and the IRB have developed liberal interpretations of the definition which should be a source of pride, not because they are liberal but because they strike closer to the truth of identifying those who genuinely need protection. Other countries have relied on technicalities within the definition to refuse refugees with a legitimate fear of serious harm. For example, some countries have denied protection to those fleeing civil war, no matter how high the likelihood of death or injury. Some countries have required that the persecutor be a state agent even though many refugees flee countries where there is no longer a viable government to protect them and their persecutors are uncontrolled militias or dominant ethnic or religious groups.

Many of the Canadian interpretations that were seen as ground-breaking in the early 1990's have become the standard for most of the industrialized countries. Recognition of persecution based

on gender or sexual orientation, persecution by non-state agents and the persecution of particular groups of refugees caught in civil wars have all been more broadly recognized by most countries, often citing Canadian decisions. The few exceptions, such as Germany and France on some issues, are broadly seen as recalcitrant holdouts who are reluctantly moving toward more reasonable and compassionate interpretations of the definition.

In 2001, Canada expanded its refugee definition to include “persons in need of protection”. This second ground for protection was intended to fill in some perceived gaps in the Convention definition. Few claims have been granted solely under the secondary definition although it has significantly added to the legal work of lawyers and IRB members. Again, from the view of refugees, consider the following definition:

A person in need of protection is a person in Canada whose removal to their country or country

of nationality or, if they do not have a country of nationality, their country of former habitual

residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning

of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves

of the protection of that country,

(ii) the risk would be faced by the person in every part of the country and is not faced

generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard

of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or

medical care.⁷

There are sound legal and policy reasons for carefully defining various categories of protection but the final result, dressed up in the current vogues in legislative drafting, is a tortured prose that is virtually impenetrable to lawyers, lay persons and certainly, refugees.

Making a Refugee Claim in Canada

Canada accepts approximately 25,000 refugees per year through two separate refugee streams, an Overseas Program and an Inland Program. In the Overseas Program, refugees are selected by visa officers in Canadian missions abroad after an interview. Those decisions are rarely controversial since there is no public scrutiny. Refugee applicants are not represented by legal counsel and visa officer decisions are not ordinarily subjected to judicial review in Canada. In addition to the claimant's fear of persecution, the visa officer will also consider the claimant's ability to "successfully establish in Canada". A negative decision, whether just or not, will quietly send the claimant back to a refugee camp or into those vast, itinerant populations of displaced persons floating in impoverished, quasi-legal status throughout the Third World.

This book concerns Canada's second and more controversial Inland Program for those who claim refugee status in Canada. Canada's refugee status determination system has been frequently praised by the UNHCR and other international bodies as a model for other countries to follow. It has often been referred to as the "Cadillac" of refugee systems. Other critics have called it the most expensive and most porous of systems. As usual, the truth lies somewhere in the middle. The Canadian system has merited neither all of the praise nor all of the criticism.

Here is a summary view of the refugee claim process. If a person arrives in Canada, whether by air, water or land, she can make a refugee claim at the border. If she is already in Canada, she can make a claim at any immigration office. The claimant is photographed, finger-printed and interviewed by an immigration officer. The interview focuses on security information and personal identity: who you are, your citizenship, where you have been, essentially information to assess security and criminality risks. The claimant is also asked why she fears persecution. At this stage, the claimant does not normally have a lawyer. If required, an interpreter assists, whether by phone or in person. Sometimes the interpreter is a relative or friend. Sometimes the interviewer gets by on the claimant's passable English or French. Interpreters are expensive and difficult to schedule.

After the interview, the immigration officer decides if the claimant is eligible to make a refugee claim. Ninety-nine per cent of claimants are eligible and their claims are referred to the IRB for a refugee hearing. The few ineligible are serious criminals, suspected security risks or the odd person who has already been accepted as a refugee in another country.⁸ The immigration officer does not assess the merits of the refugee claim itself. He has not heard enough information to do that fairly or accurately.

Once determined to be eligible, the claimant is required to fill out a thirty page personal information form(PIF) containing detailed information about her life, names and dates of schools, residences, relatives, jobs, convictions, military service and finally, an explanation of why she

fears persecution. If the claimant is fortunate, she will have the assistance of a decent lawyer. Most claimants cannot afford a lawyer. Legal aid is provided in four Canadian provinces.⁹ However, by the time of the hearing several months later, most claimants will have some form of legal representation.¹⁰ If the claimant delays in sending the PIF, the IRB may declare her claim abandoned.

