

Canadian Refugee Procedure

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1 Canadian Refugee Procedure/**Print** version

This is a book about the legal *processes* involved in claiming refugee status in Canada, focusing particularly on the Refugee Protection Division Rules of the Immigration and Refugee Board of Canada. Tens of thousands of people file a claim for refugee protection in Canada every year. The ensuing process that they navigate is governed by the set of laws described herein.

2 Preliminary

3 About this text

There are many books about the substance of refugee law, both Canadian and international. They cover subjects such as what it means to have a well-founded fear of persecution and when a claimant has access to adequate state protection. This book is not one of them. Instead, this is a book about the legal *processes* involved in claiming refugee status in Canada, focusing particularly on the *Refugee Protection Division Rules* of the Immigration and Refugee Board of Canada. Tens of thousands of people file a claim for refugee protection in Canada every year. The ensuing process that they navigate is governed by the set of laws described herein.

3.0.1 Qualifications on the scope of this text

Refugee law itself may be regarded as a combination of administrative law, human rights law, civil procedure, (at times) criminal law, and international law,^[1] and as such, this text seeks to weave these strands together. That said, this text does not aspire to be an all-encompassing description of Canadian legal processes related to refugees, let alone international ones. There are three primary qualifications to note:

1. First, as James Hathaway observes, the two core concerns of refugee law are qualification for refugee status and the rights that follow from such status. He notes that the first of these questions has attracted by far the greater attention, and, indeed this book continues in that vein by focusing on the processes involved in applying for refugee status as opposed to engaging with the nature of the Canadian legal processes that apply to those entitled to the ensuing remedy, namely, refuge.^[2]
2. Moreover, even when focusing on the process for obtaining refugee status, this text confines itself to the in-Canada asylum process, setting aside discussion of the overseas resettlement provisions in the IRPA. In part, this is because of the nature of those resettlement decisions. As the Government of Canada states, resettlement is managed as an administrative process, and "as a result resettlement decisions are not subject to the same level of formality as asylum determinations."^[3] The Canadian government notes that, in addition to being less costly to administer, this allows for quicker decision-making than is the case for asylum adjudication.
3. Furthermore, even within the context of the in-Canada asylum process, this text does not concern itself with the rules of the Federal Court for judicial review, the rules of the Refugee Appeal Division for appeals, the rules of the Immigration Division for admissibility determinations, or the Pre-Removal Risk Assessment process. Nor does it cover the law and process for having a claim referred to the Immigration and Refugee Board.

3.0.2 Approach and content of this text

Having discussed what this text does not cover, I now turn, then, to what this text *does* aspire to do and *how* it aims to go about that task. The centrepiece of this book is an annotation of the Refugee Protection Division Rules. This annotation strives to describe the law as it exists (*lex lata*), to situate such descriptions within the context of the law as it has been (*lex historica*), and to provide descriptions of the state of the law which are inflected by a conception of the law as it should be (*lex ferenda*).

Lex lata

In describing the law as it exists, the goal of this text is to contribute to the legal positivist project by providing clear descriptions of the way that the provisions at issue are, and have been, interpreted. Bentham observes that "miserable is the slavery of that people among whom the law is either unsettled or unknown."^[4] This text aims to reduce indeterminacy by elucidating how the provisions at issue are in fact operationalized. The twin methodologies utilized in furtherance of this aim are 1) analyzing past decisions in order to extract and identify rules, and 2) an empirical methodology that focuses on statistics about decision-making trends.

This necessarily takes place in an international context given the nature of the international legal commitments at issue in refugee protection. To the extent that the IRPA aims to implement international conventions, the provisions of those conventions applied through this statute should be operationalized in a way that is coherent with convention interpretations done by other states party to the conventions. In this sense, the IRPA cannot be seen to be just another domestic statute, but must be interpreted in the context of Canada's international commitments. Analyzing Canadian refugee procedure in a way that is informed by those international legal commitments is not a mere paean to internationalist values, but instead an effort to ensure that binding legal commitments are operationalized.

Lex historica

In setting out the law, this text strives to include consideration of historical context. It is said that "the life of the law has not been logic, it has been experience".^[5] Along these lines, this text strives to focus on the history and evolution of the procedures in question over time, reading the current rules in the context of what has come before and why changes have occurred. Refugee admission is described as an area of immigration law that "remains controversial" and is "difficult to administer".^[6] Some of the politics of refugee procedure have arguably been relatively constant over its lifespan; Hamlin, for example, describes refugee law as a tool created by and for states which is intended to depoliticize the subject matter, characterize refugee admissions as a *noblesse oblige* deserving of accolades, and obscure any question of state obligation arising from legacies of colonialism and continuing patterns of international exploitation and domination.^[7] Other aspects of refugee procedure have been characterized by speedy policy changes, occasioned by, in Clayton Ma's words, "new governments and shifting popular opinions".^[8] Indeed, Haddad asserts that "the refugee issue cannot be divorced from the political context in which it operates at any one time."^[9] In Gorman's words, "the refugee definition is not static but rather a site of ongoing struggle over asylum protection, evolving in response to changing human rights norms and domestic

priorities.”^[10] Refugee procedure is characterized by such repeated policy shifts not only in Canada, but in many countries that engage in refugee status determination. As an example, Norway's first level refugee status determination system is said to have high staff turnover and to have undergone “frequent reorganizations”.^[11] The policy change in this area of law means that rules and processes are regularly under development and in flux. This can be a challenge for claimants and lawyers both. Such history, and the values of the moment, also speak to the evolution, interpretation, and application of the rules, and refugee procedures *writ large*.

Lex ferenda

Finally, this text seeks to provide descriptions of the state of the law which are inflected by a conception of the law “as it should be” (*lex ferenda*). For example, this text not only summarizes key cases and policies, but also attempts to organize and synthesize them into coherent and principled approaches to the sundry procedural issues discussed herein. Where there are multiple approaches to an issue, or the law is underdeveloped, this text seeks to identify a (in the view of this author) preferable approach. In providing such descriptions of the law that are inflected by a conception of the law “as it should be”, this text has drawn on a number of sources of normative values:

- Canada’s international legal commitments have been relied upon as a source of normative values. While Canada's refugee policies have evolved and shifted over the past half century, such procedural innovations have taken place against the stable background of the country's international commitments, particularly the commitments enshrined in the 1951 Refugee Convention. Despite the initial estimate of a short lifespan, the Refugee Convention has continued to be relevant for going on seventy years. Anand Upendran writes that that relevance is in large measure supported by the Convention’s rootedness in the Universal Declaration of Human Rights, which, unlike the Convention, “was intended, from its very inception, to forever declare itself to humanity”.^[12]
- This text has strived to adopt a decidedly comparative and international perspective. While the text is rooted in Canadian law, its approach to interpreting this country's procedures is grounded in the theory that principled interpretations can be informed by a study of other states' experiences and approaches, either to emulate or distinguish them.
- The objectives section of the Immigration and Refugee Protection Act has also been relied upon as a source of Parliamentary intent: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#IRPA ss. 3(2) and 3(3): Interpretation principles as derived from the Act¹.
- This text seeks to view the rules, treaties, and legislation at issue as a coherent system. As described by the International Law Commission, legal interpretation, and therefore legal reasoning, builds systemic relationships between rules and principles by envisaging them as part of some human effort or purpose. Much legal interpretation is therefore geared towards linking an unclear rule to a purpose and thus, by showing its position within some system, to providing a justification for applying it in one way rather than another.^[13] This text seeks to contribute to this end.

¹ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_ss._3\(2\)_and_3\(3\):_Interpretation_principles_as_derived_from_the_Act](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_ss._3(2)_and_3(3):_Interpretation_principles_as_derived_from_the_Act)

3.0.3 Conclusion

As a final note, this text strives to approach these issues with a tone commensurate to the subject matter at issue. It is said that instruments of international human rights law, like the Refugee Convention, are innately sombre. Upendran writes that "they are sombre because they have been necessitated by tragic histories; sombre because they, realistically, recognise the capacity of men and nations to inflict violations; sombre also because, even as they seek to reduce indignities and suffering, they are aware of their powerlessness to prevent those conditions entirely."^[12] And yet that somber focus on human rights violation has a counterpoint in refugee law in the concept of refuge and the related forms of relief promised by the refugee regime. Bridget Hayden states: "The significant factor that distinguishes a refugee from other people who cross borders, people who are internally displaced, or indeed from those who have not moved at all but live in abysmal conditions, is the sense of responsibility and either pity or empathy we feel for them. 'Refugee,' like all other such categories, is a relational term."^[14] In this way, the protection of refugees can be as much a point of pride and identity for the receiving state as it is a somber exercise.

Canada's refugee procedures surely say many things about Canada as a state. As one author has noted, "aliens are our mirror image; nothing like our consideration of them and their legal position presents us in so stark a way with an image of ourselves."^[15] Just what that image is may be determined by the reader. Arguably, the image that emerges from these pages is of a country that has devoted significant resources and attention to the conditions upon which the other will be recognized as having status in Canada. On the one hand, this reflects and befits a state with a self-proclaimed liberal humanitarian tradition whose identity has been entwined with the concept of being a home for the displaced and persecuted. On the other hand, it can be argued that the very concept of refugee law reifies the dichotomy between "us and them", "native and foreigner", and the resources expended on the project may be seen as part of a state-centric initiative to maintain the efficacy and legitimacy of borders, and by extension, sovereign national power. Refugee law, ultimately, is surely an amalgam of these diverse histories and motivations sitting in uneasy union.

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4 Glossary

4.1 Acronyms

Common acronyms used herein:^[1]

- BOC: Basis of Claim Form
- CBSA: Canada Border Services Agency
- CIC: Citizenship and Immigration Canada (the former name for IRCC)
- COI: Country of Origin Information.^[2]
- DCO: Designated Country of Origin^[3]
- IRCC: Immigration, Refugees and Citizenship Canada
- DFN: Designated Foreign National^[4]
- IRB: Immigration and Refugee Board of Canada
- IRPA: Immigration and Refugee Protection Act
- JG: Jurisprudential Guide^[2]
- NDP: National Documentation Package^[2]. These were previously referred to as Standardized Country Files.^[5]
- RAD: Refugee Appeal Division
- RPD: Refugee Protection Division
- IRCC: Immigration, Refugees and Citizenship Canada
- NDP: National Documentation Package
- PIF: Personal Information Form (Predecessor to the BOC)
- POE Claim: Port of Entry Claim^[3]
- PRRA: Pre-Removal Risk Assessment
- UNHCR: United Nations High Commissioner for Refugees

4.2 Terms

- Alien: Non-nationals. Pursuant to section 91(25) of the Constitution Act, 1867, the federal Parliament has jurisdiction over "Naturalization and Aliens."
- Asylum seeker: individuals whose request for sanctuary has yet to be processed.^[6] Unlike in present day usage, the term asylum seeker was not used at the time of drafting leading up to the convention in 1951, when instead the dominant term of art was "refugee".^[7]
- Asylum: this has been described as "the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it".^[8] While its exact content is often contested, the principle of asylum is generally considered to extend beyond protection from *refoulement* to encompass "admission to residence and lasting protection against the jurisdiction of another State".^[9] Goodwin-Gill states that "Although [no] international instrument defines 'asylum', it can be considered as the grant to a non-citizen of lasting protection in the territory of a State, the opportunity to make a life and a living, and the possibility to enjoy fundamental human

rights and freedoms.”^[10] As Dieter Kugelmann writes in the Max Planck Encyclopedias of International Law, “Asylum implies a long-term stay; accordingly, in most cases, the admission to residence and asylum guarantees the asylees a set of rights. The prohibition of refoulement on the other hand is linked to the time of the existing risk of persecution and only encompasses a minimum standard of State obligations.”^[11] As Plaut notes, the main obligation Canada owes Convention refugees in its territory is one of non-refoulement and the Refugee Convention does not give refugees a right to durable asylum, that is, residence in the territory of the party state offering them protection.^[12]

- Country of Origin information (COI) is defined as “Information about the situation in a country that is relevant to the refugee determination process and obtained from publicly available sources that are viewed as, whenever possible, reliable and objective” in the Board's *Policy on National Documentation Packages in Refugee Determination Proceedings*.^[2]
- Diplomatic asylum is that provided to persons in a state’s legations, warships, military aircraft, camps,^[13] and diplomatic missions. The ability of a state to provide such asylum in its diplomatic missions emerges from Article 22 of the *Vienna Convention on Diplomatic Relations*, which provides that diplomatic missions are inviolable.^[14] Contrast with territorial asylum.
- Identity: for commentary on the meaning of the term “identity” as it is used in the IRPA and the RPD Rules, see: Canadian Refugee Procedure/Information and Documents to be Provided#”Identity” as the term is used in the Act and the Rules refers to personal/national identity¹.
- Inland office: Any office of Immigration, Refugees and Citizenship Canada (IRCC) or the Canada Border Services Agency (CBSA) inside Canada.^[15]
- Jurisprudential Guide (JG) is defined as “A decision identified by the Chairperson as a JG pursuant to section 159(1)(h) of the *Immigration and Refugee Protection Act (IRPA)*” in the Board's *Policy on National Documentation Packages in Refugee Determination Proceedings*.^[2]
- Landed Immigrant: this is an old term that was used under the previous *immigration Act* and has been replaced by the term “permanent resident”.^[16]
- Member: Decision maker on the RAD or RPD.^[3]
- National Documentation Package (NDP) is defined as “A selection of COI documents on a given country from which refugee claims originate, compiled by the RD based on information that is, whenever possible, accurate, balanced, and corroborated” in the Board's *Policy on National Documentation Packages in Refugee Determination Proceedings*.^[2]
- Non-refoulement is the legal principle banning expulsion and non-admittance of refugees at the border of States Parties^[17] where they would be returned to a country in which they face serious threats to their life or freedom.^[18] The word *refoulement* derives from the French verb *refouler*, which means to push back.^[19] Goodwin-Gill and McAdam state that the distinction between asylum and *non-refoulement* is that asylum relates to the admission of the foreigner to a state's territory, while the latter concerns a prohibition of expulsion or forcible return.^[20]
- Permanent resident: The right to live, work, study and remain in Canada under specific residency obligations.

https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#"Identity";_as_the_term_is_used_in_the_Act_and_the_Rules_refers_to_personal/national_identity

- Resettlement relates to the overseas selection of refugees, and is oriented toward facilitating the movement of those chosen in advance.^[21]
- Territorial asylum is that provided in a state's territory.^[13] Contrast with diplomatic asylum.

4.3 Definitions

- Interpretation refers to the oral transfer of meaning between languages.^[22] See, in contrast, translation.
- Translation refers to the written transfer of meaning between languages.^[22] See, in contrast, interpretation.

The Refugee Protection Division Rules themselves include a definitions section, which see: Canadian Refugee Procedure/Definitions². The Act also includes a definitions section, which see: Canadian Refugee Procedure/Definitions, objectives, and application of the IRPA#IRPA Section 2³.

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5 History of refugee procedure in Canada

5.1 History of asylum and the concept of sanctuary

In both the international and Canadian contexts, the very existence of a refugee determination system is a recent development. Since time immemorial, people have moved to flee persecution, war, religious intolerance, governmental instability, and criminal sanction. However, it is only in the twentieth century in which the international community began to respond to such persons on the move in an organized fashion of the likes that would entail the creation of a refugee status determination system.^[1]

Eve Lester states that flight and requests for hospitality and asylum are concepts as old as life itself.^[2] For example, in 721 BC, after the Assyrian King Sargon II conquered Israel and its capital Samaria, tens of thousands of Israelites were banished and spread across the lands of the Assyrian Empire, eventually assimilating with the locals.^[3] There are myriad examples of such population movements in Europe. For example, in 375 the Roman Emperor Valens granted asylum to thousands of Goths who were fleeing tribes of Huns who had invaded their territory.^[3] Later examples include the expulsion of Jews from Spain in 1492: in March 1492, the Alhambra Decree was issued, which ordered all the Spanish Jews to either baptize or to leave Spain within four months. As a result, more than a hundred thousand Jews were forced to leave Spain and take refuge in Portugal, France, the Netherlands, the Ottoman Empire and other countries.^[4] Other mass population movements occurred to escape instability, as when many English persons escaped to France during the Interregnum of 1649-1660^[5] or when more than 129,000 émigrés left France after the Revolution of 1789.^[6]

Historically, asylum and sanctuary were associated with particular places where, upon reaching them, an individual was inviolable and beyond the reach of the law. While this text focuses on what might be termed the Western and North American traditions of asylum, it has existed as an ancient practice throughout the world.^[7] Ancient Greece, for example, had a strictly governed system for offering sanctuary at dedicated shrines.^[8] Indeed, the word "asylum" dates from this time and its roots in the Greek word *asylia* refer to the notion of someone who cannot or should not be seized.^[9] Gil Loescher states that every major world religion contains teachings on the importance of providing protection to those in need.^[10] Migration is a major theme of the Jewish Torah and rabbinical scholars have argued that the concept of *non-refoulement* has an analogue in ancient biblical Jewish legal principles of refugee protection.^[11] There are a number of references in the Bible to sanctuary for the oppressed and needy^[12] and ecclesiastical asylum existed throughout Western Europe during the Middle Ages.^[13] Islam also continued older traditions of asylum from the Arab civilisations that existed prior to the seventh century.^[14] Indeed, Islam dates its birth to the exile of the Prophet Mohammad to Medina, where the Prophet and his followers took refuge after facing persecution from the rulers of Mecca.^[15] Islam then codified asylum into law in a way that was consistent with the duty the Quran places on Muslims to offer asylum

to all.^[14] India and China have had their own traditions of asylum dating back thousands of years.^[16] Behrman notes that some have argued that the Southern African philosophy of *Ubuntu*, which emphasizes a collective approach to human rights and which focusses on the needs of the most vulnerable in society, contains a principle of hospitality to the stranger above and beyond the notion of asylum as commonly understood in the Global North.^[14]

5.2 History of the concept of the refugee

Victims of circumstance forced to seek sanctuary in foreign lands have been known throughout history.^[17] This phenomenon has been referred to through a number of terms, including refuge, migration, exodus, asylum, sanctuary, fugitives, exiles, and *émigrés*. The specific term 'refugee' is of a more recent pedigree, having been first coined in the 1600s in France. The concept's genealogy is entwined with the emergence of the modern view of state sovereignty at that time in Europe. This section traces the history of these two concepts and how the refugees of the 17th century differed from earlier exiles and moving persons.

The world today is divided into sovereign states. All individuals are to be organized into populations and divided territorially amongst these states. In this way, the international state system is both a way of organizing political power, and also a means of organizing people.^[18] It was with the Treaty of Westphalia of 1648 that the inter-state legal and political relationships which undergird this system were first established, and the feudal society of the medieval world was superseded by this modern society of sovereign territorial states.^[19] Key concepts of modern international relations emerged at this point, including the inviolability and fixity of borders and non-interference in the domestic affairs of foreign sovereign states. In this way, the concept of state sovereignty that emerged with the Peace of Westphalia helped build the modern concept of the state which partitions the world into a vast juxtaposition of independent territorial units.^[20] One of the facets of this system was that territory was consolidated, unified, and centralized under a sovereign government and the population of the territory now owed final allegiance to this sovereign. The sovereign state could demand, among other things, religious and linguistic conformity to ensure such allegiance.^[21]

Within a few decades of the Peace of Westphalia, the term "refugee" was coined. The word refugee can be traced to its origins in the French word *réfugié* that was used to identify the Huguenots, hundreds of thousands^[22] of Reformed Protestant French migrants who escaped the French Catholic monarch to move to non-Catholic European countries^[23] around the time of Louis XIV's revocation of the Edict of Nantes in 1685.^[24] This edict had previously allowed Protestant Huguenots to practice their religion openly.^[25] With the revocation of the edict, the legal guarantees that had protected Protestant religious practice in France for a century ended. Calvinist churches were destroyed, Ministers were forcibly exiled, Protestants were forced to convert, and restrictions were put in place on their access to public office and the professions.^[26] The term "refugee" was adopted into the English language as these Huguenots arrived in England.^[27] Protestants in New France were similarly affected - forced to either abjure Protestantism, return to France, or leave for an English Protestant colony in the new world.^[28]

What arguably distinguishes the phenomenon of the refugee from the earlier exiles and moving persons was how their movements interacted with the newly emergent state system.

As Betts and Collier argue, what was new post-Peace of Westphalia was the way that governments began to conceive of themselves as being able to govern refugee movements.^[29] Rebecca Hamlin contrasts the concept of the refugee, which entails crossing an international border and appealing to a state for protection, with practices from earlier in European history when appeals for protection could be made to families, individuals, or religious leaders, not just states.^[27] Emma Haddad sets out this dichotomy in more detail and argues that the phenomenon of the "refugee" that emerged alongside the state system was marked by its new scale, bureaucratized processes, clear definitions of insiders and outsiders occasioned by newly locked borders and assumptions about the nation state being the proper home for individuals, and the lack of obvious receiving countries as national identities increasingly superseded religious ones.^[30] In this way, it is no coincidence that the term "refugee" emerged at this time in the 17th century alongside the rise of the modern conception of the state. Indeed, Harsha Walia labels the very concept of an asylum seeker a "state-centric taxonomy only possible because of a prevailing assumption of the border as a legitimate institution of governance".^[31] However, as will be detailed below, it was not until 1920 that there was a serious concern with delimiting the scope of the term refugee.^[17]

5.3 Refugee and population movements in pre-confederation Canada

Turning to Canada, (im)migration processes, of various sorts, including ones involving the search for refuge, have long been present in this territory. Asking about the history of refugee processes in Canada's territory raises an ontological question about who should qualify as a refugee when one looks at population flows of centuries past. To the extent that refugees may be regarded as those with experiences marked by discrimination, displacement across borders, a severing of the bond between the individual and their government, and an overriding apprehension of persecution in their home community, persons meeting such criteria have a long history in this land. That said, the concept of the refugee is indeed a modern one, as described above, and applying it to population movements of pre-confederation Canada is surely anachronistic. In Rebecca Hamlin's words, "to look back and place a refugee/migrant binary onto crossings of the past does not accurately reflect the realities of those events."^[32] It is nonetheless appropriate to review (not erase) the history of population movements in the territory of Canada, both indigenous and colonial, and to chart how the contemporary concept of the refugee has been deeply linked with the modern colonial state.

To start, movement and displacement of persons in the territory of Canada is not new. Some First Nations were highly itinerant, as with the Blackfoot who would follow bison across the prairies to hunting grounds where they would utilize bison jumps and runs.^[33] Warfare between First Nations also led to aboriginal persons fleeing aggression and moving to new regions. For example, in the 16th century, the Haudenosaunee (Iroquois) embarked on campaigns to subjugate or disperse neighbouring groups while pursuing an ancient ideal that they "extend the rafters of the longhouse" by absorbing their neighbours into one nation and thereby produce a universal peace.^[34] In 1649 the Haudenosaunee dispersed the French-allied Huron-Wendat from their homeland by destroying villages. Haudenosaunee dispersal campaigns then impacted the Petun, Neutral and Erie in the 1650s, with those nations

dissolving and their members either joining together to form new communities or joining pre-existing Iroquoian nations.^[35]

Forced displacement of Indigenous persons also resulted from the actions of the colonial regimes that took hold in Canada and the United States. European powers established their North American colonies on lands that they seized from the pre-existing Indigenous nations. These seizures involved the imposition of borders and attendant physical, social, and cultural displacement. As noted below, this had a number of consequences, including that many First Nations persons were killed by disease and warfare and had their mobility and way of life disrupted by this new colonial order.

To begin, the colonial regimes in North America used force to establish themselves and to erect international boundaries. These borders have served to restrict First Nations' mobility - British North America and the United States of America required the First Nations to subject themselves to these emergent colonies, even where pre-existing living arrangements did not neatly fit on one side of the border or the other. For example, Crees and Chippewas from Canada became considered "foreign Indians" in the United States and deportable "illegal immigrants" despite ties to lands in the present-day United States that pre-date that country's founding.^[36] The subversive chant "we didn't cross the border, the border crossed us" is, for this situation, entirely apt.^[37]

Furthermore, even within national boundaries, the colonial regimes erected borders which limited mobility, including the borders involved in the reserve system, which abrogated many relationships with traditional territories, and involved related social, cultural, and political displacements.^[38] Many Indigenous persons were compelled to reside on reserves, and, after the 1885 Northwest Rebellion, the federal government developed a pass system — a process by which Indigenous people had to present a travel document authorized by an Indian agent in order to leave and return to their reserves.^[39] Even apart from the reserve system, the movements of many First Nations persons were controlled by settlers in Canada, as when a xenophobic hysteria overtook Victoria, BC upon the arrival of Smallpox in 1862, something which led to the police emptying nearby Indigenous encampments at gunpoint, burning them down, and towing canoes filled with smallpox-infected Indigenous people up the coast. Over the next year, as these Indigenous persons returned to their home communities, they took Smallpox with them, and at least 30,000 Indigenous people are reported to have died from the disease, representing about 60 per cent of the extant First Nations population.^[40] Indeed, one of the most significant effects of colonialism was the large number of First Nations persons in Canada who died of diseases introduced by European colonists. One of the effects of such deaths was the emergence of post-contact communities such as the Abenaki, an aboriginal group in present-day New Brunswick and Quebec which emerged when numerous smaller bands and tribes, who shared linguistic, geographical, and cultural traits, joined together into a new political grouping after their original tribes were destroyed by disease and warfare.^[41]

Apart from the effects of such epidemics and forced movements, the newly created nation of Canada also effected the social and cultural displacement of the pre-existing aboriginal peoples. In the words of the section of the final report of the *Royal Commission on Aboriginal Peoples* on displacement and assimilation:

[The impact of colonialism on indigenous populations was profound.] Perhaps the most appropriate term to describe that impact is 'displacement'. Aboriginal peoples were dis-

placed physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.^[42]

At times Indigenous communities relied upon the newly created international boundaries when seeking refuge from such displacement. For example, after American troops destroyed 40-50 Cayuga villages in the present-day US in 1779, many peoples of the Cayuga tribe fled the United States to seek refuge in British North America, and in so doing relied on these new borders for their associated guarantee of safety.^[43] Indeed, in the 1700s and 1800s, the British instituted policies to encourage immigration to British North America. The people that the British encouraged to relocate included persons who would rightfully be termed refugees today. For example, 50,000 United Empire Loyalists, supporters of the British in the American revolution, migrated north in response to American republicanism.^[44] Many of them migrated northward either because they did not wish to become citizens of the new American republic or because they feared retribution for their public support for the British during the War of Independence.^[45] The retribution meted out to loyalists in the United States included beatings, imprisonment, and other forms of harassment.^[46] Among these loyalists who migrated northward were an estimated 2000 members of the aboriginal peoples bordering the Thirteen Colonies who had supported the British cause, believing that an alliance with the British offered the best hope for preserving their independence and protecting their territories from land-hungry colonists.^[47] The loyalists also included thousands of free black persons, some of whom had heeded a British proclamation issued early in the war offering freedom to any slave who deserted his (*sic*) American master during the Revolution and volunteered to serve with the King's forces. Most of the new black arrivals responded to an offer made late in the conflict that guaranteed that all slaves who made formal claim to protection behind British lines would receive their freedom.^[48] Upon arrival, many of these black loyalists faced the scourge of racism and dismal agricultural prospects in Nova Scotia, where they primarily settled, and, bitterly disappointed, 1,200 sailed for Sierra Leone to start afresh on the west coast of Africa in 1792.^[48] Nonetheless, over the next century an estimated 30,000 African Americans came to Canada as the final stop on the underground railroad, seeking protection from slavery in that country.^[49]

While it is the case that black and aboriginal persons did flee the United States for Canada, the fact is that a racial logic was at work in the Canadian colonial project which shaped who the regime saw fit to welcome.^[50] We can see this logic of colonialism in Canada's history, both in terms of how First Nations were treated, but also with how the state responded to ethnic and national outsiders. In the 1700s, the British enacted deliberate policies to reinforce the British character of its North American possessions. This included the forced deportation of French-speaking Acadians from present-day Nova Scotia. In 1755, Lieutenant-Governor Lawrence and his council decided that the Acadians should be dispersed among the several colonies on the continent through forced transshipment. More than 3000 Acadians were transported to southern British colonies in the present-day United States that year. As many as a third of the passengers died on the ships. Many Acadians

sought refuge on Prince Edward Island and in Cape Breton; they gained only temporary respite. In 1758, another British expedition against Louisbourg forced its surrender, and 6000 more Acadians were forcibly removed from their homes.^[51]

Indeed, while the government in Canada made explicit efforts to entice persons who can aptly be titled refugees to choose to come to the country, they were generally individuals who hailed from the "right countries" and were of desired races, religions, and nationalities. For example, John Graves Simcoe, the first lieutenant-governor of Upper Canada, issued a proclamation in 1792 inviting Americans to emigrate to Upper Canada. This included a special appeal to the members of pacifist religious communities, including Quakers, Mennonites, and Dunkards, which promised them an exemption from military service.^[52]

Finally, the concept of the refugee may also be thought of as a legal concept, and in this respect the First Nations in Canada have long faced questions about how to define and justify the conditions of community membership. Today such questions are primarily viewed through the lens of immigration and citizenship in the Canadian legal regime, but in aboriginal legal regimes they may equally be viewed through the concepts of family law, house group membership, and kinship rights, among others.^[53] Indeed, a multitude of indigenous laws and legal traditions have persisted in the territories of Canada, both prior to, and then alongside, this country's colonial legal order. As John Borrows writes, the earliest practitioners of law in North America were its Indigenous inhabitants.^[54] These indigenous laws and legal traditions have been defined by their diversity, continuity, repression, survival, and adaptability.^[55] Bhatia writes, for example, about a number of First Nations' legal principles that relate to citizenship and welcoming the other,^[55] such as the Dish With One Spoon wampum agreement, an Indigenous citizenship law made between Haudenosaunee and Anishinaabe nations in 1701.^[56] Arima, for their part, writes about First Nations' legal principles related to family relations, such as the way that the Nootka on Vancouver Island would intermarry with persons from the Coast Salish groups on the mainland, despite otherwise less than amicable relations between the nations.^[57] In such ways, setting the terms on which welcome will be offered to the other has a long legal, not just practical, history in Canada.

5.4 The emergence of legal restrictions on immigration in colonial Canada

During its earliest centuries, Canada and its colonial forebears had neither an official immigration policy, nor the means to control the movement of individuals at the border.^[58] This tracks the experience of other western states at the time. In Chetail's summary, the 17th century rise of the nation state, and its implicit corollary—territorial sovereignty—did not generally coincide with the introduction of border controls.^[59] Quite the contrary, the admission of (the right kinds of) foreigners was viewed as a means of strengthening the power of the host state, primarily for demographic and economic reasons. As a result, until the 19th and early 20th centuries, displaced, persecuted, and poor populations in Europe and North America were able to simply move to new jobs and opportunities in new regions.^[60] While the federal Parliament had been given jurisdiction over "Naturalization and Aliens" pursuant to section 91(25) of the *Constitution Act, 1867*, Canada's first post-confederation immigration law, the 1869 *Act Respecting Immigration and Immigrants*

, reflected the *laissez-faire* zeitgeist by saying nothing about which classes of immigrants should be admitted and which categories should be proscribed.^[61] Passports, for example, were not generally required for European and North American travel prior to the First World War.^[62] Given all of this, defining a refugee was not a major concern for the reigning powers.^[63]

While, from the point of view of western states, people prior to World War I enjoyed a certain freedom of movement in the world, by no means did these comparatively open-door immigration practices result in a practical and non-discriminatory freedom of movement for all. Restrictions on freedom of movement took many forms. Some of the earliest restrictions on movement which were imposed by states were imposed on the *internal* movement of both nationals and non-nationals within each state's territory. In Europe such internal migration restrictions were mainly imposed for tax purposes,^[59] and in British North America, as discussed above, one of the principal reasons for such restrictions was the control of the aboriginal population.

Furthermore, even at this time, not all migrants were welcomed by Canadian society. Even while all British subjects formally had the right to settle anywhere in the Empire, including the British Dominion of Canada,^[64] as Jan Raska describes, the Canadian government admitted migrants based on prevailing sociocultural, economic, and political views of the 'desirable' immigrant.^[65] The seemingly *laissez-faire* immigration policies of early Canada existed, to an important extent, because of *de facto* travel restrictions which particularly limited travel to Canada for those of "undesirable races", not least of which were the lack of economical transportation modes to the new world from anywhere except western Europe for several centuries.^[50] Even for those who were able to migrate to a new country at this time, the comparatively open-door immigration practices did not result in historical refugees enjoying the suite of rights set out in the modern Refugee Convention. For example, as Emma Borland writes, the French Huguenots of the 17th century did not receive an entirely welcoming reception in the United Kingdom and were not granted permanent residence.^[66] Instead, the Huguenots kept the status of foreigner, rather than being considered 'subjects', and therefore had only limited rights in England at that time.^[67]

In any event, the comparatively *laissez-faire* attitude towards immigration which had prevailed began to increasingly give way as the capacity of the state to monitor and govern the populace increased.^[59] The concept of asylum took on a newfound importance in the 1800s in Europe as countries began to conclude bilateral treaties committing to extradite criminals, which limited individuals' hitherto freedom to abscond from one state to another. States did see fit to exclude from such extradition regimes those who had perpetrated political crimes, on the basis that they should properly be granted asylum from prosecution.^[68] For example, the 1826 *Registration of Aliens Act* hampered the British government from deporting refugees, thus recognizing that a refugee once granted asylum could not be returned.^[6] Similarly, in 1833, Article 6 of the Belgian Extradition Act ('Loi sur les extraditions') enshrined the principle of the non-extradition of any political refugee, with the exception of those refugees who threatened public security.^[6] The concept of a political asylee in Latin America was similarly codified in a series of regional conventions dating from 1889.^[69] Yet more restrictive immigration policies began to be imposed at the turn of the 20th century, concomitant to the emergence of the modern welfare system. In Thériault's chronology, as states became more financially involved in the welfare of their populations, they became increasingly concerned with the perceived additional burden of new immigrants and refugees.

[70] Furthermore, increased global mobility at this time began to make racially-inflected concerns about immigration more acute.^[71]

The barriers that states began to erect increasingly affected those who would today be termed refugees; exceptions to Canada's growing immigration restrictions were generally not made based on the reason why an individual wished to depart their home state. As James Hathaway puts it, "what mattered was not the motive for immigration, but rather the immigrant's potential to contribute to the development of Canada".^[72] That said, despite lacking a refugee policy as such, the government occasionally attempted to ease and facilitate the entry of victims of religious and political persecution.^[73] A number of the people that the Canadian government specifically sought to entice to come to Canada during this period could, incidentally, rightfully be thought of as refugees, including:

- In the 1870s and 1880s the Canadian government sought to entice Mennonites to settle in western Canada. The Mennonite search for a new home was precipitated by the introduction of a policy of Russification in the schools of the Ukraine, where they lived, and by the implementation of universal conscription, which went against their pacifist beliefs.^[74] The Canadian government not only offered them freedom from military service, but also freedom from swearing the oath of allegiance, a requirement which conflicted with their religious beliefs.^[74] The Mennonites were the first non-British group to receive direct financial assistance from the Canadian government to come to Canada.^[75]
- Following the assassination of Tsar Alexander II in March 1881, violent pogroms took place throughout Russia, and hundreds of Jews were massacred, while others were systematically turned out of their homes and ordered from their villages. At this point, millions of Russians fled in search of refuge.^[76] Hundreds of them availed themselves of group-settlement opportunities in western Canada. The first party of more than 200 Russian Jewish refugees to arrive in Canada in 1882 faced what Trebilcock and Kelley describe as "formidable obstacles" to their resettlement.^[77] For example, when the federal government and the Jewish community settled on an appropriate piece of land for the new arrivals, the plan was abandoned after neighbouring Mennonites objected to living beside Jews. Eventually, a number of settlements succeeded and by the turn of the century, the Jewish population of Canada was approximately 17,000, almost ten times that of 1880.^[77] Then, from 1900 to 1921, a further 138,000 Jews immigrated to Canada, many of them refugees fleeing yet further pogroms in Czarist Russia and Eastern Europe.^[78]
- Persecuted Doukhobors also began to arrive from Russia at this point, as well.^[78]

Over time, amendments to Canada's immigration legislation began to explicitly enshrine the country's discriminatory policies in statute. These amendments were in keeping with the rise of such restrictions in other western countries at this time; indeed, by 1930 every independent state in the Western Hemisphere had passed legislation limiting migration on racial grounds.^[79] That said, as Somani puts it, racism at the Canadian border was masked by a performance of legality as Canada was reluctant to incorporate racial restrictions into its immigration laws too overtly, lest this undermine the notion of a cohesive British empire and undermine geopolitical relationships, say with the Japanese, or lend support to independence movements, for example that in India.^[80] To this end, Canadian policies which *de facto* discriminated on the grounds of class, race, sex, and disability^[81] were couched in neutral language, as with a power accorded to Cabinet to exclude any class of immigrant where it deemed that such exclusion was "in the best interests of the country".^[82]

The specific exclusionary measures employed in Canada included:

- Documentation requirements: Canada, like many states at the beginning of the 20th century, implemented a requirement that travellers to Canada carry passports. As Kaprielian-Churchill writes, the passport requirement appears to have been implemented for the purposes of exclusion.^[83] It was strictly applied to Asian immigrants, for example, while not being required for more favoured classes of immigrants.
- Restrictions based on ethnicity, including racially selective taxation: the Chinese head tax was used to selectively exclude this groups of migrants.^[49] It was first imposed by the *Chinese Immigration Act* of 1885, which is described as the first piece of Canadian legislation to exclude immigrants based on ethnic origin.^[84] The head tax on Chinese immigrants was set at \$50 in 1885, raised to \$100 in 1900,^[85] and then raised to \$500 in 1903.^[86] In contrast, the standard fare to enter the country for other immigrants was one dollar per passenger over one year of age.^[87] Later, the 1923 *Chinese Immigration Act* eliminated the duties placed on earlier Chinese immigrants,^[84] but instead outright prohibited the permanent settlement of almost all Chinese migrants. While exceptions were formally made for diplomats, merchants having invested at least \$2,500 in an established business (and their wives),^[88] people of Chinese origin born in Canada,^[89] and students, only 15 Chinese immigrants were admitted to Canada in the 23 years following this Act.^[84] It was repealed in 1947.^[90]
- Racial restrictions on immigration incentive and loan programs: Loan an incentive programs, such as the 1950s Assisted Passage Loan Scheme, provided loans to those who could not afford their own transportation to Canada. Loans were provided to those from Europe, but not to those from Africa or Asia.^[91]
- Racially-based internment: the internment of Ukrainians was directed at excluding and controlling these migrants.^[92]
- Refusal to process immigration paperwork for racial reasons: Of the more than 1 million American immigrants reported to have emigrated to Canada between 1896 and 1911, fewer than 1000 of them were African Americans. Trebilcock and Kelley report that there was relatively limited interest in settling in Canada shown by the African-American community and that the Canadian government did less than nothing to cultivate such interest. On those occasions when department officials or immigration agents were approached by African Americans wishing to emigrate to Canada, government policy was restrictive. At times, requests were simply ignored by Canadian immigration agents or put 'on file' indefinitely.^[93] Otherwise, section 38(c) of the 1910 Immigration Act, allowed the Governor-in-Council to “prohibit ... the landing in Canada ... of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada.” Black American immigrants were routinely excluded as being “unsuited to the climate” of Canada.^[94] The Cabinet of Prime Minister Sir Wilfrid Laurier approved a formal immigration ban in 1911 excluding immigrants of African descent: “*His Excellency in Council, in virtue of Sub-Section (c) of Section 38 of the Immigration Act, is pleased to Order and it is hereby Ordered as follows: ... For a period of one year from and after the date hereof the landing in Canada shall be and the same is prohibited of any immigrants belonging to the Negro race, which race is deemed unsuitable to climate and requirements of Canada.*”^[95]
- Health-based restrictions: Immigration legislation passed in 1906 tightened entry requirements for those who were diagnosed as “insane”, “idiotic”, or “epileptic”.^[96] Facially neutral legislative provisions were also employed in discriminatory ways; for example, while nothing in the *Immigration Act* specifically barred black Americans, any immigrant could effectively be denied access to Canada for health reasons under the Act's medical provisions. The government in 1911 instructed immigration inspectors along the American

border to reject all black persons as unfit for admission on medical grounds. As Harold Troper notes, "there was no appeal."^[45]

- Class-based restrictions: In 1879, an order-in-council was passed to prohibit the landing in Canada of "indigents and paupers" unless the master of the ship carrying them deposited sufficient funds to provide temporary assistance and cover inland travel expenses.^[97] Then with the 1906 *Act respecting Immigration and Immigrants* Parliament tightened the entry requirements for those deemed to be "paupers" or "destitute".^[96] The government amended the *Immigration Act* in 1910 to prohibit all "charity cases" who had not received written authority to immigrate to Canada from the superintendent of immigration at Ottawa or the assistant superintendent of emigration for Canada in London. As Valerie Knowles writes, this clause was inspired by the large number of impoverished British immigrants who had arrived in Canada with the assistance of charitable organizations eager to rid Britain of paupers and to provide them with a new start in Canada.^[98]
- Restrictions based on the manner of coming to Canada: Canada used facially neutral legislation regarding the manner in which individuals came to Canada to discriminate against racial minorities. The *Chinese Immigration Act* of 1885 limited the number of Chinese persons a ship could carry to one for every fifty tons of cargo, as compared to one European for every two tons of cargo.^[99] Later, the 1906 "continuous journey regulation" authorized the Minister to prohibit entry of immigrants unless they came to Canada from the country of their birth or citizenship "by a continuous journey on through tickets purchased before leaving the country" (the wording was subsequently amended slightly).^[100] This regulation famously prohibited the landing of all but 20 of the 376 passengers, most of whom were Sikhs, on the SS Komagata Maru in 1914.^[101] The boat was not allowed to dock in Vancouver, and, after a two-month stalemate, the Komagata Maru was forced to turn around and sail back across the Pacific Ocean. While these would-be immigrants had not started out as refugees,^[102] 26 of its passengers were killed by the British Indian police upon arrival in India,^[84] who suspected that the passengers had become aligned with a group based in North America that was committed to the overthrow of the British Raj in India.^[49] This continuous journey rule had particular implications for refugees, regardless of race, because its requirement that tickets be purchased in the country of birth or in Canada, an impossible requirement for most refugees who, by definition, would be loath to return to their country to embark on a voyage to Canada.^[103] Furthermore, the restrictive intent behind the continuous journey rule was exemplified by actions that the Canadian government took to stop the only direct ship service between India and Canada, the Canadian Pacific shipping line's Calcutta-Vancouver service.^[84] Later, the federal government would come to prohibit the landing of "skilled and unskilled workers" in Western seaports in 1913; that restriction had predictable racial effects considering who it was who was likely to arrive in Canada via the Pacific ocean.^[104] Another Canadian interdiction effort from the early 1900s involved authorities responding to consternation among prairie residents about a possible influx of African-American settlers^[105] by instructing railway staff not to sell train tickets to Black people coming from the US.^[106]
- Religious restrictions: For a three-year period starting in 1919, Doukhobors, Mennonites, and Hutterites were specifically prohibited entry into Canada because of, in the words of the relevant order-in-council, "their peculiar customs, habits, modes of life and methods of holding property, and because of their probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their entry."^[107] The Hutterites are said to have provoked particular resentment

in Canada at this time on account of their pacifism and consequent refusal to bear arms in the World War.^[108]

- Sex-based policies: In 1938, male residents of Canada who were able to support their intended wives were able to sponsor a fiancée. Female residents of Canada were not extended the same ability to sponsor a spouse.^[109]
- Political-opinion-based restrictions: In 1910, the Immigration Act was amended to provide for the exclusion and deportation of those professing anarchist views.^[110]

Exceptions to these restrictive policies were made for those with temporary status in Canada, for example fifteen thousand Chinese men were brought to Canada to construct the country's first transcontinental railroad.^[111] However, exceptions were generally not made based on the reason why an individual wished to depart their home state - indeed, until the 1970s, Canada made no formal distinction between refugees and other migrants.^[82]

5.5 League of Nations era

It was in the wake of the First World War and the Russian Revolution that the term "refugee" came to be widely used. While the term "refugee" does date to the 17th century, it had not been widely used until this point. It was during the 1920s that the term "refugee" began to emerge with more frequency and long-standing "competitor terms", like asylum, protection, and hospitality, began to be "relegated to oblivion". As Hamlin describes it, the term refugee "was a product of this period."^[112] Amidst rising public concern about this issue, and in response to an appeal from the International Committee of the Red Cross,^[113] Member states of the League of Nations approved the creation of a refugee office in 1921 and appointed Fridtjof Nansen as the first High Commissioner for Refugees.^[114] In 1922, Nansen created the so-called 'Nansen Passport' for Russian refugees.^[115] This was an international identity certificate facilitating the movement and resettlement of refugees uprooted by the events of World War I, the Russian revolution, and the Armenian genocide in Turkey. This institutional innovation provided several million post-WWI European refugees with a way to seek protection and assistance.^[114] It has also been pinpointed as the beginning of international refugee law.^[116] In 1925, the Refugee Service of the International Labor Organization (ILO) took on responsibility for issuing these Nansen Passports. Five years later, following Nansen's death, the League of Nations abolished the position of the High Commissioner^[117] and entrusted this humanitarian aspect of refugee work to the Nansen International Office for Refugees, or International Refugee Office for short.^{[118][119]}

Thériault states that at first it was generally assumed that the refugee problem was temporary and that countries voluntarily afforded refugees relatively generous benefits. However, by the late 1920s, European states began to recognize the enduring nature of the refugee problem and increasingly refused to integrate refugees. This led to a shift in international refugee law, as efforts to have states adopt agreements that imposed substantial obligations, such as the 1922 and 1924 arrangements regarding the issuance of the Nansen Passport to Russian and Armenian refugees, began to meet with limited state interest.^[120] Canada, for one, refused to sign onto any of these international initiatives.^[121] The Canadian government steadfastly refused to recognize the Nansen Passport on the basis that Canada would only accept such passport bearers if they were returnable to another country in the event that they became criminals or insane, something that Kaprielian-Churchill describes as a smokescreen and means of rejecting refugees.^[122] In fact, even once other countries strove

to accommodate the Canadian demand for returnability, Canadian officials continued to refuse refugees, finding other grounds for rejection.^[123] In 1931, Canadian officials spoke with pride that only "a dozen refugees" had been admitted to Canada on the League of Nations' Nansen Passport.^[124]

In order to address the fact that the agreements underpinning the Nansen Passport lacked the status of treaty law,^[125] the League of Nations convened an international conference in 1933 to negotiate a *Convention Relating to the International Status of Refugees*. Canada had remained a colony of the British Empire until 1931, meaning that there was no such thing as "Canadian foreign policy" before then, as Britain did not permit its colonies to sign treaties, form alliances, or pretty much interact in any meaningful way with other countries without London's approval.^[126] In 1931, the U.K. passed the Statute of Westminster giving its self-governing white colonies the right to make their own foreign policy choices. It is thus of some significance that, two years later, Canada neither attended the conference which negotiated the *Convention Relating to the International Status of Refugees*, nor subscribed to the ensuing agreement.^[127] Nonetheless, this Convention is remembered as the first attempt to create a comprehensive legal framework for the protection of refugees^[128] and the time the principle of *non-refoulement* was first incorporated into international law.^[129]

The stark limits on Canada's willingness to take in refugees can be illustrated by looking at the main refugee groups that sought sanctuary during this period. As Irving Abella and Petra Molnar write, xenophobia and anti-semitism permeated Canada and "there was little public support for, and much opposition to, the admission of refugees [to the end of the Second World War]".^[49] For example, in the 1930s Canada restricted the admission of European Jews who sought safe haven from antisemitism and the emergence of fascism in Germany, but welcomed Sudeten Germans from Czechoslovakia in search of refuge given that they were considered to be more "desirable" immigrants.^[65] Armenian refugees were also subject to Canada's exclusionary policies. The Ottoman Empire began the mass killing, relocation, and deportation of its Armenian population in 1915. This claimed more than 1 million lives and resulted in more than half a million displaced persons. While 80,000 Armenian refugees would receive sanctuary in France, and 23,000 in the United States, fewer than 1,300 were admitted to Canada.^[130]

Canada justified its restrictive resettlement policies by employing a narrow definition of who qualified for refugee protection (to the extent that it discussed the categorization whatsoever). For example, when Jewish organizations in Canada asked the Canadian government for permission to resettle Jewish refugees displaced in Europe, the government demurred, claiming that, since many had left Russia with the consent of the authorities, they could not be considered refugees.^[131] Canada also did not support efforts to expand the conception of who was entitled to refuge. In 1938, the US government brought together 30 countries for a conference on the subject of the worsening refugee situation in Europe. Canada was a reluctant participant, tarrying for months before accepting the US invitation to attend the Evian, France event. Valerie Knowles describes Canada's participation at the summer 1938 conference as having been "minimal" and states that it was to Canada's relief that the delegates at the conference accomplished little more than to produce a statement of lofty principles not actually necessitating more liberal immigration policies.^[132] The work of the Nansen International Office for Refugees, or IRO, was halted this year, largely due to the position of the USSR, and despite the about 600 thousand refugees still under the Office's protection.^[133] That said, the separate Office of the High Commissioner of the

League of Nations for Refugees continued to operate until 1946.^[134] The Intergovernmental Committee on Refugees (ICR) that was established that year, mandated to assist Jews from Germany and Austria, operated without Canadian involvement.^[135] Nonetheless, one aspect of Evian's legacy is that it is seen as a key moment in what Hathaway has called "the individualization of refugee law", because when the ICR was founded, it set forth a definition of a refugee that focused for the first time on why people were being displaced, something that would come to influence the 1951 Refugee Convention.^[136]

Canada also appears to have disregarded the notion of *refoulement* in its deportation decisions. For example, in its zeal to expel Communists, Canada removed persons who would be persecuted in their home countries. Hans Kist reportedly died of torture in a German concentration camp after being sent to that country from Canada.^[137] Kelley and Trebilcock write that many activists sent to fascist countries such as Italy, Germany, Finland, and Croatia were also in danger of losing their lives upon return.^[137]

That said, some people appropriately regarded as refugees did move to Canada during this time through Canada's regular immigration streams. In fact, Prime Minister Mackenzie King asserted that between 1932 and 1943 most of the immigrants who entered Canada were refugees.^[138] For example, between 1923 and 1930 close to 20,000 Mennonites from Russia were permitted to settle in Canada. As Kelley and Trebilcock set out the history, German-speaking Mennonite refugees from Russia came to Canada to escape hardship they were experiencing following the Russian revolution. Their refusal to take up arms during the revolution had alienated and angered both sides of the conflict, and Mennonites increasingly became the victims of brutal assaults and intimidation, which continued after the civil war ended. Throughout the 1920s, land expropriation, official intolerance of their religion, and threats of forcible relocation to Siberia prompted thousands to seek a safe haven elsewhere.^[139]

5.6 WWII-era refugee policies

Canadian refugee policy continued to be marked by antisemitism and xenophobia throughout the Second World War. Sanctuary was provided to many persons of favoured ethnicities, principally the British, and was denied to others.

At the beginning of the war, Canada began to allow for the admission of British children in danger overseas. The government agreed to the admission of 5,000 British children and their mothers and more than 4,500 British children and 1,000 mothers came to Canada. The movement was abruptly terminated in 1940 when two ships carrying children to Canada were torpedoed.^[140]

Entry for non-British persons was not facilitated in the same way. For example, a visible manifestation of the antisemitism which marked Canada's immigration and refugee policy at this time was the 1939 decision to deny admission to 930 Jewish refugees on the SS *St. Louis* seeking asylum from Nazi Germany. These refugees were instead sent back to what awaited them in Germany. When, later in the war, in 1943, Canada did announce that it intended to admit some Jewish refugees who had made their way to the Iberian peninsula, this is said to have "ignited a storm of protest from anti-refugee interests". Quebec opposition leader Maurice Duplessis held rallies in which he charged that that provincial and federal Liberals were set to allow the "International Zionist Brotherhood" to, in his words,

settle 100,000 Jewish refugees in Quebec in return for election financing.^[141] Ultimately, Canada admitted fewer than 5,000 Jewish refugees during the Second World War, something Trebilcock and Kelley call one of the worst records of any democracy in providing assistance to the persecuted Jews of Europe.^[142] In contrast, the US allowed 240,000, Britain 85,000, China 25,000, Argentina and Brazil over 25,000 each, and Mexico and Colombia received some 40,000 between them.^[49] When Canadian immigration officials were asked how many Jews the country would admit after the war, their famous response was, “None is too many.”^[143]

Measures were also employed to exclude and restrict persons considered “enemy aliens” during the Second World War. Canada enacted mass internment policies that placed so-called German enemy aliens - Nazi sympathizers and Jewish refugees alike - into camps.^[144] Regulations under the War Measures Act also restricted entry by Japanese immigrants, provided for the deportation of Canadian citizens of Japanese descent,^[145] and effected the internment of Japanese persons.^[49] In February 1942 the government ordered the expulsion of some 22,000 Japanese Canadians from a 100-mile swath of the Pacific Coast. The majority were relocated in the interior of British Columbia, often in detention camps in isolated ghost towns. Japanese Canadians were forced to remain in these detention camps until the end of the war. Then, after the conclusion of hostilities, about 4,000 would surrender to pressure and leave Canada for Japan under the federal government's “repatriation” scheme. Of these, more than half were Canadian-born and two-thirds were Canadian citizens.^[132]

During the war, the British government also transported 2,500 “enemy aliens” to Canada. For the most part, these were German and Austrian nationals, many of them highly educated Jews, who had been living in Great Britain when the war erupted. Valerie Knowles describes their reception in Canada as follows:

The Canadian government agreed to receive these male civilian internees in the belief that it would be assisting hard-pressed Britain by accepting custody of a number of “potentially dangerous enemy aliens”. Canadian authorities were therefore astonished to see a large assortment of teenage boys, university students, priests, and rabbis step ashore at Quebec. Despite their misgivings, however, the Canadians proceeded to place all in camps that resembled maximum security prisons. And it was here that scientists, theologians, musicians, teachers, artists, and writers, among others, would be forced to bide their time for months to come.^[141]

Knowles notes that, fortunately for these prisoners, the British government soon realized that it had done a possibly grave injustice to many of the internees and initiated steps to have them released. In 1945, Canada reclassified these one-time prisoners as “Interned Refugees (Friendly Aliens) from the United Kingdom” and invited them to become Canadian citizens. 972 chose to do so.^[146]

While Canada admitted a limited number of refugees during WWII, the number of refugees and displaced persons in other countries at this point was high: globally 175 million people—approximately 8 percent of the world population—were displaced in the aftermath of World War II.^[147] How to respond to them in a post-war environment became an increasing pre-occupation of the Allied powers.

5.7 United Nations Relief and Rehabilitation Administration (UNRRA) and the International Refugee Organization (IRO)

In 1943, with the end of World War II in sight, the allied powers began to lay the foundations of a post-war refugee regime. In that year, they established the United Nations Relief and Rehabilitation Agency (UNRRA) in preparation for the liberation of Europe.^[148] The War had created a refugee crisis of at least 10 million, and perhaps as many as 14 million, stateless persons in Europe alone.^[149] At war's end, there were over a million displaced persons and refugees in crowded shelters maintained by United Nations agencies in Europe. Some of these people were concentration camp survivors, others were individuals who had been dispatched to labour camps in Germany and Austria, and still others were those refusing to be repatriated to communist regimes.^[150] Canada provided funding to the UNRRA, which operated more than 800 displaced persons camps in Europe;^[151] distributed about \$4 billion worth of goods, food, medicine, and tools, at a time of severe global shortage; and focused on the repatriation of displaced persons back to their home countries in Europe in 1945-46.^[152]

The activities of the UNRRA immediately began to be enmeshed in Cold War politics. The organization was faced with large numbers of displaced persons who were reluctant to return to countries where communist parties were taking a firm hold. Many Polish, Ukrainian, and Baltic persons were thus residing in camps, asking to be referred to a non-communist country, as opposed to their country of citizenship. Soviet officials objected to any willingness to countenance such demands. While the UNRRA was returning large numbers of displaced persons to their countries against their will at this point - perhaps some 2 million^[153] - this was becoming increasingly untenable.^[154] Many of those being returned were fearful of returning to Stalin's Russia, and indeed significant numbers were executed and/or sent to labour camps.^[153] In response to this situation, in December 1946 Western governments decided to stop funding the UNRRA and to transfer the task of organizing resettlement work from the UNRRA to a new entity, the International Refugee Organization. Unlike the UNRRA, the IRO had no Soviet participation^[114] and its chief function was not repatriation, but instead the overseas resettlement of refugees and displaced persons.^[155]

As Shauna Labman writes, it was at this point that the focus of refugee law and institutions shifted from an individual's *inability* to return home to their *unwillingness* to return home.^[148] In retrospect, this move to accommodate those with objections to returning to communist countries represented a sea-change in the international approach to refugees. Previously, international organizations had dealt only with specific groups of refugees, such as Russian or German refugees, and, in Gil Loescher's words, governments had never attempted to formulate a general definition of the term 'refugee'. For the first time, therefore, with the establishment of the IRO, the international community was making refugee eligibility dependent on the individual rather than group membership and accepted the individual's right to flee from political persecution to a safe country.^[155] Alan Nash situates this within the politics of the time, noting that the West was seeking to legitimate its refusal to repatriate by developing the principle of *non-refoulement*, which had heretofore featured little in previous refugee agreements by using an approach to managing refugees that extended relief to those who were unable or unwilling to adapt to the ideologies of their own countries and for whom continued residence there was intolerable.^[17]

To achieve its mandate, the IRO had its own specialized staff, a fleet of more than 40 ships, and, most importantly, the political and economic support of the developed world. With the opening up of this IRO resettlement program, the number of repatriations to Eastern Europe was reduced to a small trickle and the IRO began operations that would relocate more than 1 million Europeans to the Americas, Israel, Southern Africa, and Oceania.^[156] After the Second World War, the Canadian government began to receive more pressure both domestically and internationally to fulfill its humanitarian responsibility of hosting displaced persons.^[157] In 1946, the Canadian government signed an order-in-council that allowed Canadians to sponsor displaced family members in Europe.^[158] In 1947, Canada began to accept refugee referrals from the International Refugee Organization.^[159] Canada also deployed its own immigration officers overseas for the purposes of selecting from among the displaced persons.^[160] Collectively, these arrivals comprised what was called the Displaced Persons Movement, which successfully resettled 186,154 persons to Canada over the course of six years.^[158] Of these, 100,000 entered Canada between 1947 and 1951 through what were termed labour-sponsored movements whereby an employer could show the government that a job could not be filled locally and the government in turn would have the IRO refer two or three potential immigrants from among available refugees for each needed labourer.^[161] During the four and a half years of IRO operations, Canada would accept 12% of all refugees resettled by the organization, when compared to Australia at 18%, Israel at 13%, and Britain at 8%.^[155] The terminology used at this time is not consistent: at times 'displaced persons' were contrasted with refugees in that displaced persons were those willing to return to their country of nationality post-war whereas refugees were not;^[162] at times the terms 'refugee' and 'displaced person' were used as synonyms; and at times the term 'displaced persons' was used to refer to what we now think of as 'internally displaced persons', in contrast to 'refugees' who had fled across a border from their home state.^[163]

When announcing the government's willingness to allow the movement of war survivors to Canada on May 1 1947, Prime Minister Mackenzie King articulated the government's position as follows: "It is not a 'fundamental human right' of any alien to enter Canada. It is a privilege. It is a matter of domestic policy. Immigration is subject to the control of the parliament of Canada."^[164] Despite such protestations to the contrary, this speech is seen as the beginning of Canada accommodating the concept of human rights enshrined in the then-new United Nations Charter. For example, in deference to the UN Charter, Mackenzie King announced that the Chinese Immigration Act of 1923 would be repealed and that Chinese residents of Canada would be able to apply for naturalization.^[165] Similarly, it was at this time that Canada was involved in discussions about the Universal Declaration of Human Rights, which would emerge in 1948 recognizing that "everyone has the right to seek and to enjoy in other countries asylum from persecution."^[166] Despite this growing accommodation to human rights rhetoric, King's realpolitik was reflected in Canada's actions: the tens of thousands of displaced persons that Canada accepted during this post-war period were "carefully selected, and most of them would have satisfied our standards if they had been applying as immigrants", according to one contemporary author.^[167] Furthermore, it is arguable that the Holocaust had surprisingly little effect on refugee policies in the immediate post-war decades, especially in comparison to the effect of Cold War power politics on Canada's actions.^[168]

1947 also saw the birth of the concept of Canadian citizenship, with the coming into force of the *Canadian Citizenship Act* that January.^[169] Before the Citizenship Act, the people of this country were British subjects. The new Act eliminated the classification "British

subject”^[84] and merged the pre-existing legal concepts of “nationality” and “citizenship” into a single status, that of “Canadian citizen”, and in so doing sought to create a unifying symbol for Canadians.^[170]

5.8 The founding of the UNHCR, negotiation of the Refugee Convention, and growing refugee intake

The International Refugee Organization had a time-limited mandate. The assumption of the international community was that refugees and displaced persons were a creation of war, hence an end to the fighting would mean an end to the existence of such individuals.^[171] However, as the IRO's June 1950 termination date neared, refugees continued to abound in Europe. Indeed, they were increasingly arriving across Western European borders from the Eastern Bloc.^[172] As a result, on December 3, 1949, the UN General Assembly decided to establish the United Nations High Commissioner for Refugees (UNHCR).^[15] A year later, on December 14, 1950, the *Statute of the Office of the United Nations High Commissioner for Refugees* was passed by the UN General Assembly, which defined the UNHCR's mandate to provide for the protection of refugees and forcibly displaced people and assist in their voluntary repatriation, local assimilation, or resettlement to a third country.^[173] The UNHCR began its work on January 1, 1951 with a staff of 99 and a budget of \$300,000.^[174] It has a humanitarian mandate and was to be of an entirely non-political character.^[175] At that point, the IRO was engaged in an extended wind-up of its operations, which it completed in 1952.^[176] The UNHCR, too, was intended to be temporary, with the UN General Assembly giving the organization a 3-year mandate to address the needs of displaced Europeans from World War II.^[177]

At the same time, negotiation of what would become the foundational treaty for modern refugee protection, the 1951 *United Nations Convention Relating to the Status of Refugees*, was underway. The preparatory work for the Convention started in 1948,^[178] with the initiation of the UN Secretary-General's ‘Study on Statelessness’.^[179] The first round of negotiations in the drafting of the Refugee Convention then began through what was termed the *Ad Hoc Committee on Statelessness and Related Problems*, which was appointed by the UN Economic and Social Council on 8 August 1949.^[180] The *Ad Hoc* Committee was said to comprise a small circle of government representatives possessing ‘special competence’ on the subject, in the words of the relevant ECOSOC resolution.^[181] It was mandated to consider, and act on, the recommendations made in the Secretary-General's ‘Study on Statelessness’.^[179] Cold War politics were felt during these discussions largely through the absence of the eastern block countries—the USSR and Poland first ‘walked out’ and then boycotted the *Ad Hoc* Committee in protest of the participation of (Nationalist) China.^[182] The committee, chaired by Canadian Leslie Chance, met from 16 January to 16 February 1950, and prepared the first draft of a refugee convention.^[183]

The *Ad Hoc* Committee then provided its report to the Social Committee of the UN Economic and Social Council. Discussions among the 15 country representatives on the Social Committee then took place over the course of eight meetings from 31 July to 10 August 1950.^[180] A draft text was voted on by ECOSOC, and the text then passed to the UN General Assembly. On December 14, 1950, the General Assembly debated and then adopted a draft of the text by 41 votes to 5, with 10 abstentions.^[184]

From there, a committee entitled the *UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* was formed to conduct the final negotiations on the Convention.^[185] The much-discussed *travaux préparatoires* of the Refugee Convention are from these meetings, which ran from July 2 to July 25, 1951, with the Convention being signed three days later on July 28.^[186] Cold War politics played an important role in the countries that participated in this conference—while 26 nations attended the negotiations,^[187] other than Yugoslavia, no Soviet bloc country was present.^[188] Pursuant to this Refugee Convention, refugee status was a label held by individuals on the grounds of their personal circumstances. This contrasted with earlier definitions that had generally applied to all nationals of a particular state or persons of a particular ethnic group from that state, and in so doing required the asylum seeker to provide a more personalized account of their experiences as well as the general situation in the country of origin. Thereby, the scope of protection was narrowed and the importance of individual screenings increased.^[189]

Canada was seen to be a leader at the conference drafting the Convention: it was one of twenty-six countries to send a delegate to participate in the conference;^[65] a Canadian, Leslie Chance, chaired the conference;^[190] Canada was the country in the Americas that presented the most proposals during the process of drafting the Convention, voicing comments during discussions that were otherwise dominated by the European states; and Canada was a part of the working group vested with the responsibility of drafting arguably the key part of the Convention - the definition of a refugee in Art. 1 of the document.^[191] Canadian chairman Leslie Chance reported “we have been regarded throughout as taking a forward attitude.”^[192] As an aside, Chance's statement could be regarded as somewhat self-serving given the shifting positions Canada took at the conference, for example arguing, *contra* France and the United Kingdom, for the inclusion of temporal and geographical limitations in the Convention, prior to flipping that position and arguing against such restrictions.^[193] In any event, Canada did ultimately advocate at the conference “in favour of the widest possible definition” and took the position that “the purpose of the Convention was to protect refugees, not states.”^[194]

The ensuing Convention provides a definition of a refugee and outlines the rights to which such people are entitled. The rights are a series of claims refugees can make against states: principally, the right not to be forcibly returned to a country in which there is a risk of serious harm (*non-refoulement*), as well as key civil and political, as well as economic and social, rights.^[195] While Commonwealth states like Australia and Britain ratified this resultant Convention, Canada declined to do so.^[196] By way of explanation, then Secretary of State for External Affairs Lester B. Pearson announced that the government was concerned the Convention would give the refugee “the right to be represented in the hearing of his appeal against deportation” and, further, that the Convention would “grant rights to communists or to other persons who believed in the destruction of fundamental human rights and freedoms.”^[192] The Canadian government also noted with concern that, “some sections of the Convention appeared to prohibit states from deporting 'bona fide' refugees, even on grounds of national security.”^[197] This reflected the RCMP's belief that the Convention would restrict Canada's right to deport refugees on security grounds and the government's suspicion that the International Refugee Organization was infiltrated by communists.^[198] Without Canada, the Refugee Convention entered into force on April 22, 1954.^[199]

Despite not signing the Convention, in the ensuing years Canada inexorably became more involved in refugee matters:

- Pledging to respect non-refoulement obligations: Despite not signing the Convention, Canada pledged to nonetheless uphold the Convention's non-refoulement obligation. In practice, Canada had no difficulty in ensuring compliance with what it viewed to be the requirements of the Convention because, from the late 1940s, and in line with US practice,^[200] Canada's Immigration Branch had invoked an administrative ban on deportations to any Communist country.^[201] Haddad notes that such a commitment was not onerous as the numbers emerging from behind the Iron Curtain were minimal for the simple reason that "refugees could not escape".^[202]
- Financially supporting UNHCR: Canada financially supported the UNHCR from its establishment.^[159] That said, Canada's contributions to UNHCR for the maintenance of refugees during this period have been described as "minimal" and in 1952 the Canadian government eliminated the UNHCR's Canadian office.^[203]
- Becoming a member of UNHCR ExCom: In 1959, began to sit on the then-new UNHCR Executive Committee, an advisory body of states that gives guidance to the High Commissioner.^[204] The UN General Assembly established the Executive Committee of the Programme of the United Nations High Commissioner for Refugees in 1958, several years after the founding of the UNHCR. ExCom is responsible for approving the Office's annual budget and programme, for setting standards and reaching conclusions on international refugee protection policy issues, and for providing guidance on UNHCR's management, objectives, and priorities. In the 1950s, this group started with 24 member states.^[205] ExCom members need not have ratified the *Refugee Convention*, but are instead selected 'on the basis of their demonstrated interest in and devotion to the solution of the refugee problem'.^[206]
- Growing refugee resettlement and admissions: At the time of UNHCR's creation, one of its principal tasks was to resolve the situation of those in displaced persons camps in Europe. Despite an initial expectation that this could be accomplished quickly, as of 1960 the UNHCR was still running refugee camps in Europe for persons displaced during WWII.^[207] For its part, by this time Canada had admitted nearly 250,000 displaced persons from Europe,^[208] many of whose journeys to Canada had been subsidized by a Canadian government seeking to recruit more workers for a booming economy.^[209] In the years following the UNHCR's creation, Canada also allowed for refugee entry on an ad-hoc basis for those displaced from other regions and for other reasons, ranging from small groups, such as when Canada admitted 39 Palestinian families in the wake of the displacement occasioned by the founding of the State of Israel,^[210] to larger movements, including the 37,000 Hungarian refugees Canada admitted following the Hungarian Revolution in 1956.^[211]
- Increasing procedural fairness for migrants in Canada: Canada also saw a movement towards increasing the extent of procedural fairness offered to migrants in Canada, providing for the creation of immigration appeal boards in 1952 which could hear appeals from decisions to deport aliens. Details of the IABs and their history follow below. That said, Canada's overall immigration laws continued to restrict persons for reasons of race, class, and health, and "national security" concerns related to the fear of communism, which were used to reject more than 29,000 applications to enter Canada between 1946 and 1958.^[208]

5.9 Non-discrimination measures

The 1952 Immigration Act empowered Cabinet to limit the admission of migrants by reason of a large number of grounds that allowed for Canada's discriminatory policies, including:

- (i) nationality, citizenship, ethnic group, occupation, class or geographical area of origin,
- (ii) peculiar customs, habits, modes of life or methods of holding property,
- (iii) unsuitability having regard to the climatic, economic, social, industrial, educational, labour, health or other conditions or requirements existing ... in Canada ... or
- (iv) probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship ...^[212]

Furthermore, to this point Canada's immigration service had been plagued by widespread corruption. Among applicants, the Deputy Minister Keenleyside noted, there was a widespread belief that "even the simplest and most proper requests had to be lubricated with monetary or more personal favours."^[213]

By the 1960s, values were changing across Canada, and around the world, and Canada's racially-based, Eurocentric approach to immigration and refugee policy was becoming less and less aligned with how the country both viewed itself and wished itself to be seen. Canada's unofficial ban on black immigrants was costing it diplomatic legitimacy with newly independent former colonies and, by 1961, Britain had begun to pressure Canada to change its policies, as it had an open door to immigrants, such as those from the West Indies, that were barred entry into Canada.^[214] Further, this race-based approach clearly contradicted the then-new Canadian Bill of Rights, which prohibited discrimination by reason of race, national origin, colour, religion, or sex.^[215]

Canada began to repeatedly liberalize who it was prepared to admit, for example admitting 325 tubercular refugees and their families around 1960, the first time that Canada had waived its health requirements for refugees.^[78] In 1962, Prime Minister Diefenbaker's Immigration Minister tabled new regulations in the House that eliminated racial discrimination as a major feature of Canada's immigration policy. With this revision, historian Valerie Knowles states that the last vestige of discrimination which remained in the immigration regulations was a provision that allowed immigrants from Europe and the Americas to sponsor a wider range of relatives, something that was inserted at the last moment because of a fear that there would be an influx of sponsorships by persons from India.^[216] In 1965, Canada ratified the four Geneva Conventions which form the basis of international humanitarian law,^[217] including the 1949 *Geneva Convention Relating to the Protection of Individuals in Times of War* which includes a provision that refugees should not be considered enemy aliens if they had formerly had the nationality of an enemy power.^[218] Then, in 1966 Lester B. Pearson's government created the *Department of Manpower and Immigration* and mandated it with the responsibility of processing refugees without "discrimination by race, country or religion".^[192] That department set to work and in 1967 all vestiges of discrimination were removed from the immigration regulations, if not the statutes themselves, and the government implemented its much-vaunted 'points system' in the regulations to guide the selection of many categories of immigrants.^[98]

That said, Canada's immigration laws continued to restrict persons who were "undesirable", which was used as a basis for screening prospective immigrants for "national security" con-

cerns related to feared communist subversion.^[219] This was used to reject more than 29,000 applications to enter Canada between 1946 and 1958.^[208]

5.10 Immigration Appeal Boards

Immigration Appeal Boards, which could hear appeals from decisions to deport aliens, became a feature of the *Immigration Act* in 1952. Each board would consist of three staff members from the immigration department selected by the executive on an *ad hoc* basis. The ability to have recourse to an immigration appeal board was, from the time of their creation, limited: all appeals were to be heard by the Minister unless, at the Minister's discretion, the appeal was directed to an IAB.^[220] Furthermore, the Minister could also reverse any decision of an IAB.^[221]

1962 regulations expanded the jurisdiction of these boards to include appeals from all deportation decisions under the Act.^[222] In this way, while immigration to Canada continued to be considered a privilege, and not a right, basic due process protections were coming to be seen as properly extended to aliens. Specifically, as Trebilcock and Kelley note, it was coming to be accepted that the rules governing admission or deportation of aliens should be reasonably well specified and transparent, and that deportation decisions should generally be open to challenge before a neutral tribunal.^[223] That said, at this point, the Immigration Appeal Boards played what Trebilcock and Kelley describe as “a very minor role” in immigration decisions because their jurisdiction was limited to questions of law, and in view of the large discretionary powers granted to the immigration department, errors of law were quite rare.^[224] Furthermore, given that the boards were controlled by immigration officials, they could be considered neither neutral nor independent.

In March 1967, the *Immigration Appeal Board Act* changed this. This Act emerged from what was called the Sedgwick Report, drawn up by Joseph Sedgwick, Q.C., a one-man board of inquiry which had been commissioned by the government to study a series of highly controversial deportations. The principal features of the newly reconstituted Board following the passage of the 1967 *Immigration Appeal Board Act* were:

- Independence: Chief among the recommendations was the establishment of a completely independent Immigration Appeal Board.^[225] The Board was no longer controlled by immigration officials, but was instead a quasi-judicial entity independent of the Department of Manpower and Immigration. The Governor in Council now appointed the members of the IAB to serve fixed terms.^[226] In 1973, the IAB's independence was further strengthened through legislative amendments which provided that some IAB members would be appointed on a permanent basis, while others would be appointed to serve renewable two-year terms.^[226]
- Broader jurisdiction: The Board assumed the status of a court of record.^[227] A right of appeal to the Board was created for everyone who had been ordered deported from Canada, and for denial of Canadian citizens' family sponsorship applications.^[228] Persons could appeal to the IAB on grounds of law, fact, mixed fact and law,^[229] or compassion.^[78] As described below, from 1973 the grounds for appeal came to include those who believed themselves to be refugees in accordance with the 1951 Geneva Convention. However, even prior to this time, any person who had been refused landing and ordered deported could appeal to the IAB, and the Board could order that person to be landed. Because the Board

had a flexible and generous compassionate jurisdiction, in Plaut's view, refugees were "to a large extent" accommodated under the IAB's procedures, and "there was therefore no real need for a specific refugee determination process".^[230]

- Final authority over deportation decisions: Under the 1952 *Immigration Act*, the IAB consisted of Immigration Branch officials who made recommendations to the Minister, which the Minister could accept or reject at their discretion. Decisions of the newly reconstituted IAB were instead final (subject only to judicial review, as set out below).^[161]
- Leave requirement for judicial review: IAB decisions were final, subject to an appeal, with leave, to the Supreme Court of Canada on questions of law, including jurisdiction.^[229] As commentators have noted, these leave requirements have effectively served to "insulate" such administrative decisions from judicial review.^[231]

The 1967 changes to the Immigration Appeal Board are said to have proceduralized and judicialized immigration policy to an unprecedented degree and to have presaged calls for similar due process protections in the determination of refugee claims.^[232] That said, the Board had a statutory limit of 7 to 9 judges^[233] (later increased to 10) and was unable to keep pace with the scale of removals being ordered.^[234] Almost immediately, the Board was swamped with a backlog that, at existing case processing rates, was expected to take decades to go through.^[235] For example, as of August 1973 the IAB had a backlog of 17,000 cases, which it was deciding at a rate of 100 cases per month.^[236] In effect, anybody wanting to achieve *de facto* permanent residence in Canada needed only to lodge an appeal of their deportation with the Immigration Appeal Board to be added to the Board's backlog, which began to extend into the 21st century.^[234]

As a result, in 1973 the government amended the *Immigration Appeal Board Act* to abolish the universal right of appeal for all persons in Canada. Instead, only permanent residents, valid visa holders, and persons claiming to be refugees or Canadian citizens were given a right of appeal.^[236] In order to clear the backlog, the government also instituted a one-time amnesty program, which more than 39,000 people availed themselves of, including a significant number of US draft dodgers.^[237]

5.11 Negotiation of the 1967 Refugee Protocol

The 1951 Convention was seen by many as a Convention that reflected European experience - and by its terms was limited to those fleeing persecution 'as a result of events occurring before 1 January 1951'. In the 1950s, refugees were emerging in other parts of the world in increasing numbers. In the 1950s, for example, anti-communist and nationalist Chinese refugees fled to Hong Kong in large numbers. In the 1960s, decolonization in Africa saw the scale of the refugee phenomenon there grow. Estimates put the total refugee population of Africa at 400,000 in 1964, a figure that had reached one million by the end of the decade.^[238] To wit, in the early 1960s, 150,000 Tutsi refugees fled Rwanda for Uganda, Burundi, Tanzania and Zaire; more than 80,000 refugees from Zaire could be found in Burundi, the Central African Republic, Sudan, Uganda and Tanzania by 1966; the first Sudanese war that ended in 1972 created 170,000 refugees; and there were 250,000 refugees from Rhodesia in Mozambique, Zambia and Botswana by the end of the 1970s.

UNHCR responded in a number of ways. In 1957 it developed what was called its 'good offices' mandate, which allowed the organization to bypass the geographical limitations of the Geneva Convention and assist in, *inter alia*, Hong Kong.^[187] In the mid to late 1960s, negotiations started to expand the temporal and geographic scope of the 1951 *Refugee Convention*. The Organization of African Unity's move to negotiate a regional refugee convention for Africa was feared by the UNHCR as something that could limit its authority and undermine the (supposedly) universal regime it shepherded.^[239] The 1967 Protocol was UNHCR's response. As articulated by the UNHCR, the motivation behind this initiative was to ensure that the *de facto* racial distinctions built into the 1951 Convention yielded to a growing anti-discrimination postcolonial zeitgeist:

The Convention had led to an unfortunate discrimination among the different groups of refugees, in particular with regard to the African refugees. Such discrimination conflicted with the Statute of his Office and was contrary to the universal spirit of the Convention itself.^[240]

The resultant protocol was signed at New York in January 1967. It entered into force that October. The changes that the protocol made to the 1951 Refugee Convention were straightforward: extending the territorial and temporal scope of the Refugee Convention to cover refugees outside of Europe and those displaced for newly emerging reasons.^[241] Canada was a laggard in signing the instrument. It initially refused to commit to the initiative to negotiate a protocol to the *Refugee Convention* on the basis that it was preparing what it termed its *White Paper on Immigration*.^[242] In 1966 Canada released this *White Paper* to, in researcher Clare Glassco's words, "test the waters" for making more fundamental changes to the immigration regime.^[243] Reaction to the White Paper was, however, tepid to negative.^[84] As a result, it would be three years until Canada would come to sign onto the 1967 Refugee Protocol.

5.12 Canada's ratification of the *Refugee Convention* and *Protocol*

Among many initiatives, the 1966 *White Paper on Immigration* committed to the establishment of an immigration admissions policy that would be free from discrimination on the grounds of "race, colour or religion". Further, the Paper proposed both the introduction of a refugee determination process within Canada's borders, as well as the ratification of the 1951 UN Refugee Convention. As immigration official E.P. Beasley noted in 1966, in reference to the need for a clear refugee policy, in his view Canada had "become a country of first asylum," and, thus, "the time may have come to set forth in legislation machinery and a methodology for determining these individual cases more precisely and more fairly."^[243] The concept of a "first country of asylum" in this context refers to a situation where Canada is the first country that grants protection to an individual, as opposed to resettling individuals who have already found temporary protection elsewhere.^[244] An overall 'concept of control' had arguably traditionally governed Canada's refugee admission policies, a concept designed to control the 'quality' of those admitted, to ensure refugee selection overseas, and to prevent uncontrolled movement into Canada.^[245] At this time, Canada was increasingly seeing itself as a country of first asylum as Cold War crises caused thousands to seek safe haven in the West.^[65] That said, reaction to the White Paper was sharply negative,

[84] which accounts for why it took a further three years to make significant reforms to the immigration regime.

In May 1969 Canada ratified the 1957 *Agreement Relating to Refugee Seamen*.^[246] Then, a month later, in June 1969 Canada ratified the 1951 *Convention Relating to the Status of Refugees* as well as the 1967 *Protocol Relating to the Status of Refugees*.^[247] A statement by the Department of Manpower and Immigration at the time said that accession "would not alter the generous treatment Canada had traditionally extended to refugees".^[248] Indeed, at that time, most refugees were from Eastern Europe, and it was Canadian policy not to return them forcibly, and as such they were generally given immigrant status. Very few persons at that time entered Canada from the parts of the world that are major refugee-producing hotspots today. Furthermore, at that time refugees could apply for residency from within Canada and be considered under our general immigration policy.^[230]

Despite ratifying the aforementioned international instruments regarding refugees in 1969, no statute-based, official refugee policy existed in Canada for affirmative claims until the implementation of the 1976 *Immigration Act*.^[249] Instead, refugee claims were dealt with on an *ad hoc* basis by the then Department of Manpower and Immigration.^[250] In 1972, the regulation permitting immigration applications to be made from within Canada was revoked.^[251] This policy change would drive more people in Canada who did not want to be removed to avail themselves of the country's nascent refugee determination procedures. In 1973 the Canadian government established its first formal administrative structure to deal with refugee claimants. An interdepartmental committee comprised of representatives from the Departments of External Affairs and Manpower and Immigration met to assess individual claims and forward their recommendations to the Minister of Manpower and Immigration who had the authority to decide whether a refugee claimant could remain in Canada or would be deported.^[65] Furthermore, the *Immigration Appeal Board Act* was amended that year to empower the Board to quash a deportation order against a person it determined to be a Convention refugee^[201] and to also grant special relief in other cases because the claimant would suffer undue hardship or where humanitarian and compassionate considerations could be invoked.^[252] While refugees were given a statutory right of appeal to the IAB, the term "refugee" was not defined.^[251]

At this point, inland claims occurred at the level of hundreds per year. Individual orders-in-council granted a person status in Canada at the Minister's discretion and were based in part on humanitarian, economic, and political considerations.^[65] Hathaway states that this was one of the flaws of the system: it was wholly within the Board's (or Minister's) discretion to grant or withhold landing in any particular case; as a result, there was no guarantee that refugees would receive protection from Canada.^[252] This in-Canada assessment system complemented the overseas assessments then ongoing. Canada had issued a "Guideline for Determination of Refugee Status" in 1970 to give immigration officers criteria for selecting refugees overseas.^[253] That year Cabinet also approved what was termed the Oppressed Minority policy, which provided for the selection of oppressed people who were not Convention refugees because they were still in their home countries.^[254]

Canada incorporated its obligations under the Refugee Convention and Protocol into domestic law at the same time as series of international efforts to expand the scope of those treaties were underway. Some of these international efforts were successful, for example Canada ratified the Protocol to the Agreement relating to Refugee Seamen in 1975.^[255] Other efforts were fruitless. In 1967 the United Nations adopted a Declaration on Terri-

torial Asylum^[256] which provided, in Article 3, that no person entitled to invoke Article 14 of the Universal Declaration of Human Rights should be subjected to measures such as rejection at the frontier. A conference was then held in 1977 to embody this, and other provisions, in a revised convention, a proposed UN Convention on Territorial Asylum.^[257] While a draft was produced,^[258] the conference ultimately ended in failure.^[259]

5.13 Establishment of the Federal Court and increasing judicial scrutiny of immigration decisions

Immigration law during the first century of Canada's nationhood has been said to have been implemented in a "highly discretionary and largely unaccountable" manner.^[260] It had previously been the case that the *Immigration Act* included a very strong privative clause, which courts had largely respected. The 1910 Act stated that "no court, and no judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge ... relating to the detention or deportation of any rejected immigrant ... upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."^[261] As Trebilcock and Kelley summarize, courts of the day, on the whole, respected these limitations imposed upon them.^[262] The comments of one Quebec Superior Court judge on this privative clause from a 1921 decision are illustrative:

... what Parliament intended, and what Parliament actually provided in the language of this statute, was that all questions as to the entry of immigrants into Canada should be determined exclusively by the machinery of the Department of Immigration, namely by the board of inquiry and immigration officers, subject only to an appeal to the Minister, and without any powers of review or control by the Courts ... no Court or Judge may interfere with the proceedings of a board of inquiry, either on the grounds of misunderstanding or misrepresentation of the law, or of the regulations, nor on account of admission of illegal evidence, nor of error in weighing the evidence heard, nor on account of any informality or omissions which may fairly be classed as a matter of procedure, or of departmental regulation.^[263]

This began to shift so that principles of fairness and due process began to assume an increasing importance in the system. Per the 1967 *Immigration Appeal Board Act*, challenges to IAB decisions could be filed directly with the Supreme Court of Canada, with that court's leave.^[264] Thereafter, the scope of the privative clause in the Act was reduced and in 1971, the Federal Courts, both Trial and Appellate, were established. At this point, Parliament amended the *Immigration Appeal Board Act* to direct applications for judicial review of IAB decisions on any question of law to the Federal Court of Appeal, which would have the discretion to grant leave and hear a matter.^[226] Furthermore, the decision of the Minister rejecting a claim to Convention refugee status was reviewable by the Federal Court Trial Division at this time, given that the Trial Division had jurisdiction to issue the traditional prerogative writs where the Court of Appeal did not have jurisdiction. That said, the supervisory jurisdiction of the Federal Courts was usually invoked by way of a judicial review of the IAB decision to the Federal Court of Appeal, rather than by way of reviewing the Minister's subsequent decision at the Federal Court Trial Division.^[265]

Raphael Girard credits the court's decisions with embedding principles of procedural fairness and transparency of decision making in the immigration Ministry's day-to-day operations.^[266] The Federal Court's immigration caseload would come to account for a large majority of its work and cause long queues of cases seeking judicial review. As of the mid-1980s, when judicial reviews were directed to three-member panels of the Federal Court of Appeal, roughly 75% of judicial review applications before that court were for the review of refugee determinations by the IAB.^[267] Two decades later, in the years preceding the implementation of the Refugee Appeal Division at the IRB in 2012, judicial review of inland refugee matters made up around half of the Federal Court's caseload.^[268]

5.14 1976 *Immigration Act*

The revised *Immigration Act* introduced into Parliament in 1976, and brought into force two years later, was a watershed moment for Canadian immigration policy. It overhauled the statute for the first time more than two decades, expunged the last vestiges of open discrimination in the Act, for example by lifting a ban prohibiting gay men and women from immigrating,^[65] and, after a broad national debate, introduced a series of objectives into the statute which largely remain to this day. It did all of this through provisions that, with their detail and specificity, served to constrain executive decision making.^[269] It was with the introduction of the 1976 *Immigration Act* into Parliament that the government reinforced its willingness to assume its international share in refugee resettlement.^[124] It was this legislation that, for the first time, incorporated Canada's *Refugee Convention* obligations into statutory form.^[270] One of the objectives stated in the Act was "to fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and persecuted".^[271] The new Act recognized Convention refugees as a class of immigrants that could be selected abroad for permanent residence in Canada.^[272] The legislation also gave legal standing to the pre-existing *ad hoc* committee for advising the Minister of Immigration on individual refugee claims from people at the border or in Canada, the Refugee Status Advisory Committee (RSAC).^[272]

The RSAC process was as follows: those who sought refugee status in Canada had to first present themselves to an immigration officer. If they were found to be inadmissible (as was usually the case), then they would be sent to an immigration inquiry for a determination about whether they should be removed from the country. It was at this point that the individual could request refugee status, in which case the removal order was stayed and the person was brought before a senior immigration officer for an interview regarding the substance of the refugee claim. The senior immigration officer then sent the transcript of the interview to the RSAC. The RSAC reviewed the application and made a recommendation to the Minister as to whether to accept or deny the claim for protection.^[273] The program was very small: it processed only a few hundred claims per year throughout the late 1970s.^[274] In the year that the revised *Immigration Act* came into force, for example, 4,130 refugees were admitted to Canada, all of whom were fleeing communism.^[275]

Those who were not granted refugee status by the RSAC or the Minister had recourse to make an application on humanitarian and compassionate grounds. Such applications were considered by what was termed the Special Review Committee, which acted in an advisory capacity to the Minister.^[273] Furthermore, the Minister could determine that a person, though declared a refugee, should not be permitted to remain in Canada.^[276] Both

groups had a right to appeal to the *Immigration Appeal Board*.^[277] The IAB reviewed the documentary record and was authorized to grant an oral hearing on the merits of the claim for any applicant who, on the basis of the documentary record, showed that there were reasonable grounds to believe that the claim could be established.^[273] Under this system, in its last year of operation, about nine percent of claimants determined by the Minister not to be refugees were determined by the Board to be refugees.^[278]

Access to the entire system was predicated on the fact that an individual was the subject of an inquiry into their immigration status, which essentially meant that they lacked legal status to remain in Canada. Other persons physically present in Canada, but with some form of (temporary) status had no right to make a claim or have it considered under the refugee claim process. This restriction led to what Rabbi Gunther Plaut termed an "administrative nightmare". In an effort to afford persons legally in Canada the benefits of the refugee status determination process, the Immigration Ministry instituted an extra-legal procedure known as the "in-status" claim. The claimant was considered in the same fashion as a person who made a claim while subject to an inquiry into their immigration status. There were problems with this. First, it lacked finality: if refused, the person could then make a second claim and undergo the whole process provided by the legislation anew. Furthermore, "in-status" claimants were ineligible for employment authorizations while they waited for their claim to be processed, their eligibility to work depending instead on the working permissions (or lack thereof) accorded to them by their pre-existing immigration status in Canada.^[279]

In the 1970s, most refugees that Canada accepted came via overseas resettlement, not an in-Canada asylum process. In the early 1970s Canada accepted its first non-European refugees by resettling a group of 228 Tibetan refugees and developing a "Tibetan Refugee Program" to host them.^[280] Tibetan refugee hosting opened the doorway to other refugee resettlement, as Canada accepted more than 7,000 ethnic South Asians expelled from Uganda under the dictatorship of Idi Amin in 1972-73, the first non-white refugees admitted to Canada in large numbers.^[281] Canada then admitted 7,000 Chilean refugees fleeing Pinochet's regime in 1973 and about 10,000 Lebanese refugees fleeing the Lebanese Civil War between 1975 and 1978.^[282] In the 1970s, the U.S. was the largest source country of immigration, in part because of the large numbers of draft dodgers and deserters unwilling to fight in Vietnam who found refuge in Canada.^[78] Historian Valerie Knowles states that it is impossible to arrive at hard numbers for the number of draft resister and deserters who escaped to Canada during the Vietnam War, but estimates range from 30,000-40,000 from the Canadian Council for Refugees to between 80,000-200,000 according to Mark Fruitkin, a "draft resister" and author.^[283] Later that decade, from 1978 and 1981, 60,000 refugees from Southeast Asia were accepted - a figure that represents 25 percent of the number of immigrants admitted in these years.^[208] During this time, Canada resettled more refugees from overseas than any other country on a per capita measurement.^[284] Canadian immigration officials also travelled to El Salvador to interview prisoners at risk from paramilitary death squads there and grant refuge in Canada to some of those at risk, an example of processing claims in another country.^[285]

That said, decisions to accept these groups of individuals were *ad hoc* and highly political; for example, fearing that most of the Chilean political refugees were too left wing, and not wishing to alienate either the American or new Chilean administrations, the Canadian government restricted their numbers, which is what limited Canada to only accepting about

7,000 Chileans during that 30-year conflict.^[49] Similarly, after Canada accepted some Ugandan Asian refugees, there was marked public opposition to the move, with a poll in 1972 indicating that only 45 percent of Canadians approved of the government's decision; some in the government came to view this initiative as having cost the government seats in that year's election.^[286]

To address demands from civil society to have more of a role in refugee sponsorship, and criticism about government refugee sponsorship decisions, in 1978 Canada established a Private Sponsorship Program through which citizens could assist fully or partially in privately sponsoring new refugees.^[287] To date more than 300,000 refugees have come to Canada through this program.^[288]

5.15 Background to the founding of the Immigration and Refugee Board

The background to the creation of the Immigration and Refugee Board of Canada lay in concerns about the rigour, capacity, independence, and fairness of the pre-existing refugee status determination system in the 1980s.

To begin with, throughout the 1980s there were concerns about the rigour of Canada's asylum system and about potential abuse of the system. In the words of Deborah Anker, in the early 1980s the government undertook to amend what it painted as a fragile asylum system being taken advantage of by 'illegitimate' immigrants.^[289] One of the formative events in the creation of the IRB was the perceived crisis situation which emerged in the late 1980s when the federal government recalled Parliament for an emergency session to amend the *Immigration Act* after 174 Sikh persons arrived by lifeboat near the fishing village of Charlesville, Nova Scotia.^[65] At that time, the Canadian Employment and Immigration Advisory Council reported that most business and labour leaders felt the government had "lost control of the border".^[290] Such concerns about the integrity of the system were exemplified by the Reform Party platform in the 1980s which invoked what has been labelled "inflammatory language" about "immigration abuses, bogus refugees, [and] improper selection of immigrants".^[291] The Progressive Conservative government of the day stated that "many claims have been fraudulent. Recent data show that an average of 70 per cent of claims are unfounded".^[292] One response to these concerns, implemented in the mid-1980s, was what Deborah Anker describes as a series of restrictive measures, including the elimination of employment authorization and various social services for refugee claimants, and a new practice of returning refugee claimants travelling from the US to that country until their Canadian hearing date approached.^[289]

There were also concerns about the capacity of the pre-IRB system as a result of a growing number of refugee claims that were being made during the decade. Rebecca Hamlin states that Canada signed the above-noted international treaties making commitments to refugee protection before it began to consider itself to be a country of first asylum and before asylum seekers started coming to its shores in significant numbers.^[293] In 1980 Canada received what today looks like a very modest 1,488 refugee claims.^[277] By the middle of the 1980s, however, that number had grown to the point where such a large number of people were making in-country asylum claims that the system had become completely overloaded, with 8,260 claims being made in 1985.^[277] The effect of this increase in claims, and the

resources dedicated to refugee status determination, by 1988 it was taking an average of five to seven years for a claim to be processed.^[294] This increase in Canada mirrored similar increases elsewhere in the world, for example, while in 1976 Western European nations received 20,000 asylum seekers, in 1980 there were 158,000 such applicants and by 1986, more than 200,000 claims were being made annually.^[295]

In response to these growing numbers, as well as concerns about political interests potentially affecting decision-making on claims, in 1982 decision-making was transferred to a newly reorganized Refugee Status Advisory Committee,^[296] which for the first time was made clearly independent of the immigration department, with its own Chairman and an increased budget. Its independence was structurally enshrined by the fact that it reported directly to the Minister, instead of being a component of the Foreign Branch of the CEIC.^[297] This allowed it to, for the first time, compile authoritative and independent documentation on refugee-producing situations around the world.^[272] This system involved only written submissions, assessed by the committee in private, with the committee ultimately making recommendations to the Minister of Immigration.^[298] While in 1983 a pilot to provide such claimants with an oral hearing began in Toronto and Montreal,^[65] this simply involved an RSAC member who sat in on the examination and who could discuss any concerns that they had with the claimant and counsel. Under this model, the process was still bifurcated as that Member did not themselves make the actual decision; the decision was still made by the Minister on the advice of an RSAC panel who themselves had not seen the claimant.^[299] The Committee consisted equally of members from private life, the Department of Immigration, and the Department of External Affairs.^[300] As such, concerns about the independence of the refugee determination process from Canada's foreign policy persisted. The granting of refugee status could be seen to make a statement about the state of origin, and it was argued that Canada had a history of restricting the grant of refugee status on political grounds, focusing it in particular on Communist states and demonstrating a reluctance to recognize refugees from newly emerging post-Colonial states, lest such grants of refugee protection be perceived as an admission that western powers' policies and actions had been the cause of refugee flows.^[301] In the 1980s, for example, there were attempts by the Department of External Affairs to reverse RSAC decisions, indicating the extent to which the system was under observation.^[302]

This impetus for change was bolstered by a series of court decisions which undermined the extant framework for the refugee system. To that point, the system had distinguished between "in status" and "out-of-status" persons, contemplating refugee claims only for those individuals under inquiry for having violated the *Immigration Act*.^[303] In 1985, the Federal Court held that distinction to be unfair and inoperative.^[304] Furthermore, another 1985 decision, *Singh v. Minister of Employment and Immigration*, established that where the credibility of a claimant is at stake, an oral hearing before the then-*Immigration Appeal Board* was required. In so ruling, the Supreme Court of Canada set aside the previous system under which an application for an oral hearing had to be made.^[305] The *Singh* decision is often seen as a watershed that enforced *Canadian Charter of Rights and Freedoms* protections for migrants on arrival on Canadian soil, thereby requiring an overhaul of the refugee determination process to ensure that fair oral hearings started to be offered as a matter of course.^[277] One immediate response to the *Singh* decision was to expand access to oral hearings and to increase the capacity of the system in order to facilitate such access. In 1985, Bill C-55 modified the IAB to ensure that all refugees had the opportunity to have

an oral hearing during their appeal and the bill increased the number of IAB members from eighteen up to fifty.^[306]

To address this constellation of challenges, the Canadian governments of the day commissioned a series of major studies, principally the 1981 Task Force on Immigration Practices and Procedures, the 1981 McDonald Royal Commission of Inquiry Concerning Certain Activities of the RCMP which reviewed the security screening process in immigration, the 1983 Robinson Report entitled *Illegal Migrants in Canada*, the 1984 Ratushny Report entitled *A New Refugee Status Determination Process for Canada*, the 1984 Deschênes Commission of Inquiry on War Criminals in Canada, and the 1985 report by Rabbi Gunther Plaut entitled *Refugee Determination in Canada*. Each of these reports recommend approaches for a new asylum determination system that would address both the right to be heard, and balance the competing interests of fairness and efficiency.^[277] The 1981 Task Force provided a report entitled "The Refugee Status Determination Process" which made three main recommendations: 1) the RSAC should be independent of immigration and external policy considerations, 2) the use of the Convention refugee definition should observe the spirit as well as the letter of the law, and 3) claimant should be given an oral hearing as part of the preliminary determination stage. Finally, the report also recommended that the *Immigration Act* "be amended to replace the present determination process with a central tribunal which would hear and determine refugee claims."^[307] The government took some immediate steps in response to the 1981 Task Force report. For example, with respect to the recommendation that the spirit of the Convention refugee definition be observed, the Minister issued new guidelines which instituted that the benefit of the doubt be given to claimants.^[307] The government also took other steps to increase the fairness of the system for refugee claimants, including replacing job-specific employment documents with generic authorizations in 1985^[307] and dropping the requirement for an inquiry to be convened before a claimant would qualify for employment authorization - thereby eliminating an obstacle that had resulted in waits of up to eight months for employment authorization.^[308]

What ultimately emerged from all of these reports, events, and related legislative machinations of the 1980s was a new asylum system centred around a tribunal model. The relevant legislation, Bill C-55, or the *Refugee Reform Act*, was introduced in the House of Commons in 1986. This bill was supplemented by Bill C-84, the *Refugee Deterrents and Detention Act*. This latter, more restrictive piece of legislation, responded concerns about ships arriving on Canada's coast, criminality, and people smuggling.^[309] There was lengthy debate about these bills at an emergency session of Parliament.^[310] The Senate conducted an extensive inquiry into Bill C-84, and rejected the bill twice.^[311] Ultimately, after a new Immigration Minister agreed to additional amendments, the two bills were passed by the House of Commons and the Senate in 1988 and were given royal assent on July 21 of that year.^[312] Features and aspects of the new system included:

- Creation of an independent tribunal: The Immigration and Refugee Board of Canada came into existence as an independent administrative tribunal on January 1, 1989 with 115 members.^[313] At that time, the IRB consisted of two divisions: the Convention Refugee Determination Division and the Immigration Appeal Division, which replaced the previous Immigration Appeal Board. Gordon Fairweather, a former Attorney General of New Brunswick and the first Chief Commissioner of the Canadian Human Rights Commission, was appointed as the first Chairman of the IRB.^[65] As the respective names imply, one of the biggest changes was the move from a Refugee Status *Advisory Committee*

which had left ultimate decision-making in the hands of the Minister it advised, to a fully independent tribunal.^[314]

- CRDD Oral hearings: The new refugee determination process included an oral refugee claim hearing with two IRB members presiding.^[315]
- Eligibility and credible basis screening procedure: The *Immigration Act* included a procedure whereby all applicants had a hearing before a panel of two in which a claimant had the burden of proving that they were eligible to have their claim determined and that there was a credible basis for the claim.^[316] The panel included an immigration officer and a member of the CRDD. If either of the two panel members were persuaded, then the claim would be heard at a full hearing before the CRDD. When this system was being introduced, the government estimated that this screening process could be completed in between three and seven days.^[317] Reasons were required to be provided for decisions in this screening process.^[317] As of October 1989, 5% of claims had been determined to lack a credible basis pursuant to this process.^[318]
- Governor-in-Council appointees: Up to 65 full-time Members of the Convention Refugee Determination Division could be appointed by the Governor in Council.^[233] If workload required, additional part-time Members could be recruited.^[319]
- Non-adversarial processes: The CRDD hearing into a claim was to be conducted in a non-adversarial manner. As part of this, the Minister was entitled only to present evidence and could not cross-examine the claimant or make representations, save where exclusion was at issue.^[233] Panels of the CRDD were assisted by an IRB employee called a Refugee Hearing Officer (RHO).^[233] The RHO was the new name for what had been referred to as the case presenting officer under the previous Refugee Status Advisory Committee system.^[320]
- Private proceedings: In contrast to the public proceedings at the former IAB, CRDD proceedings were normally conducted *in camera*.^[233]
- Informal processes: IRB management aimed to ensure that the Board respected its quasi-judicial status and avoided the trappings of a conventional court system, pushing the idea of brief written decisions and also supporting oral decisions.^[321]
- No countries designated pursuant to the safe third country regime: One concern raised by civil society with the new legislation was the Safe Third Country Regime that it introduced. In response to public criticism of the Safe Third Country Regime, Barbara McDougall, who was then Minister of Employment and Immigration, became persuaded that the United States might send refugee claimants deported from Canada back to Central America where their lives would be in jeopardy. As a result, she announced in December 1988 that she was "prepared to proceed with no country on the safe third country list ... We think the new system will be able to function without it."^[322]
- Limitations on judicial review: As was the case for the IAB, judicial review of determinations made by the IRB could only proceed with leave.^[323] However, the act provided that deportations would not take place until the Court had made a decision on the application for judicial review.^[324]
- Post-determination risk assessment: The government instituted a policy in 1989 to conduct a risk review for refused refugee claimants where time had passed between their refusal and deportation to assess claims regarding new risks.^[78] Specifically, unsuccessful refugee claimants were able to apply for post-determination review by an immigration official to evaluate whether removal would result in compelling personal risk. This review assessed "risk to life, inhumane treatment, or extreme sanctions," and could provide protection to persons not covered by the 1951 Convention and Protocol.^[325] Approximately

2-3% of such applications were accepted.^[326] As discussed below, this process eventually became the foundation for what is now s. 97 of the IRPA.

- Cessation and vacation provisions: Under this new law, the Minister was able to apply to the Refugee Division for a determination, before a panel of three of its members, that a person was no longer a Convention refugee on the grounds that the refugee obtained their status by fraudulent means or misrepresentation, or that the refugee no longer needs protection.^[324]

The IRB represented a fresh start for asylum policy-making in Canada. As part of the transition to the new system, the government instituted a one-time expedited review program for people with pending asylum applications. This was designed to "clear the decks" and allow for a fresh start in asylum policy-making.^[274] It essentially amounted to a general amnesty for refugee claimants who had entered Canada before 21 May 1986, one where individuals were permitted to stay in Canada and become permanent residents if they were already employed or likely to secure employment in the near future and had no medical, security, or criminal concerns.^[65] While under the previous system 30% of applicants had been accepted,^[327] under the expedited review program, acceptance rates were much higher - approximately 85% of the 28,000 applicants processed in 1986, for example, were accepted. All told, a backlog of 125,000 cases accumulated between the *Singh* decision and the coming into effect of the reformed refugee determination system in 1989, cases which were addressed through this expedited review program.^[266] While the expedited review program was supposed to be able to process the outstanding applications within two years, it took much longer to do so, keeping, in the words of the Canadian Council for Refugees Executive Director Janet Dench, "refugees in limbo and separated from their families for years".^[84]

5.16 Juridification of the refugee system and broader interpretations of the refugee definition

A longer-term implication of the *Singh* decision and the resultant changes to the refugee system, including the creation of the IRB, has arguably been the increasing 'juridification' of the refugee process.^[328] Colin Scott defines juridification as the "process by which relations hitherto governed by other values and expectations come to be subjected to legal values and rules".^[329] A legal conception of asylum has edged out other conceptions of the institution and process, including the political and religious conceptions of asylum that were previously dominant.^[330] This change had implications for how the system was administered. For example, the reasons offered for decisions by the Refugee Status Advisory Committee in the 1980s were scant; as refugee lawyer David Matas describes it, the reasons often consisted of "merely a few sentences" which "seldom related the findings of fact on which their conclusions were based".^[331] In short, he states, what were offered were conclusions, as opposed to reasons. The reasons offered by the IRB would generally be more fulsome. This transition was consistent with international trends at the time - for example, it was not until 1984 that the Home Secretary in the UK was even required to give reasons for an asylum decision.^[332]

In this way, as the juridification of the system emphasized the importance of individuals retaining counsel, it is no coincidence that it was in 1986 that a group of immigration consultants assembled to form the immigration industry association in Canada, the Association of Immigration Counsel of Canada.^[84] Questions that arose about the legality of the immi-

gration consultant regime were put to rest in the 1990s with legal proceedings that the Law Society of British Columbia brought against Jaswant Singh Mangat, who ran Westcoast Immigration Consultants Ltd., providing representation for a fee before the Immigration and Refugee Board. After a BC judge issued an injunction against these activities on the basis that Mangat was not called to the bar in British Columbia, his became a test case, ultimately resolving in 2001 when the Supreme Court of Canada concluded that non-lawyer immigration consultants were in fact legal and authorized by the *Immigration Act*.^[84] At this time there was no system regulating immigration consultants and there was nothing in Canadian law which would prohibit an unlicensed individual from charging a fee to represent a client in an immigration matter.^[84] This would not arrive until after 2002.

With the end of the Cold War, and this juridification of the refugee system, the nature of who was recognized as a refugee began to shift - the concept went from being primarily about flight from Communism to a broader human rights-based conception of who was entitled to protection. Between the 1950s and the 1970s, argued the refugee scholar Gil Loescher, "recognizing persecution and the identifying perpetrators caused no headaches and the grant of asylum was generally used to reaffirm the failures of Communism and the benevolence of the West."^[187] The newfound IRB began to interpret the *Refugee Convention* in a way that was characterized as "expansive" and "progressive". In 1991, Canada became one of the first countries in the world to recognize sexual orientation-related persecution as a basis for claiming asylum.^[333] In 1993, the *Immigration Act* was amended to give the Chairperson the authority to issue guidelines.^[334] Canada then issued guidelines on the handling of gender-based asylum claims in 1993, something that was associated with a growing acceptance of claims related to gender-based persecution.^[335] While 80% of Canada's refugee entrants in the 1980s were men,^[245] the system became more gender balanced by the late 1990s. In 1996, the IRB adopted guidelines on child refugee claimants, reportedly the first such policy initiative of its kind adopted by any state system.^[336] Much later, in 2017, the Board implemented guidelines on the adjudication of claims involving Sexual Orientation and Gender Identity and Expression (SOGIE).^[337]

These progressive interpretations of Canada's refugee obligations were influenced by Canada's human rights obligations and international human rights procedures that refugee claimants may access. The Government of Canada ratified the Convention on the Rights of the Child in 1991. This supplemented earlier instruments that Canada had ratified, including the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights. Claimants today can bring individual complaints to seven UN treaty bodies established pursuant to such treaties, as well as to the special procedures established by the UN Human Rights Council, in particular, the Special Rapporteur on the human rights of migrants. The Committee against Torture is by far the most solicited UN treaty body and between 80 per cent and 90 per cent of all individual complaints submitted thereto concern alleged violations of the principle of *non-refoulement* enshrined in Article 3 of the Convention.^[338]

5.17 Growing claim numbers and efficiency measures

The arguable corollary to this broadened definition of a refugee was an increasing difficulty of distinguishing refugees from other migrants.^[339] Indeed, because poverty may be a contributory cause of human rights abuse, many refugees will be migrating to better economic

conditions.^[340] Such challenges, the individualistic status determination model employed in Canada, as well as a ballooning number of claims, quickly resulted in backlogs. Soon after the IRB started in 1989, the number of asylum seekers reaching Canada began to rise, from a rate of several thousand a year, to reach 37,000 in 1992.^[341] This happened concomitant to several global crises, including the implosion of the former Yugoslavia in 1991-92, which saw a number of persons come to Canada and claim asylum. At this point, Canada also fast tracked the admission of more than 25,000 refugees from Bosnia through its resettlement program.^[342]

Bill C-86, passed by the Senate in December 1992, was a response to this influx of claimants. The bill was perceived to be primarily concerned with boosting the system's efficiency. It did this in a number of ways:

- First was by eliminating a screening system for claims at the IRB and transferring authority for determining whether an applicant was eligible to claim refugee status from the Board to senior immigration officers at the immigration department.^[343] In the name of efficiency, Bill C-86 transferred the eligibility determination step to the department and abandoned the screening process designed to eliminate claims with “no credible basis”.^[344] When the *Immigration Act* was amended to eliminate the two-stage screening process, a new test for determining that claims have no credible basis was added to the statute, but it assumed a different function: instead of screening out claims at a preliminary stage, it served to restrict the post-determination rights of unsuccessful claimants whose claims were found not to be supported by any credible evidence.^[345]
- Changes were also made to the process for seeking judicial review of the Board's decisions. From the time that the IRB had been created, panels of the Federal Court of Appeal had been conducting the judicial reviews, where they granted leave. February 1992 reforms to the *Federal Courts Act* transferred judicial review jurisdiction over credible basis decisions to the Federal Court Trial Division.^[346] In 1993, amendments to the *Immigration Act* came into force which vested single judges of the Trial Division with original judicial review jurisdiction over all decisions of the Convention Refugee Determination Division.^[347] The move from multi-member panels to single judges for judicial reviews was yet another efficiency measure implemented for this high volume system.

In 1994, as a concession to pragmatism, the government decided not to return certain refused refugee claimants to their countries of origin, particularly certain claimants from China. It did this by introducing the Deferred Removal Orders Class (DROC), which allowed applications for landing from refused refugee claimants who had not been removed after three years, subject to certain conditions. The Class was particularly aimed at resolving the situation of some 4,500 Chinese claimants waiting in limbo.^[84] In this way, the initiative was a compromise: providing a sort of amnesty for the existing backlog of claimants, who had waited while deportations to China were suspended following the Tiananmen Square massacre, while also announcing that deportations of new refused claimants would recommence. Later, Canada also introduced special measures to address the situations of claimants who were not being recognized through regular procedures. In January 1997 the government introduced the Undocumented Convention Refugees in Canada Class (UCRCC), which offered a means for some refugees from Somalia and Afghanistan who were unable to satisfactorily establish their identity to become permanent residents, but imposing a five year wait from the date of their refugee determination.^[78]

Finally, the position of the Refugee Hearing Officer continued to be seen as an important part of the efficiency and integrity of the system. This position assisted CRDD Members by conducting research and being responsible for questioning during hearings. In 1995, the position was renamed to be called a Refugee Claim Officer.^[334]

5.18 Growing claim numbers and deterrence measures

There was a time when the refugee "problem" was thought to be solvable.^[348] The Office of the United Nations High Commissioner for Refugees (UNHCR) was originally set up for only three years. The office was renewed by the UN General Assembly thereafter, but only for successive five-year periods. UNHCR's temporary nature, and repeated renewals, continued until December 2003. At that time, the UNGA removed the temporal limitation and created a framework for refugee protection set to continue indefinitely, "until the refugee problem is solved".^[348] In Shauna Labman's words, the removal of the temporal limitation on UNHCR's mandate speaks to the recognition of the increasing unlikelihood of such a resolution.^[348] Ebbing expectations of any permanent solution to refugee issues have come at the same time as refugee numbers have grown, asylum claimants have come from further afield, and concomitant refugee status determination costs have increased. This has been driven by reductions in the cost of international air travel, and the end of the Cold War, and with it a sharp reduction in the number of countries placing limits on the ability of nationals to leave their state (viz. the fall of the Berlin Wall).^[202]

In response, in Bríd Ní Ghráinne's words, states have begun to employ increasingly "creative" means to constrain refugee flows and restrict the number of individuals they recognize as refugees.^[349] Such measures have included curtailing the entry of refugees onto their territories through what she terms "relatively invisible—and hence politically expedient—*non-entrée* measures"^[349] which have been deployed by Canada to an increasing extent in recent decades. Canada's geographic location, buffered by the U.S., Mexico, and three oceans, has long made it difficult for irregular migrants to reach its territory.^[350] As the number of claimants in the country has risen in recent decades, Canada has increasingly turned towards the following *non-entrée* measures:

- Restrictive visa policies: Until the late 1970s Canada had many fewer direct flights from other countries and it also had no visa requirement for any country in the western hemisphere.^[351] Instead, many travellers to Canada had to switch flights in the United States, something which generally required a visa to that country. In the late 1970s, direct flights to Canada from other countries began to spring up and Canada began to implement an in-Canada asylum system. Canada simultaneously began to require visas for entry into Canada, something which restricted access to the asylum process.^[337] In 1987 the government began to require that individuals travelling via Canada to another country have a transit visa to pass through Canada if they came from a country whose citizens required a visitor visa to visit Canada.^[352] Such visa requirements expanded to the point that today citizens of states considered to be "refugee producing" generally require visitor visas that are described as "extremely difficult to obtain".^[353] For example, the rejection rate for visa applications from refugee-producing countries such as Somalia, Yemen, Afghanistan, and Syria is nearly 75 per cent.^[289]
- Carrier sanctions: Carrier sanctions refer to obligations placed on airlines and other transportation services to take care that they not transport anybody without a visa,

if they are required to have one.^[354] The Department of Citizenship and Immigration charges a carrier what has been labelled a "hefty" administration fee^[355] for each traveller arriving with improper documents.^[356]

- Criminalization of people smuggling: Canada has used provisions criminalizing human smuggling as a means to deter asylum claims, for example bringing charges against a US humanitarian worker for smuggling (an offence under IRPA that carries a maximum life sentence) for transporting twelve Haitian asylum seekers to the USA–Canada border.^[357] Furthermore, in 1993 the passage of Bill C-86 established an expanded list of criteria by which an applicant might be determined inadmissible.^[358]
- Biometric requirements: In the early 1990s, the government introduced a requirement that asylum applicants be fingerprinted.^[359] The government also then introduced and gradually expanded biometric requirements for visa applicants; by the end of 2018, all visitors requiring visas also required biometrics.^[360] Measures were also taken to use such biometric identifiers as part of information-sharing agreements with other countries. The Canada-US Smart Border Declaration of December 2001 committed that the two countries would develop common biometric identifiers and engage in the exchange of information.^[361] A 2003 agreement between the countries entitled *Sharing of Information on Asylum and Refugee Status Claims* allows for the automated, systematic sharing of information between Canada and the US about asylum seekers, including biometric and biographic data.^[361]
- First country of asylum principles: Canadian immigration legislation has permitted the designation of safe countries since 1988.^[362] This provision was used to authorize the safe third country agreement between Canada and the United States in 2004 (see below).
- Stricter port-of-entry interviews and security screening: In the early 1990s, the government introduced deterrence measures design to push down the number of refugee claims, including stricter port-of-entry interviews.^[359] Then, in the wake of the 9/11 attacks, the then Immigration Minister announced that there would be much greater utilization of the strategy of Front-End Security Screening (FESS) for refugees as they arrive in Canada.^[363] More detail on FESS screening is available at: Canadian Refugee Procedure/Changing the Date or Time of a Proceeding#Regulation 159.9(3)(b): The process for investigations and inquiries related to sections 34 to 37 of the Act is referred to as the FESS process¹.
- Pushback operations: For example, in 1998 Canadian officials arranged for the interception by the Senegalese navy of a boat carrying 192 Tamil persons from Sri Lanka, individuals who were then returned to Colombo before they could arrive in Canada.^[364]
- Overseas interdiction: CBSA employees called migration integrity officers work overseas, ensuring that individuals who are travelling to Canada have proper travel documentation.^[365] Canada's interdiction programs abroad are a component of what is termed its Multiple Borders Strategy (MBS). Under the MBS, liaison officers are tasked with preventing persons who lack Canadian authorization or other required documents from boarding planes or boats bound for Canada.^[366] In 2012 the government reported that there were 63 such officers in 49 locations worldwide.^[367] Between 2001 and 2014, such liaison officers intercepted over 86,000 persons offshore.^[368] For example, in 2018, 7,208 people, mostly from Romania, Mexico, India, Hungary, and Iran, were barred from boarding flights to Canada due to "improper documentation".^[369]

1 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Regulation_159.9\(3\)\(b\):_The_process_for_investigations_and_inquiries_related_to_sections_34_to_37_of_the_Act_is_referred_to_as_the_FESS_process](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Regulation_159.9(3)(b):_The_process_for_investigations_and_inquiries_related_to_sections_34_to_37_of_the_Act_is_referred_to_as_the_FESS_process)

- Funding for border enforcement in countries of transit: Canada funds border enforcement in the global South to prevent departure.^[370]

Furthermore, measures have been implemented to streamline the asylum process for those in Canada and make claiming asylum in Canada less desirable:

- Limitations on appeal: One efficiency measure that was implemented at the time of the IRB's founding was that refugee claimants no longer had the ability to appeal a refusal of their claim under this revised system. As David Matas writes, this aspect of the new process was much criticized by legal counsel for refugees at the time.^[371] Claimants whose claims were declined continued to have recourse to seek judicial review at the Federal Court. However, a leave requirement was introduced in amendments to the *Immigration Act* in 1989.^[372] As a result of this, those seeking judicial review at the Federal Court required leave of the court to have their case heard. Leave to appeal has been granted in about 10 per cent of cases and reasons for refusal of leave are not granted.^[373]
- Broader restrictions on eligibility to claim: In 1994, authority was provided to the Minister of Citizenship and Immigration to issue a danger opinion against a refugee applicant on the basis of serious criminality. This had the effect of staying the refugee proceedings, removing the case from the jurisdiction of the IRB.^[374]
- Restrictions on employment for claimants: In the early 1990s, the government prevented refugee claimants from working. This was changed later in the 1990s.
- Move from two-person panels to one-person panels: As the Convention Refugee Determination Division was originally conceived, refugee claimants would appear before panels of two decision-makers, only one of whom needed to accept their claim for their application to be successful. This at the time was conceived of as a cost-saving measure when compared to the three-member panels on the prior Refugee Status Advisory Committee^[320] and the three-member panels of the prior Immigration Appeal Boards.^[375] A further cost-saving initiative was announced in March 1995 to move from two-member panels to one-person panels.^[376] While the legislation would not be changed to make one-person panels the norm until the next decade, one-person panels *de facto* became the norm in the 1990s anyways. During that period, refugee determinations were usually made by one member sitting alone, with the "consent" of the applicant to do so. Catherine Dauvergne writes that by the time of the legislative amendment in 2002 that formalized this practice, two-person panels had already become rare.^[377]
- Increased focus on effecting removals: Citizenship and Immigration Canada describes removal as a key tool within the refugee system.^[378]
- Professionalization of immigration consultants: Steps were taken to professionalize the non-lawyer immigration consultants who can represent individuals before the IRB, including the 1996 creation of an Immigration Practitioners Certificate Program at Seneca College in Ontario, the first such program in Canada.^[84]

Rebecca Hamlin situates the rise of this regime to deter asylum claims in the following way: "the rise of the regime of deterrence is, in part, a story of unintended consequences, because international commitments made by each country in a particular political moment came back to haunt future generations of policymakers. Had these countries' leaders anticipated the financial, security, and political challenges of the present-day situation, they might not have been as willing to make commitments that, at the time, were largely an abstraction."^[293]

5.19 The 2002 move from the Immigration Act to the IRPA

In the late 1990s, the federal government began a process to overhaul the then-*Immigration Act*, including with a lengthy public consultation period.^[379] It commissioned a report entitled *Not Just Numbers: A Canadian Framework for Future Immigration* which set out priorities for the reformed system, some of which were accepted and others (like removing jurisdiction for determining refugee status from the IRB and transferring it to civil servants^[380]) which were not. The resulting *Immigration and Refugee Protection Act* (“IRPA”) was an entirely new statute and represented the first complete revision of immigration legislation in Canada since 1978.^[381] The IRPA received Royal Assent in December 2001 and came into force on June 28, 2002.^[382] The shift from the *Immigration Act* to the IRPA that June marked a new era of asylum policy in Canada - one that has been described as being focused on relieving administrative burdens. In the drafting and development of the IRPA, considerable public attention was devoted to the question of whether to have one act governing immigration matters and a separate act governing refugee law. The idea, motivated by concern about the fundamental differences between immigration and refugee law, and advocated for in the *Not Just Numbers* report, was ultimately rejected; however, the Act's new title and the establishment of a separate division of the legislation devoted to refugees reflect this concern.^[383] Highlights of the new legislative framework include the following:

- Framework legislation: Compared to the previous legislation, the IRPA was described as framework legislation, with more details to be found in the regulations.^[334]
- Consolidated grounds for refugee protection: The IRPA expanded the categories of persons entitled to refugee protection. Under the former immigration legislation, the only category of person who was clearly entitled to protection at the IRB was a person who fell within the definition of “Convention refugee”. IRPA expanded the scope of coverage to include persons who are at risk of torture, death, and cruel and unusual treatment upon deportation to their country of nationality or former habitual residence.^[384] Canada had ratified the *Convention Against Torture* in 1987, but did not implement it directly in Canadian domestic law until this point.^[385] Rebecca Hamlin writes that there is no evidence to suggest that Parliament considered the introduction of IRPA section 97 to be monumental when it discussed the legislation before voting on it in 2002. When the bill was being debated, Minister of Citizenship and Immigration Elinor Caplan assured members of Parliament the IRPA “gives us the ability to streamline our procedures, so that those who are in genuine need of our protection will be welcomed in Canada more quickly and those who are not in need of protection will be able to be removed more quickly. That streamlining is extremely important.”^[386] Immediately after IRPA went into force, the IRB Legal Services division produced a lengthy guide for decision makers on how to make section 97 decisions; the guide states that these decisions were subsumed under the IRB mandate to avoid the “delays and inconsistencies” of the previous “fragmented” and “multilayered approach”.^[386]
- Shift from the CRDD to the RPD: The Convention Refugee Determination Division (CRDD) was renamed the Refugee Protection Division (RPD), to reflect the fact that it now had jurisdiction over the consolidated grounds for refugee protection.
- Creation of the RAD: The IRPA created the Refugee Appeal Division (RAD), which would review negative decisions on their merits, though this took ten years to fully implement.^[387] Specifically, after the Act was passed, *Citizenship and Immigration Canada*

announced that as a result of “pressures on the system” implementation of the RAD would be delayed.^[388]

- Shift to single-member RPD panels: Because the IRB backlog was a huge concern, the staff time required to support the RAD was created through a shift from two-member panels to single-member hearings (or, occasionally, three-member RPD panels) so that half the number of Board members would generally be required for each case.^[389] This was as opposed to the two-member CRDD panels, or the use of single member CRDD panels on consent that had existed previously.
- PRRA: The IRPA transitioned from the Post-Determination Refugee Claimants in Canada Class (PDRCC) to the Pre-Removal Risk Assessment (PRRA) process.^[390] The procedure compensates for the inability of claimants to make a second refugee claim, even when changes in circumstances in the country of origin occurred after a first claim was denied.^[391] The way PRRA functions is that a refused asylum seeker can apply for a PRRA to assess whether the risk faced by the refugee claimant has changed since their decision was rendered.^[392] PRRA is an administrative review of an application done on the basis of a written submission.^[393] When the government announced the creation of CBSA in 2003, originally the plan was to transfer PRRA responsibility to them, but in the wake of pressure from NGOs, PRRA responsibility remained with Citizenship and Immigration Canada.^[394] As discussed below, in 2012 the IRPA was amended to limit access to the PRRA during the twelve months following the rejection of a claim.
- Increased security provisions: Sharryn Aiken, et. al., write that the most significant shift signalled by the IRPA is that it demonstrated a marked security turn in Canadian immigration law. They note that “this is hardly surprising in legislation that was passed in the immediate aftermath of the September 11, 2001 attacks in the United States.^[379] Peter Showler writes that the government almost scrapped IRPA to introduce a law much tougher on refugees, but that Immigration Minister Elinor Caplan decided to proceed with the IRPA in the end.^[395] This law included a number of security-related measures, including:
 - Increased authority to detain claimants: The IRPA expanded the authority of immigration officers to detain refugee claimants where they represented a flight risk, a danger to the public, and/or their identity was in doubt. This expanded authority resulted in the number of individuals detained pursuant to the *Immigration Act* rising substantially, from 8,000 people in the year 2000 to some 11,500 in 2003.^[396]
 - Broader grounds of ineligibility to claim refugee protection because of criminality: When compared to the 1976 Act, IRPA included broadened grounds restricting the eligibility of refugee claimants to have their refugee claims determined.^[397]
 - Anti-smuggling measures: The past century has seen what Gil Loescher describes as “dramatic growth” in human trafficking and trans-continental people smuggling.^[398] Provisions in the IRPA for the first time implemented Canada's obligations under the *Palermo Convention* together with its *Smuggling Protocol* and *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.^[399] Smugglers became eligible for a sentence of life imprisonment upon criminal conviction.^[400]

While the above overhaul of the system represented considerable change, it is also notable that some of the changes argued for in the *Not Just Numbers* report were ultimately rejected. For example, that report had recommended that the processing of overseas and inland refugee claims be unified within a single system with shared decision-makers for both.

Having a single system reflected a desire for more consistent decision-making on refugee status, but, in Shauna Labman's words, "[brushed over] the additional necessity of the selection aspect in overseas resettlement."^[401] The proposal was not adopted.

5.20 Post-IRPA measures

Following the introduction of the IRPA, a number of measures were taken which had a continued focus on system integrity, efficiency, and reducing backlogs at the RPD. These included:

- Reverse-order questioning: The year following the introduction of the IRPA, in 2003, the IRB Chairperson issued Guideline 7 on the Conduct of a Hearing, which created a new order for questioning during an RPD hearing. The new 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.^[402]
- Refusal to introduce the RAD: Over the next decade subsequent to the coming into force of the IRPA, there were several attempts by some members of Parliament to pass another act forcing the implementation of the RAD, including a very near success in summer 2008.^[403]
- Creation of CBSA: The Canada Border Services Agency was established in 2003. It operates as part of the Department of Public Safety Canada, also created in 2003 following the model of the US Department of Homeland Security.^[404]
- Increasingly merit-based Member appointment process: Additionally, there were changes to the appointment process for Governor in Council Members of the Division. Such GIC appointments to the IRB have always been controlled by the Minister of Citizenship and Immigration, although reforms implemented in the 1990s started to provide greater scope for management of the IRB to participate in the selection and reappointment of Members based on more merit-based criteria. These efforts were reversed in the winter of 2006 when the newly elected government introduced changes to give the Minister greater control and discretion. The Chair of the IRB, Jean-Guy Fleury, unexpectedly resigned at this time, eight months before the end of his mandate, leading to speculation that he did so in protest, having been a strong advocate for a more merit-based appointment process.^[373] Similarly, there were early exits of a deputy chair and the IRB executive director, as well as the resignation of all five members of an advisory panel that selected Immigration and Refugee Board adjudicators, who released a public letter indicating that they were resigning in protest.^[405]
- Introduction of the Safe Third Country Agreement with the United States: STCAs are bi- or multi-lateral agreements requiring refugees to seek refuge in the first country they reach, prohibiting them from seeking asylum in the other state(s) party to the agreement.^[106] A provision for safe third country agreements was included in Canada's *Immigration Act* in the 1980s. Canada attempted to negotiate such an agreement with the United States in the decades following, initially without success. For example, in 1993 Canada entered into a Memorandum of Agreement with the United States with the intent of the latter being declared as a safe third country,^[406] but in 1998 the Canadian government announced that negotiations with the U.S. pursuant to that Memorandum of Agreement, negotiations which aimed to see the US designed a safe third country, were being abandoned.^[78]

It was only in the wake of 9/11 that Canada was able to successfully conclude such negotiations.^[407] Specifically, on December 5, 2002, Canada signed its STCA with the United States.^[408] That agreement came into effect on December 29, 2004, the first time that the safe third country regime in Canada's immigration legislation was first utilized.^[409] The agreement, modelled on the multilateral Dublin Regulation among European Union member states,^[410] prohibits most persons from seeking asylum at a regular land port of entry in either country if they first landed in the other one.^[106] The immediate impact of the STCA was to significantly lower the number of inland refugee claims in Canada; there was a 49 percent drop in claims made at the Canada-US border after the agreement came into effect.^[106] This trend, however, did not last.^[411] For those who did make a claim at the Canadian border, the vast majority fitted within one of the exceptions to the agreement - in 2005, of the 4033 claims made at the border, only 303 refugee claimants were returned to the United States as ineligible to apply in Canada.^[393]

- Enlargement of UNHCR ExCom: Canada has continued to sit on the UNHCR ExCom. Its size has grown from 25 states in the 1950s to 106 today. As a result, Gil Loescher writes, ExCom has become too large and politicized and it is frequently not an effective decision-making body.^[205]
- Regulation of immigration consultants: The Canadian Society of Immigration Consultants was established to regulate the activities of immigration consultants providing representation for a fee in 2004, the first time that such a regulatory body had been established in Canada.^[84]

5.21 Refugee reform in 2010 and 2012

Two pieces of legislation made significant changes to the refugee system in 2010 and 2012, the *Balanced Refugee Reform Act* (BRRA, 2010) and the *Protecting Canada's Immigration System Act* (PCISA, June 2012). The BRRA received royal assent on June 29, 2010. It was passed by Parliament during a minority government and among its substantial amendments to the IRPA were some compromises proposed by the opposition parties. A federal election was subsequently held on May 2, 2011 and following that election, the BRRA was amended by the new majority government in Parliament, before the substantial provisions of the BRRA came into force on December 15, 2012. Those subsequent amendments came in the form of PCISA. Key portions of PCISA were originally part of the *Preventing Human Smugglers from Abusing Canada's Immigration System Act* (Human Smugglers Act), which was introduced as Bill C-49 in October 2010. After the May 2011 Canadian federal election caused Bill C-49 to die on the order paper, the newly formed majority government re-introduced the provisions as Bill C-4 in June 2011. This *Human Smugglers Act* was then incorporated into Bill C-31, PCISA, in June 2012.^[412]

As Neil Yeates describes it, the thrust of these reforms was for faster processing of claims, with a view that *bona fide* claimants would be more quickly approved, and failed claimants, after access to the new Refugee Appeal Division of the IRB, would be more quickly removed from Canada.^[413] Various changes were made to assist this, including:

- Legislated timelines for hearings: The legislation included accelerated timelines for scheduling refugee hearings,^[410] with a requirement that a hearing take place within 60 days of a claimant making their claim.^[414] This initial date for the RPD hearing was fixed by an immigration officer.

- Implementation of the Refugee Appeal Division (RAD). As part of this reform, the RAD came into being on December 15, 2012.^[415] The RAD, as implemented at this point, had a broader mandate than that envisioned when the legislative provisions for the RAD were originally enacted at the time that the IRPA came into force. For example, the IRPA originally allowed the Minister and the person who is the subject of the appeal to present only written submissions. This was subsequently modified by the BRRA to allow them to submit documentary evidence as well, albeit “only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented.”^[416]
- Public servant decision-makers: First-level decision makers at the IRB’s Refugee Protection Division began to be public servants appointed in accordance with the *Public Service Employment Act* as opposed to Governor-in-Council appointees. The shift away from Governor-in-Council appointees reflected a key recommendation from the government's own immigration-law advisory committee, namely that qualified public servants should be named to the Immigration and Refugee Board, not political appointees.^[417]
- Elimination of the Refugee Protection Officer position: A position that had variously gone by the name Refugee Hearing Officer (RHO), Refugee Claim Officer (RCO), and Refugee Protection Officer (RPO)^[418] was eliminated on the basis that it would no longer be necessary given the expertise that the public servant decision-makers would possess. These roles had previously assisted Members by conducting questioning at hearings.
- Creating a list of Designated Countries of Origin (DCOs), countries that were not generally considered to be refugee-producing, and where measures to deter and expedite such claims were consequently legislated.^[419] The Designated Country of Origin list was introduced in 2012 as part of the *Protecting Canada’s Immigration System Act*. The initiative was modelled on the European Safe Country of Origin list, which is used in that asylum system.^[410] The implications for asylum seekers coming from DCOs included an expedited hearing process with shortened timelines, no access to the Refugee Appeal Division, no automatic stay of removal for failed claimants seeking judicial review, limited access to PRRA, and no eligibility for a work permit or health care for the first 180 days during which they were awaiting a decision on their claim.^[420] Designation as a safe country was dependent on a combination of qualitative observations of countries’ levels of democratic process and human rights records and on two quantitative thresholds, including when 75 percent or more of previous claims by nationals of a country had been rejected by the IRB or 60 percent or more of previous claims by nationals of a country had been withdrawn. The initial DCO list included 25 countries and was eventually expanded to include 42 countries.^[421] On May 17, 2019, following a Federal Court ruling in which specific provisions of the DCO policy were struck down for not complying with the Canadian Charter of Rights and Freedoms, the Government of Canada announced that it would remove all countries from the DCO list^[421] and that the DCO regime would eventually be repealed through legislative amendment.^[422]
- Creating the concept of Designated Foreign Nationals: The PCISA reforms established a regime for what are termed Designated Foreign Nationals.^[423] DFNs, as defined in the Act, are groups of two or more refugee claimants suspected by the Minister of Public Safety 'irregular arrival' with the aid of smugglers.^[424] The implications of being so designated include that DFNs will be automatically detained until their refugee claim is determined if they are sixteen years of age or older.^[414] This built on the way that mandatory detention had already been utilized in Canada after the arrival of Tamil refugees aboard the MV *Ocean Lady* and MV *Sun Sea* in 2010.^[425] Furthermore, even if their claim is accepted,

DFNs are unable to apply for permanent resident status for five years,^[414] as well as being unable to obtain a travel document and unable to sponsor family members.^[424] Soon after the introduction of these provisions in the Act, they were invoked by the government in multiple cases.^[426]

- Reforms to PRRA: In 2012, Parliament amended the IRPA to limit access to PRRA within twelve months following the rejection of a claim.^[427] Henceforth, the way PRRA has functioned is that if a refused asylum seeker is not removed from Canada within a year of the last decision on their refugee claim, they may be eligible for a PRRA to assess whether the risk faced by the refugee claimant changed over that year.^[392] An exception to this 12-month bar was made for claimants from DCOs, who were restricted from applying for PRRA for 36 months following their initial decision; this lengthier PRRA bar was struck down as a violation of s. 15 of the *Charter* in *Feher v. Canada*.^[428] The *Balanced Refugee Reform Act* also transferred authority over the PRRA from the Minister to the IRB, although this transfer has never actually been brought into force.^[429]
- Limitations on the Interim Federal Health Program: The Interim Federal Health Program provides refugee claimants with access to health care while their claims are pending. As part of a strategy to create disincentives for refugee claimants to come to Canada, on December 15, 2012 the government cut access to health care for some categories of claimants.^[430] This policy change was introduced via Orders in Council which limited access to health care in Canada while select refugee claims were pending, principally claims from claimants who originated from DCOs.^[431] Such claimants were entitled to receive much lower levels of health care than other claimants. This policy was declared unconstitutional by the Federal Court in 2015, with the court concluding that the resultant regime amounted to "cruel and unusual treatment" prohibited by the *Canadian Charter of Rights and Freedoms*.^[209] This decision is one in a line of similar cases from courts that have pushed back against restrictive asylum legislation around the world. For example, the UK House of Lords, in *Limbuela*, found that decisions made to refuse support to asylum seekers risked violating the prohibition on inhuman and degrading treatment due to the risk of a claimant being "obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene".^[432]
- Cessation: The new legislation provided for the loss of permanent resident status for certain persons if the RPD allows an application from the Minister for the cessation of their refugee protection.

The current version of the Refugee Protection Division rules came into force on October 26, 2012 following the coming-into-force of this legislation.^[433] The Immigration and Refugee Board, in its public comments, emphasized these rules and the importance of decisions being guided by them. This aligned with comments at the time from the Immigration Minister Jason Kenney of this sort: "I think most Canadians intuitively understand that broad public support for immigration, and, frankly, diversity in our society is contingent on having a well-managed, rules-based, fair immigration system. I think they understand that we all have a stake in maintaining such a system".^[291] Following the coming into force of this new legislation and RPD rules in 2012, there was a 49 percent decline in asylum claims.^[434]

5.22 2010s refugee protection initiatives

5.22.1 Resettlement programs

Canada actively resettles thousands of refugees per year within a voluntary burden-sharing scheme. This act places Canada near the top of a small group of approximately thirty countries worldwide willing to offer refugee protection through resettlement in addition to the promise of *non-refoulement* in the *Refugee Convention*.^[435] Three states have traditionally been the leaders in resettlement: Canada, Australia, and the United States. Combined, they have tended to receive approximately 90 percent of the UNHCR's resettlement referrals.^[436] By way of example, in the 2017 calendar year, the United States resettled 33,400 refugees, while Canada resettled 26,600 refugees, and Australia resettled 15,100 refugees.^[437] In line with this tradition, Canada launched a program to resettle more than 25,000 Syrian refugees in 2015.

5.22.2 Sanctuary city movements

Many people do not file for asylum but live in the margins of society as undocumented self-settled migrants fearing arrest, deportation, and other punitive measures.^[438] The 1906 *Immigration Act* made it the duty of municipal authorities to report select categories of removable immigrants, including those who had become a charge upon public funds or upon any charitable institution.^[439] This duty was subsequently removed from Canada's immigration legislation. Nonetheless, persons without legal immigration status in Canada, whether that of a refugee, refugee claimant, or otherwise, have faced difficulties accessing government and private services lest immigration documents be demanded or they be referred to immigration authorities and deported. In Canada, since 2013, Toronto, London, Vancouver,^[440] Edmonton, Montreal, Ajax,^[441] and Hamilton have all declared themselves sanctuary cities.^[442] These sanctuary city policies have generally involved ordinances ensuring access to municipal services for the undocumented, though without going so far as prohibiting information-sharing with federal border enforcement authorities altogether.

5.22.3 Expanded information-sharing agreements between Five Eyes countries

The 2010s saw a significant increase in the use of biometric technologies by asylum systems around the world. By the end of 2018, for instance, the UN Refugee Agency alone reported the capture and storage of biometric identity for over 7.1 million refugees.^[443] Canada has long been collecting biometric information from refugee claimants and at this time it began to exchange such information more with partner countries. Canada has long had information-sharing agreements with the United States whereby information about refugee claimants is exchanged. For example, the Canada-US Smart Border Declaration of December 2001 committed that the two countries would develop common biometric identifiers and engage in the exchange of information.^[361] A 2003 agreement between the countries entitled *Sharing of Information on Asylum and Refugee Status Claims* allows for the automated, systematic sharing of information between Canada and the US about asylum seekers, including biometric and biographic data.^[361] The exchanged information includes: identity-related information, for example biographic and biometric data; previous refugee

claim status (denied, abandoned, or granted); data that would indicate that a claim is inadmissible; and any evidence submitted to support a previous application.^[361] In 2009 the "Five Eyes" countries signed a Data Sharing Protocol to conduct a small number of "immigration checks" through biometric (fingerprint) data exchanges. This arrangement was intended as a pilot for automated data exchanges and it involved commitments to share 3000 fingerprints annually. Canada then reached information sharing agreements with the United Kingdom (2015), Australia (2016), and New Zealand (2016) which moved from the pilot model to the automated sharing of information.^[361]

5.23 Irregular border crossing controversy

Since the Board's 1989 founding, the number of people making refugee claims has increased greatly, both in Canada and internationally. Looking at the numbers globally, during decade of the 1980s, there were 2.3 million applications for asylum lodged worldwide, mostly in western Europe, the United States, and Canada. During the 1990s, this number grew to 6.1 million applications filed, and the list of receiving nations grew to include Australia, New Zealand, Scandinavia, and southern Europe. During the 2000s, there were 5.5 million new applications filed worldwide, and countries such as Ireland, Greece, Poland, and South Africa became popular new destinations.^[444] Today, roughly one million individuals apply for asylum globally each year,^[445] with those classified as refugees representing 7–8 per cent of the global migrant population.^[446] Similarly, in Canada, while the volume of new claims has gone through cycles, volume has trended upwards over time. Soon after the IRB started in 1989, the number of asylum seekers reaching Canada went up from a rate of several thousand a year to reach 37,000 in 1992.^[341] Since then, three notable case decision backlogs have occurred: in 2002 with over 57,000 claims, in 2009 with over 62,000 pending claims,^[447] and post-2017, where the Refugee Protection Division had 90,000 claims awaiting decision.^[448]

In this context, persons crossing irregularly from the United States into Canada became a significant political issue starting around 2017.^[291] Such crossings occurred primarily at Roxham Road on the Quebec-New York border and at Emerson, Manitoba. From 2017 to 2020 more than 59,000 people crossed the Canada-US border in an irregular manner and claimed asylum in Canada,^[449] in order to evade the restrictions put in place by the Safe Third Country Agreement. This included 20,593 claimants in 2017, 19,419 claimants in 2018, and then 16,077 claimants in 2019.^[449] Quebec received approximately 95% of the irregular border crossers from the United States.^[450] The total number of asylum claims in Canada similarly rose over this period, going from 23,870 in 2016, to 50,390 in 2017, to 55,040 in 2018, to 64,045 in 2019.^[451]

The resources dedicated worldwide to Refugee Status Determination (RSD) have been appropriately described as immense. States and UNHCR rendered 1.5 million decisions on individual asylum claims in 2017^[452] and as of 2018 there were 3.5 million asylum seekers in the world.^[453] Although exact figures are difficult to determine, academics note that the combined cost of RSD performed by states and UNHCR exceeds the total cost of direct humanitarian assistance provided to refugees by UNHCR.^[454] In fact, Thériault has estimated that the Global North alone spends \$20 billion on RSD,^[455] a number which is a multiple of the UNHCR's budget,^[456] and, by his estimate, four times the budget made available to

agencies that are responsible for the care of the refugee population in the Global South, despite the fact that 85% of refugees reside there.

Around the world, irregular arrivals generally have higher success rates for asylum claims than those who apply after arriving on some other temporary visa. For example, in Australia, the historical average success rate for asylum seekers who arrive by boat has been more than 80 per cent. The academic Daniel Ghezelbash states that this is largely due to the effectiveness of visa regimes in identifying persons with potential asylum claims and not giving them a visa which would allow them to travel to the country by regular means.^[457] Despite the comparative *bona fides* of such claimants, the journeys undertaken by claimants arriving in a country irregularly, and necessitated by state deterrence measures, are often hazardous. For example, several crossers into Canada lost limbs to frostbite after walking for hours in freezing temperatures, and Mavis Otuteye, a 57-year-old Ghanaian grandmother, was found dead from hypothermia in a ditch near the Canada-US border in 2017.^[458]

This increase in border crossings between the United States and Canada had political, procedural, and legal consequences, including:

- Challenges to Safe Third Country Agreement: There were post-2017 calls to suspend or end the Safe Third Country Agreement, including a legal challenge to the agreement, which was denied by the Federal Court of Appeal in 2021 for procedural reasons.^[459]
- Increase in claims: The increase in claims caused the government to increase IRB capacity. One of the effects of this increase in refugee claims has been a growing backlog of claims to process at the Immigration and Refugee Board of Canada. In its 2019-20 departmental plan, the IRB noted that "an inventory of more than 75,000 claims has accumulated, representing more than two years of work at current funding levels".^[460] One of the federal government initiatives in response to this surge in claims was to temporarily expand the processing capacity of the IRB. The government increased resources at the Refugee Protection Division so that it could deal with up to 50,000 asylum claims annually by 2021.^[461]
- Calls to extend the Safe Third Country Agreement: There were post-2017 calls to extend the application of the Safe Third Country Agreement across the entire Canada-US border. As of 2017, polls indicated that 70 percent of Canadians felt that security along the Canada-US border should increase.^[462] A 2018 Angus Reid poll indicated that more than half of respondents said that Canada was too generous to asylum seekers who cross into Canada irregularly.^[463] In their 2019 platform, the Conservative Party of Canada committed to prioritizing "economic migration" and favouring those facing "true persecution" over "bogus" refugee claimants.^[291] The Conservative Party indicated that, if elected, it would hire 250 more CBSA officers and move IRB Members closer to crossing sites to expedite the process.^[464]
- Changes to eligibility for referral to the IRB: The irregular border crossing controversy led to Parliament making changes to which claimants are eligible for a hearing before the IRB. In June 2019, amendments were made to the Immigration and Refugee Protection Act in Bill C-97, the *Budget Implementation Act, 2019*.^[465] These changes introduced new grounds of ineligibility for refugee claimants if they have previously requested asylum in a country with which Canada has an information-sharing agreement or arrangement. In practice this means that individuals who made a previous claim in the United States, United Kingdom, Australia, or New Zealand (the "five eyes countries") are ineligible to claim refugee status in Canada and have their claims heard by Immigration and Refugee

Board, though if information sharing agreements are made with other countries, they also will be included.^[466] This is so regardless of whether a decision was ever made on the previous claim.^[467] Those found to be ineligible to make a claim to the IRB may submit an application for a pre-removal risk assessment instead.^[468] Idil Atak describes this omnibus Bill as having been "adopted hastily in the lead-up to the 2019 federal election" as part of the government's measures to respond to the irregular border crossing controversy^[469] and this can be seen as an example of the Canadian government's capacity to respond to developing circumstances quickly with new immigration legislation.^[470]

- Changes to the process of referring a claim to the RPD: The *Budget Implementation Act, 2019* also amended the IRPA to remove the three-day time limit for making a decision on the eligibility of a claim to be referred to the RPD and removed the "deemed referral" to the RPD if an eligibility decision was not made in that time period.^[471]
- Changes to IRB scheduling: As the backlog of claims at the IRB rose, the average wait time for a first hearing at the RPD grew to two years, as opposed to the statutory timeline of two months for most asylum seekers.^[472] The increase in claims triggered a change in how the IRB scheduled and prioritized claims. The *Immigration and Refugee Protection Regulation* allows for exceptions to the time limit for the RPD to hold a hearing in the case of operational limitations.^[473] To deal with its backlog, the IRB began to prioritize older cases for scheduling before newer cases and abandoned the case processing timelines in the Regulations. Previously, when IRCC or CBSA referred a file to the RPD, the claimant was also provided a hearing date; the RPD then postponed that hearing for lack of capacity to hold it within the time limit. As of August 29, 2018, claimants were no longer provided a hearing date at the time of referral.^[474]

5.24 Covid-19

In 2020, in response to the Covid-19 virus, fifty-seven countries shut their borders to asylum seekers.^[475] At first, the Canadian government announced that all claimants arriving outside ports of entry would be screened for the virus and then quarantined if the test results were positive. The Canadian government changed its position days later, announcing that all claimants would be returned to the United States.^[476] As part of this, the two countries reached a temporary agreement which allows Canada to send back individuals entering Canada from the US to make an asylum claim.^[477] The agreement applies between official ports of entry along the land border and at air and marine ports of entry. The government also designated Roxham Road as a port of entry for the purposes of the Safe Third Country Agreement and began returning refugee claimants to the US at this point.^[478] In response to these measures, the number of those attempting to cross the border irregularly plummeted, for example, 24 irregular migrants sought to make claims between March 16, when the border closed, and May 8, 2020.^[479]

The pandemic saw a number of states temporarily suspend asylum procedures.^[480] Canada was one of them. The Refugee Protection Division shut down all hearings for several months as a result of the pandemic, resuming them in the summer of 2020. Referrals of claims to the IRB by IRCC and CBSA were delayed or suspended for far longer.^[481]

The Covid-19 pandemic also saw the Canadian government implement one of its periodic amnesty campaigns for asylum seekers, in this case a program that became colloquially

known as the Guardian Angels initiative which granted permanent resident status to asylum seekers who were involved with front-line caregiving during the pandemic.

5.25 Conclusion

The next chapters in the story of refugee protection procedure in Canada remain to be written. What can be said is that the concept of the ‘refugee’ is as old as the state system, and, in the words of academic Eve Lester, it will remain with us for as long as the state system remains.^[2] As Emma Haddad writes, refugees are the consequence of erecting political boundaries and failing to protect all individuals as citizens, hence pushing insiders outside. So long as these conditions pertain - there are political borders constructing separate states and creating clear definitions of insiders and outsiders, and failures of protection - there will be refugees.^[482] As Alan Nash observes, the structure for protecting refugees is flawed and subject to a series of opposing tensions. Nevertheless, this structure sets out a charter of the rights and obligations owed to refugees and by doing so lays down the standards by which they should be treated.^[483]

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Emma Haddad writes "From the 1670s to the start of the eighteenth century it is estimated that between 200,000 and 500,000 French Protestants left France as refugees to seek protection abroad" in Haddad, E. (2008). *The Refugee in International Soci-*

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In contrast, Hazal Barbaros writes: "The number of immigrants varies according to sources. To begin with, the total number of members of the Reformed Church of France is estimated to be around 900,000. Some sources indicate that the most likely number of emigrants is 200,000 approximately, whereas the others give hyper-inflated figures like 800,000 which basically means France was deprived of nearly the whole of its Protestant population. Concerning those who chose England as their destination, the number is approximated to be between 40,000 to 50,000." See Hazal Barbaros, *Post Tenebras Lux: The Huguenot Diaspora in Early Modern London and its Reflections in Refugee Wills*, Master's Thesis, August 2021, Department of History, İhsan Doğramacı Bilkent University, Ankara, <⁷> (Accessed August 28, 2021), pages 9-10 of document.

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6 Procedural Fairness and Natural Justice

7 Principles for the interpretation of refugee procedure

Fundamental justice requires that a tribunal which adjudicates upon rights must act fairly, in good faith, without bias and in a judicial temper, and must give the opportunity for parties to adequately state their case.^[1] The standards of conduct for the Board are fundamentally based on and recognize two principles: (i) that public confidence and trust in the integrity, objectivity and impartiality of the IRB must be conserved and enhanced; and (ii) that independence in decision-making is required.^[2] This section of the book will explore the principles that have been used when interpreting these requirements in the refugee context.

7.1 Procedural fairness interpretation principles as derived from caselaw

The following are some of the principal principles regarding the interpretation and application of procedural fairness as they have emerged in the refugee context caselaw:

7.1.1 Principles about the expectations that one reasonably has of the Board

- **First, the Board should do no harm.** In all circumstances and at all times, United Nations High Commissioner for Human Rights staff have an obligation not to jeopardize the life, safety, freedom and well-being of victims, witnesses and other cooperating persons.^[3] The same obligation may reasonably extend to staff of the Immigration and Refugee Board of Canada. This principle is reflected in Board policies, such as commitment in the *Instructions for Gathering and Disclosing Information for Refugee Appeal Division Proceedings* that "the assigned member will request specific information about the person who is the subject of the appeal and use such information only when they have completed a risk assessment and are satisfied that there is no serious possibility that gathering the information would endanger the life, liberty or security of the person who is the subject of the appeal or any other person."^[4] That said, there are legal protections against criminal and civil claims provided that the Board acts in good faith: Canadian Refugee Procedure/156 - Immunity and no summons¹.
- **A high duty of procedural fairness is owed in the refugee context.** The Federal Court of Appeal has stated that "The independence of the Board, its adjudicative procedure and functions, and the fact that its decisions affect the Charter rights of claimants, indicate that the content of the duty of fairness owed by the Board, including the duty of

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/156_-_Immunity_and_no_summons

impartiality, falls at the high end of the continuum of procedural fairness.”^[5] This obligation arises not only from Canada’s domestic administrative law, but also from Canada’s international commitments and obligations. The Refugee Convention also provides that the expulsion of a refugee ‘shall be only in pursuance of a decision reached in accordance with due process of law’.^[6] In *Agiza v. Sweden*, the UN Committee against Torture found that article 3 of the CAT carries with it an implicit right to an ‘effective, independent and impartial review of a decision to expel’.^[7] The Board's duty of fairness is also said to be heightened when it is dealing with self-represented claimants: Canadian Refugee Procedure/Counsel of Record#The Board has a heightened duty of procedural fairness when dealing with self-represented claimants².

- **The tribunal and its procedures should be as accessible as possible.**^[8] The Federal Court has held that the IRPA provisions regarding refugee status determination evince a legislative intention to avoid the formalities which are attendant upon court hearings in civil or criminal proceedings.^[9] To this end, the Executive Committee of the UNHCR recommends that states provide refugee claimants with the necessary guidance as to the procedure to be followed.^[10]
- **It is not the Board's role to provide legal advice to claimants.** In *Sundaram v. Canada* the Federal Court stated that it was ”not prepared to read into the immigration scheme an obligation on officials to give advice on practice and procedures. The situation of giving advice is markedly different from those Court decisions which have held that officials must provide prospective applicants with the necessary forms. People are entitled to government forms; they are not entitled to receive free legal advice from RPD officials.”^[11] The Federal Court held in *Law v. Canada* that an administrative tribunal has no obligation to act as the attorney for a claimant who refused counsel.^[12] Put another way, ”it is not the obligation of the Board to 'teach' the Applicant the law on a particular matter involving his or her claim”.^[13] As the Federal Court stated in *Singh v. Canada*, ”It is not up to the RAD to make the case for the applicants”.^[14] But see the following regarding self-represented claimants: Canadian Refugee Procedure/Counsel of Record#The Board has a heightened duty of procedural fairness when dealing with self-represented claimants³. See also the following regarding the expectation that a panel will identify what legal issues are in play in a claim: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants have an expectation that a claim will only be rejected on the basis of a legal issue that a panel has identified as being at issue⁴.
- **The tribunal's decisions should follow the law.** Cases should be decided based on all of the law that binds the Board, not just the law that the parties happen to put in front of a panel.^[15] Panels are to follow all legal and procedural requirements, and when reviewing the conduct of another panel, there is a ”presumption of regularity”, a presumption which can only be rebutted with ”convincing evidence”.^[16] This tracks Canada's international obligations; the International Court of Justice has held that a panel is not limited to the

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_Board_has_a_heightened_duty_of_procedural_fairness_when_dealing_with_self-represented_claimants

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_Board_has_a_heightened_duty_of_procedural_fairness_when_dealing_with_self-represented_claimants

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Claimants_have_an_expectation_that_a_claim_will_only_be_rejected_on_the_basis_of_a_legal_issue_that_a_panel_has_identified_as_being_at_issue

arguments submitted by the parties and the panel is deemed to take judicial notice of the law and is therefore required to consider on its own initiative all rules which may be relevant.^[17] See also: Canadian Refugee Procedure/Specialized Knowledge#What is the difference between a fact that may be judicially noticed, a generally recognized fact, and information or opinion that is specialized knowledge?⁵

- **The tribunal should develop its own jurisprudence.** Within the limits of the law, the Federal Court has commented that it is important that the Board have the possibility of developing its own jurisprudence.^[18]
- **The Board's procedures should be predictable.** The basic principles of equal protection and due process reflected in the *American Declaration of the Rights and Duties of Man* require predictable procedures.^[19] Canada's position is that it implements the relevant parts of the *American Declaration* using the standards and procedures of the IRPA.^[20] Similarly, UNHCR states in its *Procedural Standards for Refugee Status Determination* that "RSD applications must be processed pursuant to transparent and fair procedures".^[21] That said, the Federal Court has stated that the tribunal has the freedom to apply the statutory provisions that it interprets "with more or less flexibility depending on the circumstances of the case".^[22]
- **The Board must not fault parties for its own deficiencies.** For example, in *Huseen v. Canada*, the government pointed out that the IRB Office in Toronto only received a venue change request one day before the abandonment hearing. The court commented "this speaks to the internal communications between regional offices at the IRB, as the Calgary IRB office was handed the change of venue request, in person, about three weeks prior. It would be unfair to fault the Applicants for the Board's delay in internal communications, over which the Applicants had no control or influence."^[23]
- **Decision-makers should prepare thoroughly.** The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that "Members shall make each decision on the merits of the case, based on thorough preparation, the assessment of evidence properly before the member and the application of the relevant law."^[24] The Federal Court notes that each application for protection deserves the same degree of care.^[25] It also states that determinations should be made with "care and attention".^[26] For more detail, see: Canadian Refugee Procedure/The Board's inquisitorial mandate#The Refugee Protection Division has an inquisitorial mandate⁶.
- **Decision-makers should consider all of the evidence before them.** There exists a presumption in Canadian refugee law that decision-makers have considered all of the evidence before them.^[27] The more important the information, particularly where it contradicts a finding being made, the more the requirement that it explicitly be referred to and distinguished in the reasons provided. This requires time. Asylum cases are said to be 'highly fact intensive and depend upon presentation and consideration of numerous details and documents which can take no small amount of time.'^[28] Evidence from social psychology studies of judging suggests a relationship between time taken and accuracy: judges with higher caseloads have been found to be more likely to make inaccurate decisions, as they rely less on deliberative reasoning and careful processing of information and more on their gut feeling and intuition.^[29] But see: Canadian Refugee Procedure/The

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Specialized_Knowledge#What_is_the_difference_between_a_fact_that_may_be_judicially_noticed,_a_generally_recognized_fact,_and_information_or_opinion_that_is_specialized_knowledge?

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#The_Refugee_Protection_Division_has_an_inquisitorial_mandate

Board's inquisitorial mandate#The Board should consider the most up-to-date country conditions evidence⁷.

- **Claims should be processed expeditiously.** For details, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The objectives of this Act with respect to refugees include the establishment of efficient procedures⁸.
- **The Board should verify that representatives appearing before the Board are authorized pursuant to the Act and regulations:** The Federal Court has noted that "there is a duty incumbent upon the Board to verify that those individuals representing clients with whom it has dealings are authorized representatives pursuant to the Regulations, or that they are not receiving a fee for their services."^[30] See: Canadian Refugee Procedure/Information and Documents to be Provided#Counsel may be representatives without fee who are not lawyers, paralegals, or immigration consultants⁹.

7.1.2 Principles about the expectations that one reasonably has of claimants and counsel

- **Claimants may be expected to submit asylum claims promptly.** Article 31 of the Refugee Convention provides that states shall not impose penalties on asylum seekers, but only if they present themselves to authorities without delay: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."^[31] Similarly, Canada's Federal Court has noted that claimants may be expected to submit asylum claims promptly: "refugees and asylum-seekers have duties and obligations to respect national laws and measures to maintain public order, including obligations to cooperate with the asylum process, which may include presenting themselves to authorities and submitting asylum claims promptly".^[32]
- **Parties will cooperate with the asylum process and supply all pertinent information.** The Federal Court holds that a person whose safety is threatened in his or her country of origin and who is seeking the protection of a country of refuge is necessarily keen to comply with the legal framework that has been established for that purpose.^[33] The legally non-binding refugees handbook issued by UNHCR stipulates that the applicant should assist the examiner to the full in establishing the facts of their case and supply all pertinent information concerning themselves and their past experience.^[34] The Federal Court states that "refugees and asylum-seekers have duties and obligations to respect national laws and measures to maintain public order, including obligations to cooperate with the asylum process, which may include presenting themselves to authorities and submitting asylum claims promptly, or complying with procedures to regularize their stay."^[32] There is a duty upon an applicant in immigration proceedings to make sure

7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#The_Board_should_consider_the_most_up-to-date_country_conditions_evidence
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_objectives_of_this_Act_with_respect_to_refugees_include_the_establishment_of_efficient_procedures

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Counsel_may_be_representatives_without_fee_who_are_not_lawyers,_paralegals,_or_immigration_consultants

9 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Counsel_may_be_representatives_without_fee_who_are_not_lawyers,_paralegals,_or_immigration_consultants

that their documents are complete and accurate.^[35] See the Basis of Claim form instructions: Canadian Refugee Procedure/RPD Rules 3-13 - Information and Documents to be Provided#Requirement that the information provided be complete, true and correct¹⁰. Indeed, where the Minister is not participating in a case, rules on *ex parte* proceedings may impose special obligations on counsel. For example, the Law Society of BC's rule states that "In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform a tribunal of all material facts, including adverse facts, known to the lawyer that will enable the tribunal to make an informed decision."^[36] For details about how this principle takes shape in the RPD Rules, see: Canadian Refugee Procedure/Documents#What documents does a party need to provide when?¹¹.

- **Concerns about defects of procedural fairness should be raised by parties at the earliest opportunity.** The general rule is that a party should raise allegations about procedural fairness at the earliest possible opportunity.^[37] For more detail, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Concerns about a lack of procedural fairness should be raised at the earliest practical opportunity¹².
- **Claimants will comply with the law and be honest.** The Federal Court has held that in immigration matters, "the jurisprudence is clear that applicants have to provide complete and accurate information.... There is a duty on an applicant to ensure that their submissions are complete and correct".^[38] The Federal Court has stated that "refugees and asylum-seekers have duties and obligations to respect national laws and measures to maintain public order".^[32] In Canada, such legal obligations require that a claimant answer truthfully all questions put to them in the refugee claim process^[39] and to disclose material facts pursuant to the duty of candour that foreign nationals seeking to enter Canada have.^[40] This is specified in s. 16 of the IRPA which stipulates that "A person who makes an application must answer truthfully all questions put to them for the purpose of the examination". This obligation may be read in conjunction with Art. 2 of the Refugee Convention, which provides that, "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."^[34] Similarly, the (legally non-binding) handbook issued by UNHCR stipulates that the applicant should tell the truth.^[34] See also: Canadian Refugee Procedure/Information and Documents to be Provided#Requirement that the information provided be complete, true and correct¹³.
- **The good faith of counsel and immigration officers can be presumed.** There is a long line of jurisprudence from the Federal Court holding that most immigration officers have no vested interest in the outcome of a claim and their official records and actions can generally be relied upon.^[41]
- **Claimants will put their best evidentiary foot forward at their first hearing.** In *Tahir v. Canada*, the Federal Court commented about a claimant that "he was required

10 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_3-13_-_Information_and_Documents_to_be_Provided#Requirement_that_the_information_provided_be_complete,_true_and_correct

11 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_documents_does_a_party_need_to_provide_when?

12 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Concerns_about_a_lack_of_procedural_fairness_should_be_raised_at_the_earliest_practical_opportunity

13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Requirement_that_the_information_provided_be_complete,_true_and_correct

to put his best evidentiary foot forward [at the RPD]. Not having done so, Mr. Tahir could not place better evidence before the RAD.”^[42] Indeed, absent new evidence on an issue, the Refugee Appeal Division cannot consider a new argument, developed for the first time on appeal.^[43] See also the commentary to RPD Rule 34: Canadian Refugee Procedure/Documents#What documents does a party need to provide when?¹⁴.

- **Parties are responsible for their own files.** The Federal Court has noted that there exists “[abundant case law] to the effect that the applicants are responsible for their files and cannot use their own wrongdoing as a means to justify fatal omissions, procedural though they may be.”^[44] While “a failure to comply with procedural obligations does not automatically disqualify a claimant from relief on fairness grounds, [] at some point a claimant will be considered the author of their own misfortune.”^[45] For example, the Federal Court has held that judicial review should not be granted where an applicant “show[ed] little or no interest in what [was] happening to [her] own application.”^[46]
- **Deficiencies in counsel's conduct are properly attributed to their clients.** The Federal Court has held that in immigration matters, “the jurisprudence is clear that applicants have to provide complete and accurate information and are bound by the submissions made by those who represent them in the process”.^[38] The general rule is that you do not separate counsel's conduct from their client. Counsel is acting as agent for the client and, as harsh as it may be, the client must bear the consequences of having hired poor counsel.^[47] This principle is reflected in the instructions in the Basis of Claim form that every claimant receives as part of the claimant process, which note that “If you have counsel, you are responsible for making sure that your counsel meets the deadlines.”^[48] In most instances, reliance on legal advice will not excuse a failure to submit significant information in support of a claim.^[49] That said, there are exceptions to this principle where counsel’s conduct falls sufficiently below the standard expected of competent counsel: Canadian Refugee Procedure/Counsel of Record#In what contexts will counsel incompetence render a hearing unfair?¹⁵. As the Federal Court held in *Glowacki v. Canada*, no slip or mistake of counsel should be permitted to bring about a miscarriage of justice.^[50]
- **Parties should be aware of the information on file.** The Federal Court holds that applicants must take responsibility to ensure that they understand the written correspondence they receive regarding their refugee claim.^[51] The Board *Policy on National Documentation Packages in Refugee Determination Proceedings* states that “the RPD provides the parties with information as to where the [National Documentation Package] can be found on the Board's website, and it is the parties' responsibility to check the IRB website for the newest version of the relevant NDP(s) prior to their hearing.”^[52] This is also stated in the *Important Instructions* claimants receive when they make their claim: “You should also check the IRB website for the newest version of the NDP prior to your hearing” and is stated in similar terms in the Claimants’ Guide.
- **Counsel will have explained at least the basic tenets of a refugee claim to their client.** The Federal Court has held that, “absent contrary evidence, it is reasonable to expect that a legal representative has explained at least the basic tenets of a refugee claim to their client. This includes the obligation to provide acceptable documentation

14 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_documents_does_a_party_need_to_provide_when?

15 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#In_what_contexts_will_counsel_incompetence_render_a_hearing_unfair?

regarding the refugee claim, including as to identity, the onus on the claimant to prove their claim, and the need to put their “best foot forward” to do so.”^[53]

7.1.3 Principles about the manner in which the Board is to exercise its discretion

The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* is based on the IRB's dedication to the following values - honesty, good faith, fairness, accountability, dignity, respect, transparency, openness, discretion, cultural sensitivity and loyalty.^[54] These values should be evinced by all of the Board's conduct and decisions. In particular:

- **Justice must be seen to be done.** The Board has an institutional responsibility to ensure that the tribunal's adjudication is both actually performed at an optimum level of competency, fairness and objectivity and is perceived to have been so performed.^[8] A tension exists between the imperative to be efficient and work rapidly through multiple cases on the one hand, and the imperative to be considered, deliberative, and just on the other (and to be seen to be so).^[55] The first set of considerations must not undermine respect for the second sort. For example, in one hearing where the Refugee Protection Division had double-booked a Member, who then tried to complete two hearings in the time ordinarily allotted to one, the court commented as follows: “while I find it commendable from an efficiency standpoint that the Member was prepared to deal with both matters, the aura of urgency that pervaded the hearing undermined the process. A reading of the transcript suggests some sense of impatience and concern on the part of the Member about being able to complete the hearing.”^[56]
- **Administrative convenience should not override fundamental justice,** which includes procedural fairness.^[57] Asylum adjudication is situated within administrative law structures, where tensions between values such as efficiency and economy are precariously balanced with fairness and justice.^[58] As noted by Lord Dyson in his 2015 decision condemning the so-called Detained Fast Track (DFT) in the United Kingdom, “justice and fairness should not be sacrificed on the altar of speed and efficiency”.^[59] Instead, as Canada's Federal Court holds, the Board “... is required to strike a balance between expeditious proceedings on the one hand and procedural fairness or natural justice on the other.”^[60]
- **The rules should not be interpreted in a way that is overly rigid.** The courts have held that when interpreting the Refugee Protection Division rules, one must “avoid the mire of procedural dogma”^[61] as “procedure should be the servant of justice, not its mistress”.^[62] The Federal Court has stated that “the door should not slam shut on all those who fail to meet ordinary procedural requirements. Such a restrictive reading would undermine Canada’s commitment to its refugee system and underlying international obligations”.^[63] The court has gone on to note that “the opportunity to free a family from the scourge of persecution should not rest on an overly rigid application of procedural requirements.”^[64] The tenor of the Rules is that flexibility is needed to guard against form trumping substance and the interests of justice and to guard against decisions not being made on their merits.^[65] Refugee applications may be allowed to proceed, despite procedural defects, to ensure that the requirements of natural justice are fulfilled.^[66] As the Federal Court held in *Glowacki v. Canada*, no slip or mistake of counsel should be permitted to bring about a miscarriage of justice.^[50] This applies with special force dur-

ing the period of the Covid-19 pandemic: the principle set out in the *Refugee Protection Division: Practice Notice on the resumption of in-person hearings* is that the Board will apply the rules flexibly in light of Covid-19.^[67]

- **Claimants are entitled to representation and rules should be relaxed for unrepresented litigants.** The representation of refugee claimants is described as “an expression of a fundamental constitutional and common law value: that individuals facing complicated legal proceedings with serious consequences should be allowed to be represented so as to ensure that there is a full and fair hearing.”^[68] The court has stated that an unrepresented party “is entitled to every possible and reasonable leeway to present a case in its entirety and that strict and technical rules should be relaxed for unrepresented litigants”.^[69] For more detail, see: Canadian Refugee Procedure/Counsel of Record#The Board has a heightened duty of procedural fairness when dealing with self-represented claimants¹⁶.
- **The Board's procedures should not be restricted to the judicial paradigm.** The courts have recognized that administrative agencies such as the IRB “are often required to be procedurally innovative in order to handle a heavy caseload effectively and to make the most efficient use of scarce resources.”^[70] The Board’s procedure “should not be confined in a model of due process that draws exclusively on the judicial paradigm and discourages innovation. Nonetheless, procedures designed to increase quality and consistency cannot be adopted at the expense of the duty of each panel to afford to the claimant before it a high degree of impartiality and independence.”^[71] For example, the court has held that “A hearing held by the Board should not be turned into a trial. The consequences that attach to these hearings are serious and the measure of procedural fairness must be commensurate. However, it does not reach the level of disclosure found in criminal law, for instance.”^[72]
- **Members should exercise their discretion with a spirit of justice and sensitivity.** The Board states in its *Guideline 8* that all persons appearing before the IRB need to be treated with sensitivity and respect.^[73] Caselaw from the Federal Court also states that the member must at all times be attentive and sensitive to claimants.^[74] The Federal Court also indicates that Members are expected to act with “civility and care”.^[75] The following comment from the UNHCR Handbook about how the task of refugee status determination should be approached is instructive: “Since the examiner’s conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding and his judgement should not, of course, be influenced by the personal consideration that the applicant may be an ‘undeserving case’.”^[76] The German Ansbach Court has stated that “in order to comply with the spirit of the Geneva Convention, the provisions of the Convention should be interpreted liberally and with human compassion, and thus generously. [translated]”^[77] In the words of Rabbi Plaut's report that led to the founding of the Immigration and Refugee Board, “the refugee determination process must be seen and designed as an act of welcome. It must be forever responsive to our humanitarian impulses and obligations and wary of any encroachment that would seek to impose other considerations and concerns upon it.”^[78]

https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_Board_has_a_heightened_duty_of_procedural_fairness_when_dealing_with_self-represented_claimants

- **Claimants should be given the benefit of the doubt in appropriate circumstances.**^[79] The Federal Court holds that the Board has a broad discretion to alleviate the burden of proof upon a refugee claimant in appropriate circumstances.^[80] The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* provides that the benefit of the doubt should be granted to the claimant in certain circumstances: "After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."^[81] Canadian law accords with this view, providing that it is not appropriate to apply the benefit of the doubt where the claimant's allegations run contrary to generally known facts or the available evidence.^{[82][83]} The words of the Canadian Bar Association, Quebec Section from the mid-1980s are instructive, if not legally binding, on this point: "There are indeed unfounded claims and they will always exist. But one must also recognize that the risk of error on the subject is very great. One should recall how several years ago the statements of Salvadoran and Guatemalan citizens about 'death squads' were believed to exist only in the imagination of the applicants. It will always be like this. Refugee movements come in waves and we must be modest enough to recognize our ignorance about certain new situations and to mistrust ready judgments."^[84]
- **The Board should have strong reasons before attributing dishonesty or malicious intent to a claimant.** The Federal Court has held that "attributing dishonesty or malicious intent to an applicant is subject to a very high threshold".^[85]
- **Parties can expect consistency and the Board should decide like cases in the same manner.** For example, each Division's rules apply equally to all parties and there is no basis to hold parties to differing standards in administrative proceedings.^[86] For more details about consistency in decision-making, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Decision-making should be consistent across the Board¹⁷.
- **A panel of the Board must keep an open mind until all of the evidence has been heard.** As the Federal Court held in *Ayele v. Canada*, "the essence of adjudication is the ability to keep an open mind until all evidence has been heard. The reliability of evidence is to be determined in the light of all of the evidence in a particular case. This is the reason why an adjudicator must remain open to persuasion until all of the evidence and submissions are received. Evidence, that at first blush may seem implausible, may later appear plausible when set in the context of subsequent evidence."^[87]

¹⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Decision-making_should_be_consistent_across_the_Board

7.2 IRPA ss. 3(2) and 3(3): Interpretation principles as derived from the Act

This section will set out the objectives and application provisions in the Act and then provide commentary on some specific ones. In the words of Sharryn Aiken, et. al., one of the enduring features of Canadian immigration law since the 1976 *Immigration Act* has been "a complex and contradictory set of objectives".^[88] Those objectives, in so far as they concern refugees, read as follows in the current IRPA:

Objectives - refugees

3...

(2) The objectives of this Act with respect to refugees are

- (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
- (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
- (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
- (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
- (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;
- (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;
- (g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and
- (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

Application

(3) This Act is to be construed and applied in a manner that

- (a) furthers the domestic and international interests of Canada;
- (b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;
- (c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;
- (d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;
- (e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and
- (f) complies with international human rights instruments to which Canada is signatory.

The above objectives can be compared to the section of the IRPA that sets out objectives for the immigration (as opposed to humanitarian or refugee) streams:

Objectives - immigration

3... 3 (1) The objectives of this Act with respect to immigration are (a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration; (b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada; (b.1) to support and assist the development of minority official languages communities in Canada; (c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada; (d) to see that families are reunited in Canada; (e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society; (f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces; (f.1) to

maintain, through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system; (g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities; (h) to protect public health and safety and to maintain the security of Canadian society; (i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

There is a statutory interpretation convention to the effect that statements of objectives in legislation serve to constrain executive discretion in implementing the law. In the words of Sharryn Aiken, et. al., however, the objectives of the IRPA "are so plentiful and far-ranging that they arguably serve to support any potential discretionary implementation choice."^[89] As such, in Catherine Dauvergne's view, the objectives "are so complex that they can neither guide nor constrain."^[90] Shauna Labman writes that the twenty-five separate paragraphs addressing the objectives and application of the act add to the IRPA's "contradictions and confusions".^[91] Dauvergne writes that these provisions "serve no purpose other than to announce that the government is aware of how thorny an issue immigration is in Canadian politics and to ensure that the law is able to mirror prevailing political views without amendment."^[90] Indeed, the Federal Court has concluded that even if an RPD Rule is non-compliant with one of these objectives, this would not render it *ultra vires* of its enabling provision in the Act.^[92]

7.2.1 IRPA Section 3(2)(a) - The refugee program is about saving lives and offering protection

Objectives - refugees

(2) The objectives of this Act with respect to refugees are

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

This has been a long-standing provision in the Act

This reflects one of the objectives that was inserted into the 1976 Immigration Act, which was "to fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and persecuted."^[93]

The refugee program aims to offer protection, including the legal rights specified in the *Refugee Convention*

Section 3(2)(a) of the IRPA provides that the objectives of this Act with respect to refugees are, *inter alia*, to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted. The protection envisaged is not just protection from *refoulement*, but also the suite of positive rights enumerated in the Refugee Convention. In the words of Donald Galloway, Canada's obligation under the Refugee Convention is not merely the negative duty of not returning a person to a place where they face a risk to their life or their freedom is threatened – the duty found explicitly within Article 33 of the Convention. Canada's duty also embraces the wider positive duty to recognize the status (and a host of other rights) of individuals who are unable to or are

justified in not availing themselves of protection in their country of origin.^[94] The Refugee Convention enumerates a number of core rights that all refugees benefit from, and then additional entitlements may accrue as a function of the nature and duration of the refugee's attachment to the asylum state. The most basic set of rights inhere as soon as a refugee comes under a state's *de jure* or *de facto* jurisdiction; a second set applies when he or she enters a state party's territory; other rights inhere only when the refugee is lawfully within the state's territory; some when the refugee is lawfully staying there; and a few rights accrue only upon satisfaction of a durable residency requirement.^[95] In sum, the rights discussed in the Convention are those that follow:

Within state's jurisdiction	Art 3: Non discrimination Art 12: Personal status Art 13: Acquisition of movable and immovable property (same as foreigners) Art 16: Access to the courts and legal assistance (same as citizens) Art 20: Rationing access (same as citizens) Art 22(1): Elementary education (same as citizens) Art 22(2): Secondary and tertiary education (same as foreigners) Art 29: Fiscal charges/taxation (same as foreigners) Art 30: Transfer of assets Art 33: Non-refoulement
Physical presence	Art 4: Freedom of religion (same as citizens) Art 25: Administrative assistance Art 27: Identity papers Art 31: Freedom from penalisation for illegal entry
Lawful presence	Art 18: Self-employment (same as foreigners) Art 26: Freedom of movement (same as foreigners) Art 32: Non expulsion
Lawful stay or habitual residence	Art 14: Artistic rights and industrial property (same as citizens) Art 15: Right of association (most favourable treatment accorded to foreigners) Art 17: Wage-earning employment (most favourable treatment accorded to foreigners) Art 19: Liberal professions (same as foreigners) Art 21: Housing (same as foreigners) Art 23: Public relief (same as citizens) Art 24: Labour legislation and social security (same as citizens) Art 28: Travel documents
Long-term residence	Art 34: Facilitate naturalisation ^[96]

The big picture rationale behind the inclusion of these rights in the Convention was the objective of preventing refugees from becoming legal non-persons. In the words of the UK House of Lords, "the general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community."^[97] After the First World War, the academic Alleweldt states, the typical problem of refugees was the lack of any legal status in the state of refuge, which deprived them automatically of many rights and opportunities. Accordingly, the parties to the Convention envisaged, for humanitarian reasons as well as for practical reasons of cooperation, providing refugees with a status which would comprise a key set of their human rights and freedoms.^[98] In short, the rights guaranteed to recognized

refugees by the Convention are intended to provide them with the rights necessary to start life anew.^[99]

The fact that the refugee protection is in the first instance about saving lives and offering protection can be contrasted with the goals for the immigration programs provided in the IRPA

Section 3(2)(a) of the IRPA provides that the objectives of this Act with respect to refugees are, *inter alia*, to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted. This can be contrasted with the broader set of objectives for Canada's immigration programs set out in s. 3(3)(1) of the Act, which include the successful integration of immigrants and maximizing immigration's economic benefits for Canada. This contrast should inform interpretations of the Act. While in immigration law, *writ large*, the desirability of an immigrant (e.g. their work experience, education, fluency in French or English, or youth) is recognized as a proper consideration for how the government may choose to accord status, refugee law, in contrast, provides the framework for individuals who are fleeing persecution to seek safety in which the primary consideration is to be, in the words of s. 3(2)(a) of the IRPA, saving lives and offering protection. In the words of Molly Joeck, "conflating the two is a dangerous exercise".^[100]

The fact that the refugee protection is in the first instance about saving lives and offering protection points to the importance of decisions being correct

Justice Gauthier, referring to the objectives of the *IRPA*, in particular "saving lives and offering protection to the displaced and persecuted," held that the RAD is a "safety net that would catch all mistakes made by the RPD, be it on the law or the facts." This required that the RAD's standard of review, applicable both to questions of law and questions of fact, be correctness.^[101]

7.2.2 IRPA Section 3(2)(b) - Fulfilling Canada's international legal obligations with respect to refugees

Objectives - refugees

(2) The objectives of this Act with respect to refugees are

(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

This has been a long-standing provision in the Act

This reflects one of the objectives that was inserted into the 1976 Immigration Act, which was "to fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and persecuted."^[93]

The IRPA should be interpreted in a way that ensures Canada fulfills its international legal obligations with respect to refugees

Section 3(2)(b) of the Act specifies that the objectives of the IRPA with respect to refugees are, among other things, to fulfill Canada's international legal obligations with respect to

refugees. There is a well-established presumption that, where possible, Canada's domestic legislation should be interpreted to conform to international law.^[102] The Supreme Court of Canada holds that the provisions of the IRPA "cannot be considered in isolation from the international norms which they reflect".^[103] Section 3(2)(b) of the Act reinforces that, where possible, the provisions of the IRPA should be interpreted in a way that fulfills Canada's obligations pursuant to, *inter alia*, the *Refugee Convention*.

See also: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The Act should be interpreted in a way that is coherent with interpretations by other states party to the Convention¹⁸.

The Refugee Convention sets out a number of rights to which refugees are entitled

See: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The refugee program aims to offer protection, including the legal rights specified in the Refugee Convention¹⁹.

The *Vienna Convention on the Law of Treaties* codifies public international law rules of treaty interpretation applicable to the interpretation of the *Refugee Convention*

The rules of treaty interpretation for discerning the content of Canada's international legal obligations with respect to refugees were codified in the *Vienna Convention on the Law of Treaties*. Arts. 31 and 32 of the *Vienna Convention* provide that:^[104]

ARTICLE 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32: Supplementary means of interpretation

¹⁸ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_Act_should_be_interpreted_in_a_way_that_is_coherent_with_interpretations_by_other_states_party_to_the_Convention

¹⁹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_refugee_program_aims_to_offer_protection,_including_the_legal_rights_specified_in_the_Refugee_Convention

1. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
 - (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

ARTICLE 33: Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

This said, the *Vienna Convention* does not in and of itself apply to the *Refugee Convention*, given that the *Vienna Convention* applies only to treaties which are concluded by states after the *Vienna Convention* entered into force on January 27, 1980 (per Article 4 of that Convention)^[105] and the Refugee Convention of 1951 and the 1967 Protocol to the Convention predate this. That said, as Hathaway notes,^[106] the approach to treaty interpretation codified in the Vienna Convention has been recognized by the International Court of Justice as embodying customary norms of treaty interpretation.^[107] Those rules are generally regarded as a codification of the public international law rules of treaty interpretation as a matter of general (or customary) international law.^[108] As such, Articles 31 to 33 of the Vienna Convention constitute a general expression of the principles of customary international law relating to treaty interpretation.^[109] In this way, the norms of treaty interpretation embodied in the Vienna Convention are properly considered when interpreting the *Refugee Convention*, even if its articles do not *sensu stricto* apply to the *Refugee Convention*. For this reason, in the context of the Refugee Convention, domestic courts in New Zealand,^[110] the UK,^[111] and Canada^[112] have seen fit to apply Arts. 31 and 32 of the VCLT when interpreting the Refugee Convention.

Canada must perform its international legal obligations with respect to refugees in good faith

Section 3(2)(b) of the Act specifies that the objectives of the IRPA with respect to refugees are, among other things, to fulfill Canada's international legal obligations with respect to refugees. These obligations must be interpreted in good faith.^[113] This is consistent with Art. 31 of the *Vienna Convention, supra*, which states that "a treaty shall be interpreted in good faith". It is also consistent with Article 26 of the *Vienna Convention*, which requires States to perform their international treaty obligations in good faith. In international law, the concept of good faith, or *bona fides*, is taken to include duties of honesty, loyalty, and reasonableness.^[114] That said, in Britain Lord Bingham has concluded that "there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do

anything significantly greater than or different from what it agreed to do.”^[115] Relatedly, Canada's Federal Court has held that “an unduly textual and restrictive interpretation [of the IRPA]” that “would impose a result that is inconsistent with and contrary to the objectives of the IRPA” must be avoided.^[116]

The *Refugee Convention* should be interpreted in good faith in light of its object and purpose

Under Art. 31 of the *Vienna Convention on the Law of the Treaties*, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.^[117] This raises the question of what the object and purpose of the *Refugee Convention* are. The principal answer that emerges in the jurisprudence relates to the Convention's humanitarian purposes. The UK House of Lords has held that a ‘good faith’ interpretation of the Refugee Convention is one that works to bolster the effectiveness of its protection purpose, and thus seeks a construction consistent with humanitarian aims and not simply a literal linguistic approach.^[118] These humanitarian aims are underscored in the IRPA with the statement at s. 3(2)(d) that “the objectives of this Act with respect to refugees are to grant, as a fundamental expression of Canada’s humanitarian ideals, fair consideration to those who come to Canada claiming persecution”. The academic Michelle Foster writes that “one perspective is that the aim of the Refugee Convention is fundamentally to pursue a social and human rights inspired purpose, namely to provide for the international protection of those individuals falling within the refugee definition.”^[119] The Supreme Court of Canada has noted the human rights purpose of the *Refugee Convention*, for example remarking upon its “obvious human rights purpose” in *Németh v. Canada*.^[120] Similarly, in *Ezokola v Canada* the court refers to the “overarching and clear human rights object and purpose [of the *Refugee Convention*]”.^[121] This is articulated as follows by the Supreme Court of Canada in *Canada v. Ward*: the underlying objective of the 1951 Convention is “the international community's commitment to the assurance of basic human rights without discrimination.”^[122]

That said, the following words of caution from the Australian courts are apposite: “the demands of language and context should not be departed from by invoking the humanitarian objectives of the Convention, without an appreciation of the limits placed by the Convention upon achievement of such objectives.”^[123] Indeed, Lord Bingham in the UK has emphasized that the 1951 Convention was “a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other.”^[115] Foster suggests that it is possible to reconcile these two approaches by emphasizing that the 1951 Convention's focus is on “the need for co-operation in order adequately to deal with the humanitarian problem”.^[124] Drawing on Klabbers' view that if a treaty's substantive provisions deal with a particular topic, then it may be surmised that that topic is the treaty's object and purpose, Foster argues that the 1951 Convention's overwhelming purpose is a human rights one. In essence the treaty provides for refugees' rights and entitlements under international law.^[124]

The *Refugee Convention* does not explicitly prescribe any particular Refugee Status Determination procedure

The objectives of this Act include fulfilling Canada's international legal obligations with respect to refugees. How does that relate to refugee procedure? Canada's refugee status determination process reflects Canada's international obligations, including those stemming from the *Convention Relating to the Status of Refugees* of 1951. The challenge of refugee status determination is determining who is a “refugee” and, conversely, who is not. As to the process by which this task should be accomplished, neither the treaty nor the statute is of much direct assistance: there are 46 articles in the *Refugee Convention* and 22 paragraphs in the *Statute of the Office of the United Nations High Commissioner for Refugees*, none of which address the issue of Refugee Status Determination (RSD).^[125] In the words of the UNHCR's *Handbook on Procedures and Criteria*, “the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status.”^[126]

The procedures used by Canada must ensure the effectiveness of the substantive provisions in the *Refugee Convention*

Section 3(2)(b) of the Act specifies that the objectives of the IRPA with respect to refugees include fulfilling Canada's international legal obligations with respect to refugees. In ratifying the *Refugee Convention*, Canada has made a number of commitments, the most important of which is arguably the principle of *non-refoulement* enshrined in Article 33 of the *Refugee Convention*. How do such commitments relate to the procedures Canada selects for refugee status determination? Hofmann and Löhr write that, with respect to the 1951 Convention, it might be stated that the Convention does not necessitate (or prohibit) any specific procedure as such, but obliges states not to introduce procedures which would result in applicants for asylum being denied the rights that Canada undertook to respect when signing the Convention. This flows from the foundational principle of international law *pacta sunt servanda*, the rule that agreements must be kept,^[127] in this case Canada's agreement to abide by the terms of the Convention. With respect to procedures, international courts have established the principle that a state's procedural rules must ensure the effectiveness of the substantive provisions of its international commitments. This has been held by, among others, the International Court of Justice in the *LaGrand (Germany v. United States of America)* case, where it ruled that the duty incumbent on states to ensure that their international obligations be fully respected implies that domestic procedural law must be construed in such a way as to give full effect to a purposive interpretation of the state's international legal commitments.^[128] For example, if a state uses deficient procedures, which lead to prohibited *refoulement*, the introduction of such procedures constitutes *per se* a violation of Article 33 of the Refugee Convention and its prohibition on *non-refoulement*.^[129] This has implications for the procedures that a state selects; for example, UNHCR states that a consequence of a state's *non-refoulement* obligation is a ‘duty of independent inquiry’.^[130] Such a duty requires states to identify individuals in need of protection before returning or transferring them to a third country.^[131]

The *Refugee Convention* should be regarded as a living instrument that evolves to meet contemporary needs

States have expressly recognized the Refugee Convention as “the foundation of the international protection regime [with] enduring value and relevance in the twenty-first century”.^[132] The UK House of Lords has concluded that “It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and the future world. In our view the Convention has to be regarded as a living instrument.”^[133] This is consistent with statements from the Supreme Court of Canada that “international conventions must be interpreted in light of current conditions”.^[134] Indeed, the *Vienna Convention on the Law of Treaties* deliberately does not constrain the meaning of terms in a treaty to their meaning at the time of the treaty's conclusion. A limitation to this effect was deleted from an earlier draft of Art. 31, para. 3(c), of that Convention on the basis that this could restrict the evolution of the law and that, in any event, the correct meaning of the provision would be derived from an “interpretation of the term 'in good faith'”.^[135]

There can only be one true interpretation of the *Refugee Convention*

See below: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The Act should be interpreted in a way that is coherent with interpretations by other states party to the Convention²⁰.

Canada does not have a binding legal obligation to accept refugees from abroad for resettlement

Section 3(2)(b) of the Act provides that the objectives of this Act with respect to refugees include 1) fulfilling Canada’s international legal obligations with respect to refugees, and 2) affirming Canada’s commitment to international efforts to provide assistance to those in need of resettlement. Resettlement falls into the second category, as opposed to the first, insofar as Canada does not have an international legal obligation to resettle refugees from abroad. When negotiating the *Refugee Convention*, the international community recognized the importance of burden sharing and prominently placed it in the preamble to the Convention, but burden sharing was not made into a binding legal obligation.^[136] Indeed, as Hathaway notes, when negotiating the *Refugee Convention*, governments were emphatic in their rejection of a duty to reach out to refugees located beyond their borders, accepting only the more constrained obligation not to force refugees back to countries in which they might be persecuted.^[137] Subsequent international efforts to articulate an individual right of asylum at international law have been unsuccessful - for example, the 1967 UN General Assembly Declaration on Territorial Asylum is non-binding and a proposed *Convention on Territorial Asylum* never materialized.^[138] For more details on burden sharing, see: Canadian Refugee

²⁰ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_Act_should_be_interpreted_in_a_way_that_is_coherent_with_interpretations_by_other_states_party_to_the_Convention

Procedure/Principles for the interpretation of refugee procedure#Responsibility sharing and burden sharing between states are fundamental principles of the Refugee Convention²¹.

7.2.3 IRPA Section 3(2)(c) - Fair consideration is to be granted to those who come to Canada claiming persecution

Objectives - refugees

(2) The objectives of this Act with respect to refugees are

(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

This has been a long-standing provision in the Act

This reflects one of the objectives that was inserted into the 1976 Immigration Act, which was "to fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and persecuted."^[93]

The importance of Board procedures being fair to the public perception of the refugee program

In addition to ensuring overall fairness and facilitating the giving of evidence, procedural fairness is also about maintaining the integrity of the refugee determination process in the eyes of the public. For example, stakeholders may come to question the integrity of the system if they observe unfair, biased, stereotyped, arbitrary, or otherwise inappropriate processes that do not provide fair consideration to those who come to Canada and file a claim. As the legal philosopher Patricia Mindus argues, arbitrariness undermines legitimacy and erodes trust in the law in a deep way that is not easy to remedy.^[139] Ensuring procedural fairness is in this way integral to maintaining the reliability of the hearing and refugee determination process and public support therefor.

Part of the Board's role in ensuring that fair consideration is provided to those who come to Canada claiming persecution relates to the nature of the reasons that are offered in their cases. As Thériault argues, "reasons encourage the acceptance of decisions and reinforce confidence in the judicial system. The act of writing reasons helps to ensure that decisions are arrived at rationally and imposes on judges a form of self-discipline. Reasons allow parties to understand why a case was decided a certain way. Reasons allow appeal judges to assess the merits of decisions under review. Reasons are also necessary for the proper development of the common law through the principle of *stare decisis*, and serve an educational purpose by informing both the legal community and those outside it of the content and evolution of legal rules."^[140]

²¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Responsibility_sharing_and_burden_sharing_between_states_are_fundamental_principles_of_the_Refugee_Convention

This provision relates to the Canadian Bill of Rights provision on principles of fundamental justice

Section 3(2)(c) of the IRPA provides that the objectives of this Act with respect to refugees are to grant fair consideration to those who come to Canada claiming persecution. This tracks Section 2(e) of the *Canadian Bill of Rights*, which states that no law of Canada shall be construed or applied so as to "abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ... (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."^[141]

This provision relates to Canada's international obligations

Section 3(2)(c) of the IRPA provides that the objectives of this Act with respect to refugees are to grant fair consideration to those who come to Canada claiming persecution. As to the scope of this concept of this "fair consideration", see Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The objectives of this Act with respect to refugees include the establishment of procedures that will uphold Canada's respect for the human rights and fundamental freedoms of all human beings²².

The focus of this provision is on those who are claimants within Canada

Section 3(2)(c) of the IRPA provides that the objectives of this Act with respect to refugees are to grant fair consideration to those who come to Canada claiming persecution. This provision can be interpreted as being focused on those who come to Canada claiming protection (asylum seekers) as opposed to those who are abroad (awaiting resettlement) given that resettled refugees do not come to Canada "claiming" protection as their claim has generally been accepted prior to that point. See also: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Canada does not have a binding legal obligation to accept refugees from abroad for resettlement²³. An alternative interpretation of this phrase could be that "those who come to Canada claiming persecution" uses Canada as an eponym in place of the Government of Canada, as opposed to the territory of the country, though this is arguably a doubtful interpretation of the phrase.

7.2.4 IRPA Section 3(2)(d) - Offering safe haven

Objectives - refugees

(2) The objectives of this Act with respect to refugees are

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

²² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_objectives_of_this_Act_with_respect_to_refugees_include_the_establishment_of_procedures_that_will_uphold_Canada's_respect_for_the_human_rights_and_fundamental_freedoms_of_all_human_beings

²³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Canada_does_not_have_a_binding_legal_obligation_to_accept_refugees_from_abroad_for_resettlement

The objective of this Act is to offer safe haven to specified persons and this is an enduring commitment unless an asylee's status ceases

The objectives of this Act with respect to refugees include offering safe haven to persons with a well-founded fear of persecution for a Convention reason, as well as those at risk of torture or cruel and unusual treatment or punishment. This obligation, which partly tracks the criteria of the *Refugee Convention*, reflects the fact that the 1951 Convention can be viewed as a third party agreement: a treaty whereby the contracting States take on obligations towards each other for the benefit of a third party, namely the refugees who are, per the terms of the treaty, provided with refugee rights.^[142] As Haddad writes, the refugee is someone who has exited their state of origin by crossing an international border and hence has become an issue of concern on the international agenda and a ward of international society.^[143]

The "safe haven" that is to be offered to refugees is independent of other types of tenuous immigration status that Canada offers such as permanent residence. An applicant's asylum status is not affected because their permanent residence status was lost or because their application for permanent residence was refused.^[144] Even where a refugee moves onward from a state which has granted international protection, that state bears ongoing obligations towards the individual, unless their status has ceased.^[145] Indeed, even those who are granted status as protected persons by the IRB may not meet the criteria to become permanent residents or citizens in Canada: Canadian Refugee Procedure/Exclusion, Integrity Issues, Inadmissibility and Ineligibility#Other grounds of inadmissibility in the IRPA do not render claimants ineligible for a refugee hearing, but may nonetheless have consequences even where a claim is accepted²⁴. That said, it is clear that refugee status ends with the application of the cessation clauses in the Convention.^[146] For example, Article 1(C)(3) of the Refugee Convention provides that refugee status is terminated upon naturalization, i.e. a situation where a refugee "acquire(s) a new nationality, and enjoys the protection of the country of his new nationality."^[147] Once the criteria in one of the cessation clauses in the Refugee Convention are met, then 'refugeehood' can rightfully be regarded as having ceased. Until then, it may be observed that refugeehood is inherently characterized by a temporal uncertainty; indeed, as Agier notes, that the word 'refuge' itself 'denotes a temporary shelter, while waiting for something better.'^[148]

7.2.5 IRPA Section 3(2)(e) - Fair and efficient procedures that maintain integrity and uphold human rights

Objectives - refugees

(2) The objectives of this Act with respect to refugees are
 (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

²⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#Other_grounds_of_inadmissibility_in_the_IRPA_do_not_render_claimants_ineligible_for_a_refugee_hearing,_but_may_nonetheless_have_consequences_even_where_a_claim_is_accepted

The objectives of this Act with respect to refugees include the establishment of efficient procedures

Section 3(2)(e) of the IRPA provides that the objectives of the Act with respect to refugees include the establishment of fair and efficient procedures. Section 162(2) of the IRPA provides that each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit; for further discussion of this, see: Canadian Refugee Procedure/Board Jurisdiction and Procedure#IRPA Section 162(2) - Obligation to proceed informally and expeditiously²⁵.

The starting point regarding the position of an alien, at common law, was summarized by Lord Denning as follows:

At common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason. If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country. The position of aliens at common law has since been covered by various regulations; but the principles remain the same.^[149] [internal citations omitted]

The reality of having largely unstoppable flows of desperate people who do not have a legal right to enter or remain in Canada has been one that the refugee determination system has had to repeatedly contend with. In this way, Hathaway writes when describing the situation that spawned one of the Refugee Convention's historical antecedents, the credibility of border controls and of the restriction of socioeconomic benefits to nationals is at stake with refugee programs: by legitimating and defining a needs-based exception to the norm of communal closure, refugee law can sustain the protectionist norm. In this way, "so long as the admission of refugees [is] understood to be formally sanctioned by states, their arrival [ceases] to be legally destabilizing."^[150] This motivation has a number of implications. The Federal Court of Appeal has stated that "there is compelling public interest, in Canada, in having refugee status determined as soon as is practically possible after a claim is made."^[151] As the Canadian Bar Association has submitted, a lack of expeditiousness "leads to legitimate claims languishing in the system and encourages the proliferation of unmeritorious claims."^[152] These goals are reflected in the structures and procedures enshrined in the Act, including:

- The control over proceedings that has been granted to decision makers: To increase the efficiency of hearings, procedures were amended following passage of the *Balanced Refugee Reform Act* (2010) and the *Protecting Canada's Immigration System Act* (2012) to give decision makers greater control over refugee protection proceedings.^[153]
- Ways that duplicative processes have been excised from the Act: The Refugee Appeal Division, when considering issues of efficiency, has observed that an interpretation of the Act which would reduce duplication of work and having an additional, unnecessary, hearing is to be preferred.^[154] This principle can be seen in the legislative history of section

²⁵ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Board_Jurisdiction_and_Procedure#IRPA_Section_162\(2\)_-_Obligation_to_proceed_informally_and_expeditiously](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Board_Jurisdiction_and_Procedure#IRPA_Section_162(2)_-_Obligation_to_proceed_informally_and_expeditiously)

97 of the Act. Section 97 was introduced with the transition from the *Immigration Act* to the IRPA, and in this way expanded the scope of asylum protection to include persons who are at risk of torture and to persons who are at risk of cruel and inhumane treatment upon deportation to their country of nationality or former habitual residence. Rebecca Hamlin writes that there is no evidence to suggest that Parliament considered the introduction of section 97 to be monumental when it discussed IRPA before voting on it in 2002. When the bill was being debated, Minister of Citizenship and Immigration Elinor Caplan assured members of Parliament the IRPA "gives us the ability to streamline our procedures, so that those who are in genuine need of our protection will be welcomed in Canada more quickly and those who are not in need of protection will be able to be removed more quickly. That streamlining is extremely important." Immediately after IRPA went into force, the IRB Legal Services division produced a guide for decision-makers on how to make section 97 decisions; the guide states that these decisions were subsumed under the IRB mandate to avoid the "delays and inconsistencies" of the previous "fragmented" and "multilayered approach".

The objectives of this Act with respect to refugees include the establishment of procedures that will maintain the integrity of the Canadian refugee protection system

Section 3(2)(e) of the IRPA provides that the objectives of the Act with respect to refugees include the establishment of fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system. The UN High Commissioner for Human Rights states that "*Because of their vulnerable situation, refugees may face pressures to exaggerate or conceal information about human rights violations they have suffered or witnessed. For example, they may exaggerate problems they have experienced if they believe that they will have a better chance of receiving humanitarian assistance or refugee status.*"^[155] As Harold Troper notes, a concern that the refugee program must seek to address is the worry that "many of the refugee claimants, including some who successfully made it through the determination process, were not really legitimate refugees but individuals looking for a way around tough Canadian immigration regulations."^[156] Indeed, fraudulent applications are said to have "plagued" a number of Canada's immigration programs, and are not simply a concern with the in-Canada asylum system.^[157] For example, under the former source country class in the IRPA for resettlement, the ICRC indicated that individuals used fraudulent referrals allegedly from the ICRC at the Canadian embassy.^[158] In 2004, a scheme was discovered by Colombian authorities in which substantial bribes were being paid to civil servants employed by the Colombian National Senate for documents identifying individuals as victims of death or abduction threats from either the guerrillas or the paramilitaries. The documents were reportedly used at the Canadian embassy in Bogota to achieve source country class resettlement for at least fifty people.^[157]

When the IRB came into existence, the government programme delivery strategy stated that the removal of non-credible refugee claimants was the law's "cornerstone".^[159] This necessarily involves a balancing, one which Jennifer Bond and David Wiseman discuss when they write that the procedural framework governing Canada's asylum system contains a number of mechanisms aimed at enabling both flexibility and rigour.^[160] These considerations also relate to what the Supreme Court of Canada refers to as the importance of maintaining "the dignity of refugee status".^[161] The Federal Court of Appeal writes that "maintenance

of the integrity of the Canadian refugee protection system is a valid purpose to consider, and one which the system requires as a duty to be taken seriously by all concerned.”^[162]

The objectives of this Act with respect to refugees include the establishment of procedures that will uphold Canada's respect for the human rights and fundamental freedoms of all human beings

Section 3(2)(e) of the IRPA provides that the objectives of the Act with respect to refugees are to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings. This can be considered in conjunction with section 3(2)(c) of the IRPA, which provides that the objectives of this Act with respect to refugees are to grant fair consideration to those who come to Canada claiming persecution. As to the scope of this concept of "fair consideration", it should be considered in conjunction with s. 3(3)(f) of the IRPA, which provides that the Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. When considering such human rights instruments, regard may properly be had of the provision of the *International Covenant on Civil and Political Rights* that provides individuals with extensive rights relating to a fair trial in the determination of a person's "rights and obligations in a suit at law",^[163] which, as Macharia-Mokobi argues, may fairly be held to cover refugee status determination procedures.^[164] This also reflects the preamble to the *Refugee Convention*, which reads:

The High Contracting parties, ... considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination ... have agreed as follows: ...^[165]

For more information on fair procedures for refugee status determination, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing²⁶.

7.2.6 IRPA Section 3(2)(g) - Protecting the health and safety of Canadians and maintaining the security of Canadian society

Objectives - refugees

(2) The objectives of this Act with respect to refugees are ...

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

This is worded identically to s. 3(1)(h) of the Act

Section 3(1)(h) of the IRPA is worded identically, stating that "the objectives of this Act with respect to immigration are (h) to protect the health and safety of Canadians and to maintain the security of Canadian society". That provision was considered in *Medovarski v Canada*, in which the Supreme Court of Canada noted that "the objectives as expressed in the IRPA indicate an intent to prioritize security":

²⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing

The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(i) of the *IRPA* versus s. 3(j) of the former Act; s. 3(1)(e) of the *IRPA* versus s. 3(d) of the former Act; s. 3(1)(h) of the *IRPA* versus s. 3(i) of the former Act. Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.^[166]

This objective is implemented through the grounds of inadmissibility found in ss. 34-42 of the *IRPA*.^[167]

7.2.7 IRPA Section 3(3)(b) - This Act is to be applied in a manner that promotes accountability and transparency by enhancing public awareness of immigration and refugee programs

Application

- (3) This Act is to be construed and applied in a manner that
- (b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;

It is important that the public perceive the determinations made under the Act as being legitimate

Section 3(3)(b) of the Act provides that that it is to be construed and applied in a manner that enhances public awareness of immigration and refugee programs. As the Court held in *Rezaei*, the Board's stakeholders "include not only the claimants who appear before the Board and its Divisions, but also the Canadian public at large, which is served by effective mechanisms for the application of immigration policy."^[168] The Board must seek to maintain the support of both groups of stakeholders. The Supreme Court of Canada has linked preserving "the integrity and legitimacy of the refugee protection system" to "the necessary public support for [the system's] viability".^[161] Refugee lawyer David Matas speaks to a policy concern related to this when he states that if the public lacks confidence in the refugee determination system "people will eventually give up all hope in the system. ... [T]hose concerned with protecting refugees will adopt extra-legal rather than legal strategies - a Canadian sanctuary movement is possible".^[169] Refugees pose a problem for the Canadian government quite different from that of other foreigners and it is necessary that decisions on asylum clearly communicate either why an individual should be entitled to stay in Canada or else why they can be returned to their state.^[170] This said, it does not appear to be an objective of the refugee system to denounce foreign states.