Once it receives the PIF, the IRB attempts to decide the claim as efficiently and as fairly as possible. If it is a very strong claim, it may be referred to the Expedited Process where it can be decided in a matter of weeks after an interview rather than a full hearing. If there is a possibility that the claimant was herself involved in the commission of human rights abuses or serious criminal acts, Citizenship and Immigration Canada (CIC) may choose to participate in the hearing to oppose the claim. In certain situations, CIC may suspend the claim process and seek an order declaring the claimant ineligible for a refugee hearing.

If there is as a need for specific evidence, such as a forensic examination of identity documents or research into specific events in the claimant's home country, the Board will seek the appropriate information.. The Board will also seek to narrow the issues and exchange all of the documentary information with the claimant's legal counsel prior to the hearing so that the testimony can be focussed on the key issues. Hearing room time is precious and the IRB expects members to complete most hearings within a half day. Exceptional cases may, however, require several days of testimony and argument. Very complicated cases may be adjourned and resumed several times. The half-day rule for hearings is only an administrative guideline. Members have an ethical obligation to ensure that all of the relevant evidence is heard before making a decision.

From the date of her initial claim, it will be a matter of months and possibly more than a year before the claim is heard. The IRB is a busy place, receiving more than 30,000 refugee claims per year.¹¹ Unavoidably, it is, to some degree, a justice factory. Delays and line ups are inevitable. At

the hearing, the claimant will answer questions about her claim, posed by her lawyer, the RCO, and the Board member(s). Most cases are decided on the credibility of the claimant along with the documentary evidence about the claimant's country. There are rarely supporting witnesses. After the testimony, the legal representative will make submissions stating why they think the claimant is, or is not, a refugee. Often the RPO will also comment on the evidence, usually in a more neutral manner.

The Board member will then render a decision with reasons, either orally from the bench or later in writing. The member is fully independent and has the power to decide the claim based solely on the law and the evidence presented. There is no authority for IRB management or the government to interfere or overrule the decision.¹² The reasons for most negative decisions are written after the hearing since the decision may be reviewed by the court. In theory, CIC may challenge a positive decision but rarely does.

If a claimant is accepted as a refugee, she may apply for permanent residence for herself and her immediate family, including family members who are still abroad. A more thorough security review is completed prior to granting permanent residence. A few refugees are refused permanent residence, usually for minor criminality, but are permitted to remain in Canada since they are not returnable to their country of nationality due to Canada's obligations under S. 33 of the UN convention. Approximately 25,000 refugees from both the Inland and Overseas Programs are granted permanent residence annually, representing approximately 12 % of the annual immigration flow to Canada.

If the claim is rejected, there are still several steps before a claimant is deported from Canada. The claimant has 15 days to apply to the Federal Court for leave for judicial review. If leave is granted (about 10% of applicants are successful), then the court will review the IRB decision. If the claimant does not apply to the court, or if leave is denied, she becomes removable from Canada. However, she may still apply to remain in Canada on humanitarian and compassionate

grounds. She may also apply for a pre-removal risk assessment (“PRRA”) to decide whether she would be subjected to any serious harm if she were involuntarily removed to her country. She may also decide to leave Canada voluntarily although claimants without valid travel documents do not have any means of legally leaving Canada.

The business of claimant removal is a difficult one. Refugee advocates say that the humanitarian and pre-removal risk assessments are perfunctory administrative reviews with minuscule acceptance rates. They allege that claimants with genuine fears do not receive a fair hearing. Delays in processing impose years of uncertainty and painful separation from families abroad. From a different perspective, other critics of the system complain that these additional steps simply cause more delay, that the process can be strung out for years and that the majority of refused claimants, most of them fraudulent, manage to remain in Canada because the process is too cumbersome and CIC is too inefficient. They allege that the low removal rate of failed claimants makes a mockery of the entire refugee system. From a third perspective, CIC officials say that they have lacked sufficient resources in the past to remove refused claimants, that the removal rate has improved in recent years and finally, removal is very difficult because of international law and the lack of co-operation from some third world countries.