7.2.8 IRPA Section 3(3)(c) - This Act is to be applied in a manner that facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations, and non-governmental organizations

Application

(3) This Act is to be construed and applied in a manner that
(c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

Canada has an obligation to cooperate with the UNHCR and the IRPA should be construed and applied in a manner that facilitates and respects this obligation

Section 3(3)(c) of the Act provides that it is to be construed and applied in a manner that facilitates cooperation between the Government of Canada and international organizations. This provision of the Act relates to Canada's international obligations. Opinions and interpretations by the UNHCR are of particular interest because of Article 35 of the *Refugee Convention*, which provides that member states have an obligation to facilitate the duty of UNHCR in supervising the application of the provisions of the Convention. Article 35 of the Refugee Convention and Article 2(1) of the 1967 Protocol stipulate that “[t]he States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol”.^[171] Furthermore, the preamble to the *Refugee Convention* reads:

The High Contracting parties, ... noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner, ... have agreed as follows: ...^[165]

As such, statements emanating from the UNHCR, such as those in its handbook, are considered highly influential in how refugee adjudication should be approached, even if its clauses are not, in and of themselves, law in Canada.^[172] The Federal Court of Appeal noted as much in *Rahaman v. Canada*, holding:

in Article 35 of the Geneva Convention the signatory states undertake to co-operate with the Office of the United Nations High Commissioner for Refugees (UNHCR) in the performance of its functions and, in particular, to facilitate the discharge of its duty of supervising the application of the Convention. Accordingly, considerable weight should be given to recommendations of the Executive Committee of the High Commissioner's Programme on issues relating to refugee determination and protection that are designed to go some way to fill the procedural void in the Convention itself.^[173]

That said, there is no requirement that panels of the Board expressly mention UNHCR guidelines in their reasons.^[174] Furthermore, the UNHCR's supervisory role does not include a mandate to provide an authoritative interpretation of the Refugee Convention.^[175] Accordingly, the UNHCR can only issue *guidance* on the Convention's interpretation. In the words of the Federal Court of Appeal from *Jayasekara v Canada*, UNHCR's statements

”cannot override the functions of the Court in determining the words of the Convention.”^[176]

Furthermore, there are also a multitude of pronouncements emanating from the UNHCR, with different levels of persuasiveness. Specifically, English jurisprudence persuasive holds that pronouncements of the UNHCR Executive Committee have been held to warrant greater weight than publications merely penned by UNHCR staff, such as the “Guidelines on International Protection” issued by the UNHCR’s Department of International Protection.^[177] That said, even the UNHCR Executive Committee Conclusions are not binding on States, even if they may be instructive in interpreting and applying the 1951 Convention.^[175]

Responsibility sharing and burden sharing between states are fundamental principles of the *Refugee Convention*

Section 3(3)(c) of the Act provides that this statute is to be construed and applied in a manner that facilitates cooperation between the Government of Canada and foreign states. This provision reflects the importance of ”burden sharing” and ”responsibility sharing” in the refugee regime. It is said that the Refugee Convention is based on two principles: *non-refoulement*, the rule that asylum seekers cannot be turned away or forced to return to their countries of origin; and *responsibility sharing*, the idea that member nations should share the costs, labour, and risks of refugee aid.^[178] While the first principle is explicitly outlined in the operative clauses of the Convention, the second is implicit in the preamble to the *Refugee Convention*, which reads:^[179]

The High Contracting parties, ... considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation, ... have agreed as follows: ...^[165]

James Hathaway writes in *The Law of Refugee Status* that burden sharing was historically one of the core motivations for the *Refugee Convention*:

... the majority of the states that drafted the Convention sought to create a rights regime conducive to the redistribution of the post-war refugee burden from European shoulders. The Europeans complained that they had been forced to cope with the bulk of the human displacement caused by the Second World War, and that the time had come for all members of the United Nations to contribute to the resettlement of both the remaining war refugees and the influx of refugees from the Soviet bloc. Refugees would be more inclined to move beyond Europe if there were guarantees that their traditional expectations in terms of rights and benefits would be respected abroad. The Convention, then, was designed to create secure conditions such as would facilitate the sharing of the European refugee burden.^[180]

Today, most refugees reside not in Europe, but in low-income states; the world’s six richest countries host under 10% of the world’s refugee population, while 80% of the world’s refugee population live in countries neighbouring their own.^[181] The majority of these countries are low-income ones, with significant resource and governance challenges of their own.^[182] As an example, Canada has welcomed 1,088,015 refugees since 1980^[183] through both the resettlement and in-Canada asylum processes. Between 1979 and 2018, a total of 707,421

refugees were resettled to Canada, including 313,401 refugees who came through the private sponsorship program, 385,014 through the Government-Assisted Refugee program, and 9,006 through the Blended Visa Office Referred (BVOR) program.^[184] The remainder came through the in-Canada asylum system. All together, these refugee numbers represent about 3% of the current Canadian population. In comparison, Jordan today hosts refugees equivalent to 9% of its current population and Lebanon hosts refugees equivalent to more than 20% of its current population, all with substantially fewer financial resources than Canada has.^[185]

Responsibility sharing, as a concept, has been said to refer to the 'sharing' of people, while burden sharing refers to the sharing of financial resources and other costs related to refugees.^[186] These principles have a number of implications. First, it is to this end that the UNHCR Executive Committee has encouraged states to continue to promote, where relevant, regional initiatives for refugee protection and durable solutions.^[187] The Federal Court has noted that "in principle, international refugee law does not confer upon refugees the right to choose their country of asylum".^[188] The Federal Court also notes that international refugee law "does not authorize their irregular movement between successive countries solely in order to benefit from more favourable conditions."^[32] The Federal Court has also cited with approval the UNHCR document *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-seekers* (2019) which includes a related discussion.^[32] One manifestation of this principle in the IRPA is through the responsibility sharing arrangement between the "Five Eyes" countries established by s. 101(c.1) of the Act: Canadian Refugee Procedure/100-102 - Examination of Eligibility to Refer Claim²⁷.

All this said, it should be noted that under international law refugees are under no obligation to apply for asylum in any particular state at any specific stage of their flight from danger.^[189] Indeed, the 1951 Convention at the time of its adoption was seen as an instrument of responsibility sharing and, to this end, binding obligations upon states were considered a requirement for effective international cooperation, as well as more equal commitments and sharing of responsibility with regard to refugee problems.^[190] In this way, in-country asylum systems have come to be seen as durable methods of responsibility sharing. Shauna Labman writes about the comparative "fragility and vulnerability" of state resettlement programs in contrast to asylum when she notes the fact that politicians have more control over resettlement levels than they do asylum numbers, and in fact resettlement programs can simply disappear.^[191] See also: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Canada does not have a binding legal obligation to accept refugees from abroad for resettlement²⁸. In contrast, the "non-refoulement" rule has been called "the only binding principle for allocating refugee responsibilities in international law".^[192]

27 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/100-102_-_Examination_of_Eligibility_to_Refer_Claim

28 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Canada_does_not_have_a_binding_legal_obligation_to_accept_refugees_from_abroad_for_resettlement

States should do everything in their power to prevent the problem of refugees from becoming a cause of tension between states

Section 3(3)(c) of the Act provides that it is to be construed and applied in a manner that facilitates cooperation between the Government of Canada and foreign states. This provision can be seen to reflect the preamble to the *Refugee Convention*, which reads:

The High Contracting parties, ... expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States, ... have agreed as follows: ...^[165]

Relatedly, in 1967, the UN General Assembly adopted a *Declaration on Territorial Asylum* directed toward States. The Declaration states that granting asylum is a peaceful and humanitarian act that cannot be regarded as unfriendly by any other State.^[193] Indeed, the modern refugee regime can be seen as one institution that supports the stability of states and their borders in that it provides a mechanism for individuals to be recognized after they cross a border and arguably may thereby reduce calls for borders to be reconfigured to reflect shifting ethnic or political differences.^[194]

The Act should be interpreted in a way that prevents the possibility of “refugees in orbit”

Section 3(3)(c) of the Act provides that this statute is to be construed and applied in a manner that facilitates cooperation between the Government of Canada and foreign states. Canada’s Senate, in amending relevant bills, has been said to have tried to ensure that the safe third country provisions in the IRPA do not result in “refugees in orbit”, refugees forced to travel from country to country in search of protection.^[195] A “refugee in orbit” situation is constituted when:

country A designates country B as a safe third country, thereby entitling country A to refuse to adjudicate the claim of an asylum seeker who arrived in country A via country B. However, in the absence of a readmission agreement, country B may refuse to re-admit the asylum seeker, and send the person to country C, who may in turn bounce the person concerned to country D, and so on.^[196]

The phrase and concept of refugees “in orbit” was a common one when the Safe Third Country Agreement provisions were being enacted in Canada's immigration legislation in the 1980s. Specifically, the Standing Senate Committee on Legal and Constitutional Affairs, which examined Bill C-55 in 1988, indicated that they had concerns about the safety involved in the 'safe country' provision of that bill. As Ian Nashh describes, it was felt that the bill provided no formal mechanism to examine the fate of people to be returned to the safe third country. Individuals might easily be sent elsewhere by the country, perhaps leading to *refoulement* and jeopardizing their lives. The Senate Committee therefore proposed an amendment that would provide for return to a safe third country only if the Refugee Division member and the adjudicator at the inquiry were convinced that the safe country would be willing to receive the claimant or to determine the individual's claim on its merits. In their view, this would minimize the danger that asylum-seekers would be put “into orbit” or sent to another country.^[197] While this recommendation was not accepted, measure were ultimately instituted to prevent this problem. For more details, see Canadian

Refugee Procedure/Safe Third Countries²⁹, and in particular Article 3 of the Safe Third Country Agreement, which exists to prevent this.

The Act should be interpreted in a way that is coherent with interpretations by other states party to the Convention

Section 3(3)(c) of the Act provides that this statute is to be construed and applied in a manner that facilitates cooperation between the Government of Canada and foreign states. In this way, the IRPA should be interpreted in a way that avoids fragmentary jurisprudence which undermines the coherence of the international protection system.^[198] Courts in the UK have phrase this obligation thusly: "in principle there can only be one true interpretation of a treaty".^[199] As such, decisions from the UK frequently stress that each State "must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty".^[199] For the same reason, decisions in Canada frequently canvass jurisprudence from other countries when interpreting the meaning of the Refugee Convention and the IRPA.^[200] This is appropriate given that, in the words of the Plaut report that preceded the establishment of the IRB, "whether or not a person is a refugee is a question which is not so much one of Canada law; rather, it belongs to the realm of international definition and justice."^[6] See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Decision-making should be predictable and consistent across the Board³⁰.

7.2.9 IRPA Section 3(3)(d) - The Act is to be applied in a manner that complies with the Charter of Rights and Freedoms

Application

(3) This Act is to be construed and applied in a manner that

(d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

The fact that Charter rights are at play in Board proceedings means that the extent of procedural fairness owed to claimants is high

The court has stated that "The independence of the Board, its adjudicative procedure and functions, and the fact that its decisions affect the Charter rights of claimants, indicate that the content of the duty of fairness owed by the Board, including the duty of impartiality, falls at the high end of the continuum of procedural fairness."^[5]

Charter issues should generally be raised before the Division

Under most circumstances in the immigration context an applicant is required to raise Charter issues before the relevant administrative tribunal within the respective proceeding.

29 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Safe_Third_Countries
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Decision-making_should_be_predictable_and_consistent_across_the_Board

30 [the_right_to_a_fair_hearing#Decision-making_should_be_predictable_and_consistent_across_the_Board](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Decision-making_should_be_predictable_and_consistent_across_the_Board)

In the present context, for example, the IRB is competent to address Charter issues. If unsuccessful, the claimant would then be able seek leave for judicial review of that decision before the Federal Court.^[201] For further discussion on this, see: Canadian Refugee Procedure/Notice of Constitutional Question³¹.

Decisions taken under this Act are to be consistent with the principles of equality and freedom from discrimination

Section 3(3)(d) of the IRPA provides that the Act is to be construed and applied in a manner that ensures that decisions taken under the Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination. This provision tracks the obligation in Article 3 of the *Refugee Convention*, which provides that the "Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin".^[202]

One can observe a transformation over the past century in the nature of international migration, including that it has an increasingly multiethnic and global character. When the 1951 *Refugee Convention* was being negotiated, it had a primarily European orientation, and the prospect of refugees coming in significant numbers from further afield was thought to be nil. For example, the UK delegate to the conference of plenipotentiaries that negotiated the 1951 Convention, asserted there that "[the risk of European states facing] a vast influx of Arab refugees was too small to be worth taking into account."^[203] This thinking about the makeup and source of refugees seeking asylum has shifted dramatically to the point where today it is recognized that most refugees are in low income countries and that individuals claim asylum in Canada against countries throughout the world. Indeed, it can be observed that while "asylum seeker" is not on its face or *de jure* a racial category, in the contemporary Canadian migration regime, it is a *de facto* racialized category, comprised largely of non-White persons.^[204]

Board Members are to exercise their discretion without discrimination or reliance on stereotype, as doing so, in the words of the Federal Court, "reveals a level of ignorance and prejudice which is not only unusual in general, but is particularly astonishing on the part of a decision maker who is in a position to adjudicate sensitive claims."^[205] See also: Canadian Refugee Procedure/The right to an unbiased decision-maker#Where a member pursues questioning with a discriminatory attitude³².

Decisions taken under this Act are to be consistent with the equality of English and French as the official languages of Canada

Section 3(3)(d) of the Act states that it is to be construed and applied in a manner that ensures that decisions taken under this Act are consistent with the Canadian Chart of Rights and Freedoms, including its principle of the equality of English ad French as the official

31 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Notice_of_Constitutional_Question
 32 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#Where_a_member_pursues_questioning_with_a_discriminatory_attitude

languages of Canada. For a discussion of this, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Language of proceedings³³.

7.2.10 IRPA Section 3(3)(f) - The Act is to be applied in a manner that complies with international human rights instruments Canada has signed

Application

(3) This Act is to be construed and applied in a manner that
(f) complies with international human rights instruments to which Canada is signatory.

In general, in Canada legislation should be presumed to conform to international law

Canada is what is referred to as a "dualist state" in that international law and municipal law are treated as separate spheres of law. As such, in order for international obligations undertaken by the state by way of treaty to form part of the national law, these international law rules have to be transformed into national law rules through the use of enabling legislation.^[206] That said, it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law.^[207] The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result.^[208] The Supreme Court of Canada articulated this rule in *Baker v. Canada* when it adopted the following statement from *Driedger on the Construction of Statutes*:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.^[209]

This provision was added to the IRPA and was not present in the former Immigration Act

Sharryn Aiken, et. al., write in *Immigration and Refugee Law: Cases, Materials, and Commentary* that there was considerable excitement in migrant advocacy circles regarding para 3(3)(f) of the IRPA stating that the Act is to be construed in a manner that "complies with international human rights instruments to which Canada is signatory." They note that this provision seemed to provide a potential shortcut for direct access to international human rights principles.^[210] However, on the basis of the Federal Court of Appeal's decision *de Guzman v. Canada* those authors conclude that "The *de Guzman* decision ensured that para 3(3)(f) is understood to reflect existing Canadian law with respect to international obligations and therefore to be essentially meaningless window dressing that adds nothing new to the interpretive framework for Canadian immigration law."^[211]

³³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Language_of_proceedings

International human rights instruments are determinative of the meaning of IRPA, in the absence of a clear legislative intent to the contrary

Section 3(3)(f) of the IRPA goes beyond the general principle of statutory interpretation described above. When interpreting any provision of IRPA, account must be had of Canada's international human rights obligations and provisions should be interpreted in a manner consistent with Canada's international obligations, where possible. In *De Guzman v. Canada* the court commented that the words "shall be construed and applied in a manner that complies with ..." are mandatory and appear to direct courts to give the international human rights instruments in question more than persuasive or contextual significance in the interpretation of IRPA. By providing that IRPA "is to be" interpreted and applied in a manner that complies with the prescribed instruments, paragraph 3(3)(f), if interpreted literally, makes them determinative of the meaning of IRPA, in the absence of a clear legislative intent to the contrary.^[212] As Bastarache J of the Canadian Supreme Court held in *Pushpanathan*, the "overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place".^[213] That said, unambiguous provisions of the IRPA must be given effect even if they are contrary to Canada's international obligations or international law.^[214]

Regard should be had to international human rights instruments that Canada has signed, whether or not Canada has ratified them

In *de Guzman v. Canada* the court commented that the sources of international law described in paragraph 3(3)(f) comprise some that are binding on Canada in international law, and some that are not. The paragraph applies to instruments to which Canada is signatory. An international instrument is not legally binding on a signatory State until it has also ratified it, unless the instrument provides that it is binding when signed. Signature normally evinces an intention to be bound in the future, although it may also impose an immediate obligation on the signatory not to take measures to undermine the agreement.^[215]

Being a signatory to a treaty has a particular meaning in international law, in that it is usually a step prior to a party becoming a party to the treaty. Article 18(a) of the *Vienna Convention on the Law of Treaties* provides that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; ...".^[104] That said, it is apparent that the instruments appropriately covered by this provision are not limited to instruments which Canada has signed, but not ratified. The Supreme Court of Canada has noted, for example, that the Refugee Convention itself is among the instruments appropriately referred to by this provision, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The refugee system is inextricably linked with the concept of human rights³⁴.

³⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_refugee_system_is_inextricably_linked_with_the_concept_of_human_rights

What are the international human rights instruments to which Canada is a signatory?

As the Federal Court of Appeal has noted, the IRPA "does not list, let alone set out the text of, the measures to which paragraph 3(3)(f) applies."^[216] It went on to note that the phrase "international human rights instruments to which Canada is signatory" is "far from self-defining".^[216] The Supreme Court of Canada has noted that the Refugee Convention itself is among the instruments appropriately referred to by this provision, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The refugee system is inextricably linked with the concept of human rights³⁵.

The Department of Justice provides the following list, *International Human Rights Treaties to which Canada is a Party*, which may also serve to inform an interpretation of this provision:^[217]

- Convention on the Prevention and Punishment of the Crime of Genocide (1952)
- International Convention on the Elimination of All Forms of Racial Discrimination (1970)
- International Covenant on Economic, Social and Cultural Rights (1976)
- International Covenant on Civil and Political Rights (ICCPR) (1976)
 - Optional Protocol to the ICCPR (complaint mechanism) (1976)
 - Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty (2005)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1981)
 - Optional Protocol to CEDAW (complaint mechanism) (2002)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)
- Convention on the Rights of the Child (CRC) (1991)
 - Optional Protocol to the CRC on the Involvement of Children in armed conflict (2000)
 - Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2005)
- Convention on the Rights of Persons with Disabilities (2010)
 - Optional Protocol to the Convention on the Rights of Persons with Disabilities (2018)

A number of additional treaties could be added to this list, including:

- The International Labour Organization *Worst Forms of Child Labour Convention* (ILO Convention No. 182)
- The International Labour Organization *Minimum Age Convention* (ILO Convention No. 138)
- The Rome Statute of the International Criminal Court
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime
- The phrase "international human rights instruments" could be taken to include regional instruments in the Inter-American system that Canada has signed. Canada is not a

³⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_refugee_system_is_inextricably_linked_with_the_concept_of_human_rights

party to the *American Convention on Human Rights*. Nevertheless, as a member of the Organization of American States, it is bound by the terms of the *American Declaration of the Rights and Duties of Man* (“American Declaration”).^[218] This instrument specifies the fundamental rights to which each person is entitled, and which each member State of the Organization of American States (OAS), like Canada, is bound to uphold. The OAS Charter and the American Declaration are a source of legal obligations applicable to Canada.^[219] Canada has also ratified several other inter-American human rights treaties, including the *Inter-American Convention on the Granting of Political Rights to Women*^[220] and the *Inter-American Convention on the Granting of Civil Rights to Women*.^[221]

- The Geneva Conventions I, II, III, and IV and Protocols I, II, and III may be added to this list, but see the following commentary on international humanitarian law.

When attempting to interpret this term, regard may be had of the interpretation that the African Court on Human and Peoples' Rights has given to its constituting protocol, which gives it jurisdiction over the African Charter on Human and Peoples' Rights as well as “any other relevant Human Rights instrument ratified by the states concerned.”^[222] That court has provided significant interpretation of this similar phrase, including how instruments can have certain provisions that are human rights ones and other provisions that are not human rights ones.

This provision may not apply to international humanitarian law instruments and texts which are not signed

Section 3(3)(f) of the IRPA provides that it is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. This arguably excludes a number of types of instruments, including:

- Instruments that are not human rights instruments, but are instead humanitarian law instruments: Canada has signed the Geneva Conventions I, II, III, and IV and Protocols I, II, and III. These may be relevant to refugee determinations. For example, the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)*, which at Art. 45, para. 4 prohibits transferring a protected person “to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”^[223] However, this instrument forms part of international humanitarian law, not international human rights law, and thus may be argued not fall within the ambit of IRPA s. 3(3)(f). For example, the International Law Commission has generally distinguished between the two areas of law.^[224]
- Instruments that are not signed: For example, the 1948 Universal Declaration of Human Rights is not a treaty, but instead an unenforceable, non-binding (yet aspirational) resolution of the United Nations General Assembly.^[225] By its terms the Universal Declaration of Human Rights was not designed to describe binding obligations by only a 'common standard of achievement', as stated in the preamble to the declaration.^[226] As such, given that this document was not signed, and as such countries cannot be said to be signatories to this declaration, it should not be regarded as one of the instruments contemplated by s. 3(3)(f) of the IRPA.

The refugee system is inextricably linked with the concept of human rights

Section 3(3)(f) of the Act provides that it is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. The Supreme Court of Canada has held that the *Refugee Convention* itself should be considered a “human rights instrument”, within the meaning of s. 3(3)(f) of the Act:

s. 3(3)(f) instructs courts to construe and apply the *IRPA* in a manner that “complies with international human rights instruments to which Canada is signatory”. There can be no doubt that the *Refugee Convention* is such an instrument, building as it does on the right of persons to seek and to enjoy asylum from persecution in other countries as set out in art. 14 of the *Universal Declaration of Human Rights*.^[227] [internal citations omitted]

UNHCR is said to have adopted this approach that sees the *Refugee Convention* as a part of human rights law and has pronounced that “the human rights base of the Convention roots it quite directly in the broader framework of human rights instruments of which it is an integral part.”^[228] The preamble to the Convention itself notes that “The High Contracting parties, considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms, ... have agreed as follows.”^[165] Brennan CJ of the High Court of Australia relied on this preamble when making the following comment about the *Refugee Convention*: “the preamble places the Convention among the international instruments that have as their object and purpose the protection of the equal enjoyment by every person of fundamental rights and freedoms.”^[229] In 2018 the Inter-American Court of Human Rights issued an Advisory Opinion entitled “The Institution Of Asylum And Its Recognition As a Human Right In The Inter-American System Of Protection” which concluded that asylum is a human right.^[230]

Furthermore, the weight of academic commentary about the place of the *Refugee Convention* within the corpus of human rights instruments. McAdam argues that refugee law is a specialized area *within* human rights law.^[231] Similarly, Hathaway argues that refugee rights should be understood as a mechanism by which to answer situation-specific vulnerabilities that would otherwise deny refugees meaningful benefit of the more general system of human rights protection. In this way, he states, “refugee rights do not exist as an alternative to, or in competition with, general human rights.”^[232]

This provision in the *IRPA* should be read in conjunction with Section 3(2)(e) of the *IRPA*, which provides that the objectives of this Act with respect to refugees including upholding Canada’s respect for the human rights and fundamental freedoms of all human beings. These legislative provisions speak to the way that the plight of refugees is inextricably linked with human rights violations. In the words of refugee lawyer David Matas, “the plight of refugees and human rights violations are not two problems, but different facets of the same problem. Human rights violations are at the root cause of mass exoduses.”^[233]

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8 The Board's inquisitorial mandate

Refugee Status Determination is said to be among the most difficult forms of adjudication, involving as it does fact-finding in regard to foreign conditions, cross-cultural and interpreted examination of witnesses, ever-present evidentiary voids, and a duty to prognosticate potential risks rather than simply to declare the more plausible account of past events.^[1] Within this context, RPD Members have to make high-stakes decisions on the basis of scarce and uncertain information, they need to strike a balance between the goals of protection and control, and Canadian refugee law is ambiguous and provides limited guidance, with credibility often being a key point in any given case.^[2] The process for Refugee Status Determination adopted in Canada that seeks to address these challenges is one where the Board has an inquisitorial mandate. The following are some of the contours of that mandate.

8.1 The Refugee Protection Division has an inquisitorial mandate

The Board generally uses an inquisitorial, as opposed to adversarial, approach to decision-making. Rebecca Hamlin describes the contrast between these two decision-making approaches this way:

The adversarial style takes the shape of a triad: two disputants arguing their respective cases before a passive judge, who must resolve the dispute by deciding which case is more persuasive. In an adversarial process, justice is based on the premise that an impartial judge decides between competing versions of this story after hearing both sides argued forcefully. Unlike this courtroom-like setting, inquisitorial hearings are designed to be non-adversarial and non-legalistic, taking the form of a dyad between the person whose fate is to be decided and the person deciding it. The inquisitorial decision-maker is engaged in a conversation with the parties, and the facts must be discovered through a collaborative process of research and questioning. Justice is demonstrated through the decision-maker's commitment to an active investigatory process.^[3]

The Refugee Protection Division has an inquisitorial mandate. The Board's *Chairperson Guideline 7* describes a Member's inquisitorial mandate this way:

A member's role is different from the role of a judge. A judge's primary role is to consider the evidence and arguments that the opposing parties choose to present; it is not to tell parties how to present their cases. Case law has clearly established that the RPD has control of its own procedures. The RPD decides and gives directions as to how a hearing is to proceed. The members have to be actively involved to make the RPD's inquiry process work properly.^[4]

This inquisitorial mandate has implications for how a Member is to assess the claim; it implies that the Board “has a duty to consider all potential grounds for a refugee claim that arise on the evidence, even when they are not raised by the applicant”.^[5] Such inquisitorial processes are commonly utilized in human rights adjudicatory contexts in order to compensate for inequalities between the parties.^[6]

8.2 Refugee Status Determination is declaratory, not constitutive

Recognizing someone as a refugee does not make the person a refugee. This is because refugee status determination is a declaratory, not constitutive act.^[7] As refugee lawyer David Matas writes, “a declaratory act recognizes someone to be what he is or always was. A constitutive act makes a person something he was not before. An asylum government cannot constitute someone to be a refugee, because he already is one.”^[8] As the refugee law academic James Hathaway puts it, refugee status arises out of the refugee's predicament, rather than from a formal determination of status.^[9] In the words of the UK Supreme Court, “the obligation not to refoule an individual arises by virtue of the fact that their circumstances meet the definition of ‘refugee’, not by reason of the recognition by a contracting state that the definition is met.”^[10]

In this way, a decision-maker errs when they fail to recognize a genuine refugee as such, and a decision-maker also errs when they do the converse by wrongly recognizing someone who is not a refugee as such. While, in principle, a state may grant asylum to anyone that it may so choose, regardless of whether or not they meet the criteria enshrined in the Refugee Convention, or any other international treaty,^[11] such a wide-ranging power has not been delegated to Immigration and Refugee Board Members, who are restricted to recognizing cases where the applicable criteria in either s. 96 or s. 97 of the IRPA have been met. This principle is reflected in section 107 of the Act: Canadian Refugee Procedure/107 - Decision on Claim for Refugee Protection#IRPA Section 107: Decision on Claim for Refugee Protection¹.

This modern conception of the refugee regime stands in contrast to pre-20th century views of asylum, where diplomatic and territorial asylum were considered to be constitutive acts such that it was the decision that made the person asking for asylum an asylee.^[12] This move away from a constitutive view of asylum to a declaratory one reflects the emergence of a rights-based view of the institution of asylum and refugee status. In Canada, this takes the form of the concrete legal obligation on the Canadian state to recognize as refugees those who meet the criteria in ss. 96 and 97 of the IRPA. Recognition of such is not a discretionary charitable act by Canada, but instead a personal right that individuals have pursuant to the IRPA, and, as recognized by the Inter-American Court of Human Rights, the Refugee Convention. In their words in their decision in *Pacheco Tineo v. Bolivia*:

Even if the 1951 Convention does not explicitly establish the right to asylum as a right, it is considered to be implicitly incorporated into its text, which mentions the definition of a refugee, the protection against the principle of *non-refoulement*, and a list of rights

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/107_-_Decision_on_Claim_for_Refugee_Protection#IRPA_Section_107:_Decision_on_Claim_for_Refugee_Protection

to which refugees have access.... With the protection provided by the 1951 Convention and its 1967 Protocol, the institution of asylum assumed a specific form and mechanism at the global level: that of refugee status.^[13]

Shauna Labman writes about the significance of this conception of asylum:

The benefit of a rights-based stance in law is that it adds a concrete assertion of legal obligation and accountability to refugee protection. It is equality between the parties. Stuart Scheingold defines this as "the call of the law." He suggests that the assertion of a right implies a legitimate and dignified reciprocal relationship that is societal and not personal. The current alternative calls in refugee protection are for compassion, humanitarianism, and morality. Such claims lack reciprocity and are founded on personal need. As Catherine Dauvergne explains, "a claim for compassion does not effectively function as a right because rights are grounded in equality but compassion is grounded in generosity and inequality."^[14]

All this said, the assertion that refugee status determination procedures are declaratory and not constitutive, and its implicit representation of 'refugeehood' as an objective identity given by law, appears to be tendentious. It is belied by the large variations in the way different individuals and systems answer the question of "who is a refugee?", even where they are all interpreting the same Convention provisions, evidence, and laws. That said, in the words of Tone Liodden, "the idea of the refugee as a non-negotiable identity across time and space may largely be fictional, but [it] is a 'crucial fiction' that has very real consequences for those who are granted – or denied – refugee status."^[2] For more on this point, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Decision-making should be predictable and consistent across the Board².

8.3 A hearing becomes adversarial where the Minister is involved

While the Division's mandate is primarily conceived of as inquisitorial and non-adversarial,^[15] in some cases the Minister intervenes in a claim and the process becomes an adversarial one. This properly constrains the Member's role. Madam Justice Tremblay-Lamer observed in *Rivas v. Canada* that in some situations, such as where exclusion is at issue, "it may be problematic for the tribunal to proceed without the Minister since the Minister usually has the burden of proof. As the applicant argues, it is a situation that can force the member to [translation] 'descend into the arena'.^[16] As Lorne Waldman states in his looseleaf: "... Since the burden of proof falls squarely on the Minister, it is certainly arguable that it is not appropriate for tribunal members themselves to engage in an investigation with respect to the exclusion matters. For the tribunal members to do so would result in their becoming prosecutors seeking to establish if the claimant falls within the exclusion clauses."^[17] Despite all of this, the jurisprudence recognizes that the Board may make a decision on the issue of exclusion without the Minister's participation,^[18] and indeed that it may have an obligation to do so even where the Minister does not participate in a case. But once the

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Decision-making_should_be_predictable_and_consistent_across_the_Board

Minister becomes involved, the hearing is seen to become an adversarial process, with both the Minister's Hearings Officer and the refugee claimant presenting evidence to establish or rebut the allegation of exclusion.^[19] This may entail some limits on the Member's proper role, and this relates to the requirement in the RPD Rules that the hearing be suspended immediately upon notification to the Minister of possible exclusion (which see: Canadian Refugee Procedure/Exclusion, Integrity Issues, Inadmissibility and Ineligibility³).

A situation can arise where the Minister concedes a point or makes a recommendation in the claimant's favour; this does not bind the Division and does not relieve a claimant from their obligation to make their case: *Fong v Canada*.^[20] That said, while a joint submission is not binding on the Division, the caselaw establishes that it should be given serious consideration: *Nguyen v Canada*.^[21]

8.4 The Member has wide latitude to question claimants in an inquisitorial process

The text *Judicial Review of Administrative Action in Canada* provides that particular latitude will be given to tribunals to question where the matter is not adversarial, as with most refugee proceedings:

Extensive and "energetic" questioning alone by tribunal members will not in itself give rise to a reasonable apprehension of bias. And particular latitude is likely to be given to tribunals operating in a non-adversarial setting, such as refugee determination hearings, where there is no one appearing to oppose the claim.^[22]

The nature of the mandate that decision-makers have in inquisitorial RSD processes is summarized by Rebecca Hamlin as follows:

The inquisitorial form requires much more active decision makers. Instead of placing the responsibility for the collection of evidence and the presentation of arguments on the disputing parties themselves, the inquisitorial process combines the role of investigator and decision-maker into one. RSD is inquisitorial if the asylum seeker goes before a decision maker who both researches and decides the claim.^[23]

That said, there are limits on appropriate questioning where a Member approaches questioning with a discriminatory or hostile attitude: Canadian Refugee Procedure/The right to an unbiased decision-maker#The tone and tenor of the decision-maker's involvement in the hearing⁴. That said, a refugee claim is not a memory test and an applicant's failure to recall dates should not be the foundation of a credibility finding.^[24] This principle would seem to have implications for the type of questions rightly asked by a panel.

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#The_tone_and_tenor_of_the_decision-maker%E2%80%99s_involvement_in_the_hearing

8.5 A Member should be adequately trained

A decision-maker should be adequately trained on issues of law and fact. While the training of Members of the Refugee Protection Division has generally been well regarded, in contrast, this has not always been seen to be the case with overseas visa officers deciding applications for resettlement from abroad. For example, in *Ghirmatsion v. Canada*, the Federal Court concluded that the visa officer's "lack of adequate training and support" were evident on cross-examination.^[25]

There are also limits on a Member's training and competency. This is reflected in the additional services available to Members, for example the statement in the *Instructions for Gathering and Disclosing Information for Refugee Protection Division Proceedings* that where, after consulting with the responsible member manager, the assigned member forms the opinion that forensic verification is necessary, they may direct the RPD adjudicative support team to send the document to the RCMP Forensic Laboratory Services for verification.^[26]

8.6 A claimant has an onus to show that they meet the criteria to be recognized as a refugee

The Federal Court affirms that the burden of proof rests on a claimant to show that they meet the definition of a Convention Refugee or a 'person in need of protection' in the Act.^[27] The Irwin Law text *Refugee Law* notes that this burden flows from the general proposition in international law that an individual seeking admission to a state must justify their admission.^[28] The UNHCR is of the view that this principle properly applies in the refugee context, stating that "the burden of proof in principle rests on the applicant".^[29] The burden of proof was previously allocated differently in Canadian refugee law, but in 1988 Canada's legislature modified the immigration legislation to shift the burden of proof for making a claim onto the asylum seeker.^[30]

The Federal Court holds that the onus is on the applicant to submit a clear, detailed, and complete application.^[31] The UNHCR Handbook provides that those examining a refugee claim should "ensure that the applicant presents his case as fully as possible and with all available evidence."^[29] This does not mean that the Board member is obliged to undertake a freestanding inquiry into a claim; the Refugee Appeal Division has held that the following principles apply in the refugee determination context: "a decision-maker [is] entitled to proper notice as to what exactly [is] being advanced. It is not up to the decision-maker to ferret out points which might possibly assist an applicant."^[32] Similarly, Member Railton of the Refugee Protection Division has noted that "The role of the Division hearing an application to re-open does not include a fact-finding mission on behalf of the applicants".^[33] One of the reasons for this is about judicial economy; indeed, it is said that "states have a right to a fair and efficient asylum procedure".^[34]

Even though the burden of proof rests on a claimant to show that they meet the requirements to be accorded protection, cases should be decided based on all of the law that binds the Board, not just the law that the parties happen to put in front of a panel.^[35] The Board "has a duty to consider all potential grounds for a refugee claim that arise on the evidence, even when they are not raised by the applicant".^[36] For example, evidence of po-

litical activities in Canada should be considered by the panel whether or not the claimant specifically raises a *sur place* claim.^[37] See: Canadian Refugee Procedure/The Board's inquisitorial mandate#To what extent does a panel of the Division have a duty to inquire into the claim?⁵.

Finally, in the Canadian system there exist legal issues where the burden of proof does not fall on the claimant, for example the Minister (or the Board, if the Minister is not participating in a hearing) bears the onus to establish a refugee claimant comes within one of the Convention's exclusion clauses.^[38] As well, if the RPD finds that the agent of persecution is the state, then the burden to establish that there is an IFA within that country where the state persecution is not happening or where a claimant would be protected by the state rests on the party asserting it and not on the claimant.^[39]

8.7 There is a shared duty of fact-finding in refugee matters

The United Nations High Commissioner for Refugees states in their handbook that there is a shared duty of fact-finding between a claimant and the examiner: "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner."^[40] States must consider persons exercising their right to asylum honestly and with due diligence so as to not violate their obligation of non-refoulement.^[41]

8.7.1 National Documentation Packages

One of the ways that this principle is implemented in practice is through packages of information that states compile on the countries of origin against which claimants are filing claims. It is an international norm that states ensure that precise and up-to-date information from various sources, such as the UNHCR and knowledgeable NGOs, is made available to the personnel responsible for examining applications and taking decisions.^[42] This information will concern the general situation prevailing in the countries of origin against which applications of asylum are being made. For the authority of the RAD to disclose such information, see: Canadian Refugee Procedure/110-111 - Appeal to Refugee Appeal Division#The RAD must proceed without a hearing on the basis of the record of the proceedings of the RPD, subject to listed exceptions, but this provision does not restrict the RAD from introducing new evidence⁶.

That said, it is generally expected that a claimant will bring the passages that they are relying on to the attention of the decision maker; the Federal Court has held that the RPD "is not obliged to comb through every document listed in the National Document Package in the hope of finding passages that may support the claim and specifically address why

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#To_what_extent_does_a_panel_of_the_Division_have_a_duty_to_inquire_into_the_claim?
6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/110-111_-_Appeal_to_Refugee_Appeal_Division#The_RAD_must_proceed_without_a_hearing_on_the_basis_of_the_record_of_the_proceedings_of_the_RPD,_subject_to_listed_exceptions,_but_this_provision_does_not_restrict_the_RAD_from_introducing_new_evidence

they do not, in fact, support the claim”.^[43] When conducting a judicial review of a PRRA decision, the court commented that “It is not for the Officer, who has many applications to adjudicate, to comb through all available National Documentation Package evidence looking for something that might establish risk for the Applicant. Rather, the onus lies with the Applicant to demonstrate to the Officer the basis for the risk claimed, he must include - or at minimum point to - the relevant country condition evidence.”^[44]

8.7.2 Claimant-specific research

Another way that Canada fulfils this obligation is through claimant-specific research. The RAD provides the following as examples of where it may engage in such research: where the RPD record and information provided by the parties fail to resolve certain issues that are before the RAD and if new issues arise.^[45] The Board has committed to using the following process when engaging in such research pre-hearing: Canadian Refugee Procedure/The right to a fair hearing#Disclosure rights and obligations for the Board⁷.

For a discussion of whether (and when) a panel may be obliged to engage in such claimant-specific research, see: Canadian Refugee Procedure/The Board's inquisitorial mandate#To what extent does a panel of the Division have a duty to inquire into the claim?⁸.

8.8 The Board must ensure that certain claimants are assisted to make their cases

The United Nations High Commissioner for Refugees states in their handbook that the scope of the shared duty of fact-finding between a claimant and the examiner will vary depending on the nature of the case: “While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at [their] disposal to produce the necessary evidence in support of the application.”^[40] What are those cases in which an examiner is to go to greater lengths to produce such evidence?

There is widespread recognition that certain types of claimants may be particularly prejudiced in presenting their cases and that in such circumstances this may affect the onus that is placed on the claimant to provide corroboration of their claim. Indeed, the *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that “Members must take reasonable measures to accommodate all participants in a proceeding so that they may participate effectively.”^[46] The UNHCR stipulates that “procedures should be in place to identify and assist asylum seekers with specific needs.”^[47]

7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_a_fair_hearing#Disclosure_rights_and_obligations_for_the_Board
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#To_what_extent_does_a_panel_of_the_Division_have_a_duty_to_inquire_into_the_claim?

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#To_what_extent_does_a_panel_of_the_Division_have_a_duty_to_inquire_into_the_claim?

8.8.1 Minors and the mentally incompetent

One such category of claimants is those whose ability to appreciate the nature of the proceedings is severely impaired, either because they are incompetent or a minor. The failure to appoint a designated representative in a refugee protection proceeding, when one is required by the rules, is a violation of procedural fairness. As the court stated in *Kurija v. Canada*, “I place the proper representation of young immigrant claimants in refugee proceedings on the same plane as concerns over bias of a decision-maker. By this I mean that it is a ‘knock-out’ issue requiring the decision to be set aside, and furthermore an issue on which new evidence is admissible after the fact for the purpose of determining the partiality of the decision-maker, or in this case, the age of the claimant.”^[48] Similarly, in *Ravi v. Canada* the claim of an Applicant who had severe mental health issues related to schizophrenia, psychosis and potential alcohol dependency was reopened on the basis that it was unfair to assess the Applicant’s credibility, and his case more broadly, when he had significant mental illness issues at the hearing, and lacked a designated representative.^[49] For further discussion of this, see: Canadian Refugee Procedure/Designated Representatives⁹.

Furthermore, the UNHCR states that determining the claim of a minor “may call for a liberal application of the benefit-of-the-doubt principle”.^[50]

8.8.2 Claimants in detention

Another category of claimant which may require special assistance is those who are in detention at the time that they are preparing for, or attending, their refugee hearing. There are particular access to justice issues for claimants in detention, who have consistently been identified as being among those who have the greatest difficulty accessing legal counsel.^[51] The UN Committee Against Torture, in its General Comment on *non-refoulement*, has listed this as one situation in which the burden of proof should reverse, and it should fall on the state to rebut the claimant's assertions where the author of the complaint has faced difficulties in obtaining evidence to substantiate their claim as a result of their deprivation of liberty:^[52]

[W]hen the complainant is in a situation where he/she cannot elaborate on his/her case, for instance, when the complainant ... is deprived of his/her liberty, the burden of proof is reversed and it is up to the State party concerned to investigate the allegations and verify the information on which the communication is based.^[53]

For further discussion of this, see: Canadian Refugee Procedure/Claimant or Protected Person in Custody¹⁰.

9 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives

10 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Claimant_or_Protected_Person_in_Custody

8.8.3 Self-represented claimants

See: Canadian Refugee Procedure/Counsel of Record#Where a claimant is unrepresented and is clearly not understanding what is occurring, the Board should inquire about whether they wish to have counsel¹¹.

8.8.4 Where a claimant has no possibility of obtaining documentation relating to their allegation

Situations where a claimant has no possibility of obtaining documentation relating to their allegation are one situation where fairness may require the Board to assist a claimant to make their case. The UN Committee Against Torture, in its General Comment on *non-refoulement*, has listed this as one situation in which the burden of proof should reverse, and it should fall on the state to rebut the claimant's assertions where the author of the complaint has faced difficulties in obtaining evidence to substantiate their claim.^[52]

[W]hen the complainant is in a situation where he/she cannot elaborate on his/her case, for instance, when the complainant has demonstrated that he/she has no possibility of obtaining documentation relating to his/her allegation of torture..., the burden of proof is reversed and it is up to the State party concerned to investigate the allegations and verify the information on which the communication is based.^[53]

For example, in *Jankovic v. Canada* the Federal Court held that the RPD breached procedural fairness by not taking steps to acquire information:

The Applicant seeks the RPD's assistance to obtain a document that has presumably been submitted to Canadian authorities, who have thus far failed to respond to the Applicant's ATIP request. The document in question is not in the possession of the Applicant, but instead is in the possession of the Canadian authorities. The Applicant is not in a position to force the Canadian authorities to produce the document to the RPD, only the Minister would be able to do so, should he so choose. Further, the Minister has relied on the Interpol Zagreb letter to seek the Applicant's exclusion from refugee protection – the same letter whose accuracy is now put into question by the very document that the Applicant requires assistance to obtain. ... Given all these circumstances, and given the importance of the Adjustment Letter to the Applicant's claim, the RPD's conclusion that verifying the information contained in the Interpol letter did not fall within its role was not only unreasonable, it was a breach of procedural fairness.^[54]

8.9 Evidence is primarily presented in written form in the Canadian process

The purpose of an oral hearing before the Refugee Protection Division is not for a claimant to repeat everything that is in their Basis of Claim form. The form is already to include "everything important for [their] claim" (as stated on the form) and as per the *Chairperson*

¹¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#Where_a_claimant_is_unrepresented_and_is_clearly_not_understanding_what_is_occurring,_the_Board_should_inquire_about_whether_they_wish_to_have_counsel

Guidelines 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division, "questions that are answered by the claimant just repeating what is written in the BOC Form do not help the Member."^[55] Instead, if the information on the form reliably establishes that the claimant meets the criteria to receive protection, then an oral hearing need not be held (See Canadian Refugee Procedure/RPD Rule 23 - Allowing a Claim Without a Hearing¹²). The purpose of an oral hearing is to test and explore the evidence presented, or lack thereof, where it is necessary to do so. This is in contrast to the practice in some other jurisdictions; for example, in Finland the practice is to have a portion of their asylum interviews in which the claimant is expected to state the grounds for claiming asylum and disclose evidence to support that claim through free narration.^[56]

It is also not always necessary for a panel to confront a party regarding deficiencies in their evidence. For example, in *Ati v. Canada* the court concluded that it was proper for the RPD to have concluded that a party did not meet their onus as a result of a lack of evidence, and that it was procedurally fair for the RPD to have done so even where the panel did not ask why such evidence was not presented.^[57] For more on this issue, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants should have a fair opportunity to respond to a panel's concerns¹³.

8.10 To what extent does a panel of the Division have a duty to inquire into the claim?

When it comes to whether the Board is obliged to conduct claimant-specific research, or to reach out to a potential witness during a hearing, there is a split in the Federal Court jurisprudence about whether and in what circumstances the Board has any such obligation. One line of jurisprudence is represented by the decision of Justice Russell in *Paxi v Canada* wherein he commented that "for the Board to take issue with the authenticity of the document yet make no further inquiries despite having the appropriate contact information to do so is a reviewable error."^[58] This appears to place a higher onus on the Board to inquire into a claim and solicit independent evidence. A contrasting line of jurisprudence is exemplified by the decision of Mr. Justice Roy in *Lutonadio v. Canada* that endorsed the following statement:

I disagree that an administrative tribunal has an obligation to contact a witness to obtain information. This is not its role. The onus rests with the Applicant to bring forward evidence it intends to rely upon and in doing so, always to put the best foot forward. It is not up to the RPD to chase down evidence from a witness to be satisfied that the document is authentic and that a person exists who has sworn to the truth of its contents before someone authorized to confirm that fact. This onus rests with the Applicant who should provide the necessary information authenticating the author and the document.^[59]

12 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_23_-_Allowing_a_Claim_Without_a_Hearing

13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Claimants_should_have_a_fair_opportunity_to_respond_to_a_panel's_concerns

Both lines of jurisprudence continue to be followed. For example, in the 2022 decision *Zhang v Canada*, the court commented about immigration officers that "there does appear to be an expectation that an Officer will take it upon themselves to simply use the contact information provided to verify the authenticity of the evidence that is provided", citing *Paxi v Canada* in support of this proposition.^[60] Relatedly, the 2022 decision *Jankovic v. Canada* held that fairness will "sometimes require the RPD to take a small, not-too-onerous, step of making further inquiry into the information relevant to a claim."^[61]

There are limits to the Board's onus to inquire into matters. In *Ramirez v. Canada*, the claimant argued on judicial review that the Board Member should have considered whether counselling in the proposed IFA location would be likely to adequately address the applicant's mental health issues. The court rejected this argument, concluding that "such an analysis would have been speculative and well beyond the RAD's expertise."^[62]

The following is a summary of some relevant rules and decisions on point:

- The panel is obliged to test the evidence where this is necessary in order to ascertain the truth: Where evidence is provided by a claimant, there may be an obligation on the Board to test that evidence. As the Board's legal services department puts it in its paper on *Assessment of Credibility in Claims for Refugee Protection*, RPD members have a duty to get at the truth concerning the claims they hear.^[63] The law "imposes a duty upon RPD members to assess the credibility of refugee claimants."^[64] As Justice Nadon stated in *Maksudur v. Canada*, "In most refugee claims, the prime issue, if not the only issue, is whether the story related by the [claimant] is true. Consequently, Board members have a duty to the [claimant] and to Canada to employ their best endeavours in the pursuit of that goal to discover the truth."^[65] Justice Mosley writes that "a close examination of the merits of the claim is consistent with the nature of the process and the role[] of the member".^[66] This is consistent with the role of the Refugee Protection Division, as envisaged in the report from Rabbi Plaut that led to the IRB's founding, with that report stating: "a determination that a claimant is a refugee requires an assessment of credibility, for the [Division] must satisfy itself that the facts as asserted by the claimant are true."^[67] Plaut goes on to note about refugee status determination that "the whole exercise falters and justice is thwarted if the truth is not elicited".^[68]
- The panel should confront a claimant and probe where it harbours credibility concerns: When it comes to a Member's obligations with respect to the acquisition of information necessary for the fair and expeditious determination of a refugee claim, the court has commented on a Member's duty to enquire by stating that "the RPD has a responsibility to prompt and probe" where it harbours a concern about credibility in certain circumstances:

[I]t was unreasonable for the RAD to draw an adverse inference from the Applicant's bare "no" in this second brief exchange. This was an issue where considerably more questioning was required in order to assess the true depth of the Applicant's knowledge. Indeed, the RPD has a responsibility to prompt and probe where it harbours a concern like this and the RAD has a corresponding responsibility to hold the RPD to that interrogatorial standard.^[69]
- A panel is not required to tell the applicant that their evidence is insufficient or ask the applicant to provide additional evidence, but it may elicit information where this is necessary to determine whether the claimant is a refugee: While there are a number of

policy statements indicating that it may be advisable for Members to solicit additional information in particular cases, the law appears to be adequately captured by the Federal Court's statement in *Mbengani v. Canada* that a panel is not required to tell the applicant that their evidence is insufficient or ask the applicant to provide additional evidence.^[70] While that decision involved a PRRA proceeding, the principle would apply with equal force to the RPD. That said, there are policy statements made to the effect that where there is a lack of evidence in a particular case, a Member may have a duty to elicit it. The Member's inquisitorial role means that they have a duty not only to hear whatever evidence comes before them, but, ultimately, according to the academic Hathaway, that they must inform themselves sufficiently to "determine whether or not the [claimant] is a Convention refugee."^[71] To this end, in 1990s 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.^[72] Indeed, to this day the *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that "Members shall make each decision on the merits of the case, based on thorough preparation, the assessment of evidence properly before the member and the application of the relevant law."^[73]

- The panel has a duty to enquire into matters related to the fairness of the proceedings if there is an indication of a procedural fairness issue: For example, in *Gallardo v. Canada* the Federal Court commented that the Division should have inquired into the claimant's capacity to represent himself given counsel's statements that the claimant had not been properly prepared and the claim had been inadequately put together without the assistance of counsel.^[74] The Court held that the Division erred in not so inquiring. In *Gorgulu v. Canada*, the Federal Court concluded that a decision maker should have alerted an applicant to what appeared to be an oversight in their submissions, stating that the "reasons fail to demonstrate that they considered the consequences of not providing the applicant with an opportunity to rectify what may very well have been an oversight concerning important information in support of his PRRA application".^[75] The Board should also verify that representatives appearing before the Board are authorized to do so: Canadian Refugee Procedure/Counsel of Record#The Board should verify that representatives appearing before the Board are authorized pursuant to the Act and regulations¹⁴.
- A panel has a duty to enquire into matters where the onus for adducing evidence falls onto the Board: By way of example, on matters of exclusion, where the Minister does not intervene in a claim, the onus is on the Board to establish that an individual is excluded (or determine that they are not). Where the record indicates that this is a possible concern, the RPD should conduct a sufficiently thorough questioning to adequately assess whether an individual is excluded under the *Refugee Convention*. The failure to conduct such an examination, for example where the RPD does not inquire into the matter and simply relies on the absence of sufficient evidence on the record to determine that exclusion has not been established, is an error.^[76]
- A panel should consider all relevant law: Cases should be decided based on all of the law that binds the Board, not just the law that the parties happen to put in front of a

¹⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_Board_should_verify_that_representatives_appearing_before_the_Board_are_authorized_pursuant_to_the_Act_and_regulations

panel.^[77] The International Court of Justice has held that a panel is not limited to the arguments submitted by the parties and the panel is deemed to take judicial notice of the law and is therefore required to consider on its own initiative all rules which may be relevant.^[6] See: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Principles about the expectations that one reasonably has of the Board¹⁵. In the context of refugee proceedings before the Board, panels have an obligation to consider certain issues, such as whether the "compelling reasons" doctrine for granting refugee status despite a change in circumstances applies, whether or not the claimant expressly invokes the relevant subsection of the Act.^[78] See: Canadian Refugee Procedure/108 - Cessation of Refugee Protection¹⁶.

8.11 The Board should consider the most up-to-date country conditions evidence

Where a new National Documentation Package is released by the Board's research unit prior to a panel rendering a decision, the panel should consider it. In *Zhao v. Canada*, the court held that the Board should consider the most recent information on country conditions.^[79]

Procedural fairness dictates that the parties should have an opportunity to present submissions and evidence on the new documents if they include material new information. As such, disclosure of an updated NDP is not required in all cases, only where they include material new information.^[79] This principle is reflected in the IRB *Policy on National Documentation Packages in Refugee Determination Proceedings*, which provides that the RAD will disclose to the parties new NDP documents only when they wish to rely upon them.^[80] As such, while the Federal Court holds that procedural fairness obligations can be met simply by "[disclosing] the most recent NDP and [giving] the Applicants an opportunity to respond and make submissions",^[81] the IRB's policy quoted above appears to specify that the RAD will instead only provide specific documents that it wishes to rely on.

That said, the RPD is not generally required to look for evidence on its own in these documents to support either the claimant's or Minister's arguments and propositions.^[43] For example, it is not the role of the RAD to address concerns relating to the reasonableness of an IFA when such concerns are not raised by applicants.^[82] See: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The Board must not ignore evidence that is validly before a panel¹⁷.

For an additional discussion of this issue, see:

15 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Principles_about_the_expectations_that_one_reasonably_has_of_the_Board

16 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/108_-_Cessation_of_Refugee_Protection

17 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_Board_must_not_ignore_evidence_that_is_validly_before_a_panel

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Disclosure rights and obligations for the Board¹⁸
- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants should have a fair opportunity to respond to a panel's concerns¹⁹
- Canadian Refugee Procedure/RPD Rules 31-43 - Documents#The panel should consider the most recent National Documentation Package²⁰
- Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#What is a new issue requiring notice?²¹

8.12 The Refugee Appeal Division must independently assess claims

The RAD is obliged to conduct an independent review of the case, focusing on the errors identified by the appellant.^[83] This has implications for the role of the RAD; the RAD cannot be expected to examine every piece of evidence and try to draw out arguments that could support an asylum claim.^[84] For more detail, see: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#Rule 3(3)(g)(i): The appellant's record must contain a memorandum with submissions regarding the errors that are the grounds of the appeal²².

That said, the Board Member must engage with evidence that, on its face, appears to contradict their key findings about the case.^[85] See: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Reasons should be sufficiently clear and provide a rational chain of reasoning²³.

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9 The right to be heard and the right to a fair hearing

The Supreme Court of Canada states that the principle that individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard.^[1] In short, parties are entitled to a reasonable opportunity to attend an oral hearing in the adjudication of a refugee claim and such hearings must be conducted fairly. The fair hearing requirement means that the people affected are given a reasonable opportunity to present their point of view and to respond to facts presented by others, and that the decision-maker will genuinely consider what each person has told them when making the decision. There is also a notice requirement to procedural fairness which means that the people affected by a decision must be told about the important issues and be given enough information to be able to participate meaningfully in the decision-making process.^[2] In considering whether a hearing was fair, the question is whether each party was able to fully and fairly present their case.^[3] The following are some of the considerations that emerge in this respect.

9.1 The Board must provide the parties with the opportunity to be heard

9.1.1 Notice of the hearing

A person affected by a decision has a right to be given adequate notice of the proceedings. The notice must be sufficient to enable preparation and presentation of the case. This requirement is enshrined in the IRPA: Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(c) - Must notify the person who is the subject of the proceeding and the Minister of the hearing¹. A related principle is the provision of adjournments necessary to allow the preparation and presentation of one's case.^[4]

Turning to the Minister, the Board must notify the Minister where the RPD rules require it, and this protects the Minister's right to be heard:

- Rule 26(1) of the RPD Rules stipulates that "If the Division believes, before a hearing begins, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, the Division must without delay notify the Minister in writing and provide any relevant information to the Minister."
- Similarly, Rule 27(1) stipulates that "If the Division believes, before a hearing begins, that there is a possibility that issues relating to the integrity of the Canadian refugee

¹ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(c\)_-_Must_notify_the_person_who_is_the_subject_of_the_proceeding_and_the_Minister_of_the_hearing](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(c)_-_Must_notify_the_person_who_is_the_subject_of_the_proceeding_and_the_Minister_of_the_hearing)

protection system may arise from the claim ... the Division must without delay notify the Minister in writing and provide any relevant information to the Minister.”

A failure on the part of the RPD to inform the Minister, as required, results in an unfair hearing where the Minister has a right to be involved and where the outcome of the claim could have been different as a result of the Minister’s involvement.^[5] See Canadian Refugee Procedure/Exclusion, Integrity Issues, Inadmissibility and Ineligibility² for a more fulsome discussion of this issue.

9.1.2 Parties are entitled to the opportunity to attend an oral hearing

Section 170(e) of the Act states that the Refugee Protection Division, in any proceeding before it, must give the person and the Minister a reasonable opportunity to present evidence, question witnesses, and make representations. This provision relates to the right that parties have to be heard. The Supreme Court of Canada has held that fundamental justice requires an oral hearing when issues of credibility are being determined in the refugee context.^[6] This hearing process must ensure that parties have an opportunity to present and respond to evidence and to make representations. This is consistent with guidance from the UNHCR that “applicants undergoing individual RSD procedures must have the opportunity to present their claims in person”.^[7] However, this does not mean that all who claim refugee protection require an oral hearing; individuals whose claims are not referred to the IRB, for example those who already have protection elsewhere, are not seen to be so entitled by the Government.^[8]

Where, for example, the Board prevents a party from speaking on multiple occasions during a hearing,^[9] hears evidence from one party while another party is not present,^[10] denies a party a reasonable opportunity to cross-examine a witness,^[11] refuses to receive evidence,^[12] prevents a party from calling witnesses,^[13] or refuses to hear submissions from a party,^[14] this may amount to a denial of the right to be heard and to a breach of natural justice. However, regard must be had to the relevant rules on, say, calling witnesses and submitting documents and the discretion that the Board has in certain circumstances to refuse such evidence. For more detail on fairness considerations related to the manner of conducting the hearing, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Fairness considerations related to the manner of conducting the hearing³.

Furthermore, it must be recognized that the principles of procedural fairness do not provide an untrammelled right to be heard, but the right to a *reasonable opportunity* to be heard. Where a party does not take advantage of that opportunity, or their actions or omissions result in them being unable to do so, procedural fairness does not automatically give them the right to another opportunity to be heard.^[15]

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility
3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Fairness_considerations_related_to_the_manner_of_conducting_the_hearing

9.1.3 A party is entitled to a hearing without unreasonable delay that causes serious prejudice

Fundamental justice may be violated when there is an unreasonable delay in hearing a claim that causes serious prejudice to the person concerned.^[16] The law in Canada may provide relief where there is such an inordinate delay that it offends the community's sense of fairness and amounts to an "abuse of process".^[17] Decision makers have, as a corollary to their duty to act fairly, the power to assess allegedly abusive delay.^[18] Relevant delays may arise either from the actions of a party (for example, where the Minister delays in bringing an application to vacate refugee status) as well as actions of the Board (where an application is properly made but the Board delays in setting the matter down for hearing). There is a three-part test for whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process:

1. First, the delay must be inordinate;^[19]
2. Second, the delay itself must have directly caused significant prejudice; and
3. When these two requirements are met, the court or tribunal should conduct a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to a party to the litigation or in some other way brings the administration of justice into disrepute.^[20]

The threshold for establishing abuse of process as a result of delay is high.^[21]

1) Inordinate delay

Whether the delay is inordinate is to be determined on an assessment of the context overall, including the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case.^[20]

Abuse of process may be alleged regarding delay prior to an application being made to the Board. The RPD can decide whether it would be an abuse of process for it to hear an application in light of inordinate delay in bringing the application.^[22] The Division can consider whether a party has delayed in bringing an application, for example whether the Minister has delayed in commencing vacation proceedings at the Board.^[23] In *Ganeswaran v. Canada*, the RPD concluded that even without evidence or allegation that the Minister was acting in bad faith or making some sort of calculated move, a period of approximately nine years before the Minister brought an application to vacate refugee status constituted delay that was unacceptable.^[24] The court in *Ati v. Canada* concluded that Mr. Ati had contributed to a six-year delay in his case with his inaccurate representations about his time spent in Iraq in both his permanent resident card renewal application and his citizenship application, and that this pointed against the delay being inordinate.^[25]

Abuse of process may also be alleged regarding delay in the board scheduling a matter after an application was made. The Federal Court recognizes that, practically, a hearing cannot be convened as of the date when a claimant perfects their claim; there will always be some gap of time.^[26] In *Seid v. Canada*, the court held that in assessing whether there was an abuse of process, the RPD can only consider the delay related to the administrative procedures before the RPD, not delay related to another process like the citizenship regime.^[27] In *Vera v. Canada* the Federal Court concluded that a delay of about six years from

the time the applicants sought refugee protection in Canada until the RPD initially heard and determined the matter did not meet this threshold.^[26]

Taking a comparative approach to the question of timeliness, the UNHCR core standards for due process in Refugee Status Determination prescribe that "RSD applications must be processed in the most timely and efficient manner possible".^[28] That said, the reality is that asylum systems around the world are plagued by significant delays; for example, in the United States, on average, affirmative asylum seekers who receive asylum relief have waited more than 1,000 days to be granted asylum.^[29] Similarly, it usually takes several years for refugees in Malaysia to go through official status determination and be recognized as a refugee by the UNHCR.^[30] Indeed, globally the average duration of a refugee situation is now 20 years.^[31] In Canada, the timelines for convening hearings with the in-Canada asylum system are generally much shorter than how long it takes to process a privately-sponsored overseas refugee application - in 2001, it was taking up to 17 months to process 80% of such overseas cases and that number grew to 35 months by 2005 and 54 months by 2015,^[32] though such times have subsequently decreased.^[33]

2) Significant prejudice

Inordinate delay on its own is insufficient to find an abuse of process. Significant prejudice to an individual that is a direct result of the delay is also required.^[34] In *Chabanov v Canada*, the Federal Court deemed a delay of eleven years as not reaching the threshold of abuse of process because the applicant failed to provide sufficient proof of significant prejudice resulting directly from the delay.^[35] The Federal Court of Appeal in *Torre v Canada* noted that the applicant in that case had not made out an abuse of process because he "had to do more than make vague allegations that the delay endangered his physical and psychological integrity and drained his ability to submit a full and complete defence, without providing any evidence to support them" and because he "never tried to show how he was prejudiced by the passage of time."^[36] In *Khan v. Canada* the court noted that while a five-year delay between service of the Minister's initial application in 2013 and the initiation of the proceedings before the RPD in 2019 may appear, at first impression, significant, there was not evidence before the tribunal that the delay was inordinate in the sense of offending the community's sense of fairness in that case, taking into account the specific evidence on file about the prejudice to the person concerned.^[37]

The fact that waiting for a hearing can be traumatic for claimants has been discussed extensively in literature about refugee status determination processes. The uncertainty inherent in the asylum process can be a source of significant stress and anxiety for many claimants.^[38] Scholars have emphasized the consequences of slowness and waiting in the governance of migrants.^[39] They point towards the painful state of limbo that waiting can induce in people with undetermined immigration status. For claimants who remain in the refugee status determination system for a lengthy period, what have been termed "the toxic effects of refugee determination, uncertainty of situation, producing documentary evidence, demonstrating past trauma, and refugee racism"^[40] have all been identified contributors to a condition labelled Prolonged Asylum Seeker Syndrome, a condition characterized by powerlessness, depression, and identity crises.^[41] The length of time that refugees 'wait in limbo' for a decision on their asylum claim also impacts on their subsequent economic integration

- a 2016 study by Hainmueller, Hangartner and Lawrence found that one additional year of waiting reduces the subsequent employment rate by 4 to 5 percentage points.^[42]

When assessing prejudice, the Board and courts have considered, among others, the following factors:

- Destruction of the original file: In *Badran v. Canada* the applicant argued that his cessation proceeding occurred after his refugee claim file had been destroyed as a result of the Board's normal document retention and disposal practices. The RPD found this was not an abuse of process, as the lack of access to the refugee claim file did not prejudice him given the RPD's ability to consider his summary of the claim. The Federal Court agreed, holding that an Applicant must show more than the destruction of files to sustain an abuse of process argument.^[43]
- Legislative change: In *Ganeswaran v. Canada* the Applicants argued that they were deprived of a procedural safeguard due to a legislative change during the delay period. In 2012, Parliament amended section 25 of *IRPA* to impose a one-year bar on applications for permanent residence based on humanitarian and compassionate grounds following a negative refugee determination. The Applicants argued that they could be at risk of removal in that one-year period and that prior to the legislative amendments in 2012 they could have accessed an H & C Application without waiting the one-year period. The court rejected this argument, finding that it did not amount to significant prejudice in the circumstances as the one-year bar on applying for a Pre-Removal Risk Assessment does not apply to those whose refugee status is vacated.^[44]
- An Applicant's apparent willingness to delay proceedings: In *Singh v. Canada*, factors that could undermine evidence of hardship included the Applicant's willingness to further delay the proceedings with an abandonment application, his application for a postponement, and his apparent silence in the interim period prior to the cessation hearing being scheduled.^[45]
- Prejudice faced by children: Where children are impacted by an administrative actor's inordinate delay, their vulnerabilities as children need to be considered in evaluating whether the delay caused significant prejudice.^[46] In *R v Wong*, 2018 SCC 25, Chief Justice Wagner described the "serious life-changing consequences" facing those who are at risk of deportation after years of living in a country: "They may be forced to leave a country they have called home for decades. They may return to a country where they no longer have any personal connections, or even speak the language, if they emigrated as children. If they have family in Canada, they and their family members face dislocation or permanent separation"^[47]
- Whether having been able to reside in Canada in the interim should be considered a benefit: This issue was considered in *Ganeswaran v. Canada* as follows: "The Principal Applicant misrepresented in order to obtain status in Canada and the Minister's delay in proceeding with the vacation application allowed her and her children to remain in Canada. The complexity here is that the benefit and the prejudice are tied together and directly proportional. As explained above, the family's integration into Canada is the very basis of the prejudice they are claiming. The more the family becomes integrated in Canada, which could be considered a benefit to them, the greater the prejudice associated with their risk of deportation. The benefits to the family of remaining in Canada cannot be considered in isolation from the impact of the Minister's delay and the resulting prejudice. Each case has to be examined on its own facts. In these circumstances, the

inordinate delay resulting in the prejudice complained of by the Applicants cannot simply be deemed as beneficial to them.”^[48]

For more discussion of this, see:

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Hearings should be conducted in a trauma-informed manner⁴
- Canadian Refugee Procedure/Changing the Date or Time of a Proceeding#Regulation 159.9(1): The Board will provide priority scheduling for certain types of claims⁵

3) Abuse of process bringing the administration of justice into disrepute

Once inordinate delay and significant prejudice have been established, a final assessment is needed to determine whether an abuse of process can be found. The decision maker needs to decide whether the “delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute”.^[49] In order to find an abuse of process, the decision maker must be satisfied that, “the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted”.^[50] There are special considerations where the remedy sought is a stay of the proceedings: “a stay should be granted only in the ‘clearest of cases’, when the abuse falls at the high end of the spectrum of seriousness”^[51] *Ganeswaran v. Canada* was an example where this standard was met:

I find the inordinate delay in this case is manifestly unfair to the Applicants and brings the administration of justice into disrepute. This case did not involve complex factual or legal issues, given that approximately five weeks after the Applicants’ claims had been accepted, the Minister had admissions and evidence confirming that there were serious misrepresentations. There was also a notation from an immigration officer at that time indicating that a vacation application would be pursued. The Minister has not explained why it did not proceed sooner; there was no evidence provided of any activity on the file for almost ten years. The Minister brings the administration of justice into disrepute by not proceeding for almost ten years, while the minor Applicants grew up in Canada, and then, based on no new information and without explanation as to the timing, deciding to bring an application to vacate their refugee status. It is unacceptable.^[52]

See also:

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Parties are entitled to timely decisions and reasons therefor⁶

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Hearings_should_be_conducted_in_a_trauma-informed_manner
5 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Regulation_159.9\(1\):_The_Board_will_provide_priority_scheduling_for_certain_types_of_claims](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Regulation_159.9(1):_The_Board_will_provide_priority_scheduling_for_certain_types_of_claims)

6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Parties_are_entitled_to_timely_decisions_and_reasons_therefor

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Abuse of process and actions of parties⁷

9.1.4 The Board must take special measures to accommodate vulnerable claimants, including minors and those who cannot appreciate the nature of the proceedings, as well as those who are unrepresented

The right to procedural fairness includes the ability to meaningfully participate in the adjudicative process.^[53] The Board is obliged to take special measures to accommodate vulnerable claimants, including minors and those who cannot appreciate the nature of the proceedings, for example by appointing a designated representative to represent their interests during the hearing. See: Canadian Refugee Procedure/The Board's inquisitorial mandate#The Board must ensure that certain claimants are assisted to make their cases⁸.

9.2 Concerns about a lack of procedural fairness should be raised at the earliest practical opportunity

The common law principle of waiver provides that a party should raise allegations about a lack of procedural fairness at the earliest practical opportunity,^[54] or the earliest reasonable moment.^[55] The court states that counsel has a responsibility to object and provide reasons for such an objection, as a lawyer entrusted with representing their client's interests.^[56] This is so for the policy reason that even where procedural unfairness occurs in a hearing, it may be correctable. The rationale for why an applicant must raise a violation of natural justice or apprehension of bias at the earliest practical opportunity was articulated in *Mohammadian v. Canada* as follows:

There is a powerful argument in favour of such a requirement arising from judicial economy. If applicants are permitted to obtain judicial review of adverse decisions by remaining silent in the face of known problems of interpretation, they will remain silent. This will result in a duplication of hearings. It seems a better policy to provide an incentive to make the original hearing as fair as possible and to avoid repetitious proceedings. Applicants should be required to complain at the first opportunity when it is reasonable to expect them to do so.^[57]

That said, for any waiver to be effective it must be made freely and with full knowledge of all the facts relevant to the decision whether to waive or not.^[58] As the Federal Court held in *Benitez v. Canada*, the earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection.^[59] See also: Canadian Refugee Procedure/The right to an unbiased decision-maker#Allegations of an apprehension of bias must be raised at the earliest opportunity⁹.

7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Abuse_of_process_and_actions_of_parties
8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#The_Board_must_ensure_that_certain_claimants_are_assisted_to_make_their_cases
9 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#Allegations_of_an_apprehension_of_bias_must_be_raised_at_the_earliest_opportunity

9.2.1 Where a concern about procedural fairness is raised for the first time on appeal to the RAD, it may be remedied by the RAD process

A finding that procedural fairness has not been observed will ordinarily result in a determination that the decision of the tribunal is invalid.^[60] However, where the RPD takes a step that is procedurally unfair (or debatably so), for example not providing an opportunity to make submissions about the authenticity of documents on file, such unfairness may be remedied by the ability to file submissions and evidence on appeal to the RAD,^[61] should the ability to have recourse to the RAD exist in the case. This is consistent with the long-standing principle that an internal administrative appeal may cure unfairness that arises earlier in an administrative process.^[62] The RAD appeal process allows for any unfairness in the RPD's decision-making to be remedied, including through the filing of new evidence and submissions. See also: Canadian Refugee Procedure/Reopening a Claim or Application#Once reopened, is a claim to be heard de novo or as a redetermination based on the previous record?¹⁰

9.3 Language of proceedings

9.3.1 A claimant has a right to proceedings in the official language of Canada of their choice

The IRB *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French* provides that the language rights of parties are substantive rights that are distinct from their right to procedural fairness. Both the *Official Languages Act* and the *Canadian Charter of Rights and Freedoms* establish official languages rights for parties as well as for individuals who are otherwise involved in IRB proceedings, such as witnesses and counsel. Consequently, any issue or request concerning the use of either official language will be examined by the IRB independently of considerations of procedural fairness, although the language skills of the parties may nonetheless be considered when examining procedural fairness issues.^[63] For more details about this right see: Canadian Refugee Procedure/Documents#Claimants need not provide documents in the language of the proceeding, only in English or French¹¹ and Canadian Refugee Procedure/Official Languages Act¹².

9.3.2 A claimant has a right to interpretation where it is necessary

The right to an interpreter in a proceeding in another language is enshrined in section 14 of the *Canadian Charter of Rights and Freedoms*, and this right has been held to be generally applicable to a proceeding before the RPD. Interpretation should be continuous, precise, impartial, competent and contemporaneous. For a discussion of this, see the commentary

10 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Once_reopened,_is_a_claim_to_be_heard_de_novo_or_as_a_redetermination_based_on_the_previous_record?

11 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Claimants_need_not_provide_documents_in_the_language_of_the_proceeding,_only_in_English_or_French

12 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Official_Languages_Act

to RPD Rule 19: Canadian Refugee Procedure/Interpreters#Legal standard for interpretation¹³. A failure to provide an interpreter at all, or to provide one that offers adequate interpretation, will mean that the process was not fair: *Kovacs v. Canada*.^[64]

9.3.3 Providing information about the status determination process in a range of languages

Academics have observed that it is a best practice that state authorities widely disseminate information on eligibility criteria, the determination procedure, and the rights associated with recognition in a range of languages.^[65] While this may be a best practice for states, to the knowledge of this author, it does not translate into a legal entitlement for claimants under Canadian law. For more details, see: Canadian Refugee Procedure/Counsel of Record#The fact that a claimant lacks counsel does not, in and of itself, mean that their hearing is unfair¹⁴.

9.4 Fairness considerations related to providing complete disclosure of information

9.4.1 Disclosure rights and obligations for the Claimant

The RPD is mandated by the common law and the IRPA to respect principles of natural justice and procedural fairness. The right to be heard is a fundamental principle of natural justice. An essential component of the right to be heard is to be able to put relevant evidence before the decision-maker.^[66] For more details on this, see: Canadian Refugee Procedure/The right to a hearing and the right to be heard#The Board must provide the parties with the opportunity to be heard¹⁵.

The information that a claimant provides in their Basis of Claim form must be complete: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 6 - Basis of Claim Form¹⁶. The documents that parties are obliged to provide to the Board are specified in rules 7 and 34: Canadian Refugee Procedure/Documents#What documents does a party need to provide when?¹⁷. See also "Parties will cooperate with the asylum process and supply all pertinent information" at Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Principles about the expectations that one reasonably has of claimants and counsel¹⁸.

13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Interpreters#Legal_standard_for_interpretation
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_fact_that_a_claimant_lacks_counsel_does_not,_in_and_of_itself,_mean_that_their_hearing_is_unfair

14 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_a_hearing_and_the_right_to_be_heard#The_Board_must_provide_the_parties_with_the_opportunity_to_be_heard

15 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_6_-_Basis_of_Claim_Form

16 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_documents_does_a_party_need_to_provide_when?

17 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Principles_about_the_expectations_that_one_reasonably_has_of_claimants_and_counsel

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9.4.2 Disclosure rights and obligations for the Minister

While the Minister has no obligation to become a party to a proceeding (see: Canadian Refugee Procedure/Intervention by the Minister#The Minister is permitted to intervene in proceedings, but is not required to do so¹⁹), once it does so its disclosure must be "complete" and cannot be selective. The documents that parties are obliged to provide to the Board are specified in rules 7 and 34: Canadian Refugee Procedure/Documents#What documents does a party need to provide when?²⁰.

On appeal to the RAD, the rules and regulations create a regime which Waldman describes as "asymmetrical", where there are "severe restrictions placed on the claimant versus substantial flexibility for the Minister".^[67] By way of example, Waldman notes that the Minister can generally file documents at any time, is not limited in the types of evidence to be filed, and, aside from the filing of Minister's appeals, would not appear to be affected by many timelines.

9.4.3 Disclosure rights and obligations for the Board

UNHCR affirms that a fair asylum system is one where parties will have access to the complete record that is before the decision-maker.^[68] Fundamental justice requires the Board provide complete disclosure so as to allow parties to know the case and meet their obligations. In this way, the Board must generally provide disclosure of documents that it relies upon and provide parties with an opportunity to reply.^[69] Where the Division relied upon a document that was not on the record or in the NDP to evaluate country conditions (and was actually contradicted by documents on the record) the Federal Court held that it had acted unfairly.^[70] Relatedly, in *Moran v. Canada* the court held that "confronting the Applicant at the hearing with the seized statement without prior disclosure was a breach of procedural fairness."^[71] In *Ola v. Canada*, the court held that the RAD's failure to provide the applicants with an opportunity to make submissions in response to the information provided in an updated NDP before the RAD amounted to a breach of procedural fairness.^[72] See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants should have a fair opportunity to respond to a panel's concerns²¹ and Canadian Refugee Procedure/The Board's inquisitorial mandate#The Board should consider the most up-to-date country conditions evidence²².

Furthermore, in any research it conducts, the RPD is to follow the *Instructions for Gathering and Disclosing Information for Refugee Protection Division Proceedings*.^[73] The Instructions note that while RPD members are responsible for identifying information needed for the adjudication of a claim and may gather information, the Research Directorate is primarily responsible for gathering information. The Instructions set out general principles related

19 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Intervention_by_the_Minister#The_Minister_is_permitted_to_intervene_in_proceedings,_but_is_not_required_to_do_so

20 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_documents_does_a_party_need_to_provide_when?

21 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Claimants_should_have_a_fair_opportunity_to_respond_to_a_panel's_concerns

22 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board's_inquisitorial_mandate#The_Board_should_consider_the_most_up-to-date_country_conditions_evidence

to the gathering and disclosing of information, as well as specific instructions.^[74] These principles apply to how the Division has committed to collecting information regarding a claim, including that:

1. Responsibility to present supporting evidence rests with the parties. This responsibility remains even when the RPD decides to obtain information other than that provided by the parties.
2. To ensure a fair determination of a refugee claim, the assigned member requires all the relevant evidence whether such evidence may be favourable or prejudicial to any party.
3. The RPD will gather information through a transparent and standard process to ensure fairness in decision-making.
4. The assigned members will request claimant specific information and use such information only where they complete a risk assessment and are satisfied that there is no serious possibility that gathering the information would endanger the life, liberty or security of the claimant or any other person.
- ...
6. The information will be sought by the RPD only in instances where the information is deemed relevant to a determinative issue in the claim, can be obtained in a timely manner, and is likely to result in obtaining new or conclusive information. ...^[75]

That said, not every situation where a decision-maker does their own research and fails to disclose it prior to providing their reasons will be considered a breach of procedural fairness.^[76] The general approach that applies is that of *Mancia v Canada*, which holds that while "extrinsic evidence" must be disclosed prior to the decision being rendered, a decision maker is not required to provide notice of their reliance on material that is (1) generally available to the public and (2) not novel and significant information that may affect the disposition of a case. In *Ashiru v Canada*, Justice Kane noted that in the recent application of the "novel and significant" test courts have adopted a contextual approach which includes consideration of the nature of the decision and the possible impact of the evidence on the decision.^[77] This contextual approach was demonstrated in *Alves v. Canada*, in which the court held that in assessing whether the duty of fairness required the disclosure of extrinsic documents that a decision-maker has consulted, the Court is to consider factors such as (i) the source, including its reputability; (ii) the public availability of the documents and the extent to which the applicant could be reasonably expected to know of them; (iii) the novelty and significance of the information, including the extent to which it differs from other evidence; and (iv) the nature of the decision, including the applicant's allegations and the evidentiary burden.^[78]

In this way, in *Dubow-Noor v. Canada*, the court held that information obtained independently by the Board (a Google Maps search used to identify distances between particular points) did not need to be disclosed prior to the decision because it was publicly available and not novel.^[79] Similarly, in *Pizarro Guitierrez v. Canada* the court concluded that the fact that an officer consulted public documents available on the internet about the situation in a country, and referred to them without advising the applicant, was not a breach of the duty of procedural fairness. This was so as the applicant was well aware that the issue was being considered, the documents were easily accessible on the internet, the documents

originated from credible and known sources, and the applicant had had an interview in which related information had been put to him.^[80] In *Sylain-Pierre v. Canada* the court relied on this test to conclude that it was not a breach of procedural fairness for the RAD to find news articles indicating that the agent of persecution had died, and consider this when assessing the claimant's prospective risk.^[81] Decisions of the Federal Court have also determined that there are circumstances in which PRRA officers cannot be criticized for relying upon country documentation that is publicly available but not specifically disclosed to a claimant.^[82]

See also RPD Rule 33: Canadian Refugee Procedure/Documents#RPD Rule 33 - Disclosure and use of documents by the Division²³.

9.4.4 The record on a court-ordered redetermination

Before the Court-Ordered Rehearings Policy came into effect in 1999, the IRB traditionally interpreted court-ordered redeterminations as a requirement for a new hearing or a hearing *de novo*. It removed from the redetermination case file all documentary evidence except for the originating or jurisdictional document, and the order and reasons of the Court. The IRB also ensured that, where possible, the matter was reheard by decision-makers other than those who made the original decision, unless ordered by the Court otherwise. That changed in 1999 when the IRB adopted a more flexible procedure in conducting court-ordered redeterminations with the introduction of the Court-Ordered Rehearings Policy. That policy is referred to as the "Policy on Court-Ordered Redeterminations", last updated in 2013. The IRB states that "The guiding principle of the policy [is] to ensure that the use of evidence from previous hearings will not lead to a reasonable apprehension of bias, or affect the right to be heard." That document is now referred to as the IRB *Policy on Court-Ordered Redeterminations*.^[83]

In short, this policy provides that where the Court has determined that there was a denial of natural justice in the original hearing and provides specific directions, the IRB will comply with those directions. Where the Court has not given specific directions, the only documents that must, in every case, be included in the redetermination case file are the Court order and the jurisdictional documents (for example: notice of appeal, referral to the RPD, etc.). Where the Court has provided no specific directions and has made no determination that there was a denial of natural justice in the original hearing, the redetermination case file will contain the documents set out at section 5.1 of that policy, namely:

- jurisdictional documents (for example: notice of appeal, referral to the RPD, request for admissibility hearing or detention review);
- the Court order and any reasons;
- the original decision(s) of the IRB and any reasons;
- administrative documents (for example: notices to appear);
- exhibits filed at the previous hearing(s);
- any transcripts of the previous hearing (if available); and
- other evidence on the original file.

See also:

²³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_33_-_Disclosure_and_use_of_documents_by_the_Division

- Canadian Refugee Procedure/The right to an independent decision-maker#The tribunal must follow explicit instructions stated in a judgment or direction from a reviewing court²⁴
- Canadian Refugee Procedure/The right to an impartial decision-maker#A Member considering prior testimony during a redetermination of a claim is not, in itself, indicative of bias²⁵
- Canadian Refugee Procedure/RPD Rules 62-63 - Reopening a Claim or Application#Once reopened, is a claim to be heard de novo or as a redetermination based on the previous record?²⁶
- A question can also arise about the application of RAD Rule 29 concerning "Documents or Written Submissions not Previously Provided" applies to redeterminations. See: Canadian Refugee Procedure/RAD Rules Part 3 - Rules Applicable to All Appeals#RAD Rule 29: Documents or Written Submissions not Previously Provided²⁷.

9.4.5 The record on a RAD-ordered redetermination

Similar to the above regarding matters remitted by the Federal Court, once a matter is remitted from the RAD to the RPD, it is to follow the process set out in the *IRB Policy on Redeterminations Ordered by the Refugee Appeal Division*.^[84]

9.5 The right to know the case to be met and the right of response

9.5.1 Claimants have an expectation that a claim will only be rejected on the basis of a legal issue that a panel has identified as being at issue

To ensure that proceedings are accessible and comprehensible, it is expected that an RPD panel will identify the issues that are at stake in a claim and, if the panel does not identify a particular legal issue as being in play, the panel would err if it subsequently rejected the claim on that basis. Furthermore, when a hearing is conducted by way of reverse-order questioning (i.e. the Board asking questions first and the claimant's counsel questioning them afterwards), the person with the onus is no longer in control of the process and there is an increased burden on the Board to ensure that issues which are determinative of the claim are raised at the hearing.^[85] As such, where a panel did not advise a claimant that state protection was at issue in a claim, and then rejected the claim on the basis that they had not rebutted the presumption of the availability of state protection, the panel acted unfairly.^[86]

24 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#The_tribunal_must_follow_explicit_instructions_stated_in_a_judgment_or_direction_from_a_reviewing_court

25 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_impartial_decision-maker#A_Member_considering_prior_testimony_during_a_redetermination_of_a_claim_is_not_in_itself_indicative_of_bias

26 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_62-63_-_Reopening_a_Claim_or_Application#Once_reopened,_is_a_claim_to_be_heard_de_novo_or_as_a_redetermination_based_on_the_previous_record?

27 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_3_-_Rules_Applicable_to_All_Appeals#RAD_Rule_29:_Documents_or_Written_Submissions_not_Previously_Provided

An exception to this principle is that some issues are said to always be at issue in every claim, and need not be identified as a distinct issue, including credibility,^[87] identity,^[88] and the objective basis of the claim.^[89] That said, the court nonetheless holds that where relevant, the claimant should be advised that identity is an issue, and of the need to provide specific documents or other corroborative evidence.^[90] Similarly, where a panel listed a series of issues that were of concern, but did not list the objective basis of the claim as being of concern, the panel erred when it rejected the claim on the basis that the claimant had not established the objective basis of their claim.^[91]

Where a panel identifies an issue, for example potential exclusion pursuant to Article 1E of the Refugee Convention, the Board does not have to advise the claimant of all the ins and outs that flow from that issue and relevant caselaw, such as the sub-issue in 1E exclusion cases of whether the appellant is at risk or not in their country of residence that is being considered during the exclusion analysis.^[92] It is not the Board's role to provide legal advice to claimants^[93] and an administrative tribunal has no obligation to act as the attorney for a claimant.^[94] See: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Principles about the expectations that one reasonably has of the Board²⁸.

The rules at the RAD differ as RAD Rule 7 provides for when the Division may provide a decision without further notice to the parties, with exceptions for situations where the RAD raises a new issue and it would be procedurally unfair not to provide notice: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#Rule 7 provides that the Division may, without further notice, decide the appeal, but further notice is required if the appeal is decided on a new ground²⁹.

Furthermore, cases should be decided based on all of the law that binds the Board. This obliges a panel to apply relevant statutory principles and follow relevant caselaw. For example, panels have an obligation to consider certain issues, such as whether the "compelling reasons" doctrine for granting refugee status despite a change in circumstances applies, whether or not the claimant expressly invokes the relevant subsection of the Act. See: Canadian Refugee Procedure/The Board's inquisitorial mandate#To what extent does a panel of the Division have a duty to inquire into the claim?³⁰. Similarly, the Board "has a duty to consider all potential grounds for a refugee claim that arise on the evidence, even when they are not raised by the applicant": Canadian Refugee Procedure/The Board's inquisitorial mandate#The Refugee Protection Division has an inquisitorial mandate³¹. However, it is not the role of the RAD to address concerns relating to the reasonableness of an IFA when such concerns are not raised by applicants.^[95]

28 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Principles_about_the_expectations_that_one_reasonably_has_of_the_Board

29 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rule_7_provides_that_the_Division_may,_without_further_notice,_decide_the_appeal,_but_further_notice_is_required_if_the_appeal_is_decided_on_a_new_ground

30 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#To_what_extent_does_a_panel_of_the_Division_have_a_duty_to_inquire_into_the_claim?

31 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#The_Refugee_Protection_Division_has_an_inquisitorial_mandate

Where a claimant is unrepresented at a hearing, the RPD has a more onerous obligation to indicate what issues are in play and explain the case to be met. However, as the Court noted in *Khosa v. Canada*, it has not identified "any case that sets a minimum standard for what must be explained about an IFA to a self-represented claimant before the RPD".^[96] See: Canadian Refugee Procedure/RPD Rules 14-16 - Counsel of Record#The Board has a heightened duty of procedural fairness when dealing with self-represented claimants³².

9.5.2 Claimants should have a fair opportunity to respond to a panel's concerns

Procedural fairness entitles those who are to be subjected to a decision affecting their rights, privileges, or interests to know the case against them.^[97] This requires that they "know what evidence has been given and what statements have been made" affecting them and that they be given "a fair opportunity to correct or contradict them."^[98] Parties should have a fair opportunity to respond to a panel's credibility concerns. Where a panel may reach an adverse credibility finding, a party should have notice and an opportunity to respond.^[99] This rule was articulated as follows by the Federal Court of Appeal in 1989: the claimant should be given an opportunity at the hearing to clarify the evidence and to explain apparent contradictions in their testimony.^[100] That said, there are limits to how far this proposition extends and a panel need not advert a claimant's attention to all possible credibility concerns,^[101] such as potential inconsistencies between their evidence and the objective country condition documents. As a general principle, the rules of procedural fairness do not require refugee claimants to be confronted about information that they are aware of and which they have, in addition, provided themselves.^[102] The rationale for this is that the claimant, having produced the documents, could have addressed any facial inconsistencies in them at the time of submission.^[103] For the RAD context, see the following discussion of what is a new issue requiring notice to the parties, and sometimes additionally to the Minister: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#What is a new issue requiring notice?³³

Parties should also have a fair opportunity to respond to concerns that a panel has, even where they concern issues other than credibility. For example, in *Conde v. Canada*, the claimant had been designated a vulnerable person by a previous panel of the Board. The claim was returned to the Board for redetermination after the original decision was overturned by the Federal Court. On redetermination, the Member de-designated the claimant as a vulnerable person. On judicial review, the court concluded that this had been done in a procedurally unfair manner as "there was no reason, given the previous psychological evidence and the acceptance of the [applicant] as a vulnerable person at previous hearings, to expect that he needed to provide more psychological evidence without notice".^[104] In that case, the Federal Court concluded "clearly, this was procedurally unfair."^[105]

32 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_14-16_-_Counsel_of_Record#The_Board_has_a_heightened_duty_of_procedural_fairness_when_dealing_with_self-represented_claimants

33 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#What_is_a_new_issue_requiring_notice?

This principle was not always operative in the Canadian refugee determination system; prior to the mid-1980s, the Federal Court held that the Minister was not bound to comply with the rules of natural justice and could even consider information without giving the claimant an opportunity to respond.^[106]

There are further principles that are related to this one, for example, where prior evidence is put to a witness as a contradiction, what is put to them must be a fair and accurate statement of their evidence.^[107] For further details, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Members are expected to act honestly and in good faith and are precluded from "setting traps" for claimants³⁴.

9.5.3 The right to provide submissions on the law and the facts prior to a decision being reached

Failing to provide a party with an opportunity to make submissions prior to a decision being reached is a breach of procedural fairness.^[14] For more detail, see:

- For how this applies at the RPD, see: Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(e) - Must provide an opportunity to present evidence, question witnesses and make representations³⁵.
- For the RAD, the provisions are different, but there rights of the Minister and the person who is the subject of the appeal are similarly protected: Canadian Refugee Procedure/IRPA Section 171 - Proceedings³⁶.
- See also: Canadian Refugee Procedure/165 - Powers of a Member#These powers must be employed fairly, which will generally require providing notice to the Minister³⁷.

9.5.4 Ministerial notification rules ensure that a claimant will have advance notice of particular types of issues

Rule 26(1) of the RPD Rules stipulates that "If the Division believes, before a hearing begins, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, the Division must without delay notify the Minister in writing and provide any relevant information to the Minister." The obligation to inform the Minister in writing where there is a "possibility" of exclusion, integrity issues, or other other types of issues that require such notice, not only ensures that the Minister is heard where they desire to intervene, but also ensures that a claimant will have adequate notice of the issues at the hearing, including time to prepare for a hearing that may involve a new issue or that may have become more complicated. The court commented on this aspect of the notice requirement in *Canada v. Louis*, indicating that procedural unfairness that arises from the

34 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Members_are_expected_to_act_honestly_and_in_good_faith_and_are_precluded_from_"setting_traps"_for_claimants
[https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(e\)_-_Must_provide_an_opportunity_to_present_evidence,_question_witnesses_and_make_representations](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(e)_-_Must_provide_an_opportunity_to_present_evidence,_question_witnesses_and_make_representations)

35 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(e\)_-_Must_provide_an_opportunity_to_present_evidence,_question_witnesses_and_make_representations](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(e)_-_Must_provide_an_opportunity_to_present_evidence,_question_witnesses_and_make_representations)
36 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_171_-_Proceedings
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/165_-_Powers_of_a_Member#These_powers_must_be_employed_fairly,_which_will_generally_require_providing_notice_to_the_Minister

37 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/165_-_Powers_of_a_Member#These_powers_must_be_employed_fairly,_which_will_generally_require_providing_notice_to_the_Minister

failure to provide such notice may be relied upon by either a claimant or the Minister: ” Even though in [*Kanya v. Canada*] the breach of the rules of procedural fairness was relied on to the benefit of the refugee claimant, there is no reason that a breach of the obligations provided for in subsection 23(1) of the Rules cannot be relied on in the same way by the Minister who, according to the wording of this provision, is the true beneficiary of the said obligation.”^[108]

Similarly, a claimant is entitled to 10 days of advance notice where the Minister will be intervening in person and of the purpose of any Ministerial intervention: Canadian Refugee Procedure/Intervention by the Minister#Rule 29(2)(a) requirement that the notice state the purpose for which the Minister will intervene³⁸.

For issues that are not noted in the above rule, it is generally sufficient for a panel of the Board to raise those issues at the start of the hearing. For example, there is no obligation on the RPD to raise the IFA issue and proposed locations before the RPD hearing as it suffices to do so at the beginning of the hearing.^[109]

9.5.5 The Board is bound by its own undertakings where it indicates that something is not at issue or that particular evidence is unnecessary

To be fair, the Board's conduct must not violate a party's legitimate expectations. In this way, the Board is bound by its own undertakings and, once an undertaking is given by a Board Member, failure to comply with it (or provide notice that it will not be complied with and an opportunity to respond^[110]) will constitute a breach of natural justice.^[111] The Supreme Court of Canada described this principle, and the related doctrine of legitimate expectations, in *Agraira v Canada*:

If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.^[112]

The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized in the looseleaf *Judicial Review of Administrative Action in Canada*:

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to

38 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Intervention_by_the_Minister#Rule_29\(2\)\(a\)_requirement_that_the_notice_state_the_purpose_for_which_the_Minister_will_intervene](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Intervention_by_the_Minister#Rule_29(2)(a)_requirement_that_the_notice_state_the_purpose_for_which_the_Minister_will_intervene)

a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.^[113]

There are additional qualifications to the applicability of the doctrine of legitimate expectations, including that it does not apply where the promise conflicts with a statutory duty.^[114] This is so as the doctrine of legitimate expectations does not create substantive rights and cannot hinder the discretion of the decisionmaker responsible for applying the law.^[115] As such, even where an undertaking has been made by the tribunal, it remains free to change its mind while seized with a case, so long as fair notice is provided to the parties. While the court has indicated that it is preferable to provide notice of issues as far in advance as possible,^[116] so long as the tribunal provides an adequate opportunity to respond to the issue, procedural fairness is respected^[117] - even if notice of an issue is provided at some point during the hearing, not at the start of, or prior to, the hearing.^[118]

These principles have been applied in the refugee context:

- Where the tribunal indicates that it is not concerned about an issue, it should not find against a party on that issue without providing notice and an opportunity to respond: In *Okwagbe v. Canada* the tribunal advised that its only concern was delay but then rejected the claim based on the availability of an IFA. The Court held that this conduct constituted a breach of natural justice.^[119]
- Where the tribunal indicates that it is not necessary to adduce particular evidence, it should not find against a party for failing to provide such evidence: In *Isik v. Canada* the court concluded that the Board had acted unfairly where it indicated that it was not necessary to call a witness and then made adverse credibility findings on the point that the witness may have testified about:

[T]he Court strongly believes that the RPD should refrain from taking a position on the necessity of presenting a witness unless it knows exactly what facts the witness will testify about and in what specific respect this evidence is meant to corroborate a claimant's testimony or story. If a counsel simply inquires about the advisability of presenting a witness, the RPD can always refuse to take a position on the basis that it has yet to complete its evaluation of the evidence. If it chooses to take a stand, it must be fully aware that its decision will have consequences. In this particular case, the Court finds that the RPD ought to have known that its comment that the evidence was not necessary would clearly impact on the legal representatives acting in this case and it is clear that it did so without knowing the full extent of the facts on which the proposed witness was meant to testify.^[120]
- Where the tribunal publishes a policy which indicates that it will follow a particular practice, parties may rely on it: Member Edward Bosveld of the RAD has held that the RPD's actions in creating, publishing, and committing to follow its Front End Security Screening Instructions give rise to a legitimate expectation that those instructions will be followed.^[121]
- The fact that the tribunal asks for submissions on an issue does not create a legitimate expectation that the issue will be canvassed in the reasons if it is not determinative: In *Rodriguez v. Canada*, the court considered an argument that the fact that the tribunal had asked for submissions on an issue created a legitimate expectation that the issue was of significance and would be assessed by the tribunal in its reasons.^[122] The court rejected this argument, holding that the fact that submissions have been requested on an issue

does not oblige the tribunal to consider it if that issue is irrelevant. See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Decisions may focus on the determinative issue³⁹.

9.6 Fairness considerations related to the manner of conducting the hearing

9.6.1 The right to counsel

For considerations of the right to counsel and incompetence of counsel, see the commentary to s. 167 of the Act: Canadian Refugee Procedure/Counsel of Record#IRPA s. 167 on the Right to Counsel⁴⁰.

9.6.2 Hearings shall normally be conducted privately

See the commentary on section 166 of the Act: Canadian Refugee Procedure/Proceedings must be held in the absence of the public⁴¹.

9.6.3 The right to present evidence

Section 170(e) of the Act states that the Refugee Protection Division, in any proceeding before it, must give the person and the Minister a reasonable opportunity to present evidence, question witnesses, and make representations. The Supreme Court of Canada has held that fundamental justice requires an oral hearing when issues of credibility are being determined in the refugee context.^[6] This hearing process must ensure that parties have an opportunity to present and respond to evidence and to make representations. Where, for example, the Board prevents a party from speaking on multiple occasions during a hearing,^[9] denies a party a reasonable opportunity to cross-examine a witness,^[11] refuses to receive evidence,^[12] or prevents a party from calling witnesses,^[13] this may amount to a denial of the right to be heard and to a breach of natural justice. However, regard must be had to the relevant rules on, say, calling witnesses and submitting documents and the discretion that the Board has in certain circumstances to refuse such evidence.

The failure to allow a witness to testify or discouraging a witness from testifying could constitute a breach of procedural fairness

Where the Board denies a party a reasonable opportunity to cross-examine a witness,^[11] refuses to receive evidence,^[12] prevents a party from calling witnesses,^[13] or discourages a witness from testifying,^[123] this may amount to a denial of the right to be heard and to a breach of natural justice. As the court stated in *Kamtasingh v. Canada*: "the place to control excessive or repetitive evidence on issues of controversy which are central or

39 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Decisions_may_focus_on_the_determinative_issue

40 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#IRPA_s._167_on_the_Right_to_Counsel

41 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Proceedings_must_be_held_in_the_absence_of_the_public

determinative is generally not at the entrance to the witness box, but once the witness is testifying”.^[124] However, regard must be had to the relevant rules on, say, calling witnesses and submitting documents and the discretion that the Board has in certain circumstances to refuse such evidence. In the Federal Court's words in *Ahmad v. Canada*, "fairness does not require that an applicant be permitted to call multiple redundant witnesses to give repetitive evidence".^[125] See more: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 10(6) provides that the Division may limit the questioning of witnesses⁴².

A panel can establish principled rules regarding the manner in which a witness testifies

The right to make one's case is subject to reasonable limitations, but those limitations, when they are the result of the exercise of discretion, are to be made and applied in a principled way.^[126] Examples of such principled limitations include:

- Having witnesses put away notes: The Refugee Appeal Division has held that whether a hearing is in person or virtual, a refugee protection claimant must not read their Basis of Claim Form (BOC Form) or their notes during the hearing without obtaining the member's authorization.^[127] A Member of the Board does not normally err by asking a witness to put away notes before giving testimony. One option for a panel in such circumstances is to offer to the party that they may admit the notes in question as an exhibit, something that was offered in *Wysozki v. Canada*.^[128]
- Requiring a witness to take steps to verify their identity: Another example of the right of a Board to establish principled limitations on the testimony that may be adduced in a proceeding was where a Member required a proposed overseas witness to attend at a Canadian embassy abroad for identification before the panel would hear their testimony by telephone, a limitation that was upheld by the Federal Court on judicial review: Canadian Refugee Procedure/Witnesses#44(1)(f): If a party wants to call a witness, the party must provide information on whether the party wants the witness to testify by means of live telecommunication⁴³.
- Limiting repetitive testimony: A decision-maker is entitled to limit repetitive testimony and to not allow testimony that is not central to the claim.^[129] More detail on this is provided at RPD Rule 10(6): "The Division may limit the questioning of witnesses, including a claimant or a protected person, taking into account the nature and complexity of the issues and the relevance of the questions" (Canadian Refugee Procedure/Information and Documents to be Provided#RPD Rule 10 - Order of questioning in hearings, oral representations, oral decisions, limiting questioning⁴⁴).
- Having the panel question the claimant prior to a claimant's counsel asking questions: While the Federal Court allows that it may be necessary for the claimant's counsel to question first in order to ensure that evidence is properly presented in particular hearings,

42 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_10\(6\)_provides_that_the_Division_may_limit_the_questioning_of_witnesses](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_10(6)_provides_that_the_Division_may_limit_the_questioning_of_witnesses)

43 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Witnesses#44\(1\)\(f\):_If_a_party_wants_to_call_a_witness,_the_party_must_provide_information_on_whether_the_parts_wants_the_witness_to_testify_by_means_of_live_telecommunication](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Witnesses#44(1)(f):_If_a_party_wants_to_call_a_witness,_the_party_must_provide_information_on_whether_the_parts_wants_the_witness_to_testify_by_means_of_live_telecommunication)

44 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#RPD_Rule_10_-_Order_of_questioning_in_hearings,_oral_representations,_oral_decisions,_limiting_questioning

^[130] it is permissible for the tribunal to establish as a default that the panel questions the witness first, a default that can be deviated from in appropriate circumstances.

Where a witness is interrupted while providing testimony, this may establish that their right to present oral testimony was interfered with

Where the Board prevents a party from speaking on multiple occasions during a hearing, this may amount to a denial of the right to be heard and to a breach of justice.^[9] However, redirecting a witness is not in and of itself problematic; the court concluded in *Wysozki v. Canada* that seeking to have an applicant respond to the question asked rather than provide other irrelevant information is not a breach of procedural fairness.^[131] Furthermore, a panel may determine that counsel will only be given a specified amount of time in order to ask questions in a case; in *Ramachandiran v. Canada*, the RAD noted "Counsel was given more than 40 minutes for questions, which is generally considered ample time".^[132] That said, where a panel interrupts a witness' testimony in a manner that could be described as "constant interruptions or gross interference", this may establish that the process was not fair.^[133] See: Canadian Refugee Procedure/The right to an unbiased decision-maker#The tone and tenor of the decision-maker's involvement in the hearing⁴⁵.

Where a panel or opposing counsel acts in an intimidating way, this may establish that the right to present oral testimony was interfered with

The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that "Members shall conduct hearings in a courteous and respectful manner while ensuring that the proceedings are fair, orderly and efficient."^[134] It is important for a decision-maker to be aware of their tone and their reactions when they are hearing evidence.^[135] Intrusive and intimidating interventions by a Board member may be found to interfere with an applicant's ability to present his case.^[136] If the interruptions are made for the purpose of clarifying testimony or an issue, they will not raise a reasonable apprehension of bias, even if the manner of questioning or interruption is "energetic".^[137] However, there will be cases where conduct crosses the line. For example, in *Kumar*, the Federal Court of Appeal found that the decision-maker's conduct of the hearing, which included statements such as "[t]his is one of the most ridiculous cases I have ever heard in my life" and, in response to a summary of the applicant's political views stated "Who cares?", was intrusive and that the intimidating character of the interventions interfered significantly with the applicant's presentation of his case by his counsel.^[138] Similarly, in *Farkas v. Canada* a Board ruling was set aside because of persistent and aggressive questioning by one of the Board members.^[139] That said, the fact that a panel acted in a manner the lacked sensitivity will not in itself suffice to overturn a decision; for example, in *Miranda c. Canada* the court concluded that the panel "a été brusque et indifférente, ce qui suggère, au pire, que la SPR n'était pas accueillante et sensible au demandeur alors qu'il racontait des expériences difficiles", but nonetheless went on to uphold the decision.^[140] This general issue is related to issues of bias

⁴⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#The_tone_and_tenor_of_the_decision-maker%E2%80%99s_involvement_in_the_hearing

and prejudgment of the evidence, which see: Canadian Refugee Procedure/The right to an unbiased decision-maker#Bias and the Member's Inquisitorial Role⁴⁶.

In some cases, evidence may only be admitted where it is credible and trustworthy

Just as the refusal to admit relevant evidence may breach procedural fairness, so can a decision to admit and rely on evidence which may not be reliable, credible, or trustworthy or, in the case of hearsay evidence, in circumstances where a party is unable to correct or contradict any statement prejudicial to its view, including by means of cross-examination.^[141] For further discussion of this, see: Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(h) - May receive evidence considered credible or trustworthy⁴⁷.

9.6.4 Members are expected to act honestly and in good faith and are precluded from "setting traps" for claimants

The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that "Members are expected to act honestly and in good faith, in a professional and ethical manner."^[142] Parliament's objective with the IRPA is to fulfill Canada's international legal obligations with respect to refugees, including Canada's obligations pursuant to the *Refugee Convention*, obligations which must be interpreted and performed in good faith.^[143] In international law, the concept of good faith, or *bona fides*, is taken to include duties of honesty, loyalty, and reasonableness.^[144] The Federal Court observes that the Member's role "calls for exemplary probity and integrity."^[145] As such, this requirement will preclude outright dishonesty, such as falsely indicating that a claimant made a statement that they did not make, something that has been an issue in other countries' refugee status determination systems.^[146]

This will also preclude more subtle actions that do not demonstrate good faith, such as "setting traps" for claimants.^[147] By way of example, the Board must not mislead a claimant by putting a false premise to them. This has been held to be a "clear breach of procedural fairness."^[148] In *Yahaya v. Canada*, the court concluded that the panel had breached procedural fairness as follows: "the RPD member's questioning on this issue added to the confusion, as it resulted from the initial misinterpretation of the Applicant's statement. At the hearing, the RPD member put a false premise to the Applicant, i.e., that the police visit took place on December 21, 2016, and then took note of how the Applicant reacted to what the Applicant had never understood as being a discrepancy. In effect, the Applicant was asked to explain away a discrepancy that never existed."^[149] That conduct was held to have been procedurally unfair, and the matter was remitted to the IRB for redetermination. Similarly, in *Reveron v. Canada* the Federal Court noted that "The panel seems to have imposed a false premise on Mr. Chace Reveron and asked him to prove it" and concluded that this was a procedural fairness violation.^[150] In *Herrera v. Canada* the Federal Court

46 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#Bias_and_the_Member's_Inquisitorial_Role
[https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(h\)_-_May_receive_evidence_considered_credible_or_trustworthy](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(h)_-_May_receive_evidence_considered_credible_or_trustworthy)

47 [_Proceedings#IRPA_Section_170\(h\)_-_May_receive_evidence_considered_credible_or_trustworthy](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(h)_-_May_receive_evidence_considered_credible_or_trustworthy)

concluded that the RPD had effectively set a trap for the applicant at the outset of the hearing by misdescribing the issues to be addressed, which has held to be unfair.^[151] Similarly, in *Sivaguru v. Canada* the Federal Court of Appeal quashed a decision in a case where a panel member, after hearing evidence on the claimant's knowledge of the LTTE's violent activities in Sri Lanka, and doubting his credibility, initiated a search for further evidence, and upon resuming the hearing, did not disclose this contradicting evidence until he had questioned the claimant further, in a way that was described by the court as the setting of a trap.^[152]

9.6.5 Abuse of process and actions of parties and the Board

Abuse of process “aims to prevent unfairness by precluding ‘abuse of the decision-making process’”.^[153] The doctrine of abuse of process may be invoked in refugee proceedings, usually where the Minister has tarried in bringing an application to vacate status.^[154] For considerations related to delay in the tribunal convening a hearing, unrelated to the actions of any party, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#A party is entitled to a hearing without unreasonable delay that causes serious prejudice⁴⁸.

9.6.6 A hearing should be conducted in a way that upholds the dignity of the individual

Members who preside over refugee hearings should have appropriate skills and understanding.

Hearings should be conducted in a trauma-informed manner

Refugee Status Determination processes can have negative psychological effects on asylum-seekers. Despite their diverse cultural backgrounds and nationalities, refugees and asylum seekers often share common experiences, including the loss or separation of family members, the hardships of flight, as well as stigma, discrimination, social isolation, financial insecurity, and protracted asylum determination processes.^[155] Indeed, IRB Member Railton has noted that “most claimants are suffering some trauma or stress when they arrive in Canada”.^[156] The fact that hearings can have significant deleterious psychological effects for claimants is well documented. A study conducted by Katrin Schock, an expert in clinical psychology, examined the psychological impact of asylum interviews. The participants were examined 10 days prior and 16 days after their asylum interview and the results clearly showed an “increase in post-traumatic intrusions and a significant decrease in post-traumatic avoidance and hyper-arousal symptoms,” meaning that the findings confirm the stressful impact asylum interviews have.^[157] A fair hearing process is one that takes these concerns into account and seeks to minimize them.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* recognizes that decision-makers assessing refugee status must be sensitive to the mental

⁴⁸ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#A_party_is_entitled_to_a_hearing_without_unreasonable_delay_that_causes_serious_prejudice

health of asylum seekers and be prepared to adjust their decision-making strategy:^[158] ”207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.”^[159] Having a trauma-informed adjudication process has implications both for the manner in which any refugee status determination hearing is conducted, as well as the timeliness of the process:

- Priority processing should be available for some claimants: The fact that waiting for a hearing can also be traumatic for claimants has been discussed extensively in literature about refugee status determination processes. For more detail, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#A party is entitled to a hearing without unreasonable delay that causes serious prejudice⁴⁹.
- Questions should be appropriate for the claimant: This is especially the case when conducting hearings involving children, where care must be taken to ensure that questions are asked in a manner appropriate to the claimant's age, maturity, and level of understanding, as discussed in the relevant Chairperson's Guideline. Furthermore, since the nature of a hearing is not adversarial, the panel should control the scope of any cross-examination where it is liable to traumatize a claimant. A panel should limit cross-examination when it believes that the proposed questioning would add little to the knowledge of the decision-maker and would unduly prejudice the claimant or cause unwarranted emotional strain.^[160]
- Members should adopt an appropriate demeanour: See: Canadian Refugee Procedure/The right to an unbiased decision-maker#A passive or distant countenance is not required of Board members⁵⁰.

Hearings should be conducted with appropriate skill in inter-cultural communication

The Federal Court has held that a Member's findings must be ”duly sensitive to cultural differences”^[161] and that the Board ”must be careful not to review evidence unduly with a North American lens”.^[162] The court also states that ”the Board should not be quick to apply the North American logic and reasoning to the claimant's behaviour: consideration should be given to the claimant's age, cultural background and previous social experiences”.^[163] The Federal Court has spoken positively of the RAD being ”clearly alert to the risks of unconscious or implicit racial bias”.^[164] The RAD has also emphasized that this has implications for who should be selected to serve on the tribunal, stating: ”It is desirable and, arguably, necessary that the composition of the tribunal reflect the composition of Canadian society and, in particular, the immigrant community which it has been created to serve.”^[165]

International standards provide that decision-makers should be taught the inter-cultural skills required to conduct interviews in a non-discriminatory and meaningful manner.^[166]

49 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#A_party_is_entitled_to_a_hearing_without_unreasonable_delay_that_causes_serious_prejudice

50 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#A_passive_or_distant_countenance_is_not_required_of_Board_members

Mary Crock, et. al., note that 'cultural competence' can range from understanding the impact that religious belief systems might have on behaviour to acknowledging the impact of the dissonance caused by cultural and social dislocation to understanding the expectations that a person might have of a government official in a position of authority and acknowledging the type of education and experiences that a person likely has (or has not) had.^[167] The general view is that cultural competence is likely to be context-specific, given the heterogeneity of refugee populations;^[168] in the words of Riggs, "there may not be one 'model' of best practice, but a suite of strategies that are flexible and adaptable and are reflective of the clients' cultures, languages, existing social groups and resources of local service providers—both mainstream and culturally-specific."^[169] For example, the *UN High Commissioner for Human Rights* states that their officials doing interviews need to be aware that some interviewees may use different temporal references or do not pay attention to dates and time. Staff should understand how they relate to time (e.g., by linking facts to remarkable events, seasons, holidays and festivities) to trace back possible dates of human rights incidents.^[170]

Hearings should be conducted in manner that appropriately considers gender

If a Member acts in a way that does not appropriately consider gender, they may be raising a reasonable apprehension of bias. For example, the Federal Court of Appeal commented as following in *Yusuf v. Canada*:

In my opinion, these sexist, unwarranted and highly irrelevant observations by a member of the Refugee Division are capable of giving the impression that their originator was biased. The day is past when women who dared to penetrate the male sanctum of the courts of justice were all too often met with condescension, a tone of inherent superiority and insulting "compliments". A judge who indulges in that now loses his cloak of impartiality. The decision cannot stand.^[171]

See further: Canadian Refugee Procedure/The right to an impartial decision-maker⁵¹.

Gender should also be appropriately considered when assigning adjudicators to claims, as one academic has argued: "This will help to ensure respect for people whose culture does not allow for a woman to be seen alone with a man who is not her husband, and ensure that women are able to discuss their protection concerns freely with caseworkers."^[172] Most staff who work at refugee status determination bodies in western countries are women - for example 70% of those at Norway's body are female^[173] and the percentage is similar in Canada. For more detail, see: Canadian Refugee Procedure/Guideline 4 - Gender Considerations in Proceedings Before the Immigration and Refugee Board⁵².

9.6.7 Videoconferencing is not *per se* unfair, but may be inappropriate in certain circumstances

Section 164 of the Act provides that the Board may conduct a hearing via live telecommunication. For a discussion of the fairness implications of such technology, see: Canadian

51 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_impartial_decision-maker

52 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Guideline_4_-_Gender_Considerations_in_Proceedings_Before_the_Immigration_and_Refugee_Board

Refugee Procedure/Presence of parties and use of telecommunications for hearings#IRPA Section 164⁵³.

9.6.8 The Board is not obliged to record hearings, but a lack of such a recording may constitute grounds for setting aside the decision

There is no statutory right to a recording of a Division's proceedings. A lack of a recording is not by itself a ground for allowing an appeal of a decision.^[174] However, if an issue of natural justice is raised, a reviewing body must consider whether the applicant has been deprived of his or her grounds of appeal given the absence of a recording of the impugned hearing. If the decision facing the RAD or Court can be made on the basis of evidence established through other means, the principles of natural justice will not be infringed. As such, in *Popoola v. Canada* the court concluded that the fact that the recording included inaudible portions in the testimony about which credibility findings were made was not a basis for setting aside the decision.^[175] This was so because the inaudible portions were "minimal in nature and often [were] illuminated by follow-up questions from the RPD", and as such, the case was one where the record permitted the Court to determine whether the RAD's findings were reasonable on the evidence before it. Similarly, in cases where no recording has been made, it remains open to the decision-maker to provide their notes of what was said at the hearing, which may be sufficient.^[176] On the other hand, if the appellant raises an issue that can only be determined through a record of what was said at the hearing, and the absence of, or gaps in, such a record prevents the appeal body from addressing the issue properly, this would normally constitute a ground for allowing the appeal (or review, in the case of a judicial review).^[177] However, the applicant retains the burden of proving that a breach of procedural fairness occurred by, for example, submitting an affidavit with sufficient particulars to establish this.^[178]

This is consistent with international jurisprudence. For example, in the UK the Court of Appeal has found that in the interests of fairness, claimants have the right to request that their interview be electronically recorded in the absence of having a legal representative present.^[179]

9.6.9 The Board is not obliged to provide a transcript of an RPD proceeding, regardless of whether or not a recording of the proceeding was made

The *Federal Courts Citizenship, Immigration and Refugee Protection Rules* provide that the tribunal must prepare a record containing a transcript "if any". Essentially, at that stage of proceedings the transcript must be provided to the parties if it has been prepared, but the Board is not obliged to produce such a transcript of its own accord: *Zhang v. Canada*.^[180] It used to be the case that transcripts were produced as a matter of course in the Canadian refugee protection system; for example in the Refugee Status Advisory Committee system that existed prior to the establishment of the IRB, a senior immigration officer would examine the claimant under oath, a stenographer would be present, and then that transcript

⁵³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Presence_of_parties_and_use_of_telecommunications_for_hearings#IRPA_Section_164

would be forwarded to the RSAC.^[181] This was abandoned as the regime developed, decision-makers were now face-to-face with claimants as a legal requirement, and audio recordings of hearings became the norm. That said, transcripts are frequently prepared for hearings of more than three hours in duration that are appealed to the RAD. See: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#Rule 3(3)(b): The appellant's record must contain all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript in the appeal⁵⁴.

9.7 Fairness considerations related to decisions

9.7.1 Parties are entitled to timely decisions and reasons therefor

The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* stipulates that "Members are expected to render their reasons in accordance with any standards that may be established by the IRB regarding quality decision-making and timeliness."^[182] Ordinarily, RPD decisions are to be provided orally at the end of the hearing: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 10 - Order of questioning in hearings, oral representations, oral decisions, limiting questioning⁵⁵. Where a decision has been reserved and is not being issued in a timely manner, a party can apply to the Federal Court for mandamus to require that the decision be provided.^[183] That said, the fact that there has been a delay in providing a decision will not generally justify setting aside the decision, as the Federal Court of Appeal has stated, "the 'unreasonable delay' argument cannot be perceived as a fertile basis for setting aside decisions of tribunals. It is probably closer to legal reality for one to presuppose that rarely, if ever, will the argument be successfully invoked."^[184]

See also: Canadian Refugee Procedure/The right to a hearing and the right to be heard#A party is entitled to a hearing without unreasonable delay that causes serious prejudice⁵⁶.

9.7.2 Decision-making assigned to a Member must be done by the Member and shall not be delegated

The principle that *delegata potestas non potest delegari* applies to matters at the RPD. In short, no delegated powers can be further delegated. Alternatively, this administrative law principle can be stated *delegatus non potest delegare* ("one to whom power is delegated cannot himself further delegate that power"). This is affirmed in the *Code of Conduct for*

⁵⁴ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rule_3\(3\)\(b\):_The_appellant's_record_must_contain_all_or_part_of_the_transcript_of_the_Refugee_Protection_Division_hearing_if_the_appellant_wants_to_rely_on_the_transcript_in_the_appeal](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rule_3(3)(b):_The_appellant's_record_must_contain_all_or_part_of_the_transcript_of_the_Refugee_Protection_Division_hearing_if_the_appellant_wants_to_rely_on_the_transcript_in_the_appeal)

⁵⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_10_-_Order_of_questioning_in_hearings,_oral_representations,_oral_decisions,_limiting_questioning

⁵⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_a_hearing_and_the_right_to_be_heard#A_party_is_entitled_to_a_hearing_without_unreasonable_delay_that_causes_serious_prejudice

Members of the Immigration and Refugee Board of Canada which stipulates that "decision-making responsibility shall not be delegated."^[185]

9.7.3 Each claim should be considered individually, while overall decision-making should be predictable and consistent

There are two fundamental principles regarding decision-making: each claim should be considered individually, and yet, overall decision-making should be consistent. The following sections explicate these principles and the tension that they can have with one another.

Each claim should be considered individually

Every application should be considered individually and where multiple persons make a claim and the claims are joined, each claimant is entitled to have their unique circumstances considered in the decision that ultimately ensues.^[186] That said, where claims are joined and they rely on a similar version of events, the panel's factual determinations may reasonably apply to each joined claim. For example, in *Pedige v. Canada*, the court wrote as follows:

[T]he Applicants argue that the RAD erred by failing to consider the Associate Applicant's case independently by improperly importing findings from the Principal Applicant's claim. Each of the Applicants' claims in this case relied on a similar version of events. Namely, Sri Lankan authorities had pursued and abused them and their family following an environmental protest instigated by the Principal Applicant. The RAD rejected this version of events. It was reasonable for the RAD to import those findings into the analysis of the Associate Applicant's claim.^[187]

See also RPD Rule 55: Canadian Refugee Procedure/RPD Rules 55-56 - Joining or Separating Claims or Applications⁵⁷.

This principle that each claim should be considered individually is also in play where one RPD panel relies upon fact-finding conducted by another panel. As a starting point, "an individual case does not establish binding factual precedents or eliminate the necessity of proving facts in each [subsequent] individual case."^[188] That said, there are circumstances in which one panel of the RPD can rely on fact-finding conducted by another.^[189] This usually occurs uncontroversially in the context of documentary evidence about conditions in the country in question, where both panels had the same record before them from the same National Documentation Package. That said, the Federal Court has stated that relying on fact-finding conducted by another panel must be done "sparingly"^[190] and cautions that a panel cannot "blindly" or "blithely" adopt another panel's findings and that "reliance on the findings of another panel must be limited, careful and justified".^[191] This is so for a number of reasons, including that the information before another panel generally cannot be verified, as the record in another case is generally not before the new panel that is deciding what weight to place on another panel's factual findings. Even where a party submits that the record in the case at bar is similar to that in another case, the Federal Court has noted that "this does not establish that it was".^[192]

⁵⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_55-56_-_Joining_or_Separating_Claims_or_Applications

Such concerns apply equally to more case-specific factual findings. For example, in *Lopez v. Canada*, the RPD noted that the father’s claim was found not to be credible. The RPD recognized that it was not bound by the prior decision and had to arrive at a conclusion based on the evidence before it. However, given that Ms. Rodriguez Lopez’s claim was based on the facts alleged by her father, the RPD found on a balance of probabilities that the credibility of her own claim had been undermined. The court held that this was unreasonable in the circumstances:

The RPD relied on credibility findings made by the panel in Ms Rodriguez Lopez’s father’s claim to draw conclusions about her own credibility. This was not a reasonable or fair use of the fact-finding of another panel. Ms Rodriguez Lopez was ill-placed to rehabilitate her father’s claim, not knowing what evidence might have overcome the panel’s concerns in his case. ... There was little that Ms Rodriguez Lopez could do to sustain the veracity of her own claim once the RPD had determined, based on her father’s claim, that there had been no persecution by the ELN. Accordingly, having erred by applying the credibility findings of another panel to the claim before it, the RPD’s decision cannot stand.^[193]

Another way that this issue can arise is with the use of boilerplate language that has been used in past decisions. The Federal Court has held that “while use of boilerplate text in some cases provides sufficient grounds to believe the decision was not personalized, it is acceptable when the boilerplate used addresses historic documents and actions taken by a country provided that it is clear the decision-maker put their mind to the actual issues and made an independent decision based on the evidence”.^[194] For further detail on this point, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Use of templates and precedents⁵⁸.

Finally, this issue can arise on appeal where the RAD does not engage in an independent assessment of the case. A RAD Member may not dispose of an appeal in a few sentences by simply stating that they had reviewed the record, done an independent assessment, and agreed with the RPD.^[195] In the Federal Court’s words in *Jeyaseelan v Canada*, “An overly obsequious support for and reinforcement of all RPD findings can bring into question the independence of the RAD’s analysis”.^[196] Similarly, when a matter is remitted for redetermination, the new panel should not copy and paste from the prior decision in a way that calls into question whether they considered new evidence at all: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Use of templates and precedents⁵⁹.

Decision-making should be predictable and consistent across the Board

While keeping in mind the principle that each claim should be considered individually, as the Federal Court of Appeal has held, one of Parliament’s intentions with the IRPA is also to promote the consistency of decisions.^[197] Persons affected by administrative decisions are entitled to expect that like cases will generally be treated alike, and that outcomes will not depend merely on the identity of the individual decision-maker.^[198] The *Code of Conduct*

58 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Use_of_templates_and_precedents
59 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Use_of_templates_and_precedents

for *Members of the Immigration and Refugee Board of Canada* provides that "Members, in their decision-making, have a responsibility to support the institutional interest of the IRB in ensuring the consistency of its decisions, while recognizing that no improper influence may be brought to bear upon their adjudicative independence."^[199] In short, in the context of this decision-making scheme, from a policy point of view, it is important that like cases be treated alike, and that this be seen to be done.^[200] As Neil Yeates writes in his report on the Board's operations, "fairness is undermined when decision making is not perceived as consistent".^[201] In the pithy words of the philosopher Patricia Mindus, "arbitrariness is detrimental to the legitimacy of any rule in a deep and decisive way".^[202] Furthermore, in the evocative words of refugee lawyer David Matas, consistency and accuracy in the system's determinations are important, lest, "real refugees seeking protection in Canada [] evade authorities rather than submit themselves to a deadly game of Russian roulette."^[203]

Achieving consistency is a challenge for any judicial system; for example, in the context of the American asylum system, it has been said that "in many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge".^[204] Indeed, decisions on claims appear to be affected by factors as diverse as the decision-maker and the zeitgeist. For example, scholarship from Europe notes a relationship where the number of xenophobic attacks in a region leads to lower recognition rates in the following year, suggesting that for case officers the "preferences and moods that prevail in their land guide their decisions."^[205] Research in the United States compared asylum recognition rates in the pre- and post-9/11 environments, observing that between 2002 and 2004, asylum claims were about 7 percent less likely to be accepted than before the September 11 attacks in 2001.^[206] In Canada, academic studies point to variations in refugee claim approvals and rejections by individual decision-makers at the RPD for cases that have similar facts and relate to the same country of origin.^[207] Professor Sean Rehaag states that there is an extent to which inconsistency is a necessary corollary of independence, writing that "while the independence of Board members offers important protections against inappropriate government interference in refugee adjudication, this independence sometimes makes it difficult for the IRB to achieve another key policy objective: consistency across refugee determinations made by different Board members".^[207] Yet, that said, research by scholars focused on variation within RSD regimes confirms that the Canadian RSD regime has lower levels of variation by individual decision makers than that seen in other regimes, including those in Australia and the United States.^[208]

Moreover, the importance of consistency does not mean that the courts will intervene in the Board's operations for this reason alone; the general rule is that unlike judges, tribunal members are free, as far as the law is concerned, not to follow previous decisions of their tribunal colleagues even if the previous decisions cannot be distinguished.^[209] This was recognized in the Supreme Court of Canada's 1993 decision *Domtar v. Québec*, where it held that the fact that two tribunal decisions are in direct conflict with one another does not render either one of them necessarily reviewable by the courts.^[210] As per the Federal Court, Canadian administrative law does not recognize inconsistency in a tribunal's decisions as a stand-alone ground of review.^[211] Potential disparity of outcomes is said to be "the natural consequence of the framework established by the Supreme Court of Canada in *Canada v Vavilov*" and "where there is evidence on both sides of the issue, decision makers may well reach opposite decisions that are equally reasonable."^[212] Furthermore, as the Federal Court recognized in *Arumathurai v. Canada*, Members are not even bound by their own

past decisions as "the principle of *stare decisis* does not apply horizontally with respect to decisions of administrative tribunals such as the RPD".^[213]

That said, in order for their decision to be reasonable, it may be incumbent upon a Member to show that they have turned their mind to any other decisions that have been brought to their attention. As the Supreme Court of Canada articulated in *Canada v. Vavilov*, to promote "general consistency", any administrative body that departs from its own past decisions typically "bears the justificatory burden of explaining that departure in its reasons".^[214] In choosing to follow, or distinguish, another decision, a Board Member may consider factors such as whether the decisions materially differ in the facts, a different question was asked in the other decision, the other decision is clearly wrong, or the application of the other decision would create an injustice.^[215] However, it will not always be necessary for a panel to articulate how a previous decision of the RPD differed from the previous case; in *Arumathurai v. Canada* the court concluded that in the circumstances "the RPD was not required to engage in such an analysis" and "any flaw or shortcoming in the reasons of the RPD in this regard was not 'sufficiently central or significant to render the decision unreasonable'".^[216] Similarly, in *Vanam v Canada* the court concluded that "the prior IFA decisions cited by the Applicants are distinguishable and are not the type of decisions imposing a "justificatory burden" on the RAD to explain a departure from its previous decisions".^[217]

Finally, in the words of Tone Liodden, it is worth keeping in mind that while equal treatment contributes to consistency and predictability, it is a normatively empty concept; as Liodden notes, "it is entirely possible that decisions are 100 per cent consistent, but substantially wrong". She cautions that "although a focus on consistency is important in order to avoid the outcome of a case depending mainly upon the decision maker, it is equally important to ensure that equal treatment does not contribute to perpetuating patterns of practice that are no longer valid."^[173] In this respect, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The procedures used by Canada must ensure the effectiveness of the substantive provisions in the Refugee Convention⁶⁰.

From an institutional point of view, one of the key tools that a large tribunal like the IRB uses to achieve consistency in decision-making is the guidelines issued by the Chairperson.^[218] For more information on which, see: Canadian Refugee Procedure/Duties of Chairperson#159(1)(h) The Chairperson may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides⁶¹. See also the ability of a Division's Deputy Chairperson to designate particular decisions as "persuasive": Canadian Refugee Procedure/159 - Duties of Chairperson#The Board has other ways of designating decisions, besides its power to issue jurisprudential guides⁶².

To avoid the prospect of duelling administrative interpretations of a provision, and to ensure that an interpretation of a provision is correct, at any stage during proceedings, a "federal

60 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_procedures_used_by_Canada_must_ensure_the_effectiveness_of_the_substantive_provisions_in_the_Refugee_Convention
[https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Duties_of_Chairperson#159\(1\)\(h\)_The_Chairperson_may_issue_guidelines_in_writing_to_members_of_the_Board_and_identify_decisions_of_the_Board_as_jurisprudential_guides](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Duties_of_Chairperson#159(1)(h)_The_Chairperson_may_issue_guidelines_in_writing_to_members_of_the_Board_and_identify_decisions_of_the_Board_as_jurisprudential_guides)
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/159_-_Duties_of_Chairperson#The_Board_has_other_ways_of_designating_decisions,_besides_its_power_to_issue_jurisprudential_guides

board, commission or other tribunal”, such as the Refugee Protection Division, may “refer any question or issue of law...to the Federal Court for hearing and determination”: s. 18.3(1) of the *Federal Courts Act*. In such a reference, the Federal Courts would not have to defer to any administrative decision-making, could receive all necessary evidence and submissions, and could pronounce the correct state of the law.^[219]

9.7.4 Parties are entitled to reasoned decisions

Parties are entitled to reasoned decisions on applications they make to the Board. This is so both as a result of Canada's international law obligations,^[220] and also Canada's domestic law.^[221] The requirement to provide reasons for a decision is a fundamental part of due process. It ensures that the inquiry processes is meaningful and assures the applicant that their representations have been given due consideration and a decision was taken on the factual and legal merits of their application.^[222] Whether or not reasons for decisions must be in writing or may be provided orally is a question governed by specific provisions of the IRPA; see the commentary to section 169 of the Act: Canadian Refugee Procedure/Decisions and Reasons⁶³. The requirement to provide reasons when an application is made applies equally to refugee claims by claimants, appeals, applications by the Minister, as well as to preliminary matters that are raised by a party.

This principle was illustrated by *Goodman v. Canada*, in which Mr. Goodman asked that his PRRA application be held in abeyance pending the determination of his outstanding application for Ministerial relief. Counsel asked the officer to respond to the request for a deferral and, if it was refused, to allow “an additional 30 days from the date of the CIC’s response in order to provide updated submissions and materials”. The Officer never responded to these requests and then went on to render a negative decision. The court held that this was an error and that a response to the application should have been provided.^[223] Similarly, in *Naeem v. Canada*, the court concluded that the applicant was denied fairness by not receiving a decision in response to a deferral request.^[224]

See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Reasons should be sufficiently clear and provide a rational chain of reasoning⁶⁴.

9.7.5 A panel must make a decision based on evidence on the record or evidence that is otherwise available to them

The Board must not ignore evidence that is validly before a panel

If the Board fails to receive and consider evidence properly submitted to it, for example where evidence is submitted but does not reach the panel deciding the case, then the procedure cannot be said to have been fair. As the Federal Court held in *Mannan v. Canada*, the Board has a duty to receive and consider evidence submitted by the parties at any time until a decision is rendered.^[225] This duty is subject to the specific provisions of the RPD Rules, such as Rule 43 which concerns additional documents provided as evidence after

63 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions_and_Reasons
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_

64 [and_the_right_to_a_fair_hearing#Reasons_should_be_sufficiently_clear_and_provide_a_rational_chain_of_reasoning](#)

a hearing: Canadian Refugee Procedure/Documents#RPD Rule 43 - Additional documents provided as evidence after a hearing⁶⁵. Where there is a question about whether materials were submitted to the Board or not, a bare assertion by the applicant that the document was sent will not generally suffice to meet their burden to show that the document was properly submitted but not placed on the record.^[226]

That said, a decision-maker is entitled to place principled limits on the evidence that can be adduced in a case. This applies both to oral evidence, for example, a decision-maker is entitled to limit repetitive testimony, and to written evidence. For a description of how this principle applies to oral evidence, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#A panel can establish principled rules regarding the manner in which a witness testifies⁶⁶. For a description of how this principle applies to written evidence, see: Canadian Refugee Procedure/Documents#The Board has jurisdiction to refuse to admit documents for reasons that are broader than the Rule 35 criteria⁶⁷. Ultimately, while there may be valid grounds for a panel to refuse to admit evidence in particular circumstances, a panel cannot refuse to consider evidence without such valid grounds.

Indeed, the Board Member must consider the entirety of the evidence in the record before making any determinations.^[227] The Board *Policy on National Documentation Packages in Refugee Determination Proceedings* commits that "the RPD and RAD will consider the most recent NDP(s) in support of assessing forward-looking risk."^[228] That said, there are limitations on this principle, for example article 1E exclusion determinations by the Refugee Appeal Division may be limited to evidence regarding the risk to the claimant at the time of the RPD's determination of the matter, excluding evidence of new risks that emerged subsequently.^[229] See also: Canadian Refugee Procedure/Documents#The panel should consider the most recent National Documentation Package⁶⁸.

Furthermore, it is generally expected that a claimant will bring the passages that they are relying on to the attention of the decision maker; the Federal Court has held that the RPD "is not obliged to comb through every document listed in the National Document Package in the hope of finding passages that may support the claim and specifically address why they do not, in fact, support the claim".^[230] For more detail on this, see: Canadian Refugee Procedure/The Board's inquisitorial mandate#There is a shared duty of fact-finding in refugee matters⁶⁹.

The Board's findings of fact should accurately reflect the evidence

Misapprehending evidence that may have impacted the outcome of a decision constitutes a reviewable error.^[231] For example, in *Varga v. Canada* the Federal Court concluded that

65 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_43_-_Additional_documents_provided_as_evidence_after_a_hearing
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#A_panel_can_establish_principled_rules_regarding_the_manner_in_which_a_witness_testifies
66 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#The_Board_has_jurisdiction_to_refuse_to_admit_documents_for_reasons_that_are_broader_than_the_Rule_35_criteria
67 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#The_panel_should_consider_the_most_recent_National_Documentation_Package
68 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#There_is_a_shared_duty_of_fact-finding_in_refugee_matters
69

”The RPD seriously misstates Ms. Varga’s evidence”^[232] and overturned the decision on this basis as follows: ”the RPD's serious misstatement of the evidence on a matter central to its Decision vitiates its whole credibility finding with regard to Ms. Varga”.^[233] However, in other situations where a misstatement has no effect on the analysis or the outcome of the application, this will not render the decision unreasonable. For example, in *Rosu v. Canada*, the court commented: ”At most, the RAD’s statement that the applicant was “beaten up” at the gym (rather than threatened with a beating) was a minor misstatement. It had no effect on the RAD’s analysis or the outcome of the appeal. It did not render the decision unreasonable”.^[234]

The Board must not rely on evidence that is not on the record or otherwise properly available to the Member

A panel of the Refugee Protection Division may only base a decision on evidence on the record, or evidence that is otherwise properly available to the Member, for example through their specialized knowledge, or because the evidence may be judicially noticed or is otherwise a generally recognized fact. As stated in *Regina v. Barthe*, and cited with approval in the refugee context, ”the ability to judge a case only on the legal evidence adduced is an essential part of the judicial process.”^[235] Where a Member “fills in the gaps” in a refugee's account by making false assumptions, they err.^[236] Inferences drawn by a decision maker must be based on clear and non-speculative evidence.^[237]

For more discussion of this, see:

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Disclosure rights and obligations for the Board⁷⁰.
- Canadian Refugee Procedure/Specialized Knowledge⁷¹.

9.7.6 The Board's reasons should show that the panel meaningfully grappled with the key elements of the case

The Board should provide explicit findings and meaningful justifications of its decision regarding the central issues and concerns raised by the parties in a transparent and intelligible manner. See *Gomes v. Canada* for a discussion of this principle.^[238] In the context of a claim for refugee protection, where the impact of the decision on the individual is severe, “the reasons provided to that individual must reflect the stakes”.^[239]

Decisions must follow the law

The Board's decision-makers are obliged to follow the law. If a claimant fulfils the criteria set out in the IRPA for receiving protection, they are to be granted protection – at this point in the process, there is no space for discretion.^[173] For further discussion of this, see: Canadian Refugee Procedure/The Board's inquisitorial mandate#Refugee Status Determination is

⁷⁰ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Disclosure_rights_and_obligations_for_the_Board

⁷¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Specialized_Knowledge

declaratory, not constitutive⁷². A corollary of this is that a decision-maker should be fully conversant with refugee law in order to properly assess the claim. Cases should be decided based on all of the law that binds the Board, not just the law that the parties happen to put in front of a panel.^[240] Adherence to well-established jurisprudence and legal rules supports the virtues of uniformity and predictability, two key principles that underlie the rule of law and the rule of vertical *stare decisis*.^[241]

Administrative decision makers have the right to make a distinction based on the background facts before them. However, it is not open to them to refuse to follow the decision of a higher court on the ground that they consider the decision of the superior court to be erroneous, that they disagree with it, or that another interpretation should have prevailed.^[241] Trial courts (and administrative decision makers) may only reconsider settled rulings of higher courts in certain situations, specifically where a new legal issue is raised or where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate”.^[242] However, the standard to review and revisit a question that has already been decided by appellate courts is not an easy one to meet. The rule of *stare decisis* is fundamental to our legal system and remains the presumed starting point for any analysis to settle the state of the law on a given point.^[243]

For more detail on how Board members must follow the law, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Principles about the expectations that one reasonably has of the Board⁷³ and Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Principles about the manner in which the Board is to exercise its discretion⁷⁴.

Reasons should be sufficiently clear and provide a rational chain of reasoning

Parties are entitled to reasoned decisions: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Parties are entitled to reasoned decisions⁷⁵. This has a number of implications:

- Decisions should be clear, precise, and intelligible: The Federal Court holds that reasons should be “sufficiently clear, precise and intelligible” on all key points.^[244] For example, credibility determinations should be made in “clear and unmistakable terms”.^[245] It is a best practice for the reasons to explain the decision and conclusions in a manner that enables affected individuals and their counsel (as well as any reviewing body) to readily understand the Member's reasoning “without having to invest substantial time and effort to connect the bits of relevant evidence, [and any prior decisions and submissions]”.^[246]
- Decisions should provide a rational chain of reasoning: Decisions should provide a rational chain of reasoning and not contain any fundamental logical flaws, internal inconsisten-

72 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#Refugee_Status_Determination_is_declaratory,_not_constitutive
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_

73 [interpretation_of_refugee_procedure#Principles_about_the_expectations_that_one_reasonably_has_of_the_Board](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Principles_about_the_expectations_that_one_reasonably_has_of_the_Board)
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_

74 [interpretation_of_refugee_procedure#Principles_about_the_manner_in_which_the_Board_is_to_exercise_its_discretion](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_about_the_manner_in_which_the_Board_is_to_exercise_its_discretion)
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_

75 [the_right_to_a_fair_hearing#Parties_are_entitled_to_reasoned_decisions](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Parties_are_entitled_to_reasoned_decisions)

cies or contradictions, or other reasoning errors that can render a decision irrational or arbitrary.^[247]

- Decisions must include an analysis of how the legal criteria relate to the facts. For example, in *Samra v Canada*, Favel J found a decision unreasonable because it “lacked analysis”: “the officer’s decision is merely a recitation of the evidence before him followed by a conclusion”.^[248] Similarly, in *Gedi v. Canada*, the RAD accepted that the applicant’s identity had not been established because of photographic evidence which the Minister had submitted which, the RAD accepted, tied the applicant to another identity. The Federal Court overturned this decision on judicial review, on the basis that the RAD failed to justify how it reached the conclusion that the photographs were of the same individual as it did not explain what distinguishing features led it to find that the photographs were of the same person.^[249]
- Decisions must contend with evidence that appears to contradict key findings. The Board Member must engage with evidence that, on its face, appears to contradict their key findings about the case.^[250]

In this way, the Board’s decision-makers do not generally have the freedom to be arbitrary but must provide reasons that are justified and intelligible. In the words of refugee lawyer David Matas, “reasons must be more than just stock phrases and conclusions. They should manifest reasoning. They should relate refugee law to the claim, deal with the substantial points raised, and relate the facts to the conclusion.”^[251] One of the policy rationales for this was articulated by Plaut, who observed: “cogent, proper reasons can go a long way in assisting the claimant in accepting the decision and will also assist counsel in determining whether there are grounds for appeal or review.”^[252]

Decisions may focus on the determinative issue

Decision-makers are not required to explicitly respond to each and every argument raised by the parties,^[253] or every line of possible analysis,^[254] but may instead focus on the determinative issues in the case.^[255] A decision-maker has particular latitude not to address an argument that arises on the record where the arguments in question were not made on appeal to the RAD but only earlier in the process, to the RPD.^[256] That said, the Division has the discretion to engage in analyses of alternative issues that are not essential to resolve the matter; for example, the Federal Court has encouraged the Division to carry out an inclusion analysis even where a claimant has been found to be excluded.^[257]

Use of templates and precedents

Where a panel’s reasons are taken virtually word for word from its earlier decision, this can suggest to the unsuccessful party that the decision was written without due care and attention to the record; as such, the Federal Court comments that this practice is not to be encouraged.^[258] The Federal Court has held that “while use of boilerplate text in some cases provides sufficient grounds to believe the decision was not personalized, it is acceptable when the boilerplate used addresses historic documents and actions taken by a country provided that it is clear the decision-maker put their mind to the actual issues and made an independent decision based on the evidence”.^[194] The Federal Court states that the use of “boilerplate passages” in a decision is not unreasonable by default:

[...] the Applicant’s suggestion that the use of “boilerplate passages” in the Board’s decision renders it unreasonable by default. On the whole, the Board’s state protection analysis addresses the correct question of whether a journalist such as the Applicant would be at risk. It is self-evident that much of the analysis will be the same for any given country. Provided that the “boilerplate” is based on the documentary evidence and addresses the particular evidence and position of a claimant, the Board’s repetition of certain passages from other decisions is not, in and of itself, an error.^[259]

In a case where a claim had been remitted for a *de novo* hearing, and the new decision largely copied and pasted from the first, the Federal Court held that this issue was “so severe” that it amounted to an “unquestionable breach of the Applicant’s right to a *de novo* hearing”.^[260] In that case, the RAD discussed the issue as follows:

In my review of both RPD Decisions and the oral testimony, I agree with Appellant’s Counsel that the second RPD Decision is seriously deficient. To a large extent, it appears that the second RPD Decision is “[copied] and pasted” from the first RPD Decision. As Appellant’s Counsel submits, paragraphs 4-21 of the second RPD Decision have the same wording as paragraphs 3-23 and paragraphs 26-30 of the earlier RPD Decision. Additionally, the references to Exhibits in the second RPD Decision follows the numbering of the original RPD Record as reflected in the first RPD Decision. The second RPD Panel does not refer anywhere to the oral testimony that the Appellant gave during the hearing that took place before the second RAD, thus making it unclear whether that testimony was assessed. I agree with Appellant’s Counsel that, considering all the evidence, this amounts to a substantive breach of the Appellant’s right to a *de novo* hearing.^[261]

See also:

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Each claim should be considered individually⁷⁶
- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Decision-making assigned to a Member must be done by the Member and shall not be delegated⁷⁷.

9.7.7 Decisions must be non-discriminatory

Section 3(3)(d) of the IRPA provides that the Act is to be construed and applied in a manner that ensures that decisions are consistent with the principles of equality and freedom from discrimination in the *Canadian Charter of Rights and Freedoms*: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#IRPA Section 3(3)(d) - The Act is to be applied in a manner that complies with the Charter of Rights and Freedoms⁷⁸.

76 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Each_claim_should_be_considered_individually
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Decision-making_assigned_to_a_Member_must_be_done_by_the_Member_and_shall_not_be_delegated

77 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_Section_3\(3\)\(d\)_-_The_Act_is_to_be_applied_in_a_manner_that_complies_with_the_Charter_of_Rights_and_Freedoms](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_Section_3(3)(d)_-_The_Act_is_to_be_applied_in_a_manner_that_complies_with_the_Charter_of_Rights_and_Freedoms)

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See also: Canadian Refugee Procedure/Guideline 4 - Gender Considerations in Proceedings Before the Immigration and Refugee Board⁷⁹ and Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Principles about the manner in which the Board is to exercise its discretion⁸⁰.

9.7.8 Appeal

As a matter of fairness, parties should be given reasonable time to appeal a decision that they receive, whether to the Refugee Appeal Division or the Federal Court.^[106] The Executive Committee of the UNHCR has stated that applicants that are not recognized should be given a reasonable time to appeal for a formal reconsideration of the decision.^[262]

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241. *Canada (Public Safety and Emergency Preparedness) v. Ukhueduan*, 2023 FC 189 (CanLII), at para 47, <²²⁰>, retrieved on 2023-08-15.
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247. *Rosu v. Canada (Citizenship and Immigration)*, 2022 FC 57 (CanLII), at para 35, <²²⁴>, retrieved on 2022-03-14.
- See also the work of Mindus, P. (2020). Towards a Theory of Arbitrary Law-making in Migration Policy. *Etikk I Praksis - Nordic Journal of Applied Ethics*, 14(2), 9-33. <https://doi.org/10.5324.eip.v14i2.3712> at page 17.
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216 <http://canlii.ca/t/j4tz1#par82>

217 <https://canlii.ca/t/jmbdh#par47>

218 <https://canlii.ca/t/fn552#par9>

219 <https://canlii.ca/t/jxd96#par20>

220 <https://canlii.ca/t/jvlh3#par47>

221 <https://canlii.ca/t/jvlh3#par48>

222 <https://canlii.ca/t/jvlh3#par49>

223 <https://canlii.ca/t/jmbdh#par45>

224 <https://canlii.ca/t/jmbdh#par35>

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254. *Sellathambi v. Canada (Citizenship and Immigration)*, 2022 FC 1227 (CanLII), at para 31, <²²⁸>, retrieved on 2022-09-15.
255. *Correa Rodriguez v. Canada (Citizenship and Immigration)*, 2021 FC 937 (CanLII), at para 10, <²²⁹>, retrieved on 2021-09-29.
256. *Canada (Citizenship and Immigration) v. Alazar*, 2021 FC 637 (CanLII), at para 58, <²³⁰>, retrieved on 2022-03-16.
257. *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298, 1993 CanLII 2993 (FCA).
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259. *Cordova v Canada (Minister of Citizenship and Immigration)*, 2009 FC 309 at para 24, [2009] FCJ No 620 (Snider).
260. *Belay v. Canada (Citizenship and Immigration)*, 2023 FC 1154 (CanLII), at para 24, <²³²>, retrieved on 2023-09-29.
261. *Belay v. Canada (Citizenship and Immigration)*, 2023 FC 1154 (CanLII), at para 23, <²³³>, retrieved on 2023-09-29.
262. W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, page 52.

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228 <https://canlii.ca/t/jrnkz#par31>

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230 <https://canlii.ca/t/jgr79#par58>

231 <https://canlii.ca/t/jfb1q#par5>

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233 <https://canlii.ca/t/jzwtv#par23>

10 The right to an unbiased decision-maker

Members are expected to approach each case with an open mind and, at all times, must be, and must be seen to be, impartial and objective. A decision of the tribunal is liable to be set aside for bias if a reasonable person, properly informed of the facts and having thought the matter through in a practical manner, would conclude on a balance of probabilities that the decision maker was not impartial. The following are some of the ways that these principles have emerged in refugee decision-making in Canada.

10.1 Impartiality

In *Valente v. The Queen*, Le Dain J. held that the concept of impartiality describes “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case”.^[1] The Supreme Court of Canada noted in *R. v. Généreux* that, in a positive sense, “impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.”^[2] The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that “Members shall comply with all procedural fairness and natural justice requirements. Members are expected to approach each case with an open mind and, at all times, must be, and must be seen to be, impartial and objective.”^[3] IRB members also take an oath of office publicly and formally undertake to carry out their duties impartially.^[4] A tribunal’s decision is liable to be set aside for bias if a reasonable person, properly informed of the facts and having thought the matter through in a practical manner, would conclude on a balance of probabilities that the decision maker was not impartial.^[5] Members are bound by the *Code of Conduct for Members of the IRB* which has a section on bias stipulating that “Members shall conduct themselves in a manner that will not cast doubt on their ability to perform their duties objectively.”^[6] Furthermore, Board Members are required to be alert to any situation in which there may be a reasonable apprehension of bias and must disqualify themselves from sitting on the case in those circumstances; as provided by the *Code of Conduct for Members of the Immigration and Refugee Board of Canada*, “Members shall disqualify themselves from any proceeding where they know or reasonably should know that, in the making of the decision, they would be in a conflict of interest, or that their participation may create a reasonable apprehension of bias. In such a case, they shall immediately inform their manager and provide the reason for their self-disqualification.”^[7]

10.2 The test for a reasonable apprehension of bias

The Supreme Court in *Wewaykum Indian Band v Canada* endorsed the following definition of bias:

...a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.^[8]

Most cases concerning bias do not involve actual bias being demonstrated (or admitted) but are instead cases where a party alleges that a reasonable apprehension of bias exists on the facts. The test for determining reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that the decision-maker, either consciously or unconsciously, would not decide fairly. This well-established test originates from the case *Committee for Justice and Liberty v Canada*.^[9] As stated by the Supreme Court of Canada in *Arsenault-Cameron v. Prince Edward Island*, “The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood of bias must be demonstrated.”^[10] The Supreme Court reiterated this principle in *Wewaykum v. Canada*: “The standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality.”^[11] In this way, bias allegations “cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions [of a party or their counsel]”.^[12] The burden of proof where an allegation of bias is made is on the party making the allegation and “the threshold to be met is high.”^[13] The allegation must be supported by material evidence demonstrating conduct that derogates from the standard.^[14] Alleging bias is “a serious step” “that challenges the integrity of the decision-maker”^[15] and “should not be undertaken lightly”.^[16]

In applying this test and deciding whether a panel’s conduct gives rise to a reasonable apprehension of bias, a holistic view of the proceeding should be taken. As the Ontario Court of Appeal noted in a decision on this issue, it is normally necessary to examine the record in its entirety in order to assess whether a decision-maker’s conduct gave rise to a reasonable apprehension of bias.^[17] Factors to assess when considering the record include:

- Any relationship, past or present, between the decision-maker and the party/parties or those who may benefit from the decision;^[18]
- Whether or not a full and fair opportunity is provided to present arguments and evidence;^[19]
- Whether there is a pattern of decisions that suggests influences other than the applicable law and available evidence;
- Statements or conduct that might indicate a predisposition on the part of the decision-maker;^[20]
- The tone and tenor of the decision-maker’s involvement in the hearing;^[21] and
- The institutional arrangements that pertain to the freedom and independence of the decision-maker.

Additional comments on each of these factors follow.

10.3 Allegations of an apprehension of bias must be raised at the earliest opportunity

A person alleging an apprehension of bias on the part of the decision-maker must raise it at the earliest opportunity to allow the decision-maker to recuse themselves, if necessary.^[22] Failure to do so will generally amount to an implied waiver of the right to invoke bias in subsequent proceedings, such as an appeal or an application for judicial review.^[22] See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Concerns about a lack of procedural fairness should be raised at the earliest practical opportunity¹.

10.4 Factors that are commonly assessed when determining whether a reasonable apprehension of bias exists in a given case

10.4.1 Any relationship, past or present, between the decision-maker and the party/parties or those who may benefit from the decision

The fact that the decision-maker has (or has had) a relationship with one of the parties who may benefit from the decision can mean, in appropriate cases, that there is a reasonable apprehension of bias regarding them presiding over the case.^[18] The *Code of Conduct for Members of the IRB* also provides that "Members shall not, during the course of a proceeding, have any social contact with a party, counsel, witness, interpreter or other non-IRB participant, if such social contact may create a reasonable apprehension of bias." Furthermore, it stipulates that Members may only take part in outside activities that are not inconsistent or incompatible with their official duties and responsibilities, or that do not cast doubt on their ability to perform their duties objectively.^[6] Members are also bound by the terms of the *Conflict of Interest Act*.^[23]

The predecessor to the RPD at the IRB, the Refugee Status Advisory Committee, used to include members included from the Department of Immigration and the Department of External Affairs. All were part time, while also maintaining regular departmental responsibilities. This arrangement was criticized, and a report was issued in 1982 recommending that those affiliated with a department sever ties therewith during their time serving on the committee. The Minister of Employment and Immigration announced in 1982 that departmental appointees would be required to serve full time and be free of departmental responsibilities during the term of their appointment.^[24]

The fact that a member of the Board previously worked for a party, whether it be a law firm appearing before the Board, CBSA, or IRCC does not automatically mean that the Member should not sit on cases where that organization is a party. In *Ahumada v. Canada* the Federal Court of Appeal considered this question. Specifically, they considered the following certified question: "would a reasonable apprehension of bias be created by the fact that a member of the Convention Refugee Determination Division (CRDD) of the

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Concerns_about_a_lack_of_procedural_fairness_should_be_raised_at_the_earliest_practical_opportunity

Immigration and Refugee Board is an employee on leave of absence from a position as an immigration officer in the Enforcement Branch of CIC?" They held that such a member should not be restricted from sitting on cases where the Minister intervenes:

The Minister's role in the refugee determination process is primarily oriented towards detecting and opposing claims that the Minister or her officials believe should not be allowed. Accordingly, cases holding that an employment relationship between a member of an adjudicative tribunal and a party may give rise to a reasonable apprehension of bias were in principle relevant. The suggestion that an employee of CIC would only be disqualified from sitting on a CRDD panel when the Minister intervened would enable the Minister to ensure the exclusion of the employee from the panel by exercising the power to intervene. To enable the Minister to so influence the composition of a panel would clearly compromise the CRDD's independence from CIC in a manner inconsistent with the scheme of the Act.^[25]

That said, the ultimate holding in that case was that a reasonable apprehension of bias was made out where an appeals officer on temporary leave from the Branch of *Citizenship and Immigration Canada* that advises the Minister on whether an intervention is appropriate and represents the Minister when the Minister does intervene in IRB proceedings became an IRB member.^[25] That employee was obliged to resign from their employment with CIC if they wished to continue working as a decision-maker at the IRB.

Exposure to political and bilateral relations considerations

Decision-makers in refugee matters must not be beholden to any political or bilateral relations considerations. As Neil Yeates writes in his report on the Board, "decision makers must be able to hear cases in an environment within which their decisions are not seen to be fettered by external considerations, such as the foreign policy positions of the government of the day."^[26] The importance of an independent mechanism for asylum adjudication is illustrated when considering other countries' systems that are said to be subject to the vicissitudes of politics and hence to "[leave] people seeking protection promised by international treaty to the whims of a politically responsive enforcement agency".^[27] Refugee lawyer David Matas recounts the example of Belgian refugee policy in the 1980s, wherein government authorities apparently had a tacit policy that Zairois were not to be recognized as refugees. He writes about the apparent basis for this policy as follows: "for political and economic reasons, Belgium does not want to incur the anger of the present regime governing Zaire, a former a Belgian colony. There remain substantial economic ties between Belgium and Zaire. The countries are on friendly terms politically. [Hence,] UNHCR representatives in Belgium presumed that Zairois were not *bona fide* refugees."^[28]

10.4.2 Whether or not a full and fair opportunity is provided to present arguments and evidence

Questions about impartiality tend to come into play where a reviewing body is persuaded that the decision-maker has mistakenly come to a conclusion without giving due regard to the possibility that a full consideration of the evidence might lead to a different result, for example where a matter is pre-judged. Where parties are not provided a full and fair opportunity to present arguments and evidence, this may point towards a conclusion that

the matter was pre-judged, and hence that there is a reasonable apprehension that the decision-maker did not approach the case impartially. The opposite is also true - evidence which indicates that the parties had such a full and fair opportunity to present evidence and provide submissions tends to indicate that the matter was not pre-judged and that it is not reasonable to apprehend bias in the circumstances.^[19] For example, where over-intrusive questioning by a Board member, including "constant interruptions", amounts to a "hijacking" of the case and grossly interferes with the orderly presentation of a claimant's case, the panel may have interfered with a claimant's right to be heard and it may be concluded that the panel did not approach the case impartially.^[29] For further discussion of this, see: Canadian Refugee Procedure/The right to a hearing and the right to be heard#Where a witness is interrupted while providing testimony, this may establish that their right to present oral testimony was interfered with².

10.4.3 Whether there is a pattern of decisions that suggests influences other than the applicable law and available evidence

A pattern of decisions that suggests influence other than the applicable law and available evidence may serve to establish a reasonable apprehension of bias in a particular case. Furthermore, a decision maker simply making adverse findings against a party—even adverse findings that are not justified on the record—does not mean they are biased against them, though an accumulation of unsubstantiated findings might be indicative of bias.^[30] That said, this is but one factor that should be assessed along with the totality of the evidence and caution is appropriate in drawing any conclusions of this sort. The corollary of this principle is that complying with legal obligations, for example those imposed by the *Access to Information Act*, does not constitute evidence of bias or a reasonable apprehension of bias.^[31]

Deciding against a claimant on an interlocutory matter does not, in and of itself, create a reasonable apprehension of bias

Niyonkuru v. Canada was a case in which the panel provided notice to the Minister that the claimant was possibly excluded from refugee protection. The claimant argued that, by adjourning the hearing to allow the Minister to intervene and present arguments regarding the applicant's possible exclusion, the panel had demonstrated bias and loss of impartiality. The court rejected this argument, stating that it is well settled that the mere fact that in an earlier proceeding a decision-maker rendered judgment against the party does not compromise his or her ability to be impartial.^[32]

Statistics about a member's past refusal rate do not in and of themselves establish a reasonable apprehension of bias

No claimant (or, indeed, Minister's representative) has succeeded on bias motions based on statistics alone.^[33] *Fenanir v. Canada* was a case in which the claimant noted that the

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_a_hearing_and_the_right_to_be_heard#Where_a_witness_is_interrupted_while_providing_testimony,_this_may_establish_that_their_right_to_present_oral_testimony_was_interfered_with

average number of refugee claim refusals by the member hearing his matter (99%) was higher than the average of 45% for all of the other members.^[34] The claimant submitted that there was a reasonable apprehension of bias on this basis. The court held that the data filed did not in itself support a finding of bias. It noted that the data can be "explained by a certain number of factors which are unrelated to any bias".^[35] The comments of Justice Zinn in *Turoczi v. Canada* are illustrative of the judicial approach to such applications:

Although the statistical data presented by the applicants may raise an eyebrow for some, the informed reasonable person, thinking the matter through, would demand to know much more, including:

- Were all of the figures, including, importantly, the weighted country origin averages, properly compiled?
- Did the RPD randomly assign cases within each country of origin? If not, how did the RPD assign cases?
- Can factors affecting the randomness of case assignment be reliably adjusted for statistically?
- If so, what are the adjusted statistics, and what is their significance?
- If the RPD did randomly assign cases, what is the statistical significance of the Member's rejection rate?
- Beyond the Member's relative performance within the RPD, is there anything objective impugning the Member's decisions (i.e. that suggests they are wrongly decided)?
- Accounting for appropriate factors (if that is possible), are the Member's decisions more frequently quashed on judicial review than would be expected?
- Has the Member made recurring errors of a certain type, e.g. on credibility, state protection, etc., that bear a semblance to the impugned decision?

In short, the informed reasonable person, thinking the matter through, would demand a statistical analysis of this data by an expert based upon and having taken into consideration all of the various factors and circumstances that are unique to and impact on determinations of refugee claims before he or she would think it more likely than not that the decision-maker would not render a fair decision.^[36]

In *Arrachch v. Canada*, the court dismissed such an argument as follows: "Counsel in this matter was clearly seeking not just a fair and impartial tribunal but one that would more likely be favourable to his clients as measured on a statistical basis. This was blatant forum shopping."^[37] That said, in that decision the court went on to allow counsel's argument that there was a reasonable apprehension of bias for other reasons related to how the Member had responded to counsel's application.

10.4.4 Statements or conduct that might indicate a predisposition on the part of the decision-maker

A Board member must approach each case impartially. The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that "Members shall comply with all procedural fairness and natural justice requirements. Members are expected to

approach each case with an open mind and, at all times, must be, and must be seen to be, impartial and objective.”^[38] Statements or conduct that might indicate a predisposition on the part of the decision-maker may point towards a conclusion that there is a reasonable apprehension of bias in a particular case.^[20] For example, in *Hernandez v Canada* the court held that the Member seemed to have “a preconceived idea of the outcome of the case, ... cutting Ms. Hernandez's explanations short.” The court concluded that the member had aggressively dismissed justified objections from counsel regarding the member's questions and errors in the translation.^[39] Similarly, issues can arise where a decision-maker has previously expressed strong views regarding a matter on which they must decide.^[40]

That said, the inquisitorial nature of refugee hearings must be considered when interpreting this type of requirement. The Board's procedures should not be restricted to the judicial paradigm.^[41] Refugee hearings are not adversarial; instead, they generally involve a panel of the Board appropriately investigating a particular case. In an inquisitorial proceeding, it is the role of the Member to investigate and/or probe factual matters.^[42] This means that a member of the Board will have a more active role in the hearing than is common in other judicial contexts. As the Federal Court held in *Gebreyesus v. Canada*, raising or renewing the consideration of a potential issue based on evidence that arises during a hearing, without more, is simply an indicator that a panel is performing this appointed function, not that the panel is biased.^[43] For a more fulsome discussion of this, see: Canadian Refugee Procedure/The Board's inquisitorial mandate³. Similarly, as the court concluded in *Habimana v. Canada*, the fact that a tribunal member evidently became frustrated with a claimant's manner of presenting their testimony does not mean that they have prejudged the outcome before hearing all of the evidence.^[44]

A Member considering prior testimony during a redetermination of a claim is not, in itself, indicative of bias

An RPD panel is not *required* to have regard to the transcript from a prior hearing on reconsideration: *Huang v. Canada*.^[45] However, its choice to do so is not generally indicative of bias or of having pre-judged a matter.^[46] See: Canadian Refugee Procedure/Reopening a Claim or Application#Once reopened, is a claim to be heard de novo or as a redetermination based on the previous record?⁴.

A Member rendering an oral decision at the end of the hearing is not, in and of itself, indicative of bias

A Member should approach a case impartially and not with an open mind. This does not mean that the Member is required to reserve their decision after a hearing and consider the case for days afterwards. In fact, Rule 10(8) provides that a Division member must render an oral decision and reasons for the decision at the hearing unless it is not practicable to do so. In *Pajarillo v. Canada*, the claimant argued that the RPD was biased against her because the member made up her mind to reject the Applicant's claim prior to hearing.

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Once_reopened,_is_a_claim_to_be_heard_de_novo_or_as_a_redetermination_based_on_the_previous_record?

The sole basis for making this allegation against the member was that the member returned after a lunch break and proceeded to render a lengthy oral decision. The court rejected this argument, noting that the claimant had failed to establish that the facts or issues in the case were so substantial or complex it was not reasonably practicable to comply with Rule 10(8) of the RPD Rules. The court stated: "The mere fact that the RPD was able to draft a decision and render it orally shortly 50 minutes after the conclusion of the hearing does not prove bias. A review of the transcript of the hearing discloses that the RPD member took into account the Applicant's testimony and counsel's arguments in reaching her decision."^[47] For more details about this rule, see Canadian Refugee Procedure/Information and Documents to be Provided#Rule 10 - Order of questioning in hearings, oral representations, oral decisions, limiting questioning⁵.

A Member's past employment with a government that a claim is against does not *per se* raise a reasonable apprehension of bias

The Federal Court has cautioned against categorical findings of bias based solely on a decision maker's past employment, without any other evidence. For example, in *Chan v. Canada*, the RPD Member had previously worked for the government of Hong Kong SAR, which the refugee protection claim was against. The Federal Court declined to find that the Member's previous employment *per se* raised a reasonable apprehension of bias, noting that "RPD members are presumed to be impartial and are required to swear an oath of impartiality. This presumption applies regardless of the members' prior employment."^[48] The court went on to note that in this case the employment had ended more than 6 years prior to the hearing in question, and that the conclusion could have been different if the employment history was more recent or was with an entity more directly related to the specific agent of alleged persecution in the claim.^[49]

A Member's ethnicity, religion, or other protected factors are not relevant to an assessment of bias

The Federal Court has held that "the Board, like a corporation, acts through its members. They are flesh and blood. [The Member] may be a man of religion, an agnostic or an atheist. He may be Sunni Muslim, Shia Muslim, Jewish, Roman Catholic, Orthodox Christian, Protestant, Hindu, Sikh, Buddhist or an adherent of any other number of religions. The Court does not know. It is irrelevant."^[50]

10.4.5 The tone and tenor of the decision-maker's involvement in the hearing

The tone and tenor of the decision-maker's involvement in the hearing may be considered as part of a holistic assessment of whether there is a reasonable apprehension of bias in any particular case. As a starting point, the role of RPD is an inquisitorial one, and Members have to ask the "hard questions" that maybe inappropriate for a judge to ask.^[51] This is

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_10_-_Order_of_questioning_in_hearings,_oral_representations,_oral_decisions,_limiting_questioning

expanded upon in the text *Judicial Review of Administrative Action in Canada*, which notes that particular latitude is given to tribunals to question where the matter is not adversarial, as with most refugee proceedings:

Extensive and "energetic" questioning alone by tribunal members will not in itself give rise to a reasonable apprehension of bias. And particular latitude is likely to be given to tribunals operating in a non-adversarial setting, such as refugee determination hearings, where there is no one appearing to oppose the claim. Nor will an expression of momentary impatience or loss of equanimity by a tribunal member result in disqualification, particularly where it was merely an attempt to control the manner of proceeding. Similarly, a sarcastic comment when a party refused to give evidence, or an ill-chosen and insensitive phrase, will not, without more, lead to disqualification.^[52]

For example, where a Member's use of profanity during a break in the hearing was recorded on a recording device that was left on, this did not in itself establish a reasonable apprehension of bias.^[53]

However, there are limits on this latitude, including in the types of circumstances that follow. Where there are allegations that the RPD member's manner of questioning gave rise to a reasonable apprehension of bias, a decision-maker, for example the RAD, is generally expected to listen to the recording of the RPD hearing, not just a transcript of the proceeding (setting aside situations where the application about bias is made to the Member who presided over the hearing).^[54] This is so only if such a review could reveal whether the RPD member's manner of speaking, as opposed to their specific words, disclosed a reasonable apprehension of bias.^[54]

Where a member pursues questioning with a discriminatory attitude

The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that "Members shall exercise their duties without discrimination."^[55] The Federal Court affirms that a member may not pursue questioning derived from a discriminatory attitude.^[56] Members must exhibit appropriate sensitivity and the Federal Court holds that the member must at all times be attentive and sensitive to claimants.^[57] UNHCR writes in their document on *Procedural Standards for Refugee Status Determination* that "RSD applications must be processed on a non-discriminatory basis".^[58] In *Baker v. Canada*, for example, an apprehension of bias was found to have arisen from the stereotypical assumptions about persons suffering from mental illness in the officer's notes.^[59] In *Yusuf v. Canada*, the Federal Court of Appeal set aside a decision because of the Member's discriminatory comments: "In my opinion, these sexist, unwarranted and highly irrelevant observations by a member of the Refugee Division are capable of giving the impression that their originator was biased."^[60]

Relatedly, the Federal Court holds that it is an error for IRB adjudicators to make inferences based on stereotypes.^[61] For additional commentary on this, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#IRPA Section 3(2)(c) - Fair consideration is to be granted to those who come to Canada claiming persecution⁶.

6 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_Section_3\(2\)\(c\)_-_Fair_consideration_is_to_be_granted_to_those_who_come_to_Canada_claiming_persecution](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_Section_3(2)(c)_-_Fair_consideration_is_to_be_granted_to_those_who_come_to_Canada_claiming_persecution)

Where a member pursues questioning with a hostile or antagonistic attitude, or where the member takes on the role of a prosecutor

As the Federal Court stated in *Aloulou v Canada*, "the inquisitorial process [can] give rise to sometimes extensive and energetic questioning, expressions of momentary impatience or loss of equanimity, even sarcastic or harsh language, without leading to a reasonable apprehension of bias".^[62] However, the Federal Court holds that a member crosses the line into impermissible conduct where they pursue questioning in a manner that is inconsistent with their proper role. For example, as Waldman puts it in his text *Canadian Immigration & Refugee Law Practice*, if, during the course of the hearing, the tribunal "descends into the arena" to such an extent that the decision-maker assumes the role of a prosecutor, they risk of losing their impartiality.^[21] The Refugee Appeal Division has held that "constant interruption" and "flagrant intervention in the presentation of a claimant's case" can amount to procedural unfairness.^[63] This may also occur where questioning is derived from an actually hostile attitude.^[56] The Federal Court overturned a decision of the RPD where "from the outset...the member was not at all interested in hearing the applicant's testimony", where the hearing "was more like a police interrogation than a hearing before a tribunal" and where the Member went on "long tirades ... on peripheral aspects having no real relevance (except that they eloquently demonstrated the member's prejudices and biases)".^[64] That said, as stated in *Mahmoud v Canada*, "intrusive and intimidating interventions by a Board member may be found to interfere with an applicant's ability to present his case. However, if the interruptions are made for the purpose of clarifying testimony or an issue, they will not raise a reasonable apprehension of bias, even if the manner of questioning or interruption is 'energetic'".^[65]

International standards recommend that state officials adopt a collaborative, non-adversarial approach in investigating a person's claim.^[66] Furthermore, social science research notes that where hearings are hostile or confrontational, claimants may be discouraged from providing information that may be crucial to their claim.^[67] That said, the lack of this will not necessarily establish unfairness or bias: in *Fadhili v. Canada*, the RPD admonished the Applicants for their misrepresentation during the hearing and in the decision, but the court held that this did not rise to the level of unfairness or bias.^[68] For additional detail about the appropriate limits of a Board member's questioning in this inquisitorial process, see Canadian Refugee Procedure/The Board's inquisitorial mandate⁷ and also the following discussion of limits on questions that the Board may pose: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Members are expected to act honestly and in good faith and are precluded from "setting traps" for claimants⁸.

A passive or distant countenance is not required of Board members

It may be noted that it is common for government officials conducting asylum interviews to have a passive and distanced countenance during hearings. For example, in one empirical study of Finish asylum officers, the researchers noted that the officers did not detectably react to the claimants' narrations of events. The researchers stated that although an officer

7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Members_are_expected_to_act_honestly_and_in_good_faith_and_are_precluded_from_'setting_traps'_for_claimants

may think that a passive and distanced attitude guarantees neutrality, from a claimant's perspective it can be interpreted as negative feedback. They argue that:

Traumatized individuals are prone to feel threatened and perceive the other's intentions as intimidating, unless they receive clear and constant messages of the safety of a situation. A successful narration of traumatic events, for instance, is known to require a safe atmosphere characterized by a feeling of being connected to another person. [citations omitted]^[69]

Indeed, the legal academic Hathaway has gone as far as to say that "the maintenance of 'judicial distance' is for some members a convenient way of concealing a tendency to cynicism and negativism."^[70] As such international guidelines, such as those from the EU, prescribe that asylum interviews should be marked by trust, respect, and empathy.^[71] The Member may consider this advice in order to have an appropriately trauma-informed approach to hearings. Indeed, the Refugee Appeal Division has held that "insensitivity to the claimant's particular situation and disinterest in the claim" can constitute procedural unfairness.^[63] Conversely, the fact that a Member is engaged and may be encouraging a claimant's testimony should not be taken as the Member having accepted the credibility of that testimony, lest it leave Members with the impression that only a detached demeanour is permissible. Additionally, while Members should adopt a trauma-informed approach marked by trust, respect, and empathy, they must also maintain the proper role of a tribunal. For example, referring to a claimant by their first name in a decision has been held to be "inappropriate" and an indicia of lack of respect for the claimant.^[72]

10.4.6 The institutional arrangements that pertain to the freedom and independence of the decision-maker

Institutional bias

Decisions are liable to be set aside for bias if a reasonable person would conclude, a balance of probabilities, that the decision-maker was not impartial.^[73] Such partiality can occur either because of factors specific to a particular decision-maker of the sort discussed above (e.g. statements they have made or their past actions or relationships) or for institutional reasons. Specifically, the test for institutional bias, introduced in *R v Lippé*, asks whether a well-informed person would have a reasonable apprehension of bias in a substantial number of cases.^[74] The test for institutional (im)partiality is generally stated as follows:

The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically—and having thought the matter through—would have a reasonable apprehension of bias in a substantial number of cases. In this regard, all factors must be considered, but the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention.^[75]

Institutional bias will be found where a well-informed person would have a reasonable apprehension in a substantial number of cases. Failing that, allegations of an apprehension of bias cannot be brought on an institutional level but must be dealt with on a case-by-case basis.^[76]

In and of itself, legal review of members' decisions does not create a reasonable apprehension of bias

In *Weerasinghe v. Canada* the Federal Court of Appeal considered whether Members of the Board having their reasons reviewed by a legal advisor created a reasonable apprehension of bias. The court rejected this argument, commenting as follows:

The Refugee Division consists of such number of full and part-time members as the Governor in Council may decide. They are appointed for terms of up to seven years. A minimum of one-tenth are required to be barristers or advocates of at least five years' standing. It would be pure coincidence if either member of a panel hearing a particular claim were legally qualified.

The Refugee Division is a lay tribunal required to decide claims which, as I have observed, involve the life, liberty and security of the person. It must do so within the framework of extensive, confusing, and sometimes confused, jurisprudence. It is required to give written reasons for decision not favourable to claimants. The desirability of legal review of those reasons is manifest. Having come to a decision on what is essentially a question of fact: whether the claimant has a well-founded fear of persecution for a reason that engages the Convention refugee definition, a tribunal does not, in my opinion, offend any tenet of natural justice by taking advice as to legal matters contained in its reasons.

While the reasons review process, both in the more limited format described in the memorandum and the full review format suggested, could be abused and result in the reviewing lawyers influencing the decisions to which the reasons relate, there is, in my opinion, simply no foundation for a conclusion that it has been, in fact, abused, either in the case before us or generally. Any consultation by a decision maker before publishing a decision, including consultation by a judge with a law clerk, could be abused. As to whether there is an appearance offensive to our notions of natural justice, it seems to me that the question to be asked is, as in dealing with an assertion of a reasonable apprehension of bias, namely, whether an informed person, viewing the matter realistically and practically and having thought it through, would think it more likely than not that the tribunal's decision that a claimant was, or was not, a Convention refugee had been influenced by the review of its reasons by its staff lawyers. In my opinion, that person would not think it likely.^[77]

Furthermore, to the extent that members of the tribunal receive legal advice, legal advisors are not to attempt to influence the factual findings, but may have access to the facts and files of the claims in question and offer legal advice in relation to them: *Bovbel v. Canada*.^[78] That said, the interpretation of these questions is fraught and the relevant principles are, in the mind of this author, far from clear. This is illustrated by the fact that in *Bovbel v. Canada* the Federal Court had initially found that the IRB process was problematic,^[79] only for this conclusion to be overturned on appeal to the Federal Court of Appeal. For further discussion of legal review, see: Canadian Refugee Procedure/The right to an independent decision-maker#Legal services review of decisions may discuss issues of fact in the reasons but should not attempt to influence factual findings⁹.

⁹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#Legal_services_review_of_decisions_may_discuss_issues_of_fact_in_the_reasons_but_should_not_attempt_to_influence_factual_findings

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Administrative appellate tribunals may cure bias arising in previous decisions on the matter.
[80]

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11 The right to an independent decision-maker

Parties are entitled to an independent decision maker.^[1] A key concern with issues of independence is that a decision-maker must approach and determine the matters in issue freely and in a sufficiently dispassionate and disinterested way. The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* stipulates that "Members shall not be influenced by extraneous or improper considerations in their decision-making. Members shall make their decisions free from the improper influence of other persons, institutions, interest groups or the political process."^[2] Key legal issues that have emerged related to this independence follow.

11.1 The right to an independent decision-maker

The Immigration and Refugee Board is structured to operate as an administrative tribunal with as much independence from its sponsoring Department as is ever found in the contemporary administrative justice system.^[3] The requirement that decisions in refugee matters be made (or be reviewable) by an independent decision-maker arises from Canada's international obligations; the UN Human Rights Committee has found, in *Alzery v Sweden*, that effective, independent review of the decision to expel prior to expulsion is necessitated by the nature of the *non-refoulement* obligation under article 7 of the *International Covenant on Civil and Political Rights*, as read with the right to effective remedies under article 2 of that instrument.^[4]

11.1.1 Decision-makers must be free of any reasonable apprehension of bias

Decision makers must enjoy independence from the parties to the cases before them.^[5] For a discussion of the doctrine of bias, or a reasonable apprehension thereof, as it relates to any relationship, past or present, between the decision-maker and the parties or those who may benefit from the decision, see: Canadian Refugee Procedure/The right to an unbiased decision-maker#Any relationship, past or present, between the decision-maker and the party/parties or those who may benefit from the decision¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#Any_relationship,_past_or_present,_between_the_decision-maker_and_the_party/parties_or_those_who_may_benefit_from_the_decision

11.1.2 The IRB may use "soft law" instruments such as policy statements, guidelines, manuals, and handbooks

The Federal Court of Appeal holds that administrative agencies do not require an express grant of statutory authority in order to use "soft law" such as policy statements, guidelines, manuals and handbooks to structure the exercise of their discretion.^[6] In any event, the IRPA provides an express grant of authority to the Chairperson to issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides. Members are expected to follow such guidelines unless compelling or exceptional reasons exist to depart from them.^[7] See the discussion of this authority at the commentary on section 159 of the IRPA: Canadian Refugee Procedure/Duties of Chairperson².

11.1.3 The Board may not fetter the discretion of Members and Members may not fetter their own discretion

Members should engage in an independent assessment of the case before them

Every application should be considered individually.^[8] A decision maker's reasons must make clear that they put their mind to the actual issues and made an independent decision based on the evidence.^[9] For example, a RAD Member may not dispose of an appeal in a few sentences by simply stating that they had reviewed the record, done an independent assessment, and agreed with the RPD.^[10] Similarly, when a matter is remitted for redetermination, the new panel should not copy and paste from the prior decision in a way that calls into question whether they genuinely reconsidered the matter.^[11]

See:

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Each claim should be considered individually³
- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Use of templates and precedents⁴
- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Decision-making assigned to a Member must be done by the Member and shall not be delegated⁵

The Board may not fetter the discretion of Members through policy statements or guidelines that take on a mandatory character

Fundamental to the right of a fair hearing is that a Board member exercise independent judgment in deciding a case on its merits free from undue influence. Where policy statements, guidelines, or other institutional actions fetter a decision-maker's independence, this

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Duties_of_Chairperson
3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Each_claim_should_be_considered_individually
4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Use_of_templates_and_precedents
5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Decision-making_assigned_to_a_Member_must_be_done_by_the_Member_and_shall_not_be_delegated

can constitute undue influence upon the member and violate the principles of procedural fairness.^[12] The fettering of discretion doctrine has been used primarily to assess the validity of policy instruments such as guidelines.^[13] The fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision-maker may deviate from normal practice in the light of particular facts.^[14] When assessing whether a policy statement or guideline amounts to an unlawful fetter on a decision-maker's discretion, courts have recourse to the factors from *Ainsley*: (1) the language of the policy; (2) the practical effect of failing to comply with the policy; and (3) the evidence with respect to the expectations of the Commission and staff regarding the implementation of the policy.^[15] If a policy statement is actually a set of binding rules, then this will require legislative or regulatory authority. For discussion of this, see: Canadian Refugee Procedure/Documents#What is the Board's jurisdiction to limit voluminous country conditions disclosure?⁶. An example of where a policy in the immigration context was held by the Federal Court of Appeal to have invalidly fettered discretion was a blanket directive issued by *Citizenship and Immigration Canada* prohibiting lawyers and representatives from attending interviews in the overseas refugee resettlement context. This policy was held by the court in *Ha v. Canada* to be invalid because it fettered visa officers' discretion to consider each case on their facts and determine whether to allow lawyers to attend the interview.^[16]

Members may not fetter their own discretion

In addition, Members may not fetter their *own* discretion through excessive deference to policy statements and other extraneous materials. As the court held in *Yanasik v. Canada*, a decision-maker cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant.^[17] The application of a policy guideline may amount to an unlawful fettering of a panel's discretion if it is applied without due consideration to the evidence and submissions in a particular case. Such a situation may arise where a member decides to apply the guideline without exception and ignores the evidence or submissions of counsel that there is reason to vary the procedure.^[18]

A separate, but related, issue can arise where one RPD panel relies upon fact-finding conducted by another panel. Generally speaking, one panel of the RPD can rely on fact-finding conducted by another.^[19] This usually occurs uncontroversially in the context of documentary evidence about conditions in a country. That said, the Federal Court cautions that a panel cannot “blindly” or “blithely” adopt another panel’s findings and that “reliance on the findings of another panel must be limited, careful and justified”.^[20] In *Calandrini v Canada*, Justice Mosley explained that “[t]he exercise of discretion by a decision-maker is said to have been fettered if the decision is made in accordance with the views of another without the exercise of independent judgment”.^[21] For further discussion of this, see Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Each claim should be considered individually⁷.

6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_is_the_Board's_jurisdiction_to_limit_voluminous_country_conditions_disclosure?
7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Each_claim_should_be_considered_individually

Another example of where Members may be held to have fettered their own discretion is where they refuse to admit evidence on the basis that it is unsworn. There is no requirement that a document be sworn in order to be admitted,^[22] as the Refugee Division is not bound by legal or technical rules of evidence. In the words of *Siad v. Canada*, it is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them.^[23]

Members are not bound by previous interlocutory decisions on a file

The IRPA distinguishes between interlocutory and non-interlocutory decisions: Canadian Refugee Procedure/169 - Decisions and Reasons⁸. A member is not bound by a past interlocutory decision made on a file, for example the decision of a coordinating member on a preliminary matter. This principle is codified in the RAD and RPD Rules with respect to some applications: see, e.g. Canadian Refugee Procedure/RPD Rule 54 - Changing the Date or Time of a Proceeding#RPD Rule 54(9) - Subsequent applications⁹. However, section 23 of the IRB Code of Conduct states: “Members, in their decision-making, have a responsibility to support the institutional interest of the IRB in ensuring the consistency of its decisions, while recognizing that no improper influence may be brought to bear upon their adjudicative independence.” For reasons of consistency and judicial comity, previous decisions should generally be respected unless there are reasons to deviate from them (e.g., new evidence is filed, new arguments are raised); see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Each claim should be considered individually, while overall decision-making should be predictable and consistent¹⁰.

11.1.4 Members will be seized of a matter in certain circumstances

As RAD Member Edward Bosveld noted in *X (Re)*, 2013 CanLII 76391 (CA IRB), the tribunal may remain seized of a matter.^[24] The fact that the tribunal is seized of a matter means that it remains in consideration of the matter. Once a superior court of record has heard evidence, it is seized of the case and no other judge may decide it.^[25] However, this principle does not apply to a tribunal like the IRB, which maintains more flexibility than a court to proceed in an informal and expeditious manner: *Manalang v. Canada*.^[26] For examine, in a case involving another tribunal, the Quebec Court of Appeal concluded that it was not improper for the Senior Chair of the Office of Disciplinary Chairs to remove seized cases from a member due to long delays in rendering decisions.^[27]

11.1.5 Informal discussions with colleagues are permissible so long as independence is maintained

A question can arise about the permissible limits of voluntary and informal discussions amongst Members of a tribunal about the issues raised in their files. As Mullan notes in his

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/169_-_Decisions_and_Reasons
9 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_54_-_Changing_the_Date_or_Time_of_a_Proceeding#RPD_Rule_54\(9\)_-_Subsequent_applications](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_54_-_Changing_the_Date_or_Time_of_a_Proceeding#RPD_Rule_54(9)_-_Subsequent_applications)
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Each_claim_should_be_considered_individually,_while_overall_decision-making_should_be_predictable_and_consistent
10 [the_right_to_a_fair_hearing#Each_claim_should_be_considered_individually,_while_overall_decision-making_should_be_predictable_and_consistent](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Each_claim_should_be_considered_individually,_while_overall_decision-making_should_be_predictable_and_consistent)

text, "the case law on the subject is surprisingly far from comprehensive".^[28] The Ontario Court of Appeal held that there is no bar on a tribunal member consulting and being influenced by those internal consultations in *Khan v. College of Physicians & Surgeons of Ontario*:

The volume and complexity of modern decision-making all but necessitates resort to "outside" sources during the drafting process. Contemporary reason-writing is very much a consultive process during which the writer of the reasons resorts to many sources, including persons not charged with the responsibility of deciding the matter, in formulating his or her reasons. It is inevitable that the author of the reasons will be influenced by some of these sources. To hold that any "outside" influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is not only totally unrealistic, but also destructive of effective reason-writing.

This is reinforced in the IRB context by section 13 of the Code of Conduct for Members which provides that "Members have a responsibility to perform their duties in a manner that fosters collegiality among members and with staff and to treat them with courtesy and respect. Members are expected to assist their colleagues through the respectful exchange of views, information and opinions."^[29] There is no doubt that the participation of "outsiders" in the decision-making process of an administrative tribunal may sometimes cause problems. The decisions of the tribunal must, indeed, be rendered by those on whom Parliament has conferred power to decide and their decisions must, unless the relevant legislation impliedly or expressly provides otherwise, meet the requirements of natural justice. However, the court has held that "when the practice followed by members of an administrative tribunal does not violate natural justice and does not infringe on their ability to decide according to their opinion, even though it may influence that opinion, it cannot be criticized."^[30] As such, there is no issue with the Board, for example, hiring mentors for new members who may work with those new members in order to assist with preparing for hearings and then assist post-hearing with reaching factual findings about the evidence heard. There is indeed a body of literature on such mentoring for adjudicators and its permissibility so long as it is carried out in a way that maintains the mentee's independence.^[31] As well, it is permissible for other tribunal members, even a member's superiors such as the Chairperson and Deputy Chairperson of the tribunal, to comment on a member's draft reasons as noted by the Federal Court of Appeal: "While the Acting Deputy Chairperson reviewed drafts of the member's decision, under the *IRPA*, the Chairperson and Deputy Chairperson are also members of the RAD and paragraph 159(1)(h) does not prohibit them from suggesting changes to a draft at a deliberative stage."^[32] Furthermore, the use of administrative and proofreading assistance is not prohibited so long as, in every case, the ultimate decision is that of the decision maker.^[33]

11.1.6 Internal discussions between tribunal members on process, law, and policy are encouraged

A key issue that arises with respect to independence is the extent of permitted discussions amongst members of the tribunal about a case that is under consideration. The leading case on this subject is the Supreme Court of Canada decision *I.W.A. v. Consolidated Bathurst Packaging Ltd.*^[34] The rules on this subject allow for a broad latitude for internal discussions, within an atmosphere that has been referred to as "assertive collegiality", provided that the

final decision-maker is unencumbered in freely making their own decision. The principles are well captured by this passage from the paper *Consistency in Tribunal Decision Making* from the Canadian Institute for the Administration of Justice:

This culture of ongoing discussion can be described as a system of “assertive collegiality”—where there can be vigorous debate internally within the complement of adjudicators, but once the discussion is complete, the person hearing the case is free to make their own decision. Discussions also occur regularly between tribunal Chairs and individual adjudicators at any stage in the hearing process. For example, particular types of cases which raise significant or novel issues may be flagged at the intake stage. Once identified, they are brought to the attention of the Chair who will then choose a particular adjudicator to deal with the case. The Chair may have a discussion with the adjudicator before the assignment is made in order to canvass the procedural, law and policy issues that might be presented in the case. During the course of the hearing, the adjudicator and the Chair may continue the discussion, so that the adjudicator understands the issues in the context of the tribunal’s institutional views. Once the hearing is completed, the Chair and the adjudicator may then continue their discussion throughout the decision writing process.^[35]

It is entirely permissible, and even desirable for reasons of training and consistency, for members to be encouraged to distribute draft decisions amongst each other for comment: “Most tribunals schedule regular meetings for more formal discussions and it is not unusual where adjudicators are primarily full time and based in one location for there to be weekly or in some cases, daily meetings where drafts are exchanged and where issues of process, law and policy are discussed.”^[35] In the words of the Supreme Court of Canada, the “criteria for independence are not absence of influence but rather the freedom to decide according to one’s own conscience and opinions.”^[36]

As a general rule, the members of the organization who have not heard the evidence cannot be allowed to re-assess it.^[37] Discussions of policy in the context of refugee adjudication may, and indeed should, cover consideration of country conditions. As the Federal Court of Appeal notes when distinguishing the type of factual findings at issue in *Consolidated Bathurst, supra*, factual issues in refugee adjudication can be of a “special nature to the extent that they go beyond the evidence specific to any particular claimant.”^[38] As the Federal Court noted in *Barrantes v. Canada (Minister of Citizenship and Immigration)*, “it would not do to have one panel member’s terrorist organization be characterized by another member as a benevolent non-government organization.”^[39] As such, in the context of refugee adjudication, discussions between tribunal members on general issues of fact related to a country are not just permissible, but desirable.

11.1.7 Discussions cannot be imposed upon a Member

Consolidated-Bathurst involved discussions by members of an administrative tribunal after hearing cases but before reaching final decisions. In that decision Gonthier J. okayed the practice, but imposed important limitations. In short, discussions could not be coercive and could not delve into the facts of particular cases.^[40] The rules for such discussions are enumerated in the eponymous case.^[41] The Supreme Court of Canada affirmed this conclusion in *Tremblay v. Quebec*: “In my view, the mere fact that the president can of his own motion refer a matter for plenary discussion may in itself be a constraint on decision

makers. In such circumstances, they may not feel free to refuse to submit a question to the "consensus table" when the president suggests this. Further, the statute clearly provides that it is the decision makers who must decide a matter. Accordingly, it is those decision makers who must retain the right to initiate consultation; imposing it on them amounts to an act of compulsion towards them and a denial of the choice expressly made by the legislature."^[42] As such, where a Member does not wish to consult, either with other members, a supervisor, or legal services, they must be truly free to not do so (aside from during special circumstances such as during an initial probationary training period).

11.1.8 Legal services review of decisions may discuss issues of fact in the reasons but should not attempt to influence factual findings

Gonthier J. of the Supreme Court of Canada made the following comment (in dissent) in *Consolidated-Bathurst*:

The determination and assessment of facts are delicate tasks which turn on the credibility of the witness and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, *I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence. [emphasis added]*^[41]

The applicability of this comment to the refugee context was considered by the Federal Court of Appeal in *Bovbel v. Canada*. Specifically, in that case, the court considered whether having legal advisors have access to the files of refugee claimants when providing legal advice to Members, the above principle could be offended. The court rejected this concern as follows:

A fair reading of the documents on the record shows, in our view, that the legal advisors were not expected to discuss the findings of facts made by the members but merely, if there was a factual inconsistency in the reasons, to look at the file in order to determine, if possible, how the inconsistency could be resolved. True, there was always the possibility that the legal advisors might, since they were in possession of the file, exceed their mandate and try to influence the factual findings of the Board. However, as mentioned by Mahoney J.A. in *Weerasinge*, any policy is susceptible of abuse.^[30]

As such, discussions, whether with the Board's legal services team, or otherwise, should not aim to influence the factual findings of Members, but need not eschew all discussion of facts, for example where a Member has made inconsistent factual findings in a decision and that concern should be resolved. Procedural fairness does not demand that Members of the Board never discuss the facts of a file. That said, it is plain that a mandatory policy of legal review in which legal services members attempted to influence or pressure Members to make certain factual findings regarding a hearing that they had never observed would offend principles of independence. Finally, there appears to be a real lack of clarity on exactly how to interpret the statements of Gonthier J. in *Consolidated-Bathurst*.^[41] For example, David Mullan writes in his text *Administrative Law* that "on the matter of discussion of the

evidence, the Court itself is not totally unequivocal even in the context of discussions with colleagues who have not heard the evidence. Where staff have been present at giving of the relevant testimony or where the evidence is written rather than given orally, the constraint on discussion may not have quite the same force.”^[28]

11.1.9 Discussions between Members of different Divisions must be limited

The IRB Chairperson’s *Instructions Governing Communications Between Related Divisions* reaffirm the importance of institutional independence so that members are free from improper influence.^[43] The Instructions provide that members of a first-level Division must never communicate with members of a related appeal Division, and vice versa, with respect to:

- particular files, whether before or during deliberations, or after the final decision is rendered; and
- adjudicative strategies pertaining to their Division.

11.1.10 The fact that IRB Members have limited terms of appointment does not in itself unduly constrain their independence

The IRPA establishes that IRB members have appointments of fixed duration. Generally speaking, independent decision makers should have terms that are sufficiently long to limit the pressure stemming from frequent renewals. This is compatible with having a term of fixed duration. For example, judges of the Inter-American Court of Human Rights, the African Court of Justice and Human Rights, and the Court of Justice of the European Union all have terms of six years.^[44]

11.1.11 The tribunal must follow explicit instructions stated in a judgment or direction from a reviewing court

Where a matter is remitted by the Court to an administrative tribunal for redetermination, a tribunal is required to follow explicit instruction stated in the judgment or direction from the reviewing Court.^[45] While the decision maker is advised to consider the comments and recommendations in the reviewing Court’s reasons, it is not required to follow them.^[46] In the words of the Federal Court of Appeal: “I am of the opinion that only instructions explicitly stated in the judgment bind the subsequent decision-maker; otherwise, the comments and recommendations made by the Court in its reasons would have to be considered mere *obiters*, and the decision-maker would be advised to consider them but not required to follow them.”^[47] As such, in *Patricks v. Canada*, wherein a matter had been returned to the RAD on consent at the Federal Court on the basis that the compelling reasons doctrine had not been adequately considered in the underlying decision, the court held that as the court order did not make any explicit reference to “compelling reasons”, the new RAD panel was “[free] to conduct a complete assessment and to reach a different conclusion from the RPD and namely, on the issue of credibility”.^[48]

See also:

- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The record on a court-ordered redetermination¹¹
- Canadian Refugee Procedure/Reopening a Claim or Application#Once reopened, is a claim to be heard de novo or as a redetermination based on the previous record?¹²

11.2 Deliberative Secrecy

The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. The "how and why" of decision-making are kept secret to protect the decision-maker and the decision-making process.^[49] In the context of administrative decision-making, the common law principle of deliberative secrecy has two elements: (i) the general rule that the deliberative process is secret, and (ii) that secrecy will be lifted when this is necessary for effective judicial review of the administrative decision.^[50] The jurisprudence establishes that, in the administrative context, the principle of deliberative secrecy applies only to administrative tribunals – that is, to bodies that make adjudicative decisions. It does not apply to "administrative decision makers" writ large.^[51] Secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.^[52]

This principle is reflected in s. 156 of the IRPA, which provides that members are not competent or compellable to appear as a witness in any civil proceedings in respect of the exercise or purported exercise of their functions under this Act: Canadian Refugee Procedure/156 - Immunity and no summons¹³.

11.2.1 Access to information rights under the *Privacy Act* and *Access to Information Act* apply to files and recordings made of hearings

In general, the IRB may be required to release records related to hearing, including copies of files, audio recordings, and videos of hearing under the *Access to Information Act* to non-party requestors. This includes third-party subpoenas, media requests, and requests from academics or the general public. Such requests can also be made by a party to the case pursuant to the *Privacy Act*. For example, in *Krasilov v. Canada*, the applicants obtained a series of internal emails between the RAD member and an assistant working at the RAD regarding the assistant's review of the member's draft decision.^[53] See also: Canadian Refugee Procedure/Privacy Act¹⁴.

11 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_record_on_a_court-ordered_redetermination
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Once_reopened,_is_a_claim_to_be_heard_de_novo_or_as_a_redetermination_based_on_the_previous_record?

12 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/156_-_Immunity_and_no_summons

13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/156_-_Immunity_and_no_summons

14 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Privacy_Act

11.2.2 Access to information rights under the *Privacy Act* do not apply to a Board Member's notes

The issue of how the principle of deliberative secrecy intersects with access to information rights under the federal *Privacy Act* was considered in *Tunian v. Chairman of the Immigration and Refugee Board*.^[54] The Tunian family were refused refugee status. They applied pursuant to section 41 of the *Privacy Act* to receive the draft reasons and notes prepared by the member of the Refugee Protection Division of the IRB who made the decision determining that they were not Convention refugees. Section 41 of the *Privacy Act* gives the Court the jurisdiction to review instances in which an individual has been refused access to personal information. The *Privacy Act* provides individuals with a right of access to information about them where it is either in a "personal information bank" or under the "control" of a government institution. Access to the Member's notes was refused in this case on the basis that notes made by quasi-judicial decision-makers in the course of carrying out an independent adjudicative function are not in the control of the administrative tribunal but, rather, are in the control of the member themselves. In this case, the court affirmed the decision *Privacy Commissioner v. Labour Relations Board* and held that the principles discussed therein apply to the Immigration and Refugee Board, particularly:

It is the duty and role of courts to ensure that administrative tribunals make their decisions in accordance with the rules of natural justice. ... As such, courts are called upon to warrant the fairness of the process. To do so the Court must ensure that the tribunal possesses the freedom to decide matters independently, as it sees fit, without interference from anyone at any time. In my view, regulated and systematic intrusions by outsiders into the thought process of a decision maker as it stands to be revealed by the hearing notes would impact negatively on the integrity of the decision-making process.^[55]

11.2.3 Board Members are neither competent nor compellable witnesses as a result of the principle of deliberative secrecy

The rule protecting deliberative secrecy is an exclusionary rule. The rule operates to prohibit compelled testimony from judges about their deliberations. It also provides that judges are not *competent* to testify about their deliberations. That is because the purpose of the rule is not to protect judges' personal interests, but rather "to ensure public confidence in an impartial and independent judicial system": *Kosko c. Bijimine*.^[56] Gascon J. stated in *Laval v. Syndicat de l'enseignement de la région de Laval* that "[j]udges cannot of course choose to lift deliberative secrecy to explain the reasoning behind their conclusions whenever it suits them to do so."^[57] Among the broader rationales that have been offered for this rule is to prevent judges themselves from subsequently augmenting or qualifying their reasons, which offends the need for finality in judicial decision-making and undermines public confidence in the administration of justice.^[58]

The applicability of this rule to Members of the Immigration and Refugee Board was considered in *Ermina v. Canada*.^[59] In that case, the applicant's refugee status had been vacated by a panel of the Board. At the hearing before the Board, the applicant had sought to elicit testimony from the chair of the panel that had originally granted her that status. The Board refused to hear such testimony, relying on the rule protecting deliberative secrecy. The applicant then tried to adduce an affidavit sworn by the former chair and containing

the same information. The Board refused to receive that as well. On the ensuing application for judicial review, Tremblay-Lamer J. upheld the Board's decisions in that regard, finding that the former chair was neither a compellable nor a competent witness. In that decision, justice Tremblay-Lamer explained that “[d]ecisions must be final and subject only to review in the ordinary channels.” In reaching that conclusion, she relied heavily on *Agnew v. Ontario Association of Architects*,^[60] in which the Court elaborated on the rationale for extending the rule to administrative decision-makers:

The authorities do not make it clear whether this general rule applies equally to members of administrative tribunals. In logic, there is no reason why it should not. The mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge.

Apart from the practical consideration that tribunal members and judges would spend more time testifying about their decisions than making them, their compellability would be inconsistent with any system of finality of decisions. No decision and *a fortiori* no record, would be really final until the judge or tribunal member had been cross-examined about his decision. Instead of review by appeal or extraordinary remedy, a system would grow up of review by cross-examination.

In the case of a specialized tribunal representing different interests the mischief would be even greater because the process of discussion and compromise among different points of view would not work if stripped of its confidentiality.

It is not necessary to catalogue all the different forms of mischief that might result from the compellability of judges and tribunal members to testify about their decisions. It is sufficient to say that there is no reason in logic to distinguish between a judge and a member of the statutory tribunal under consideration here.

See also: Canadian Refugee Procedure/156 - Immunity and no summons¹⁵.

This is consistent with international practices regarding human rights and refugee inquiries. For example, the Special Court for Sierra Leone concluded that the High Commissioner for Human Rights was protected by privilege and should not be compelled to provide information considered confidential.^[61]

11.2.4 Board management cannot read a Member's emails without good reason

The IRB has stated that it supports the principle that access to an employee's e-mail without consent is justified only in extreme situations, for example in situations involving a criminal or security infraction, and only after proper authorization from senior management. As a result, a Member's emails will ordinarily be private and not readable by managers or others in the organization, absent exceptional circumstances and good reason to do so. The federal Privacy Commissioner chastised the IRB when it departed from this standard in one case.^[62]

¹⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/156_-_Immunity_and_no_summons

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12 Appropriate decorum and propriety at a refugee hearing

Decorum is defined as "behavior in keeping with good taste and propriety." What is proper decorum in the context of Refugee Protection Division hearings? A number of issues arise:

12.1 Terminology for the Member

The Member may be referred to as such, but is not, properly speaking, a judge, and should not be referred to with the appellation "your honour".

12.2 The claimant should be received and introduced to the hearing room by a Board staff member

Claimants should be properly received at the beginning of the hearing. The IRB commissioned a report on its use of videoconference and the resultant report stated that "From a justice system perspective, it seems to me wrong that claimants attending a hearing in which their future is to be decided by an adjudicator in what is effectively a judicial proceeding, should not be received in the hearing room at the outset by a real person with official status, who can address the claimants by name, confirm that they are in the right place, introduce them to the equipment, explain what to expect, and so on."^[1] That report, which is published on the Board's website, identifies this as an important step in the creation of a receptive and comfortable hearing environment.

12.3 The Member should foster the appropriate climate for the hearing

Persons who are designated to act as members or as refugee claims officers represent Canada to claimants. They must therefore behave in such a way as to preclude any suggestion that Canada is not willing to accept refugees, even though it reserves the right to make sure that they are acting in good faith.^[2] The following has been held to be applicable to Members of the IRB: the judge will ensure the climate necessary for the operation of justice by his moderation, his discipline and his courtesy in his relations with counsel, the parties and the witnesses.^[3]

12.4 Proceedings will be recorded

Audio of refugee proceedings before the Board will, as a matter of course, be recorded. Indeed, there is some legal risk where the Board does not record the hearing: Canadian Refugee Procedure/Print version#The Board is not obliged to record hearings, but a lack of such a recording may constitute grounds for setting aside the decision¹. International law regarding refugee determination provides that States may record a refugee claimant's oral statements, but the claimant should be given due notice that this may be required.^[4] Such notice is a common way to begin proceedings at the RPD, where the member will, as part of an introductory spiel, inform the claimant that they are now "on the record".

12.5 Proceedings are a mix of formal and informal

Section 162(2) provides that each Division must deal with proceedings as informally and quickly as circumstances permit, taking into account the requirements of fairness and natural justice. This provision implies that the Division is not bound by formal rules of procedure that would apply in a court or more formal quasi-judicial tribunal.^[5] This accords with the recommendations of Rabbi Plaut, whose report led to the foundation of the Immigration and Refugee Board. In his report *Refugee determination in Canada*, he stated "The atmosphere [of the refugee hearing] should be relaxed and informal and every effort should be made to put the claimant at ease".^[6]

The Irwin Law text *Refugee Law* notes that "despite the Board's own description of its hearing process as 'informal,' the reality for claimants is that it is decidedly formal."^[7] Similarly, the Law Reform Commission of Canada, in its report *The Determination of Refugee Status in Canada: A Review of the Procedure* states that "Hearings are conducted...in a fairly formal atmosphere, in a quasi-judicial context which many claimants appeared to find intimidating. This formality flows from both the setting and the behaviour of the participants. The hearing room is laid out like a court room, with a raised desk and high-back chairs for Members. The style of proceedings is typical of that for a quasi-judicial tribunal."^[8]

In operation, a refugee hearing is not dissimilar to any other administrative hearing: the parties are present, witnesses are examined, and submissions are made.^[7] Some of the expectations for conduct at such hearings follow:

12.5.1 The parties should stand whenever the Board Member enters or leaves the hearing room

The parties should stand whenever the Board Member enters or leaves the hearing room.^[9]

¹ #The Board is not obliged to record hearings, but a lack of such a recording may constitute grounds for setting aside the decision

12.5.2 Witnesses will swear or affirm to tell the truth and should put away notes while testifying

Evidence is typically presented in *viva voce* form at the hearing. Witnesses are sworn or affirmed and then questioned.^[10] It is expected that witnesses, including claimants, will not have notes, their BOC form, or other paperwork in front of them while testifying. Such an expectation has generally been held to be compatible with a fair procedure.^[11]

12.5.3 Attire appropriate for a formal hearing

The Board states that "attire should be appropriate for a formal hearing and in keeping with the atmosphere of the hearing room."^[12] Similarly, the guide for designated representatives provides that "In-person hearings are often held in a formal hearing room. Participants are expected to dress professionally."^[13]

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13 Annotated Refugee Protection Division Rules

14 Interpretation and Definitions (RPD Rule 1)

14.1 RPD Rule 1

The text of the relevant rule reads:

Interpretation

Definitions

1 The following definitions apply in these Rules.

Act means the Immigration and Refugee Protection Act. (Loi)

Basis of Claim Form means the form in which a claimant gives the information referred to in Schedule 1. (Formulaire de fondement de la demande d'asile)

contact information means, with respect to a person,

(a) the person's name, postal address and telephone number, and their fax number and email address, if any; and

(b) in the case of counsel for a claimant or protected person, if the counsel is a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, in addition to the information referred to in paragraph (a), the name of the body of which the counsel is a member and the membership identification number issued to the counsel. (coordonnées)

Division means the Refugee Protection Division. (Section)

officer means a person designated as an officer by the Minister under subsection 6(1) of the Act. (agent)

party means,

(a) in the case of a claim for refugee protection, the claimant and, if the Minister intervenes in the claim, the Minister; and

(b) in the case of an application to vacate or to cease refugee protection, the protected person and the Minister. (partie)

proceeding includes a conference, an application or a hearing. (procédure)

registry office means a business office of the Division. (greffe)

Regulations means the Immigration and Refugee Protection Regulations. (Règlement)

vulnerable person means a person who has been identified as vulnerable under the Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB issued under paragraph 159(1)(h) of the Act. (personne vulnérable)

working day does not include Saturdays, Sundays or other days on which the Board offices are closed. (jour ouvrable)

14.1.1 This should be read in conjunction with the definitions section in the Act

See the definitions section in the IRPA: Canadian Refugee Procedure/Definitions, objectives, and application of the IRPA#IRPA Section 2¹.