There is truth and exaggeration in all of these statements. It is very difficult to obtain accurate and meaningful refugee removal statistics for Canada or any of the developed countries.¹³ Certainly CIC removal programs were at one time very inefficient and there has been significant improvement in the past several years. More could certainly be done including effective time management of the entire claim process, promoting voluntary removal programs and expediting removals to high-volume refugee flow countries such as Costa Rica where state protection is available and almost all of the claims are without merit.

Canada’s asylum system: Criticisms and kudos

Canada's refugee system has been misunderstood and misrepresented by the media, the government and the public for many years. Whether you measure on a per capita or total volume standard, Canada's received refugee flows are neither the highest nor lowest amongst the developed nations. We usually place in the middle of the scale.¹⁴ Compared to nations of the developing world, in particular some African and Middle Eastern countries, our refugee numbers are disproportionately small.¹⁵ Over the past decade, the number of refugees, persons outside of their country seeking protection, has normally ranged from 12 to 14 million people and most of them, more than ninety-five per cent, have been located in the world's developing countries.

Canadians have good reason to be proud of their refugee system. In many ways, it works well. They also have cause for discomfort and even embarrassment. There are obvious and correctable flaws in the system that result in too many bad decisions. The consequences of refugee decisions, both negative and positive, are too important not to seek obvious improvements.

Genuine refugees confront many inherent impediments to proving their claim: lack of identity documents, lack of documentary evidence, lack of witnesses and most seriously, an inability to testify effectively due to language, culture, past traumas and current fears. By granting claimants a quasi-judicial hearing before an independent decision-maker, refugees normally have a full opportunity to tell their story. It is a system that makes allowances for a refugee's inability to articulate her fear of persecution and recognizes the importance of establishing a solid evidentiary base for the decision.

The Canadian refugee claim process is unique among nations. We are the only country that seeks to make the initial decision the best and definitive one. In most countries, a government official, normally an immigration or border official, will initially decide the claim after a brief interview. Often the claimant does not have the time, opportunity or understanding to fully present her case. Decisions are relatively quick, based on meagre evidence and a sketchy legal and factual analysis. The decision-maker is often poorly trained, ill informed and not fully independent, meaning that

the claim may be decided according to government policy rather than the facts and the law. Most of the European nations follow that initial decision with appeals to administrative tribunals and courts resulting in high overturn rates, inefficiency and delays in removal of refused claimants.

All of these countries have very low acceptance rates of Convention refugees but then grant alternative forms of protection that only grant the claimant temporary protection. The refugee's status is periodically renewed until circumstances change in her country, and then she is sent home. At first glance, such systems appear to make fast decisions with high rejection rates. A closer look discloses lengthy, complex asylum systems that yield ambiguous, unfair and inefficient results.

One of the most unjust criticisms of the Canadian system has been the repeated comparison of the IRB's high acceptance rates to the far lower European rates, with the unstated presumption that the Europeans got it right. Such comparisons do not include the secondary grounds for protection in Europe. They also do not account for the differences in refugee flows or the European determination to prevent excessive immigration levels.¹⁶

In Canada, claimants receive a thorough hearing where they are usually represented by legal counsel, an interpreter is available and they have the opportunity to testify, call witnesses and submit documentary evidence to support their claim. In addition, the IRB submits documentary evidence about the claimant's country, recognizing that claimants often do not have the skills and means to obtain all of the relevant evidence. The IRB's country research centre is world renowned for the quality of its reports. The system is intended to give claimants a fair and efficient hearing where they truly do have a full opportunity to explain why they have a fear of persecution.

Unfortunately our national pride must be tempered with some honest humility. We excel partially by comparison to the other developed countries who have been deceitfully stingy in granting refugees a legitimately fair opportunity to tell their stories. Moreover, there are darker sides to the

Canadian system, most notably our method of selecting our refugee decision-makers, our failure to effectively review negative decisions for error and our failure to provide consistently effective legal counsel for a process which is legally intricate. In the most problematic cases, these three flaws re-enforce one another; incompetent or mediocre IRB members, hindered by inadequate counsel, can produce incorrect decisions that are not caught by the limited form of judicial review available in the Federal Court.