14.1.2 Commentary on the definition of "party"

party means,

- (a) in the case of a claim for refugee protection, the claimant and, if the Minister intervenes in the claim, the Minister; and
- (b) in the case of an application to vacate or to cease refugee protection, the protected person and the Minister. (partie)

Procedural fairness may be owed to the Minister despite them not being a party to a proceeding

While this rule defines "party" as "the claimant and, if the Minister intervenes in the claim, the Minister", however, for procedural fairness purposes, this is not exhaustive of the Minister's interest in proceedings before the Division: *Canada v. Alazar* (as it applies, *mutatis mutandis*).^[1]

14.1.3 Commentary on the definition of "proceeding"

proceeding includes a conference, an application or a hearing. (procédure)

History of the definition

Under the previous version of the Rules, the word "proceeding" was defined to include "a conference, an application, a hearing and an interview".^[2]

Definition includes the listed elements, but is not limited to them

The definition of a proceeding in Rule 1 "includes" the listed procedures ("proceeding includes a conference, an application or a hearing"), but does not indicate that it is limited to them. The RPD Rules are subordinate to the Act, which in s. 170 contemplates a broad and expansive conception of what a Refugee Protection Division "proceeding" is, including that a file-review decision made without any hearing being held is something that happens in a proceeding (s. 170(f)) and that the Board's provision of notice of the hearing to the Minister is also something that happens in a proceeding (s. 170(c)). Furthermore, the court has commented that "proceedings" as used in section 167 of the Act encompass more than the actual hearing before the RPD.^[2] Thus, subsection 168(1) allows a division to determine that "a proceeding" before it has been abandoned for such pre-hearing matters as failing to provide a Basis of Claim form or otherwise failing to communicate with the division as required, and that proceedings include refugee claims as well as Minister's applications for cessation and vacation.^[3] In *Cui v. Canada* the Federal Court commented on the term "proceeding" as it is used in the IRPA as follows:

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions,_objectives,_and_application_of_the_IRPA#IRPA_Section_2

A “proceeding” has been considered by Justice Tremblay-Lamer of this Court in *Gagné v. Canada (Attorney General)*, 2002 FCT 711 at paragraphs 27 and 28 where she adopted, *inter alia*, the definition found in Black’s Law Dictionary that a “proceeding” contemplates “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and entry of judgment.” Thus a “proceeding” as contemplated by paragraph 166(c) of IRPA is not just the hearing but all that which occurs from the institution of the matter until its final disposition.^[4]

The Federal Court of Appeal concluded in *Canada v. Gutierrez* that nothing in the Act compels a narrow interpretation of when an individual is “subject of proceedings before ... the Board” and indicated that there were policy reasons to prefer a broad interpretation of this, and the attendant right to counsel that exists in such circumstances.^[5] See: Canadian Refugee Procedure/RPD Rules 14-16 - Counsel of Record#The right to counsel in the IRPA applies from the time a person is subject to proceedings before the Board, not just at the hearing². See also the following discussion of why a *Notice to Intervene* is a document provided by the Minister “in a proceeding”: Canadian Refugee Procedure/Documents#Meaning_of_”proceeding”_in_this_rule³

14.2 References

1. *Canada (Citizenship and Immigration) v. Alazar*, 2021 FC 637 (CanLII), at para 81, <⁴>, retrieved on 2022-03-16.
2. *Duale v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 150 (CanLII), par. 5, <⁵>, retrieved on 2020-01-27
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15 Communicating with the Division (RPD Rule 2)

15.1 RPD Rule 2

The text of the relevant rule reads:

Communicating with Division

² All communication with the Division must be directed to the registry office specified by the Division.

15.1.1 What are the registry offices specified by the Division?

The registry offices are specified on the IRB website, including in the Board's Claimant's Guide. The only registries are in Vancouver, Toronto, and Montreal. While the IRB has offices in other cities, such as Ottawa, Winnipeg, and Calgary, these offices do not have registries and are not registry offices "specified by the Division" to receive communications within the meaning of this rule.^[1]

15.2 References

1. Immigration and Refugee Board of Canada, *Claimant's Guide*, <¹> (Accessed April 14, 2020).

¹ <https://irb-cisr.gc.ca/en/refugee-claims/Pages/ClaDemGuide.aspx>

16 Information and Documents to be Provided (RPD Rules 3-13)

It is said that at its heart, the refugee process is about storytelling. Lawyer Tess Acton writes that "stories permeate the Canadian refugee determination system. At the port of entry a claimant tells their story to the border official, in preparation for a hearing a refugee claimant tells their story to their lawyer, and during the hearing the refugee claimant tells their story to a Board Member. After the hearing the claimant's story is re-told in the form of a decision authored by the Board Member. These stories are the most important part of a refugee claim, as refugees often come with little else in the way of evidence of persecution."^[1] The set of rules described herein regulate, at a high level, the process by which claimants provide these stories to the Board.

16.1 RPD Rule 3(1)-(3) - Fixing date, time and location of hearing

The text of the relevant rule reads:

Information and Documents to Be Provided

Claims for Refugee Protection

Fixing date, time and location of hearing

3 (1) As soon as a claim for refugee protection is referred to the Division, or as soon as possible before it is deemed to be referred under subsection 100(3) of the Act, an officer must fix a date, time and location for the claimant to attend a hearing on the claim, within the time limits set out in the Regulations, from the dates, times and locations provided by the Division.

Date fixed by officer

(2) Subject to paragraph 3(b), the officer must select the date closest to the last day of the applicable time limit set out in the Regulations, unless the claimant agrees to an earlier date.

Factors

(3) In fixing the date, time and location for the hearing, the officer must consider

- (a) the claimant's preference of location; and
- (b) counsel's availability, if the claimant has retained counsel at the time of referral and the officer has been informed that counsel will be available to attend a hearing on one of the dates provided by the Division.

16.1.1 Roles of officers, parties, and Board in scheduling matters

Responsibility for scheduling hearings before the Refugee Protection Division is multi-faceted. As indicated by this rule, initial scheduling decisions are to be made by the IRCC or CBSA officer referring the claim. The parties to a proceeding then have the ability to

request that the date and time of a claim be changed (Rule 54). The Board also has the power to act on its own motion in scheduling matters.

16.1.2 Rule 3(1): Regulation on mandatory timelines for scheduling claims

For the text of this regulation, see Canadian Refugee Procedure/Timelines¹.

16.2 RPD Rule 3(4)-(6) - Information an officer must provide to the claimant

Providing information to claimant in writing

(4) The officer must

- (a) notify the claimant in writing by way of a notice to appear
 - (i) of the date, time and location of the hearing of the claim; and
 - (ii) of the date, time and location of any special hearing on the abandonment of the claim under subrules 65(2) and (3);
- (b) unless the claimant has provided a completed Basis of Claim Form to the officer in accordance with subsection 99(3.1) of the Act, provide to the claimant the Basis of Claim Form; and
- (c) provide to the claimant information in writing
 - (i) explaining how and when to provide a Basis of Claim Form and other documents to the Division and to the Minister,
 - (ii) informing the claimant of the importance of obtaining relevant documentary evidence without delay,
 - (iii) explaining how the hearing will proceed,
 - (iv) informing the claimant of the obligation to notify the Division and the Minister of the claimant's contact information and any changes to that information,
 - (v) informing the claimant that they may, at their own expense, be represented by legal or other counsel, and
 - (vi) informing the claimant that the claim may be declared abandoned without further notice if the claimant fails to provide the completed Basis of Claim Form or fails to appear at the hearing.

Providing information in writing and documents to Division

- (5) After providing to the claimant the information set out in subrule (4), the officer must without delay provide to the Division
 - (a) a written statement indicating how and when the information set out in subrule (4) was provided to the claimant;
 - (b) the completed Basis of Claim Form for a claimant referred to in subsection 99(3.1) of the Act;
 - (c) a copy of each notice to appear provided to the claimant in accordance with paragraph (4)(a);
 - (d) the information set out in Schedule 2;
 - (e) a copy of any identity and travel documents of the claimant that have been seized by the officer;
 - (f) a copy of the notice of seizure of any seized documents referred to in paragraph (e); and
 - (g) a copy of any other relevant documents that are in the possession of the officer.

Providing copies to claimant

- (6) The officer must provide to the claimant a copy of any documents or information that the officer has provided to the Division under paragraphs (5)(d) to (g).

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Timelines

16.2.1 Right to counsel

RPD Rule 3(4) states that an officer must notify a claimant in writing that they may be represented "by legal or other counsel". For a discussion of the right to counsel, see: Canadian Refugee Procedure/Counsel of Record².

16.3 RPD Rule 4 - Claimant's contact information

Claimant's contact information

4 (1) The claimant must provide their contact information in writing to the Division and to the Minister.

Time limit

(2) The claimant's contact information must be received by the Division and the Minister no later than 10 days after the day on which the claimant receives the information provided by the officer under subrule 3(4).

Change to contact information

(3) If the claimant's contact information changes, the claimant must without delay provide the changes in writing to the Division and to the Minister.

Information concerning claimant's counsel

(4) A claimant who is represented by counsel must without delay, on retaining counsel, provide the counsel's contact information in writing to the Division and to the Minister and notify them of any limitations on the counsel's retainer. If that information changes, the claimant must without delay provide the changes in writing to the Division and to the Minister.

16.3.1 Rule 4(3): If the claimant's contact information changes, the claimant must without delay provide the changes in writing to the Division

Rule 4(3) provides that if a claimant's contact information changes, the claimant must without delay provide the changes in writing to the Division and to the Minister. As a result of this requirement, the Federal Court has declined to find a breach of procedural fairness where an applicant's opportunity to be heard was lost because they failed to advise the RPD of their updated address and consequently did not receive notice of the hearing.^[2] This rule places the obligation on the claimant to advise where they can be contacted. When discussing the equivalent rule for the IAD, the Federal Court has rejected arguments from applicants who believed that advising the CBSA meant they had also advised the IAD, concluding that the obligation to advise the CBSA and the IAD is clearly indicated on the mailings from the tribunal. In addition, the applicant's stay conditions clearly specify his obligation to notify both bodies.^[3] The RPD has no positive obligation to conduct extensive investigations to locate a party, to the extent of engaging the enforcement powers of the Canada Border Services Agency that might be used to locate a person for apprehension.^[4] Furthermore, leaving a voicemail with the RPD is not sufficient to discharge a claimant's obligations under this rule, which explicitly requires that the claimant must provide the new contact information in writing.^[5] For additional discussion of principles relevant to this, see the discussion of principles related to whether the claimant has been diligent in keeping the Board up to date with their current and correct contact information at Canadian Refugee

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record

Procedure/RPD Rule 65 - Abandonment#RPD Rule 65(4) - Factors to consider at an abandonment hearing³.

16.3.2 Rule 4(4): Information concerning claimant's counsel included the name of the body of which the counsel is a member and the membership identification number issued to the counsel

Rule 4(4) provides that a claimant who is represented by counsel must, on retaining counsel, provide counsel's contact information in writing to the Division. As per Rule 1, contact information means, with respect to a person, "(a) the person's name, postal address and telephone number, and their fax number and email address, if any; and (b) in the case of counsel for a claimant or protected person, if the counsel is a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, in addition to the information referred to in paragraph (a), the name of the body of which the counsel is a member and the membership identification number issued to the counsel.": Canadian Refugee Procedure/RPD Rule 1 - Definitions⁴.

16.4 RPD Rule 5 - Declaration where counsel is not acting for consideration

Declaration - counsel not representing or advising for consideration

5 If a claimant retains counsel who is not a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, both the claimant and their counsel must without delay provide the information and declarations set out in Schedule 3 to the Division in writing.

16.4.1 Counsel may be representatives without fee who are not lawyers, paralegals, or immigration consultants

The Federal Court has observed that "Counsel need not be legally qualified and many are not; they are frequently friends, relatives, clergymen or immigration consultants. The latter are not always competent."^[6] Similarly, the Board has stated that "a limited category of others can represent an individual in a volunteer, unpaid capacity—this could include family members, community groups, or members of a religious institution."^[7] Rule 5 applies where a claimant retains counsel who is not a person referred to in any of paragraphs 91(2)(a) to (c) of the Act. These paragraphs allow representation by lawyers, registered consultants, law students and others.^[8] Specifically, those provisions read, in context:

Representation or advice for consideration

91 (1) Subject to this section, no person shall knowingly, directly or indirectly, represent or advise a person for consideration - or offer to do so - in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.

Persons who may represent or advise

(2) A person does not contravene subsection (1) if they are
(a) a lawyer who is a member in good standing of a law society of a province or

3 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_65_-_Abandonment#RPD_Rule_65\(4\)_-_Factors_to_consider_at_an_abandonment_hearing](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_65_-_Abandonment#RPD_Rule_65(4)_-_Factors_to_consider_at_an_abandonment_hearing)

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_1_-_Definitions

- a notary who is a member in good standing of the Chambre des notaires du Québec;
- (b) any other member in good standing of a law society of a province or the Chambre des notaires du Québec, including a paralegal; or
- (c) a member in good standing of a body designated under subsection (5).

...

Designation by Minister

- (5) The Minister may, by regulation, designate a body whose members in good standing may represent or advise a person for consideration - or offer to do so - in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.

For the fuller context of the above provisions, see: Canadian Refugee Procedure/91-91.1 - Representation or Advice⁵. RPD Rule 5 provides that in the situation where a claimant retains counsel who is not a person referred to in paragraphs 91(2)(a) to (c) above, both the claimant and their counsel must without delay provide the information and declarations set out in Schedule 3 to the Division in writing. That schedule reads as follows:

SCHEDULE 3

(Rules 5 and 13)

Information and Declarations - Counsel Not Representing or Advising for Consideration

Item Information

- 1 IRB Division and file number with respect to the claimant or protected person.
- 2 Name of counsel who is representing or advising the claimant or protected person and who is not receiving consideration for those services.
- 3 Name of counsel's firm or organization, if applicable, and counsel's postal address, telephone number, fax number and email address, if any.
- 4 If applicable, a declaration, signed by the interpreter, that includes the interpreter's name, the language and dialect, if any, interpreted and a statement that the interpretation is accurate.
- 5 Declaration signed by the claimant or protected person that the counsel who is representing or advising them is not receiving consideration and the information provided in the form is complete, true and correct.
- 6 Declaration signed by counsel that they are not receiving consideration for representing or advising the claimant or protected person and that the information provided in the form is complete, true and correct.

The declaration includes a statement that the counsel is not receiving consideration. This is discussed in the Board's Basis of Claim form which states that "The Immigration and Refugee Protection Act makes it an offence for any person not authorized under the Act to knowingly, directly or indirectly, represent or advise a person for consideration - or offer to do so - in connection with a proceeding or application under that Act. (Consideration includes money, or any other form of compensation or reward.)"^[9] The Federal Court has noted that "there is a duty incumbent upon the Board to verify that those individuals representing clients with whom it has dealings are authorized representatives pursuant to the Regulations, or that they are not receiving a fee for their services."^[10] The court articulated the rationale for this duty as follows: "This duty envisions the protection of applicants and the preservation of the integrity of Canada's immigration system". This Rule is one of the ways that the Board fulfills that obligation.

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/91-91.1_-_Representation_or_Advice

16.5 RPD Rule 6 - Basis of Claim Form

Basis of Claim Form

Claimant's declarations

- 6 (1) The claimant must complete a Basis of Claim Form and sign and date the declaration set out in the form stating that
- (a) the information given by the claimant is complete, true and correct; and
 - (b) the claimant understands that the declaration is of the same force and effect as if made under oath.

Form completed without interpreter

- (2) If the claimant completes the Basis of Claim Form without an interpreter's assistance, the claimant must sign and date the declaration set out in the form stating that they can read the language of the form and understand what information is requested.

Interpreter's declaration

- (3) If the claimant completes the Basis of Claim Form with an interpreter's assistance, the interpreter must sign and date the declaration in the form stating that
- (a) they are proficient in the language and dialect, if any, used, and were able to communicate effectively with the claimant;
 - (b) the completed Basis of Claim Form and all attached documents were interpreted to the claimant; and
 - (c) the claimant indicated that the claimant understood what was interpreted.

16.5.1 History of this Rule

The text of Rule 6 is similar, but not identical, to the text of Rule 5 in the previous RPD rules:^[1]

5. (1) The claimant must complete the Personal Information Form and sign and date the included declaration that states that
- (a) the information given by the claimant is complete, true and correct; and
 - (b) the claimant knows that the declaration is of the same force and effect as if made under oath.
- (2) If the claimant completes the Personal Information Form without an interpreter, the claimant must also sign and date the included declaration that states that the claimant can read the language of the form and understands what information is requested.
- (3) If the claimant completes the Personal Information Form with an interpreter, the interpreter must sign and date the included declaration that states
- (a) the interpreter is proficient in the languages or dialects used, and was able to communicate fully with the claimant;
 - (b) the completed form and all attached documents were interpreted to the claimant; and
 - (c) the claimant assured the interpreter that the claimant understood what was interpreted.

16.5.2 Rule 6(1): The requirement that the claimant must sign and date the Basis of Claim form is waived during the Covid-19 pandemic

The RPD *Refugee Protection Division: Practice Notice on the resumption of in-person hearings* provides that, on occasion of the Covid-19 pandemic, the RPD has waived the requirement in the rules for signatures on documents until further notice.^[12]

16.5.3 Requirement that the information provided be complete, true and correct

The Rule 6(1)(a) obligation to provide information that is "complete" should be read in conjunction with the instructions in the BOC form that claimants are to include everything that is important to their claims therein, "including dates, names and places wherever possible". Where a fact that is a "significant and central part of a claim" is omitted from the Basis of Claim form, then the Board can consider that when determining whether it has been established that the alleged incident more likely than not occurred; the omission may properly point away from the claimant having established the allegation on a balance of probabilities.^[13] A Basis of Claim form should contain the significant events that give rise to an applicant's claim.^[14] In the words of the Federal Court in *Arroyave v. Canada*, it is clearly established that all the material facts of a story must appear in the Basis of Claim form and that failure to include them can be fatal to the credibility of a claim.^[15] It is irrelevant how sparse the Applicant's BOC narrative is, as all important facts and details of a claim should be included.^[16] However, if a claimant includes details in another document that they submit, but not in their Basis of Claim form, their absence from the BOC form should not in itself justify a negative credibility inference.^[17] See also: Canadian Refugee Procedure/The Board's inquisitorial mandate#Evidence is primarily presented in written form in the Canadian process⁶.

Bishop v. Canada provides guidance about the level of completeness that is expected in a Basis of Claim form. In that case, the claimant wrote in her Basis of Claim form that the police had issued a warning to her husband in response to her complaint about threats and domestic abuse. At the hearing, the claimant indicated that the warning had been made jokingly. The court determined that it was reasonable for the RAD to conclude that this was a material change from the BOC form and to impugn the claimant's credibility on this basis: "*It is true that a warning made jokingly is still a warning. However, I agree with the Minister that a police warning is inherently serious, and subsequently stating that a police warning was made jokingly constitutes a material change. ... The police warning to Mr. Arthur was a significant event and a fact central to Ms. Bishop's claim for refugee protection. By stating that the police warning was made jokingly, Ms. Bishop was not solely adding more detail, she was instead modifying her story and creating a material inconsistency.*"^[18] Similarly, in that case the claimant made no mention in her BOC form of the fact that the agent of harm's father was a police officer in her country, something that also properly gave rise to a negative credibility inference in a case that centered on state protection, even where the claimant had amended her BOC form to add this information.^[19] See also: Canadian Refugee Procedure/Information and Documents to be Provided#The fact that a claimant amends their BOC form does not prevent the Board from drawing an adverse credibility inference as a result of the initially incorrect information⁷.

In contrast, in *Apena v. Canada*, the court held that the RAD erred in undermining the credibility of a narrative on the basis that the BOC form did not mention that the claimant

6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#Evidence_is_primarily_presented_in_written_form_in_the_Canadian_process
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#The_fact_that_a_claimant_amends_their_BOC_form_does_not_prevent_the_Board_from_drawing_an_adverse_credibility_inference_as_a_result_of_the_initially_incorrect_information

accompanied the police the day after an alleged attack. The court held that this detail was immaterial to the core elements of this assertion, such as whether the attack occurred, whether the Applicant reported the attack to the police, whether the police searched for the assailants, or whether the attack resulted in an injury as he claimed. Given that those elements were supported by the evidentiary record, the court held that the credibility finding was unreasonable and represented an unreasonably overzealous and microscopic analysis in the applicant's case.^[20]

The obligation to provide information that is "complete, true and correct" in Rule 6(1)(a) tracks the following conclusion from the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*: "The applicant should...Tell the truth and assist the examiner to the full in establishing the facts of his case." Furthermore, the Handbook provides that an applicant should "Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him."^[21] In the words of the Law Reform Commission of Canada's report on the refugee determination process, "There is no place in such a process for adversary tactics of surprise. If the process is to work effectively, there must be full and frank disclosure by all parties concerned and all documents must be available in time to allow them to be reviewed prior to commencement of any hearing."^[22] See also: Canadian Refugee Procedure/RPD Rules 3-13 - Information and Documents to be Provided#RPD Rule 9 - Changes or additions to BOC Form⁸ and Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Principles about the expectations that one reasonably has of claimants and counsel⁹.

16.5.4 Providing exemptions to the Rule 6 requirements for illiterate claimants

When this Rule was being drafted, the Board received feedback that illiterate claimants should be given flexibility in those situations in which the BOC form is not filled out and signed as requested. The Board stated that as discretion rests with the Member to provide an exemption from the requirements of a rule when necessary, and after proper notice to parties, this comment did not necessitate a change in the rules.^[23]

16.5.5 At the beginning of the hearing, the member is to ask the claimant to confirm that the BOC form interpretation was done

RPD Rule 6(3) provides the requirements for the interpreter's declaration on the BOC form. Chairperson *Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* further states "The claimant is responsible for making sure that the BOC Form was interpreted to them before the hearing. At the beginning of the hearing, the member will ask the claimant to confirm that the interpretation was done."^[24]

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_3-13_-_Information_and_Documents_to_be_Provided#RPD_Rule_9_-_Changes_or_additions_to_BOC_Form
9 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Principles_about_the_expectations_that_one_reasonably_has_of_claimants_and_counsel

16.6 RPD Rule 7 - Providing BOC Form

Providing Basis of Claim Form - inland claim

7 (1) A claimant referred to in subsection 99(3.1) of the Act must provide the original and a copy of the completed Basis of Claim Form to the officer referred to in rule 3.

Providing Basis of Claim Form - port of entry claim

(2) A claimant other than a claimant referred to in subsection 99(3.1) of the Act must provide the original and a copy of the completed Basis of Claim Form to the Division.

Documents to be attached

(3) The claimant must attach to the original and to the copy of the completed Basis of Claim Form a copy of their identity and travel documents, genuine or not, and a copy of any other relevant documents in their possession. The claimant does not have to attach a copy of a document that has been seized by an officer or provided to the Division by an officer.

Documents obtained after providing Basis of Claim Form

(4) If the claimant obtains an identity or travel document after the Division has received the completed Basis of Claim Form, they must provide two copies of the document to the Division without delay.

Providing Basis of Claim Form - port of entry claim

(5) The Basis of Claim Form provided under subrule (2) must be

(a) received by the Division within the time limit set out in the Regulations, and

(b) provided in any of the following ways:

(i) by hand,

(ii) by courier,

(iii) by fax if the document is no more than 20 pages long, unless the Division consents to receiving more than 20 pages, or

(iv) by email or other electronic means if the Division allows.

Original Basis of Claim Form

(6) A claimant who provides the Basis of Claim Form by fax must provide the original to the Division at the beginning of the hearing.

16.6.1 When a claimant must provide their BOC form

- **Port of Entry claimants:** As per Rule 7(5)(a), for a Port of Entry claimant, their BOC must be submitted to the RPD within 15 days after referral per s. 159.8(2) of the Regulation.^[25] However, for the duration of the Covid-19 pandemic, the RPD is temporarily extending the time limit for claims made on or after August 29, 2020. In these cases, the BOC form will now be due 45 days after the day on which the claim was referred to the RPD.^[26]
- **Inland claimants:** For inland claimants, their BOC must be submitted to IRCC at determination of eligibility, per s. 159.8(1) of the Regulation.
- **Detained claimants:** CBSA has taken the position that individuals who initiate claims after being arrested or detained inland are required to complete all the forms, including the Basis of Claim form, within three working days. The basis for this interpretation appears to be the combination of IRPR s. 159.8(1) which says that a person who makes a claim for refugee protection inside Canada other than at a port of entry must provide an officer with the documents and information referred to in s. 99(3.1) not later than the day on which the officer determines the eligibility of their claim under IRPA s. 100(1). RPD Rule 7 specifies that the Basis of Claim must be provided to the officer referred to in IRPA s. 99(3.1).^[27]

See Canadian Refugee Procedure/Time Limit for Providing Documents¹⁰ for the full text of the relevant regulations.

16.6.2 A BOC Abandonment hearing must be scheduled if a claimant fails to provide a completed Basis of Claim Form in accordance with RPD Rule 7

RPD Rule 7(2) provides that a claimant making a claim at a port of entry (an airport, seaport or land border crossing) must provide the original and a copy of the completed Basis of Claim Form to the Division. As per RPD Rule 7(5), this must be received by the Division within the time limit set out in the Regulations. If it is not so received, then a special hearing on the abandonment of the claim for the failure to provide a completed Basis of Claim Form in accordance with paragraph 7(5)(a) must be held no later than five working days after the day on which the completed Basis of Claim Form was due: Canadian Refugee Procedure/Abandonment#RPD Rule 65(2) - When the BOC Abandonment hearing must be scheduled¹¹.

16.6.3 Documents attached to the BOC form need not be translated at the time that they are attached

Rule 7(3) requires a claimant to attach to their BOC Form a copy of their identity and travel documents, genuine or not, and a copy of any other relevant documents in their possession. In this way, Rule 7(3) functions as one of the main RPD Rules that oblige the disclosure of documents (in comparison, other rules regarding the disclosure of documents generally provide a claimant with discretion about what documents they will provide, see: Canadian Refugee Procedure/Documents#What documents does a party need to provide when?¹²). Such documents need not be translated in order for them to be accepted by the Board. This is because the rule on the language of documents, Rule 32 (Canadian Refugee Procedure/RPD Rules 31-43 - Documents#RPD Rule 32 - Language of Documents¹³), only applies to documents that a claimant chooses to *use* in the proceeding: "All documents used by a claimant or protected person in a proceeding must be in English or French or, if in another language, be provided together with an English or French translation and a declaration signed by the translator." In this way, Rule 7(3) requires a claimant to provide all relevant documents in their possession at the time that they file their claim, but if a claimant wants to "use" such documents in the proceeding, then they will need to provide a translation of those documents prior to the hearing. Otherwise, the documents will be retained for the purposes of the record, but in an untranslated form, and will likely therefore be assigned limited or no weight. On the other hand, some untranslated documents such as original ID documents from a country may be assigned significant weight, especially where they can be authenticated or compared to sample documents available to the Board

10 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Time_Limit_for_Providing_Documents
11 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#RPD_Rule_65\(2\)_-_When_the_BOC_Abandonment_hearing_must_be_scheduled](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#RPD_Rule_65(2)_-_When_the_BOC_Abandonment_hearing_must_be_scheduled)
12 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_documents_does_a_party_need_to_provide_when?
13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#RPD_Rule_32_-_Language_of_Documents

in the National Documentation Package or other sources. If these rules were interpreted any other way, for example to limit the ability of a claimant to provide documents such as their non-genuine ID documents where those ID documents are not accompanied by a translation, then it would frustrate the purpose of this disclosure obligation, which is clearly to ensure that the claimant provides, *en masse*, relevant documents at the earliest time so that the Minister can assess those documents as part of any investigation into the claimant, their credibility, and their identity. If the claimant were only obliged to submit documents for which they had secured a translation, then it would either frustrate the broad mandatory language of the rule ("must attach") or else it could potentially impose significant translation costs on refugee claimants who may not have the resources to pay for, or the ability to procure translations of, the documents (especially in the four Canadian provinces that provide no legal aid to refugee claimants whatsoever: Canadian Refugee Procedure/Counsel of Record¹⁴).

16.7 RPD Rule 8 - Application for an extension of time to provide BOC Form

Application for extension of time

8 (1) A claimant who makes an application for an extension of time to provide the completed Basis of Claim Form must make the application in accordance with rule 50, but the claimant is not required to give evidence in an affidavit or statutory declaration.

Time limit

(2) The application must be received by the Division no later than three working days before the expiry of the time limit set out in the Regulations.

Application for medical reasons

(3) If a claimant makes the application for medical reasons, other than those related to their counsel, they must provide, together with the application, a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate. A claimant who has provided a copy of the certificate to the Division must provide the original document to the Division without delay.

Content of certificate

(4) The medical certificate must set out the particulars of the medical condition, without specifying the diagnosis, that prevent the claimant from providing the completed Basis of Claim Form in the time limit referred to in paragraph 7(5)(a).

Failure to provide medical certificate

(5) If a claimant fails to provide a medical certificate in accordance with subrules (3) and (4), the claimant must include in their application

- (a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;
- (b) particulars of the medical reasons for the application, supported by corroborating evidence; and
- (c) an explanation of how the medical condition prevents them from providing the completed Basis of Claim Form in the time limit referred to in paragraph 7(5)(a).

Providing Basis of Claim Form after extension granted

(6) If an extension of time is granted, the claimant must provide the original and a copy of the completed Basis of Claim Form to the Division in accordance

¹⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#Refugee-related_services_are_provided_by_some_provincial_legal_aid_programs

with subrules 7(2) and (3), no later than on the date indicated by the Division and by a means set out in paragraph 7(5)(b).

16.7.1 Extensions will only be granted if there is a justifiable reason for the delay

The Board's public commentary to the previous version of the RPD rules that "An extension [to provide this form] will only be granted if there is a justifiable reason for the delay" continues to apply to decisions made under the current Rule 8.^[28] The legal standard that the Board is to apply in assessing an application for an extension of time to provide the Basis of Claim form is that set out in subsection 159.8(3) of the *Immigration and Refugee Protection Regulations*, which provides that "If the documents and information cannot be provided within the time limit ... the Refugee Protection Division may, for reasons of fairness and natural justice, extend that time limit by the number of days that is necessary in the circumstances." As such, a claimant should demonstrate that the form "cannot be provided within the time limit", that their inability to provide it within the time limit raises "reasons of fairness and natural justice", and that the period that they are requesting as an extension is what is "necessary" in the circumstances.

One academic argues that as a principle, refugee claimants should have time to recover and be ready to disclose the reasons of their flight and the possible ill treatment they risk suffering in their country of origin in case of return prior to having to provide such information to the state.^[29] It is frequently observed that there are gendered aspects to this short deadline, which is said to particularly penalize survivors of rape and sexual violence, since it is well-documented that these survivors often need time before they are ready to disclose their experiences, whether to a lawyer completing a form describing their experiences, or to decision-makers.^[30]

16.7.2 This Rule applies to applications for an extension of time, but does not constrain the Board's ability to extend deadlines on its own motion

At times, the IRB has extended the deadline for filing a Basis of Claim form of its own accord. For example, during the COVID-19 pandemic, the Board issued a *Practice notice on the temporary extension of time limits for filing the basis of claim form*. This practice notice provided a temporary extension for filing a Basis of Claim form, specifically stating: "If your time limit for filing the BOC Form with the RPD falls between February 15 and April 15, 2020 inclusive, the deadline is extended to May 30, 2020." The authority for this rule was cited as subsection 159.8(3) of the *Immigration and Refugee Protection Regulations* which provide that the RPD may extend the time for providing the BOC Form for part of entry claimants by the number of days necessary for reasons of fairness and natural justice. Furthermore, that practice directive noted that section 165 of the *Immigration and Refugee Protection Act* provides that the RPD may do whatever is necessary for a full and proper hearing.^[31] The principle is that this rule does not constrain the Board from extending a deadline and only governs how the Board should exercise its discretion where a claimant applies to extend the deadline.

16.7.3 Applications for an extension of time must be received at least three working days before the expiry of the time limit for providing the form

As per Rule 8(2), the application for an extension of time to provide the BOC must be received by the Division no later than three working days before the expiry of the time limit set out in the Regulations. The 3 working day time period is counted backwards from the expiry date to provide the BOC. Day 1 is the first business day before the expiry date. The application must be received no later than the third business day before the expiry date to provide the BOC. This arises as a result of the definition of "working day" in RPD Rule 1.

Applications received after that date will be dealt with under the BOC abandonment rule, Rule 65(2): Canadian Refugee Procedure/Abandonment#Rule 65(2) - When the BOC Abandonment hearing must be scheduled¹⁵. The interaction between this rule and the abandonment rule was discussed in the Board's commentary to the previous version of the RPD Rules, which remains instructive:

An application for an extension of time received after the [time limit] will be considered at a special hearing held under [presently, subsection 65(2)] of the Rules. At that hearing, the claimant will be given a chance to explain the delay in filing the [Form]. The claimant should make every effort to provide a completed [Form] to the Division before or at the special hearing. If there is no justifiable reason for the delay, the Division may declare the claim to be abandoned (*Immigration and Refugee Protection Act*, subsection 168(1)).
[32]

Thus, for example, the Board has denied requests for an extension of time to file Basis of Claim forms where the claims had already been declared abandoned.^[33] As such, the proper procedure in such cases is for the claimant to either participate in the abandonment process under Rule 65 or, if that has been completed, then to apply to reopen the claim pursuant to Rule 62.

16.8 RPD Rule 9 - Changes or additions to BOC Form

Changes or additions to Basis of Claim Form

9 (1) To make changes or add any information to the Basis of Claim Form, the claimant must

- (a) provide to the Division the original and a copy of each page of the form to which changes or additions have been made;
- (b) sign and date each new page and underline the changes or additions made; and
- (c) sign and date a declaration stating that
 - (i) the information given by the claimant in the Basis of Claim Form, together with the changes and additions, is complete, true and correct, and
 - (ii) the claimant understands that the declaration is of the same force and effect as if made under oath.

Time limit

(2) The documents referred to in subrule (1) must be provided to the Division without delay and must be received by it no later than 10 days before the date fixed for the hearing.

¹⁵ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#Rule_65\(2\)_-_When_the_BOC_Abandonment_hearing_must_be_scheduled](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#Rule_65(2)_-_When_the_BOC_Abandonment_hearing_must_be_scheduled)

16.8.1 History of this rule

The previous 2002 version of the RPD rules did not include an analogous rule. For example, there was no rule which mentioned adding information to the then-PIF. Instead, the most on point rule was Rule 6, the relevant parts of which read as follows:

Changes to the claimant's information

(4) If a claimant wants to change any information given in the Personal Information Form, the claimant must provide to the Division three copies of each page of the form to which changes have been made. The claimant must sign and date each new page and underline the change made. This subsection does not apply to a change in the choice of language for the proceedings or the language of interpretation.

Documents obtained after providing the form

(5) If the claimant obtains a passport, travel document, identity document or any other relevant document after providing the Personal Information Form, the claimant must provide three copies of the document to the Division without delay.

16.8.2 Claimants are under an ongoing obligation to amend their Basis of Claim form should additional information arise

Claimants are under an ongoing relationship to update their Basis of Claim form to ensure that it is complete. The process for making such changes is described by this rule, RPD Rule 9. The obligation to provide such updates arises from the requirement in RPD Rule 9(2) to provide the Division with such update documents "without delay"; the fact that claimants swear or affirm at the beginning of their hearing that their Basis of Claim form is "complete, true, and correct",^[34] the instruction on the BOC form that "if your information changes or if you want to add information, you must inform the IRB",^[35] the statements in the IRB's Claimant's Guide that "If you find a mistake on your BOC Form or realize that you forgot something important, or receive additional information, you must tell the RPD",^[36] and caselaw that all the important facts of a claim for refugee protection must appear in the BOC Form.^[37] As is summarized in the Irwin Law text *Refugee Law*, "the duty to provide a complete and accurate BOC Form has been interpreted as an ongoing one. A claimant must amend and update their BOC if circumstances change or new information comes to light; in the absence of such amendments, adverse inferences can be drawn."^[38] This principle has been affirmed by the Federal Court in *Olusola v. Canada*: "the RAD reasonably found that the Principal Applicant's failure to update her BOC and report the new threat to the police, undermined her credibility".^[39]

For a discussion of how the phrase "without delay", which is used extensively in the RPD Rules, has been interpreted in other contexts, see: Canadian Refugee Procedure/RPD Rules 26-28 - Exclusion, Integrity Issues, Inadmissibility and Ineligibility#What does it mean that the Division must notify the Minister "without delay"?¹⁶.

But see *Zhang v. Canada*, in which the Court did not agree with the Board drawing an adverse inference from Ms. Zhang's failure to amend her PIF to mention recent visits to her parents' home by security officers: "These visits took place after she had filed her PIF. Again, the basis for the Board's concern is difficult to appreciate. The applicant understandably

¹⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_26-28_-_Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#What_does_it_mean_that_the_Division_must_notify_the_Minister_"without_delay"?

felt that she could testify about recent events at her hearing without having to amend her written documents.”^[40] This decision was cited with approval in *Weng v. Canada* as continuing to apply despite the 2012 changes to the rules, including the addition of RPD Rule 9, albeit without any discussion of this change and its applicability, or lack thereof.^[40] In *Ma v. Canada*, the court found “that it was improper of the RPD to ask the Applicant if the PSB had returned to her home after June 14, 2018, only to draw a negative inference from the fact that she failed to amend her BOC to include subsequent PSB visits”.^[41] The court found that “the RAD erred by placing undue focus on the BOC omissions”, pointing to the fact that even where a BOC omission occurs, the weight of that omission relative to all of the other evidence must be assessed.

16.8.3 No explanation for BOC amendments necessary

It was previously the case that a draft of this rule required that an explanation of changes to the BOC form be provided. Following stakeholder feedback, that requirement was eliminated. The Board commented on this feedback as follows in its *RPD Rules Regulatory Impact Analysis Statement*:

Respondents commented that the rule which addresses changes or additions to the BoC Form was overly complicated in its wording. Several respondents expressed confusion regarding how the requested explanations for any additions or deletions were to be provided. A respondent also suggested that the IRB ensure that claimants, when providing amendments to their BoC Form, be required to state that the changes are “true to the best of the claimant's knowledge”. In response to these comments, the IRB has: (1) simplified the language in this rule, (2) removed the requirement for an explanation of changes, and (3) included an additional requirement that claimants provide a declaration which states that the information given by the claimant in the BoC Form, together with the changes and additions, is complete, true and correct, which is consistent with the declaration in the BoC Form that claimants must initially sign.^[42]

16.8.4 The fact that a claimant amends their BOC form does not prevent the Board from drawing an adverse credibility inference as a result of the initially incorrect information

RPD Rule 9 sets out a process by which a claimant can make changes to the Basis of Claim form. The fact that a claimant has updated their BOC information does not prevent a panel from drawing a negative credibility inference as a result of contradictions between the earlier information that was included in the form and the information in the amended BOC form.^[43] It can be open to the RPD to conclude that the information contained in amendments was likely an embellishment.^[44] The RPD may also draw a negative credibility inference with respect to late amendments relating to important elements of an applicant’s narrative.^[45] See also: Canadian Refugee Procedure/Information and Documents to be Provided#Requirement that the information provided be complete, true and correct¹⁷.

¹⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Requirement_that_the_information_provided_be_complete,_true_and_correct

16.9 RPD Rule 10 - Order of questioning in hearings, oral representations, oral decisions, limiting questioning

Conduct of a Hearing

Standard order of questioning

10 (1) In a hearing of a claim for refugee protection, if the Minister is not a party, any witness, including the claimant, will be questioned first by the Division and then by the claimant's counsel.

Order of questioning - Minister's intervention on exclusion issue

(2) In a hearing of a claim for refugee protection, if the Minister is a party and has intervened on an issue of exclusion under subrule 29(3), any witness, including the claimant, will be questioned first by the Minister's counsel, then by the Division and then by the claimant's counsel.

Order of questioning - Minister's intervention not on exclusion issue

(3) In a hearing of a claim for refugee protection, if the Minister is a party but has not intervened on an issue of exclusion under subrule 29(3), any witness, including the claimant, will be questioned first by the Division, then by the Minister's counsel and then by the claimant's counsel.

Order of questioning - application to vacate or cease refugee protection

(4) In a hearing into an application to vacate or to cease refugee protection, any witness, including the protected person, is to be questioned first by the Minister's counsel, then by the Division and then by the protected person's counsel.

Variation of order of questioning

(5) The Division must not vary the order of questioning unless there are exceptional circumstances, including that the variation is required to accommodate a vulnerable person.

Limiting questioning of witnesses

(6) The Division may limit the questioning of witnesses, including a claimant or a protected person, taking into account the nature and complexity of the issues and the relevance of the questions.

Oral representations

(7) Representations must be made orally at the end of a hearing unless the Division orders otherwise.

Oral decision and reasons

(8) A Division member must render an oral decision and reasons for the decision at the hearing unless it is not practicable to do so.

16.9.1 Rule 10(6) provides that the Division may limit the questioning of witnesses

RPD Rule 10(6) provides that the Division may limit the questioning of witnesses, including a claimant or a protected person, taking into account the nature and complexity of the issues and the relevance of the questions. Generally speaking, this may involve limiting the questions put to and the responses of a witness, but will not involve refusing to hear from a witness altogether on the basis that their testimony is not relevant. As the Federal Court held in *Kamtasingh v. Canada*, panels of the Board should be wary of refusing to hear from witnesses altogether on the basis that their testimony is not relevant, lest their conception of relevance be too narrow:

The fundamental problem with the Respondent's argument is that the Member's narrow characterization of relevance was wrong. After correctly stating that the central

issue before him was the genuineness of the marriage, the Member erred by telling Mr. Kamtasingh that the testimony of others, which only corroborated his evidence, would not be useful. The Member may well have had only a few issues of concern, but the credibility of Mr. Kamtasingh was obviously one of them. Corroborating evidence from other witnesses may have been sufficient to rehabilitate Mr. Kamtasingh's credibility and to displace the Member's other concerns. All of these witnesses had potentially relevant evidence to give concerning the genuineness of the marriage, even if their testimony was not "different" from Mr. Kamtasingh's evidence. In effect, what the Member did was predetermine the issue of credibility without having heard the witnesses.^[46]

In other words, as the court held in *Ayele v. Canada*, "one can never rule on the credibility of evidence that has not yet been heard. The presiding member violated this principle when he stated that even if the witnesses corroborated Mr. Ayele's testimony that subsequent testimony would not be credible."^[47] As the court stated in *Kamtasingh v. Canada*:

I agree with counsel for the Respondent that the IAD has the right to limit repetitive testimony, but not by effectively excluding witnesses who could offer evidence going to the central issues of the case. The place to control excessive or repetitive evidence on issues of controversy which are central or determinative is generally not at the entrance to the witness box, but once the witness is testifying – and even then the member must grant some latitude to ensure that all important matters are covered.^[48]

The right to a fair hearing can also be violated where the RPD imposes an arbitrary time limit for counsel's questions at the hearing.^[49]

See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#A panel can establish principled rules regarding the manner in which a witness testifies¹⁸.

16.9.2 The standard order of questioning is that any witness will be questioned first by the Division and this is a fair process

It used to be the case that hearings began with an introductory "examination in chief" by a claimant's counsel. This aspect of the refugee process was sharply criticized. The Law Reform Commission of Canada noted that while the process before the Division is supposed to be non-adversarial, "all of the details of the adversarial system are present in the examination-in-chief, cross-examination, and re-examination format".^[50] The Board commissioned the noted refugee law academic James C. Hathaway to write a report on its processes in which he recommended "the present practice of an introductory 'examination in chief' by counsel should be dispensed with".^[51] The Board subsequently acted on this advice when issuing the Chairperson's *Guideline 7 Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*.^[24] In drafting the Guideline, the Board made a deliberate choice to avoid the use of terminology such as "examination-in-chief" and "cross-examination" as inappropriate concepts better suited to an adversarial model requiring judicial formality.^[52] *Thamotharem v Canada* was a case which concluded that

18 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#A_panel_can_establish_principled_rules_regarding_the_manner_in_which_a_witness_testifies

the resultant process is a fair one, especially given that Board Members may vary the order of questioning in exceptional circumstances.^[53]

16.9.3 It is expected that counsel will provide oral submissions after the evidence has been heard

Rule 10(7) states that representations must be made orally at the end of a hearing unless the Division orders otherwise. The *Chairperson's Guidelines 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*) state that "in general, it is expected that counsel should be ready to give oral representations after the evidence has been heard."^[54] However, the Division has the discretion to order that written representations be provided instead of oral ones.^[55]

16.9.4 A Member rendering an oral decision at the end of the hearing is not, in and of itself, indicative of bias

Rule 10(8) provides that a Division member must render an oral decision and reasons for the decision at the hearing unless it is not practicable to do so. In *Pajarillo v. Canada* , the claimant argues that the RPD was biased against her because the member made up her mind to reject the Applicant's claim prior to hearing. The sole basis for making this allegation against the member was that the member returned after a lunch break and proceeded to render a lengthy oral decision. The court rejected this argument, noting that the claimant had failed to establish that the facts or issues in the case were so substantial or complex it was not reasonably practicable to comply with Rule 10(8) of the RPD Rules. The court stated: "The mere fact that the RPD was able to draft a decision and render it orally shortly 50 minutes after the conclusion of the hearing does not prove bias. A review of the transcript of the hearing discloses that the RPD member took into account the Applicant's testimony and counsel's arguments in reaching her decision."^[56] For more detail, see: Canadian Refugee Procedure/The right to an unbiased decision-maker#Statements or conduct that might indicate a predisposition on the part of the decision-maker¹⁹.

16.10 RPD Rule 11 - Documents Establishing Identity and Other Elements of the Claim

Documents Establishing Identity and Other Elements of the Claim

Documents

11 The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.

¹⁹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_unbiased_decision-maker#Statements_or_conduct_that_might_indicate_a_predisposition_on_the_part_of_the_decision-maker

16.10.1 Rule 11 should be read in conjunction with Section 106 of the Act

Section 106 of the IRPA states:

Claimant Without Identification

Credibility

106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

Despite the above provision of the Act referring to the RPD, section 106 of the IRPA does not preclude the RAD from overturning the RPD's finding on the question of the Applicant's identity. The RAD has jurisdiction to consider the question of a claimant's identity, and to intervene when the RPD is wrong in law, in fact, or in fact or law.^[57] See: Canadian Refugee Procedure/110-111 - Appeal to Refugee Appeal Division²⁰.

16.10.2 History of Rule 11 of the RPD Rules

Rule 7 of the previous *RPD Rules* is in nearly (but not) identical language to the current version of the rules:

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

Rule 7 was introduced into the RPD rules with the onset of the IRPA, and it built on a previous commentary and Practice Notice that had been issued by the IRB in 1997. This *Commentary on Undocumented and Improperly Documented Claimants* was issued to provide guidance to CRDD members as to how to deal with claimants who lacked proper documentation.^[58] The Federal Court held that Rule 7 was a codification of the common law that existed under the then *Immigration Act*: "Before Rule 7 existed, the law required that claimants provide sufficient proof of their identity or explain the failure to do so".^[59]

16.10.3 "Identity" as the term is used in the Act and the Rules refers to personal and national identity

The term "identity" can take on various meanings in the context of the IRPA and these rules. For example, the Board produced a public commentary to the previous version of the RPD Rules, which commented on the meaning of identity as follows:

"Identity" most commonly refers to the name or names that a claimant uses or has used to identify himself or herself. "Identity" also includes indications of personal status such as country of nationality or former habitual residence, citizenship, race, ethnicity, linguistic background, and political, religious or social affiliation.^[58]

²⁰ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/110-111_-_Appeal_to_Refugee_Appeal_Division

That commentary is no longer in effect today. Thus, while it remains common to refer to an individual's "ethnic identity" or their "identity as Roma", the Federal Court has held that these are not aspects of "identity" as that term is used in section 106 of the Act:

While ethnicity, like religion, sexuality, or other fundamental personal characteristics, may be considered part of one's identity, I do not consider these characteristics to fall within the scope of "identity" in section 106. Rather, section 106 appears to refer to identity in the sense of personal/national identity^[60]

It should be presumed that the way that the term "identity" is used in the Rules conforms to the way that the term is used in the Act.

16.10.4 A claimant is obliged to provide any relevant documents in their possession at the time that they provide their BOC form

As per Rule 7(3), the claimant must attach to the original and to the copy of the completed Basis of Claim Form a copy of their identity and travel documents, genuine or not, and a copy of any other relevant documents in their possession. This obligation is reproduced in the Basis of Claim form which instructs: "Attach two copies of any documents you have to support your claim, such as travel documents (including your passport) and identity, medical, psychological or police documents."^[61] The Appendix to the BOC form discusses this in more detail: "Attach two copies of all documents (identity, travel or other documents) that you have with you now to support your claim for refugee protection, including documents that are not genuine, documents that you got in an irregular or illegal way or by giving information that is not true, and documents you used that do not really belong to you."^[62] The requirement to provide copies of non-genuine identity documents is a reflection of the reality that roughly 60 percent of refugee claimants arrive either with false documents or without proper documentation.^[63] The Board's commentary to the previous version of the rules may provide some guidance about the scope of this obligation: "These documents include not only those that were used but also those intended to be used for travelling or supporting the claim."^[32] Rule 7(4) further provides that if the claimant obtains an identity or travel document after the Division has received the completed Basis of Claim Form, they must provide two copies of the document to the Division without delay.

16.10.5 A claimant has an obligation to make reasonable efforts to establish their identity and to corroborate their claim

RPD Rule 11 provides that a claimant must provide acceptable documents establishing their identity and other elements of the claim. In the words of the Federal Court, "this search for confirmatory evidence is a matter of common sense."^[64] Subsection 100(4) of the *Immigration and Refugee Protection Act* requires the claimant to produce all documents and information as required by the rules of the Board. This obligation tracks the following statement from the UNHCR Handbook: "The applicant should...make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence."^[21] The Basis of Claim form emphasizes a claimant's obligation to make efforts to obtain such documents as follows:

If you do not have [identification] documents like this with you, you need to do everything you can to get them immediately. If you still cannot get these documents, you will need to explain the reason for this at your hearing and show that you did everything you could to get them.^[62]

As explained in the Board's commentary to the previous version of these rules, "the claimant should keep a record of the steps taken, such as copies of letters sent, to obtain identity and other necessary documents."^[65] In this way, as explained in the Board's commentary to the previous version of the RPD Rules, a claimant who is unsuccessful in obtaining documents to establish his or her identity and other elements of the claim should not only be prepared to provide a reasonable explanation for the lack of documents and describe the diligent efforts they made to obtain such documents, but they should also be able to present proof of the steps that were taken.^[65] There are limits on the types of documents that a claimant may reasonably be expected to produce. For example, in *Discua v. Canada*, the court commented that the Board may not question a claimant on their failure to obtain a passport from their embassy once in Canada:

it was altogether unreasonable for the RPD to find fault with Ms. Lazo Discua because she did not attempt to obtain a Honduran passport once she was in Canada. Had she done so, and had a Honduran passport been issued to her, Ms. Lazo Discua would have created a significant impediment to her refugee claim which she would then have to try to overcome. Indeed, even simply applying for a passport could have raised serious questions about her willingness to seek the protection of her country of nationality and, as a result, whether she was a Convention refugee. In short, the RPD faulted Ms. Lazo Discua for failing to take a step that could have made it materially more difficult for her to establish her claim for refugee protection. This cannot reasonably ground an adverse finding concerning her credibility. Indeed, it was unreasonable for the RPD even to pursue the line of questioning it did in this regard^[66]

16.10.6 The types of documents a claimant should submit to establish their identity

As stated in the Board's commentary to the previous version of the RPD Rules, "Section 106 of the *Immigration and Refugee Protection Act* imposes a duty on the claimant to provide acceptable documents establishing the claimant's identity, including documents the claimant does not possess but can reasonably obtain."^[32] The commentary went on to state that "In assessing the claimant's credibility, the Division must consider the lack of such documents and any reasonable explanation given for not providing them, as well as the steps taken to obtain them. Documents that are not genuine, that have been altered, or that are otherwise improper are generally not acceptable proof of identity."^[32] The Claimant's Kit from the Board highlights the claimant's responsibility to provide relevant documents and clarifies what types of documents might be considered acceptable:

You must show the RPD evidence of who you are by giving the RPD high-quality copies of official documents with your name and date of birth on them ("identity documents"). For example, you can give a passport, national identity card, birth certificate, school certificate, driver's licence, military document, and professional or religious membership card. ... If you do not provide identity documents or other documents in support of

your claim, you will have to explain at your hearing why you do not have them and show that you did everything to try to get them.^[36]

In the words of the Federal Court, the requirements of this rule impose "a burden that any claimant can meet."^[67] As noted in *Arewel v. Canada*, documents establishing identity need not necessarily be government-issued identity documents.^[68] The Board's commentary to the previous version of the rules had the following commentary on the subject of "other independent evidence to establish identity", which appears to be of continued relevance:

The claimant who lacks documents or whose documents are not found acceptable should be prepared to present other independent evidence to establish his or her identity or other elements of the claim, if such evidence is available. Such evidence may include:

- testimony of friends, relatives, community elders or other witnesses; and
- affidavits of individuals who have personal knowledge of the claimant's identity or other elements of the claim.^[58]

See also: Canadian Refugee Procedure/IRPR ss. 28-52 - Conduct of Examination#IRPR s. 50.1 - Designation of unreliable travel documents²¹.

16.10.7 The types of documents a claimant should submit to establish "other elements of their claim"

The scope of Rule 11 is not limited to documents establishing identity and also applies to "other elements of the claim".^[69] The Board has a document on its website entitled *Important instructions for refugee claimants* which states "You should obtain and submit whatever documents you can to support your claim, such as police reports, medical records, newspaper articles etc."^[70] The Claimant's Kit highlights the claimant's responsibility to provide relevant documents and clarifies what type of documents might be considered acceptable:

Along with identity documents, you can submit other high-quality copies of original documents that you feel are relevant to your claim, including proof of membership in political organizations, medical or psychological reports, police documents, business records, news clippings, visas and travel documents (airplane, train or bus tickets). ... If you do not provide identity documents or other documents in support of your claim, you will have to explain at your hearing why you do not have them and show that you did everything to try to get them.^[23]

Similarly, the instructions on the BOC form state: "Attach two copies of any documents you have to support your claim, such as travel documents (including your passport) and identity, medical, psychological or police documents."^[61] Additionally, the caselaw has indicated that Roma claimants may be expected to have approached NGO and governmental sources for identity documents relating to their ethnicity.^[71]

²¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPR_ss._28-52_-_Conduct_of_Examination#IRPR_s._50.1_-_Designation_of_unreliable_travel_documents

16.10.8 Inferences about credibility that may be made where a claimant does not supply documents

The starting-point when assessing credibility in the Canadian refugee determination system is the principle in the oft-cited case of *Maldonado* that “[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness”.^[72] Drawing on the *Maldonado* presumption, a line of cases flowing from the decision of Justice Teitelbaum in *Ahortor* has concluded that the absence of corroborative evidence is not, in and of itself, a basis to disbelieve a claimant’s allegations.^[73] These principles, however, exist alongside section 106 of the *IRPA* and Rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], which were introduced subsequent to the decisions in *Maldonado* and *Ahortor*.^[74] As such, Canadian refugee law provides that it would be an error to make a credibility finding based on the absence of corroborative evidence alone where there is no independent reason to require corroboration. A decision-maker can only require corroborative evidence if:

1. The decision-maker clearly sets out an independent reason for requiring corroboration, such as doubts regarding the applicant’s credibility, implausibility of the applicant’s testimony or the fact that a large portion of the claim is based on hearsay; and
2. The evidence could reasonably be expected to be available and, after being given an opportunity to do so, the applicant failed to provide a reasonable explanation for not obtaining it.^[75]

16.10.9 The Division may instruct a claimant to provide specific documents

The Board's public comment to the previous version of the RPD Rules noted that “the Division may instruct the claimant to provide specific documents that have been identified by the Division in the claim-screening process as being necessary for considering the claim.”^[65] The Board retains the power to issue such instructions under its power to control its own process. Further, the Board's powers under the Inquiries Act authorize members to compel testimony and the production of evidence: Canadian Refugee Procedure/Powers of a Member²².

16.10.10 A claimant must provide original documents at the hearing, or beforehand, on the request of the Division

As per RPD Rule 42, a claimant is to present the originals of his or her documents at the beginning of the hearing of the claim. The Division may require the claimant to provide the originals earlier by notice in writing. See Canadian Refugee Procedure/RPD Rules 31-43 - Documents#RPD Rule 42 - Original documents²³ for further details, including the way that the Board has waived part of this rule during the Covid-19 period.

22 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Powers_of_a_Member

23 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#RPD_Rule_42_-_Original_documents

16.11 RPD Rule 12 - Supplying contact information after an Application to Vacate or to Cease Refugee Protection

Application to Vacate or to Cease Refugee Protection

Contact information

12 If an application to vacate or to cease refugee protection is made, the protected person must without delay notify the Division and the Minister in writing of

- (a) any change in their contact information; and
- (b) their counsel's contact information and any limitations on the counsel's retainer, if represented by counsel, and any changes to that information.

16.11.1 Commentary

For a discussion of the principles applicable to this provision, see the commentary on Rule 4(3), the equivalent provision for refugee claimants: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 4 - Claimant's contact information²⁴.

16.12 RPD Rule 13 - Declaration where counsel not representing or advising for consideration

Declaration - counsel not representing or advising for consideration

13 If a protected person retains counsel who is not a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, both the protected person and their counsel must without delay provide the information and declarations set out in Schedule 3 to the Division in writing.

16.12.1 Commentary

In effect, Rule 13 requires that a protected person who is being represented by someone who is not a lawyer, paralegal, or registered immigration consultant to complete a form certifying that their counsel is not being paid. What is a protected person? Section 95(2) of the IRPA provides that "a protected person is a person on whom refugee protection is conferred [under subsection 95(1) of the Act], and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4)." In this way, Rule 13 is the analogue to RPD Rule 5 which imposes the same obligation on refugee claimants: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 5 - Declaration where counsel is not acting for consideration²⁵.

²⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_4_-_Claimant's_contact_information

²⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_5_-_Declaration_where_counsel_is_not_acting_for_consideration

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3. *Levy, Kevin Omarea v. M.P.S.E.P.* (F.C., No. IMM-8650-21), Gascon, November 10, 2022; 2022 FC 1533.
4. *Perez v. Canada (Citizenship and Immigration)*, 2020 FC 1171 (CanLII), par. 30, <²⁷>, retrieved on 2021-01-14.
5. *Perez v. Canada (Citizenship and Immigration)*, 2020 FC 1171 (CanLII), par. 34, <²⁸>, retrieved on 2021-01-14.
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17 Counsel of Record (RPD Rules 14-16)

As Martin Jones and Sasha Baglay observe, “the representation of refugee claimants by qualified counsel is an important part of the Canadian refugee determination process. The availability and expertise of counsel bring significant benefits to both the claimants and the overall efficiency and legitimacy of the process. The representation of refugee claimants is also an expression of a fundamental constitutional and common law value: that individuals facing complicated legal proceedings with serious consequences should be allowed to be represented so as to ensure that there is a full and fair hearing.”^[1] The following sections outline the contours, limits, and practicalities of this right.

17.1 Canadian Charter of Rights and Freedoms

Section 7 of the Canadian Charter of Rights and Freedoms provides:

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 10(b) of the Canadian Charter of Rights and Freedoms provides the following right to counsel:^[2]

Arrest or Detention

10. Everyone has the right on arrest or detention ...

(b) to retain and instruct counsel without delay and to be informed of that right ...

17.1.1 Both sections 7 and 10 of the Charter are relevant to the right to counsel in refugee proceedings

The court has found that section 7 Charter rights are involved in inland refugee proceedings and that they include “the right to be represented by competent and careful counsel”.^[3] For a discussion of s. 10 of the Charter, see: Canadian Refugee Procedure/Counsel of Record#The right to counsel does not apply where a person is not yet subject to proceedings before the Board and where the person is not detained¹.

17.2 Canadian Bill of Rights

Section 2(d) of the Canadian Bill of Rights concerns the right to counsel:^[4]

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_right_to_counsel_does_not_apply_where_a_person_is_not_yet_subject_to_proceedings_before_the_Board_and_where_the_person_is_not_detained

Construction of law

2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;

17.3 IRPA s. 167 - Right to counsel

Right to counsel

167 (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

17.3.1 History of this provision

In the 1976 *Immigration Act*, claimants right to retain counsel was recognized, as was a provision providing that claimants be informed of that right.^[5]

17.3.2 In what immigration contexts do claimants have a right to counsel?

The right to counsel in the IRPA applies from the time a person is subject to proceedings before the Board, not just at the hearing

Section 167(1) of the Act provides that a person who is the subject of proceedings before any Division of the Board may be represented by legal or other counsel. As such, this provision of the Act ties the right to counsel to whether or not the individual is the subject of proceedings before the Board. RPD Rule 1 provides that a proceeding includes a conference, an application or a hearing: Canadian Refugee Procedure/Definitions#Commentary on the definition of "proceeding"². In *Canada v. Gutierrez*, the Federal Court of Appeal found that the applicants had a right to counsel at an interview with a CBSA officer conducted after their claim had been made, but a few weeks before their IRB hearing was scheduled. In that situation, the claimants were considered to be the subject of proceedings before the Board, and as such, were entitled to be represented by counsel according to s. 167 of the Act.^[6]

This scope for the right to counsel in Canadian law appears to track that in international law, where the right to representation is specific to that where an alien is appearing before the authority competent to decide on their expulsion per Article 13 of the International Covenant on Civil and Political Rights:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions#Commentary_on_the_definition_of_"proceeding";

to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.^[7]

The right to counsel does not apply where a person is not yet subject to proceedings before the Board and where the person is not detained

A person is generally not entitled to counsel at interviews or pre-hearing proceedings where the person has not yet become the subject of proceedings at the Board, for example before a claim is referred to the Board: *Canada v. Bermudez*.^[8] In *Canada v. Barrios*, the claimant's request to be represented by counsel during his initial encounter with a CBSA officer who was interviewing him at the border was denied. In subsequent proceedings before the RPD, the claimant requested that evidence arising from this interview be excluded because it was, he argued, obtained in violation of his right to counsel. The court held that the CBSA's conduct in interviewing the claimant in the absence of counsel did not violate any right to counsel, since the person concerned had no right to counsel in the circumstances, as they were not, at the time they were being interviewed, subject to any proceedings before the Board.^[9] As a general proposition, the Federal Court of Appeal has observed that a refugee claimant “does not have a right to counsel at an interview relating to their eligibility to claim refugee status”.^[10]

This conclusion will be different, however, where a person is detained and not free to leave at the time that they are being questioned: *Chen v. Canada*.^[11] This is so on the basis that in such circumstances an individual's s. 10(b) right to counsel under the *Charter of Rights and Freedoms* will apply. Remedies for violation of this right to counsel may be provided by the Board. For example, in *Chen v. Canada* Justice O'Reilly held that the IRB could not rely on statements made by a Chinese refugee claimant after being detained for two days when he was not informed of his right to consult a lawyer.^[11] However, this is dependent on determining that the individual has been arrested. As a general proposition, there is no right to legal representation during secondary examinations at the port of entry as that process does not amount to arrest that would in turn trigger a right to counsel.^[12]

17.3.3 What is entailed by the right to counsel?

Once a claim has been referred to the Refugee Protection Division for determination, an officer should advise counsel of record of any proposed examination and provide counsel an opportunity to attend

In *Canada v. Gutierrez*, the Federal Court of Appeal concluded that if a refugee claimant has indicated on the basis of claim form or elsewhere so that it appears on the record of the Refugee Protection Division that the claimant has counsel of record, it is a breach of subsection 167(1) of the *Immigration and Refugee Protection Act* and a breach of procedural fairness for an officer (e.g. a CBSA or IRCC officer) to examine the refugee claimant about their refugee claim after the claim has been referred to the Refugee Protection Division for determination without advising counsel of record of the proposed examination and providing counsel an opportunity to attend.^[13]

Individuals who are detained have a right to the assistance needed to obtain legal counsel

In *Chevez v. Canada*, the applicant was arrested and detained by the RCMP and questioned on several occasions by officers from the Canada Border Services Agency before an exclusion order was issued against him. According to the applicant, the officers had ignored his requests to see a lawyer and did not provide him with any alternatives. The Federal Court ruled in his favour. The court held that the officers were required to do more than inform him of his right to counsel, they were additionally required to provide him with the assistance he needed to obtain legal counsel. According to the court, it was incumbent on the officers to take positive actions, including waiting for duty counsel to become available, informing the applicant that he could insist on waiting until duty counsel was available, or providing other representation through a legal aid services.^[14]

The right to counsel at the RPD and RAD is not a right to state-funded counsel

Section 167(1) of the IRPA provides that an individual may be represented by counsel "at their own expense". In practice, most Canadian provinces have a legal aid program which ensures that refugee claimants have access to a lawyer where they cannot afford one: Canadian Refugee Procedure/Counsel of Record#Refugee-related services are provided by some provincial legal aid programs³. However, such programs can be cancelled, as Nova Scotia did with its refugee legal aid program in the 1990s. This is so as, in the words of the BC Court of Appeal, in *Canada* "there is no general constitutional right to legal aid, but only a right arising in specific circumstances".^[15] As such, no Canadian case has established that refugee claimants have a right to state-funded counsel. Instead, the Federal Court has held that "state-funded legal aid is only constitutionally mandated in some cases [and] the right to counsel is not absolute".^[16]

UNHCR has expressed the view that whether or not refugee claimants have a right to state-funded counsel in Canada should be thought of as an open question. Section 7 of the *Charter of Rights and Freedoms* raises the possibility that an implied right to state-funded counsel for indigent claimants may, under certain circumstances, be included within its protection guarantees, given that protection claims can involve grave issues related to a person's security. Specifically, the notion of "fundamental justice" in s. 7 of the Canadian *Charter of Rights and Freedoms* involves both substantive and procedural fairness. As a consequence, a UNHCR report discussing the Canadian asylum process observes that representation is likely necessary when refugee claimants do not understand the procedures in order to ensure that the process is conducted in accordance with principles of fundamental justice.^[17] The academics Sharry Aiken, et. al., also write that "there are strong arguments that s. 7 guarantees refugee claimants a right to counsel at refugee hearings".^[18]

At the international level there are many statements about rights to legal counsel in asylum proceedings. On the one hand, the UK High Court states that international law does not require the provision of legal advice and assistance to asylum seekers.^[19] US courts have also not accepted a constitutional or statutory argument that appointed counsel is required

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#Refugee-related_services_are_provided_by_some_provincial_legal_aid_programs

for noncitizens to vindicate their right to a fair hearing in immigration court.^[20] Similarly, Canadian courts have held that international law does not specifically call for legal counsel as part of the implementation of a fair refugee adjudication system.^[19]

On the other hand, the UN Human Rights Committee has concluded that the *International Covenant on Civil and Political Rights* requires that “asylum-seekers be properly informed and assured of their rights, including the right to apply for asylum, with access to free legal aid”^[21] and has recommended that, in accordance with Article 13 ICCPR, States should grant “free legal assistance to asylum-seekers during all asylum procedures”.^[22] Similarly, the European Court of Human Rights has held that failure to provide access to legal aid for asylum seekers by Greece constituted a violation of the European Convention on Human Rights in particular circumstances.^[23] As well, the Council of the European Union *Procedures Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* provides that in the event of a negative decision, applicants in EU member states are in principle entitled to free legal assistance which Member States may, however, make contingent upon the fulfilment of further requirements such as that the appeal or review is likely to succeed.^[24]

The Inter-American Commission on Human Rights states that legal aid may be necessary when it is required in order to effectively vindicate a fundamental protected right under the *American Declaration of the Rights and Duties of Man* or the Constitution or laws of a particular country. This flows in large measure from the principle that rights must be implemented in ways that give them proper effect.^[25] It also flows from the right to equal protection of - and before - the law. They state in a report on the Canadian refugee determination system that when deciding whether legal aid is necessary for a particular individual, one may properly consider the circumstances of the particular case, its significance, legal character, and the context in the particular legal system.^[26]

17.3.4 In what contexts will a lack of counsel render a hearing unfair?

The fact that a claimant lacks counsel does not, in and of itself, mean that their hearing is unfair

The Federal Court states that “individuals are free to choose to represent themselves or to be represented by counsel”.^[27] While about 90% of claimants attend their hearing with representation,^[28] they may proceed with a claim and hearing without counsel. The Canadian jurisprudence is clear that where a claimant does not request a postponement on the basis of this lack of counsel, there is no obligation on the Board to canvass the issue of a postponement of the hearing simply because a claimant is unrepresented.^[29] As Refugee Appeal Division Member Atam Uppal held in one case, the mere fact that a claimant was unrepresented and the Board denied the claim did not mean that the RPD denied procedural fairness or that the claimant was denied his right to a fair hearing.^[30] Instead, the lack of representation by counsel results in a breach of procedural fairness only if, given the circumstances, it deprives the applicant of the opportunity to “participate meaningfully” in the hearing.^[31]

A panel may be obliged to postpone a hearing to give a claimant an opportunity to obtain counsel upon request in certain circumstances

The court has stated that "the right to be represented by counsel is not an absolute right. It is predicated on all parties and counsel acting reasonably in all circumstances."^[32] There is no obligation on the Board to tell a self-represented claimant that they may ask for an adjournment of the hearing.^[33] When considering a judicial review of an IAD decision involving an unrepresented litigant, the court commented that "as a general matter there is no obligation on the IAD to propose an adjournment and no unfairness in not granting an adjournment that is not requested".^[34]

In certain circumstances, where a party has acted diligently and reasonably and has not been able to obtain counsel for the hearing, and requests a postponement of a hearing to obtain counsel, it may be unfair for a panel to deny that request and proceed with the hearing. The following principles can therefore be drawn from the case law: although the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, and/or the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.^[35] See RPD Rule 54 on changing the date and time of a proceeding for further discussion of this and a discussion of the rules that a panel should consider when exercising its discretion about whether or not to postpone a matter: Canadian Refugee Procedure/Changing the Date or Time of a Proceeding⁴.

Where a claimant is unrepresented and is clearly not understanding what is occurring, the Board should inquire about whether they wish to have counsel

The general rule is that there is no stand-alone duty on a tribunal to advise a party about the availability of or right to legal aid in immigration proceedings.^[36] In the words of the Refugee Appeal Division, the law is that, in general, there is "no obligation of the RPD to inform claimants of the availability of Legal Aid".^[37] There is also no obligation on the Board that it insist on claimants obtaining counsel; they may proceed by representing themselves.^[38] As a matter of practice, however, the notices of hearing sent by the Board advise claimants of their right to be represented by counsel.^[39] Additionally, the Board publishes a Claimant's Kit, which is made available to all claimants, and includes a list of Canadian legal aid offices.^[40]

That said, the court has noted that "applicants are often lost without counsel" and that counsel "can make a significant impact in the smooth progression of a proceeding".^[41] The Federal Court of Appeal has stated that "[w]ithout representation, an individual may not be able to participate effectively in the decision-making process, especially when facing a more powerful adversary, such as a government department".^[42] Where it is clear that an unrepresented claimant is not understanding what is occurring, a panel may be obliged to enquire with the claimant about whether they wish to have counsel. In *Alvarez v. Canada*, the Court found a breach of natural justice in circumstances where the tribunal proceeded despite the fact that it was clear that the applicant was not understanding the proceedings.

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding

^[43] The court reached this conclusion even though the claimant had not formally requested an adjournment at the time of the hearing. For additional discussion of this principle, see: Canadian Refugee Procedure/Changing the Date or Time of a Proceeding#The Board's actions on its own motion (ex proprio motu)⁵.

The Board has a heightened duty of procedural fairness when dealing with self-represented claimants

Unrepresented claimants are comparatively rare in refugee proceedings; for example, in 2011–2012 Legal Aid Ontario provided services to 90% of all refugee claimants in Ontario.^[44] The proportion of unrepresented claimants nationally remained relatively consistent at 12 to 13 percent from 2009 to 2012.^[45] British Columbia has traditionally had significantly higher rates of unrepresented claimants than the rest of the country, with approximately a quarter of claimants unrepresented at their refugee hearings.^[46]

The representation of refugee claimants is described as “an expression of a fundamental constitutional and common law value: that individuals facing complicated legal proceedings with serious consequences should be allowed to be represented so as to ensure that there is a full and fair hearing.”^[47] That said, claimants before the RPD have a right to represent themselves.^[48] Caselaw establishes that the RPD owes such unrepresented litigants a heightened duty of fairness.^[49] However, the precise scope of this duty will depend on all of the circumstances of the case, including the sophistication of the applicant; where the applicant is clearly sophisticated, this may support the fairness of the procedural choices that were made.^[50] The RPD has a positive duty to ensure that the applicant understands both the nature of the proceedings and the salient aspects of the hearing to be conducted.^[51] The Board also commits in its *Guideline 8 - Concerning Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada* that it “will take extra care to ensure that self-represented vulnerable persons can participate as meaningfully as possible in their own hearings.”^[52]

To this end, the courts have commented positively on Members taking steps to inform self-represented claimants about RPD procedures and about the existence and application of the National Documentation Package.^[53] The court has stated that an unrepresented party “is entitled to every possible and reasonable leeway to present a case in its entirety and that strict and technical rules should be relaxed for unrepresented litigants”.^[54] For example, in *Turton*, the Federal Court held that where a claimant is unrepresented at a hearing, the RPD has a more onerous obligation to indicate what issues are in play and explain the case to be met.^[55] In *Ghomi Neja v Canada*, the Court found that a cessation hearing was procedurally unfair when the RPD failed to explain “the serious consequences to the Applicant in clear non-legalese language”.^[56] Similarly, in *Olifant v. Canada* the Court found that a hearing was unfair when the Board did not take any positive measures to introduce the seriousness of a no credible basis finding.^[57] In *Clarke v Canada*, the court concluded that the IAD had acted unfairly when it did not advise a self-represented applicant that she could file more material after the close of the hearing, as permitted under the IRB Rules.^[58]

⁵ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#The_Board's_actions_on_its_own_motion_\(ex_proprio_motu\)](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#The_Board's_actions_on_its_own_motion_(ex_proprio_motu))

That said, even where an individual is self-represented, there are limits to the Board's responsibilities: the Board is not obliged to act as counsel for applicants, or to formulate arguments on their behalf, for example.^[59] In *Sundaram v. Canada* the Federal Court stated that it was "not prepared to read into the immigration scheme an obligation on officials to give advice on practice and procedures. The situation of giving advice is markedly different from those Court decisions which have held that officials must provide prospective applicants with the necessary forms. People are entitled to government forms; they are not entitled to receive free legal advice from RPD officials."^[60] Put another way, "it is not the obligation of the Board to 'teach' the Applicant the law on a particular matter involving his or her claim".^[61] Claimants before the IRB have a right to represent themselves and "they can be in no better position because they did not have a lawyer".^[48]

17.3.5 In what contexts will counsel incompetence render a hearing unfair?

Normally, claimants with counsel are more likely to succeed with their claims

Statistically, claimants with counsel are far more likely to succeed with their refugee claims than are those who are unrepresented. Several studies have shown that there is a clear correlation between having legal advice and the recognition of refugee status.^[62] A study of legal advisers in Cairo, Egypt, for example, found that refugees who had legal advice had nearly double the chance of having their refugee status recognized after a UNHCR interview than other, unrepresented, asylum seekers.^[63] In the US, Schoenholtz and Jacobs found that asylum seekers who had legal assistance were four to six times more likely to be recognized as refugees compared to those who did not have assistance.^[64] In this study, access to a legal adviser was found to improve the chance of recognition, regardless of the refugee's origin, at every stage of the determination process studied. Researchers studying the Canadian refugee status determination system have also concluded that having a lawyer is associated with an increased chance of success in refugee proceedings: according to a study by academic Sean Rehaag, Canadian claimants with representation from a lawyer were approximately 75 percent more likely to succeed than those who were unrepresented.^[65]

Counsel's role is to exercise judgement regarding a file and not to advance any argument that their client requests

In *Aghedo v. Canada*, the Federal Court concluded that an argument that counsel advanced on behalf of their clients was "so weak that it should not have been made."^[66] This reflects the nature of the role of counsel and how it is incumbent upon them to exercise judgement regarding what arguments they choose to advance.

Deficiencies of counsel's conduct are properly attributed to their client

Applicants who choose to be represented "are bound by the submissions made by those who represent them in the process; there is a duty on an applicant to ensure that their submissions are complete and correct".^[67] Sometimes counsel will adopt a theory of the case that does not succeed or will make tactical decisions in approaching a case where another lawyer would have decided differently. The Federal Court has held that the general rule is that you do not separate counsel's conduct from the client. Generally, the courts have held

clients liable for the (mis)conduct of their counsel: “It is well recognized that a person has to accept the consequences of their choice of counsel.”^[68] Counsel is acting as agent for the client and, as harsh as it may be, the client must bear the consequences of having hired poor counsel.^[69] This principle is reflected in the instructions in the Basis of Claim form that every claimant receives as part of the claim process, which notes that “If you have counsel, you are responsible for making sure that your counsel meets the deadlines.”^[70] The Federal Court has held that judicial review should not be granted where an applicant “show[ed] little or no interest in what [was] happening to [her] own application”.^[71] That said, this principle may be distinguishable in situations where counsel's conduct is incompetent to the point where it would be unfair to attribute deficiencies to the client, as discussed in the following section.

A hearing will be unfair where counsel incompetence results in a miscarriage of justice

As the court held in *Aluthge v. Canada*, in order for an applicant to demonstrate that their representative's conduct (i.e. incompetence) amounted to a breach of procedural fairness which would warrant setting aside a decision on the basis of counsel incompetency, the applicant must satisfy a three-pronged test set out in case law:

1. The previous representative's acts or omissions constituted incompetence or negligence;^[72]
2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different;^[73] and
3. The representative be given notice and a reasonable opportunity to respond.^[74]

These may be referred to as the performance, prejudice, and notice portions of the test, respectively.^[75] The Applicant bears the onus of proving all elements of the test for negligent representation, including rebutting the presumption that the representative acted competently.^[76]

The application must show that they were represented by counsel

The applicants bear the onus of establishing that they were represented by counsel and that their representative's conduct fell outside the range of reasonable professional assistance.^[77] With respect to showing that they were represented by counsel, an applicant must also show that they actually engaged counsel or reasonably believed that the counsel had agreed to provide legal services to them.^[78] See the following disclosure obligation where an individual is represented by counsel during a refugee proceeding: Canadian Refugee Procedure/RPD Rules 3-13 - Information and Documents to be Provided#Rule 4(4): Information concerning claimant's counsel included the name of the body of which the counsel is a member and the membership identification number issued to the counsel⁶. As a policy matter, the Federal

⁶ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_3-13_-_Information_and_Documents_to_be_Provided#Rule_4\(4\):_Information_concerning_claimant's_counsel_included_the_name_of_the_body_of_which_the_counsel_is_a_member_and_the_membership_identification_number_issued_to_the_counsel](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_3-13_-_Information_and_Documents_to_be_Provided#Rule_4(4):_Information_concerning_claimant's_counsel_included_the_name_of_the_body_of_which_the_counsel_is_a_member_and_the_membership_identification_number_issued_to_the_counsel)

Court has held that where counsel is not disclosed in violation of relevant requirements in immigration matters, there is no reason to condone the use of unauthorized “ghost” consultants.^[79]

The Federal Court states that their protocol for dealing with allegations of incompetent counsel – lawyers or immigration consultants – does not apply to other professionals, such as a case where a travel agent made submissions on behalf of an individual.^[80] In contrast, with the IRB's equivalent practice notice, the Board has discretion about whether to apply it to a person other than a lawyer, immigration consultant, or other person who is entitled to represent a person for a fee or other consideration at an IRB proceeding:

This Practice Notice applies where the person's former counsel is a lawyer, immigration consultant, or other person who is entitled to represent a person for a fee or other consideration at an IRB proceeding. In other cases, a Division may choose whether or not to apply the procedures in this Practice Notice.^[81]

1) Incompetence

The applicants bear the onus of establishing that their representative's conduct fell outside the range of reasonable professional assistance.^[77] There is a strong presumption that former counsel's conduct fell within the wide range of reasonable professional assistance.^[82] As such, the test for concluding that counsel was incompetent is strict, and counsel incompetence will only be found to have caused procedural unfairness in extraordinary circumstances.^[83] An applicant must demonstrate “extraordinary incompetence” tantamount to a denial of natural justice.^[84] Their allegations must be sufficiently specific and clearly supported by the evidence.^[85] An inadvertent or honest mistake will not suffice to demonstrate incompetence.^[86] The Supreme Court of Canada has also noted that “the wisdom of hindsight has no place in this assessment.”^[87] In the words of the Federal Court, “Strategic decisions may have an impact on the outcome. Strategic decisions involve a balancing of risk and benefits. When the risk materializes, the strategic decision does not become unreasonable or the product of incompetence.”^[88]

Incompetence may be established with reference to the professional standards required of the representative at issue,^[89] e.g. immigration consultants in Canada have been governed by the Code of Professional Ethics issued by the *College of Immigration and Citizenship Consultants*. While an immigration consultant may not have the same legal training as a lawyer, the jurisprudence suggests that they nonetheless are held to the same standard of competency.^[90] Furthermore, in the words of the Federal Court of Appeal, the irreparable harm that can befall an individual upon deportation “obviously calls for the utmost vigilance from counsel representing [refugee] claimants, and for the need on their part to act with the highest standard of professionalism and thoroughness.”^[91] What follows are some of the main obligations that counsel has in a refugee proceeding and notes about cases where they were not complied with:

Building trust and eliciting facts

Claimants may be suffering the effects of persecution and might be experiencing post-traumatic stress disorder. Most claimants are not familiar with the refugee determination process or the definition of a “refugee” that is found in the 1967 Protocol to the Refugee Convention. There are language barriers and the consequent need for an interpreter. Counsel's

task is to build trust and elicit the necessary evidence and documentation within the time frame that is allowed for producing a Basis of Claim form.^[92] In this context, the following are some of the way that counsel may err:

- Acting while having a conflict of interest.^[93] Representatives are generally enjoined by relevant professional standards from acting while in a conflict of interest. For example, under subsection 11.1.1(iii) of the ICCRC Ethics Code, withdrawal as a client's representative was required if continued involvement will place the consultant in a conflict of interest.^[94] In *Yanasik v. Canada*, counsel indicated that he had not advanced an argument before the Refugee Appeal Division impugning his client's past counsel because of his personal friendship with that counsel; the court concluded that this was incompetent representation.^[95] In *Zakeri v. Canada*, the court concluded that counsel had acted incompetently in copying-and-pasting identical Basis of Claim narratives that were not reflective of the claimants' story, and then when the Minister intervened to note this, provided what appears to have been self-serving advice to the claimants in order to protect himself from further allegations of professional misconduct, for example minimising and incorrectly describing the issue that the Minister had flagged.^[96] See also the related issue of counsel acting as the translator for documents where they are appearing on a matter: Canadian Refugee Procedure/RPD Rules 31-43 - Documents#What are the requirements for the translator's declaration for documents?⁷.
- Failure to be honest and candid: Representatives have duties of honesty and candour to their clients. In *Yang v. Canada*, the Federal Court found that the applicant's representative had deliberately attempted to mislead the applicant: "Rather than make the Applicant aware of the Procedural Fairness Letter, and thereby admit to the mistaken omission from the updated IMM5669 form, the Agent instead took deliberate steps to mislead both the Applicant and the IRCC."^[97] This was found to constitute incompetence. Similarly, in *Xiao v. Canada* the court concluded that an immigration consultant breached their duties of honesty and candour when they misleadingly advised the Applicant that the consultant had submitted an application, but had in fact not done so.^[98]

Establishing the consistency and reliability of the claimants' evidence

Claims for refugee protection upon arrival at the port of entry typically involved an initial interview, without counsel, by an immigration officer. Notes of these interviews are generally prepared. Basic biographical information and an indication of why refugee protection is being sought are taken. Omissions, inaccuracies or inconsistencies with later written documents (such as the PIF) or anticipated testimony at a hearing could result in adverse credibility findings and has to be addressed by counsel at the earliest opportunity. Port of entry notes should be obtained where they are available.^[99]

Proper preparation of the Basis of Claim form

If a claimant was eligible to make a claim, the claim is referred to the RPD. The claimant is required to fill out a form to state the basis of the claim (the Basis of Claim form). The BOC is the most important document provided by the claimant, and it has to contain

⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#What_are_the_requirements_for_the_translator's_declaration_for_documents?

extensive personal data and a narrative setting out all alleged incidents of past persecution and efforts to obtain state protection. Proper preparation of the form requires careful questioning by counsel, not an interpreter, to ensure that the narrative portion of the form is complete, sufficient, clear and internally consistent. Once submitted, amendments can be provided to the IRB at any time before the hearing, but every effort has to be made to make amendments as early as possible. Compliance with the procedural and substantive aspects of the BOC has implications for the credibility of the claimant. In this context, the following are some of the way that counsel may err:

- Failure to assist the claimant in the preparation of documents: In *Galyas v. Canada*, the court held that counsel had acted incompetently where the claimant had been "left to prepare [his BOC form] by himself, without guidance on what it should contain[,] and what the RPD would be looking for in such a narrative."^[100] In *El Kaissi v. Canada* the court concluded that counsel had acted incompetently where they did not assist the claimant in the preparation of the Personal Information Form.^[101] In *Zakeri v. Canada*, the court concluded that counsel had acted incompetently when he did not assist in filling out the BOCs and instead left it to a translator, who was not a lawyer even though he acted as if he was.^[102] But see *Obasuyi v. Canada* in which the court concluded that counsel did not act incompetently where the claimant drafted the brief narrative herself, but counsel then reviewed it and repeatedly asked the claimant whether there were other details to add to her narrative (none being provided).^[103]
- Negligently providing manifestly incorrect legal advice to applicants: In *Aluthge v. Canada*, the court held that counsel had acted incompetently where they provided incorrect advice to their client about what needed to be disclosed on their immigration forms.^[104] In *Zakeri v. Canada*, the court concluded that counsel had acted "egregiously incompetently" when, among other things, he advised his clients not to file an amended Basis of Claim form to correct errors therein, on the basis that it would negatively impact their credibility, and that they would be able to provide clarifications at the hearing before the RPD.^[102]
- Not drafting documents conscientiously and diligently: The Law Society Tribunal held in *Law Society of Upper Canada v Hohots* that the following were indicative of incompetence in counsel's drafting of PIF narratives: forms having numerous spelling and grammatical mistakes,^[105] forms containing significant errors of fact,^[106] and the absence of important details about the "who, what, when, and where" of the alleged acts of persecution.^[107]
- Failure to include relevant facts in the Basis of Claim form and narrative: Failure to include relevant facts in the forms submitted may also constitute incompetence, for example in *Bisht v. Canada*, the Federal Court held that the counsel's failure to include all relevant information in an application form was incompetent.^[108] However, such an argument was rejected in *Baig v. Canada*, in which the court concluded that there was no indication that the supposed evidence the applicants claim was neglected by their previous counsel existed at all.^[109]

Marshalling the necessary evidence

Two categories of evidence are required. The first is personal documents. The second is country conditions documents. For a discussion of the difference between such documents, see: Canadian Refugee Procedure/RPD Rules 31-43 - Documents#How does one know

whether documents are country conditions evidence or not?⁸. Counsel has obligations to ensure that necessary evidence is marshalled and submitted. In this context, the following are some of the way that counsel may err:

- Failure to meet deadlines: The court held in *Xiao v. Canada* that meeting a deadline is a serious component of a representative's duty to their client.^[110] For example, subsection 6.2.1 of the Ethics Code requires immigration consultants to make best efforts to ensure that documents are delivered to IRCC before any applicable deadline.
- Failure to advise a claimant to procure relevant evidence: In *Sabitu v. Canada*, the court noted that counsel may have an obligation to ask clients if they can procure additional relevant evidence where counsel recognizes that such evidence would be relevant to a matter that must be established in the claim.^[111] The Federal Court stated in *Yang v. Canada* that immigration representatives may be negligent where they fail to submit crucial evidence - even in cases where the applicant did not volunteer the evidence.^[112]
- Failure to provide important evidence to the Board: A clear evidentiary gap or the failure to submit evidence that clearly should have been submitted can be sufficient to sustain allegations of counsel's incompetence.^[113] In *El Kaissi v. Canada* the court concluded that counsel had acted incompetently where they failed to produce a piece of corroborating evidence which the applicant had provided to counsel.^[101] In *Mcintyre v. Canada*, the court concluded that counsel had acted incompetently when they failed to file crucial evidence as to the country conditions that demonstrated how the applicant, a gay man, would be affected by removal.^[114] The jurisprudence has found incompetence "due to a failure of the representative to submit evidence that clearly should have been submitted and for which logic defies failure to submit that evidence".^[115] The court in *Discua v. Canada* concluded that counsel had acted incompetently where they failed to submit highly probative evidence that was actually in his possession, despite counsel's argument that the documents had been provided by the IRB (what was determinative was that they were never entered as exhibits at the hearing).^[116]

Preparation of case law and legal submissions

The claimant's counsel needs to demonstrate that the client meets the statutory prerequisites to the granting of refugee status.^[117] In this context, the following are some of the way that counsel may err:

- Failure to advance an important argument before the Board: Counsel must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work they have undertaken to enable them to perceive the need to ascertain the law on relevant points.^[118] For example, in *Satkunanathan v. Canada* the applicant's former counsel appeared to be under the mistaken impression that it was not possible to advance a particular argument before the Board, when in fact it was. This was held by the court to have fallen below the standard of competence expected of counsel and to have resulted in an unfair hearing.^[119] In *Tesema v. Canada* counsel made no submissions to the RAD on appeal whatsoever; this was held by the Federal Court to be incompetent.^[120] In *Kandiah*, the Court held that counsel's failure to make submissions on the main issues could amount to incompetence.^[121]

⁸ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#How_does_one_know_whether_documents_are_country_conditions_evidence_or_not?

- Failure to comply with undertakings: In *Shirwa v. Canada*, counsel had made an undertaking to file written submissions on issues that were raised during the hearing and then failed to do so. The court held that this was a serious failure on the part of counsel.^[122]

Preparation of the claimant for the hearing

As in any administrative or judicial proceeding, counsel needs to inform the client of what to expect – in this case, the RPD's procedures, including questioning by the Member – and to prepare the client's evidence. These duties are heightened by the often vulnerable state of refugee applicants. Preparation often involves a time-consuming process, and must address the major issues outlined above.^[123] In this context, the following are some of the way that counsel may err:

- Failure to meet with the claimant in advance of the hearing to prepare: Counsel must adequately prepare clients for their refugee hearings.^[124] In *El Kaissi v. Canada* the court concluded that counsel had acted incompetently where they did not meet with their clients until just prior to the hearing.^[101] In *Olah v Canada*, the claimants had never met their counsel, who relied on unsupervised interpreters to do the work for him; this was found to be incompetent.^[125]
- Failure to keep the applicant updated about their file: Rules of professional conduct generally require counsel to communicate at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client.^[126] For example, failing to notify the claimant of their hearing date has been held to be incompetent.^[127] Similarly, failing to notify a client that their application has been refused has been held to be incompetent.^[128] In *Zakeri v. Canada*, the court concluded that counsel had acted incompetently when he did not inform the claimants of the extent of the Minister's intervention in their cases.^[102]

Attendance at the hearing

Competent counsel in any such hearing has to protect the client's interests and ensure that the required evidence is presented fully and fairly to the tribunal.^[129] That said, as the Federal Court notes, "many things can happen in a hearing involving witnesses. Counsel may have to adapt quickly in a manner that may not seem perfectly logical in hindsight, but may nevertheless be reasonable in the circumstances."^[130] In this context, the following are some of the way that counsel may err:

- Failure to appear for a hearing date where they are counsel of record.^[131]

Cumulative grounds

Counsel have also been held incompetent because of the cumulative impact of many acts and omissions which alone would not amount to incompetence.^[132] Errors may result in a cascading or "snowball" effect to the Applicant's prejudice, eventually leading to serious consequences.^[133] As the court stated in *Fernandez v. Canada*, "I do not have to find any one act of egregious conduct to find that former counsel was incompetent. I need to establish that the actions fell outside of the realm of reasonable judgment".^[134] A decision-maker may choose not to assess this first part of the test related to level of competence in great detail where they are not persuaded that the applicant has met the second component of the test, which requires a demonstration that they have been prejudiced by the inadequate

representation. In fact, the court has held that in such circumstances “it is undesirable for the Court to consider the performance component of the analysis”.^[135]

2) Prejudice resulting in a miscarriage of justice

It is not sufficient for a claimant to show that their counsel performed incompetently, they must also show that but for counsel's unprofessional errors, the result of the proceeding might have been different.^[136] In this respect, the test is whether there exists “a reasonable probability that the original decision would have been different.”^[137] This does not require that an applicant demonstrate that, on a balance of probabilities, their former counsel's incompetence would have affected the outcome of the impugned decision, only a reasonable probability (which is equivalent to a serious possibility) of such.^[138] A *reasonable probability* may be defined as “a probability sufficient to undermine confidence in the outcome.”^[139] It “lies somewhere between a mere possibility and a likelihood”.^[140]

In making a determination about whether the counsel incompetence resulted in a miscarriage of justice such that there is a reasonable probability that the original decision would have been different, courts have looked at whether, on account of counsel's performance, there was some procedural unfairness in the hearing,^[141] the reliability of the hearing's result may have been compromised, or there was otherwise some readily apparent form of miscarriage of justice.^[142] Factors to consider when applying this standard include the following:

- Was the omission or failure on the part of counsel relevant to the outcome? An example of where this standard was not met was in *Hannan v. Canada*, in which a claimant alleged that their previous counsel was negligent in not providing a particular document to the Board. The Federal Court concluded that the claimant had “failed to demonstrate that substantial prejudice flowed from their former counsel's alleged inaction” because the document in question was not relevant to the issue that was determinative for the tribunal (in that case, the availability of an Internal Flight Alternative), and as such, the court concluded that “previous counsel's alleged omission had no impact on the outcome of the proceeding”.^[143] One can also consider the situation of similarly situated applicants and whether, if the incompetence did not affect them, their claims succeeded.^[144] For example, in *Discua v. Canada* the court commented “This is a close case, especially considering that the RPD also rejected the closely related claim of Mr. Mejia Bonilla despite finding that his national identity had been established.”^[144] In *Cubas v. Canada*, the court concluded that it appeared that counsel had erred by unnecessarily instituting appeal proceedings before the Refugee Appeal Division (RAD), to which the applicants, who are covered by the Safe Third Country Agreement, were not entitled, but held that this was not an extraordinary circumstance amounting to a breach of natural justice since there was no reasonable probability that the result would have been different had it not been for this error.^[145] The mere fact that counsel's client succeeded in their application does not preclude a conclusion that counsel incompetence resulted in prejudice; when considering the outcome, one can consider outcomes such as the fact that the Minister chose to appeal the decision as being prejudicial to the client.^[146]
- Has the applicant particularized the additional credible information they would have submitted if given a chance? In *Obasuyi v. Canada* the applicants argued that counsel had been negligent by not having an interpreter present during their meetings to discuss the case. The court dismissed this argument as follows: “Despite the Applicants' assertions

about what [counsel] did not do when he represented them, they have not provided persuasive evidence about what additional information they would have submitted if given the chance.”^[147] Similarly, in that case the court stated that “the Applicants argue that [counsel] failed to provide sufficient documentary evidence about conditions in Nigeria, but they do not point to specific documents that he failed to bring forward.”^[148]

- Was the claimant contributorily negligent? Another example of where this standard was not met was in *Khan v Canada*, in which the court concluded that a breach of procedural fairness should only be found “where there has been no contributory negligence or fault on the part of the [applicant]”.^[149] The logic being that if the claimant had acted with care, then the issue may have been remedied at an earlier stage, say by actively monitoring the progress of their file and switching counsel in a timely way once there were signs that their counsel was conducting themselves incompetently.^[150] It is not open to the Applicant to rely on his failure to review his own application as a basis for asserting a denial of procedural fairness.^[151] But see *Xiao v. Canada*, in which the court concluded that “it defeats the purpose of hiring a representative if the expectation was that the Applicant should scrutinize the submissions of her representative.”^[152]

3) The representative must be given notice and a reasonable opportunity to respond

It is undisputed that notice that incompetence is being alleged must be given to former counsel.^[153] Where such notice is provided, and the representative does not seek to dispute the allegations made, this may properly further support a finding that a representative has been negligent.^[154] Furthermore, in *Yanasik v. Canada* Justice Favel concluded that failure to provide such notice does not allow a panel to disregard evidence before it demonstrating issues with counsel's representation.^[155]

For more details on the prerequisites for making such an argument before the RPD, see Rule 62(4): Canadian Refugee Procedure/RPD Rules 62-63 - Reopening a Claim or Application#RPD Rule 62(4) - Allegations against counsel⁹. See also the IRB Practice Notice on Allegations Against Former Counsel.^[81]

17.4 RPD Rule 14 - Becoming counsel of record

Counsel of Record

Becoming counsel of record

14 (1) Subject to subrule (2), as soon as counsel for a claimant or protected person agrees to a date for a proceeding, or as soon as a person becomes counsel after a date for a proceeding has been fixed, the counsel becomes counsel of record for the claimant or protected person.

Limitation on counsel's retainer

(2) If a claimant or protected person has notified the Division of a limitation on their counsel's retainer, counsel is counsel of record only to the extent of the services to be provided within the limited retainer. Counsel ceases to be counsel of record as soon as those services are completed.

⁹ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_62-63_-_Reopening_a_Claim_or_Application#RPD_Rule_62\(4\)_-_Allegations_against_counsel](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_62-63_-_Reopening_a_Claim_or_Application#RPD_Rule_62(4)_-_Allegations_against_counsel)

17.4.1 Who may act as counsel in refugee proceedings before the Board?

An individual can pay fees to be represented by a person who is a lawyer, paralegal, Quebec notary public, or immigration consultant. For more details, see sections 91(2)(a) to (c) of the Act: Canadian Refugee Procedure/91-91.1 - Representation or Advice¹⁰.

A person may also be represented by someone who is not one of those professionals. For the form that needs to be completed in such circumstances, see Rule 5 (which applies to refugee claimants - Canadian Refugee Procedure/Information and Documents to be Provided#Rule 5 - Declaration where counsel is not acting for consideration¹¹) and Rule 13 (which applies to persons who have already been conferred refugee status - Canadian Refugee Procedure/Information and Documents to be Provided#Rule 13 - Declaration where counsel not representing or advising for consideration¹²).

17.4.2 Parties may be represented by multiple counsel (co-counsel) in a proceeding

Parties may be represented by more than one representative (counsel, immigration consultant, etc.) in a proceeding before the IRB. This was allowed for the Minister in *Muhammad v Canada*,^[156] a case before the Immigration Division, and has been allowed for claimants appearing before the RPD as well.^[157] Indeed, this is commonly done for the training for new representatives, as when articling students co-counsel with a more experienced lawyer.^[158]

17.4.3 Changing counsel of record from one counsel to another

When changing counsel, a claimant or protected person must comply with two Rules. First, they must provide the contact information for the new counsel as required by this rule (Rule 14) and by RPD Rule 4(4). See: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 4 - Claimant's contact information¹³. Secondly, they must remove the old counsel of record pursuant to Rule 16(1) below. See: Canadian Refugee Procedure/Counsel of Record#Rule 16 - Removing counsel of record¹⁴

17.4.4 The Board has jurisdiction to control who can appear before it as counsel

Counsel has no substantive right to appear before the IRB.^[159] In *Yari v. Canada* the Federal Court, in holding that the Immigration Appeal Division had the discretion to regulate

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 11 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_5_-_Declaration_where_counsel_is_not_acting_for_consideration
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 13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_4_-_Claimant's_contact_information
 14 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#Rule_16_-_Removing_counsel_of_record

its own procedure when its rules are silent, stated that “It clearly makes intuitive sense that a tribunal such as the IRB or any of its constituent divisions ought to be able to regulate its own procedure. It ought also to regulate the privilege of appearing before the tribunal to represent a claimant.”^[160] In *Rezaei v. Canada*, the court held that the IRB has the ability (through the Chairperson’s delegate) to suspend a representative from appearing before the IRB on behalf of another person.^[161]

17.4.5 The Board should verify that representatives appearing before the Board are authorized pursuant to the Act and regulations

The Federal Court has noted that “there is a duty incumbent upon the Board to verify that those individuals representing clients with whom it has dealings are authorized representatives pursuant to the Regulations, or that they are not receiving a fee for their services.”^[162] As the IRB has recognized, this duty exists to protect the public and to preserve the integrity of Canada’s immigration system.^[163]

17.4.6 Refugee-related services are provided by some provincial legal aid programs

In FY2019-20, 5% of legal aid budgets nationally were allocated to immigration and refugee matters.^[164] Six provinces - British Columbia, Alberta, Manitoba, Ontario, Quebec, and Newfoundland and Labrador - offer immigration and refugee legal aid service,^[165] and the overwhelming majority of the work of the Refugee Protection Division is centred in the provinces that do have legal aid programs.^[166] Some other provinces, such as Nova Scotia, used to provide legal aid, but cancelled the programs in the late 1990s during budgetary cuts.^[167] Similarly, the Minister previously provided “designated counsel” at its expense to claimants having an eligibility hearing at a port-of-entry, in order to avoid delay in processing claims; this practice was abandoned when decisions on eligibility were transferred away from the IRB in the 1990s.^[168] Other provinces have announced the end of legal aid funding for refugee matters, before reversing course. For example, in May 2003 the Attorney General of British Columbia and the Legal Services Society of British Columbia signed a Memorandum of Understanding stating that there would be no funding for immigration and refugee matters after 31 March 2004,^[169] a decision that was subsequently reversed.^[170]

Most immigration and refugee matters funded by legal aid in Canada in 2016-17 were handled by private bar lawyers (84%), while 11% were handled in specialized clinics, and 5% were handled through staff lawyers.^[171] The amount of money that is spent per province varies markedly, as does the volume of immigration and refugee matters:^[171]

	Number of legal aid certificates	Total expenditures (dollars)	Expenditure per certificate (dollars)
Alberta	940	642,925	683
BC	1331	2,041,272	1533
Man	354	259,807	733
NL	6	21,634	3605
ON	14716	30,880,850	2098
QC	7040	3,033,283	430

Estimates suggest that more than 70% of refugee claimants rely on legal aid nationally.^[172] In FY2019-20, Ontario accounted for 56.5% of all refugee legal aid certificates, & Québec accounted for 31.2%.^[164]

British Columbia Legal Services Society

In 2016-17, legal aid in British Columbia issued 914 new immigration and refugee legal aid certificates.^[171] In British Columbia, the Legal Services Society authorizes 16 hours for case preparation, with an additional 8 hours permitted if there is a second adult client, and a further four hours for any additional adult clients. Lawyers are also paid for their time at the RPD hearing. LSS will pay for up to 10 hours of interpretation services per adult client, with additional hours requiring authorization.^[173] The BC Public Interest Advocacy Centre states that these hours rates are "so low they invariably require a subsidy in time and commitment from counsel who accept such retainers to ensure adequate representation."^[174] In the 2013-2014 fiscal year, funding was approved for 82 percent of applications by refugee claimants (348 out of 424 applications).^[175] The average total cost to BC's Legal Services Society of a refugee claim under the new system in the 2013-2014 fiscal year was \$2,062, including disbursements.^[176] The average of legal fees charged in private refugee cases in the Western Region in the same time period would appear to have been in the range of \$4000.^[177] Such limits on legal aid fees have been said to have resulted in "more experienced lawyers [stopping the practice of] asylum and immigration law" in other jurisdictions.^[178]

Alberta

In 2016-17, legal aid in Alberta issued 441 new immigration and refugee legal aid certificates.^[171] Certificates in most provinces were predominately handled by private bar lawyers. Alberta was the only province where the percentage of staff lawyer certificates was almost as high as that of private bar certificates (55% versus 44%).^[171]

Legal Aid Manitoba

In 2016-17, legal aid in Manitoba issued 315 new immigration and refugee legal aid certificates.^[171] In Manitoba, most of the case preparation work is done by two salaried paralegals working with the Manitoba Interfaith Immigration Council.^[179] The legal aid tariff in that province provides far fewer hours for work on refugee claims than is allowed under the tariffs in British Columbia, Ontario and Alberta. As of 2019, the Manitoba tariff allows 13 hours for preparation and the first half-day of hearing.^[180]

Legal Aid Ontario

In 2016-17, legal aid in Ontario issued 14,716 new immigration and refugee legal aid certificates.^[171] Legal Aid Ontario (LAO) provides (as of 2013) counsel with 5 hours to prepare a BOC form, 11 hours to prepare for a refugee hearing, plus the time of the hearing. LAO will pay up to 10 hours of interpretation services in case preparation, with authorization required for any additional time.^[181] LAO pays 16 hours to prepare for a RAD hearing (plus an additional four hours and attendance time if the RAD proceeding involves an oral

hearing), 15 hours for an application for leave for a judicial review, and 15 hours to prepare for a judicial review (the combination with preparation hours not to exceed 27 hours, plus attendance time).^[182] Tariff rates were set in April 2015 and the amount paid is not regularly incremented to account for inflation.^[183]

Quebec

In 2016-17, legal aid in Quebec issued 5592 new immigration and refugee legal aid certificates.^[171] Quebec operates a legal aid program for refugee claimants through their Commission des services juridiques (CSJ). The program provides comparatively low-paying legal aid certificates and they have been criticised in the past for their failure to compensate counsel for preparatory and pre-hearing work.^[184] A private bar lawyer is paid about 1/4 per case (\$430) of what a private bar lawyer in BC is paid (\$1533). Thériault asserts that this has led to the development of a refugee law business model where lawyers do not devote as much time to a case as they would otherwise.^[185]

17.5 RPD Rule 15 - Request to be removed as counsel of record

Request to be removed as counsel of record

15 (1) To be removed as counsel of record, counsel for a claimant or protected person must first provide to the person represented and to the Minister, if the Minister is a party, a copy of a written request to be removed and then provide the written request to the Division, no later than three working days before the date fixed for the next proceeding.

Oral request

(2) If it is not possible for counsel to make the request in accordance with subrule (1), counsel must appear on the date fixed for the proceeding and make the request to be removed orally before the time fixed for the proceeding.

Division's permission required

(3) Counsel remains counsel of record unless the request to be removed is granted.

17.5.1 Rule 15(1): To be removed as counsel of record, counsel must first provide to the person represented a copy of a written request to be removed

Rule 15(1) provides that to be removed as counsel of record, counsel must first provide to the person represented a copy of a written request to be removed, and only then provide the written request to the Division. In cases where counsel has not provided to the Division a copy of the written request to be removed sent to the person they represent, applications to be removed as counsel have rightfully been denied as not meeting the requirements of Rule 15(1). It is common practice in this respect for counsel to have written a letter to their client setting out the basis on which they are terminating their retainer and then to enclose that letter to the Board along with their application to be removed as counsel of record.

17.5.2 Board commentary on discretion to refuse requests for counsel to be removed as counsel of record

Lorne Waldman notes in his text that "the Rules do not specify how the Board is to deal with an application by counsel to be removed."^[186] Some guidance on this issue comes from the drafting history for the current version of the rules and the Board's public commentary thereon. When this rule was being drafted and the IRB solicited feedback on it, three respondents provided comments concerning the process to follow to be removed as counsel of record. Specifically, respondents requested that the rule which stipulates that counsel of record remains counsel of record until the request is granted be changed to state that counsel are released as of the Division's receipt of the written notification. While the IRB has noted that it is unlikely to require counsel of record to continue to represent a claimant if a request has been made to the Division in a timely manner, the IRB maintains that it has discretion to deny the request in appropriate circumstances, such as where allowing it would impede the timely progress of a proceeding and cause an injustice. With this in mind, the rule retains its current form.^[187]

17.6 RPD Rule 16 - Removing counsel of record

Removing counsel of record

16 (1) To remove counsel as counsel of record, a claimant or protected person must first provide to counsel and to the Minister, if the Minister is a party, a copy of a written notice that counsel is no longer counsel for the claimant or protected person, as the case may be, and then provide the written notice to the Division.

Ceasing to be counsel of record

(2) Counsel ceases to be counsel of record as soon as the Division receives the notice.

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18 Language of Proceedings (RPD Rules 17-18)

18.1 Charter of Rights and Freedoms

Sections 16 to 22 of the Canadian Charter of Rights and Freedoms concern language rights, the most probative provisions being:^[1]

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

...

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

18.1.1 The Board is considered to be a "court established by Parliament" for the purposes of Charter language rights

Section 19 of the Charter provides that "Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament." Is this right applicable to proceedings before the IRB? It is. The expression "courts" includes quasi-judicial organizations. The test to be applied in determining whether a quasi-judicial body is to be considered a "court" for such purposes is stated as follows: it includes any federal institution whose organizing statute confers the power to decide matters affecting the rights or interests of the individual, by applying principles of law and not considerations of convenience or administrative policy.^[2] The position that the government has taken before is that s. 19 of the Charter is applicable to proceedings before the Board: *Taire v. Canada* .^[3]

For more detail, see: Canadian Refugee Procedure/Charter of Rights and Freedoms#RPD Rules concerning language of proceedings, interpreters, and language of documents¹.

18.2 Immigration and Refugee Protection Act Provisions

Section 3(3) of the IRPA provides that:

Application

s. 3(3) This Act is to be construed and applied in a manner that ...

(d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

(e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada;

[emphasis added]

18.3 RPD Rule 17 - Language of proceedings for a claim for refugee protection

The text of the relevant rule reads:

Language of Proceedings

Choice of language - claim for refugee protection

17 (1) A claimant must choose English or French as the language of the proceedings at the time of the referral of their claim for refugee protection to the Division.

Changing language

(2) A claimant may change the language of the proceedings that they chose under subrule (1) by notifying the Division and the Minister in writing. The notice must be received by the Division and the Minister no later than 10 days before the date fixed for the next proceeding.

18.4 RPD Rule 18 - Language of proceedings for an application to vacate or cease refugee protection

Choice of language - application to vacate or cease refugee protection

18 (1) The language that is chosen under rule 17 is to be the language of the proceedings in any application made by the Minister to vacate or to cease refugee protection with respect to that claim.

Changing language

(2) A protected person may change the language of the proceedings by notifying the Division and the Minister in writing. The notice must be received by the Division and the Minister no later than 10 days before the date fixed for the next proceeding.

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Charter_of_Rights_and_Freedoms#RPD_Rules_concerning_language_of_proceedings,_interpreters,_and_language_of_documents

18.5 Commentary

18.5.1 Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French

The IRB has a *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French* which provides that "Recognizing that provisions establishing language rights must generally be given a broad and liberal interpretation, the IRB will ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in the administration of justice, in communicating with or providing services to the public and in carrying out the Board's work."^[4]

18.5.2 Counsel may speak in a hearing in an official language different from the language of proceedings that a claimant has chosen

The IRB *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French* provides that "All persons in the hearing room are free to speak the official language of their choice, including counsel for the subject of the proceeding. At the request of any party to the proceeding, the IRB will make arrangements to provide interpretation from one official language to the other, taking into consideration third language interpretation may also be required for the case."^[4]

18.5.3 The Board has the operational capacity to entertain requests to change the language of proceedings across the country

A question can arise about how often a participant begins proceedings in one official language and then wishes to change to proceed in the other official language. In 2009 the Board received 125 such requests. In 2010, they received 164 such requests to change language after a proceeding had commenced.^[5]

The Board has capacity across the country to offer proceedings in either official language. An illustration of the linguistic capabilities of Members was offered in testimony before the House of Commons in 2010:

As of December 14, two days ago, the linguistic breakdown of our decision-makers was the following. In the eastern region, we have 54 members, of whom 44 are bilingual, seven are unilingual French, and three are unilingual English. In the central region, we have 111 members, of whom nine are bilingual and 102 are unilingual English. In the western region, we have 38 members, of whom six are bilingual and 32 are unilingual English.^[6]

18.5.4 A claimant may impliedly waive their right to proceed in their language of choice

In *Brahim v. Canada*, the claimants allowed their counsel to deliver part of his oral arguments in English, given that counsel for the applicants' notes were in English and he wished to communicate them in that language. On judicial review, the claimants argued that given that they had elected to proceed in French, their counsel's English-language submissions

denied them this right. What had occurred during the hearing was that was the applicants' counsel himself who switched to English of his own volition, preferring to speak English during oral argument because that was the language in which his notes had been written:

Perhaps I'll move straight into the... just a few references in the documentation which is, my notes, in English.^[7]

The court rejected this argument as follows:

As for the matter of the language at the hearing, the Court is of the view that, based on a detailed transcript of the hearing before the RPD, the applicants were not denied a hearing in French; rather, they themselves waived their right to an interpreter when they allowed their counsel to deliver part of his oral arguments in English, given that counsel for the applicants' notes were in English and he wished to communicate them in that language. The RPD was under no obligation to ask the applicants whether they wanted an interpreter at the time or to get them to specifically waive their right to an interpreter. This Court has clearly ruled that a party can implicitly waive the language rights granted to it under the *Official Languages Act*.^[8]

18.5.5 Rule regarding language of documents

See also Rule 32 regarding the language that parties must supply documents in, including the language that the Minister is to use where a claimant has elected for a particular official language: Canadian Refugee Procedure/Documents#RPD Rule 32 - Language of Documents²

18.5.6 In what language or languages must the reasons for decisions be made available where they are publicly released?

See Canadian Refugee Procedure/Decisions#In what language or languages must written decisions be made available?³

18.6 References

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2. *Blaikie v. Quebec (Attorney General)*, [1979] 2 S.C.R. 1016, at pages 1017-18 and *Société des Acadiens v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549) at paragraph 53.
3. *Taire v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 877 (CanLII), paras. 51 and 55, <<http://canlii.ca/t/1g6pm#51>>, retrieved on 2020-01-25

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_32_-_Language_of_Documents

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#In_what_language_or_languages_must_written_decisions_be_made_available?

4 <http://canlii.ca/t/1dsx#sec16>

4. Immigration and Refugee Board of Canada, *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French*, Date modified: 2018-07-03 <⁵> (Accessed January 22, 2020).
5. Comments of Executive Director, Office of the Executive Director, Immigration and Refugee Board of Canada, House of Commons Hansard <⁶> and <⁷>.
6. Testimony of Simon Coakeley Executive Director, Office of the Executive Director, Immigration and Refugee Board of Canada, Official Languages Committee on Dec. 16th, 2010, House of Commons Hansard <⁸>.
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19 Interpreters (RPD Rule 19)

The Refugee Protection Division simply would not be able to exist in its current form without interpreters. They are key professionals involved in the refugee claim process and over 90% of IRB hearings require interpretation services, with the Board providing interpretation in over 260 languages in some 40,00-60,000 procedures a year.^[1] It is said that Refugee Status Determination is not easy because it, by definition, involves determining the status of individuals from foreign countries, describing events elsewhere about which little is known, often speaking foreign languages, and with a range of different cultural beliefs and behaviours.^[2] Most refugees have suffered significant trauma, if not before flight, then as a result of flight. The process of status determination requires perpetual sensitivity to the unique predicament of the refugee. What is the role of the interpreter in seeking to ensure communication in such circumstances? What follows is a discussion of the laws and rules regarding interpreters at the Refugee Protection Division.

19.1 Charter of Rights and Freedoms

Section 14 of the *Canadian Charter of Rights and Freedoms* provides:^[3]

Interpreter

14 A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

The standard of interpretation required by section 14 of the Charter of Rights and Freedoms varies between immigration and criminal proceedings.^[4] The text *Refugee Law* notes that "although there is a substantial jurisprudence establishing a *Charter* right to accurate interpretation in the context of criminal proceedings, there has been a notable reluctance by the Federal Court to extend such a comprehensive protection to refugee claimants."^[5] The authors note that "although the finding in *R v Tran* concerning the right to 'continuous, precise, impartial, competent and contemporaneous' interpretation has been applied to refugee proceedings, the Federal Court has also frequently lowered the threshold for waiver of the right." For the standard required in proceedings before the IRB, see Canadian Refugee Procedure/Interpreters#Legal standard for interpretation¹ below.

19.2 Canadian Bill of Rights

Section 2(g) of the *Canadian Bill of Rights* concerns the right to interpretation:^[6]

2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Interpreters#Legal_standard_for_interpretation

Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

19.3 RPD Rule 19 - Interpreters

The text of the relevant rule reads:

Interpreters

Need for interpreter - claimant

19 (1) If a claimant needs an interpreter for the proceedings, the claimant must notify an officer at the time of the referral of the claim to the Division and specify the language and dialect, if any, to be interpreted.

Changing language of interpretation

(2) A claimant may change the language and dialect, if any, that they specified under subrule (1), or if they had not indicated that an interpreter was needed, they may indicate that they need an interpreter, by notifying the Division in writing and indicating the language and dialect, if any, to be interpreted. The notice must be received by the Division no later than 10 days before the date fixed for the next proceeding.

Need for interpreter - protected person

(3) If a protected person needs an interpreter for the proceedings, the protected person must notify the Division in writing and specify the language and dialect, if any, to be interpreted. The notice must be received by the Division no later than 10 days before the date fixed for the next proceeding.

Need for interpreter - witness

(4) If any party's witness needs an interpreter for the proceedings, the party must notify the Division in writing and specify the language and dialect, if any, to be interpreted. The notice must be received by the Division no later than 10 days before the date fixed for the next proceeding.

Interpreter's oath

(5) The interpreter must take an oath or make a solemn affirmation to interpret accurately.

19.3.1 History of this Rule

While previous versions of the *Regulations* and *Refugee Protection Division Rules* expressly required the Board to provide an interpreter when one was needed, the current *Regulations* are silent on this and the *Rules* now only indicate that if an interpreter is needed the claimant or witness must provide the requisite notice. This change does not alter the Board's obligation to provide interpretation as required by the *Charter of Rights and Freedoms* and the *Bill of Rights*.

19.3.2 To what extent is counsel obliged to use an interpreter in their private meetings with a claimant prior to hearing?

At times a question can arise about whether counsel is obliged to use an interpreter in their private meetings with a claimant prior to a hearing. For example, in *Obasuyi v. Canada*

the claimant argued that their past counsel's failure to arrange for an interpreter to assist the claimant in her interactions with him amounted to professional incompetence.^[7] The court rejected this argument in the circumstances, noting that while "it may have been preferable or more prudent for [counsel] to arrange for an interpreter, in order to assist the [claimant] in recounting a difficult personal story," that is not the test and in this case the lawyer indicated that he was able to understand the claimant and the claimant did not request an interpreter.^[8] For more details about counsel competence, see: Canadian Refugee Procedure/RPD Rules 14-16 - Counsel of Record#In what contexts will counsel incompetence render a hearing unfair?²

19.3.3 What is the scope of the interpreter's role before the Board?

Interpretation must be made available for the substantive portions of the proceedings where the case is being advanced

The section 14 Charter right to interpretation applies to "proceedings". RPD Rule 1 defines a proceeding at the RPD as including "a conference, an application or a hearing": Canadian Refugee Procedure/Definitions#Commentary on the definition of "proceeding"³. To constitute a violation of section 14 of the Charter, a claimant must establish that a failure to provide interpretation occurred with regards to an aspect of the proceedings involving the individual's "vital interests". This will occur where the failure to provide interpretation occurred while the case was being advanced.^[9]

Members should ensure that substantive exchanges between a Member and counsel are interpreted, but it is not necessary for purely logistical exchanges to be completely translated. In *Dhaliwal v. Canada*, the Applicant complained that some exchanges between the member and counsel were not interpreted at all. The court rejected this argument, noting that "those conversations were purely about administrative matters, and the Supreme Court said in *Tran* that 'where a lack of or lapse in interpretation occurs in respect of some purely administrative or logistical matter which does not involve the vital interests of the accused, such as scheduling or agreeing to a recess, this will not be a violation of s. 14 of the *Charter*."^[10]

Furthermore, the right to interpretation may be waived, and in such circumstances, there is no need to provide an interpreter.^[11]

The right to interpretation may be waived either expressly or implicitly

The right to interpretation may be waived, and in such circumstances, there is no need to provide an interpreter.^[11] Waiver of the right to object to inadequate translation may be either explicit or inferred from conduct in refugee cases. This is so as the volume of workload before the Board necessitates a more flexible approach to waiver than that which is applied in the criminal context.^[12] This principle applies both where there are concerns about the quality of interpretation and where no interpretation was provided for some or all of a proceeding whatsoever: *Baloch v. Canada*.^[13] Where an applicant explicitly

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_14-16_-_Counsel_of_Record#In_what_contexts_will_counsel_incompetence_render_a_hearing_unfair?
³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions#Commentary_on_the_definition_of_"proceeding";

waives their right to interpretation, then, even if they have some subsequent communication difficulties, it will not be procedurally unfair for the panel to continue; the panel is not under an obligation to adjourn the hearing and call an interpreter despite a clear waiver of interpretation.^[14] For more context regarding concerns about quality of interpretation, see: Canadian Refugee Procedure/Interpreters#Legal standard for interpretation⁴.

There are independent rules about official languages in Canada and the ability to proceed in French or English

Rule 19 of the RPD Rules concerns languages other than English and French. For commentary on English and French, including the potential need for interpreters in and between those languages, see the commentary to Rules 17 and 18: Canadian Refugee Procedure/Language of Proceedings⁵.

Legal standard for interpretation

The right to an interpreter in a proceeding in another language is enshrined in section 14 of the *Charter of Rights and Freedoms*, and this right has been held to be generally applicable to a proceeding before the RPD.^[15] In order to comply with this *Charter* right, interpretation should be continuous, precise, impartial, competent and contemporaneous.^[16] This is defined by the Board as follows:

- Interpretation should be continuous, as in without breaks and complete.
- Interpretation should be precise, as close as can be to word-for-word and without summaries or changes in grammar and syntax; it should be in the first person. This should include the verbatim interpretation of legal jargon used by a Board Member. The French term for this requirement can also be translated as "faithful".^[17]
- Interpretation should be impartial; the interpreter is not a witness.
- Interpretation should be competent; the interpreter must take an oath and should his or her competence be in doubt, an inquiry into competence should be made.
- Interpretation should be contemporaneous; this is achieved through consecutive, rather than simultaneous, interpretation.^[1] The French term for this requirement can also be translated as "concurrent".^[17]

To put it another way, persons who do not speak and understand one of the official languages must be able to tell their story, and the interpretation must be of such quality that they are not impeached in their ability to make their case.^[18] The Board's Interpreter Handbook states that "The role of an interpreter ... is to provide a clear channel of communication. ... Whatever is said in one language should be interpreted faithfully and accurately into the other language using the exact equivalent meaning and structure."^[19] The underlying principle is that of linguistic understanding. This principle implies that where a person testifies through an interpreter, they should have the same opportunity to understand and be understood as if the person were conversant in English or French. In this way, the purpose of providing interpretation is to provide a "level and fair playing field."^[20] As the

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Interpreters#Legal_standard_for_interpretation

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Language_of_Proceedings

Supreme Court said in *Tran*, "interpretation must be of a high enough quality to ensure that justice is done and seen to be done."^[21]

The Federal Court has stated that "an interpreter auditing a hearing recording can always find instances of interpretation that are not perfect."^[22] This will not suffice to show that the interpretation fell below the standard expected. Although the standard of interpretation is high, it need not be so high as to be perfect. What is important is whether the claimant understood the interpretation and was able to adequately express themself through the interpreter.^[23] If a breach of this standard is shown, it is not necessary to show actual prejudice^[24] or harm.^[17] As Mr. Justice J.D. Denis Pelletier has observed, "requiring proof of prejudice as a condition of obtaining a remedy for infringement of a constitutionally protected right undermines the constitutional protection".^[25] While actual prejudice need not be demonstrated, the applicant must show that the interpretation errors were consequential (i.e., they must be real, significant, serious, substantial,^[17] or non-trivial), material to the decision maker's findings, and related to the applicant's ability to answer questions or present the refugee claim.^[26]

Where a panel of the Board makes a general finding that a claimant lacked credibility, then reviewing bodies have had little difficulty concluding that pervasive interpretation challenges were material.^[27] However, the fact that an interpreter added some words that were not said, mistranslated some of the Board's questions, and frequently intermingled English words in interpreting to the claimant in another language does not necessarily mean that a decision should be set aside if the portions of the hearing where interpretation was problematic are unrelated to the negative credibility determinations: *Sherpa v. Canada*.^[28]

An interpreter can be asked to translate short documents

The Board's Interpreter Handbook informs the Board's contractors that "in some cases, [you will be asked to translate] short documents submitted before, during, or after IRB proceedings."^[19] The Interpreter Handbook includes the following details on the scope of what is called "sight translation" that the Board may expect of an interpreter: "As an IRB interpreter, you may be asked to translate aloud a variety of documents for the tribunal. The most common of these documents are identification documents such as passports, drivers' licenses, national identification cards and birth certificates. You may also be asked to sight translate handwritten personal letters, newspaper articles, police or medical reports and other legal documents. In order to give as accurate and precise a translation as possible, and depending on the size and complexity of the document, it is better to request a brief amount of time to review the document ahead of time in order to prepare a rough written translation and/or solve some translation problems beforehand."^[19] For more about translation of documents, see RPD Rule 32: Canadian Refugee Procedure/Documents#RPD Rule 32 - Language of Documents⁶.

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_32_-_Language_of_Documents

In what ways is an interpreter expected to provide cultural, not just linguistic, interpretation?

The Board's Interpreter Handbook has a section on "What is the role of an interpreter at the IRB?" It states that an interpreter is to "provide a clear channel of communication between decision-makers and the individuals appearing before the IRB with culturally, linguistically diverse backgrounds." As such, through these statements the Board is indicating that issues of cultural difference are likely to arise in some cases and that an interpreter's role is to provide a clear channel of communication in order to overcome both linguistic and cultural differences. What are examples of how an interpreter should do this? The most straightforward examples of when an interpreter is expected to do this are where it overlaps with their role to interpret a claimant's utterances. In the words of the academics Jennifer Bond and David Wiseman, "it is essential that interpretation ... take into account nuances of social and cultural idiom and contextual background."^[29] Other examples of the interpreter's role in overcoming cultural difference go beyond the strictly linguistic. For example, the IRB's Handbook states that an interpreter may use a calendar to convert dates from other countries, something expected where the other country uses a different calendar system.^[19] Finally, as discussed in the following section of this page, where an evident misunderstanding has arisen between a panel and/or one or more parties as a result of differing cultural inferences, the interpreter may properly note this for the record.

That said, the interpreter's role in providing cultural interpretation is properly quite limited. The terms of their contract with the Board provide that interpreters are not to provide any "explanation":

INTERPRETER SERVICE CONTRACTORS shall take all reasonable care to faithfully and accurately interpret or translate what is stated in the source language into the target language, having regard primarily to meaning and secondarily to style, without any paraphrasing, embellishment, omission, explanation, or expression of opinion, using the same person as in the source language and the closest natural equivalent of the source language. [emphasis added]^[30]

Some commentators have called for Board interpreters to take on more of this cultural interpretation role. For example, Barsky provides examples of cases where potential pitfalls in the refugee's claim were 'saved' when an interpreter offered a cultural explanation, such as a comment on the relative cost of items, different concepts of time, or the different meaning of words in different cultures.^[31] Generally, it would appear that, where an interpreter comments on such issues, they are going beyond their appropriate role and treading into prohibited "explanation" or the "expression of opinion". The reason to be cautious with allowing interpreters to take on a cultural authority role is 1) that it risks treading onto the role of counsel, or the Member, and their respective choices when making, or investigating, a case; 2) such interventions could be perceived as favouring one party or another in a proceeding, thereby compromising the neutral role of the interpreter; and 3) as the academic Ahmad observes, "allowing interpreters to act as cultural brokers risks essentializing the [claimant's] cultural background, and this is further complicated because their information is influenced by their own subjective experiences."^[32] Interpreters are evaluated by the Board for their linguistic proficiency, not their cultural or country conditions expertise, and they should not necessarily be accepted as experts on such. Specifically, the IRB accreditation process is comprised of three tests (a hearing simulation, a sight translation, and an official language

test); candidates must get a mark of 70% on all tests to be successful.^[33] Furthermore, the Board's Interpreter Handbook notes that in "exceptional circumstances" where the claimant speaks a very rare language or dialect, non-accredited interpreters may be used.^[34]

When is an interpreter expected to speak out, ask a question, or point some matter out to the Member?

The Board's Interpreter Handbook has a section on the role of an interpreter at the IRB. It notes that "in addition to overcoming the barrier of language between IRB decision-makers and IRB clients, the interpreter plays a key role in helping the IRB perform its core mandate: making well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law. As such, through these comments the Board is signalling that the role of the interpreter extends to playing a role in ensuring that proceedings are fair and that decisions are well-reasoned. The starting-point is described by Acton as "the expectation that interpreters will primarily interpret the meaning of one language to another, imparting as little personal intervention on the interpreted meaning as possible. However, recognizing that interpretation is not a straightforward process, if interpreters must step outside this primary role, they should make it clear where their subjectivity begins."^[35]

The appropriate scope of this role can be illustrated or informed by industry codes of conduct about the proper role of interpreters. For example, the *Chartered Institute of Linguists*, an international organization that offers interpreter accreditation and professional development, has a Code of Conduct that sets clear standards for member interpreters. It notes that interpreters are permitted to intervene to ask for clarifications; point out misunderstandings, including cultural inferences; and signal conditions that may impair interpretation, such as inadequate breaks or seating arrangements.^[36] The following provides some comment on these tasks:

- Ask for clarification: As a best practice (even if not a legal requirement) an interpreter should ask a speaker for clarification or reformulation if a question is overly complicated.^[33] In doing so, the interpreter should put on the record in both languages what they are doing and ask for permission from the Member, if relevant.
- Point out misunderstandings, including cultural inferences: For example, where an evident misunderstanding has arisen between a panel and/or one or more parties, the interpreter may properly observe and note this.
- Signal conditions that may impair interpretation, such as inadequate breaks or seating arrangements.
- Make corrections: The IRB Interpreter Handbook advises interpreters to correct themselves immediately if they realize that they have made a mistake or if a mistake is pointed out.^[19]

To what extent is an interpreter expected to reflect the tone, register, and demeanour of the person testifying?

The Board Interpreter Handbook instructs interpreters to "try to use the same tone and level of language as the person speaking."^[34] Robert Gibb and Anthony Good state that this can be a complex task, as a competent interpreter is required to balance the obligation to translate an applicant's answers honestly, while exercising independent judgment on a

range of matters, including "how to negotiate different registers of speech without potentially damaging the perceived credibility of an applicant's ... narrative" (register being the level of formality in language, something usually determined by the context in which it is spoken or written).^[37]

Interpreters are under a duty of confidentiality

Interpreters are under a duty of confidentiality. It is a good practice to note this for the benefit of the claimant. This is emphasized in the contract that each interpreter signs before commencing work at the Board, which states "[Interpreters] shall keep confidential all information gained in the course of providing services to the [Board]. More specifically, [Interpreters] shall not, either within or outside the [Board] premises, discuss, report on, or give an opinion concerning any matter for which they provide services to the [Board]."^[30] The UNHCR Handbook emphasizes the importance of confidentiality in creating an atmosphere of trust in the refugee status determination process: "It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed."^[38] For this reason, it may be advisable to underscore to the claimant that the proceedings are confidential.

Interpreters are not required to perform clerical duties

It used to be the case that in the Refugee Status Advisory Committee process, which preceded the establishment of the Immigration and Refugee Board, that interpreters were classified at a low clerical level within the civil service structure and that they were required to perform clerical duties in addition to their interpretation functions. The report of Rabbi Plaut that preceded the founding of the IRB was sharply critical of this: "It is not surprising that qualified interpreters are not attracted to this position with its low rate of pay and the unskilled clerical duties which must be performed as part of their function", he wrote.^[39] He recommended that this be reformed in order to improve the quality of interpretation in the refugee process, something which has been done.

19.3.4 Who can interpret?

Does an interpreter need to be accredited by the Board?

The IRB Interpreters Handbook states: "Non-accredited interpreters may be retained in very exceptional circumstances and only where it is necessary to safeguard the fundamental rights of the subject of the proceedings. This may happen in cases where the individual appearing before the IRB only speaks a very rare language or dialect".^[19]

Requests for an interpreter who is not from a particular community or who is of a particular gender

The Board's gender guidelines quote with approval a paper that states that decision-makers should be sensitive to the fact that "if a claimant's culture dictates that she should suffer

battering silently, the use of an interpreter from her community may also intimidate her.”^[40] Furthermore, the *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB* state that the Board has a broad discretion to tailor procedures to meet the particular needs of a vulnerable person, and, where appropriate and permitted by law, the IRB may accommodate a person's vulnerability by various means, including by providing a panel and interpreter of a particular gender.^[41]

Such requests should be made at the earliest available opportunity. The IRB Interpreter Handbook notes that “Interpreters are scheduled on an on-call basis and may be booked for a hearing up to three weeks in advance.”^[34] It is a best practice to make any specific requests for the interpreter prior to this point.

The Board is bound by the *Canadian Human Rights Act*. This act prohibits discrimination on the basis of “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.”^[42] As such, the Board should not make distinctions on these grounds (for example, entertaining a request from a claimant not to have an interpreter who is “from” a particular country) without good reason. That said, research on the role of interpreters in legal proceedings discusses the way that characteristics such as sex, age, ethnic identity, and appearance can both generate or diminish trust, so such “protected grounds” may be important occupational requirements in the refugee context.^[43] James C. Hathaway notes, for example, that “claimants may have difficulty trusting an interpreter who comes from their own country because, rationally or irrationally, the interpreter may be suspected of being associated with the alleged agent of persecution.”^[44]

Conflicts of interest for interpreters

The Board's *Standard Interpretation Service Contractor Clauses and Conditions* includes a detailed section regarding potential conflicts of interest. It requires that “INTERPRETER SERVICE CONTRACTORS shall avoid, and where it arises, shall, without delay, disclose to the case management officer, clerk or BOARD official directing the proceeding, as the case may be, any real, potential, or apparent conflict of interest in relation to any matter for which they provide services to the BOARD.”^[30]

A claimant is entitled to an interpreter which provides linguistic understanding, not their language or dialect of choice

The requirement to provide an interpreter who provides linguistic understanding cannot be relaxed when there is difficulty in finding an interpreter who can interpret in the language that the applicant understands.^[45] That said, a claimant is entitled to an interpreter which provides linguistic understanding, not their language or dialect of choice. In *Bykov v. Canada*, the IRB had been unable to provide a Tchouvache interpreter, but had supplied a Russian interpreter. Mr. Bykov understood Russian and had had ten years of Russian education. Mr. Justice Teitelbaum held that the applicant understood Russian well enough for the purposes of the hearing and that the IRB was not obligated “to provide an interpreter with the exact dialect of the applicant.”^[46]

Furthermore, the Board must be alert to circumstances where an interpreter speaks a different dialect of a language and this will impede linguistic understanding. Rule 19(1) instructs a claimant to provide notice of the language and dialect that they require interpretation in. At times, issues have arisen about just what a dialect is. For example, is the difference between Arabic as spoken in Libya and Arabic as spoken in Iraq a matter of dialect or accent? The RAD has noted that, where questions of this nature arise, it is a best practice for the panel to confirm with the interpreter whether they have provided interpretation services for someone who speaks the dialect in question in the past.^[47] That said, the mere fact that the claimant and interpreter are from different localities and have different accents does not mean that the interpretation is not sufficiently precise and competent to convey the claimant's words on the material points of concern; in *Sherpa v. Canada* the interpreter acknowledged during the hearing that the claimant was having difficulty understanding her because they were from different localities and had different accents, but the court nonetheless accepted that the interpretation provided met the applicable standards.^[28]

See also: Canadian Refugee Procedure/Interpreters#Legal standard for interpretation⁷.

Best practices regarding locating the interpreter with the claimant during videoconference hearings

Interpreters may be present in person, on the phone, or may appear at a hearing by videoconference.^[48] The Board policy is that in hearings that take place via videoconferencing from an IRB office, "as a usual practice, the interpreter is located in the hearing room with the claimant". This practice emerged from a recommendation included in an independent review the Board commissioned of the use of videoconferencing in refugee proceedings, which recommended:

Make it the usual practice to locate the interpreters in the claimant's room with the claimant. Exceptions could be made where an interpreter in the required language is not available close to the location of the claimant's room. It is apparent from the survey evidence that it is not impossible to have reasonable interpretation services with the interpreter in the member's room, but the advantages in terms of putting claimants at ease, and facilitating the efficiency of the translation are sufficiently clear that having the interpreters with the claimant as a regular rule is clearly desirable.^[49]

Board management accepted this response, while reserving for itself the discretion to depart from this practice, as follows: "The Board will adopt this recommendation and ensure that, as a usual practice, the interpreter is located in the hearing room with the claimant. However, as the choice to use videoconferencing always requires a balancing of fairness and efficiency, the Board retains a discretion to depart from the norm of locating the interpreter with the claimant when it is not practical to do so (for example, for reasons of interpreter availability or cost)."^[50]

⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Interpreters#Legal_standard_for_interpretation

19.3.5 What should be done if there are concerns about the quality or accuracy of interpretation?

Members should intervene if a witness and interpreter are not working together effectively

Where interpreters are providing consecutive interpretation, an altered manner of speaking is usually required when working with them, as one counsel describes in a report on point:

Speaking through an interpreter is not intuitive, so I think it's something I've picked up. It's being able to speak in a way that can be interpreted, and the big thing is stopping every, like I'm doing now, stopping every two sentences.^[51]

Members should inquire if they have suspicions that the interpreter is not interpreting accurately; the following Citizenship and Immigration Canada recommendation to officers conducting interviews for the *Overseas Selection and Processing of Convention Refugees Abroad Class* would apply equally to IRB Members: "If at any time the officer is not satisfied that an interpreter is translating accurately, the officer should verify their suspicion by rephrasing the answers that have raised doubts, and ask the applicant to confirm that the officer has understood correctly."^[52]

Members should also ensure that all conversations between the claimant and the interpreter are interpreted back into the language of the proceeding, French or English. At times an interpreter will converse with a claimant in order to ask clarifying questions. The fact that an interpreter is doing this should be put on the record and the content of the conversations should be interpreted. The Board should insist that this be done. Where it is not, it is an error, as noted by the RAD with this example from one case: "In his affidavit Mr. XXXX further states that '*there were many conversations between Mr. XXXX (the appellant) and Mr. XXXX (the interpreter at the first hearing) that were not translated back to English.*' This evidence further establishes that the interpretation provided for the appellant at his first RPD hearing was flawed."^[53] They should be done, equally, where it is a witness or claimant who is initiating such conversations. In a Masters Thesis on the topic of interpretation in refugee hearings, one interviewee notes that "good interpreters will let the lawyers and Board Members know if the client is trying to have side conversations with an interpreter in a hearing".^[33]

It is a best practice for the Board to record hearings

In the case of *Toussaint v. Canada* the refugee claimant's testimony was not contained in the transcript of the hearing presumably because the recording equipment was not turned on after an early off-the-record discussion. The missing testimony representing most of the hearing. The Federal Court noted that a failure by the Board to produce a transcript of the evidence taken before it may constitute a denial of natural justice if a reviewing court is unable to properly dispose of the issues raised. This is particularly applicable where there is a subsequent challenge to the interpretation provided. For example, in one case the RAD remitted a matter where interpretation issues were raised on appeal based on the following reasoning: "In the case at hand, the RAD is unable to fully assess the issue of interpretation since a good portion of the principal Appellant's testimony, whose claim it is that he did not understand the interpreters at the hearing, is missing from the recording of the hearing. The RAD is unable to fully consider the RPD's observation that the principal

Appellant freely answered questions from both interpreters and it did not appear that he did not understand since the RPD's questioning of the principal Appellant is missing from the recording of the hearing."^[54] See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The Board is not obliged to record hearings, but a lack of such a recording may constitute grounds for setting aside the decision⁸.

Parties are obliged to raise concerns about interpretation issues at the earliest reasonable opportunity

Parties are obliged to raise any issues about the quality of interpretation at the earliest reasonable opportunity.^[55] Failure to do so results in a waiver of the right to object to the interpretation on judicial review, and by analogy also on appeal to the RAD.^[56] As the Federal Court stated in *Singh v. Canada* regarding a failure to object to interpretation issues during a hearing, "waiver of a right to object can be inferred from a party's conduct. Where a party, with knowledge of his or her rights, fails to object at the earliest opportunity, that will be construed as a waiver."^[57] This obligation to raise interpretation issues at the earliest reasonable opportunity is usually reinforced by the Member's instructions to the claimant at the beginning of the hearing, wherein it is customary for a panel of the Board to communicate to a claimant that they have an obligation to stop the proceeding and alert the RPD panel and their counsel if they either did not understand the interpreter's statements or had reason to believe that the interpretation was in some way incorrect.^[58]

The fact that a party must raise issues about the quality of interpretation at the earliest reasonable opportunity does not necessarily mean that they need to be raised immediately during the hearing. Interpretation issues may be raised after the fact where the claimant could not reasonably have known of the interpretation issue until afterwards. For example, RAD Member Richard Jackson noted that in one case before him "the Appellant does not speak English well, while his counsel before the RPD did not speak Tamil, and therefore neither could reasonably be expected to have been aware of the interpretation issues, until subsequent to the rejection of his refugee claim, and the RAD therefore finds that the Appellant has not waived his right to object to the interpretation on appeal."^[56] Whether or not such issues should be raised during the hearing will be dependent on the circumstances, including:

- the language(s) that the claimant speaks;^[59]
- whether the claimant was asked to acknowledge at the start of the hearing that they understood the interpreter;^[60]
- whether the claimant was represented by counsel or unrepresented;^[61]
- the language(s) that counsel speaks;
- whether the claimant had an observer present at the hearing who was fluent in both languages and able to assess the quality of interpretation;^[62]
- whether the claimant had difficulty understanding the interpreter during the hearing;^[63] and
- whether the issue only became apparent subsequent to the hearing upon an audit or closer examination of the proceedings.

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_Board_is_not_obliged_to_record_hearings,_but_a_lack_of_such_a_recording_may_constitute_grounds_for_setting_aside_the_decision

An example of how these factors were applied was in *Dhaliwal v. Canada*, a case where counsel did speak the language in question, and had raised issues about several small interpretation issues that were addressed on the spot, the failure to raise other issues at the hearing was held to constitute a waiver of the right to object to the quality of interpretation at the hearing:

I agree with counsel for the Respondent that Mr. Dhaliwal waived his right to object to the quality of interpretation at his hearing. ... The Applicant was represented by a Punjabi speaking counsel, who took no issue with the calibre of interpretation at the IAD hearing. During Mr. Dhaliwal's five hour IAD hearing, counsel raised concerns six times about possible misinterpretations or words that may not have been clear or heard. Each concern was addressed by the interpreter or the IAD member, who asked the Applicant on multiple occasions to slow down, to repeat inaudible answers and to answer in segments to allow for accurate and complete interpretation. The member took every step to ensure that the interpretation was accurate, and counsel appeared to be satisfied that her concerns had been addressed. Never did she complain about the quality of interpretation at the hearing, in her lengthy written submissions to the IAD after the hearing or in her reply.^[64]

As explained by the Federal Court, "there is a powerful argument in favour of [the requirement that claimants raise concerns with interpretation at the first opportunity] arising from judicial economy. If applicants are permitted to obtain judicial review of adverse decisions by remaining silent in the face of known problems of interpretation, they will remain silent. This will result in a duplication of hearings. It seems a better policy to provide an incentive to make the original hearing as fair as possible and to avoid repetitious proceedings. Applicants should be required to complain at the first opportunity when it is reasonable to expect them to do so."^[65]

An interpreter may discuss and explain their interpretation during the hearing in response to questions from the Member or challenges from a party

It is within the proper scope of an interpreter's role during the proceeding to discuss or explain their interpretation when the Member provides permission to do so. The Board Interpreter Handbook states that "if your interpretation is challenged by counsel or by the person who is the subject of the proceedings, you should be able to explain your choice of words if requested."^[19] However, absent a specific invitation from the Member to explain their interpretation, the interpreter should refrain from doing so, as per the terms of their contract which prohibit "explanation":

INTERPRETER SERVICE CONTRACTORS shall take all reasonable care to faithfully and accurately interpret or translate what is stated in the source language into the target language, having regard primarily to meaning and secondarily to style, without any paraphrasing, embellishment, omission, explanation, or expression of opinion, using the same person as in the source language and the closest natural equivalent of the source language. [emphasis added]^[30]

Members may provide a claimant with the opportunity to make submissions on interpretation issues in post-hearing submissions

In some cases, a claimant or counsel will note at the hearing that there were some interpretation issues. A good practice in such circumstances was exemplified in *Khatun v. Canada* where the Member indicated that counsel could obtain a recording of the hearing and provide evidence of any translation issues in post-hearing submissions. None were provided. As such, where the claimant subsequently attempted to make arguments on judicial review about inadequate interpretation, the argument was dismissed on the basis that it should have been made before the original panel.^[66]

Post-hearing evidence is expected to demonstrate that interpretation was inadequate

There will be cases where the interpretation provided does not meet the legal standard required. Indeed, when the Board first introduced an accreditation test in 1991, 40% of interpreters who were already working for the IRB failed.^[67] Evidence used to demonstrate that interpretation was inadequate will usually take the following form where it is submitted post-hearing:

- A statement from a certified interpreter: When a claimant wishes to demonstrate that interpretation has not met the above standard, it is usual for them to go to a certified interpreter to obtain a transcript of the hearing. Interpreters that have been certified by the IRB and that have provided interpretation services in past RPD hearings will, of course, meet this standard.^[68] In contrast, where a claimant submits a statement from someone who is not a certified interpreter but merely suggests that they know both languages, less weight should be accorded to the statement. For example, Member Leonard Favreau commented in one case that "the RAD finds that it can give little weight to this affidavit in establishing that the interpretation was flawed. Although the affiant claims to be a "professional interpreter" the RAD notes that he has not provided any evidence that he has been certified by any organization as an interpreter."^[69]
- A transcript which highlights errors: The certified interpreter will usually then set out in an affidavit any errors that they identify in the transcript that can be attributed to interpretation problems caused by the interpreter at the hearing. For example, this was the type of evidence placed before the RAD in *X (Re)*, 2017 CanLII 143144 (CA IRB), a decision concerning the (in)adequacy of interpretation at the Refugee Protection Division.^[70] In contrast, the mere assertion of errors without this type of side-by-side comparison has been held to be insufficient evidence to establish that the above standard was not met, e.g. Member Leonard Favreau of the RAD commented in one case: "Although the Appellant has submitted that it was flawed interpretation that resulted in the RPD attributing statements to him that he did not make, he has not submitted adequate evidence to establish that there actually were any interpretation errors. In light of the allegation of flawed interpretation, it is reasonable to expect that the Appellant could provide a side by side comparison of the interpretation conducted by the board certified interpreter and the Appellant's certified interpreter, to demonstrate the specific interpretation errors that were made, rather than just relying on his own unsupported declaration."^[71]

A party can also request that the Board's interpreter unit conduct an audit. The Board will generally do spot audits of a portion of the hearing. The way the conclusions of such audits are often framed is typified by the following excerpt from a RAD decision: "according to the IRB audit, 'Problems and discrepancies were not serious in general; however some serious inaccuracies occurred.'" The IRB audit also noted "Some of the (in)-accuracies resulted in creating confusion on both sides."^[72] Where the Board orders such an audit, it must disclose it to the parties for comment, as it would with any other evidence it receives and wishes to place on the record: *Vakulenko v. Canada*.^[73]

Evidence tainted by inadequate or faulty interpretation should be set aside

If the evidence has been tainted by inadequate or faulty interpretation, then it should be set aside and should not be placed on the record.^[74] However, where a claimant experienced challenges understanding questions without an interpreter, and subsequently switched to using an interpreter, this does not mean that all of the earlier testimony need be set aside.^[75] If there is an objection to the interpretation of a particular question, the Board should clearly explain whether the testimony is being set aside or relied upon, and how.^[76]

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20 Designated Representatives (RPD Rule 20)

The RPD Rules regarding the appointment of representatives for minors and for those who are unable to appreciate the nature of their proceedings are of significant and enduring importance to proceedings before the Refugee Protection Division. Globally, children below 18 years of age constitute about half of the world's refugee population.^[1] Most children who file a refugee claim in Canada have a familial representative appointed for them for their proceedings before the IRB. A smaller number of claimants, about 300 per year,^[2] or 0.9% of all claimants,^[3] are unaccompanied.

20.1 IRPA s. 167(2): Board's responsibility to designate a representative

Subsection 167(2) of the IRPA states:

Representation

167(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

20.1.1 The Board must designate a representative for minors and incompetent persons

The categories of persons who the Board must designate a representative for are minors and incompetent persons, as noted in the Board's public commentary on the analogous provision in the Immigration Division Rules:

A representative must be designated for any person who is the subject of an admissibility hearing or a detention review if this person is under the age of 18 years (a "minor") or is unable to appreciate the nature of the proceedings (an "incompetent person") (*Immigration and Refugee Protection Act*, subsection 167(2)).^[4]

The Board's duty to designate a representative for minors reflects Canada's international law obligations. The IRPA states that "this Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory" (IRPA s. 3). The *Convention on the Rights of the Child* (CRC) provides, in Article 22(1), that:

State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law procedures, shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian

assistance in the enjoyment of applicable rights set forth in the Convention and in other international human rights or humanitarian instruments to which the said States are Parties.^[5]

Article 22 of the CRC obliges states to ‘take appropriate measures’ to ensure the child receives ‘appropriate protection and humanitarian assistance’, thus imposing a positive obligation on the state to ensure that adequate procedures are put in place to protect the child as appropriate.^[6] The UNHCR also issued the *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997) which provide that:

A guardian or adviser should be appointed as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of child-caring, so as to ensure that the interests of the child are safeguarded and that his/her needs are appropriately met.^[7]

See also: Canadian Refugee Procedure/The Board's inquisitorial mandate#The Board must ensure that certain claimants are assisted to make their cases¹.

20.1.2 How the provisions regarding designated representatives interact with the Board guidelines on vulnerable persons

The Board also has a *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada*. A designated representative will only be appointed if the person is either under eighteen years of age or unable to appreciate the nature of the proceedings, a standard which is considerably narrower than the criteria for recognition as a vulnerable person, which usually occurs where a claimant’s ability to present their case is severely impaired.^[8] In a number of cases, the Board has refused to appoint a designated representative but has gone on to recognize that the person was vulnerable and allowed procedural accommodations.^[9] As the academic Janet Cleveland observes, if an adult’s ability to understand the proceedings is so impaired as to warrant the appointment of a designated representative, she is necessarily also severely impaired in her ability to present her case and should automatically be considered vulnerable.^[10]

20.1.3 The Board must not delay a proceeding until a minor has turned 18 as an alternative to designating a representative

The Federal Court of Appeal in *Stumpf v. Canada* stated that the obligation to designate a representative for a minor arises at the earliest point at which the Board becomes aware of the facts that entail such designation.^[11] The following public commentary from the IRB on the previous version of the rules continues to apply: “The Division will not delay a proceeding until the minor has reached 18 merely to avoid having to designate a representative.”^[12] In fact, pursuant to the *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*, certain categories of children such as unaccompanied children are to be given given scheduling and processing priority.^[13] Furthermore, given that a designated representative is to assist a minor claimant with preparing their Basis of Claim form, gathering evidence, and instructing counsel (and not just at the hearing itself) a minor may

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#The_Board_must_ensure_that_certain_claimants_are_assisted_to_make_their_cases

be prejudiced where they did not have such assistance in preparing their claim and the lack of such assistance may properly vitiate any proceedings before the RPD, as was the case in *Duale v. Canada*.^[14]

The absolute nature of the requirement to appoint a designated representative for minors in the Canadian system may be contrasted with the European approach which allows Member States to 'refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative'.^[15] This European practice has been severely criticized by academic commentators.^[16]

20.2 RPD Rule 20(1)-(3) - Duty of counsel or officer to notify the Division of relevant circumstances

The text of the relevant rule reads:

Designated Representatives

Duty of counsel or officer to notify

20 (1) If counsel for a party or if an officer believes that the Division should designate a representative for the claimant or protected person because the claimant or protected person is under 18 years of age or is unable to appreciate the nature of the proceedings, counsel or the officer must without delay notify the Division in writing.

Exception

(2) Subrule (1) does not apply in the case of a claimant under 18 years of age whose claim is joined with the claim of their parent or legal guardian if the parent or legal guardian is 18 years of age or older.

Content of notice

(3) The notice must include the following information:

- (a) whether counsel or the officer is aware of a person in Canada who meets the requirements to be designated as a representative and, if so, the person's contact information;
- (b) a copy of any available supporting documents; and
- (c) the reasons why counsel or the officer believes that a representative should be designated.

20.2.1 Rule 20(3)(a): The notice from counsel or the officer should indicate whether they are aware of a person in Canada who meets the requirements to be designated as a representative

As per Rule 20(1), if counsel for a party or if an officer believes that the Division should designate a representative for the claimant or protected person because the claimant or protected person is under 18 years of age or is unable to appreciate the nature of the proceedings, counsel or the officer must without delay notify the Division in writing. As per Rule 20(3)(a), the notice must indicate whether counsel or the officer is aware of a person in Canada who meets the requirements to be designated as a representative and, if so, the person's contact information. Rule 20(3)(b) also indicates that the notice should include a copy of any available supporting documents. In practice, these two requirements will often work together in that a notice from counsel advising that a DR is appropriate will often include a medical report which comments on who may be an appropriate representative.

This was illustrated in *Singh v Canada*, a decision from the Immigration Appeal Division interpreting its similar rule, wherein the panel wrote:

In his letter to the Immigration Appeal Division (the “IAD”), dated October 30, 2012 the appellant’s counsel advised that the appellant is unable to appreciate the nature of proceedings of his appeal due to his medical condition. The appellant’s counsel requested the appellant’s sister Mandeep Kaur be designated as his representative.... In considering to appoint the appellant’s sister Mandeep Kaur as his representative I have taken into account the conclusion in the psychological assessment report dated October 4, 2012. The report was based on the interviews conducted by the clinical psychologist, Dr. Lydia Kwa with the appellant and his immediate family members. In her report, Dr. Kwa stated as following: ”Given Gurpreet’s cognitive limits and his anxiety, he is not able to represent himself competently. He would be best served by having a member of his family assume responsibility as legal representative to act in his best interests....His sister Mandeep seems to be a good choice at this time to assume that role as his legal representative.”^[17]

20.2.2 Rule 20(3)(b): The notice from counsel or the officer should include a copy of any available supporting documents

As noted in the Board's public commentary on the previous version of the rules, it is expected that counsel will provide evidence of the claimant's age or mental condition: ”When notifying the Division, counsel should provide copies of all available supporting documents such as birth certificates and medical or psychological reports”.^[12]

20.2.3 Can a designated representative from one province act as a representative in a proceeding or for an individual in another province?

Yes. This is emphasised by the notice provision in Rule 20(3) which instructs the person providing the notice to indicate if they are aware of any ”person *in Canada* who meets the requirements to be designated as a representative [*emphasis added*]”. Generally speaking, a DR is not acting as a lawyer, so even where a designated representative is a lawyer regulated by a provincial or territorial law society, the rules on such counsel acting inter-provincially should not apply, though this may depend on the exact way in which the provisions, including what the practice of law is and when inter-provincial practice is allowed, are framed in the relevant statutes.

20.2.4 Justification for the requirement that counsel or an officer notify the Board of any perceived need for a DR

Rule 20(1) provides that the referring officer who does the intake of the refugee claim and any counsel for the claimant (or protected person, as the case may be) are to advise the IRB in writing ”without delay” if they believe that a claimant requires an independent designated representative. The rationale for this is manifold, including:

- The time inherent in appointing an independent DR and the importance of avoiding adjournments: Where an independent designated representative will need to be appointed

by the Board, this will take time and may require a postponement of a proceeding. Appointing a representative at the earliest opportunity based on notice from an officer or counsel obviates the need for such postponements. Such scheduling realities have commonly been noted by panels of the Board, such as with the following comment from a panel of the Immigration Appeal Division when interpreting its analogous rule: "It was clear from the outset that should the panel's opinion be that a designated representative was required, and that the appellant's sister was not an appropriate candidate, the matter would have to be adjourned to a future date pending appointment of a new designated representative."^[18]

- The value of an early appointment given the role of the designated representative in preparing for the hearing: Appointing a representative at the earliest stage allows them to be involved in case preparation. This is commonly emphasized by panels of the Board, e.g. "The panel prefers to proceed with caution by having a designated representative involved and available to play whatever role is required in *preparing for* and participating at the hearing. [*emphasis added*]"^[19] The instructions to designated representatives in the Board's guide for DRs instructs them that "You must meet the minor or the person who is unable to appreciate the nature of the proceedings as early as possible in the process to explain your role and responsibilities and to begin to assist them with their case."^[20]
- The fact that needs may only become apparent over time, and thus may not be evident to the Board: There will be cases where the need for a designated representative only becomes apparent over time. This was well illustrated by a decision of Immigration Appeal Division Member D. Collison wherein the panel noted that "Appellant's counsel also explained that it was only in meeting with the appellant on a number of occasions over an extended period of time, mostly after the March 2008 admissibility hearing, that it became apparent she did not understand the nature of the proceedings and required a designated representative."^[21] In this way, placing the duty on counsel to notify the Board avoids a situation where a DR is necessary but would not be appointed on the Board's own initiative because it is not immediately apparent on the face of a file or upon initially interacting with a claimant that such a representative is necessary.
- The fact that claimants may be reluctant to self-identify as having a disability: The *Convention on the Rights of Persons with Disabilities* committee has noted that migrants with disabilities 'are often hesitant to disclose their disabilities to authorities for fear of affecting their asylum applications'.^[22] Academic research suggests that asylum seekers will often resist identifying as persons with disabilities, with children less likely again than adults to volunteer information on impairments that are not immediately apparent.^[23] As such, this type of rule may promote greater disclosure of needs to the IRB to ensure that appropriate assistance is put in place.

20.2.5 Criticisms of automatically making a parent the designated representative for an accompanying minor claimant

UNICEF has been critical of the fact that Rule 20(2) automatically grants designated representative status to a parent or guardian without first consulting the child whose application is at stake. In this way, they argue that "Canada's immigration and refugee policy does not sufficiently provide for children's right to be heard."^[24] However, this presumption that a child's parent or guardian should be their designated representative in the refugee determination process is endorsed by the UNHCR Handbook: "A child – and for that matter, an

adolescent – not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor’s best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.”^[25]

20.3 RPD Rule 20(4) - Requirements for being designated

Requirements for being designated

- (4) To be designated as a representative, a person must
- (a) be 18 years of age or older;
 - (b) understand the nature of the proceedings;
 - (c) be willing and able to act in the best interests of the claimant or protected person; and
 - (d) not have interests that conflict with those of the claimant or protected person.

20.3.1 Criteria to consider when appointing a representative for a child

As per the Board's guidelines on *Child Refugee Claimants: Procedural and Evidentiary Issues*, when determining whether to designate a particular person as the representative for a child claimant, the Member shall determine whether the proposed DR satisfies all of the mandatory criteria in RPD Rule 20(4) and should also consider the linguistic and cultural background, age, gender and other personal characteristics of the proposed DR and that of the child claimant. As per the UNHCR *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997):

8.3 Not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child’s background and who would protect his/her interests. Access should also be given to a qualified legal representative.^[7]

20.3.2 Rule 20(4)(b): When will a proposed designated representative be found not to understand the nature of the proceedings?

It should be noted that this is a distinct test from that in Rule 20(5) which focuses on a claimant’s (or protected person’s) ability to appreciate the nature of the proceedings, whereas this rule focuses on whether the proposed person does in fact understand them. The tribunal must advise the designated representative of its role in the proceeding.^[26] The UN Committee on the Rights of the Child has commented on the obligations that representatives should have towards unaccompanied children, including knowledge of country conditions in the country of origin.^[27]

20.3.3 Rule 20(4)(c): When will a designated representative be found not to be willing and able to act in the best interests of the claimant or protected person?

As per Rule 20(4)(c), to be designated as a representative, a person must be willing and able to act in the best interests of the claimant or protected person. When has it been

found that a potential representative was not willing and able to act in the best interests of the claimant or protected person?

- When the claimant does not trust the proposed representative: Even if the proposed representative is willing to act in the best interests of the claimant or protected person, their ability to do so may be stymied where the claimant in question does not trust the proposed representative. This appeared to be the case in one matter before the Immigration Appeal Division, which observed that "There is evidence, from the appellant's side, that she has a very tense relationship with her family, particularly her sister [the proposed DR], and that she feels her sister does not have her best interests in mind." On this basis, the panel concluded that the proposed DR was not appropriate.^[28]
- When the proposed representative does not appreciate their role: In *Black v. Canada* the Court set aside a decision on the basis that the designated representative was not "able" to act in the represented individual's best interests because the representative did not fully appreciate the implications of her role as designated representative. That was a decision interpreting the analogous rule of the Immigration Appeal Division, which, like the RPD rules, requires that the person appointed must understand the nature of the proceedings and that they be "willing and able to act in the best interests of the person to be represented." In that case, "The [panel] asked the Applicant's mother to act as a designated representative. Even though she had no appreciation of the significance of this role or how to best represent the interests of the Applicant, she willingly stepped into the breach to help her son. The Applicant's mother was obviously appointed as an expedient. She just happened to be in the room to support her son and, being a mother, she naturally stepped forward." In that case, "The Applicant's mother insist[ed] in an affidavit filed in the[] proceedings that she was not informed of the duties of a designated representative. She also did not know that part of a designated representative's responsibility is to arrange for counsel. Nothing was explained to her at the hearing."^[29] The court concluded that "In my view, the ability to act in the Applicant's best interests requires more than a sympathetic and supportive relative, and the [Board] and counsel will need to satisfy themselves that anyone who does assume the role is appointed in a timely manner and has the necessary understanding to act in the Applicant's best interests."^[30] The court specifically noted the importance of the designated representative understanding their obligations with respect to obtaining counsel, having an appreciation for what evidence needs to be called, and the substantive issues and facts at issue in the case.
- When the proposed representative makes statements indicating that they are not prepared to act in the best interests of the claimant or protected person: For example, in *Urbekhashvili v. Canada*, the RAD held that the RPD correctly determined that the proposed representative, the claimant's father, did not understand the responsibilities of a DR and was not prepared to act in the best interests of the children, "as he was only willing to share evidence relating to his children's claim if his request to be a DR was accepted".^[31]

Separate considerations apply to terminating a designated representative once their behaviour indicates that they are not properly assuming their role, see: Canadian Refugee

Procedure/RPD Rule 20 - Designated Representatives#Circumstances in which a designated representative ceases to be appropriate^{2,3}^[32]

20.3.4 Rule 20(4)(d): When will a designated representative be found to have interests that conflict with those of the claimant or protected person?

As per Rule 20(4)(d), to be designated as a representative, the person must not have interests that conflict with those of the claimant or protected person. When have such conflicts been found?

- When the proposed representative will also act as a witness in the proceeding: In interpreting its analogous rule, the Immigration Appeal Division has held that where a proposed designated representative is to be called as a witness, this will conflict with their role as designated representative and lessen the weight which could be accorded their testimony as they would be present throughout the hearing in their role as designated representative and hear all of the testimony before testifying themselves: "Further, as Ms. Jangbahadur is expected to be called as a witness, her role, as the designated representative, who will be present throughout the appellant's testimony, could well lessen the weight the panel may be able to attribute to her own testimony."^[33] This is distinct from situations in which the DR provides testimony on behalf of the claimant but is not themselves an independent witness being called to testify about their direct personal knowledge of facts at issue.
- When the representative refrains from providing relevant evidence as a result of their personal interests or concerns: As an example, Refugee Appeal Division Member Rena Dhir presided over a case in which the Designated Representative did not disclose relevant information as a result of fears of disclosing details related to her immediate family: "the [DR] feared the Chinese authorities and feared for her own self and family if they came to know about her involvement in the appellant's refugee claim in Canada" and as a result "failed to provide information which may have addressed the RPD's credibility concerns and further substantiated the risk the appellant faces in China", such as by contacting the family members to ask that they provide evidence.^[34] In that case, the RAD concluded that "it is clear that because of the conflicts of the designated representative with the appellant's interest, she did not meet the 'mandatory criteria' and also did not fulfil all 'duties' that are required for a designated representative, such as acting in the best interests of the appellant."^[34]

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_20_-_Designated_Representatives#Circumstances_in_which_a_designated_representative_ceases_to_be_appropriate

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives#Circumstances_in_which_a_designated_representative_ceases_to_be_appropriate

20.4 RPD Rule 20(5) - Factors for determining whether a claimant or protected person is unable to appreciate the nature of the proceedings

Factors

- (5) When determining whether a claimant or protected person is unable to appreciate the nature of the proceedings, the Division must consider any relevant factors, including
- (a) whether the person can understand the reason for the proceeding and can instruct counsel;
 - (b) the person's statements and behaviour at the proceeding;
 - (c) expert evidence, if any, on the person's intellectual or physical faculties, age or mental condition; and
 - (d) whether the person has had a representative designated for a proceeding in another division of the Board.

20.4.1 Rule 20(5): The Division must consider any relevant factors, including those listed, but not all listed factors may be relevant to a given case

As per RPD Rule 20(5), when determining whether a claimant or protected person is unable to appreciate the nature of the proceedings, the Division must consider any relevant factors, including those listed. However, this does not imply that all of the factors listed in RPD Rule 20(5) will be pertinent to each case. In *Ryvina v. Canada*, for example, the court concluded that on the facts in that case "most of the matters discussed in Rule 20 have no application."^[35]

20.4.2 Rule 20(5)(a): Whether the person can understand the reason for the proceeding and can instruct counsel

The Board's public commentary on the analogous Immigration Division rule states that a person is unable to appreciate the nature of the proceedings vis-a-vis this criterion where "the person cannot understand the reason for the hearing or why it is important or cannot give meaningful instructions to counsel about his or her case."^[4]

20.4.3 Rule 20(5)(b): Assessing a person's statements and behaviour at the proceeding

When determining whether a claimant is unable to appreciate the nature of the proceedings, a panel of the Board is to consider the person's statements and behaviour at the proceeding. An example of this comes from the case *Ryvina v. Canada*, where the claimant was described as having difficulty answering simple questions and where the claimant indicated that as a result of her nervousness she was unable to answer questions related to the core of the claim, such as threats that she received in her country.^[36] In the circumstances, the court concluded that it was reasonable and fair that the Division had appointed the claimant's son to act as her representative.^[37] The Board's public commentary on the analogous Immigration Division rule states that "an opinion regarding competency may be based on the person's own admission [of incompetency]".^[4] Similarly, in *M. v. Canada*, the court stated that "it is obvious from the transcript that the claimant was not rational throughout the course of the hearing" and that it was "apparent that he was unable to give coherent testimony

about the issues raised by his claim for refugee status and protection". The court held that the Member "should have stopped the hearing at that point and considered alternative procedures to determine the claim".^[38]

20.4.4 Rule 20(5)(d): Whether the person has had a representative designated for a proceeding in another division of the Board

Whether the person has had a representative designated for a proceeding in another division of the Board is a factor that the Division must consider when determining whether a claimant or protected person is unable to appreciate the nature of the proceedings. That said, the fact that an individual has previously had a designated representative appointed for them by another Division does not mean that that designation will automatically continue before the RPD. See the following commentary on the RAD Rules: Canadian Refugee Procedure/RAD Rules Part 3 - Rules Applicable to All Appeals#Rule 23(7): Designation applies to all proceedings in the Refugee Appeal Division⁴.

20.5 RPD Rule 20(6) - What proceedings the designation applies to

Designation applies to all proceedings

(6) The designation of a representative for a person who is under 18 years of age or who is unable to appreciate the nature of the proceedings applies to all subsequent proceedings in the Division with respect to that person unless the Division orders otherwise.

20.5.1 What proceedings does the designation of the representative apply to?

As per Rule 20(6), the designation applies to all subsequent proceedings in the Division unless the Division orders otherwise. "Proceeding" is a defined term in the Rules, and it is defined as including a conference, an application, or a hearing (Rule 1). The Federal Court holds that the need for a designated representative applies to the entirety of the proceedings and not just the hearing itself.^[30] This allows the representative to, for example, retain and instruct counsel and to assist in gathering evidence pre-hearing (as detailed in Rule 20(10) below).

20.6 RPD Rule 20(7) - Ending a designation where a person reaches 18 years of age

End of designation - person reaches 18 years of age

(7) The designation of a representative for a person who is under 18 years of age ends when the person reaches 18 years of age unless that representative has also been designated because the person is unable to appreciate the nature of the proceedings.

⁴ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_3_-_Rules_Applicable_to_All_Appeals#Rule_23\(7\):_Designation_applies_to_all_proceedings_in_the_Refugee_Appeal_Division](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_3_-_Rules_Applicable_to_All_Appeals#Rule_23(7):_Designation_applies_to_all_proceedings_in_the_Refugee_Appeal_Division)

20.6.1 A designation ends automatically by operation of law when a person reaches 18 years of age and no explicit steps need be taken by the Board

The Board's public commentary on the analogous Immigration Division Rules states that "A designation is ended automatically by operation of law when the person who is the subject of the [proceeding] reaches 18 years of age."⁴

20.7 RPD Rule 20(8) - Termination of designation

Termination of designation

(8) The Division may terminate a designation if the Division is of the opinion that the representative is no longer required or suitable and may designate a new representative if required.

20.7.1 Circumstances in which a designated representative ceases to be appropriate

The Division may (but need not always) terminate a designation if the Division is of the opinion that the representative is no longer required or suitable. Situations where a representative is no longer suitable have included:

- When the representative does not carry out their obligations: The Board's *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* note that "There may be situations where the person who was designated to be the representative ceases to be an appropriate representative of the child. For example, the person may prove unwilling or unable to make themselves available for pre-hearing conferences. In these situations, the CRDD should remove the person as designated representative and designate another appropriate representative."¹³
- When the representative is not willing or able to full their responsibilities. See: Canadian Refugee Procedure/RPD Rule 20 - Designated Representatives#Rule 20(4)(c): When will a designated representative be found not to be willing and able to act in the best interests of the claimant or protected person?⁵

20.7.2 The Division may terminate a designation, but it is not always obliged to do so

Rule 20(8) provides that the Division *may* terminate a designation if the Division is of the opinion that the representative is no longer required or suitable. It does not require that such a designation be terminated, particularly where it is ambiguous whether or not such a representative is any longer required (as in a case where there is a factual dispute as to whether a claimant is a minor or not). The courts have encouraged panels of the Board to exercise their discretion when deciding whether or not to terminate a designation in a given case. For example, in *Kurija v. Canada* there was a factual dispute about whether the claimant was a minor or not: "At the hearing on May 11, 2012, counsel informed

⁵ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_20_-_Designated_Representatives#Rule_20\(4\)\(c\):_When_will_a_designated_representative_be_found_not_to_be_willing_and_able_to_act_in_the_best_interests_of_the_claimant_or_protected_person?](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_20_-_Designated_Representatives#Rule_20(4)(c):_When_will_a_designated_representative_be_found_not_to_be_willing_and_able_to_act_in_the_best_interests_of_the_claimant_or_protected_person?)

the Board member that Mr Kurija was under 18 and had difficulty understanding English (although an interpreter had not been requested). However, the Board member made a finding that Mr Kurija spoke adequate English and a finding that he was of age based on his passport documents and other evidence, and ordered the designated representative to leave the proceedings.^[39] The court concluded that this had been procedurally unfair, and in so doing encouraged panels of the Board to consider allowing a representative, who is already present at the hearing, to remain in such circumstances: "In this instance the Designated Representative was present and was in a position to assist the applicant and the Board. Rather than making an adverse credibility finding to the effect that the applicant had provided a false birth certificate, a finding which colours all of the Board's decision and which appears to be incorrect in light of the additional evidence, why should the Board not exercise its discretion liberally and permit the social worker to remain and assist the claimant?"^[40] In instances where a designated representative is no longer suitable, terminating the designation and appointing a new representative prior to the hearing may be sufficient to remedy any potential procedural unfairness.^[41]

20.8 RPD Rule 20(9) - What the panel must do before designating the person as a representative

Designation criteria

- (9) Before designating a person as a representative, the Division must
- (a) assess the person's ability to fulfil the responsibilities of a designated representative; and
 - (b) ensure that the person has been informed of the responsibilities of a designated representative.

20.8.1 Common categories of persons who are designated as representatives

The Board's public commentary on the analogous Immigration Division Rules states that "The member presiding at a proceeding will decide whether to designate a representative and who that representative will be. The member will usually, but not always, designate a parent, another relative, or legal guardian to be the representative, if that person meets the specified requirements."^[4] A trusted friend who appears capable of assisting and protecting the best interests of the claimant or protected person is also a common category of person to appoint. An individual is not barred from acting as a designated representative simply because she is also a refugee claimant.^[42] Should no representative be available or deemed suitable who is related to or otherwise known to the claimant, the RPD will select a representative using a regional list of lawyers and social services (or non-governmental) support agencies.

20.8.2 The Board will generally designate a representative prior to the outset of the hearing via a paper-based process

The normal processes in which a designated representative is appointed is a paper-based process. For a co-claimant, such as a parent, the Board will, as a matter of course, send a letter to the proposed representative naming them to the role and describing their duties as a representative. The Board's form letter states that the individual can "refuse to assume

this role if [they] contact the Refugee Protection Division within ten days of receiving the letter”.^[43] For an independent designated representative, the Board will send the potential representative a *Confirmation of Acceptance to Act as a Designated Representative* form. The proposed representative can then sign a declaration on the form that they are willing and able to fulfil the designated representative's responsibilities and that they understand the responsibilities of such a representative. A Member of the Board will then review the paperwork and designate the proposed representative by signing the Board's standard form for this purpose. The requirement in Rule 9(a) that the panel assess the person's ability to fulfil the responsibilities of a designated representative and ensure that the person has been informed of the responsibility of a designated representative prior to so designating the person can in this way be done on paper.

The Board stated in its commentary on the previous RPD Rules that, “generally, the member who presides at a proceeding designates the representative at the outset of the proceeding.” That commentary allowed that, “if required, any member of the Division may designate a representative before a proceeding begins”.^[12] That is no longer the usual process. The *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* state that a designated representative for an unaccompanied child should be appointed as soon as possible following the assignment of the panel to the claim. Even in cases where a child is accompanied, that should be done as soon as possible after the claim is referred to the Board: Canadian Refugee Procedure/Designated Representatives#The Board must not delay a proceeding until a minor has turned 18 as an alternative to designating a representative⁶. The *Chairperson Guideline 3* notes that the designation of a representative will usually occur at a pre-hearing conference, but it may be done earlier.^[13] That guideline dates from 1996 and has not been updated since, and that statement of the usual practice is arguably no longer current, as a paper-based designation process is the norm instead of it being done at a pre-hearing conference.

A question has at times arisen about whether a designated representative was appointed or not in a given case. Even where the appointment is not mentioned on the record or in the panel's reasons, the proposed representative will be taken to have assumed the role for their co-claimant child where they attend the hearing after having received one of the letters described above, as the court stated in *Plancher v. Canada*: “There is nothing in the file indicating that this letter was never received by the principal applicant and her counsel. Since no evidence is presented indicating the principal applicant’s refusal, I must conclude that she accepted to act as the minor applicant’s designated representative.”^[43]

20.8.3 The Rules do not require a designated representative to be appointed for an eligibility interview

RPD Rule 20(9) provides that it is the IRB that designates a person as a representative and it sets out what the Division must do prior to designating a representative. As such, under the RPD Rules a representative cannot be designated by an officer prior to a claim being referred to the Board since designating a representative is something that only the Board itself can do. This is consistent with policy statements from the Board, including in the

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives#The_Board_must_not_delay_a_proceeding_until_a_minor_has_turned_18_as_an_alternative_to_designating_a_representative

Chairperson's *Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues* which state that "a representative will be designated as soon as possible after the claim of an 'unaccompanied' minor is referred to the Division [emphasis added]."^[13] A separate question may arise about the reliability of statements made by minors or those who are incompetent to an officer at the border, but that will generally be a matter of the weight that should be ascribed to the statements in question.

When feedback was solicited by the Board as this rule was being drafted, several respondents made comments regarding the rules which pertain to designated representatives. One respondent indicated that they would prefer to see the rules amended so a representative can be designated by the officer at the eligibility interview rather than only the Division. The IRB stated that it agrees that a designated representative should be designated as early as possible in the process, but noted that the IRB is of the view that it lacks the jurisdiction to designate a representative prior to the referral of a claim, and that the officer lacks the authority to do so at the eligibility interview.^[44] As such, the rule was not changed as a result of that feedback during the comment period of these rules.

The RPD rules place a number of obligations on different actors in the refugee claim process, including the Minister, counsel for claimants, and in Rule 3, the officers who assess and refer claims. The Rules impose a number of obligations on officers prior to the referral of a claim, including specifying actions they must take (e.g. fixing a date for the hearing, Rule 3(1)), how the officer is to exercise their discretion when carrying out such actions (e.g. rules about what hearing date they must choose, Rule 3(2)), and questions they must ask a claimant (e.g. the claimant's preference of location, Rule 3(3)), and so it is unclear why the Board took the position that as a matter of jurisdiction the Board could not further qualify how an officer is to carry out such duties where a would-be claimant has a disability, is a minor, etc. Regardless, examining Rule 20 as drafted, the rule arguably does not impose such a duty. The RPD Rules do require the referring officer to inform the RPD whether the claimant may need a designated representative and to provide the contact information for any proposed designated representative (Rule 20(1) above), however they are clear in Rule 20(9) that it is the Division that must take steps prior to designating a person as a representative. It would thus be impossible for an officer to do so, and as such, the rules do not, in and of themselves, oblige a referring officer to designate a representative for a minor or other claimant at an eligibility interview. In short, as the court observed in *Stumpf v. Canada*, Section 167(2) of IRPA "imposes on the Board an obligation to designate a representative for any refugee claimant who meets the statutory criteria, and that the obligation arises at the earliest point at which the Board becomes aware of those facts. [emphasis added]."^[45]

In the case of unaccompanied minors, the Minister has argued that the appointment of a designated representative may be made shortly after the minor initiates a claim for refugee status, and the court has commented that such could potentially "remedy" an unaccompanied minor's initial lack of capacity.^[46]

IRCC has a related concept called a "guardian" which can be specified where a claim is being made, before it is being referred to the IRB. One can have a guardian at the stage where a claim is being made because they can't understand the proceedings or they are under 18 years of age. The types of guardians that IRCC envisages include family, friends of family, non-governmental organizations for child services, provincial child welfare authorities, and other organizations.^[47]

20.9 RPD Rule 20(10) - Responsibilities of the representative

Responsibilities of representative

- (10) The responsibilities of a designated representative include
- (a) deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel;
 - (b) making decisions regarding the claim or application or assisting the represented person in making those decisions;
 - (c) informing the represented person about the various stages and procedures in the processing of their case;
 - (d) assisting in gathering evidence to support the represented person's case and in providing evidence and, if necessary, being a witness at the hearing;
 - (e) protecting the interests of the represented person and putting forward the best possible case to the Division;
 - (f) informing and consulting the represented person to the extent possible when making decisions about the case; and
 - (g) filing and perfecting an appeal to the Refugee Appeal Division, if required.

20.9.1 History of this rule

The wording of Rule 20(10) is identical to the wording of Rule 15(3) in the previous version of the rules from 2002.^[48]

20.9.2 A designated representative is akin to a litigation guardian

In *A.N. v. Canada*, the court described a minor's designated representative as being "akin to a litigation guardian in the context of civil proceedings." They noted that "the representative must act in the minor's best interest at all times during the proceedings and must not let any extraneous or outside concerns or interests impair his or her ability to protect the minor's interests and to put forward to the RPD the best possible case on the minor's behalf."^[49] The Board's guide for designated representatives notes that "a designated representative is not the same as counsel" and that "the Division must appoint a representative even when the minor or the person who is unable to appreciate the nature of the proceedings has legal or other counsel."^[20] That said, the Board's public commentary on the analogous Immigration Division Rules states that "where appropriate, a designated representative may act as counsel."^[4]

A designated representative does not, however, have an unlimited obligation to assist a refugee claimant with all aspects of their introduction to Canadian society. Persons seeking protection often have a range of different needs, including health welfare, education, employment, financial, and legal needs.^[50] The designated representative does not have an obligation to act as a social worker to attend to all such needs of the represented person. This is notable because such a role is recommended in the UNHCR *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*:

The guardian or adviser should have the necessary expertise in the field of childcaring, so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures and until a durable solution for the child has been identified and implemented. To this end, the guardian or adviser would act as a link between the child and existing specialist agencies/individuals who would provide the continuum of care required by the child.^[51]

While it is still incumbent upon the Canadian state to ensure that the above needs of a child are attended to, this is outside of the scope of the responsibilities of a designated representative as appointed by the Board.

20.9.3 Remuneration for independent designated representatives

For an RPD hearing, the amount that an independent designated representative is paid depends on whether it is a less complex claim or not. If a claim is processed through the less complex process at the RPD, then the designated representative is paid \$660. For all other claims, they receive \$935. If the matter proceeds to the RAD, then up to \$880 will normally be paid. As set out in the remuneration schedule, additional amounts may be authorized and paid in exceptional situations, such as where there is a resumption and additional sitting of the hearing.^[52]

20.9.4 Even once a designated representative has been appointed, the claimant will often continue to have a role in the claim process

As the court noted in *A.N. v. Canada*, "The designated representative is not the minor, nor vice versa."^[49] The significance of this is that even where represented by a designated representative, the procedural interests of the claimant themselves do not become irrelevant. This has been reflected in proceedings in a number of ways, including:

- Using (a) language the claimant understands: The court commented approvingly on a panel's decision to continue proceedings in the language that the claimant spoke, even where a representative was designated for them and the representative, counsel, and the panel would have otherwise been able to proceed in English: "The Board Member ensured that the applicant [the claimant in the proceeding] remained involved in the events by rejecting her counsel's suggestion that the proceedings be conducted in English, or that she should not sit beside her son [who served as the designated representative] while he testified. The applicant understood that she was there to advise her son as he testified. During the course of the testimony when her son could not answer a question, she provided the answer indicating she was engaged and understanding the proceedings."^[53]
- Allowing the claimant to remain in the hearing room: The person who has a representative designated for them continues to have a right to observe and, where possible, understand the hearing. Even where the claimant will not be able to understand the hearing room, a Member may err where they refuse to allow the claimant to remain in the room during the hearing. For example, in one case where a Board Member refused to proceed with the hearing with children present, the Board found that in so doing (and in the way that they went about making the decision not to proceed) they had breached the *Code of Conduct for Members of the IRB*.^[54]
- Allowing the claimant to testify, where appropriate: The person who has a representative designated for them may still testify, as appropriate. The Federal Court commented approvingly on this practice in one case: "The [claimant] understood that she was there to advise her [designated representative] as he testified. During the course of the testimony when her [DR] could not answer a question, [the claimant] provided the answer indicating she was engaged and understanding the proceedings."^[53] This also reflects a children's rights approach. This Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory, per s. 3 of

the IRPA; the *Convention on the Rights of the Child* provides that children have a right to be heard, should be allowed to express their views in all matters affecting them, and should be given the opportunity to participate in any decision about their lives (Article 12 CRC), subject to the principle of evolving capacities (Article 5 CRC).^[55]

20.9.5 The role of the designated representative can be limited to some of the above tasks

In *Ryvina v. Canada*, the claimant's son was appointed as her designated representative at the hearing after the claimant had trouble testifying. The Federal Court concluded that the designated representative took on some of the above roles, but that it was not necessary for the hearing to be adjourned for the designated representative to repeat all the tasks specified in Rule 20(10) *de novo*:

In this matter, where the applicant was represented by counsel, the issue only arose once the applicant attempted to testify and was experiencing difficulty in doing so. Accordingly, most of the matters discussed in Rule 20 have no application. This would include the requirements such as deciding whether to retain counsel and instructing counsel [Rule 20(10)(a)], making or assisting in making decisions regarding the claim or application [Rule 20(10)(b)], informing the represented person about the various stages and procedures in the processing of their case [Rule 20(10)(c)], assisting in gathering evidence to support the represented person's case [Rule 20(10)(d)], informing and consulting the represented person when making decisions about the case [Rule 20(10)(f)], and in filing and perfecting an appeal [Rule 20(10)(g)]. In this particular case, the applicant son's role as a representative was limited to providing evidence, and if necessary, being a witness at the hearing [Rule 20(10)(d)], and also protecting the interests of the represented person in putting forward the best possible case [Rule 20(10)(e)].^[56]

This is consistent with international standards that where special needs become apparent at a later stage in the asylum procedure, states will ensure that the need for special procedural accommodations is addressed without necessarily restarting the procedure.^[57]

20.9.6 Rule 20(10)(a): Deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel

RPD Rule 20(10)(a) provides that the responsibilities of a designated representative include deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel.

- Principles about whether to retain counsel: The UN Committee on the Rights of the Child has specified that pursuant to the *Convention on the Rights of the Child*, all children, including those in parental care, should be appointed a legal representative to provide representation at all stages in the proceedings and with whom they can communicate freely.^[58] The recent *Global Compact for Safe, Orderly and Regular Migration* also confirms that migrants should be provided with 'gender-responsive, child-sensitive, accessible and comprehensive information and legal guidance on their rights and obligations'.^[59] That said, the right to counsel is not absolute in an administrative proceeding. There will be circumstances where an applicant with a designated representative will proceed without

legal counsel and in those circumstances, an applicant (or their DR) will be obligated to prepare any legal submissions required for the purpose of the proceeding. The court in *Kikewa v. Canada* noted that this not *per se* unfair.^[60]

- **Principles about how to instruct counsel:** How is a designated representative to decide whether to simply instruct counsel based on what they think is in the represented person's best interests or whether they should instead assist the represented person in instruction counsel? When considering ambiguous terms about the obligations of a designated representative, such as "instructing counsel or assisting the represented person in instructing counsel", s. 3(3)(f) of the Act may properly be considered. This provision provides that "This Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory." Relevant international human rights instruments include the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*. Article 12 of the *Convention on the Rights of the Child* recognizes the right of children to express their views freely and for those views to be given due weight according to the age and maturity of the child.^[61] Similarly, Article 3(a) of the *Convention on the Rights of Persons with Disabilities* emphasizes the right to autonomy.^[62] Accordingly, to the extent possible, this provision should be interpreted in a way where the designated representative respects this right, including by soliciting the represented person's views and giving them due weight.

20.9.7 Rule 20(10)(b): Making decisions regarding the claim or application or assisting the represented person in making those decisions

RPD Rule 20(10)(b) provides that the responsibilities of a designated representative include making decisions regarding the claim or application or assisting the represented person in making those decisions. This provision should be interpreted in light of Article 12 of the *Convention on the Rights of Persons with Disabilities* which provides that such persons have a right to legal capacity and supported rather than substitute decision-making.^[63]

20.9.8 Rule 20(10)(c): Informing the represented person about the various stages and procedures in the processing of their case

Rule 20(10)(c) provides that the responsibilities of a designated representative include informing the represented person about the various stages and procedures in the processing of their case. In the case of children, this obligation tracks a child's right to information in Article 17 of the UN Convention on the Rights of the Child, which specifies that "states ... shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health".^[5] Furthermore, the right to information has close connections with the right to be heard in Article 12 of the *Convention on the Rights of the Child*, which recognizes the right of the child to express his or her views freely and for those views to be given due weight according to the age and maturity of the child.^[61] To this end, the UN Committee on the Rights of the Child recommends that those children should be provided will all relevant information regarding the asylum process that would allow them to express their views and wishes in a well-informed manner.^[64] The Committee further states that the right to information is essential in this regard, "because

it is the precondition of the child's clarified decisions" and that "children should be provided with full accessible, diversity-sensitive and age-appropriate information about their right to express their views freely".^[65] A designated representative should provide information in a manner that is understandable and suitable to the person concerned, considering their age, development, education, cultural and linguistic background, and individual needs.^[66]

20.9.9 Rule 20(10)(d): Assisting in gathering evidence to support the represented person's case and in providing evidence and, if necessary, being a witness at the hearing

Where a representative is appointed late in the process, whether it will be necessary to adjourn the case or not in such circumstances will be dependent on the facts at issue. For example, in *Singh v. Canada* the court concluded that the failure to designate a representative for the minor claimant until just before the hearing did not vitiate the decision in question for the following reasons:

In the case at bar, I do not think the RPD's decision is vitiated, in view of the following facts:

- The applicant was 17 years and 10 months at the time of the hearing, 16 years and 5 months at the time he completed his PIF, and he was at all times able to understand the proceedings that were in progress;
- A representative was assigned to him before the hearing and he was allowed to meet with a social worker on the eve of the hearing;
- The improbabilities in his story are too numerous and significant to conclude that the RPD decision is vitiated because he had not yet reached the age of 18.^[67]

20.9.10 Rule 20(10)(e): Protecting the interests of the represented person and putting forward the best possible case to the Division

RPD Rule 10(e) provides that the responsibilities of a designated representative include protecting the interests of the represented person and putting forward the best possible case to the Division. There are a number of aspects to this for the designated representative, including:

- Preparing submissions where a claimant lacks legal counsel: There will be circumstances where an applicant will proceed without legal counsel and in those circumstances, an applicant will be obligated to prepare any legal submissions required for the purpose of the proceeding. Where a designated representative is appointed and the matter proceeds without legal counsel, it falls on the designated representative to deliver such legal submissions on behalf of an applicant, regardless of their absence of legal training or the complexity of the proceeding.^[60]
- Deciding whether the represented person should testify: The UNHCR states that the best interests of the child must be a primary consideration in deciding whether and how to have a child testify.^[68] The best interests principle is an interpretative principle and procedural guarantee, as well as a substantive right.^[69] At the core of the best interests principle is the notion that children require protection and guidance because of their lack

of maturity, experience or understanding.^[70] The principle is most directly expressed in Article 3(1) of the *Convention on the Rights of the Child*, which states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.^[5]

20.9.11 Rule 20(10)(f): Informing and consulting the represented person to the extent possible when making decisions about the case

The Board's public commentary on the analogous Immigration Division Rules states that "As much as possible, the designated representative should inform and consult the minor or incompetent person when making decisions about the case. [emphasis added]".^[4] Similarly, the Board's guide for designated representatives states that "your role as a designated representative may vary" depending on the person's capacity to participate in the decision-making process:

The designated representative should inform and consult the minor or the person who is unable to appreciate the nature of the proceedings when making decisions about their case. However, the role of the designated representative may vary, depending on the level of understanding of the minor or the person who is unable to appreciate the nature of the proceedings. Minors will vary in their ability to participate in making decisions, depending on the type of decision that has to be made, their age and their maturity. Persons who are unable to appreciate the nature of the proceedings may also have some ability to participate in making decisions, depending on the type of decision that has to be made and the nature and severity of their impairment.^[20]

In the case of children, this will involve communicating in a language and in a manner they understand. The relevant UNHCR guidelines provide that children need to be informed of the decision in their case in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment. If the decision is negative, particular care will need to be taken in delivering the message to the child and explaining what next steps may be taken in order to avoid or reduce psychological stress or harm.^[71]

As the legal philosopher Patricia Mindus states, frequent exposure to rules perceived to be unintelligible, arbitrary or simply unwarranted results in signs of distress and mistrust of organizations and institutional staff in authoritative positions.^[72] The designated representative exists to help guard against this during the refugee claim process, to the extent possible.

20.9.12 Rule 20(10)(g): Filing and perfecting an appeal to the Refugee Appeal Division, if required

RPD Rule 20(10)(g) provides that the responsibilities of a designated representative include filing and perfecting an appeal to the Refugee Appeal Division, if required. This implies that the designation may continue after a decision has been provided by the Division.

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70. Woolf, 'Coming of Age? The Principle of 'the Best Interests of the Child' (2003) 2 *European Human Rights Law Review* 205 at 208–9.
71. UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: ⁴⁵ [accessed 29 June 2020].
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21 Disclosure of Personal Information (RPD Rule 21)

21.1 Rule 21

The text of the relevant rule reads:

Disclosure of Personal Information

Disclosure of information from another claim

21 (1) Subject to subrule (5), the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar questions of fact or if the information is otherwise relevant to the determination of their claim.

Notice to another claimant

(2) If the personal or other information of another claimant has not been made public, the Division must make reasonable efforts to notify the other claimant in writing that

- (a) it intends to disclose the information to a claimant; and
- (b) the other claimant may object to that disclosure.

Request for disclosure

(3) In order to decide whether to object to the disclosure, the other claimant may make a written request to the Division for personal and other information relating to the claimant. Subject to subrule (5), the Division may disclose only information that is necessary to permit the other claimant to make an informed decision.

Notice to claimant

(4) If the personal or other information of the claimant has not been made public, the Division must make reasonable efforts to notify the claimant in writing that

- (a) it intends to disclose the information to the other claimant; and
- (b) the claimant may object to that disclosure.

Information not to be disclosed

(5) The Division must not disclose personal or other information unless it is satisfied that

- (a) there is not a serious possibility that disclosing the information will endanger the life, liberty or security of any person; or
- (b) disclosing the information is not likely to cause an injustice.

Information from joined claims

(6) Personal or other information from a joined claim is not subject to this rule. If claims were once joined but were later separated, only personal or other information that was provided before the separation is not subject to this rule.

21.1.1 The process specified in this rule does not apply if the information has been made public

Rule 21(2) provides that the Board must make reasonable efforts to notify a claimant whose information it intends to disclose in another claim if their information has not been made

public. If the information has been made public, this rule does not apply, as discussed in the Board's public commentary to the previous version of these rules: "This rule does not apply ... where the information is already a matter of public record. Information may become public when a claim is the subject of a judicial review application before the Federal Court, and the court does not make an order for confidentiality, or when the Division decides to have a proceeding conducted in public".^[1]

21.1.2 The process specified in this rule does not apply to evidence disclosed by the Minister

Rule 21 only applies to disclosure by the Division. It does not apply to disclosure by the Minister. Where the Minister discloses information from one claim to another claim themselves, for example disclosing a Basis of Claim form from one claim on another claim, Rule 21 does not *per se* apply. However, pursuant to s.166 of the IRPA, the Board has the jurisdiction to enquire into the source of information provided to it that originates from another claim and to order that particular measures be taken to ensure the confidentiality of any information.

21.1.3 The Board may disclose information about a claim to other organizations for the purposes of administering and enforcing the Act and Rule 21 does not apply to such disclosures

The instructions on the Basis of Claim form that all claimants receive states: "The personal information you provide on this form is collected under the authority of the Immigration and Refugee Protection Act for the purpose of determination of your claim for refugee protection by the IRB. Your personal information may be shared with other organizations including the Canada Border Services Agency (CBSA), Citizenship and Immigration Canada (CIC), the Canadian Security Intelligence Service (CSIS) and law enforcement agencies, for the purpose of administration and enforcement of the Immigration and Refugee Protection Act."^[2] That said, the CBSA cannot disclose personal information about a person's refugee claim to the country of persecution at any point, whether before or after the person has been found to be a Convention refugee: *Canada v. Lin*.^[3]

21.1.4 The Division may partially redact information disclosed under this rule

Rule 21(1) provides that "the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar questions of fact or if the information is otherwise relevant to the determination of their claim." As was stated in the Board's commentaries on the previous version of these rules, "Normally the information to be disclosed will include the source claimant's Personal Information Form in its entirety. However, specific information will be removed from the Personal Information Form where the Division decides that disclosure of that information would give rise to an unacceptable risk or injustice."^[1] Notwithstanding the transition from the PIF form to the BOC, the principle that the Board may disclose information in whole, or in part, under this rule persists.

21.1.5 Rule 21(1): The Division must determine that evidence is relevant to the other claim before disclosing it under this rule, but it need not assess its probative value

Rule 21(1) provides that "the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar questions of fact or if the information is otherwise relevant to the determination of their claim." As such, the Division may only act under Rule 21 where the two claims involve similar questions of fact or if the information in question is "otherwise relevant to the determination" of the other claim. If the information to be disclosed were not relevant, the Board would err if it disclosed it. That said, so long as the information is relevant, the Board need not assess how probative it is to the claim; that assessment is best left to the individual Member hearing the other matter. This was explained in the Board's commentary to the previous version of these rules as follows: "The decision to transfer information as potential evidence from one claim to another is not a decision as to the probative value of that information. The parties and the refugee protection officer will have an opportunity to address that issue at the hearing of the claim."^[1]

21.1.6 Rule 21(4): Notifying the claimant that they may object to the disclosure of their information

Rule 21(4) provides that the Division must make reasonable efforts to notify a claimant in writing that it intends to disclose private information to the other claimant and that the claimant may object to that disclosure. Where a claimant consents to the disclosure, then the Board should proceed to do the Rule 21(5) risk assessment. Where a claimant objects to the disclosure, then the Board should assess whether it is permissible to disclose the information under the federal *Privacy Act*, as described by the Federal Court in *AB v. Canada*.^[4] For more discussion of the implications of the *Privacy Act* see: Canadian Refugee Procedure/Joining or Separating Claims or Applications#Once claims are joined, information on one claim is properly available to the other joined claimants¹.

21.1.7 Rule 21(5): The risk assessment the Board must conduct before disclosing personal or other information under this rule

The Board's commentary regarding the previous version of the RPD Rules commented on the risk assessment that the Board is to undertake prior to disclosing information pursuant to this rule thusly: "Whether or not the source claimant objects, the Division will assess the risk to satisfy itself that the disclosure of the source claimant's information would not give rise to an unacceptable risk or injustice. The source claimant's information will be disclosed to the parties only after the Division has assessed the risk and authorized the use and disclosure of that information. The same considerations apply when information about the receiving claimant is provided to the source claimant."^[1] Lorne Waldman writes that "Generally speaking, the policy that has evolved is that the Board will provide notice to the

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Joining_or_Separating_Claims_or_Applications#Once_claims_are_joined,_information_on_one_claim_is_properly_available_to_the_other_joined_claimants

claimant if possible and, if the claimant does not object to this information being disclosed, it is disclosed.”^{5]}

21.1.8 Rule 21(6): Information from joined claims

Rule 21(6) provides that personal or other information from a joined claim is not subject to this rule. In other words, if claims were once joined but were later separated, personal or other information that was provided before the separation is not subject to this rule such that the Division need not go through the risk assessment and notification process when keeping the material on each of the disjoined files. That said, this rule does not *require* that the information be kept on both files after the disjoinder and the Division would have discretion to remove, for example, irrelevant information from a file at the point of disjoinder.

21.2 References

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22 Specialized Knowledge (RPD Rule 22)

22.1 IRPA Sections 170(i) and 171(b)

This section of the Act applicable to the RPD provides that:

170(i) The Refugee Protection Division, in any proceeding before it, ... may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.

Similarly, section 171, applicable to the RAD, reads:

Proceedings

171 In the case of a proceeding of the Refugee Appeal Division, ...

(b) the Division may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge;

22.1.1 The IRPA provisions for noticing facts are different for refugee proceedings when compared to immigration proceedings at the IRB

Section 170(i) of the Act is the provision that applies to the RPD. There is a similar provision for the RAD, s. 171(b).^[1] That said, the IRPA does not have similar provisions for the Immigration Division or the Immigration Appeal Division, as Waldman notes in the text *Canadian Immigration and Refugee Law Practice*:

Both the Immigration Division and the Immigration Appeal Division of the Immigration and Refugee Board may base their decision only on evidence proven before them during the course of the hearing. These two Divisions of the Immigration and Refugee Board have no power to take notice of facts that form part of their expertise, and they err if they attempt to take notice of facts not before them. This contrasts with the procedure at a hearing held before the Refugee Protection Division of the Immigration and Refugee Board, where, pursuant to s. 170 of IRPA, the Division may take notice of any facts that may be judicially noted, and any other generally recognized facts, information or opinions that are within its specialized knowledge.^[2]

22.1.2 What is the difference between a fact that may be judicially noticed, a generally recognized fact, and information or opinion that is specialized knowledge?

- Judicial notice: Judicial notice concerns facts that are considered to be "common knowledge"^[3] or are "generally known, reasonably unquestionable, or easily verifiable."^[4] The definition provided by Waldman in *Canadian Immigration and Refugee Law Practice* is that "judicial notice refers to facts that may be noticed by the court without proof thereof, that are either so notorious as not to be the subject of dispute among reasonable people, or facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy."^[5] Waldman's text goes on to explain that "notorious facts include local conditions and matters, geographical facts, human behaviour and business trade and practices. For example, the fact that Toronto is situated in Ontario or that the rain makes roads slippery would not have to be proven to the court. In simpler terms, the court may and should notice without proof facts that everybody knows."^[5] It is said that the purpose of judicial notice is to dispense with unnecessary proof.^[6] An example more germane to the context of refugee adjudication is that the fact that university education is generally conducted in the language of the country in which it is located has been cited as an appropriate matter for judicial notice.^[7] Judicial notice can be taken of Canadian laws, including all federal and provincial statutes and regulations.^[8] Judicial notice may also be taken of published decisions in Canadian judicial proceedings^[9] as well as international treaties or custom.^[10] In contrast, whether or not there is a wide sentencing range in Canada for the crime of robbery is not something that is appropriately the subject of judicial notice.^[11] Furthermore, courts "cannot take judicial notice of foreign law".^[12]
- Generally recognized facts: The Federal Court of Appeal has observed that "no tribunal can approach a problem with its collective mind blank and devoid of any of the knowledge of a general nature which has been acquired in common with other members of the general public, through the respective lifetimes of its members."^[13] The statutory ability to take notice of generally recognized facts reflects this truism. The category of "generally recognized facts" is a broader one than the category of facts that may be judicially noticed. As the Board has stated in its legal paper on weighing evidence, the term "generally recognized facts" could include facts which are usually accepted without question by scholars, by government and United Nations officials, and by people who resided in an area, but which are not necessarily commonly known by the general public.^[14] It includes information that may be gleaned from an encyclopedia,^[15] a country's census,^[16] and information in the Board's National Documentation Package.^[17] For example, the Federal Court of Appeal upheld a finding that "it is common knowledge that in Poland there are thousands upon thousands of Poles of Ukrainian origin".^[13] It cannot be said that all information in the NDP is of "indisputable accuracy", and hence appropriate for judicial notice, but information in the NDP from reputable sources such as well-regarded human rights groups and academics is nonetheless appropriately accepted by the Board as being "generally recognized". That said, it also should not be said that information from the NDP constitutes specialized knowledge; as illustrated by the court's comments in *Pal v. Canada* that "the RAD's comments were grounded in the NDP evidence and surrounding circumstances...not specialized information or knowledge."^[18]
- Specialized knowledge: In contrast, specialized knowledge is information that a panel has gleaned from other claims in the manner detailed below, even if it would not be

generally recognized. See: Canadian Refugee Procedure/Specialized Knowledge#What is "specialized knowledge"?¹.

22.1.3 Generally recognized facts are not a type of specialized knowledge

A question can arise about the above typology: per s. 170(i) of the Act, are "generally recognized facts" a category of specialized knowledge or an independent type of fact that the Board may notice? In his text, Waldman notes that:

Section 170(i) also refers to "any other generally recognized facts and any information or opinion that is within [the Division's] specialized knowledge". This would give the Division a broad discretion to rely on its knowledge gained from other claims once proper notice had been provided.^[19]

This should not be taken as implying that "generally recognized facts" are a subset or type of specialized knowledge. Instead, they are best thought of as an independent type of fact that the Division can recognize, in the same way that facts that may be judicially noticed is also a distinct category. This interpretation of s. 170(i) of the Act is to be preferred for several reasons:

1. The RPD Rule on specialized knowledge, Rule 22, sets out the steps a panel of the Division must take before using any information or opinion that is within its specialized knowledge. The fact that this rule omits any mention of "generally recognized facts" and speaks only of "information or opinion that is within its specialized knowledge" implies that "generally recognized facts" are not a type of specialized knowledge and thereby are not subject to the rules thereon.
2. Furthermore, the courts readily distinguish between "generally recognized facts" and "specialized knowledge". For example, in *Aguirre v. Canada*, the court's comments indicate that generally recognized facts are distinct from the category of specialized knowledge: "Applicant's counsel says the information given by Mr. Burke was not specialized knowledge within the meaning of subsection 68(4) and I am inclined to agree with her. However, I would think that for purposes of the subsection, Mr. Burke must have thought it was at least a generally recognized fact that it is common to see big cars in Mexico."^[20] Ditto the court's comment in *Magonza v. Canada*, which affirms the distinction between generally recognized facts and specialized knowledge: "the NDP is better viewed as containing generally recognized facts or specialized knowledge."^[17] Similarly, when the Federal Court of Appeal considered this provision of the Act in *Lawal v. Canada*, they punctuated it with an Oxford comma after "generally recognized facts" as follows, implying that there are three separate categories: "facts which may be judicially noticed, generally recognized facts, and information or opinion that is within the board's specialized knowledge."^[21]
3. The type of knowledge that has been regarded as a "generally recognized fact" does not meet the criteria to be considered specialized knowledge. The type of knowledge that is considered to be a "generally recognized fact" is something that, for instance, the Board gleaned from an encyclopedia (in *Hussain v. Canada*^[15]), which is distinct

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Specialized_Knowledge#What_is_"specialized_knowledge"?

from "specialized knowledge" that a panel has learned by virtue of their role as a Member of the Board hearing claims.