The federal cabinet holds the sole authority to appoint members to the Board. Unfortunately, not all members have been as competent as they could and should be. From the beginning of its history in 1989, the Board has been burdened by patronage appointments. I define patronage narrowly as the appointment or re-appointment of politically-connected members who are not able to do the job. Obviously, the finest judicial process in the world is neither fair or effective if the decision-maker is incompetent. Over the years the Board's morale and reputation have suffered because of a minority of weak members making bad decisions.

Poorly decided cases, both positive and negative, rarely reach the public eye. For the protection of refugees, hearings are confidential. Until 1999¹⁷, members were not required to provide reasons for their positive decisions unless requested to do so by the Minister or the claimant. Badly decided positive decisions rarely attracted the attention of the Minister and were seldom challenged. Due to the high volume of claims and the limited judicial review process, many incorrect negative decisions also escaped public and judicial scrutiny. Sloppy reasoning and shoddy hearing practices were not always identified and corrected by the courts or by the IRB. With relative impunity, the federal cabinet was able to re-appoint notoriously weak or biased members. Covert political influence trumped member evaluation. Excellence was not necessarily rewarded, political connection was. The cumulative effect, particularly in the early history of the Board, led to a culture of cynicism for both members and the public service staff within the Board.

Patronage is principally driven by the regional caucuses of the governing party. Appointments are normally made on a regional basis to the regional offices of the Board, the two largest being Toronto and Montreal. IRB appointments are eagerly sought and the power to make them jealously guarded. Intense horse trading occurs between regional ministers who have no subsequent accountability for the performance of their nominees or apparently little interest in the Board's effectiveness. They do not see or wish to see the institutional and individual damage caused by bad appointments. Their interests are political and remote, not operational and immediate.

Incrementally, the government has improved the appointment process, placing more emphasis on the merit of applicants and granting the Board a greater role in the process. But the shadow of patronage still hovers over the IRB as the federal cabinet continues to delay or deny the re-appointment of superior members while re-appointing manifestly mediocre ones. Similarly, strong candidates without political credentials are repeatedly passed over and many potential candidates do not bother to apply. Such a practice continues to undermine the morale of the entire IRB and the effective authority of Board management. Given its early history, it is difficult to restore the full integrity of the Board with such reluctant half measures.

However the patronage issue should not be over-stated. Over the past several years, the majority of IRB members have done a very difficult job well, hearing thousands of cases per year with an admirable record of consistency. Despite the cynicism and indifference of political overseers, a remarkable number of Board members and staff have served with great dedication. Their loyalty and commitment have been founded on the importance and nature of the work itself, the work of deciding who needs protection and who does not. There is great power in the stories of genuine refugees, not only in the horror and pathos of their suffering but in the courage and fortitude that so many display. Despite the unctuous pieties of the politicians and Public Service mandarins, many IRB members and staff have continued to believe in the humanitarian values underlying the Board's work.

The second weakness in the Canadian refugee system is the lack of a meaningful appeal for refused claimants. An effective appeal is necessary. Even good members make mistakes and poor members make many more, some of them quite egregious. This weakness was exacerbated by the new *Immigration and Refugee Protection Act* which mandated that refugee claims be decided by a single member instead of two member panels where a split decision would be decided in favour of the claimant. Unexpectedly, the government failed to implement the new appeal process in the Act which was intended to provide a safety net for single member decisions. Refused claimants are limited to the old system of asking the Federal Court for permission to apply for a judicial review of the Board's decision. Approximately ninety per cent of applicants are denied permission, after an unavoidably cursory review of the application by the court which does not give reasons for its refusals.¹⁸

Judicial review, itself, is not a full appeal. The court has a limited authority to quash the IRB decision if it is incorrect in law or "patently unreasonable" in its findings of fact. Even if the court does quash the decision, it may only return it to the IRB to be heard by a different decision-maker. The court cannot substitute its own decision. Most international agencies, including the UNHCR, criticize Canada for not providing an effective appeal for refused claimants.

A third weakness in the Canadian system is the inconsistency of legal counsel. It is ironic that many of the procedural protections of the quasi-judicial process, due to their complexity, make the process less accessible to refugees who lack the assistance of skilled counsel. The claimant has a right to counsel at the hearing but only at her own expense. Most refugees cannot afford a lawyer. Only four provincial legal aid programs currently pay for legal counsel. At the hearing, the great majority of claimants have some form of representative, most often a lawyer but sometimes a consultant, a support agency worker or a relative. Many representatives lack the training and skill required to represent the claimant effectively.¹⁹ Too many claimants proceed with badly prepared cases where important documentary evidence has not been obtained, where mistakes and omissions in the PIF have not been addressed before the hearing, where potential

witnesses have been ignored and where claimants have not been adequately prepared to testify at the hearing.