22.1.4 When must a panel provide notice of "generally recognized facts" before relying upon them?

The previous *Immigration Act* applied the special notice provisions now enshrined in RPD Rule 22 to generally recognized facts. The relevant provisions of that Act read:

68(4) The Refugee Division may, in any proceedings before it, take notice of any facts that may be judicially noticed and, subject to subsection (5), of any other generally recognized facts and any information or opinion that is within its specialized knowledge.

(5) Before the Refugee Division takes notice of any facts, information or opinion, other than facts that may be judicially noticed, in any proceedings, the Division shall notify the Minister, if present at the proceedings, and the person who is the subject of the proceedings of its intention and afford them a reasonable opportunity to make representations with respect thereto.

As such, it was clear from the construction of the then-section 68(4) of the Act that the Board had to provide notice of generally recognized facts that did not meet the test for being judicially noticed, prior to relying upon them.^[22] This provision changed with the advent of the IRPA and now the ordinary procedural fairness concepts regarding notice will apply to a panel's reliance on generally recognized facts, as opposed to this *sui generis* statutory notice regime.

As a general proposition, a panel should disclose to the parties all information on which the decision-maker intends to rely, allowing them an opportunity to respond, before taking notice of any facts.^[23] That said, not every situation where a decision-maker does their own research and fails to disclose it prior to providing their reasons will be considered a breach of procedural fairness.^[13] The general approach that applies is that of *Mancia v Canada*, which holds that while "extrinsic evidence" must be disclosed prior to the decision being rendered, a decision maker is not required to provide notice of their reliance on material that is (1) generally available to the public and (2) not novel and significant information that may affect the disposition of a case. That said, there remains a duty of disclosure where the information to be relied upon is potentially contestable.^[24] For more detail, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Disclosure rights and obligations for the Board².

Whether explicit notice is required where a panel relies upon information in the National Documentation Package will depend on the circumstances of the case. Generally, the NDP is explicitly placed onto the record by reference in a Consolidated List of Documents, which obviates this issue. See RPD Rule 33: Canadian Refugee Procedure/Documents#RPD Rule 33 - Disclosure and use of documents by the Division³. In *Adefule v. Canada* the panel relied upon a section of the NDP for the United States, which was not explicitly on the record.^[25] The court concluded that in the circumstances there was no unfairness in

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Disclosure_rights_and_obligations_for_the_Board
3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_33_-_Disclosure_and_use_of_documents_by_the_Division

relying upon this information, even without having provided prior notice that it would do so:

The information about the asylum process in the USA was not information which the Applicants could not reasonably be expected to have knowledge of. They were represented by counsel at each stage of the proceedings and the RPD had found that the Applicants' failure to take advantage of the options available to them in the USA undermined their fear of persecution. The RAD was not required to give the Applicants notice that it would be referring to the NDP when it considered that question.^[26]

22.2 RPD Rule 22

The text of the relevant rule reads:

Specialized Knowledge

Notice to parties

22 Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person and, if the Minister is present at the hearing, the Minister, and give them an opportunity to

- (a) make representations on the reliability and use of the information or opinion; and
- (b) provide evidence in support of their representations.

22.2.1 Comparison to previous version of the Rules

The predecessor to Rule 22 in the previous version of the Rules was Rule 18,^[27] which bore a very similar wording to the current Rule 22:^[28]

18. Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to

- (a) make representations on the reliability and use of the information or opinion; and
- (b) give evidence in support of their representations.

22.2.2 What is "specialized knowledge"?

As the Federal Court held in *Adefule v. Canada*, specialized knowledge is knowledge accumulated over time as a result of a decision-maker's adjudicative functions.^[29] The Federal Court of Appeal speaks broadly of knowledge that a tribunal member has acquired from time to time in carrying out their statutory duties.^[13] In the words of RAD Member Patricia O'Connor, "the very basis of specialized knowledge involves information which would not necessarily be known to the parties in a particular claim, especially when the knowledge is based on information stemming from other cases before [a panel]."^[30] There are any number of examples of what constitutes specialized knowledge, e.g.:

- In *I.P.P. v. Canada* the court accepted the following as being examples of specialized knowledge: the statement that *Mexican media gives a great deal of coverage to gangs and their activities* and the observation that claimants are often able to present medical reports for treatment obtained in Mexico.^[31]

- In *Habiboglu v. Canada*, the court accepted that the Board had specialized knowledge of the procedures employed by the Canadian Border Security Service to analyse Iraqi documents.^[32]
- In *Tariq v. Canada*, the court accepted that Board findings about the clothing worn by women in Karachi were an example of the panel relying on specialized knowledge.^[33]
- In *Appau v Canada*, the panel's own knowledge of Swiss border points and procedures was held to be specialized knowledge.^[34]
- In *Saghiri v. Canada*, the court held (arguably in *obiter*) that "Whether the RPD had erred by failing to undertake an analysis under section 98 of *IRPA* with respect to whether the Applicant is a person referred to in article 1F(b) of the Refugee Convention falls within the RAD's specialized knowledge of the law applicable to refugee claims" and observed that "Rule 24 of the RAD Rules provides that before using any information or opinion that is within its specialized knowledge, the RAD must give the parties an opportunity to make written submissions."^[35]

However, not just any knowledge that a Member has gleaned from other claims may properly count as specialized knowledge:

- The knowledge must be quantifiable and verifiable: Specialized knowledge, to count as such, must be "quantifiable and verifiable". Unverifiable personal knowledge does not qualify as specialized knowledge.^[36] The court considered this issue in *Cortes v. Canada*, where the panel had noted that there have been "refugee protection claimants who have filed complaints with the Mexican authorities without necessarily being injured or on their deathbed." The court commented as follows: "In my opinion, the 'specialized knowledge' relied on in this case was mischaracterized. Here, the decision maker drew on the specialized and general knowledge it had acquired over the years to point out to the applicant that this was the first time it had heard such an argument and that its professional knowledge and experience in cases from Mexico demonstrated the contrary. The 'knowledge' relied on in this case was neither quantifiable nor verifiable, which meant that Rule 18 did not apply."^[37] Similarly, the Federal Court of Appeal stated that "it is not only normal but inevitable that in performing their role, panel members will be influenced by the experience they may have acquired in the exercise of their duties. On the other hand, as long as the members rely only on their experience and not on specific information, [the specialized knowledge provisions do] not apply."^[38]
- The knowledge cannot be based on stereotypes: As the court stated in *Vodics v. Canada*, "the use of specialized knowledge in the decision-making process, which is, in fact, the use of acquired personal knowledge on the part of the decision-maker, is acceptable, but with a very important limit when it comes to the use of stereotypes."^[39] The court in that case goes on to note that a "stereotype" is a preconceived, standardized, and oversimplified impression of the characteristics which typify a person or situation. The danger in applying a stereotype is that the person who is the exception to the oversimplified impression is not protected from the erroneous application of the impression. The court concludes that a number of the panel's findings in that case were made in error because the specialized knowledge was incomplete and based on stereotypes, for example:
The CRDD makes the finding that the Applicant's mother's maiden name is not typically Romany, and draws on its specialized knowledge to do so. Therefore, this finding is significant in that it can be taken to be some evidence used to rebut the Applicant's sworn evidence that he is a Roma. However, in my opinion, before the finding can be considered evidence to be used in this way, the CRDD must be satisfied

that its specialized knowledge is complete. The CRDD admits that it has specialized knowledge of "some specific Roma names", and, accordingly, I find it is reasonable to conclude that it does not have specific knowledge of *all* Romany names, if such a task is even possible to reach. The CRDD's statement that the Applicant's mother's maiden name is not typically Romany, is not relevant to the determination of the Applicant's ethnicity. It is conjecture used as evidence. As such, the CRDD should not have used it in forming its negative credibility finding.^[40]

- Specialized knowledge should be distinguished from facts that may be judicially noticed and generally recognized facts: There are three types of facts that the Refugee Division may take notice of. They are properly distinguished from each other. See further: Canadian Refugee Procedure/Specialized Knowledge#Generally recognized facts are not a type of specialized knowledge⁴.

22.2.3 The Member must provide sufficient information so that the specialized knowledge can be tested by the parties

Rule 22 provides that before using any information or opinion that is within its specialized knowledge, the Division must notify the parties and give them a chance to make representations and give evidence in response. This is a requirement of the rules, and procedural fairness, and the courts have held that the effect of Rule 22 is to "codify the common law which requires that parties be notified where information not already on the record may be relied on."^[41] Where a Member has relevant knowledge from a related file, there is a presumption that Members reach their decisions by relying solely on the evidence before them in the record and that they are able to ignore any other evidence from other files.^[42] Rule 22 provides that the Division must notify the parties (technically the Minister need only be notified if they are present at the hearing, not if they are only intervening in writing) and give them an opportunity to make representations on the reliability and use of the information or opinion. Mr. Justice Campbell commented on what a panel must do so that a party may be said to have had a meaningful opportunity to make representations on the reliability and use of the knowledge in *Isakova v Canada*: "in order for [the Rule] to be effective, the RPD member who declares specialized knowledge must place on the record sufficient detail of the knowledge so as to allow it to be tested. That is, the knowledge must be quantifiable and verifiable."^[43] The legal requirement that specialized knowledge be "quantifiable and verifiable" is thus an aspect of procedural fairness in that the purpose of the notice requirement enshrined in Rule 22 is that a party be able to make meaningful representations on the reliability and use of the information or opinion and this right would be rendered meaningless if the information offered were insufficiently specific for a party to be able to do so.

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Specialized_Knowledge#Generally_recognized_facts_are_not_a_type_of_specialized_knowledge

22.2.4 Does the Member need to specifically use the words "specialized knowledge" or refer to this rule by number prior to relying on specialized knowledge?

Arguably not, as the purpose of the Rule is satisfied where a claimant has notice of the specialized knowledge being relied upon, and an adequate opportunity to reply, regardless of whether or not the particular words "specialized knowledge" are uttered by the panel member. The principle enshrined in Rule 22 is that prior to relying on any specialized knowledge, a panel of the Board must "advise the claimant of the actual information it will be relying on and give the claimant an opportunity to challenge the evidence."^[5]

Member Jolyane Lefebvre of the Refugee Appeal Division considered this issue in a 2019 decision. It involved a case where the RPD found that the answers provided by the male appellant concerning why the appellants had failed to seek asylum in Chile or the United States diminished and undermined their credibility. The RPD was of the opinion that it was reasonable to expect that the appellants would have obtained information on these options, considering their statements that they feared returning to their country. The principal appellant testified that he did not have the right to apply for asylum in the United States because of his "parole" status. The Member stated during the hearing that "that there are several types of parole." The RAD Member held in the reasons that "I am of the opinion that the member misspoke and should have told the appellants that his specialized knowledge led him to determine that there are several types of 'parole.' As Rule 22 of the *Refugee Protection Division Rules* sets out, the member must notify the parties and give them an opportunity to make representations or provide evidence in support of their representations at the time of the hearing. I would agree that this was not done because the member failed to specifically mention that he had specialized knowledge in this area."^[44]

22.2.5 Does specialized knowledge only arise from a Member's personal hearings or is what a Member learns of their colleague's hearings also properly considered specialized knowledge?

Specialized knowledge is information that a panel has gleaned in its role as a Member of the Board. It need not arise from hearings that the Member in question presided over personally. Thus, for example, the Federal Court has held that the Board may take notice of an expert opinion in a "lead case" and consider it in a subsequent case, as an exercise of its authority to take notice of information and opinions within its specialized knowledge, provided it gives proper notice.^[45] Relatedly, where a Member has knowledge of similar claims, details of such knowledge are part of their specialized knowledge, and that knowledge may be placed on the record provided that the notice requirements set out in the Refugee Protection Division Rules are followed.^[46] Additionally, specialized knowledge need not arise from a hearing at all: the Board states in the legal services paper on its website that "specialized knowledge" may arise from a panel's knowledge of documents in the Board's Documentation Centre, for example.^[14]

22.3 References

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23 Allowing a Claim Without a Hearing (RPD Rule 23)

23.1 IRPA Section 170

The relevant portions of s. 170 of the Act read:

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

(b) must hold a hearing; ...

(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations; ...

(f) may, despite paragraph (b), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;

23.1.1 The Division may allow a claim if the Minister has not notified the Division of an intention to intervene

Section 170(f) provides that the Division may allow a claim for refugee protection without a hearing if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene in the claim. That time period for the Minister to notify the Board of an intention to intervene in a claim is provided in RPD Rule 23.

23.2 RPD Rule 23 - Allowing a Claim Without a Hearing

The text of the relevant rule reads:

Allowing a Claim Without a Hearing

Claim allowed without hearing

23 For the purpose of paragraph 170(f) of the Act, the period during which the Minister must notify the Division of the Minister's intention to intervene is no later than 10 days after the day on which the Minister receives the Basis of Claim Form.

23.2.1 What is the history of the Board's processes to accept claims without a hearing?

In 1990 the expedited process was introduced at the IRB. This process permitted a Refugee Hearing Officer (RHO) to refer a claim to a single CRDD member for paper review. If the CRDD member found the claim to be established, a positive decision could be issued without the need for an oral hearing. In 1993, between 25 and 30 per cent of all claims were processed through this expedited process.^[1] The process was codified in legislation with

amendments to the *Immigration Act* that year.^[2] At that point, RHOs were instructed to direct a claim to a member for positive determination without a hearing if, after screening and a preliminary conference, the RHO was of the opinion that a panel would almost certainly find the claimant to be a Convention refugee.^[3] Then, prior to the 2012 refugee reforms, a claimant was interviewed by IRB staff, such as a Tribunal Officer, under what was then called the Board's "expedited process".^[4] Currently, there is no interview, and the determination about whether or not to accept a claim this way is made based on a review of the paper record submitted to the Board.

23.2.2 When may a Member decide a claim without having held a hearing?

Paragraph 170(b) of the Act specifies that "The Refugee Protection Division, in any proceeding before it, must hold a hearing". However, paragraph 170(f) serves as an exception to this rule, providing that the Board "may, despite paragraph (b), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene". The relevant IRB policy is the *Instructions governing the streaming of less complex claims at the Refugee Protection Division*. It states, as a matter of policy, what the Board should do before accepting a claim without a hearing and the substantive nature of the claims that are appropriate for being accepted this way.

First, the Minister has a legitimate expectation that it will receive notice and an opportunity to object prior to any claim being accepted under the file-review process based on the Board's public statements in this document: "Parties must be given a reasonable opportunity to be heard. Therefore, because a Notice to Appear is not provided when a claim is accepted without a hearing, the Minister will be given notice where a claim is chosen for the file-review process."^[5] This relates to the requirement in s. 170(e) of the Act that The Refugee Protection Division must give the Minister a reasonable opportunity to present evidence, question witnesses and make representations.

Furthermore, the instructions state that the RPD will not decide any claim without a hearing in the following circumstances:

- confirmation of front-end security screening has not been received;
- the Minister has filed a Notice of Intervention to intervene in person;
- A Notice has been sent under the RPD Rules notifying the Minister of a possible exclusion, inadmissibility or integrity issue;
- there are issues related to the claimant's identity which require further examination;
- there are serious credibility issues that arise from the documents in the file;
- the claim is inconsistent with country information; or
- there are complex legal or factual issues that require a hearing to resolve.

Were the IRB to decide a claim that did not meet these criteria, it would err. *Canada v. Mukasi* is an example of such a case. In that case, a panel of the Board granted the claim without holding a hearing. The Board concluded that Mr. Mukasi had established his identity, did not present any issues that might exclude him from refugee protection, and had shown that his account of events was consistent with documentary evidence on the conditions in Burundi. The Minister applied for judicial review, arguing that the Board

erred when it failed to refer the claim for a hearing and by granting his claim in the face of reliable contradictory evidence. The court accepted this argument, noting that there was evidence on the record that the claimant was associated with violence. As the court stated, "This should have alerted the Board to the possibility that Mr. Mukasi might be excluded from the definition of a Convention refugee based on Article 1(F) of the Convention. That provision states, among other things, that the Convention does not apply to persons who have committed a crime against peace, a war crime, a crime against humanity, or acts contrary to the purposes and principles of the United Nations."^[6]

23.2.3 In principle, how should the Board decide whether to allow a claim under the file-review process?

As stated in the Board's commentary to the previous version of these rules, "The purpose of the expedited process is to identify cases that appear to be manifestly well founded, based on the factors set out in subsection 19(4) of the Rules." What were those factors? They are the following factors which appeared in the previous version of the rules and are now included in the list of considerations in the Instructions (*supra*):

Allowing a claim without a hearing

(4) If the refugee protection officer recommends that the claim be allowed without a hearing, the Division may allow the claim if

(a) there are no issues that should be brought to the attention of the Minister;

(b) the claimant's identity is sufficiently established;

(c) there are no serious credibility issues; and

(d) the information given by the claimant is consistent with information about conditions in their country of nationality or, if they have no country of nationality, their country of former habitual residence, and establishes that the claimant is a Convention refugee or a person in need of protection.^[7]

The general principle in asylum adjudication was well summarized by the European Court of Human Rights when they stated that "a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 [of that European human rights instrument]".^[8] The use of the file-review process is consistent with this principle in that it is only manifestly well-founded cases that will be accepted under this process.

23.2.4 Applications to separate claims so that some claimants may be eligible for the file-review process

As stated in the Board's commentary to the previous version of these rules, "Members of the same family will normally be treated as a unit and their claims processed jointly."^[9] At times claimants will apply to separate the claims of some family members so that others will be eligible for this file-review process. For example, parents with US-born children would not meet the criteria to have the US-born child's claim accepted under this policy. For the considerations that apply to such applications to separate the claims of family members, see

the commentary to Rules 55 and 56: Canadian Refugee Procedure/Joining or Separating Claims or Applications#Application of factors in Rule 56(5)¹.

23.2.5 Claimants have no right to a decision about whether a claim is eligible under the file-review process

The Federal Court has held that Parliament never intended section 170(f) of the IRPA to provide a mechanism by which refugee claimants could claim the right to obtain refugee status without a hearing:

It would never have been Parliament's intention to allow a refugee claimant to proclaim a right pursuant to section 170(f) to require the RPD to exercise its discretion in their favour without a hearing. Forcing the RPD to provide a decision pursuant to section 170(f), would result in yet another decision, with yet another judicial review application for its review, and yet more delay in processing the refugee application.^[10]

The Board's commentary to the previous version of these rules stated that "Counsel may suggest that a claim be dealt with under the expedited process, but the decision to select suitable claims rests solely with the Division."^[9] It continues to be the case that the Board has discretion to entertain applications to have a claim processed through the file-review process, but it is "[not required to] consider a request from a refugee claimant pursuant to section 170(f) of the IRPA to grant refugee status without a hearing."^[11]

23.2.6 Allowing a claim is the same as accepting a claim

The fact that allowing a claim for refugee protection is a synonym for accepting the claim was stated in the Board's commentary to the previous version of these rules: "Subsection 170(f) of the *Immigration and Refugee Protection Act* provides that the Division may allow (i.e., accept) a claim for refugee protection without a hearing, unless the Minister has notified the Division of the Minister's intention to intervene."^[9]

23.2.7 How often does the Board use this file-review process?

According to a 2019 Auditor General audit of Board processes, it expedited only a quarter of eligible claims. The other three quarters proceeded to regular hearings, and 87% of them received positive decisions.^[12]

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6. *Canada (Citizenship and Immigration) v. Mukasi*, 2008 FC 347 (CanLII), para. 8.
7. *Refugee Protection Division Rules*, SOR/2002-228, Rule 19(4).
8. ECtHR, *Jabari v. Turkey*, RJD 2000-VIII, pp. 149-163, 159 (para. 39).
9. Immigration and Refugee Board of Canada, *Commentaries to the Refugee Protection Division Rules*, Date Modified: 2009-05-22 <⁵> (Accessed January 28, 2020).
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11. *Bernataviciute v. Canada (Citizenship and Immigration)*, 2019 FC 953 (CanLII), par. 26, <⁷>, retrieved on 2021-07-14.
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24 Conferences (RPD Rule 24)

24.1 RPD Rule 24 - Conferences

The text of the relevant rule reads:

Conferences

Requirement to participate at conference

24 (1) The Division may require the parties to participate at a conference to fix a date for a proceeding or to discuss issues, relevant facts and any other matter to make the proceedings fairer and more efficient.

Information or documents

(2) The Division may require the parties to give any information or provide any document, at or before the conference.

Written record

(3) The Division must make a written record of any decisions and agreements made at the conference.

24.1.1 Conferences may be held in the absence of the claimant

A claimant need not be present for any conferences. The Board's *Chairperson Guidelines 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* discusses this and provides guidance on this point. The guidelines state that a conference should be held only where it would be more practical or efficient to consider issues before the actual hearing or where it may be more appropriate to discuss certain sensitive issues without the presence of the claimant. For example, where there are complex legal issues to be discussed, a conference may be held to go over matters related to procedure or for questions relate to the evidence to be settled. One example of this is where the Board schedules a telephone conference prior to a hearing date in order to discuss issues of scheduling or procedural orders that parties are requesting the Board make.

A particular type of pre-hearing conference is one held, in the words of the Chairperson's Guideline 7, "just before the hearing". The guidelines state that a brief conference with the parties will be held in this way only where it would help make the proceedings fairer and more efficient. An example of such a conference discussed in the guideline is where the refugee claimant has been identified as vulnerable and counsel and the claimant will meet, without the claimant being present, in order to discuss appropriate procedures for the hearing in light of the claimant's vulnerability. The guidelines go on to note that "when the claimant is represented, the member and counsel will participate, but the claimant will not usually be present." However, they go on to note that "a represented claimant may be present if the member decides it would be useful."^[1] The better practice is likely for Members to ordinarily have claimants in the room during such pre-hearing conferences, with simultaneous interpretation provided as necessary. The discussions occurring relate,

after all, to *their* claim. That said, this is a matter of the Member's discretion and at times excluding a claimant will be appropriate.

24.1.2 Conferences should not become a hearing in the claimant's absence

The Board's *Chairperson Guidelines 7* state that "A conference should be held only where it would be more practical or efficient to consider such issues before the actual hearing or where it may be more appropriate to discuss certain sensitive issues without the presence of the claimant." There will exist a point where a conference could come to delve into the substance of a case to such an extent that it involves submissions going to the merit of the case moreso than a matter appropriately considered before the actual hearing. For example, where a conference continues for a very lengthy time and where the Member hears and debates extensive arguments from the parties on the central issues of the claim without the attendance of the claimant, it may be the case that it virtually becomes a hearing on the merits, instead of a pre-hearing conference. Such an extensive conference regarding the determinative issues of a refugee claim taking place without the presence of a claimant, even where there is the implied consent of counsel, may not be an acceptable use of this conference provision.

24.1.3 A proper pre-hearing conference will not lead to a Member being seized of a matter

The Member who conducts a pre-hearing conference may differ from the Member who ultimately presides over the hearing. Where the matters discussed do not go beyond those appropriate for a pre-hearing conference, the Member who conducts the pre-hearing conference will not ordinarily be seized of the case. For more detail on this concept, see: Canadian Refugee Procedure/The right to an independent decision-maker#Members will be seized of a matter in certain circumstances¹.

24.1.4 Members should both provide an oral summary and make a written record of any decisions and agreements made at pre-hearing conferences

As per Rule 24(3), "The Division must make a written record of any decisions and agreements made at the conference." If the claimant was not present at a pre-hearing conference, then, before the hearing starts, the Board's *Chairperson Guidelines 7* state that the Member will summarize for the claimant what was discussed and what instructions the Member gave at the conference.^[1] The Member will also make a written record of any decisions and agreements made at the conference. As such, the oral summary at the hearing is something that Members are expected to provide *in addition to*, not instead of, the requirement in Rule 24(3) that a written record of decisions and agreements be made (often this can be practically accomplished by commenting on the pre-hearing conference in the reasons for decision, but in other cases it will be more practical to provide this written record as a set of

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#Members_will_be_seized_of_a_matter_in_certain_circumstances

interim reasons). This provision requiring an oral summary in the Chairperson Guidelines is just that, a guideline, and not a legal requirement. It appears to be a good practice where a pre-hearing conference from which the claimant was excluded occurs just before the hearing and consequently counsel may not have had an opportunity to go over the decisions made at the pre-hearing conference with the claimant. In contrast, the guideline would appear not to apply to, say, a telephone pre-hearing conference held weeks prior to the hearing commencing and where the decisions made at the pre-hearing conference have already been reduced to writing and received by the parties.

24.2 References

1. Immigration and Refugee Board of Canada, *Chairperson Guidelines 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, Amended December 15, 2012 <²> (Accessed January 26, 2020), section 4.6.

² <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir07.aspx#ConfB4>

25 Notice to Appear (RPD Rule 25)

25.1 Rule 25

The text of the relevant rule reads:

Notice to Appear

Notice to appear

25 (1) The Division must notify the claimant or protected person and the Minister in writing of the date, time and location of the proceeding.

Notice to appear for hearing

(2) In the case of a hearing on a refugee claim, the notice may be provided by an officer under paragraph 3(4)(a).

Date fixed for hearing

(3) The date fixed for a hearing of a claim or an application to vacate or to cease refugee protection must not be earlier than 20 days after the day on which the parties receive the notice referred to in subrule (1) or (2) unless

(a) the hearing has been adjourned or postponed from an earlier date; or
(b) the parties consent to an earlier date.

25.1.1 Children under 12 who are accompanied by an adult in Canada are not ordinarily expected to attend the hearing. During COVID this applies to all accompanied children.

Accompanied children who are under the age of 12 on the date of the hearing are not required to appear before the RPD unless the presiding member requires their attendance.

^[1] Children 12 years of age or older are still required to attend the hearing. However, during the COVID period, as a temporary measure, this is extended to all children: accompanied children under the age of 18 on the date of the hearing are not required to appear before the RPD unless the presiding member requires their attendance.^[2] As outlined in *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*, accompanied children include:

- Children who arrive in Canada at the same time as their parents or some time thereafter. In most cases, the parents also seek refugee status, and
- Children who arrive in Canada with, or are being looked after in Canada by, persons who the RPD is satisfied are related to the child, then the child should be considered an accompanied child.

25.1.2 How long is a normal hearing?

Unless otherwise specified, for example if the hearing notice states that the hearing will be a full day or a short hearing of only 2 hours, parties should expect that a hearing will usually be about 3.5 hours.^[3] That said, hearing length can vary, usually within a range

of 1–4 hours.^[4] Parties can make an application pursuant to Rule 50 to request a different hearing duration, for example that a full-day hearing be scheduled.

25.1.3 Conduct and process at the hearing

For details about how parties should comport themselves in the context of a hearing, see the section of this book on decorum: Canadian Refugee Procedure/Decorum¹.

25.2 References

1. Immigration and Refugee Board of Canada, *Practice notice: Presence of children at Refugee Protection Division hearings*, Practice notice signed on March 11, 2019 <²>.
2. Immigration and Refugee Board of Canada, *Refugee Protection Division: Practice Notice on the resumption of in-person hearings*, June 23, 2020, <³> (Accessed August 1, 2020).
3. Kinbrace Community Society, *Refugee Hearing Preparation: A Guide for Refugee Claimants*, 2019 Version, <<https://refugeeclaim.ca/wp-content/themes/refugeeclaim/library/guide/rhpg-vancouver-en.pdf>>, page 33 (accessed January 17, 2020).
4. Nicholas Alexander Rymal Fraser, *Shared Heuristics: How Organizational Culture Shapes Asylum Policy*, Department of Political Science, University of Toronto (Canada), ProQuest Dissertations Publishing, 2020, <<https://search.proquest.com/openview/f925dea72da7d94141f0f559633da65a/14>> (Accessed August 1, 2020), at page 80 of PDF.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decorum

² <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/children-RPD-hearings.aspx>

³ <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/rpd-pn-hearing-resumption.aspx#toc42>

⁴ <https://search.proquest.com/openview/f925dea72da7d94141f0f559633da65a/1?pq-origsite=gscholar&cbl=18750&diss=y>

26 Exclusion, Integrity Issues, Inadmissibility and Ineligibility (RPD Rules 26-28)

The Division is required, in accordance with the following three rules, to notify the Minister of Public Safety and Emergency Preparedness (PSEP) or the Minister for Immigration, Refugees and Citizenship Canada (IRCC) that intervention in an RPD case, wherein neither organization had originally intervened, may be warranted. This mechanism is referred to as a “red letter”.

26.1 IRPA Section 98: Exclusion — Refugee Convention

Section 98 of the *Immigration and Refugee Protection Act* reads:

Exclusion - Refugee Convention

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

26.1.1 The RPD is required to determine whether a claimant is excluded regardless of whether the Minister decides to intervene

The RPD is required to determine whether section 98 of the IRPA is applicable to a claimant regardless of whether or not the Minister decides to intervene.^[1] See: Canadian Refugee Procedure/The Board's inquisitorial mandate#A claimant has an onus to show that they meet the criteria to be recognized as a refugee¹.

26.1.2 There is no absolute right to a section 96 risk analysis

The Federal Court concludes that both the Refugee Convention and the IRPA recognize that there is no absolute right to a section 96 risk analysis. Article 33(2) of the Refugee Convention clearly allows individuals to be excluded from the protection against *refoulement* where there are reasonable grounds for regarding them as a threat to public security. Article 1F of the Convention states that its provisions shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a war crime, crime against humanity, or serious non-political crime outside the country of refuge; it also excludes he who has been guilty of acts contrary to the purposes and principles of the United

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#A_claimant_has_an_onus_to_show_that_they_meet_the_criteria_to_be_recognized_as_a_refugee

Nations. In the words of the Federal Court in *Hussain v. Canada*, "these exclusions are clearly reflected in section 98 of the IRPA".^[2]

26.2 Heading to this portion of the Rules: Exclusion, Integrity Issues, Inadmissibility and Ineligibility

Exclusion, Integrity Issues, Inadmissibility and Ineligibility

26.2.1 Division of responsibility between CBSA and IRCC

Rules 26-28 use the term "the Minister", but responsibility for responding to these notifications is split between two such Ministers (and Ministries): that related to the Minister of Public Safety and Emergency Preparedness (specifically its sub-entity, the CBSA or Canada Border Services Agency) and that related to IRCC (technically, still CIC or Citizenship and Immigration Canada). With the introduction of the IRCC Ministerial Reviews and Interventions pilot project in October 2012, senior immigration officers were delegated to effect reviews and interventions at the IRB. IRCC ministerial interventions are restricted to cases involving program integrity and credibility as well as cases where exclusion pursuant to article 1E of the Refugee Convention arises.

CBSA intervenes in cases involving serious criminality, security concerns, war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations. CBSA is also responsible for hybrid cases (i.e. those where there are combined program integrity/credibility issues and criminality or security concerns). Where the case is determined to be a hybrid case and, due to various circumstances, CBSA elects not to pursue the case on the grounds of criminality or security, CBSA has made a commitment to IRCC to go forward on credibility or program integrity grounds where warranted. The CBSA also has responsibility for detention cases, all arguments regarding the Charter of the United Nations, and designated foreign nationals.^[3]

26.2.2 How frequently are these notification provisions used?

The number of such red letters has increased steadily in recent years. In most cases where the RPD provides such notification, the Minister declines to intervene:^[4]

Year	Total Red Letters (#)	CBSA Intervention in Red Letter Cases (%)	IRCC Intervention in Red Letter Cases (%)	No Intervention in Red Letter Cases (%)
2013	634	21.6	9.0	69.4
2014	725	32.4	11.6	56.0
2015	758	30.5	12.0	57.5
2016	1031	19.2	9.5	71.3
2017	1627	12.1	11.6	76.3
Total	4775	23.2	10.7	66.1

The CBSA approach to interventions varies markedly across the country. For example, in Central region, due to the volume of “red letters” and its current staffing level, the CBSA team assigned to the Refugee Protection Division focuses on assessing the cases referred by the IRB red letter process, while not working on cases referred through the CBSA triage process. Central Region maintains the lowest level of intervention in red letter cases, relative to other IRB regions, largely because it has much lower staffing levels when compared to the other regions:^[4]

Ratio of IRB Members to CBSA/IRCC Hearings Officers	RPD	
	IRB Mem-bers	CBSA/IRCC Hearings Of-ficers
Eastern Region (Atlantic, Quebec, Northern Ontario)	5.3	1
Central Region (GTA, Southern Ontario)	11.8	1
Western Region (Prairie, Pacific)	2.6	1

26.2.3 How often does the Minister participate in proceedings at the Board?

In the 1990s, the Minister of Citizenship and Immigration was represented in fewer than three percent of the refugee cases which came before the Board.^[5] In part, this was a product of the legislation at the time, which limited in-person Ministerial participation in a hearing to vacation, cessation, and exclusion cases.^[6] The academic Hathaway was sharply critical of this low intervention rate, writing “This ministerial lethargy is destructive of the intended non-adversarial role of refugee hearing officers, who are too frequently tempted to 'fill the shoes' of the absent Minister's representative in pursuit of matters which are important, but which have no bearing on their protection mandate.”^[7] The legislation was subsequently amended and Ministerial interventions increased. Today the Minister intervenes in about seven percent of claims.^[8]

26.3 RPD Rule 26 - Possible Exclusion

The text of the relevant rule reads:

Notice to Minister of possible exclusion before hearing

26 (1) If the Division believes, before a hearing begins, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, the Division must without delay notify the Minister in writing and provide any relevant information to the Minister.

Notice to Minister of possible exclusion during hearing

(2) If the Division believes, after a hearing begins, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim and the Division is of the opinion that the Minister’s participation may help in the full and proper hearing of the claim, the Division must adjourn the hearing and without delay notify the Minister in writing and provide any relevant information to the Minister.

Disclosure to claimant

(3) The Division must provide to the claimant a copy of any notice or information that the Division provides to the Minister.

Resumption of hearing

- (4) The Division must fix a date for the resumption of the hearing that is as soon as practicable,
- (a) if the Minister responds to the notice referred to in subrule (2), after receipt of the response from the Minister; or
- (b) if the Minister does not respond to that notice, no earlier than 14 days after receipt of the notice by the Minister.

26.3.1 History of this rule

This rule is to Rule 23 in the previous version of the Refugee Protection Division Rules from 2002.^[9] Changes include that the phrase "after a hearing begins" in Rule 26(2) previously read "at any time during a hearing" in the previous version of the Rules and that the previous Rule did not speak of needing to adjourn the hearing:

- 23.(1) If the Division believes, before a hearing begins, that there is a possibility that sections E or F of Article 1 of the Refugee Convention applies to the claim, the Division must notify the Minister in writing and provide any relevant information to the Minister.
- (2) If the Division believes, at any time during a hearing, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must notify the Minister in writing and provide the Minister with any relevant information.^[10]

26.3.2 What are sections E or F of Article 1 of the Refugee Convention?

The schedule to the IRPA includes the full text of these articles of the Refugee Convention:

Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees

E This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

These grounds for denying protection have been directly incorporated into Canadian law through section 98 of IRPA.^[11]

26.3.3 When will there be a "possibility" of exclusion?

The standard used in Rules 26(1) and 26(2) relates to whether or not there is a "possibility that section E or F of Article 1 of the Refugee Convention applies to the claim". Specifically, Rule 26(1) provides that "if the Division believes, before a hearing begins, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim,

the Division must without delay notify the Minister in writing and provide any relevant information to the Minister.” Similarly, Rule 26(2) requires notification where, *inter alia*, there is a “possibility that section E or F of Article 1 of the Refugee Convention applies to the claim”. This provision turns on the Division believing that there is a “possibility” of the claimant being excluded. The RAD has held that the term “possibility” suggests a “low threshold that need only be met in order to prompt the RPD to notify the Minister that exclusion may apply in the claim”.^[12] Generally speaking, this threshold will be met in the following types of cases:

- Where it is evident that the Member subjectively believes that there is a possibility of exclusion: As the RAD notes, “Rule 26 of the RPD Rules specifically refers to the belief of the RPD member.”^[13] As such, where it is clear from a Member's conduct that they believed, before a hearing began, that there was a possibility of exclusion, then notification should have been provided. For example:
 - *Where a panel identifies exclusion as an issue at the hearing:* Where the panel identifies exclusion as an issue at the beginning of the hearing, then it is clear that the “possibility” standard has been met on the basis of the pre-hearing evidence and formal notification is appropriate. For example, in *Kanya v. Canada*, the Member stated at the beginning of the hearing that “The issues in this claim ... from what I can figure out from the narrative, it might be an issue [of] exclusion on 1F(b).” Justice Rouleau of the Federal Court held in that case that “the Board has a duty to notify the Minister if there is a ‘possibility’ that Article 1(F)(b) should apply to a refugee claimant. The Board clearly indicated from the outset of the proceedings that there was a ‘possibility’ that 1(F)(b) would apply to the applicant. The hearing should have been adjourned from the outset; the Minister should have been notified and the applicant should have been given time to prepare for an exclusion determination.”^[14]
 - *Where the panel asks questions about the issue:* The court commented in *Canada v. Louis* that the Board erred by questioning a claimant about exclusion issues without having previously notified the Minister of the possibility of exclusion. The fact that the panel asked the claimant questions about their possible exclusion was a sufficient basis on which to conclude that there was a “possibility” of it.^[15] That said, the fact that a panel asks questions about an issue that could relate to exclusion does not always mean that the “possibility” threshold has been met, especially when the questions could equally relate to other issues such as the claimant's general credibility. For example, in one case the RAD noted that “The RPD member [] told the respondent at the beginning of his RPD hearing that she will have questions about his role with the army. I note that the RPD member did question the respondent about why he joined the army, how long he was in the army, what his duties were in the army, and where he was stationed while in the army.” The Minister had appealed the RPD's positive determination on the basis that the Member should have notified the Minister that there was a possibility of exclusion in the case as, in their view, the panel “simply overlooked the evidence of his service in the Afghan National Army and did no analysis of whether his service and responsibilities amount to complicity in war crimes or crimes against humanity.” The RAD rejected this argument noting that “there was no evidence that was before the RPD [that] could have alerted the RPD member to the possibility of exclusion being a live issue for the RPD hearing” and that the fact that the Member asked questions that *could* relate to such issues did not, without more, trigger the obligation to notify the Minister.^[13]

- *Where the Board makes a factual finding relating to the issue in its reasons:* In *Canada v. Oladapo*, the court considered a case in which the Minister sought judicial review on the basis that "the Board did not notify the Minister upon becoming aware that section 1E of the *Convention*...possibly applied to the claim". The Minister stated that the Board was clearly aware there was a possibility [Article 1E] applied since it took the time to review the evidence and make a finding. The Minister argued that had it had the chance to participate in the proceedings, it could have provided evidence on the respondent's status in Spain and other questions relevant to whether or not the respondent had status substantially similar to that of Spain's nationals. The court concurred: "the Board considered and then rejected exclusion. The Board made a factual finding relating to the respondent's status in Spain. This reaches the threshold of 'possibility' as used in [then-]Rule 23 and therefore requires notice to the Minister."^[16] In such circumstances where a Member considers exclusion in their reasons, unless it can be said that the issue only arose after the hearing began, then it should be concluded there was a possibility of exclusion in the case and that the possibility existed prior to the hearing commencing.
- When there is evidence on the record that should have alerted the panel to the issue: Even where it is clear that the Member did not subjectively believe that there was a possibility of exclusion, if the Member's failure to form that belief is unexplained or unreasonable in light of the evidence that was before them, then reviewing bodies have been quite willing to conclude that there was a possibility of exclusion and that the Minister should have been so notified. Examples of cases where the RAD and courts have reached this conclusion follow.
 - *The claimant admits to having committed a serious crime:* For example, in one case a claimant had stated in his Basis of Claim form that the state wanted him to pay back 3 billion Soums he stole and that he had left Uzbekistan because he did not have the money. The RAD held that with that information in front of it, the RPD had erred in not notifying the Minister of possible exclusion for serious criminality, notwithstanding the fact that the RPD had ultimately rejected the claim in question.^[17]
 - *Information in the NDP establishes that the claimant was involved with a problematic group:*
 - *Examples of where notification was appropriate:* For example, in one case a claimant indicated that he was involved with the Sudan People's Liberation Movement (SPLM). Information in the National Documentation Package was that the SPLM or factions of the SPLM were involved in excessive acts of violence and the targeting of civilians. The group was also accused of recruiting child soldiers. Even where there was no explicit evidence in the record that the claimant was actively and personally involved in activities that would lead to exclusion, there was evidence in the record which established that the group with which he admitted he was a highly active member was involved in such activities. The RAD concluded that this gave rise to the possibility that exclusion may apply to the claim and thus the obligation to notify the Minister.^[18] Similarly, in *Canada v. Mukasi* there was evidence before the Board that the claimant was associated with violence, particularly that the claimant "led a faction of UPRONA that was opposed to the peace process in Burundi. He was arrested for his stance. UPRONA was associated with a violent militant group." In the view of the court, this evidence "should have alerted the Board to the possibility that Mr. Mukasi might be excluded from the definition of a Convention refugee based on Article 1(F) of the Convention."^[19]

- *Examples of where notification was unnecessary:* That said, the Minister need not be notified where the possibility of exclusion is purely speculative. For example, RAD Member Rena Dhir considered a case in which the Minister appealed a positive determination from the RPD regarding an Afghan national. In that case, the claimant had a record of service with the Afghan National Army. The Minister argued that issues of exclusion should have been canvassed, and notification provided, on the basis that there have been documented human rights abuses in Afghanistan on the pro-government side attributed to pro-government armed militias, who operate outside of government control, but may at times have some contact with the army, and on the basis of the Army's own past activities. The RAD held that this was an insufficient basis on which to conclude that any such notice needed to be provided, noting that "there is no evidence, from my review, that indicates that the ANA was complicit in war crimes regarding the issue of Exclusion as it relates to Article 1(F)(a) when the respondent was part of this organization" and that the organization's more tangential links to armed militias were also insufficient to trigger this rule.^[20]

26.3.4 What does it mean that the Division must notify the Minister "without delay"?

The standard used in Rule 26(1) is that "if the Division believes, before a hearing begins, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, the Division must without delay notify the Minister in writing and provide any relevant information to the Minister." Similarly, Rule 26(2) requires the Division to "adjourn the hearing and without delay notify the Minister in writing" where certain conditions are met.

What does "without delay" mean in this context? The Federal Court commented on this in *Kanya v. Canada*, noting that where the Board determines that there is a possibility of exclusion, the hearing should be adjourned immediately:

The Board clearly indicated from the outset of the proceedings that there was a "possibility" that 1(F)(b) would apply to the applicant. The hearing should have been adjourned from the outset; the Minister should have been notified and the applicant should have been given time to prepare for an exclusion determination.

In that case, the court held that the Board erred when it asked a series of questions related to the narrative and the possibility of exclusion before, mid-way through the hearing, "formally" raising the possibility of 1F(b) exclusion, notifying the Minister, and ultimately setting a future date for the hearing to resume. This was held to be procedurally unfair to the claimant who had not had the requisite pre-hearing notice of this issue that is entailed by the Ministerial notification requirement. The court reaffirmed that the rule requires that the claim be suspended "immediately" and does not permit a panel to ask any additional questions prior to notifying the Minister in *Oyejobi v. Canada*:

My review of the transcript shows that the RPD member actually did not invoke Rule 27(1) immediately because he was trying to "give the client a chance." As the RPD member himself stated, he wanted to see if he could find the Applicant credible (specifically with regard to her sexual orientation) – in spite of the perceived integrity issue – such that he might grant the claim. While the RPD approach is laudable in that it was

likely motivated by a desire to give the Applicant the benefit of the doubt, the RPD member did not do what Rule 27 requires him to do[.]^[21]

In similar fashion, the court commented in *Canada v. Louis*, another case in which a panel proceeded to question a claimant about possible exclusion without having previously notified the Minister, that "the Board [set] aside the issues of exclusion following an examination of their merits. The fundamental problem [with the Board's conduct was] the fact that the Board indeed continued with this examination without having previously notified the Minister."^[15] As such, where the Board examines the merits of an issue on which it is supposed to provide notice, without having previously provided the notice in question, it errs.

The phrase "without delay" is used not just in the Refugee Protection Rules, but across the scheme and regulations of the IRPA more broadly. For example, in the IRCC manual on port of entry procedures, it notes that a person who is arrested must be informed of their right to counsel "without delay": "For the purpose of an Immigration Secondary examination, a person is not entitled to counsel unless formally arrested or detained. A person who is arrested or detained must be informed without delay of their right to counsel and granted the opportunity to retain and instruct counsel. [emphasis added]"^[22] It is easy to appreciate in the criminal context the importance of affording the right to counsel without delay, and without first asking a claimant a series of questions about the matter that they are being arrested in relation to. The fact that the same language is used in the context of this Ministerial notification obligation may be instructive.

26.3.5 How much notice must the Division provide where it identifies a possibility of exclusion prior to a hearing?

Rule 26(1) provides that the Division must notify the Minister where it believes, before a hearing begins, that there is a possibility of exclusion in the claim. Once such notification has been provided, this rule does not provide any particular notice period for the Minister and does not require that the hearing be postponed for any specific number of days. Instead, a specific notification period only arises pursuant to Rule 26(2) in situations where the Division is of the view both that there is a possibility of exclusion and where "the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim". In such circumstances, the Division must adjourn the hearing, notify the Minister, and can only resume after the Minister responds or after 14 days have elapsed following the Minister's receipt of the notice.

As such, how much notice is required where notification is provided pre-hearing pursuant to Rule 26(1) will be driven by procedural fairness requirements, including what is fair and sufficient notice to the Minister and to the claimant regarding this new issue. The notification provisions above operate not only to the benefit of the Minister, but also ensure that a claimant has adequate notice of a potential exclusion issue and time to prepare for it. For a discussion of this, see: Canadian Refugee Procedure/The right to a hearing and the right to be heard#The Board must notify the Minister where the Board's rules require

it and this protects the Minister's right to be heard². As a starting point, the notice period specified in Rule 26(4) may be relied upon for an indication of what amount of notice should normally be considered appropriate, requisite, and fair, but the Division has discretion to deviate from this duration where appropriate given that there is no specific period specific in this rule.

26.3.6 When should a panel form the belief that there is a possibility of exclusion prior to a hearing, as opposed to forming such a belief after the hearing begins?

Reading Rules 26(1) and 26(2) in conjunction, Rule 26(2) provides a panel with discretion about whether or not to notify the Minister where the panel only forms an opinion about there being a potential issue "after a hearing begins". Rule 26(1) is entitled "Notice to Minister of possible exclusion *before* hearing". Per Rule 26(1), where an issue is identified before the hearing, the panel *must* notify the Minister. In contrast, Rule 26(2) is entitled "Notice to Minister of possible exclusion *during* hearing". Where the panel only forms an opinion about there being a potential issue "after a hearing begins", per Rule 26(2) the Ministerial notification requirement only applies where the Division is of the view that the Minister's participation "may help in the full and proper hearing of the claim". This discretionary aspect to Rule 26(2) means that even where the panel forms an opinion that there is a "possibility" that the claimant is excluded during the hearing, the panel nonetheless retains discretion about whether or not to notify the Minister, and, as a result, adjourn the hearing.

The court commented on how the notification provisions in Rules 26(1) and 26(2) interact in *Oyejobi v. Canada*, noting that where issues exist on the record prior to the hearing, notification will be called for, and that the types of issues where Rule 26(2) applies are ones where a panel should be able to identify some particular new evidence on the record that caused the panel to come to its newfound belief about the possibility of exclusion:

I am unable to identify the precise testimony from the Applicant that caused the RPD member to change his mind and decide that the Minister's assistance would, after all, be necessary to ensure a full and proper hearing. I find this to be particularly troubling, considering that the integrity issue was discovered prior to the hearing and involved the copying of BOC narratives. In my view, it is not clear from the RPD reasons how such an integrity concern would be resolved (positively or negatively) through the Applicant's oral testimony. In other words, and contrary to the assertion of the RPD, the copying of BOC narratives would present a significant integrity issue whether or not this Applicant is believed to be bisexual.^[23]

It should be noted that *Oyejobi v. Canada* concerned Rule 27 of the RPD Rules, but the point applies equally to Rule 26, *mutatis mutandis*.

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_a_hearing_and_the_right_to_be_heard#The_Board_must_notify_the_Minister_where_the_Board's_rules_require_it_and_this_protects_the_Minister's_right_to_be_heard

26.3.7 How should a panel decide whether "the Minister's participation may help in the full and proper hearing of the claim"?

Where the panel only forms an opinion about there being a potential issue "after a hearing begins", per Rule 26(2) the Ministerial notification requirement will apply if, and only if, the Division is of the view that the Minister's participation "may help in the full and proper hearing of the claim". How should the Division exercise this discretion? As Madam Justice Tremblay-Lamer observed in *Rivas v. Canada*, when an issue of exclusion is raised during the hearing, this rule "allows a certain discretion for the RPD to determine whether the Minister's participation will help it deal with the issue of the applicant's exclusion".^[24] The court provided some guidance on this question in *Oyejobi v. Canada*, as follows:

In my view, the RPD member ignored the provisions of Rule 27. The RPD member claims to have not invoked the Rule 27(1) because he was not of the opinion that the Minister could provide "meaningful assistance" when he was preparing for the hearing, and then invoked Rule 27(2) once he determined that the allegedly copied passages "would need to be addressed after all." This explanation is simply repeated in the Decision without further analysis. I find this to be problematic for at least three reasons. First, the standard for notifying the Minister is not when there is a belief that the Minister may provide "meaningful assistance;" rather, it is triggered as soon as the RPD is of the opinion that the Minister's participation "may help in the full and proper hearing of the claim" (emphasis added). As such, the standard is much lower than the one employed by the RPD member.^[25]

The above case concerned Rule 27 of the RPD Rules, but the point applies equally to Rule 26, *mutatis mutandis*.

26.4 RPD Rule 27 - Possible Integrity Issues

Notice to Minister of possible integrity issues before hearing

27 (1) If the Division believes, before a hearing begins, that there is a possibility that issues relating to the integrity of the Canadian refugee protection system may arise from the claim and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must without delay notify the Minister in writing and provide any relevant information to the Minister.

Notice to Minister of possible integrity issues during hearing

(2) If the Division believes, after a hearing begins, that there is a possibility that issues relating to the integrity of the Canadian refugee protection system may arise from the claim and the Division is of the opinion that the Minister's participation may help in the full and proper hearing of the claim, the Division must adjourn the hearing and without delay notify the Minister in writing and provide any relevant information to the Minister.

Integrity issues

(3) For the purpose of this rule, claims in which the possibility that issues relating to the integrity of the Canadian refugee protection system may arise include those in which there is

- (a) information that the claim may have been made under a false identity in whole or in part;
- (b) a substantial change to the basis of the claim from that indicated in the Basis of Claim Form first provided to the Division;
- (c) information that, in support of the claim, the claimant submitted documents that may be fraudulent; or
- (d) other information that the claimant may be directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

Disclosure to claimant

(4) The Division must provide to the claimant a copy of any notice or information that the Division provides to the Minister.

Resumption of hearing

(5) The Division must fix a date for the resumption of the hearing that is as soon as practicable,
 (a) if the Minister responds to the notice referred to in subrule (2), after receipt of the response from the Minister; or
 (b) if the Minister does not respond to that notice, no earlier than 14 days after receipt of the notice by the Minister.

26.4.1 What are "issues relating to the integrity of the Canadian refugee protection system"?

Rule 27 is triggered where the Division believes that there is a possibility that issues relating to the integrity of the Canadian refugee protection system may arise from the claim. What so qualifies? Those categories listed in Rule 27(3) provide guidance when it states that such issues include those in which there is:

- (a) information that the claim may have been made under a false identity in whole or in part.
- (b) a substantial change to the basis of the claim from that indicated in the Basis of Claim Form first provided to the Division.
- (c) information that, in support of the claim, the claimant submitted documents that may be fraudulent.
- (d) other information that the claimant may be directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. The court provided some guidance on this question in *Oyejobi v. Canada*, noting that a situation in which a panel suspects that a BOC narrative has been copied from another claimant is one which raises issues relating to the integrity of the system.^[23]

26.4.2 When should the Division be of the opinion that the Minister's participation may help in the full and proper hearing of the claim?

It is clear from the focus of Rule 27 that even where such issues arise in relation to a claim, for example there is an indication that the BOC narrative was copied from another claim, the clear wording of the Rule also requires that the panel believe that the Minister's participation may help in the hearing of the specific claim before the Member, not simply in investigating a possibility of broader integrity issues involving the other (suspiciously similar) claim. For a broader discussion of this question, see Canadian Refugee Procedure/Exclusion, Integrity Issues, Inadmissibility and Ineligibility#How should a panel

decide whether "the Minister's participation may help in the full and proper hearing of the claim"?³ above.

26.5 RPD Rule 28 - Possible Inadmissibility or Ineligibility

Notice of possible inadmissibility or ineligibility

28 (1) The Division must without delay notify the Minister in writing and provide the Minister with any relevant information if the Division believes that

- (a) a claimant may be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality;
- (b) there is an outstanding charge against the claimant for an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years; or
- (c) the claimant's claim may be ineligible to be referred under section 101 or paragraph 104(1)(c) or (d) of the Act.

Disclosure to claimant

(2) The Division must provide to the claimant a copy of any notice or information that the Division provides to the Minister.

Continuation of proceeding

(3) If, within 20 days after receipt of the notice referred to in subrule (1), the Minister does not notify the Division that the proceedings are suspended under paragraph 103(1)(a) or (b) of the Act or that the pending proceedings respecting the claim are terminated under section 104 of the Act, the Division may continue with the proceedings.

26.5.1 What process does the Minister follow in order to determine ineligibility?

Under the Act, the burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests solely with the refugee protection claimant, and it is not for an immigration officer to show that the claim is ineligible.^[26] Prior to declaring that a claimant is ineligible, the Minister will generally send out what is referred to as a procedural fairness letter. The letter will invite the claimant to provide evidence/submissions/materials regarding their eligibility by providing a written response to the letter. An officer will make a final decision after the deadline for providing submissions. If the claimant does not respond by the stated date, an officer will make a decision with the information on file. An appointment will generally be set up shortly thereafter to discuss the matter with the claimant in a CBSA office. If the final decision is that their claim is ineligible for referral to the Refugee Protection Division, the claimant will face removal from Canada. If, and when, the CBSA commences removal arrangements, the claimant's eligibility to apply for a Pre-Removal Risk Assessment (PRRA) will be assessed.

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#How_should_a_panel_decide_whether_"the_Minister%E2%80%99s_participation_may_help_in_the_full_and_proper_hearing_of_the_claim"?

26.5.2 What does it mean that the Division must notify the Minister "without delay"?

Rule 28(1) provides that the Division must without delay notify the Minister if it believes that one of the listed issues may arise in the claim (regarding inadmissibility, criminality, and ineligibility). The Rule 28(3) then provides the circumstances under which the Board may continue with the proceedings. The rationale for this scheduling policy has been articulated by the Federal Court, which has observed that "there is no point in conducting a hearing if eligibility could be an issue".^[27] Furthermore, the Minister argues that one of the purposes of this provision is to "avoid the need to nullify an RPD decision on a claim that is later found to be ineligible."^[28] That said, these issues of admissibility and eligibility are not determined by the Board. As with the notice provisions considered above (Canadian Refugee Procedure/Exclusion, Integrity Issues, Inadmissibility and Ineligibility#What does it mean that the Division must notify the Minister "without delay"?⁴), the claimant will generally have a right to have the proceedings halt when the Board determines that such notification is necessary, but the claimant may waive this right and elect to continue with the questioning (with the Board's decision suspended during the 20-day notice period above) for reasons of the claimant's choice, efficiency, and other considerations.

26.5.3 Rule 28(1)(c): When is a claim ineligible to be referred under section 101 of the Act?

See the provisions of, and commentary on, section 101 of the Act: Canadian Refugee Procedure/100-102 - Examination of Eligibility to Refer Claim⁵

26.5.4 Rule 28(1)(c): When is a claim ineligible to be referred under section 104 of the Act?

See the provisions of, and commentary on, section 104 of the Act: Canadian Refugee Procedure/103-104 - Suspension or Termination of Consideration of Claim⁶.

26.5.5 Other grounds of inadmissibility in the IRPA do not render claimants ineligible for a refugee hearing, but may nonetheless have consequences even where a claim is accepted

A number of grounds of inadmissibility are listed in the provision above. There are a number of others in the Act that are not listed above. As Jennifer Bond, et. al., observe, those other grounds of inadmissibility, such as health or financial criteria (ss. 38–39 of IRPA), misrepresentation (s. 40(1)(a) of IRPA), or criminality falling below the threshold described above will not make them ineligible for a refugee hearing; however, if their claim is successful and they become a "protected person", some of these grounds of inadmissibility could prevent

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#What_does_it_mean_that_the_Division_must_notify_the_Minister_"without_delay"?

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/100-102_-_Examination_of_Eligibility_to_Refer_Claim

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/103-104_-_Suspension_or_Termination_of_Consideration_of_Claim

them from acquiring permanent resident status.^[29] These include health grounds if their condition poses a danger to the public (s. 38(1)(a)–(b) of IRPA) or “serious criminality” in the absence of a conviction (s. 36(1)(c) of IRPA) or for a crime that does not carry a 10-year maximum sentence (IRPA, s. 99(4) and s. 21(2)). Such persons could not be refouled from Canada, by virtue of s. 115(1) of IRPA, but would be subject to a range of negative consequences due to their lack of permanent status.^[30] This has been a part of Canadian immigration law for some time; even under the previous *Immigration Act*, where a claimant applying for permanent residence did not have sufficient identity documents, or he/she or a dependent included in the application was inadmissible for criminal or security reasons, it was possible that “landing” would not be granted.^[31]

26.6 References

1. *Badriyah v Canada (Minister of Citizenship and Immigration)*, 2016 1002, para. 26.
2. *Hussain v. Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1412 (CanLII), at para 37, <⁷>, retrieved on 2023-06-27.
3. Immigration, Refugees and Citizenship Canada, *ENF 24 Ministerial interventions Policy*, dated 2016-03-18 <⁸>, page 6.
4. Canada Border Services Agency, *Evaluation of the CBSA Hearings Program*, Publication dated December 2018, <⁹> (Accessed January 6, 2020).
5. Inter-American Commission on Human Rights (IACHR), *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, 2000, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. (2000), available at: ¹⁰ [accessed 18 August 2020], para. 46.
6. R. G. L. Fairweather, *Canada's New Refugee Determination System*, 27 CAN. Y.B. INT'L L. 295 (1989), page 302.
7. Hathaway, James C., *Rebuilding trust: a report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*, Refugee Studies Centre, Publisher: Osgoode Hall Law School, 01/12/1993 <¹¹> (Accessed April 14, 2020), page 30.
8. Brian Hill & Mikail Malik, ‘This is really the end’: Asylum seekers in Canada struggle with suicidal thoughts¹², October 13, 2022, Global News.
9. *Refugee Protection Division Rules*, SOR/2002-228, Rule 23.
10. *Canada (Citizenship and Immigration) v. Oladapo*, 2013 FC 1195 (CanLII), par. 34, <¹³>, retrieved on 2021-06-11.
11. As summarized in Jennifer Bond, Nathan Benson, Jared Porter, *Guilt by Association: Ezokola’s Unfinished Business in Canadian Refugee Law*, Refugee Survey Quarterly, , hdz019, ¹⁴.
12. *X (Re)*, 2015 CanLII 40799 (CA IRB), para. 25.

7 <https://canlii.ca/t/jsgr3#par37>

8 <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf24-eng.pdf>

9 <https://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2018/imp-pa-eng.html>

10 <https://www.refworld.org/docid/50ceedc72.html>

11 http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:1136

12 <https://globalnews.ca/news/9192965/asylum-seekers-canada-mental-health-suicide/>

13 <https://canlii.ca/t/g26cr#par34>

14 <https://doi-org.ezproxy.library.yorku.ca/10.1093/rsq/hdz019>

13. *X (Re)*, 2016 CanLII 107938 (CA IRB), para. 23, <¹⁵>, retrieved on 2020-01-31.
14. *Kanya v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1677 (CanLII), para. 21.
15. *Canada (Citizenship and Immigration) v. Louis*, 2009 FC 674 (CanLII), para. 24.
16. *Canada (Citizenship and Immigration) v. Oladapo*, 2013 FC 1195 (CanLII), para. 27.
17. *X (Re)*, 2014 CanLII 96668 (CA IRB), paras. 23-28.
18. *X (Re)*, 2015 CanLII 40799 (CA IRB), para. 27.
19. *Canada (Citizenship and Immigration) v. Mukasi*, 2008 FC 347 (CanLII), paras. 7-8.
20. *X (Re)*, 2016 CanLII 107938 (CA IRB), <¹⁶>, retrieved on 2020-01-31.
21. *Oyejobi v. Canada (Citizenship and Immigration)*, 2018 FC 107 (CanLII), para. 21.
22. Immigration, Refugees and Citizenship Canada, *ENF 4: Port of entry examinations*, Dated 2019-08-15 <¹⁷>, page 36 (Accessed January 25, 2020).
23. *Oyejobi v. Canada (Citizenship and Immigration)*, 2018 FC 107 (CanLII), para. 20.
24. *Reyes Rivas v. Canada (Citizenship and Immigration)*, 2007 FC 317 (CanLII), para. 37.
25. *Oyejobi v. Canada (Citizenship and Immigration)*, 2018 FC 107 (CanLII), paras. 18-19.
26. *Hermes Ablahad v Canada (Citizenship and Immigration)*, 2019 FC 1315 at paras 25-26.
27. *Alhaqli v. Canada (Citizenship and Immigration)*, 2017 FC 728 (CanLII), para. 64.
28. *Alhaqli v. Canada (Citizenship and Immigration)*, 2017 FC 728 (CanLII), para. 39.
29. Jennifer Bond, Nathan Benson, Jared Porter, *Guilt by Association: Ezokola's Unfinished Business in Canadian Refugee Law*, *Refugee Survey Quarterly*, hdz019, ¹⁸, footnote 37.
30. J. Bond, *Unwanted but Unremovable: Canada's Treatment of 'Criminal' Migrants Who Cannot be Removed*, *Refugee Survey Quarterly*, 36(1), 2017, 168-186.
31. Inter-American Commission on Human Rights (IACHR), *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, 2000, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. (2000), available at: ¹⁹ [accessed 18 August 2020], para. 51.

15 <http://canlii.ca/t/hqh9q#23>

16 <http://canlii.ca/t/hqh9q#1>

17 <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf04-eng.pdf>

18 <https://doi-org.ezproxy.library.yorku.ca/10.1093/rsq/hdz019>

19 <https://www.refworld.org/docid/50ceedc72.html>

27 Intervention by the Minister (RPD Rule 29)

27.1 Relevant IRPA Provision

The relevant provision in the Act is s. 170(e), which reads:

Proceedings

170 The Refugee Protection Division, in any proceeding before it, (e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;

27.1.1 The rate of Ministerial interventions in Refugee Protection Division hearings

For details on the rate at which the Minister intervenes in Refugee Protection Division proceedings, see: Canadian Refugee Procedure/RPD Rules 26-28 - Exclusion, Integrity Issues, Inadmissibility and Ineligibility#How often does the Minister participate in proceedings at the Board?¹.

27.1.2 The Minister is permitted to intervene in proceedings, but is not required to do so

The Minister is not required to intervene and bring forward evidence available to it prior to a refugee hearing.^[1]

27.2 Rule 29

The text of the relevant rule reads:

Intervention by the Minister

Notice of intention to intervene

29 (1) To intervene in a claim, the Minister must provide (a) to the claimant, a copy of a notice of the Minister's intention to intervene; and (b) to the Division, the original of the notice, together with a written statement indicating how and when a copy was provided to the claimant.

Contents of notice

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_26-28_-_Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#How_often_does_the_Minister_participate_in_proceedings_at_the_Board?

- (2) In the notice, the Minister must state
- (a) the purpose for which the Minister will intervene;
 - (b) whether the Minister will intervene in writing only, in person, or both; and
 - (c) the Minister's counsel's contact information.

Intervention - exclusion clauses

- (3) If the Minister believes that section E or F of Article 1 of the Refugee Convention may apply to the claim, the Minister must also state in the notice the facts and law on which the Minister relies.

Time limit

- (4) Documents provided under this rule must be received by their recipients no later than 10 days before the date fixed for a hearing.

27.2.1 History of this Rule

The equivalent rule in the previous 2002 version of the Rules read:

INTERVENTION BY THE MINISTER

Notice of intention to intervene

25. (1) To intervene in a claim, the Minister must provide
- (a) to the claimant, a copy of a written notice of the Minister's intention to intervene; and
 - (b) to the Division, the original of that notice and a written statement of how and when a copy was provided to the claimant.

Contents of notice

- (2) In the notice, the Minister must state how the Minister will intervene and give the Minister's counsel's contact information.

Intervention - exclusion clauses

- (3) If the Minister believes that section E or F of Article 1 of the Refugee Convention may apply to the claim, the Minister must also state in the notice the facts and law on which the Minister relies.

Time limit

- (4) Documents provided under this rule must be received by the Division and the claimant no later than 20 days before the hearing.

Comparing this version of the rule to the current version of the rule, one can see that the current version of the rules introduced changes to the requirements for the contents of the notice (the former Rule 25(2)) and also changed the timeline provided for in the former Rule 25(4).

27.2.2 Rule 29(2)(a) requires that the Minister provide a notice stating the purpose for which it will intervene

Rule 29(2)(a) provides that in order for the Minister to intervene in a claim and thus become a party to the proceedings, the Minister must provide a Notice of Intervention, and this Notice must state the purpose for which they are intervening in the claim. The Notice of Intervention should go beyond identifying what the Minister wishes to do at the hearing and should state why they want to do it, e.g. what determinative issues are at play in the hearing. For example, in one case the Minister provided a notice of intervention which identified their purposes as "appearing through Minister's counsel at the proceedings to present evidence, question witnesses and make representations." The Division held that this notice did not actually identify any purpose for the intervention and thus did not meet the requirements imposed by the rules:

They are merely listing what they intend to do at the hearing as opposed to why they are doing it. The Minister has not stated what their purpose is for filing their intervention; they have simply recited the obvious role Minister's counsel will play at the hearing when they appear in person once they become a party. The statement in the notice made by Minister's counsel that is defined as their "purpose" are descriptions of actions and not the reasons behind those actions, and therefore do not constitute a statement of purpose at all.^[2]

In that case, the Board declined to allow the Minister's intervention on the basis that the intervention notice was insufficiently specific. The rationale for this decision is strengthened by comparing the current version of the rules to its predecessor reproduced above. Whereas the previous version of the rules only required that the Minister state "how" they would intervene, this was modified to require that the Minister identify the "purpose" of their intervention in the current version of the rules. As discussed in the reasons above, the Board identified in its public commentary at the time of this change that this modification was made in order to ensure that claimants had better notice of the reasons why the Minister would be intervening in the upcoming proceeding.

The Board has noted that "the level of detail required in the Notice is fact driven and may vary from case to case".^[2] A description of the issues the Minister will raise at the hearing or identifying the specific facts and issues of the intervention are not necessarily required. It is common that such notices simply indicate that the Minister is intervening on an issue such as "credibility" or that it indicates that the Minister is intervening "in all aspects of the claim". What a claimant can expect from such statements is exemplified by the following passage from a University of Ottawa guide for refugee claimant which describes the process: "If [IRCC] has sent a Minister's Counsel to your hearing, you will have already been informed of the reason why (for example [IRCC] suspects you are misrepresenting your identity) and the Minister's Counsel will ask questions relating to those concerns."^[3]

Where the Notice of Intervention is deficient in this respect, the Division should generally decline to allow the Minister's intervention, while inviting them to submit a notice of intervention that complies with the requirements of the rules. See the reasons of Member Davidson of the Refugee Protection Division for an example of this approach.^[2] However, where there would not be enough time to allow the Minister to do this prior to the hearing date, then see the following commentary.

27.2.3 Rule 29(4) provides that a claimant is entitled to 10 days of notice of the purpose of any Ministerial intervention

Under Rule 29(4), claimants are entitled to notice of the purpose of any Ministerial intervention under this Rule at least 10 days before the hearing. This mirrors the requirement that the Board provide advance notification to the Minister that certain issues may arise in a claim and the way that that is a substantive right that the claimant is entitled to: Canadian Refugee Procedure/The right to a fair hearing#Rules creating an obligation to notify the Minister ensure that a claimant will have advance notice of particular types of

issues². Where this notice requirement has not been complied with, what should a panel of the Board do?

- The Board may waive this notice requirement, including pursuant to Rule 71: Canadian Refugee Procedure/General Provisions#Effect of Rule 71 where the Division has not explicitly changed the requirement of a rule³. This may properly be done where there is no prejudice to the claimant as a result of the lack of notice or any potential prejudice can be ameliorated through post-hearing submissions. For example, in *El Haddad c. Canada* the Minister intervened on the issue of exclusion. At the hearing, the Minister stated that they would not be pursuing the exclusion matter, but wished to provide submissions on the claimant's credibility. On judicial review, the claimant challenged their ability to do so on the basis that they had not provided the advance notice required by Rule 29 that they would be intervening for that purpose. The court held that the Board had not erred in allowing the Minister to provide submissions on credibility in these circumstances given that the Minister did not question the claimant but only provided legal submissions at the close of the hearing, and given that the issue they provided submissions on, credibility, is one that is always at issue in hearings.^[4]
- The Board may postpone the commencement of proceedings so that the claimant receives the requisite amount of notice.
- The Board may err if it proceeds with the hearing and denies the Minister the ability to participate. Section 170(e) of the IRPA provides the Minister with a right to participate in the hearing: "The Refugee Protection Division, in any proceeding before it, ... must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations". In *Canada v. Atabaki* the Minister's notice of intervention indicated that they would intervene related to exclusion, but did not indicate that they would intervene on issues of credibility. The Member accordingly denied the Minister the ability to question the claimant regarding issues of credibility. The court held that this approach was in error and remitted the matter to be redetermined by the Board.^[5] That said, it should be noted that this case concerned the previous version of the RPD Rules, which had a different requirement for Ministerial notice, and so that may affect the decision's ongoing applicability.

27.2.4 Rule 29(2)(b) provides that a claimant is entitled to advance notice where the Minister will be intervening in person

Rule 29(2)(b) provides that the Minister's notice of intervention must state whether the Minister will intervene in writing only, in person, or both. Member McSweeney of the Refugee Appeal Division has considered the effect of a violation of this rule in a published decision. In that case, the Minister's intervention notice had not indicated whether or not the Minister would be intervening in person. When the Minister's delegate appeared at the hearing and sought to question the claimant, counsel for the claimant objected to the Minister being able to do so because of the lack of notice as required by the rules. The claimant and their counsel did not have an opportunity to prepare for questioning by the

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_a_fair_hearing#Rules_creating_an_obligation_to_notify_the_Minister_ensure_that_a_claimant_will_have_advance_notice_of_particular_types_of_issues

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/General_Provisions#Effect_of_Rule_71_where_the_Division_has_not_explicitly_changed_the_requirement_of_a_rule

Minister given the lack of notice before the second sitting. The Refugee Appeal Division held that it was wrong to have allowed the questioning to proceed in such circumstances, this rendered the proceeding unfair, and a new hearing was consequently ordered by the RAD.^[6]

27.2.5 A Minister's Notice of Intention to Intervene must be in the language of the proceeding

Any documents that the Minister provides in a proceeding, including the Notice of Intention to Intervene, must be in the language of the proceedings: Canadian Refugee Procedure/Documents#The language the Minister must use in oral and written pleadings⁴. Thus, for example, where a claimant elects to proceed with their case in French and the Minister provides a Notice of Intention to Intervene in English, a claimant will be right to object that they have not received proper notice as required by Rule 29.

27.3 References

1. *Canada v. Cortez*, [2000] FJC No. 115.
2. *X (Re)*, 2016 CanLII 62221 (CA IRB), <⁵>.
3. University of Ottawa Refugee Assistance Project, *UORAP Hearing Preparation Kit, Guide 3: Preparing Evidence for your Hearing* <https://ccrweb.ca/sites/ccrweb.ca/files/hearing_preparation_kit.pdf>, page 22 (Accessed January 17, 2020).
4. *El Haddad c. Canada (Citoyenneté et Immigration)*, 2020 CF 487 (CanLII), par. 24, <⁶>, consulté le 2020-04-20.
5. *Canada (Citizenship and Immigration) v. Atabaki*, 2007 FC 1170 (CanLII), par. 30, <⁷>, retrieved on 2020-04-13.
6. *X (Re)*, 2014 CanLII 90905 (CA IRB), para. 18 <⁸>.

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#The_language_the_Minister_must_use_in_oral_and_written_pleadings

5 <https://www.canlii.org/en/ca/irb/doc/2016/2016canlii62221/2016canlii62221.html>

6 <http://canlii.ca/t/j6fqr#par24>

7 <http://canlii.ca/t/1tprf#par30>

8 <https://www.canlii.org/en/ca/irb/doc/2014/2014canlii90905/2014canlii90905.html>

28 Claimant or Protected Person in Custody (RPD Rule 30)

28.1 Rule 30 - Claimant or Protected Person in Custody

The text of the relevant rule reads:

Claimant or Protected Person in Custody

Custody

30 The Division may order a person who holds a claimant or protected person in custody to bring the claimant or protected person to a proceeding at a location specified by the Division.

28.1.1 A large majority of refugee claimants who are detained are detained on grounds of identity or being a flight risk

The CBSA detained an average of 7215 individuals per year in the period from 2012 to 2017, each of whom spent, on average, 19.5 days behind bars.^[1] One study found that the vast majority (93 percent) of refugee claimants detained in 2015 were detained on grounds of identity or of their being flight risks, without allegations that they represented a danger to the public or a security risk.^[2]

28.1.2 Access to Justice issues for persons in custody

There are particular access to justice issues for persons in custody: claimants in detention have consistently been identified as those who have had the greatest difficulty accessing legal counsel.^[3] The UN Committee Against Torture, in its General Comment on *non-refoulement*, has listed this as one situation in which the burden of proof should reverse, and it should fall on the state to rebut the claimant's assertions where a detained persons faces difficulties in obtaining evidence to substantiate their claim:^[4]

[W]hen the complainant is in a situation where he/she cannot elaborate on his/her case, for instance, when the complainant has demonstrated that he/she has no possibility of obtaining documentation relating to his/her allegation of torture or is deprived of his/her liberty, the burden of proof is reversed and it is up to the State party concerned to investigate the allegations and verify the information on which the communication is based.^[5]

For more details on this, see Canadian Refugee Procedure/The Board's inquisitorial mandate#The Board must ensure that certain claimants are assisted to make their cases¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#The_Board_must_ensure_that_certain_claimants_are_assisted_to_make_their_cases

28.2 References

1. Petra Molnar and Stephanie J. Silverman, *Canada needs to get out of the immigration detention business*, CBC News, July 5, 2018, <²> (Accessed April 5, 2021).
2. Obiora Chinedu Okafor, *Refugee Law After 9/11: Sanctuary and Security in Canada and the United States*, UBC Press 2020, Law and Society Series, ISBN 9780774861465, page 74.
3. BC Public Interest Advocacy Centre, *Refugee Reform Paper*, <³>, page 3.
4. Çalı, B., Costello, C., & Cunningham, S., *Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies*, German Law Journal, 21(3) (2020), 355-384. doi:10.1017/glj.2020.28 (Accessed April 11, 2020), page 375.
5. CAT, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, Paragraphs 15 and 16, U.N. Doc. CAT/C/GC/4 (Sep. 4, 2018), at para. 38.

² <https://www.cbc.ca/news/opinion/immigration-detention-1.4733897>

³ <https://bcpiac.com/wp-content/uploads/2015/09/LFBC-Refugee-Reform-Paper-Final-July-30-2015-2.pdf>

29 Documents (RPD Rules 31-43)

Rules 31-43 are in a section of the rules entitled "documents" and they concern how to provide documents, the language(s) that documents may be in, the process that the Division should follow when it itself wants to provide documents, the criteria that the Division shall use to determine whether to accept documents, how the Division should decide whether or not to accept documents that have been submitted late, how documents may be provided both to the Division and to other parties, the requirement to provide original documents at the hearing, and the process for providing additional documents as evidence after a hearing. In short, these rules 31-43 concern the *process* by which a claimant is to submit a document to the Board. For a discussion of what documents a claimant is obliged to submit to the Board, see Rules 3-12 and the summary of those obligations at Canadian Refugee Procedure/Documents#What documents does a party need to provide when?¹

29.1 RPD Rule 31 - How to provide documents

The text of the relevant rules reads:

Documents

Form and Language of Documents

Documents prepared by party

31 (1) A document prepared for use by a party in a proceeding must be typewritten, in a type not smaller than 12 point, on one or both sides of 216 mm by 279 mm (8 1/2 inches x 11 inches) paper.

Photocopies

(2) Any photocopy provided by a party must be a clear copy of the document photocopied and be on one or both sides of 216 mm by 279 mm (8 1/2 inches x 11 inches) paper.

List of documents

(3) If more than one document is provided, the party must provide a list identifying each of the documents.

Consecutively numbered pages

(4) A party must consecutively number each page of all the documents provided as if they were one document.

29.1.1 What is a "document" as the term is used in these rules?

The term "document" is not explicitly defined in these rules. No definition, for instance, is provided in the definitions section of the rules at Rule 1 (Canadian Refugee Proce-

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_documents_does_a_party_need_to_provide_when?

dure/Definitions²). As with any exercise of statutory interpretation in Canada, the proper scope and meaning of the term "document" in these rules will thus emerge by applying Driedger's modern approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

^[1] Doing so, the following principles emerge:

- The term "documents" is defined broadly and is not confined to paper documents: When the current version of the RPD Rules were drafted in 2012, they were drafted against the background of the wording of the prior Rule 27 under the 2002 Refugee Protection Division Rules and the caselaw that had interpreted that version of the rules. One such case was *Cortes v. Canada*, which, when interpreting the previous version of this rule in the 2002 RPD Rules,^[2] had endorsed the following broad conception of what a document is within the meaning of the RPD Rules: "The *Commentaries to the Refugee Protection Division Rules* provide that "document" includes "any correspondence, memorandum, book, plan, map, drawing, diagram, picture or graphic work, photograph, film, microform, sound recording, videotape, machine-readable record, and any other documentary material, regardless of physical form or characteristics, and any copy of those documents"". ^[3] This interpretation continues to be persuasive, notwithstanding that the *Commentaries to the Refugee Protection Division Rules* are no longer made available by the Board. The caselaw applying to the previous rule would therefore appear to continue to be applicable to the updated one, as there was no indication that the 2012 amendments to the rules intended to depart from the previous interpretations and practices. Indeed, decisions under the new rules continue to construe the term "document" broadly, as with the following 2017 Refugee Appeal Division decision which concludes that "documents" include "electronic documents", as that term is defined in section 31.8 of the *Canada Evidence Act* ("electronic document means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data."). ^[4] The *Interpretation Act* includes the following definition: "writing, or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form. (écrit)". ^[5] This definition has been considered in other contexts that have concluded that written documents may include those in electronic format. ^[6] Furthermore, the Federal Court has held that non-paper sources of evidence, such as DVDs, are admissible before administrative tribunals in other circumstances: *Grenier v Canada*. ^[7]
- The term "document" as used in these rules is not limited to documents provided for evidentiary purposes, but also includes other types of documents: Where the term "document" is used in these rules without any qualification, it should apply to all documents, whether or not those documents are evidentiary ones or other types of documents such as written submissions. The term "documents" as used in these rules includes documents *prepared by a party* as per Rule 31(1), which sets out the format required for any "document prepared for use by a party in a proceeding". RPD Rule 37 specifies that a "document", as the term is used in these rules, includes "a notice or request in writing". Some of the RPD rules apply only to documents used as evidence (for example Rule

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions

43 applies only where "a party wants to provide a document *as evidence*", which the courts have held excludes situations where documents are provided for non-evidentiary purposes, such as written submissions (*Yared Belay v. Canada*, paras. 41-42^[8]) and caselaw (*Petrovic v. Canada*, para. 11^[9]). By necessary implication, the fact that other rules do not include this type of limitation on the term "documents" means that those rules apply to all documents submitted (notices, requests, submissions, caselaw, etc.), not simply evidentiary ones.

29.1.2 What is a "proceeding" as the term is used in these rules?

Many of these rules relate to documents used in "a proceeding", for example Rule 31(1) specifies that "a document prepared for use by a party in a proceeding" must meet the specifications set out therein. Are all documents submitted to the Refugee Board by a claimant or protected person (where there is an application to vacate or cease their protection, say) ones that are being used in a proceeding? Generally speaking, that is the case, as discussed in the following commentary below: Canadian Refugee Procedure/Documents#Meaning of "proceeding" in this rule³.

29.1.3 The evidence to be replied upon should be submitted so that it is part of the tribunal's record

Rule 31(4) provides that a party must consecutively number each page of all of the documents provided as if they were one document. One of the policy implications of this is that documents and evidence relied upon should generally be submitted and placed on the record so that they are available for any appeal or review of the Division's decision. In this way, the Division should not generally accept hyperlinks to evidence given that the content at the hyperlink may change. The Federal Court holds that "citations are not evidence before the Court"^[10] and the Division should conclude likewise. The following analysis from *Iribhogbe v. Canada* may be considered persuasive:

With respect to the website links and excerpts from these webpages, the RAD noted that the Applicant did not provide any documentation as new evidence in his Rule 29 application, as required by the RAD Rules. Instead, he included references to forty (40) Internet web links and select excerpts from webpages. The RAD indicated that any submission of new evidence must be in printed form, not a simple reference to an Internet link. The RAD further indicated that, in the absence of the actual documents containing the excerpts, it was unable to ascertain the publication date of the information to determine if the documents could have been provided with the Applicant's appeal record.^[11]

Similarly, in *Urbieta v. Canada* the RAD noted the RPD could not reasonably be expected to take a claimant's cellphone into evidence and proffering one's cellphone at the hearing is not a substitute for having submitted the documents prior to the hearing as required by the RPD Rules, so that the evidence may be accepted and placed on the record.^[12]

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Meaning_of_'proceeding'_in_this_rule

29.2 RPD Rule 32 - Language of Documents

Language of documents - claimant or protected person

32 (1) All documents used by a claimant or protected person in a proceeding must be in English or French or, if in another language, be provided together with an English or French translation and a declaration signed by the translator.

Language of Minister's documents

(2) All documents used by the Minister in a proceeding must be in the language of the proceeding or be provided together with a translation in the language of the proceeding and a declaration signed by the translator.

Translator's declaration

(3) A translator's declaration must include translator's name, the language and dialect, if any, translated and a statement that the translation is accurate.

29.3 Commentary

The following commentary applies to RPD Rules 32(1)-(3) collectively. It is then followed by more specific commentary pertaining to each of the specific subsections of Rule 32.

29.3.1 Where evidence has not been translated in accordance with the rules, the Board may decline to accept it or may assign it low weight

Declining to accept untranslated documents

The proper procedure to follow where a claimant attempts to admit documents that are untranslated is ordinarily that followed by RAD Member Normand Leduc when he wrote as follows: "Exhibit P-3 is not translated into English or French and, consequently, I cannot accept it as evidence."^[13] This is so as the language of this rule is described as "mandatory", including through its use of the word "must",^[14] and that countervailing considerations such as cost^[15] and time constraints^[16] are not generally valid reasons for non-compliance with the rule that documents be translated. Furthermore, the Federal Court has stated that it is not the tribunal's role to ask an interpreter present in the hearing room, if any, to translate a claimant's narrative:

The burden of being ready to proceed at a hearing is on the applicant, not the tribunal. Placing an obligation on the tribunal to ensure that the applicant's PIF is complete is similar to transferring the applicant's burden to the tribunal. The Court feels that the tribunal did not have an obligation to ask the interpreter present in the courtroom to translate the applicant's PIF to correct his deficiencies, as the applicant had suggested. It is the applicant's responsibility to prepare his claim file, and it is not up to the tribunal to fix his deficiencies.^[17]

See RPD Rule 6(3) on the requirement for the Basis of Claim form to have an interpreter's declaration: Canadian Refugee Procedure/Information and Documents to be Provided#RPD Rule 6 - Basis of Claim Form⁴.

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#RPD_Rule_6_-_Basis_of_Claim_Form

Declining to accept a document that has only been translated in part

The above logic applies equally where only a portion of the document has been translated. Member Edward Bosveld of the Refugee Appeal Division concluded that generally, a translation of a document should be complete, not only a selective translation of isolated words in a document on which a party wishes to rely:

Here, the Minister has not provided a translation of the Albanian-language wording on the Facebook pages, and yet seeks to rely upon that wording to establish that the Respondent's father is employed as a XXXX XXXX XXXX, which the Minister argues is not consistent with self-confinement at home. The Respondent disputes this contention, noting that the Minister has only translated selective words, and he disagrees that the words relate to his father's employment. The Minister has not complied with the requirement to provide a signed translator's declaration along with the translation of the Albanian words on the Facebook posts. Further, even if such a declaration had been provided, the RAD would still have some difficulty because only a partial translation has been provided. The translation provided does not comply with the Rules, is not complete, and the RAD cannot determine whether it is accurate. The RAD therefore declines to admit the Google translations into evidence.^[18]

But see *Islam v. Canada*, in which the Federal Court held that it was unreasonable for the RAD to accord no weight to new evidence on the sole basis that the translated version contains a caption that was absent in the untranslated version. This was so as the caption did not provide any information that was not already present in the translation, and giving weight to the evidence could potentially undermine the conclusion that the agents of persecution were unconnected with the Awami League.^[19]

Accepting untranslated evidence into evidence, but weighing it based on the fact that it is untranslated

The Board also has the power to admit such evidence into the record through its power to vary the rules per Rule 70 of the RPD Rules. Doing so and accepting untranslated documents from a claimant in a case where the Minister is not intervening does not generally breach procedural fairness.^[20]

Normally such evidence will be assigned little or no weight, though there may be circumstances where more weight can be given to the evidence. For example, in interpreting its analogous rule, the Immigration Appeal Division commented that German-language documents intended to show the extent of the applicant's medical treatment could be accepted into evidence, though given low weight:

The appellant provided approximately 72 pages of documents as evidence. The majority of the documents were in the German language. Minister's counsel objected to admission of those documents on the basis that they did not comply with *Immigration Appeal Division Rule 29(1)*. The German language documents were not translated into either official language. The appellant explained that the purpose of the documents was to show the extent of his dental treatment. The documents were allowed into evidence but the appellant was advised little or no weight could be attached to them since they were not translated into one of Canada's official languages.^[21]

The logic and practicality of admitting such untranslated documents was illustrated by the Immigration Appeal Division, when interpreting its analogous rule, as follows:

The appellant provided copies of chat messages for a select period. For the most part, those messages are in a foreign language. Counsel for the Minister of Citizenship and Immigration submitted that the messages should not have been admitted as evidence because they do not conform to *IAD Rule 29(1)*. The age of smartphones, internet communications and social media creates a dilemma. If a couple is regularly communicating by text, chat messages, Facebook or similar instant messaging, disclosure of all their messages would bog down hearings with mountains of paper. The cost of translation would be prohibitive. On the other hand, providing the messages without translation limits their probative value. Providing only a sample may lead to the inference that the remaining messages contain evidence adverse to the appellant's case. There is no easy solution. The appellant has attempted to overcome the problem by providing a statutory declaration explaining the evidence. That is of some assistance. I give the evidence some weight, but the weight I give is reduced by the fact that the messages are in a foreign language.^[22]

See also *Elias v. Canada*, in which the Federal Court commented on an IAD decision that had discounted evidence on the basis that it was untranslated. The court commented that the fact that the evidence was untranslated was not relevant to its probative value, as follows:

The IAD found that there was insufficient evidence that Ms. Elias and Mr. Baiade are in frequent communication. Yet, the record contains about 50 pages of screen shots showing communications by WhatsApp or other phone and messaging applications, apparently in 2015 and 2019. The IAD discounted this evidence because it was in Arabic and not translated. Yet, what is relevant is the frequency of communication, not its contents. ... While these issues may not independently render the IAD's decision unreasonable, they further erode its reasonableness.^[23]

When considering this case, it should be noted that the IAD's equivalent rule, IAD Rule 29, is very similar to the above RPD Rule ("All documents used at a proceeding by a person who is the subject of an appeal must be in English or French or, if in another language, be provided with an English or French translation and a translator's declaration").^[24]

29.3.2 This translation requirement applies to video and audio evidence submitted to the Board, which must also be transcribed

Claimants regularly submit audio and video evidence to the Board. It must be transcribed and that transcription should then be translated into English or French. The Federal Court confirmed this in *Cortes v. Canada* when interpreting the previous version of this rule:

Rule 28 provides that "[a]ll documents used at a proceeding must be in English or French or, if in another language, be provided with an English or French translation and a translator's declaration". Moreover, the *Commentaries to the Refugee Protection Division Rules* provide that "document" includes "any correspondence, memorandum, book, plan, map, drawing, diagram, picture or graphic work, photograph, film, microform, sound recording, videotape, machine-readable record, and any other documentary material, regardless of physical form or characteristics, and any copy of those documents".

Here, the DVD is a “document” that was not translated as required by the Rules. The panel was therefore entitled to attach no probative value to it.^[3]

The Refugee Protection Division has confirmed that the same reasoning applies to audiovisual and other evidence submitted under the current version of the RPD Rules.^[25] The guidebook *Refugee Hearing Preparation: A Guide for Refugee Claimants* from *refugeeclaim.ca* under the question “Do videos, websites, or other electronic documents need to be translated?” states that “Yes! All evidence that you obtain must be translated into English or French. Videos must be transcribed.” This reflects the best, and usual, practice.

29.4 RPD Rule 32(1) - Language of claimant or protected person's documents

Language of documents - claimant or protected person

32 (1) All documents used by a claimant or protected person in a proceeding must be in English or French or, if in another language, be provided together with an English or French translation and a declaration signed by the translator.

29.4.1 This rule applies to documents used by a claimant or protected person in a proceeding, not to all documents provided

Claimants are obliged to provide all relevant documents in their possession at the time that they provide their BOC Form. These documents need not be translated: Canadian Refugee Procedure/Information and Documents to be Provided#Documents attached to the BOC form need not be translated at the time that they are attached⁵. In contrast, documents provided at a later time must be translated since the only reason for their provision is that the claimant intends to rely upon them at the hearing, and hence they are to be “used” within the meaning of Rule 32(1).

29.4.2 Claimants need not provide documents in the language of the proceeding, only in English or French

Claimants elect a language for their proceeding, either English or French. That said, per Rule 32(1), they are not limited to submitting documents in that language. Unlike the Rule for the Minister at 32(2), claimants are solely required to provide their documents in English or French (or, for documents in another language, with a translation into either English or French), regardless of what the language of the proceeding is. RAD Member Douglas Fortney commented on this issue as follows:

In this case where the RPD member could not understand a document provided in French, the correct procedure would have been to have accepted the document into evidence and if necessary obtain an English language translation. Alternatively, it could have been considered to have obtained the services of a French – English interpreter who could have assisted in understanding the contents of the document at the RPD hearing.^[26]

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Documents_attached_to_the_BOC_form_need_not_be_translated_at_the_time_that_they_are_attached

This is reinforced by the IRB *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French*, which states that "All persons in the hearing room are free to speak the official language of their choice, including counsel for the subject of the proceeding. At the request of any party to the proceeding, the IRB will make arrangements to provide interpretation from one official language to the other, taking into consideration third language interpretation may also be required for the case."^[27] This has legislative support in section 14 of the *Official Languages Act*, which provides:

Official languages of federal courts

14) English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.^[28]

The Board is considered to be a "federal court" based on the way that term is defined in the Official Languages Act and is thus bound by this provision: Canadian Refugee Procedure/Decisions#In what language or languages must the reasons for decisions be made available where they are publicly released?⁶ As such, a claimant may provide documents (be they letters, correspondence, submissions, notices, or other evidentiary or non-evidentiary documents - see the broad definition of what is considered to be a "document" above Canadian Refugee Procedure/Documents#Rule 31 - How to provide documents⁷) provided that they meet the Rule 32 requirements regarding language.

29.4.3 What should a claimant do if they cannot afford to translate all of their documents?

Claimants are responsible for absorbing the cost of translating all written materials into either French or English.^[29] At times, claimants cannot afford to translate all of their documents. This may come up where a claimant is unrepresented (and thus does not have access to a translation budget from Legal Aid), where a claimant has sufficient means to afford private counsel but nonetheless is not able to afford having all of their documents translated because the documents are particularly voluminous, and where a claimant is entitled to legal aid but the translation budget provided by legal aid has been insufficient in the context of the case. In such a situation the claimant should advise the Division of the situation and be able to show that they took all reasonable steps to have the documents translated:

- Advise the Division in writing of the existence of the additional documents and the cost issue preventing them from being translated: The guidebook *Refugee Hearing Preparation: A Guide for Refugee Claimants* from *refugeclaim.ca* recommends that a claimant "Tell the [RPD] in writing that you have other documents that you could not afford to translate."^[30]
- Seek out a friend, volunteer, family member, etc. to translate the documents: The claimant should be prepared to show that they made reasonable efforts to have the documents translated. The rules do not require that the translation be done by a professional:

6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#In_what_language_or_languages_must_the_reasons_for_decisions_be_made_available_where_they_are_publicly_released?

7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Rule_31_-_How_to_provide_documents

Canadian Refugee Procedure/Documents#The translator need not supply an affidavit, be accredited, be fluent in both languages, or be completely independent⁸.

- Apply to legal aid (for additional funds for translation): For example, the BC Legal Services Society pre-authorizes translation costs of up to \$361 (1,900 words) for each immigration representation contract.^[31] Counsel may apply for authorization to translate additional documents in particular cases. Similarly, in Ontario, lawyers with RPD certificates from Legal Aid can bill Legal Aid online for translation of up to 3500 words. For documents longer than 3500 words, lawyers can submit a request for additional disbursements for translation.^[32]

Furthermore, the claimant should consider alternative ways to put the information in question in front of the Member:

- Translate the most important documents: Instructions to claimants in public documents such as the guidebook *Refugee Hearing Preparation: A Guide for Refugee Claimants* from *refugeclaim.ca* are that "Translation can be very expensive. If you can't afford to translate everything, choose the most important documents."^[33]
- Have only portions of the documents translated: As a half-way measure, the claimant may attempt to have the most important or relevant portions of the documents translated. But see Canadian Refugee Procedure/Documents#Declining to accept evidence that has only been translated in part⁹ regarding the Division's discretion to decline to admit such evidence where, for instance, the partial translation properly reduces the weight that can be attached to the document.
- Make the untranslated documents available at the hearing, including for spot translation: The guidebook *Refugee Hearing Preparation: A Guide for Refugee Claimants* from *refugeclaim.ca* recommends that a claimant "Take [the untranslated documents] to the hearing and explain to the Presiding Member what the documents show."^[33] The Member would then have the discretion to ask the interpreter to spot-translate portions of the documents: Canadian Refugee Procedure/Interpreters#Can an interpreter be asked to translate documents?¹⁰
- Provide a statutory declaration or testimony under oath about the contents of the untranslated documents: The Board has the power to waive the rules and admit the untranslated documents into evidence for the purposes of the record (albeit potentially assigning them less weight because of the lack of a translation). For example, the Immigration Appeal Division did just this when interpreting its analogous rule, commenting as follows:

The appellant provided copies of chat messages for a select period. For the most part, those messages are in a foreign language. Counsel for the Minister of Citizenship and Immigration submitted that the messages should not have been admitted as evidence because they do not conform to *IAD Rule 29(1)*. The age of smartphones, internet communications and social media creates a dilemma. If a couple is regularly communicating by text, chat messages, Facebook or similar instant messaging, disclosure of all their

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#The_translator_need_not_supply_an_affidavit,_be_accredited,_be_fluent_in_both_languages,_or_be_completely_independent

9 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Declining_to_accept_evidence_that_has_only_been_translated_in_part

10 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Interpreters#Can_an_interpreter_be_asked_to_translate_documents?

messages would bog down hearings with mountains of paper. The cost of translation would be prohibitive. On the other hand, providing the messages without translation limits their probative value. Providing only a sample may lead to the inference that the remaining messages contain evidence adverse to the appellant's case. There is no easy solution. The appellant has attempted to overcome the problem by providing a statutory declaration explaining the evidence. That is of some assistance. I give the evidence some weight, but the weight I give is reduced by the fact that the messages are in a foreign language.^[22]

Finally, the claimant should consider that except for documents that were in their possession at the time that they completed their BOC form, and documents travel and identity documents that they acquire after that time, the rules do not strictly require the claimant to submit all relevant documents in their possession. Instead, the claimant need only submit the documents on which they wish to rely in order to make their case and the claimant must take all reasonable steps to corroborate their claim in the circumstances; see commentary to Rule 34: Canadian Refugee Procedure/Documents#What documents does a party need to provide when?¹¹. As such, if the rules do not require the evidence in question to be submitted to the tribunal, then the claimant may consider whether they wish to rely on the information and whether the same information may be adduced in another way, such as through witness testimony.

29.4.4 The Board is not obliged to pay for the translation of documents where a claimant cannot afford to do so

The instructions on the Basis of Claim form are "Include certified translations in English or French for all documents in a language other than English or French. You must pay for these translations yourself."^[34] The Refugee Appeal Division has held that "the responsibility to provide translations for documents in a foreign language rests with the party using the documents, in this case, the claimant." They went on to note that "the fact that the Board can and sometimes does translate documents that the Board intends to use as evidence is not relevant to the decision of the RPD. The RPD Rules clearly require the "user" (claimant in this case) to provide translations of foreign language documents. The claimant (the Appellant) failed to do so and therefore failed to comply with the rules."^[35]

29.4.5 Procedural fairness considerations where a claimant's untranslated documents are not accepted

The above list of possible actions by a claimant concerns circumstances where the claimant has made reasonable efforts to have documents translated and has been unable to do so because of cost. There are other reasons why a claimant may appear at a hearing with untranslated documents, including where they state that they did not know that the documents needed to be translated. Where a claimant's untranslated documents are not accepted, panels of the Division have attempted to accommodate persons, particularly unrepresented claimants, in a number of ways, including by allowing the party to testify to the matters discussed in the documents as an alternative way of adducing the evidence in question (see

¹¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_documents_does_a_party_need_to_provide_when?

Huang v Canada^[36] and by allowing the party to submit proper translations of the documents in question post-hearing (though the court has held that the Board need not do so as a matter of procedural fairness, even where a claimant is unrepresented, though this conclusion will likely depend on the probative value of the document in question, see *Soares v. Canada*).^[37]

29.5 RPD Rule 32(2) - Language of Minister's documents

Language of Minister's documents

(2) All documents used by the Minister in a proceeding must be in the language of the proceeding or be provided together with a translation in the language of the proceeding and a declaration signed by the translator.

29.5.1 The Minister must use the language of the proceeding in oral and written pleadings

As per Rule 32(2), all documents used by the Minister in a proceeding must be in the language of the proceeding (or be provided together with a translation). A question may arise about the proper scope of the terms "documents" and "proceeding" in the above rule. For example, if a Minister provides a notice of intervention, is it a "document" being used in a "proceeding"?

Meaning of "documents" in this rule

One argument that has been advanced is that the term "documents" as used in this rule only includes documents as evidence, not notices from the Minister. This argument is best rejected based on the observations and citations provided in the section on the definition of "document" above: Canadian Refugee Procedure/Documents#What is a "document" as the term is used in these rules?¹².

Meaning of "proceeding" in this rule

As per Rule 32(2), all documents used by the Minister in a proceeding must be in the language of the proceeding (or be provided together with a translation). At times, the argument has been advanced that documents such as a notice of intervention are not being used in a proceeding at the time that they are supplied since "proceeding" is defined in Rule 1 as follows: "proceeding includes a conference, an application or a hearing". Instead, rather than being supplied for use in any one of those listed proceedings, the argument is that it is being supplied for notification purposes. Such semantic quibbling is best avoided and this argument should be rejected for the following reasons:

- As the Board states in its *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French*, "language rights must generally be given a broad and liberal interpretation".^[27]

¹² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#What_is_a_"document"_as_the_term_is_used_in_these_rules?

- The definition of a proceeding in Rule 1 "includes" the listed procedures, but does not indicate that it is limited to them. The RPD Rules are subordinate to the Act, which in s. 170 contemplates a broad and expansive conception of what a Refugee Protection Division "proceeding" is, including that a file-review decision made without any hearing being held is something that happens within a proceeding (s. 170(f)) and that the Board's provision of notice of the hearing to the Minister is also something that happens in a proceeding (s. 170(c)). If notifying the Minister of the hearing is something that happens "in a proceeding", then it is hard to see why the Minister's notifications should not similarly be considered to have been provided for use "in a proceeding".^[38] Furthermore, in *Duale v. Canada* the court commented that "proceedings" as used in section 167 of the Act encompass more than the actual hearing before the RPD. Thus, subsection 168(1) allows a division to determine that "a proceeding" before it has been abandoned for such pre-hearing matters as failing to provide required information or failing to communicate with the division as required.^[39] See the discussion of the interpretation of the term "proceeding" in the Act at: Canadian Refugee Procedure/Definitions#Commentary on the definition of "proceeding"¹³.
- Furthermore, Ministerial intervention notices must include the details required by Rule 29, and where they do not, the proper remedy is that the notice of intervention will not be accepted.^[40] It is clear that the Minister provides a notice of intervention so that it can rely on it *at the hearing* as proof that it has complied with the rules requiring such notification.
- Finally, the purpose of such notices has been described as follows: "[Rule 29(2)(a)] exists to compel the Minister to provide notice to the claimant why they have decided to intervene in his or her claim. It is to provide the claimant with fore-knowledge of the concerns the Minister has with the claim, so as to allow the claimant to prepare a response to these concerns. It is an issue of procedural fairness."^[41] If this notice were not provided in the language of the proceedings, then the purpose of providing this specific advance information to the claimant about the Minister's concerns could be frustrated.