There are some excellent refugee lawyers providing impeccable legal service for very modest wages and many less diligent ones who continue shoddy legal practices with near impunity. Provincial law societies have shown little interest or effectiveness in regulating the problem. Their disciplinary proceedings are complaint driven. Refused refugee claimants facing deportation lack the capacity to pursue a complaint. With a few notable exceptions, refugee consultants lack adequate legal training and advocacy skills. Many of them prey on claimants of their own ethnicity or language group who are unable to assess their competence and naively believe them to be more sympathetic to their case.

It is extremely difficult to identify and root out the causes of counsel incompetence since counsel are also protected by the confidentiality of the hearing process. The IRB's efforts to institute a code of conduct for counsel to place more accountability on legal representatives was not supported by the Minister of Citizenship and Immigration.²⁰

In modest ways, the presiding Board member's inquisitorial role can offset the failures of counsel. In legal terms, a refugee hearing is an *inquiry*, where the decision-maker can directly engage in the gathering of evidence in a manner not available to a judge in an adversarial proceeding. With the assistance of RPO's and Board researchers, members can request additional evidence that is essential for their decision or take a more direct role in the questioning of the claimant. On the other hand, the role of legal counsel can be critical. They have far earlier and more intimate access to the claimant to understand the true nature of the claim and to gather critical evidence to prove it. Their advocacy role is essential when the member does not clearly understand the evidence or the law. Board members have a far easier decision where a claim is well prepared and well presented and undoubtedly, many claims have been incorrectly rejected because of inadequate legal representation.

Asylum reform

Along with virtually all of the developed countries, Canada has consistently sought the same goal, “a fast and fair refugee system”. To date, that goal has not been achieved by Canada or any of the developed countries. To Canada’s credit, the greater emphasis has been on the fairness of its process while many of its fellow countries have emphasized speed at the cost of fairness.²¹ The practical measure of “fast” is the time required for the entire asylum process from date of claim to the date of either granting protection or removal of a refused claimant. In that sense, none of the developed countries are fast and few, if any, can provide accurate data about their entire asylum process. A comparable definition of “fair” would be a process that allows the claimant a legitimate and reasonable opportunity to tell her story to an independent decision-maker.

A discussion about asylum policy in the developed countries would be incomplete without acknowledging government preoccupation with the sheer volume of refugee claims.

Unexpectedly high flows can overwhelm asylum systems, imposing unacceptable delays, both from the view of genuine refugees, the public and the government. Excessive delay itself can attract false claimants who hope that a two or three year claim process will allow them to either remain permanently in Canada or at least earn sufficient money to justify their venture.

Within Canada, any proposal for refugee claim reform inevitably invites a question about its “draw factor”. Government officials will always consider whether a proposal will make Canada comparatively more attractive to both genuine and false refugee claimants.

Undeniably, volume can affect the quality of decision-making. High refugee flows can overextend judicial resources causing delays, time pressures and a greater emphasis on administrative priorities rather than judicial ones. Within the IRB, there has frequently been a tension between increased efficiency and maintaining reasonable standards of fairness. At the same time, distinctions between fast and fair can also create a false dichotomy. Many of the IRB’s best initiatives have improved both the quality and speed of decision-making.

Unfortunately, most asylum reforms in Europe, North America and Australia have focussed on denying access to asylum proceedings rather than reforming the systems themselves. Various methods have been employed to deter refugees from coming to a particular country, to intercept refugees before they arrive at borders or to deny them access beyond the border. In Canada's case, those strategies have included increased visa requirements from particular countries, the assignment of Canadian immigration officers to international airports to detect false documents, carrier sanctions on airlines carrying falsely-documented passengers and the Safe Third Country agreement with the United States. Under the agreement, refugees coming from the United States are not permitted to make a claim at a Canadian port-of-entry.²²

Canada has not engaged in some of the unsuccessful deterrence strategies of some countries such as the universal detention of refugee claimants or the denial or reduction of social assistance benefits.²³

The essential criticism of such interdiction policies is that they do not distinguish between the genuine and false claimant. Canada has imposed new visa restrictions on countries such as Zimbabwe when many citizens were fleeing the country with a genuine fear of persecution. Similarly, a person intercepted in Singapore or Kuala Lumpur airport with a false document may well be a genuine refugee who is being turned away in a country that does not grant refugee protection.

Many governments have been attracted by the success of the Australian interdiction program, the so-called "Pacific Solution". In 2001, Australia imposed extremely tight visa controls on all air travel to the country and diverted water-borne refugees to the tiny island of Nauru, a separate country, to have their claims determined there or in Papua-New Guinea. The strategy has been successful in the sense that the refugee flows out of South-east Asia have been choked off. Desperate refugees will risk their lives to reach genuine protection or will even endure years of prison as they did in Western Australia but they will not risk themselves and their families to go nowhere.

The “Pacific solution” also highlights the essential problem. Most of the people on the diverted boats were genuine refugees from Iran, Iraq and Afghanistan who were trapped in Indonesia and Malaysia, countries who are not signatories to the *UN Convention relating to the Status of Refugees*. They must now remain in those countries with no legal status, vulnerable to criminal and government abuses until they find the means to escape to some other country, if they can afford to do so.²⁴ Having first fled persecution and then the destitution and hopelessness of the refugee camps parked on the edges of civil war, they become part of the human flotsam and jetsam, floating throughout the world with no country or organization willing or able to provide them with genuine protection.

The interdiction and diversion of refugees to other jurisdictions is a short-term and cynical strategy that undermines the strength of the Convention and its underlying commitment by the signatory nations to co-operatively share the burden of refugee protection.²⁵ Canada is capable of producing an asylum system that is able to decide claims fairly and efficiently, a system that is capable of deterring excessive flows of manifestly unfounded claims without resorting to extreme interdiction strategies. Here are four obvious reforms that would contribute to that result.

1. Selection of decision-makers

The government, specifically cabinet, must completely remove itself from the selection process. Their interests are essentially political not operational. An efficient system cannot afford that indulgence. The IRB’s best decision-makers have been excellent. They have been capable of producing far more and better-reasoned decisions in less time. The decision-maker, although part of a much larger support team, is the lynch pin participant in the process. A well-designed racing car with a poor driver wastes everyone’s effort. Member mediocrity and incompetence have imposed a large and hidden cost in wasted hearing room time, wasted support services, excessive training, excessive management, inconsistent decisions and worse, bad decisions. There is a pool of potential candidates within Canada with no political connection that could spectacularly

improve IRB performance. Refugee decision-making is too difficult and too important not to use the best available resources.

2. Effective legal counsel

Some Board members and most government officials see lawyers as obstructions to the refugee claim process. Bad lawyers are, good lawyers aren't. Given the complexities of the definition of a refugee and the inherent incapacities of most refugees to gather the relevant evidence or speak for themselves, legal counsel are essential. They are in the best position to frame the essential elements of the claim early in the process and to gather the relevant evidence as quickly as possible. The current system of providing indirect and partial funding for legal aid service through provincial governments who in turn pay for some or none of the necessary legal service has not worked well. Efficient and reliable refugee decisions require skilled, consistent and accountable legal counsel. There are judicare models that can provide it. The federal government must acknowledge its responsibility for refugee determination and directly fund the appropriate model on a national basis²⁶.

3. Appeal process

Hopefully it is apparent from the stories that refugee decisions can be complex, subtle and confusing. No one gets it right all of the time. Yet the outcomes, particularly the negative ones, can potentially threaten a claimant's life, liberty and security of the person. If Canada is going to firmly and promptly return refused claimants to their countries, we must do so with the confidence that they do not have a well-founded fear of persecution. That confidence requires a meaningful review of the original refugee decision. Just to be sure. As any good carpenter would say, measure twice, cut once.

There is no perfect appeal model. Courts tend to be more authoritative but slower, more cumbersome and more expensive. A tribunal model can be faster, procedurally more agile, with a

more specialized expertise in refugee decisions. However, its decisions would be ineffective if the courts insisted on a third level of review. The great majority of refused claimants must be removable after a single appeal decision.

4. Prompt removal

After decisions by the IRB and the Federal Court, refused claimants have additional means of remaining in Canada, notably an application to remain for humanitarian and compassionate reasons and an application for a pre-removal risk assessment as well as applications to the Federal Court to review those decisions. The current process is vague and seemingly interminable. Moreover, it is not viewed administratively as a single process, rather as a series of different administrative stages with little accountability or communication between them.

The asylum process requires integrity and finality. Interminable post-appeal proceedings are unnecessary and render the asylum system vulnerable to abuse.²⁷ Some claimants have genuine humanitarian reasons for leaving their country that do not come within the refugee definition. Such issues must be identified early in the claim process (again with the assistance of legal counsel) and resolved prior to the appeal decision. Once their claim has been denied at the appeal level, the claimant must be promptly removed to their country of origin. The removals program would benefit from more positive and proactive approaches including assisting voluntary returns and even aid programs to assist meritorious returnees.²⁸ Not all refused claimants have intentionally abused the asylum system. For those who have, prompt return to their own country is the most effective deterrent for them and others who would follow.

Conclusion

One of the most gratifying moments for a Board member at the conclusion of a hearing, having understood and accepted the truth of a claimant's fear and suffering, is to be able to tell her that she is accepted as a refugee, that she is safe and will not be sent back to the persecutions of her

previous life. It is a powerful moment, often accompanied by tears from any one of several participants as comprehension slowly or suddenly dawns on the claimant that beyond all of the legal gibberish, she is indeed safe, that ancient fears will no longer rule her life.

At such moments, members understand that they are the spokesperson for their country and that the grant of protection belongs to the Canadian people, not themselves. Such an experience can inspire members to have great pride in a country that has the capacity and willingness to protect the fearful and dispossessed of the world and has the foresight to listen well before deciding. These are not casual emotions. There is a sense of being the point of the pencil for Canada's collective generosity. The liberalism of Canada's refugee law and asylum process is a construction shared by all of its builders: parliament, the courts, the IRB , government, legal counsel and ultimately, the Canadian people.

Canada's asylum system is worth appreciating and saving. It contains intelligence, integrity and compassion that is embedded in Canada's refugee law and finds expression in the hearing rooms of the IRB every day. Undoubtedly there are increasing migration and security pressures that will test the efficiency of any asylum system but the solutions do not lie in wholesale off-shore exclusions of refugees. With sensible reforms, the system can be so much better. The traditions and rudiments are there, the capacity is there and it is again an opportunity for Canada to lead the world in kinder and saner directions.

1. *1951 Convention Relating to the Status of Refugees*, United Nations *Treaties Series*, vol. 189, p. 137.

2. *Universal Declaration of Human Rights*, Article 14, adopted by the General Assembly of the United Nations, Dec 10, 1948.

3. *1967 Protocol Relating to the Status of Refugees*, United Nations *Treaty Series*, vol. 606, p. 267.

4. Two other international accords are also used to grant asylum in specific regions. The Organization of African Unity's *Convention governing the specific aspects of refugee problems in Africa* expanded protection to include all persons who have fled across borders from man-made disasters. The Organization of American States approved a similar definition in the *Cartagena Declaration* in 1984.

5. In June, 2001, the *Immigration and Refugee Protection Act* expanded the refugee definition to include "persons in need of protection". See p.4

6. *Immigration and Refugee Protection Act*, ss. 94 (2) and 95

7. *Immigration and Refugee Protection Act*, S. 97,

8. The *Immigration and Refugee Protection Act* expanded the categories of ineligibility to include repeat claimants who had made previous refugee claims in Canada or claimants who were entering Canada from the United States of America. pursuant to the *Safe Third Country Agreement* with the United States of America which was not implemented until Dec. 2004. See p.14 below.

9. Ontario, Quebec, Manitoba and Alberta legal aid plans fund some refugee claimants. Generally, the legal tariffs for refugee lawyers are extremely low.

10. S. 177 (1) of the *Immigration and Refugee Protection Act* grants claimants a right to counsel but does not require that counsel be a lawyer.

11. In 2001, the IRB received 45,000 claims; in 2002, 39,000; in 2003, 29,000 (numbers rounded to nearest thousand). Over the past 15 years, Canada has received approximately 28,000 inland claims per year.

12. Every rule has its exception. Where there has been an obvious breach of natural justice in a particular claim, the IRB may appoint a different member to re-hear the claim. With a few notorious exceptions, the IRB and the government has been very respectful of the members' judicial independence. In this regard, the government's conduct has been admirable given that the outcome of some refugee claims, of both individuals and particular nationalities, have had potentially serious negative effects on Canada's economic and political interests.

13. Few governments are straight forward about their removal data. In addition, it is extremely difficult to track refugees who are at various stages in the claim process over a period of two or three years. As a generality, it can be said that Canada has traditionally removed fewer than half of its refused claimants.

14. Over a 10 year period, 1992-2001, Canada averaged 29,000 claims per year. The annual flows in Germany (160,000), the USA. (126,000) and the United Kingdom (57,000) were far higher. The Netherlands (36,000), France (28,000), Belgium (22,000), Sweden (23,000) and Switzerland (23,000) were in the same range. All statistics, rounded to the nearest thousand, are based on UNHCR data.

15. In 2002, Canada's total refugee population was 78,000 (claimants and accepted refugees). Iran had more than 2 million, Pakistan more than 1.5 million. China, India, Tanzania, Zambia, Sudan, Lebanon, Kenya and Thailand all exceeded a quarter million.

16. The IRB did seek to compile a more accurate comparison of "protection rates" of various countries to provide a more realistic comparison. Such comparisons are fraught with technical difficulties given the differences in refugee flows, varying time periods for measurement and the different methods of data collection. Despite these variances, the results still provide a more accurate picture than the simplistic comparisons of acceptances under the refugee Convention. Here are some sample comparisons for 2001.

17. Under the *Immigration Act, 1989*, members were not required to give reasons for positive decisions unless reasons were requested by successful claimants or the Minister. In 1999, the IRB implemented a policy requiring reasons for all decisions. That policy became law under *the Immigration and Refugee Protection Act in 2001*. Throughout its history, many of the Board's better members routinely gave reasons for all of their decisions.

18. Approximately 25% of refused claimants do not seek judicial review. Their reasons for not doing so are unknown. Speculative suggestions from lawyers and community workers include false claims, discouragement after lengthy delays and the inability to retain a lawyer for the court proceeding.

19. Approximately 15 per cent of claimants are unrepresented at hearings. It is generally thought that the majority of claimants are represented by lawyers but the IRB does not statistically track different types of legal counsel.

20. Along with new Rules of Practice following passage of the *Immigration and Refugee Protection Act* in 2001, the IRB presented a Code of Conduct to the Minister of Citizenship and Immigration, Denis Coderre, who declined to sign them.

21. "Fast and fair" are of course relative and subjective terms. Some countries render first-level decisions very quickly at the border. However in 2004 more than half of the decisions were overturned on appeal.

22. The Safe Third Country Agreement was implemented on Dec. 29, 2004. Refugee advocates have criticized the agreement since the US interpretation of the Convention is narrower than Canada's and the US detains far more refugee claimants. Refugee claims coming from the US have declined significantly since implementation. Some claimants are exempted from the agreement including: claimants with relatives already legally resident in Canada, claimants from "moratorium countries" which Canada views as particularly dangerous countries and refugees claiming inside of Canada.

23. The most extreme detention policies were instituted by the United States, Australia and New Zealand. Great Britain increased detention and sought to reduce benefits. The United States does not provide claimants with welfare or employment authorizations. There is no evidence that any of these strategies have reduced refugee flows.

24. The United States has also intercepted refugees at sea, particularly Haitians, and forced them to return to Haiti in direct violation of their Convention obligations.

25. At a ceremony in Geneva marking the 50th Anniversary of the UN Convention in January, 2001, the signatory nations unanimously re-affirmed the Convention to be the cornerstone of international refugee protection

26. There are tremendous hidden costs to delays and errors in refugee determination, many of them, such as social assistance, education and social services, are borne by the provinces. A faster, more efficient system can pay for itself although funding would have to be reallocated from other envelopes. It is a question of enlightened self-interest.

27. While experts may agree on the issues, they do not agree on the solutions. For those with a strong interest in potential solutions, a *Summary Report of the Roundtable on Canada's Refugee System*, March, 2004, may be obtained at the website of the Human Rights Research and Education Centre of the University of Ottawa Law School, www.cdp-hrc.uottawa.ca.

28. The Swiss government in particular has undertaken some innovative programs to substantially assist individual refugees and build community infrastructures in regions such as Kosovo.