Ministerial obligations pursuant to *Official Languages Act*

Finally, the better view of this question is that the Minister is under a legal obligation to provide all documents, including pleadings and other procedural documents, in the language of the proceeding and that this obligation stems from the *Official Languages Act*, which is considered a quasi-constitutional statute.^[42] The *Official Languages Act* provides that where a federal institution is a party to civil proceedings is shall use the language chosen by the other parties in any oral or written pleadings, except in narrow exceptional circumstances:

Language of civil proceedings where Her Majesty is a party

18 Where Her Majesty in right of Canada or a federal institution is a party to civil proceedings before a federal court,

(a) Her Majesty or the institution concerned shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties unless it is established

¹³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions#Commentary_on_the_definition_of_"proceeding";

by Her Majesty or the institution that reasonable notice of the language chosen has not been given; and

(b) if the other parties fail to choose or agree on the official language to be used in those pleadings, Her Majesty or the institution concerned shall use such official language as is reasonable, having regard to the circumstances.^[43]

While there does not appear to be judicial consideration on point, it is arguable that this provision applies to delegates of the Minister from IRCC and PSEP where they intervene in matters before the Board. Such proceedings are "before a federal court", which is defined in s. 3(2) of the *Official Languages Act* as "any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament." The Federal Court of Appeal concluded that the IRB meets this definition in *Devinat v. Canada*.^[44] Furthermore, the participation of the Minister's delegates in Board proceedings would appear to constitute a circumstance in which a "federal institution" has become party to proceedings. A "federal institution" is defined broadly in the *Official Languages Act*, it not only includes the Department of Citizenship and Immigration and the Department of Public Safety and Emergency Preparedness (based on the definitions of "federal institution" and "department" in s. 3 of the Act), but it also includes "any other body that is specified by an Act of Parliament to be an agent of Her Majesty in right of Canada or to be subject to the direction of the Governor in Council or a minister of the Crown", which would presumably include a Minister's delegate under the IRPA whose powers are derived from s. 6 of the Act which provides, *inter alia*, that "The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated".^[45]

29.5.2 If the claimant switches languages from French to English, or vice versa, the Minister must provide translations of their documents they intend to use

Practice under the previous version of the RPD rules was that such documents did not need to be translated

Under the previous 2002 version of the rules, the wording of the predecessor rule to Rule 32(2) was interpreted as not requiring the Minister to provide translations of documents where the claimant subsequently switched the language of proceedings. For example, if the claimant elected to proceed in French and the Minister gave the claimant a document in French, and the claimant then subsequently decided that they instead preferred to proceed in English, the Minister was not obliged to provide a new translation of the document into English, but could instead rely on the previously disclosed document. The key question was whether the document was provided to the claimant in the language of proceedings at the time that it was sent.

This question was dealt with by the Federal Court in *Blanco v. Canada*, a case that concerned the previous version of the rules at the Immigration Division, which tracked the wording in the RPD Rule. In that case, the person concerned commenced his proceedings in English. The claimant then secured new, French-speaking, counsel. The Board then approved the claimant's application to change the language of the proceedings to French. At the same time, both the panel and the Minister refused to provide French translations

of the documents that the Minister had previously sent to the applicant's former counsel in English. The claimant argued at the hearing that the panel could not legally enter into evidence documents that were in English and had not been translated into French prior to the hearing. The Federal Court rejected this argument on the basis that "It is clear that when the documents in question were provided by the respondents, the language of the proceedings was English, precluding the need for a French translation."^[46] This interpretation appears to turn on the then-extant Immigration Division rule which stipulated that "If the Minister provides a document that is not in the language of the proceedings, the Minister must provide a translation and a translator's declaration. [emphasis added]" On the basis that the rule in question provided that the trigger for translation is the language of proceedings at the time that the document is provided, the court concluded that the documents could properly be entered as evidence in the hearing.

Changes to this provision in the 2012 RPD Rules now require that the document be in the language of proceedings at the time of its use

The Board's practice that was highlighted in the *Blanco* decision (above) was stridently criticized by members of the House of Commons Official Languages Committee.^[47] The Official Languages Commissioner subsequently requested that the Board make changes to the RPD Rules regarding the rules about the language of RPD proceedings. One of the goals for the new RPD Rules, as identified by the Board, was to "address [these] recommendations of the Office of the Commissioner of Official Languages (OCOL)".^[48] The wording of the new (and current) Rule 32(2) requires that "all documents used by the Minister in a proceeding must be in the language of the proceeding or be provided together with a translation in the language of the proceeding and a declaration signed by the translator [emphasis added]". This is a departure from the previous wording of this Rule under the 2002 version of these rules, which read: "If the Minister provides a document that is not in the language of the proceedings, the Minister must provide a translation in that language and a translator's declaration."^[49] The fact that the rule focuses on the *use* of the documents appears to indicate that under the new rules, the circumstances in *Blanco v. Canada* would not recur because the Minister would be obliged to provide translations of any documents that they had previously provided should they want to continue to rely on them.

29.6 RPD Rule 32(3) - Language of documents - Requirement for a translator's declaration

Translator's declaration

(3) A translator's declaration must include translator's name, the language and dialect, if any, translated and a statement that the translation is accurate.

29.6.1 What are the requirements for the translator's declaration for documents?

Translated document should meet the following requirements:

- A copy of the original-language document should be provided in addition to the translation: Rules 32(1), 32(2), and 32(3), read conjointly, require that a copy of the original document in the original language be submitted as well as a translation of it.

- The translator's declaration must meet each of the requirements enumerated in Rule 32(3): The translator's declaration should be in the following form: "A translator's declaration must include the translator's name, the language and dialect, if any, translated and a statement that the translation is accurate."
- The translator's declaration should be signed: The instructions in the Basis of Claim form regarding document translation are that a claimant is to "Include certified translations in English or French for all documents in a language other than English or French."^[34] As explained on the Basis of Claim form, this requirement that the translations be "certified" will be met where any documents provided are accompanied by a translator's declaration that meets the requirements of Rule 32(3) ("A translator's declaration must include translator's name, the language and dialect, if any, translated and a statement that the translation is accurate") plus the statement is signed by the translator.^[50]
- The translator should have some independence from the claimant: As a best practice, the translator is to have a certain degree of independence from the claimant.
 - *Counsel on record for the case should not act as the translator*: As a best practice, counsel themselves should not act as the translator because, should any issues arise as to the accuracy of the translation in question, then they could be called as a witness. While that can occur (e.g. cases in other legal contexts have held that "while it is highly undesirable for counsel to wear the cloak of both advocate and witness, the client has the right to have his counsel testify as a witness"^[51]) it raises questions about potential conflicts of interest and logistical hurdles. However, as the court accepted in *Grandmont v. Canada*, a person working in-house at the law firm the claimant has selected may be considered acceptable to translate documents.^[52]
 - *The claimant themselves, and close family members thereto, should not act as the translator*: When interpreting its similar rule, the Immigration Appeal Division has rejected documents in on the basis of its concern that, *inter alia*, the documents were "not fully translated by an independent translator".^[53] The basis for this independence requirement in the rules appears to be somewhat scant, but arguably arises as a matter of the weight that the Board should attach to the evidence - particularly if any other credibility issues regarding the person doing the translating were to emerge at the hearing. This aspect of independence is also emphasized by public explanations of the refugee claim process, including Kinbrace Community Society's *Refugee Hearing Preparation: A Guide for Refugee Claimants* which notes that it is best that the translator not be a relative: "Certified translators are best, but not required. If you cannot pay for a professional translator, you can have someone else you trust (preferably not a relative) translate your documents for you."^[33]

29.6.2 Where the document does not contain a translator's declaration in the appropriate form, it should generally not be admitted

Where the requirement for a translator's declaration has not been complied with, the proper process is generally that the document should not be admitted. For example, the RAD has commented as follows:

Although there is an English translation of these documents, there is no [translator's declaration] attached to them, as is required.... The RAD, therefore, cannot ascertain that these documents have been properly translated from Chinese into English. The RAD therefore cannot accept these documents[.]^[54]

In the words of the Federal Court in *Gorgulu v. Canada*, "unless there is confirmation that the translation is accurate, the information in the English document is simply irrelevant because the necessary nexus to the original document is missing. ... Standing on their own, the English documents have no evidentiary value. In the absence of an attestation from the translator that the documents in English are accurate translations of the original documents, there is no basis for the decision maker to consider the English documents. They are simply irrelevant."^[55] Parties sometimes attempt to adduce evidence that has been translated through automated systems such as Google Translate. It should generally not be admitted into evidence on the basis that no Rule 32(3) translator's declaration has been provided for such evidence. On the basis that "The Board cannot determine whether it is accurate", the Refugee Appeal Division has declined to admit such Google translations into evidence, including when provided by the Minister.^[56] The Refugee Protection Division specifically has issued a practice notice on this point entitled *Refugee Protection Division Practice Notice: Compliance with Refugee Protection Division Rules* which comments on Google translations as follows:

The RPD frequently receives documents that have not been translated, or have been translated but are not accompanied by a translator's declaration. Sometimes these documents have been translated by a web-based tool, such as Google Translate. Such translations do not comply with RPD Rule 32, cause delays to the proceedings and may not be accepted by the presiding member.^[57]

But see *Gorgulu v. Canada*, in which an applicant had submitted documents without a translator's declaration, and the court concluded that the decision maker was unreasonable in excluding the evidence without having first alerted the applicant to the missing certifications.^[58] In that case the court found that "a reasonable decision maker would conclude that the absence of a certification as to the accuracy of the translations was likely due to an oversight on the part of the translator and/or the lawyer who submitted the documents."^[59]

29.6.3 The translator need not supply an affidavit, be accredited, be fluent in both languages, or be completely independent

Provided that this is done, a translator's declaration need not comply with other requirements that are not found in the rules:

- Statement from translator need not be an affidavit: For example, the translator's statement need not be in the form of an affidavit; the Immigration Appeal Division reached this conclusion when interpreting its similar rule: "The panel does not share the respondent's concern with the Certificate of Translation that accompanied the disclosure. While not in the form of an affidavit, the Rule does not require one".^[60]
- Translator need not be "accredited": There are many bodies that accredit translators and interpreters, from the Board itself to professional organizations like the *Society of Translators and Interpreters of British Columbia*.^[61] While using an accredited translator may be a good idea, it is not a requirement of the rules. The Immigration Appeal Division reached this conclusion when interpreting its similar rule: "The Minister's counsel submitted that the translations ... do not constitute credible evidence because they were not done by accredited translators.... The panel is of the opinion that the documents submitted by the appellant showing the exchanges between the parties ... can be taken

into account by the panel, even though they were not written by accredited translators”.^[52]

- The translator need not be fluent in both languages: The requirement in the rules is solely that the translator provide a “statement that the translation is accurate,” nothing more. The University of Ottawa Refugee Assistance Project has a Hearing Preparation Kit which discusses the level of proficiency the translator must have in the languages in question. That kit includes sample translator's declarations, both where the translator is fully fluent in both languages, and one for where the translator is not. They indicate that an acceptable declaration to be used where the translator is not fully fluent in both languages is as follows: “I, _____ (name _____, of the City of _____ (location) _____, hereby certify that I have translated this Marriage Certificate from _____ (original language) _____ to English, and that I am partially competent to render such translation, being partially fluent in the _____ (original language) _____ and English languages. A fully competent translator was not available.”^[62] That said, a party may use a non-fluent translator at their peril: the court notes that parties appearing before the RPD or the RAD are responsible for providing certified translations of their own documents that are in a language other than English or French and the Division need not be attuned to the possibility of there being a translation error in a document a party has submitted.^[63]
- Translator need not be completely independent from the claimant: As discussed above, the translator is to have a certain degree of independence from the claimant, but the degree of independence required is not high. This aspect of independence is also emphasized by public explanations of the process, including Kinbrace Community Society's *Refugee Hearing Preparation: A Guide for Refugee Claimants* which notes that it is best that the translator not be a relative: “Certified translators are best, but not required. If you cannot pay for a professional translator, you can have someone else you trust (preferably not a relative) translate your documents for you. This person must sign a translator’s declaration.”^[33] As the court accepted in *Grandmont v. Canada*, a person working in-house at the law firm the claimant has selected may be considered acceptable to perform this task.^[52]

29.7 RPD Rule 33 - Disclosure and use of documents by the Division

Disclosure and Use of Documents

Disclosure of documents by Division

33 (1) Subject to subrule (2), if the Division wants to use a document in a hearing, the Division must provide a copy of the document to each party.

Disclosure of country documentation by Division

(2) The Division may disclose country documentation by providing to the parties a list of those documents or providing information as to where a list of those documents can be found on the Board’s website.

29.7.1 There is no time limit that applies to this rule, and new documents can be provided during a hearing

Rule 33(1) of the *RPD Rules* say that if the RPD “wants to use a document in a hearing, the Division must provide a copy of the document to each party.” The jurisprudence confirms that there are no time constraints on Rule 33(1), and that the RPD may disclose documents to a claimant at the hearing.^[64] Providing copies of documents during a break to counsel is not in and of itself procedurally unfair.^[65] But see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Disclosure rights and obligations for the Board¹⁴.

29.7.2 The Division has the power to provide post-hearing documents prior to rendering a decision

RPD Rule 33 concerns circumstances in which the Division provides a copy of a document that it wants to use in a hearing. What about where the Division wants to provide a document to parties following a hearing? The Division may do so and, while it must invite comment from the parties on any such post-hearing disclosure, it need not resume the hearing afterwards. The Division's power to provide such post-hearing documents was emphasized in the Board's public commentary on the previous version of the RPD Rules, which read “The Division may provide a document to the claimant (and to the Minister if the Minister has intervened) after a hearing if the Division considers its use would assist in ensuring a full and proper determination of a claim for refugee protection. The claimant will be given an opportunity to make submissions on that document.”^[66] While that public commentary is no longer published by the IRB, the principle stands.

29.7.3 The RPD has an obligation to provide documents and information required by the Rules to the Minister upon request

Subsection 170(*d*) of the Act requires the Division to provide the Minister, on request, with the documents and information referred to in subsection 100(4) of the Act, which are the documents and information required by the rules of the Board:

100(4) A person who makes a claim for refugee protection inside Canada at a port of entry and whose claim is referred to the Refugee Protection Division must provide the Division, within the time limits provided for in the regulations, with the documents and information — including in respect of the basis for the claim — required by the rules of the Board, in accordance with those rules.

29.7.4 The panel should consider the most recent National Documentation Package

The Board *Policy on National Documentation Packages in Refugee Determination Proceedings*, which is dated June 2019, commits that “The RPD and RAD will consider the most recent NDP(s) in support of assessing forward-looking risk.”^[67] A panel of the

¹⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Disclosure_rights_and_obligations_for_the_Board

Board should comply with this policy. This has implications both for which NDPs should be disclosed on a file and for the currency of the NDPs which are disclosed:

- Which NDPs are disclosed: A panel should ensure that it considers the relevant NDPs, both those that relate to countries of citizenship, as well as those that relate to countries of former habitual residence, where that concept applies. For example, in *El Hraich v. Canada*, the court commented that "There is no indication that the Panel considered the National Documentary Package on the UAE before it rendered the decision", noting that the Court has found that where central elements of a claim, such as the right to return to a CFHR for a stateless person, are at issue, the RPD should examine and refer to the available country documentation.^[68]
- Whether the NDPs disclosed are current: In *Zhao v. Canada* the court held that "as a matter of procedural fairness, the [Board] had a duty to disclose the most recent NDP and to give the Applicants an opportunity to respond and make submissions on this matter."^[69] Similarly, in *Oymali v. Canada* the court held that "the latest NDP should be considered in assessing risks".^[70]

The obligation to consider the latest NDP extends to matters where a new NDP is released while a claim is under reserve. However, there are some limits to this principle:

- It does not apply to documents other than those in an NDP: In *Tambwe-Lubemba* the court considered whether a panel of the Board must consider updated country documents received by the Board post-hearing that are not explicitly placed on the file. The applicants in that case submitted that the panel hearing their claim should have considered information received by the Refugee Division's document centre after the hearing, but before the decision had been rendered. What the Court held was that the panel was under no obligation to consider information that the members had not seen and that was not tendered by the claimants.^[71]
- It does not apply where the new information would make no difference to the decision: The failure of the RAD to consider the most up-to-date NDP may constitute a reviewable error where the failure leads to the tribunal failing to consider and comment on evidence that contradicts its findings.^[72] In *Worku v. Canada*, the Federal Court held that the Board was not bound to consider the newest NDP information when there was no indication that the information was a significant departure from the information which was considered by the RPD.^[73] As such, the Board *Policy on National Documentation Packages in Refugee Determination Proceedings* is that "The RAD will disclose to the parties new NDP documents only when they wish to rely upon them".^[67]

See also: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#What is a new issue requiring notice?¹⁵.

The fact that the panel should consider the most recent National Documentation Package does not mean that a panel needs to scour through every document in it for any possible statement that could support or hinder the claimant; for a discussion of this, see

¹⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#What_is_a_new_issue_requiring_notice?

Canadian Refugee Procedure/The Board's inquisitorial mandate#There is a shared duty of fact-finding in refugee matters¹⁶.

29.7.5 Rule 33(2): The Division may disclose country documentation by providing information as to where a list of those documents can be found on the Board's website

RPD Rule 33(2) provides that "the Division may disclose country documentation by providing to the parties a list of those documents or providing information as to where a list of those documents can be found on the Board's website." Certain documents are listed in the lists of documents on the Board website, but the documents themselves are only available via email, in particular samples of identity documents appended to Responses to Information Requests generated by the Board's research directorate. The court has held that the fact that such samples are not reproduced in the NDP published online on the IRB's website does not breach procedural fairness. In *Zerihaymanot v. Canada*, the court noted that "this sample document was attached to a Response to Information Request in the NDP, with a note that to obtain a copy of the attachment, one must email a request. Rule 33(2) specifies that disclosure of country documentation may include being provided with the document by the Division or being informed where the information could be found."^[74] Further, in that case, during the RPD hearing, counsel was directed to the sample birth certificate and it was clear from counsel's questions and submissions that counsel had the document. The court noted that there does not appear to be any requirement that the NDP be publicly posted on the internet, and that in the 1990s when this was not done, the Federal Court of Appeal had concluded that the fact that documents were available in IRB documentation centres was sufficient to be fair: *Mancia v Canada*.^[75]

29.8 RPD Rule 34 - Obligation, process, and timeline for a party to disclose documents they want to use in a hearing

Disclosure of documents by party

34 (1) If a party wants to use a document in a hearing, the party must provide a copy of the document to the other party, if any, and to the Division.

Proof that document was provided

(2) The copy of the document provided to the Division must be accompanied by a written statement indicating how and when a copy of that document was provided to the other party, if any.

Time limit

(3) Documents provided under this rule must be received by their recipients no later than

(a) 10 days before the date fixed for the hearing; or

(b) five days before the date fixed for the hearing if the document is provided to respond to another document provided by a party or the Division.

¹⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#There_is_a_shared_duty_of_fact-finding_in_refugee_matters

29.8.1 What documents does a party need to provide when?

Rule 34(1) concerns documents that a party "wants" to use in a hearing. The rule provides that such documents must be received by their recipients no later than 10 days before the date fixed for the hearing (except, per Rule 34(3)(b) where they are provided in response to documents provided by other party, in which case the deadline is five days prior to the hearing). This discretionary rule allows, but does not require, a claimant to submit documents. It can be contrasted with Rule 7(3) which obliges claimants to provide certain types of documents. Specifically, Rule 7(3) provides that a claimant "must" attach all "relevant documents in their possession" to their Basis of Claim form, including identity and travel documents (whether genuine or not). The only exception to this is for documents that were seized by an officer or provided to the Division by an officer. In short, the disclosure deadlines established by the RPD rules appear to be the following:

Stage in Claim	Document Type	Disclosure Obligation	Deadline	Rule
When BOC Form Provided	All relevant documents in the claimant's possession	Mandatory Disclosure	Must be attached to BOC Form	Rule 7(3)
After BOC Form Provided	Claimant's identity or travel documents	Mandatory Disclosure	Must be provided "without delay" after the claimant obtains	Rule 7(4)
After BOC Form Provided	Any other documents "a party wants to use"	Discretionary/optional	10 days before the hearing (or 5, if in response)	Rule 34

As such, the rules appear to establish a regime in which a claimant is obliged to provide all relevant documents that are in their possession at the time that they provide their BOC form. For documents that come into a claimant's possession after that point, other than identity or travel documents, the claimant has discretion about whether or not to submit them and need only do so if they want to use them in the proceeding. A qualification to this principle is that:

- claimants are obliged to submit identity and travel documents (whether genuine or not) that come into their possession at any point (Rule 7(4) - Canadian Refugee Procedure/Information and Documents to be Provided#A claimant is obliged to provide any relevant documents in their possession without delay, whether genuine or not¹⁷);
- while the Minister has no obligation to become a party to a proceeding (Canadian Refugee Procedure/Intervention by the Minister#The Minister is permitted to intervene in proceedings, but is not required to do so¹⁸), once it does so its disclosure must be "complete" and cannot be selective. A failure to do so is a violation of natural justice. In the words of the Federal Court, "At a bare minimum, if the Minister chooses to disclose evidence, that disclosure must be complete."^[76] Where complete disclosure has not been provided by

¹⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#A_claimant_is_obliged_to_provide_any_relevant_documents_in_their_possession_without_delay,_whether_genuine_or_not
¹⁸ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Intervention_by_the_Minister#The_Minister_is_permitted_to_intervene_in_proceedings,_but_is_not_required_to_do_so

the Minister, procedural fairness may oblige the RPD to require the Minister to make inquiries of relevant Canadian law enforcement agencies to obtain documents, for example.^[77]

- claimants have an obligation to take reasonable steps to provide acceptable documents establishing their identity and other elements of the claim (Canadian Refugee Procedure/Information and Documents to be Provided#A claimant has an obligation to make reasonable efforts to establish their identity and to corroborate their claim¹⁹); and
- the Board can compel testimony and the production of evidence should it choose to do so (Canadian Refugee Procedure/Information and Documents to be Provided#The Division may instruct the claimant to provide specific documents²⁰).

The above timelines for providing documents are reiterated in the Basis of Claim form that all claimants receive: "If you get more identity or travel documents that support your claim after you have provided your BOC Form, give two copies to the IRB without delay. If you get more documents, other than identity or travel documents, that support your claim after you have provided your BOC Form, give one copy to the IRB and a copy to the Minister, if the Minister is a party, at least 10 days before your hearing." The BOC Form also states on its cover page: "you are responsible for obtaining and providing to the IRB any documents that may support your claim."

The above documentary disclosure obligations specified in the Rules are also distinct from the separate matter of the Division's ability to draw an adverse inference as to credibility in circumstances in which documents are not provided. Even if it is not mandatory for the claimant to have submitted a particular document above as per the Rules, where a claimant does not do so, the Division may conclude that a claimant's failure to provide a document is indicative of a fear to provide the evidence to the Board, allowing the Board to draw an adverse inference about the credibility of the fact that the document would have otherwise served to establish or corroborate. Of course, this type of adverse inference may only be drawn where the claimant is given a reasonable opportunity to adduce the evidence once the Division identifies its concern, or where the evidence was otherwise mandatory for the claimant to produce, and furthermore the Federal Court has held that "a panel cannot draw a negative inference from the mere fact that a party failed to produce any extrinsic documents corroborating his or her allegations, except when the applicant's credibility is at issue".^[78] See the discussion of Rule 11 for more detail: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 11 - Documents Establishing Identity and Other Elements of the Claim²¹.

19 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#A_claimant_has_an_obligation_to_make_reasonable_efforts_to_establish_their_identity_and_to_corroborate_their_claim

20 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#The_Division_may_instruct_the_claimant_to_provide_specific_documents

21 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_11_-_Documents_Establishing_Identity_and_Other_Elements_of_the_Claim

29.8.2 The Board must consider its discretion to provide relief where a claimant submits a document later than the time limit in Rule 34(3)

The time limit in Rule 34(3) for providing documents must be read in conjunction with section 170 of the IRPA, and specifically the following subsections of that provision:

Subsections 170 (e), (g) and (h) of the IRPA however indicate that in any proceeding before the RPD it:

- (e) must give the person . . . a reasonable opportunity to present evidence . . . ;
- (g) is not bound by any legal or technical rules of evidence;
- (h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances.

In *Trboljevac v. Canada*, the court commented that "While the Panel Member was aware of the ten-day time period in Rule 34(3) for disclosing documents, the failure of the Member to acknowledge or apparently be aware of the *IRPA* provisions allowing them to nonetheless accept the documents had the effect of preventing the Applicant from substantiating his claim. ... the Panel Member should have addressed why they declined to exercise the discretion provided to them in section 170 of the *IRPA*. Failure to exercise that discretion was a breach of natural justice in this matter."^{79]} The Board's discretion to admit late-filed documents is guided by Rule 36, below: Canadian Refugee Procedure/Documents#Rule 36 - Use of undisclosed documents²².

29.8.3 Does the 10 day deadline for submitting documents reset when a hearing has multiple sittings?

A question can arise about the interpretation of the phrase "days before the date fixed for the hearing" in Rule 34. As per Rule 34(3), documents provided under this rule must be received by their recipients no later than 10 days before the date fixed for the hearing. If a resumption of a hearing is scheduled more than 10 days after the first sitting of the hearing, does this mean that any documents submitted 10 or more days prior to the next sitting are, in the words of RPD Rule 34(3), being submitted at least "10 days before the date fixed for the hearing"? To the mind of this author, this question has not been definitively resolved in the published jurisprudence. This this is likely because panels are permissive about accepting documents submitted prior to a resumption given their obligation to give any person before them a reasonable opportunity to present evidence (s. 170(e) of the Act).

29.9 RPD Rule 35 - Documents relevant and not duplicate

Documents relevant and not duplicate

35 Each document provided by a party for use at a proceeding must

- (a) be relevant to the particular proceeding; and
- (b) not duplicate other documents provided by a party or by the Division.

²² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Rule_36_-_Use_of_undisclosed_documents

29.9.1 The use of the National Documentation Package does not preclude the disclosure of additional Country of origin information

The Board *Policy on National Documentation Packages in Refugee Determination Proceedings* states that:

Relevant NDP(s) are disclosed to the parties in every refugee claim before the RPD as the standard source of COI evidence in refugee determination. As per RPD Rule 33(2), the RPD provides the parties with information as to where the NDP can be found on the Board's website, and it is the parties' responsibility to check the IRB website for the newest version of the relevant NDP(s) prior to their hearing. ... The use of NDPs does not preclude the disclosure of additional COI not contained in an NDP by the Division or a party to a proceeding. Such information must be disclosed on a case-by-case basis, subject to the legal and procedural requirements of each Division.

29.9.2 Practice notice on voluminous country conditions evidence

The Board's *Notice to parties and counsel appearing before the Refugee Protection Division – voluminous country conditions evidence* specifies procedures regarding voluminous disclosure of country conditions evidence filed at the Refugee Protection Division. As per the practice notice, parties must make a formal application to submit country conditions evidence that exceeds 100 pages per country of reference.^[80] Disclosure of country conditions evidence over the specified page limit must be accompanied by an application made in accordance with RPD Rule 50. That said, during the Covid-19 pandemic, this practice notice has been suspended, so it is no longer in effect.^[81]

How does one know whether documents are country conditions evidence or not?

As the practice notice states, evidence presented before the RPD generally falls into two broad categories: documents personal to the parties (e.g. identity documents, police reports, etc.) and evidence regarding country conditions (e.g. human rights reports, research on the situation in the country, etc.). This Practice Notice applies only to country conditions evidence. Documents which speak to the claimant's personal risk and are specific to their claim, for example those that are by or about the claimant themselves, will be considered personal. In contrast, country conditions documents are evidence relating to human rights conditions in a claimant's country. The question in each case is whether the primary purpose of a particular document is to substantiate the claimant's personal profile or to speak to human rights or other facts and conditions regarding a claimant's country. The guidebook *Refugee Hearing Preparation: A Guide for Refugee Claimants* from refugeelcaim.ca provides examples of each type of document. With regards to personal documents, they list:

- Are there photographs, letters, videos, emails, or other documents that show the problems you had? Get them!
- Did you go to the police or another government agency for help? Get a copy of the police report or other proof of your visit.
- Did you get medical help? Get your hospital or doctor's records.
- Are there news articles about people who are connected to your case? Get them!

- Are there people who witnessed what happened to you? Ask them to write what happened and send it to you. If possible, ask this person to swear (declare) their statement is true in front of a lawyer or notary.
- Are there people who have experienced problems that are similar to yours? Ask them to describe their experiences in writing. If possible, ask this person to swear their statement is true in front of a lawyer or notary.
- Is your claim based on your religious identity or membership in a political party or other group? Get documents that show your membership.
- Has your mental health suffered because of what happened to you? Get a report from a doctor or psychologist in Canada which documents your health problems.
- You will also need identity documents to prove your citizenship.^[33]

With regards to country conditions documents, they list:

- This type of evidence includes reports from well-respected sources that document human rights abuses, political events, and other news that relate to your claim.
- Recent reports from human rights organizations (e.g. Amnesty International, Human Rights Watch), United Nations reports, U.S. State Department Country Reports, news articles, or videos showing human rights abuses in your country.
- Articles and reports from newspapers and human rights organizations in your country.

Similarly, documents about an organization that the claimant may have been involved with (even in Canada) will fit into this category of evidence that relates to human rights conditions in a claimant's country, so long as they do not mention the claimant by name or otherwise depict or refer to the claimant. Thus, for example, where the Minister seeks to intervene to argue that a claimant is excluded pursuant to Article 1F(a) of the Convention, if the Minister wishes to provide more than 100 pages to demonstrate that an organization in question committed crimes during a specific historical period, pursuant to this practice notice, they must bring an application for permission to file voluminous disclosure. Additional discussion of the difference between these two types of documents is found in the IRB *Instructions for Gathering and Disclosing Information for Refugee Protection Division Proceedings* which distinguishes between country-of-origin research—which is generally-available information and does not include “information gathered by the IRB that is specific to a particular claimant”—and claimant-specific research.^[82] Furthermore, the Board *Policy on National Documentation Packages in Refugee Determination Proceedings* provides the following definition of Country of origin information (COI): “Information about the situation in a country that is relevant to the refugee determination process and obtained from publicly available sources that are viewed as, whenever possible, reliable and objective.”^[67]

What is the Board's jurisdiction to limit voluminous country conditions disclosure?

As is clear from Rule 35, the only conditions imposed by the Rules on which documents may be admitted are that they must be relevant to the proceeding and not duplicate any other documents provided by the claimant or the Division. The RPD Rules themselves contain no restriction on the volume of documents that may be disclosed, and they make no distinctions between different types of documents. The authority cited in the practice notice is that the Chairperson of the IRB has the authority to take any action that may be

necessary to ensure that members of the Board are able to carry out their duties efficiently and without undue delay as per paragraph 159(1)(g) of the Act. In addition, Rule 69 of the RPD Rules specifies that in the absence of a provision in the Rules dealing with a matter raised during the proceedings, the Division may do whatever is necessary to deal with the matter.

The sufficiency of this legislative provision and Rule as authority for what appears to be an amendment to the Rules via practice notice (that was not authorized by the Governor in Council, as required), does not appear to have received judicial consideration. See Canadian Refugee Procedure/About²³ for details about how the RPD rules were authorized by the Governor General in Council. However, the Federal Court of Appeal's reasoning in *Thamotharem v. Canada* would appear to provide some support for the Board's action.^[83] As stated in the IRB *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides* notes, "that the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(a) of the IRPA will not normally invalidate it."^[84] For further discussion thereon, see: Canadian Refugee Procedure/Duties of Chairperson#The Chairperson's guideline-issuing and rule-making powers overlap²⁴.

29.9.3 The Board has jurisdiction to refuse to admit documents for reasons that are broader than the Rule 35 criteria

Rule 35 provides two criteria for all documents provided by a party for use at a proceeding: they must be relevant and not duplicative. Does the fact that the Rules only enumerate these two criteria here mean that, by implication, the Board may not refuse to admit documents for other reasons beyond those enumerated in Rule 35? No. The Board retains a broader discretion to control its process, including the documents that it admits in its proceedings. There are numerous examples of this, including:

- *Excluding evidence where doing so is required by the Constitution:* For example, the Division has the power to exclude evidence pursuant to s. 24(2) of the *Charter* where the evidence was collected in violation of *Charter* rights, an issue which usually arises regarding port of entry interview notes in situation where the right to counsel was violated; see, as an example, *Huang v. Canada*.^[85]
- *Excluding evidence where doing so is required by law:* The Board states in its Legal Services paper on Weighing Evidence that "in some cases it is not appropriate to admit evidence and give it little or no weight, instead the panel should refuse to admit the evidence at all. This may arise, for example, where the evidence is ... protected by privilege or statutory protection of its confidentiality".^[86] This would apply, for example, where the use of the evidence is prohibited by the *Privacy Act*. The Board frequently considers this issue when determining whether to admit decisions from other panels into evidence where they are provided by the parties, see, for example Canadian Refugee Procedure/Proceedings must be held in the absence of the public#Should a panel admit copies of decisions from other claims?²⁵.

23 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/About

24 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Duties_of_Chairperson#The_Chairperson's_guideline%E2%80%91issuing_and_rule%E2%80%91making_powers_overlap

25 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Proceedings_must_be_held_in_the_absence_of_the_public#Should_a_panel_admit_copies_of_decisions_from_other_claims?

- *Excluding evidence as a discretionary decision made by the tribunal:* The Board states in its Legal Services paper on Weighing Evidence that "in some cases it is not appropriate to admit evidence and give it little or no weight, instead the panel should refuse to admit the evidence at all. This may arise, for example, where the evidence is not relevant to the issues in the case; or where the prejudicial effect of the evidence outweighs its probative value; ... or where the evidence is unduly repetitive."^[86]

29.10 RPD Rule 36 - Use of undisclosed documents

Use of undisclosed documents

36 A party who does not provide a document in accordance with rule 34 must not use the document at the hearing unless allowed to do so by the Division. In deciding whether to allow its use, the Division must consider any relevant factors, including

- (a) the document's relevance and probative value;
- (b) any new evidence the document brings to the hearing; and
- (c) whether the party, with reasonable effort, could have provided the document as required by rule 34.

29.10.1 The Board must weigh the relevant factors

The court has provided guidance on how the RPD should approach the task of weighing the factors listed in Rule 36, noting that considering such factors does not mean merely listing them, but involves actively weighing them to determine whether the documents in question should be admitted.^[87] Prior to the Covid-19 pandemic, the RPD had a practice notice in effect entitled *Notice to parties and counsel appearing before the Refugee Protection Division – late disclosure*.^[88] Nothing in this practice notice relieved the Board of the obligation to exercise its discretion under Rule 36:

Rule 36 of the RPD Rules clearly gives the RPD discretion to accept an undisclosed document at the hearing. This discretion exists even if a party's request does not comply with the *Notice to parties and counsel appearing before the Refugee Protection Division - late disclosure* published by the Immigration and Refugee Board of Canada, although this defect may be a relevant factor in determining the request. When a refugee protection claimant asks the RPD to exercise this discretion, the principles of procedural fairness require that he or she be given the opportunity to make submissions on the matter. The RPD did not give Ms. Alvarez Rivera such an opportunity, which constitutes a breach of procedural fairness.^[89]

Furthermore, the list of relevant factors under Rule 36 requires that all of the factors should be considered, not just some of them.^[90]

29.10.2 Past consideration of the Rule 36 factors

Past decisions of the Board have considered the above factors thusly:

- **(a) the document's relevance and probative value**
 - Is the source of the document reliable? For country conditions evidence, probative value can be assessed in part by considering the source of the document. For example, in *Hasan v. Canada* the Board refused to admit a series of documents concerning country conditions relevant to the claim: "Within the Disclosure Package are a number of

reports from various organizations attesting to the ill-treatment of Palestinian males, the severe measures taken against Palestinians, and the unlawful killings and other abuses directed against Palestinians by Israeli forces.” The court held that it could be considered that “These reports come from such traditionally accepted (for purposes of evidence) sources as Amnesty International. In addition, several reports emanated from Israeli sources such as the Israeli Information Centre for Human Rights in the Occupied Territories.”^[91]

- How central are these documents to the core elements of the claim? The RAD has held that, as part of this probative value assessment, there should be an analysis as to the centrality of the documents to the core elements of the claim.^[92]
- **(b) any new evidence the document brings to the proceedings**
- **(c) whether the party, with reasonable effort, could have provided the document as required by rule 34**
 - Is the claimant educated? In *Mercado v. Canada* the court affirmed that it is proper to consider a claimant's level of education when making this decision, stating with approval that “The panel clearly took into consideration the fact that the applicant was educated.”^[93]
 - Has the claimant been self-represented? The Board's Chairperson Guidelines 7 provide that “Generally speaking, the RPD will make allowances for self-represented claimants who are unfamiliar with the RPD's processes and rules.”^[94] That said, it may be considered that the Claimant's Kit that all claimants receive, and the instructions on the BOC form, emphasize the document disclosure deadlines (see Canadian Refugee Procedure/Documents#The deadline for providing documents to the Board depends on the nature of the document²⁶).
 - Is the party's counsel experienced? In *Mercado v. Canada* the court affirmed that it is proper to consider the fact that a claimant was represented by experienced counsel when making this decision. The court stated: “Contrary to the applicant’s argument, the RPD did not impose a heavier burden on him simply because he was represented by this counsel. That was simply a part of the facts relevant to assessing the reasonable efforts that could objectively be expected on the part of a person in the applicant’s position.”^[93]
 - How much time has the party had to try to obtain the document? In *Mercado v. Canada* the court affirmed that it is proper to consider how much time a claimant has had to access the document in question, writing “the RPD also considered that the applicant had more than two years to obtain this documentation and that it should have been easy to access”.^[95]
 - Were the documents available to the party earlier? Lorne Waldman writes in his text that a panel of the Board should consider the explanation provided for the late disclosure: “If the documents were available and could have been disclosed earlier than this will weigh against acceptance of the documents.”^[96] For example, in *Mercado v. Canada* the court commented with approval that the RPD “considered that the applicant had more than two years to obtain this documentation and that it should have been easy to access because the principal applicant seemed to indicate that the tax return was in his father’s possession in Venezuela.”^[95]

²⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#The_deadline_for_providing_documents_to_the_Board_depends_on_the_nature_of_the_document

- Was a party's ability to produce this document affected by the Covid-19 pandemic? The RPD should consider the principle set out in the *Refugee Protection Division: Practice Notice on the resumption of in-person hearings* that it will apply the rules flexibly in light of Covid-19.^[97]

Furthermore, the Board is to consider any other relevant factors, which have included:

- When were the documents actually disclosed? As stated in the Board's public commentary on the previous version of these rules under the heading *Other factors the Division may consider where disclosure is late*, "The Division may also consider other relevant factors such as ... when the documents were actually disclosed. Thus the parties should make every effort to disclose their documents as soon as possible."^[66] For example, in one decision on this matter RAD Member Angus Grant noted that it was relevant that the documents had been submitted "a full five days prior to the hearing."^[98]
- Was the Board aware at an earlier date that a mistake was made in providing the document, and what actions did the Board take? The Federal Court noted in *Balasundaram v. Canada* that "Reasonableness underlying fairness is also based on expectations. Norms of conduct develop and persons come to rely upon them. One of those norms that normally applies is that obvious slips and omissions will not be automatically fatal and may be corrected. For example, the failure to include an attachment to an email raises the expectation that the addressee will advise the sender of his or her error."^[99]
- Will admitting the documents result in delay to the proceedings? Lorne Waldman writes in his text that a panel properly considers "whether or not the admission of the late disclosure will result in a lengthy delay in the proceedings."^[96] Where it would, this would point against admission of the late document. Where it would not, this would support admitting the document.
- Would admitting the evidence cause prejudice to the other party in the proceedings? The court considered this factor in *Hasan v. Canada* when it concluded that the Board was wrong to refuse late evidence in a case where the Minister was not participating.^[100] Lorne Waldman writes in his text that "In light of the wording of these Rules and given the importance of the procedure to the individual involved, it is certainly arguable that relevant documents should be excluded only if their admission would be highly prejudicial to one of the parties and if this prejudice could not be rectified by a short adjournment."^[101]
- Are there any relevant personal circumstances of the claimant? As stated in the Board's public commentary on the previous version of these rules under the heading *Other factors the Division may consider where disclosure is late*, "The Division may also consider other relevant factors such as the personal circumstances of the claimant."^[66] For example, one may consider the statement in the Board's SOGIE guidelines that "A reasonable delay may also arise out of an individual's reluctance to reveal their SOGIE to a spouse or other family member, or in their realizing or accepting their SOGIE."^[102]

29.10.3 Rule concerns use of undisclosed documents at a hearing, as opposed to other types of proceedings

Rule 36 provides that a party who does not provide a document in accordance with Rule 34 (which specifies the process and timeline for disclosure of documents by a party) must not use the document at the hearing unless allowed to do so by the Division as per the process

specified above. In interpreting this rule, the definitions section in Rule 1 provides a definition of a "proceeding" which is apposite. It defines a proceeding as including "a conference, an application or a hearing". As such, the fact that such documents cannot be used at a "hearing" appears to imply that they may be used in other types of proceedings, subject to other relevant rules. One such rule is Rule 43 concerning additional documents provided after a hearing. If the hearing has occurred, then any documents provided afterwards must meet the requirements of that rule. The fact that this rule does not limit a party's ability to use documents in, say, a pre-hearing application or conference stems from the wording of Rule 34, which establishes the deadline for providing such documents as being "10 days before the date fixed for the hearing". Instead, if a late-filed document being relied upon in a pre-hearing conference or application were to cause prejudice to another party, then general principles of procedural fairness would guide the Board's actions.

29.10.4 The Division may impose conditions on the use of late documents

As stated in the Board's public commentary on the previous version of these rules, "Where the Division allows the use of a document provided outside the time limit in the rules, it may impose conditions on its use that it considers appropriate. For example, the Division may decide that only certain relevant portions of a long document will be referred to."^[66]

29.10.5 If the panel admits late documents pursuant to Rule 36, it should not then assign those documents low weight for the sole reason that they are late

In *Pineda v. Canada*, the Division had accepted documents that were submitted late. However, in its reasons, the tribunal concluded that it would afford the documents little weight because of the late disclosure. The court concluded that this was in error: "having exercised its discretion to allow the filing of this evidence pursuant to Rule 30 outside of the delay provided for in Rule 29, it appears somewhat counterintuitive considering the criteria to be used in the exercise of such discretion to then assign very little weight to this evidence on the basis that it was filed late and without considering the explanation provided by the applicant as to why it was so."^[103]

29.10.6 The Rule 36 factors need not be considered where a document is otherwise inadmissible, for example where it has not been translated

The requirement that the tribunal consider whether to accept a late document does not apply where the issue is not the lateness of the document but rather the lack of a proper translation. In *Soares v. Canada* the court held that this rule need not be considered in a case where the issue is not that a document had been disclosed late, but rather that it has been disclosed without translation.^[104] In short, the fact that a party is attempting to provide untranslated analysis late does not change the fact that both this rule and Rule 32 properly apply in such circumstances: Canadian Refugee Procedure/Documents#Where

evidence has not been translated in accordance with the rules, the Board may decline to accept it or may assign it low weight²⁷.

29.11 RPD Rule 37 - Rules 38-41 apply to any document

Providing a Document

General provision

37 Rules 38 to 41 apply to any document, including a notice or request in writing.

29.12 RPD Rule 38 - How to provide documents to the Division, the Minister, and any other person

Providing documents to Division

38 (1) A document to be provided to the Division must be provided to the registry office specified by the Division.

Providing documents to Minister

(2) A document to be provided to the Minister must be provided to the Minister's counsel.

Providing documents to person other than Minister

(3) A document to be provided to a person other than the Minister must be provided to the person's counsel if the person has counsel of record. If the person does not have counsel of record, the document must be provided to the person.

29.13 RPD Rule 39 - Ways that a document may be provided

How to provide document

39 Unless these Rules provide otherwise, a document may be provided in any of the following ways:

- (a) by hand;
- (b) by regular mail or registered mail;
- (c) by courier;
- (d) by fax if the recipient has a fax number and the document is no more than 20 pages long, unless the recipient consents to receiving more than 20 pages; and
- (e) by email or other electronic means if the Division allows.

29.13.1 This limit has been increased to 50 pages by practice notice

As per the *Practice Notice on the resumption of in-person hearings* from the RPD dated June 24, 2020, the 20 page limit for faxes has been increased to 50 pages.^[97]

[https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Where_evidence_](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Where_evidence_has_not_been_translated_in_accordance_with_the_rules,_the_Board_may_decline_to_accept_it_or_may_assign_it_low_weight)
27 [has_not_been_translated_in_accordance_with_the_rules,_the_Board_may_decline_to_](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Where_evidence_has_not_been_translated_in_accordance_with_the_rules,_the_Board_may_decline_to_accept_it_or_may_assign_it_low_weight)
[accept_it_or_may_assign_it_low_weight](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Where_evidence_has_not_been_translated_in_accordance_with_the_rules,_the_Board_may_decline_to_accept_it_or_may_assign_it_low_weight)

29.13.2 Unless consent to receive more than 20 pages by fax is received prior to sending the document, the document will not be considered to have been received

As stated in the Board's public commentary on the previous version of these rules, "The maximum number of pages that may be faxed to the Division or to another party is 20 pages, including a cover sheet. The recipient's consent must be obtained *before* faxing a document or package of documents longer than 20 pages; otherwise, the documents will not be considered to have been received."^[66] This statement would apply, *mutatis mutandis*, to the new limit of 50 pages.

29.14 RPD Rule 40 - Application if unable to provide document

Application if unable to provide document

40 (1) If a party is unable to provide a document in a way required by rule 39, the party may make an application to the Division to be allowed to provide the document in another way or to be excused from providing the document.

Form of application

(2) The application must be made in accordance with rule 50.

Allowing application

(3) The Division must not allow the application unless the party has made reasonable efforts to provide the document to the person to whom the document must be provided.

29.14.1 Rule 40(3): The party must have made reasonable efforts to provide the document to the person to whom the document must be provided

This is an issue that arises with applications to vacate and cease refugee protection where the protected person cannot be located: Canadian Refugee Procedure/Applications to Vacate or to Cease Refugee Protection#Rule 64(3): The Minister must provide a copy of the application to the protected person²⁸. Such applications may proceed in the absence of the person concerned unless doing so would amount to a breach of the tribunal's duty of fairness. The Division must not allow an application to proceed without having provided notice to the person concerned unless the Minister can show, to the Division's satisfaction, that reasonable efforts have been made to provide the document as required, as stated in Rule 40(3). In determining applications under rule 40, the RPD has considered such factors as:

- the Minister's efforts to search internet databases,
 - the Minister's searches in the Canadian Police Information Centre database,
 - the Minister's personal attendance at the last known address,
 - the Minister's attempts to reach the protected person at the last known telephone number,
- and

²⁸ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Applications_to_Vacate_or_to_Cease_Refugee_Protection#Rule_64\(3\):_The_Minister_must_provide_a_copy_of_the_application_to_the_protected_person](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Applications_to_Vacate_or_to_Cease_Refugee_Protection#Rule_64(3):_The_Minister_must_provide_a_copy_of_the_application_to_the_protected_person)

- the relative quality of the Minister's evidence on the merits of the application to cease.
[105]

29.15 RPD Rule 41 - When documents are considered received

When document received by Division

41 (1) A document provided to the Division is considered to be received by the Division on the day on which the document is date-stamped by the Division.

When document received by recipient other than Division

(2) A document provided by regular mail other than to the Division is considered to be received seven days after the day on which it was mailed. If the seventh day is not a working day, the document is considered to be received on the next working day.

Extension of time limit - next working day

(3) When the time limit for providing a document ends on a day that is not a working day, the time limit is extended to the next working day.

29.15.1 The fact that a document is "considered to be received" on a particular day creates a rebuttable presumption of fact

Rule 41(2) states that "a document provided by regular mail...is considered to be received seven days after the day on which it was mailed." The fact that a document is "considered to be received" on that date means that it can be presumed, in the absence of evidence to the contrary, that the document was received on the date in question. However, this is a rebuttable presumption of fact. Where, for example, the mail is returned as undeliverable, the presumption would not hold. Similarly, if information came to the attention of the sender that the document in question in reality was received on a later day, for example because the recipient was outside of the country for an extended period, then it would not be proper to simply "consider" the document as having been received after the seven-day period. This interpretation is supported by the Board's public commentary on the previous version of the rules which held that the fact that a document is "considered to be received" in this way "does not relieve a party of ensuring that [it was actually received]": "If a document is sent by regular mail, [this subsection] of the Rules states that the document is considered to be received seven days after the day it was mailed. If the seventh day is not a working day, the document is considered received on the next working day. However, mailing the document does not relieve a party of ensuring that the Division actually receives the document within the specified time limit."^[66] Similarly, while it will be presumed that a notice of hearing mailed to a claimant (or their counsel) provides adequate notice of a hearing, where the evidence establishes that the notice was not in fact received, then any abandonment determination could be set aside, subject to a broader examination of the principles relevant to abandonment proceedings including whether the claimant was diligent in keeping the Board up-to-date with their contact information.^[106] In Waldman's words, "in a specific case it may be possible to overcome the deeming provision if the claimant can show that in fact the [document] was not received within the stipulated seven day period. However, there will be an onus on the claimant to establish through cogent evidence that that was the case."^[107]

29.15.2 Documents sent to another Division of the Board will not automatically be placed on the RPD file

Persons with matters before the RPD may also have matters before another Division of the Board, including the Immigration Division, or the Refugee Appeal Division (as when a matter is appealed and then remitted for reconsideration by the RAD). Documents submitted to those other Divisions will not automatically be placed on the record at the RPD and it is generally up to a party to submit such documents to the RPD if they want the RPD to consider them.

29.16 RPD Rule 42 - Original documents

Original Documents

Original documents

42 (1) A party who has provided a copy of a document to the Division must provide the original document to the Division

- (a) without delay, on the written request of the Division; or
- (b) if the Division does not make a request, no later than at the beginning of the proceeding at which the document will be used.

Documents referred to in paragraph 3(5)(e) or (g)

(2) On the written request of the Division, the Minister must without delay provide to the Division the original of any document referred to in paragraph 3(5)(e) or (g) that is in the possession of an officer.

29.16.1 One of the purposes of original documents being made available to the Division is to allow for the verification of those original documents

Rule 42 provides that a party who has provided a copy of a document to the Division must also provide the original document to the Division. One of the purposes of this relates to the integrity of the process and the ability of the Division to assess the authenticity of the original document. For example, the *Instructions for Gathering and Disclosing Information for Refugee Protection Division Proceedings* state that where, after consulting with the responsible member manager, the assigned member forms the opinion that forensic verification is necessary, they may direct the RPD adjudicative support team to send the document to the RCMP Forensic Laboratory Services for verification.^[108] The average turn around time for forensic examination is 120 days. Hence, the assigned member must consider whether forensic verification will unreasonably delay the proceedings beyond the parameters set by legislation.

29.16.2 The Board has suspended the application of Rule 42(1)(b) during the Covid-19 pandemic

In its *Practice Notice on the resumption of in-person hearings*, which applies during the Covid-19 period, the Board has states that "until further notice, the RPD waives the requirement in RPD Rule 42(1)(b) to provide the original documents at the beginning of the hearing, unless directed in advance by the presiding member."^[109] This practice notice states that "original documents must still be retained and provided to the Division upon request."

29.17 RPD Rule 43 - Additional documents provided as evidence after a hearing

Additional Documents

Documents after hearing

43 (1) A party who wants to provide a document as evidence after a hearing but before a decision takes effect must make an application to the Division.

Application

(2) The party must attach a copy of the document to the application that must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

Factors

(3) In deciding the application, the Division must consider any relevant factors, including

- (a) the document's relevance and probative value;
- (b) any new evidence the document brings to the proceedings; and
- (c) whether the party, with reasonable effort, could have provided the document as required by rule 34.

29.17.1 History

The present RPD Rule 43 is similar, but not identical, to the previous Rule 37 in the older, 2002, version of the rules:^[110]

Additional documents after the hearing has ended

37. (1) A party who wants to provide a document as evidence after a hearing must make an application to the Division.

Written application

(2) The party must attach a copy of the document to the application. The application must be made under rule 44, but the party is not required to give evidence in an affidavit or statutory declaration.

Factors

(3) In deciding the application, the Division must consider any relevant factors, including:

- (a) the document's relevance and probative value;
- (b) any new evidence it brings to the proceedings; and
- (c) whether the party, with reasonable effort, could have provided the document as required by rule 29.

29.17.2 Rule 43 applies to evidence, not submissions, caselaw, or other tribunal decisions

Rule 43 does not apply to submissions made after a hearing. This is because, as stated in *Yared Belay v. Canada*, this rule sets out a procedure for filing evidence after a hearing, not submissions.^[8] Furthermore, a party cannot make an application to submit another decision of the Refugee Protection Division, or indeed some other tribunal, or a piece of caselaw pursuant to this rule. As the court commented in *Petrovic v. Canada*:

I do not find that a copy of a tribunal decision constitutes “evidence” under subsection 43(1) of the Rules for the following reasons. First, the RPD is not required to analyze each piece of case law, as it would material evidence. Second, with the presentation of new evidence, the opposing party is generally given the opportunity to make submissions on the admissibility of said evidence, including cross-examination. It is difficult to

imagine how anyone could oppose the admissibility of a piece of case law (decision). Lastly, if Parliament wanted previous RPD decisions to constitute evidence under section 43 of the Rules, I believe it would have explicitly indicated so.^[9]

The relevant rule for extending the time to supply non-evidentiary documents is Rule 70 (Canadian Refugee Procedure/General Provisions#RPD Rule 70 - Power to change a rule, excuse a person from a rule, extend a time limit, or act on its own initiative²⁹). All of this said, the court has held that in some situations where the RPD accepts post-hearing submissions, it may be unreasonable not to accept the evidence on which those submissions were based.^[111]

29.17.3 The Division has no substantive duty to accept post-hearing evidence or submissions, but it must consider the newly submitted evidence expressly

As held in *Aguilera v Canada*, the Board "has no duty to accept post-hearing evidence or to allow submissions thereon".^[112] It does, however, have a duty to "acknowledge the post-hearing evidence submitted by the Applicants and to explain why it should or should not be considered".^[113] In short, "the Board ha[s] a duty to consider the newly submitted evidence expressly".^[114] This duty extends until such time as the decision is rendered.^[115] Where a panel fails to acknowledge and review a claimant's post-hearing evidentiary submissions, it will have violated the principles of natural justice and procedural fairness in the adjudication of the claim. However, this obligation does not entitle a claimant to any particular result other than a fair process in which the relevant rules, such as Rule 43, are considered and the evidence is then either accepted or rejected.

This obligation to consider newly submitted evidence expressly applies even where the Rule 43 application may be scant, or missing details. For example, in *Cox v. Canada*, the court considered a situation in which the Minister argued that:

the Board had no duty to consider expressly the application to admit the evidence in its reasons because the application did not comply with all of the requirements of Rule 37. Particularly, the Respondent underlines the want of explanation in the application as to why the evidence could not have been submitted in time for the hearing.

The court dismissed this argument, concluding that the Board had a duty to consider the newly submitted evidence expressly notwithstanding the lack of such submissions on one of the factors enumerated in the relevant rule.^[116] See also the following commentary: Canadian Refugee Procedure/Documents#New evidence submitted post-hearing should be assessed pursuant to Rule 43 even where the party does not explicitly refer to the rule³⁰.

29 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/General_Provisions#RPD_Rule_70_-_Power_to_change_a_rule,_excuse_a_person_from_a_rule,_extend_a_time_limit,_or_act_on_its_own_initiative
30 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#New_evidence_submitted_post-hearing_should_be_assessed_pursuant_to_Rule_43_even_where_the_party_does_not_explicitly_refer_to_the_rule

29.17.4 New evidence submitted post-hearing should be assessed pursuant to Rule 43 even where the party does not explicitly refer to the rule

In *Shuaib*, the Court addressed the issue of whether the RPD could reject post-hearing documents on the basis that no formal application for their admission was made in accordance with Rule 43. The Court found that providing the documents, accompanied by an explanation as to why they should be considered, met the requirements of the Rules.^[117] The Court determined that the RPD made a reviewable error in ignoring the post-hearing evidence. Similarly, the RAD has held that the RPD erred in not considering documents where it was "implicit in the correspondence to the RPD that an application was being made to have further evidence considered post-hearing." Member M. Pettinella of the RAD commented on this obligation as follows in one case:

The RAD notes that the Minister's correspondence was received by the Board after the Appellant's hearing and before a decision was rendered by the RPD. It is implicit in the Minister's correspondence to the RPD that an application was being made to have further evidence considered post-hearing. The RPD erred when it failed to consider the Minister's correspondence as an application. The RPD had an obligation to consider the Minister's application and determine if the evidence was admissible within its rules. RPD rule 43(3) indicates that the RPD must consider any relevant factors, including, the document's relevance and probative value; any new evidence the document brings to the proceedings; and whether the party, with reasonable effort, could have provided the document as required by rule [43].^[118]

29.17.5 The Board must consider each of the Rule 43(3) factors

Pursuant to Rule 43(3), in deciding this type of application, the Division must consider any relevant factors, including:

- (a) the document's relevance and probative value
- (b) any new evidence the document brings to the proceedings
- (c) whether the party, with reasonable effort, could have provided the document as required by rule 34

As such, the Board is required to consider the relevance, probative value, newness of the documents, as well as whether the party, with reasonable effort, could have provided the document on time, i.e. factors that are the same as those enumerated in Rules 36(a), (b), and (c). The text *Refugee Law* states that "the criteria for the receipt of post-hearing evidence are similar to the long-established grounds at common law by which an individual may tender new evidence on appeal."^[119] The court has held that "While the list of factors to be considered in [Rule 36] is not exhaustive, the use of the word "including" rather than the words "such as" before the list of factors indicates the intent that each of the factors included in the sub-rule be considered. A failure to do so gives rise to a breach of procedural fairness."^[120] As such, in a case where the Board's decision weighed only one factor, the court concluded that it had erred.

29.17.6 Rule 43(3) factors are not exhaustive, and as such, the Board may consider additional factors

The fact that, per Rule 43(3), the Division should consider "any relevant factors" means that it is not limited to the factors above, which are enumerated in the rule, and may consider other factors. In the words of Mr. Justice Near, "the list of factors to be considered in Rule 37(3) is not exhaustive" and the same principle would apply here.^[120]

29.17.7 The consideration of the Rule 43(3) factors in past decisions

See the discussion of the identical factors in the commentary for Rule 36 above (Canadian Refugee Procedure/Documents#RPD Rule 36 - Use of undisclosed documents³¹). Additional factors particular to post-hearing documents that have been considered have included:

- **Whether a claimant made an earlier application to provide post-hearing documents that did not include this type of document:** Where a panel has provided a claimant with leave to submit some specified type of document post-hearing, the claimant should not expect that another, unrelated, type of document will be allowed absent an application on point. In *Farkas v. Canada*, the court noted that "the post-hearing documents actually submitted do not fit within the type for which the RPD had given leave to file, that is to say 'corroborative police and/or medical documents'. As the post-hearing evidence did not fall within the scope of the RPD's grant of permission, the RPD would have been justified rejecting it."^[121]
- **Whether the document exists at the time of the application:** At times, parties will apply for a proceeding to be held in abeyance until some document comes into their possession, for example a court decision from a foreign judicial process that has not yet concluded. This rule does not apply to such requests because this rule only applies where the party has and submits a copy of the document that it wants the Board to consider, per Rule 43(2). Instead, requests for leave to provide documents post-hearing, and to refrain from providing a decision until such documents are provided are not strictly assessed under Rule 43, but should instead be considered based on the Board's plenary jurisdiction.

29.17.8 Requests to submit a document post-hearing that the claimant does not have in its possession are not made pursuant to Rule 43

At times, parties will apply for a proceeding to be held in abeyance until some document comes into their possession, for example a court decision from a foreign judicial process that has not yet concluded. Rule 43 does not apply to such requests because this rule only applies where the party has and submits a copy of the document that it wants the Board to consider, per Rule 43(2). Instead, requests for leave to provide documents post-hearing, and to refrain from providing a decision until such documents are provided are not strictly assessed under Rule 43, but should instead be considered based on the Board's plenary jurisdiction. The general approach is to decline to hold a proceeding in abeyance pending

³¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_36_-_Use_of_undisclosed_documents

the outcome of a foreign process, but it should be noted that, when considering the overall scheme of the Act, In cases where the person has been charged with an offence in Canada punishable by ten or more years, and the criminal proceedings are still pending, the officer has the discretion to await the outcome of the trial before making a determination as to an individual's admissibility to file a claim.^[122] As such, there is some precedent in the IRPA for putting proceedings into abeyance pending another proceeding's conclusion and documents related thereto becoming available.

The court held in *Gulamsakhi v. Canada* that the Board should generally have a liberal approach to allowing reasonable requests to submit post-hearing documents given the issues that are usually at stake in refugee claims:

In my opinion, in the circumstances of this case, the RPD erred in refusing to grant the Applicant an adjournment or permission to file evidence later. All adjournments require a balancing of the many circumstances of the case. Here, the primary error was that the RPD did not factor into its balancing the consequences of deportation for this Applicant. ... In the present case, particularly given the potentially horrific fate awaiting the Applicant, not only at the hands of her husband but also at the hands of criminal and possibly religious justice authorities, and given little prejudice an adjournment would realistically cause the RPD or Canadian authorities, in my view in the circumstances overall fairness required the RPD to grant the adjournment to enable the Applicant to provide the RPD with the corroborating documents it was requested.^[123]

29.17.9 If credibility concerns emerge from documents submitted by a claimant post-hearing, the panel generally need not resume the hearing

The general rule is that the RPD has no obligation to return to a claimant with concerns arising from their own post-hearing submissions. The court has stated that "To do so would be onerous on the RPD. It must be kept in mind that it was up to the Applicants to submit credible and corroborative evidence to support their claim."^[124] This conclusion may differ where the Minister is involved in a proceeding and their post-hearing submissions raise issues as to the credibility of the claimant, or vice versa.

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119. Martin David Jones and Sasha Baglay. *Refugee Law (Second Edition)*. Irwin Law, 2017, page 304.
120. *Cox v. Canada (Citizenship and Immigration)*, 2012 FC 1220 (CanLII), para. 27.
121. *Farkas v. Canada (Citizenship and Immigration)*, 2014 FC 542 (CanLII), para. 13.

80 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>

81 <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef12.aspx#n1242>

82 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/InstructInfo.aspx>

83 <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/rpd-pn-hearing-resumption.aspx#toc25>

84 <https://canlii.ca/t/ftgjl#par23>

85 <https://canlii.ca/t/jt03h#par22>

86 <https://canlii.ca/t/ftgjl#par24>

122. Immigration and Refugee Protection Act, SC 2001, c 27, s 100(2) <⁸⁷> retrieved on 2020-04-13.
123. *Gulamsakhi v. Canada (Minister of Citizenship & Immigration)*, [2015] F.C.J. No. 271, 2015 FC 105 (F.C.), para. 25.
124. *Behary v. Canada (Citizenship and Immigration)*, 2015 FC 794 (CanLII), para. 31.

⁸⁷ <http://canlii.ca/t/53z6t#sec100subsec2>

30 Witnesses (RPD Rules 44-48)

Oral testimony is at the heart of most proceedings before the Refugee Protection Division. The rules herein concern witnesses other than a person who is party to a matter. For a discussion of the principles related to oral testimony before the Board more generally, see: Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(e) - Must provide an opportunity to present evidence, question witnesses and make representations¹.

30.1 RPD Rule 44 - Witness notification

The text of the relevant rules reads:

Witnesses

Providing witness information

44 (1) If a party wants to call a witness, the party must provide the following witness information in writing to the other party, if any, and to the Division:

- (a) the witness's contact information;
- (b) a brief statement of the purpose and substance of the witness's testimony or, in the case of an expert witness, the expert witness's brief signed summary of the testimony to be given;
- (c) the time needed for the witness's testimony;
- (d) the party's relationship to the witness;
- (e) in the case of an expert witness, a description of the expert witness's qualifications; and
- (f) whether the party wants the witness to testify by means of live telecommunication.

Proof witness information provided

(2) The witness information provided to the Division must be accompanied by a written statement indicating how and when it was provided to the other party, if any.

Time limit

(3) Documents provided under this rule must be received by their recipients no later than 10 days before the date fixed for the hearing.

Failure to provide witness information

(4) If a party does not provide the witness information, the witness must not testify at the hearing unless the Division allows them to testify.

Factors

(5) In deciding whether to allow a witness to testify, the Division must consider any relevant factors, including

- (a) the relevance and probative value of the proposed testimony; and
- (b) the reason why the witness information was not provided.

1 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(e\)_-_Must_provide_an_opportunity_to_present_evidence,_question_witnesses_and_make_representations](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(e)_-_Must_provide_an_opportunity_to_present_evidence,_question_witnesses_and_make_representations)

30.1.1 44(1) This rule applies where a party wants to call a witness but does not apply where a party themselves will testify

Claimants automatically have the right to testify at a hearing and need not provide witness contact information in order to do so. The relevant rule regarding claimants testifying at a hearing is not Rule 44, instead see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The Board must provide the parties with the opportunity to be heard².

30.1.2 44(1)(f): If a party wants to call a witness, the party must provide information on whether the party wants the witness to testify by means of live telecommunication

Rule 44(1)(f) provides that if a party wants to call a witness, the party must provide witness information in writing to the other party, if any, and to the Division and include whether the party wants the witness to testify by means of live telecommunication. The Federal Court has held that the general rule before the RPD is that witnesses should be physically present.^[1] In *Aslani v Canada*, the RPD member required that the proposed overseas witnesses report to the Canadian embassy in the country where they resided to be identified, before she would hear them. On judicial review, the claimant maintained that a non-existent procedural rule was imposed upon him and that this infringed his right to be heard. The court, however, upheld the RPD's refusal to hear from the witnesses on the basis that testimony by telephone can create particular issues around establishing the identity of the witness.^[1]

30.1.3 44(4): Division has discretion not to allow a witness to testify where proper notice has not been provided

Pursuant to Rule 44(4), if a party does not provide the witness information required by the rule, their witness must not testify at the hearing unless the Division allows them to testify. In exercising this discretion, the Board must consider any relevant factors, including those specified in Rule 44(5). The courts have granted significant leeway to the RPD in the exercise of this discretion. For example, in *Parveen v. Canada*, the Board declared that the claimant had abandoned their claim. The claimant indicated during the hearing that she wished to have her landlord provide testimony in her special hearing on abandonment. The RPD declined to allow the testimony because no notice was given that he would be called as a witness, and he had not been excluded from the Applicant's testimony. The court upheld this decision for these reasons.^[2]

30.1.4 44(5): In deciding whether to allow a witness to testify, the Division must consider any relevant factors

Relevant factors include, but are not limited to, the two factors enumerated under Rule 44(5):

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_Board_must_provide_the_parties_with_the_opportunity_to_be_heard

- (a) the relevance and probative value of the proposed testimony
 - *Whether the witness was excluded from hearing other testimony.* A relevant factor when assessing the probative value of the testimony that could be offered is whether the witness was excluded from hearing other testimony in the case. RPD Rule 48 sets out a process for excluding a witness from hearing testimony during a hearing. In some cases, an observer will be present throughout a hearing and then a claimant will offer them as a witness. The fact that they were able to observe the other testimony that had been provided has been found relevant by the Division when determining the probative value (or lack thereof) of the anticipated testimony.
 - *Whether the proposed witness has first-hand knowledge of the matter of which they would testify.*
 - *Whether the proposed witness would be expressing an opinion, and if so, their expertise to do so.*
- (b) the reason why the witness information was not provided

In assessing the probative value of testimony, the panel must not pre-judge the credibility of the testimony. In *Ayele v. Canada*, the court states that the essence of adjudication is the ability to keep an open mind until all the evidence has been heard. The reliability of evidence is to be determined in light of all of the evidence in a particular case. This is the reason why an adjudicator must remain open to persuasion until all of the evidence and submissions are received. Evidence, that at first blush may seem implausible, may later appear plausible when set in the context of subsequent evidence. It is, at the least, suggestive of an impermissibly closed mind to state “there’s no point calling the witness”.^[3]

Recourse may also be had to the consideration of Rule 36, regarding undisclosed documents, as such decisions may apply *mutatis mutandis* to witnesses: Canadian Refugee Procedure/Documents#RPD Rule 36 - Use of undisclosed documents³.

30.1.5 Witnesses have a right to testify in the official language of their choice

The IRB *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French* provides that “All persons in the hearing room are free to speak the official language of their choice, including counsel for the subject of the proceeding. At the request of any party to the proceeding, the IRB will make arrangements to provide interpretation from one official language to the other, taking into consideration third language interpretation may also be required for the case.” The policy emphasizes that both the *Official Languages Act* and the *Canadian Charter of Rights and Freedoms* establish official languages rights for parties as well as for individuals who are otherwise involved in IRB proceedings, such as witnesses and counsel.^[4]

30.1.6 Limitations on the ability of legal counsel to act as a witness in a proceeding

The Refugee Appeal Division has found that testimony from a claimant's counsel inadmissible before the tribunal, writing “I find counsel’s statutory declaration is inadmissible

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_36_-_Use_of_undisclosed_documents

as evidence in this appeal.” In reaching this conclusion, the RAD referred to the Code of Conduct of the Law Society of Alberta which provides that:

The Lawyer as Witness

4.02(1) A lawyer who appears as advocate must not testify *or submit his or her own affidavit evidence* before the tribunal unless permitted to do so by law, the tribunal, the Rules of Court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.^[5]

The Board also noted that the Commentary set out in the Alberta Code also states:

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer’s own credibility at issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the applicant’s right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.^[6]

The RAD concluded that ”I find that his statutory declaration improperly provides evidence and is, therefore, not admissible.”^[7] The ability of a lawyer to provide evidence in this way may thus depend on the jurisdiction and the rules of the Law Society in question. See also the following discussion of how the Board is not bound by technical rules of evidence: Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(g) - Is not bound by any legal or technical rules of evidence⁴. As ”the Division is not bound by any legal or technical rules of evidence”^[8] it is not bound to reject evidence provided by counsel, but it nonetheless has the residual discretion to do so as part of the broader discretion that it has to control its own process and balance the probative value of evidence with its prejudicial effect, if any, on the hearing process.

30.2 RPD Rule 45(1) - Requesting summons

Requesting summons

45 (1) A party who wants the Division to order a person to testify at a hearing must make a request to the Division for a summons, either orally at a proceeding or in writing.

30.2.1 The authority of the Division to issue a summons for a person or documents

The legislative authority for enforcing a summons is found under s. 5 of the *Inquiries Act*.^[9] This provision allows the Division to either summon an individual or to compel the production of evidence. For a discussion of this provision, see Canadian Refugee Procedure/Powers of a Member⁵. A second basis for the Board's authority to summon a witness is s. 127(c) of the IRPA, which reads:

4 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(g\)_-_Is_not_bound_by_any_legal_or_technical_rules_of_evidence](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(g)_-_Is_not_bound_by_any_legal_or_technical_rules_of_evidence)

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Powers_of_a_Member

Misrepresentation

127 No person shall knowingly

- (a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
- (b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or
- (c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

30.2.2 Rule 45 does not have extraterritorial effect and only allows the Board to summon a person within Canada

When interpreting its identical rule, the IAD commented that it does not have extraterritorial effect: "The request for a summons or subpoena is denied for reasons that the IAD has no jurisdiction to issue a summons for persons outside Canada where the IAD has no extraterritorial power to enforce the summons. The jurisdiction of the IAD with respect to the issuance of summons under Rule 38 of the *IAD Rules* does not extend beyond Canada."^[10] It would appear that this interpretation is a persuasive one when interpreting the scope of the equivalent RPD rule.

30.3 RPD Rule 45(2) - Factors the Division must consider in deciding whether to issue a summons

Factors

- 45(2) In deciding whether to issue a summons, the Division must consider any relevant factors, including
- (a) the necessity of the testimony to a full and proper hearing;
 - (b) the person's ability to give that testimony; and
 - (c) whether the person has agreed to be summoned as a witness.

30.3.1 Factors the Division is to consider when deciding whether to issue a summons

Rule 45(2) provides that in deciding whether to issue a summons, the Division must consider any relevant factors, including:

- (a) the necessity of the testimony to a full and proper hearing.
 - *Is the testimony duplicative of evidence that will already be provided?* In interpreting its identical rule, the Immigration Appeal Division considered this factor in *Lama v. Canada* when rejecting an application for a summons by noting that the testimony that the applicant sought to adduce from the persons who would be summoned was duplicated by, and less probative than, persons who were already going to be witnesses: "The appellant's counsel submits the evidence of family members and the close relatives who witnessed the marriage ceremony is highly relevant to the proceeding. The wedding celebration is one of the many factors which will be considered by the Panel. The appellant's and applicant's testimonies are the more relevant pertaining to the genuineness of their marriage. For these reasons, I don't find the testimony of the appellant's sister and "big mommy" necessary for the full and proper hearing."^[11]

- *Can the evidence be obtained in other ways?* In *Ahmadpour v. Canada*, the Board rejected a request for a summons on the basis that the evidence in question could be obtained in alternative ways, such as by the claimant's counsel and family members obtaining documents.^[12]
- *May the testimony of the witness lead to other potentially relevant witnesses?* In *Akram v. Canada* the Federal Court held that the RPD had been wrong to deny a request to summon a CBSA officer on the basis that even if the officer was unlikely to provide direct testimony that was relevant to the issue being considered, "the Officer had the ability to provide information about *other* individuals involved in the investigation" and that it was important to consider this purpose for summoning the officer.^[13]
- (b) the person's ability to give that testimony. If the person in question has provided information that they have no knowledge of the matter in question, this is a relevant consideration. In one case where a protected person sought to summon a CBSA officer who had been involved in his claim, the panel of the RPD stated that she "considered the factors laid out in the *Rules* and denied the application to summon the officer at the pre-hearing conference. The officer has already explained in writing the limited scope of his role in the investigation and his inability to give further testimony about any timeline. This was the basis for not agreeing to be summoned as a witness, which I find to be reasonable."^[14] This was on the basis that the officer in question had had a limited role in the claim about a decade prior and that the officer "took no further action, has no further knowledge about applications brought against the respondent, the related background, circumstances or the timeline."^[15]
- (c) whether the person has agreed to be summoned as a witness. In one decision considering this factor in its identical rules, the Immigration Appeal Division weighed a respondent's disinclination to testify as follows: "the appellant provides in the June 8, 2017 submissions that he not wish to be a witness for the Minister. Having considered the respondent's wishes, I find that the interests of justice, including the public interest that tribunals render full and fair decisions, outweigh any prejudice to the respondent and mandate the provision of his testimony at this appeal."^[16] The reasoning of the IAD has been similar in cases where information about whether the person has agreed to be summoned is simply not before the tribunal, e.g. in *Liu v. Canada* the Board commented as follows: "As to whether Mr. Reid has agreed to be summoned as a witness, it is not clear that he has. However, I find that the interests of justice outweigh any inconvenience or prejudice to Mr. Reid. Therefore, I require the provision of his testimony at this appeal."^[17]

As the Division is to consider "any relevant factors", factors other than those listed above may properly be considered by a panel when making a decision, including:

- The timing of the request and whether it may delay proceedings: Where a party has not acted diligently and a request for a summons risks delaying a proceeding, this may appropriately be considered when issuing a summons. For example, when interpreting its identical provision, the IAD commented as follows in *Liu v. Canada*: "While the relevant factors in this case support the granting of a summons, I note that the Appellant brought this application on April 2, 2019 with a hearing resumption date scheduled for April 24, 2019. This matter was adjourned following the first sitting on January 29, 2019 and the content of Mr. Reid's statutory declaration were known to the Appellant at that sitting and prior to the commencement of the hearing of this appeal. As such, while the

application for a summons is granted, the Appellant should be prepared to proceed on April 24, 2019 regardless of whether Mr. Reid appears at the hearing.”

30.4 RPD Rule 45(3) - How to use a summons

Using summons

- (3) If a party wants to use a summons, the party must
- (a) provide the summons to the person by hand;
 - (b) provide a copy of the summons to the Division, together with a written statement indicating the name of the person who provided the summons and the date, time and place that it was provided by hand; and
 - (c) pay or offer to pay the person the applicable witness fees and travel expenses set out in Tariff A of the Federal Courts Rules.

30.4.1 Rule 45(3)(a) Requires Personal Service of the Summons

When interpreting its similar rule, the Immigration Appeal Division commented on the fact that electronic service is not sufficient to meet the requirement that the summons be provided "to the person by hand": "The Appellant shall comply with section 38(3) of the *IAD Rules* and any other relevant requirements in executing the summons. Section 38(3)(a) of the *IAD Rules* states that the Appellant *must* 'provide the summons to the summoned person by hand'. The Appellant has indicated that she will notify Mr. Reid of the summons by electronic means. While the Appellant is free to do so, the use of electronic means does not discharge the obligation of personal service as required in section 38(3)(a) of the *IAD Rules*."^[18]

30.5 RPD Rule 46 - Cancelling summons

Cancelling summons

- 46 (1) If a person who is summoned to appear as a witness wants the summons cancelled, the person must make an application in writing to the Division.

Application

- (2) The person must make the application in accordance with rule 50, but is not required to give evidence in an affidavit or statutory declaration.

30.6 RPD Rule 47 - Arrest warrant

Arrest warrant

- 47 (1) If a person does not obey a summons to appear as a witness, the party who requested the summons may make a request to the Division orally at the hearing, or in writing, to issue a warrant for the person's arrest.

Written request

- (2) A party who makes a written request for a warrant must provide supporting evidence by affidavit or statutory declaration.

Requirements for issue of arrest warrant

- (3) The Division must not issue a warrant unless
- (a) the person was provided the summons by hand or the person is avoiding being provided the summons;
 - (b) the person was paid or offered the applicable witness fees and travel expenses set out in Tariff A of the Federal Courts Rules;
 - (c) the person did not appear at the hearing as required by the summons; and
 - (d) the person's testimony is still needed for a full and proper hearing.

Content of warrant

(4) A warrant issued by the Division for the arrest of a person must include directions concerning detention or release.

30.7 RPD Rule 48 - Excluded witnesses

Excluded witness

48 If the Division excludes a witness from a hearing room, no person may communicate to the witness any evidence given while the witness was excluded unless allowed to do so by the Division or until the witness has finished testifying.

30.7.1 Communicating with an excluded witness may amount to witness tampering

In *(Re) Mumtaz Khan*, counsel for a claimant provided information to an excluded witness and the Board concluded that this amounted to witness tampering and sanctioned the counsel.^[19]

30.8 References

1. *Aslani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 351, <⁶>.
2. *Parveen v. Canada (Citizenship and Immigration)*, 2019 FC 155 (CanLII), para. 23.
3. *Ayele v. Canada (MCI)*, 2007 FC 126, at para. 12.
4. Immigration and Refugee Board of Canada, *Policy Statement on Official Languages and the Principle of the Substantive Equality of English and French*, Date modified: 2018-07-03 <<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/pnnpollo.aspx>> (Accessed January 22, 2020).
5. *X (Re)*, 2014 CanLII 96662 (CA IRB), par. 35, <⁷>, retrieved on 2020-02-06.
6. *X (Re)*, 2014 CanLII 96662 (CA IRB), par. 36, <⁸>, retrieved on 2020-02-06.
7. *X (Re)*, 2014 CanLII 96662 (CA IRB), par. 41, <⁹>, retrieved on 2020-02-06.
8. Immigration and Refugee Protection Act, SC 2001, c 27, s 170 <¹⁰> retrieved on 2020-02-07.
9. *Inquiries Act*, R.S.C., 1985, c. I-11
10. *Ahmadpour v. Canada (Citizenship and Immigration)*, 2011 CanLII 79685 (CA IRB), par. 9, <¹¹>, retrieved on 2020-02-05.
11. *Lama v Canada (Citizenship and Immigration)*, 2018 CanLII 139884 (CA IRB), par. 5, <¹²>, retrieved on 2020-02-05.
12. *Ahmadpour v. Canada (Citizenship and Immigration)*, 2011 CanLII 79685 (CA IRB), par. 7, <¹³>, retrieved on 2020-02-05.

6 <http://canlii.ca/t/1q8jk>
7 <http://canlii.ca/t/glc8d#par35>
8 <http://canlii.ca/t/glc8d#par36>
9 <http://canlii.ca/t/glc8d#par41>
10 <http://canlii.ca/t/53z6t#sec170>
11 <http://canlii.ca/t/fp9fj#9>
12 <http://canlii.ca/t/hzrg2#5>
13 <http://canlii.ca/t/fp9fj#7>

13. *Akram v. Canada (Citizenship and Immigration)*, 2019 FC 171 (CanLII), par. 32, <¹⁴>, retrieved on 2020-02-05.
14. *X (Re)*, 2018 CanLII 72628 (CA IRB), par. 24, <¹⁵>, retrieved on 2020-02-05 (reversed in *Akram v. Canada (Citizenship and Immigration)*, 2019 FC 171 (CanLII), but on other grounds relating not to this basis for concluded that the person was unable to provide significant testimony on this issue, but on another ground that the officer may be able to provide testimony about another unrelated issue).
15. *X (Re)*, 2018 CanLII 72628 (CA IRB), par. 20, <<http://canlii.ca/t/htc27#20>>, retrieved on 2020-02-05.
16. *Nguyen v Canada (Public Safety and Emergency Preparedness)*, 2017 CanLII 68077 (CA IRB), par. 7, <¹⁶>, retrieved on 2020-02-05.
17. *Liu v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 82084 (CA IRB), par. 7, <¹⁷>, retrieved on 2020-02-05.
18. *Liu v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 82084 (CA IRB), par. 10, <¹⁸>, retrieved on 2020-02-05.
19. *(Re) Mumtaz Khan*, December 18, 2020 <¹⁹> (Accessed February 1, 2021)

14 <http://canlii.ca/t/hxh6c#32>

15 <http://canlii.ca/t/htc27#24>

16 <http://canlii.ca/t/h6nx3#7>

17 <http://canlii.ca/t/j287f#7>

18 <http://canlii.ca/t/j287f#10>

19 <https://irb-cisr.gc.ca/en/decisions/Pages/mumtaz-khan.aspx>

31 Applications (RPD Rules 49-52)

31.1 RPD Rule 49 - General provision describing how to make, respond to, and reply to a response to an application

The text of Rule 49 reads:

Applications

General

General provision

49 Unless these Rules provide otherwise,

(a) a party who wants the Division to make a decision on any matter in a proceeding, including the procedure to be followed, must make an application to the Division in accordance with rule 50;

(b) a party who wants to respond to the application must respond in accordance with rule 51; and

(c) a party who wants to reply to a response must reply in accordance with rule 52.

31.1.1 Evidence attached to an application, a response to an application, or a reply to a response must meet the requirements in Rules 35, 36 or 43 regarding relevance, probative value, new evidence, etc. (as applicable)

The fact that Rules 50(4), 51(2), and 52(2) make provision for a party to attach evidence to an application, a response, or a reply to a response, does not establish the legal framework for whether or not such evidence is to be accepted. It merely provides the process and procedure for providing such evidence. Instead, the rules for whether or not such evidence should be accepted are Rule 35 (if the evidence is provided at least 10 days prior to the hearing date), Rule 36 (if the evidence is provided within 10 days of the hearing), or Rule 43 (if the evidence is provided post-hearing).

31.1.2 The Board may convene a conference in response to an application made under these rules

As Lorne Waldman notes in his text, "once all of the documents have been received by the parties, the Refugee Protection Division may order a hearing into the application or, in cases where it is satisfied that no injustice would result, may dispose of the matter without a hearing."^[1] The framework in the Rules for having such a hearing are the provisions in Rule 24 on case conferences: Canadian Refugee Procedure/Conferences#Rule 24 - Conferences¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Conferences#Rule_24_-_Conferences

31.2 RPD Rule 50 - How to Make an Application

How to Make an Application

Written application and time limit

50 (1) Unless these Rules provide otherwise, an application must be made in writing, without delay, and must be received by the Division no later than 10 days before the date fixed for the next proceeding.

Oral application

(2) The Division must not allow a party to make an application orally at a proceeding unless the party, with reasonable effort, could not have made a written application before the proceeding.

Content of application

(3) Unless these Rules provide otherwise, in a written application, the party must

- (a) state the decision the party wants the Division to make;
- (b) give reasons why the Division should make that decision; and
- (c) if there is another party and the views of that party are known, state whether the other party agrees to the application.

Affidavit or statutory declaration

(4) Unless these Rules provide otherwise, any evidence that the party wants the Division to consider with a written application must be given in an affidavit or statutory declaration that accompanies the application.

Providing application to other party and Division

(5) A party who makes a written application must provide

- (a) to the other party, if any, a copy of the application and a copy of any affidavit or statutory declaration; and
- (b) to the Division, the original application and the original of any affidavit or statutory declaration, together with a written statement indicating how and when the party provided a copy to the other party, if any.

31.2.1 The Rule 50(4) requirement that evidence be provided in an affidavit is waived during the Covid-19 pandemic

The Refugee Protection Division: Practice Notice on the resumption of in-person hearings states:

Several RPD Rules refer to RPD Rule 50 which requires that an application be accompanied by an affidavit or statutory declaration. Until further notice, the requirement to provide an affidavit or statutory declaration is waived. This waiver applies to all applications, including those made pursuant to Chairperson's Guideline 8 to declare a person to be a vulnerable person. The waiver also applies to the Response to the Application (RPD Rule 51) and the Reply to the Response (RPD Rule 52).^[2]

31.3 RPD Rule 51 - How to Respond to a Written Application

How to Respond to a Written Application

Responding to written application

51 (1) A response to a written application must be in writing and

- (a) state the decision the party wants the Division to make; and
- (b) give reasons why the Division should make that decision.

Evidence in written response

(2) Any evidence that the party wants the Division to consider with the written response must be given in an affidavit or statutory declaration that accompanies the response. Unless the Division requires it, an affidavit or statutory declaration is not required if the party who made the application was not required to give evidence in an affidavit or statutory declaration, together with the application.

Providing response

(3) A party who responds to a written application must provide

- (a) to the other party, a copy of the response and a copy of any affidavit or statutory declaration; and
- (b) to the Division, the original response and the original of any affidavit or statutory declaration, together with a written statement indicating how and when the party provided a copy to the other party.

Time limit

(4) Documents provided under subrule (3) must be received by their recipients no later than five days after the date on which the party receives the copy of the application.

31.4 RPD Rule 52 - How to Reply to a Written Response

How to Reply to a Written Response

Replying to written response

52 (1) A reply to a written response must be in writing.

Evidence in reply

(2) Any evidence that the party wants the Division to consider with the written reply must be given in an affidavit or statutory declaration that accompanies the reply. Unless the Division requires it, an affidavit or statutory declaration is not required if the party was not required to give evidence in an affidavit or statutory declaration, together with the application.

Providing reply

(3) A party who replies to a written response must provide

- (a) to the other party, a copy of the reply and a copy of any affidavit or statutory declaration; and
- (b) to the Division, the original reply and the original of any affidavit or statutory declaration, together with a written statement indicating how and when the party provided a copy to the other party.

Time limit

(4) Documents provided under subrule (3) must be received by their recipients no later than three days after the date on which the party receives the copy of the response.

31.5 References

1. Waldman, Lorne, *Canadian Immigration & Refugee Law Practice*, Markham, Ont.: LexisNexis Butterworths, 2018, ISBN 9780433478928², ISSN 1912-0311, <<https://search.library.utoronto.ca/details?5022478>> (Accessed April 1, 2020) at page 1746 of the PDF.

² <https://en.wikibooks.org/wiki/Special:BookSources/9780433478928>

2. Immigration and Refugee Board of Canada, *Refugee Protection Division: Practice Notice on the resumption of in-person hearings*, June 23, 2020, <³> (Accessed August 1, 2020).

³ <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/rpd-pn-hearing-resumption.aspx>

32 Changing the Location of a Proceeding (RPD Rule 53)

32.1 RPD Rule 53 - Changing the Location of a Proceeding

The text of the relevant rule reads:

Changing the Location of a Proceeding

Application to change location

53 (1) A party may make an application to the Division to change the location of a proceeding.

Form and content of application

(2) The party must make the application in accordance with rule 50, but is not required to give evidence in an affidavit or statutory declaration.

Time limit

(3) Documents provided under this rule must be received by their recipients no later than 20 days before the date fixed for the proceeding.

Factors

(4) In deciding the application, the Division must consider any relevant factors, including

(a) whether the party is residing in the location where the party wants the proceeding to be held;

(b) whether a change of location would allow the proceeding to be full and proper;

(c) whether a change of location would likely delay the proceeding;

(d) how a change of location would affect the Division's operation;

(e) how a change of location would affect the parties;

(f) whether a change of location is necessary to accommodate a vulnerable person; and

(g) whether a hearing may be conducted by a means of live telecommunication with the claimant or protected person.

Duty to appear

(5) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the location fixed and be ready to start or continue the proceeding.

32.1.1 Commentary on the Rule 53(4) Factors

The IRB provides a specific form to make such applications, the *Application to Change the Location of a Proceeding* form.^[1] Waldman notes in his text that "The Rules confer a broad discretion on the Division to determine whether or not to grant the change of venue, and it is unlikely that the discretion will be interfered with by a reviewing court unless the Division acts arbitrarily."^[2] Past decisions have commented on the above factors thusly:

- (a) whether the party is residing in the location where the party wants the proceeding to be held:

- Where a party has moved, this points to moving the proceedings: The instructions provided on the IRB website about these applications is that the *Application to Change the Location of a Proceeding* form "can be used by claimants who have moved or who intend to move, and who wish to have their proceeding held at a Refugee Protection Division (RPD) office in another city in Canada."^[3] As a result, the fact that a party is residing in the new location is a factor in favour of moving proceedings there.
- An intent to move is also properly considered: Additionally, as per the instructions quoted *supra*, the Board has communicated that it is also appropriate for those who *intend* to move to bring such applications *prior* to doing so.^[3]
- Location of counsel not generally an appropriate consideration: In contrast, where such applications have been made to move proceedings away from where an individual resides to another city where the individual's counsel resides, the fact that the individual concerned does not reside in the new city being proposed has been taken as a factor pointing against accepting the application.^[4] In interpreting its similar rule, the Immigration Appeal Division commented on this as follows: "I note that the appellant's representative of choice resides in Vancouver and although not stated, may be one of the factors driving the application to change the location of the proceeding. In the absence of argument or evidence to suggest that travel for the representative is more onerous than travel for the appellant, that is a neutral consideration in this case."^[5] The general view is that it was open to counsel not to accept the retainer and to suggest to the claimant seek counsel in the province where they reside, and that not having done this, counsel can either travel to the location where the hearing is being held to participate in the hearing in-person, counsel can request that they be able to appear via video or telephone, or the claimant can retain any of the number of counsel who are available to provide legal services in in the location where the hearing is being held.
- **(b) whether a change of location would allow the proceeding to be full and proper:**
 - Not generally necessary for witnesses to testify in person for a proceeding to be "full and proper": It is common that witnesses will provide testimony by telephone and it will not generally be necessary to change a location in order to hear from witnesses in person. In this respect, where witnesses are in another city in Canada and they testify by telephone, the claimant is in no different a position from the numerous claimants who rely on witnesses located overseas and consequently adduce their evidence by telephone or video.
- **(c) whether a change of location would likely delay the proceeding:** This is a consideration both where a date has been set and where a date has not been set.
 - Where hearing date set: In terms of cases where a date has been set, in interpreting its similar rule, the Immigration Appeal Division has held that a change of location that would require abandoning an existing date and substituting it for a later date is a factor that points against granting an application to change location.^[4]
 - Where hearing date not set: Delay of a proceeding is also a factor even for claims where a hearing date has not yet been scheduled. The Board publishes statistics on the number of pending cases in each of its regions on its website.^[6] The Eastern region has a greater number of pending cases than the Central region, which in turn has a greater number of pending cases than the Western region, and as a result, all else being equal, changing location to the Eastern region is likely to delay a proceeding, while changing location to the Western region is unlikely to do so.

- Delay should be considered, not expediting a hearing: While the Division must consider whether a change of venue request will result in a delay or slowing of the proceedings, the expediting of proceedings is not a listed factor. While it is open to the Division to consider any relevant factors, as a matter of policy, claimants should not be permitted to change the venue of their cases simply to obtain an earlier hearing date. Allowing applications for a change of venue so as to allow an earlier hearing date is not proper, as the likely impact on proceedings is that claimants will seek to bring such applications as a form of “forum shopping.” Ultimately, this would not benefit the operation of the Division as pressures would simply shift from one location to another, with a concomitant increase in delay in the receiving location. Furthermore, this option would be available only to those with sufficient financial means to travel for the purpose of attending their hearing. This provision cannot have been intended to provide an advantage to those of greater financial means. Instead, the Refugee Protection Division has a *Policy on the Transfer of Files for Hearings by Videoconference* which provides for a principled, as opposed to *ad hoc*, approach to transferring workload between regions and using videoconferencing in order to efficiently and fairly utilize the Board's resources.^[7]
- **(d) how a change of location would affect the Division’s operation:**
 - Does the Board have an office in the location proposed? In commenting on its similar rule, the Immigration Appeal Division has noted that there are administrative and operational implications for IAD processes conducted in itinerant locations.^[8] The Board has registries in Montreal, Toronto, and Vancouver, and it has permanent offices in a number of other cities including Ottawa, Calgary, Edmonton, and Winnipeg, and facilities and resources to conduct hearings in those cities are generally more readily available than in itinerant locations such as Saskatoon, where the Board's presence is more occasional. Such operational realities are properly considered when entertaining such requests to move proceedings.
- **(e) how a change of location would affect the parties:**
 - Effect on Minister: The administrative and operational effects on the Minister of a change in location requested by a claimant is a factor to be considered where the Minister is intervening in a proceeding. It is for this reason that the the *Application to Change the Location of a Proceeding* form instructs that any application made by a claimant “must also include the views of the Minister, if known.” By way of example, in interpreting its similar rule, the Immigration Appeal Division concluded that this factor pointed against a change of location as follows: “In this case, the file would have to be physically transferred between the two Canada Border Services Agency (CBSA) units that serve the IAD’s Western Region and a different hearings officer would be required to prepare the file on relatively short notice. A transfer within one week of an ADR proceeding would, in this circumstance, be an unreasonable hardship on the respondent in the absence of other exceptional circumstances that would compel such a transfer.”^[5]
- **(f) whether a change of location is necessary to accommodate a vulnerable person:** Vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired. Regard should be had to the *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*.^[9] A number of commonly considered accommodations, such as allowing the vulnerable person to provide evidence by videoconference or other means, allowing a support person to participate in

a hearing, and creating a more informal setting for a hearing may be relevant to requests to change the location of a hearing.

• **(g) whether a hearing may be conducted by a means of live telecommunication with the claimant or protected person:**

- In general, videoconferencing is not considered unfair or a detriment: Section 164 of the *Immigration and Refugee Protection Act* (IRPA) provides that "where a hearing is held by a Division, it may, at the Division's discretion, be conducted in the presence of, or by means of, live telecommunication with, the person who is the subject of the proceedings." The Board has a policy entitled *Use of Videoconferencing in Proceedings before the Immigration and Refugee Board of Canada* which sets out that it is the IRB's position that provided that it is carried out in accordance with appropriate technological and procedural standards, videoconferencing does not affect the quality of the hearing or decision-making and respects the principles of natural justice and procedural fairness.^[10] That said, while not strictly a legal consideration, it may be noted that many counsel do not like videoconferencing and academic commentators have called on the Board to "limit this practice as much as possible"^[11] because of the way that, among other things, the subtle lags inherent in the technology can affect perceptions of credibility according to psychological research.^[12] The Board commissioned an external review of the use of videoconferencing technology in hearings and the resultant report includes much grousing from Board Members;^[13] the Board made some changes to its practices in response to the report,^[14] but other challenges identified by Members and counsel therein remain.
- The Board can partially accommodate a request: In his text, Waldman notes that "in some cases, the tribunal will partially accommodate the request by allowing the person to appear by video conference so that the tribunal is located in the location set for the hearing and the claimant and their counsel are located at a different location."^[2]
- Claimant retains the option to attend in person: The Refugee Protection Division *Policy on the Transfer of Files for Hearings by Videoconference* states that where a file is heard via videoconference at a different RPD office from that nearest to the claimant, a claimant retains the right to, at their own expense, attend a hearing in-person in another region from where they reside: "a claimant, and counsel, if any, may choose to attend the hearing in person in the receiving region at claimant's own expense."^[7]
- Types of cases where videoconferencing is inappropriate: The Refugee Protection Division *Policy on the Transfer of Files for Hearings by Videoconference* recognizes that there are circumstances in which it is inappropriate to hold a hearing by videoconference, including certain cases involving unaccompanied minors and persons who, in the opinion of the RPD, are unable to appreciate the nature of the proceedings; some cases involving detained persons receiving priority processing; and particular highly complex cases, for example, cases likely to involve multiple sittings, those involving in-person Ministerial interventions where case complexities have been confirmed, or those involving the joining of multiple files where significant case complexities exist.

32.1.2 This rule governs changes to the region in which a claim will be heard, not conversions between virtual and in-person hearings

Applications to convert the format of a hearing, for example from remote to on-site, are addressed through Rule 50 with its 10-day deadline, not through this rule, as stated by the Division.^[15]

32.1.3 An application to change the location of a proceeding does not put other timelines on hold

Nothing in the *Refugee Protection Division Rules* or the BOC forms indicates a hold period pending a venue change request. As such, the fact that an individual has moved and has submitted a request to transfer their file does not excuse them from appearing at other proceedings, filing completed BOC forms on time, etc.^[16]

32.1.4 The Division has the jurisdiction to conduct a hearing even if a claimant departs from Canada

One issue that can arise with regards to the location of proceedings relates to the Division's jurisdiction to conduct proceedings where the claimant is outside of Canada. Claims will only be referred to the Division where a claimant is in Canada, but in some cases a claimant may leave Canada while their claim is pending. For example, a claim may be declined, the claimant may judicially review the decision, the claimant may be deported, and then the claimant may succeed on judicial review and have their matter returned to the Board. In some situations, the claimant will be permitted to return to Canada to attend their hearing at that point. In other cases, the Division has conducted a hearing remotely while the claimant is outside of Canada, for example by telephone or based upon the record (*Freitas v. Canada*).^[17] In other cases, the Board has proceeded with the case "as though the [claimant] were in Canada."^[18]

32.2 References

1. Immigration and Refugee Board of Canada, Application to Change the Location of a Proceeding, Date modified: July 31, 2018, Accessed January 2, 2020 <¹>.
2. Waldman, Lorne, *Immigration Law and Practice, 2nd Edition*, Rel. 49-2/215, Publisher: LexisNexis Canada, ISBN/ISSN: 9780433449867, at section 9.345 (Page 9-146.3).
3. Immigration and Refugee Board of Canada, Application to Change the Location of a Proceeding, Date modified: 2018-07-05, Accessed January 2, 2020 <²>.
4. *Rai v. Canada (Citizenship and Immigration)*, 2009 CanLII 87173 (CA IRB), para. 3 <³>.
5. *Nguyen v Canada (Citizenship and Immigration)*, 2016 CanLII 47216 (CA IRB), para. 5 <⁴>.

1 <https://irb-cisr.gc.ca/en/forms/Documents/RpdSpr1901e.pdf>

2 <https://irb-cisr.gc.ca/en/forms/Pages/RpdSpr2020.aspx>

3 <https://www.canlii.org/en/ca/irb/doc/2009/2009canlii87173/2009canlii87173.html>

4 <https://www.canlii.org/en/ca/irb/doc/2016/2016canlii47216/2016canlii47216.html>

6. Immigration and Refugee Board of Canada, *Refugee Protection Claims (New System) Statistics*, Date modified: Nov 20, 2019, Accessed: January 2, 2019 <⁵>.
7. Immigration and Refugee Board of Canada, *Policy on the Transfer of Files for Hearings by Videoconference (Refugee Protection Division)*, Policy dated June 28, 2004, Accessed January 2, 2019, <⁶>.
8. *Nguyen v Canada (Citizenship and Immigration)*, 2016 CanLII 47216 (CA IRB), para. 4 <⁷>.
9. Immigration and Refugee Board of Canada, *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*, Amended: December 15, 2012 <<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>⁸>.
10. Immigration and Refugee Board of Canada, *Use of Videoconferencing in Proceedings before the Immigration and Refugee Board of Canada*, Policy dated 15 December 2010, Accessed January 2, 2019, <⁹>.
11. Acton, Tess, *Understanding Refugee Stories: Lawyers, Interpreters, and Refugee Claims in Canada*, 2015, Master of Laws Thesis, <https://dspace.library.uvic.ca/bitstream/handle/1828/6213/Acton_Tess_LLM_2015.pdf?sequence=1> page 130 (Accessed January 25, 2020).
12. Mark Federman, “On the Media Effects of Immigration and Refugee Board Hearings via Videoconference” (2006) 19(4) *J of Refugee Studies* 433 [Federman] at 442.
13. S. Ronald Ellis, Q.C., *Videoconferencing in Refugee Hearings*, Published by Immigration and Refugee Board of Canada, Date October 21, 2004 <¹⁰> (Accessed January 26, 2020).
14. Immigration and Refugee Board of Canada, *Immigration and Refugee Board Response to the Report on Videoconferencing in Refugee Hearings*, Date modified listed on webpage: 2018-06-26, <¹¹> (Accessed January 26, 2020).
15. Immigration and Refugee Board of Canada, *RPD Virtual Hearings Guide*, <¹²>.
16. *Huseen v. Canada (Citizenship and Immigration)*, 2015 FC 845 (CanLII), par. 11, <¹³>, retrieved on 2020-03-11.
17. *Freitas v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 20463 (FC), [1999] 2 FC 432.
18. *X (Re)*, 2022 CanLII 34948 (CA IRB), at para 14, <¹⁴>, retrieved on 2023-09-15.

5 <https://irb-cisr.gc.ca/en/statistics/protection/Pages/RPDStat.aspx>

6 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolTransfer.aspx>

7 <https://www.canlii.org/en/ca/irb/doc/2016/2016canlii47216/2016canlii47216.html>

8 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx#a9>

9 <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/Videoconf.aspx>

10 <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/Video.aspx>

11 <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/VideoRespRep.aspx>

12 <https://irb.gc.ca/en/legal-policy/procedures/Pages/rpd-virtual-hearings-guide.aspx#toc23>

13 <http://canlii.ca/t/gkmz2#par11>

14 <https://canlii.ca/t/jp015#par14>

33 Changing the Date or Time of a Proceeding (RPD Rule 54)

The Act, Regulation, and Rules all include provisions that are relevant to the (re)scheduling of proceedings before the Board. Rule 54 is the relevant rule in the RPD Rules for changing the date or time of a proceeding. It operates against the background of section 159.9 of the regulations and section 162 of the Act, which follows.

33.1 IRPA Section 162

Sole and exclusive jurisdiction

162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

Procedure

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

For discussion of this provision, see: Canadian Refugee Procedure/Board Jurisdiction and Procedure¹.

33.2 Relevant Immigration and Refugee Protection Regulation Provisions

Hearing Before Refugee Protection Division

Time limits for hearing

159.9 (1) Subject to subsections (2) and (3), for the purpose of subsection 100(4.1) of the Act, the date fixed for the hearing before the Refugee Protection Division must be not later than

(a) in the case of a claimant referred to in subsection 111.1(2) of the Act,

(i) 30 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada other than at a port of entry, and

(ii) 45 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada at a port of entry; and

(b) in the case of any other claimant, 60 days after the day on which the claim is referred to the Refugee Protection Division, whether the claim is made inside Canada at a port of entry or inside Canada other than at a port of entry.

Exclusion

(2) If the time limit set out in subparagraph (1)(a)(i) or (ii) or paragraph (1)(b) ends on a Saturday, that time limit is extended to the next working day.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Board_Jurisdiction_and_Procedure

Exceptions

(3) If the hearing cannot be held within the time limit set out in subparagraph (1)(a)(i) or (ii) or paragraph (1)(b) for any of the following reasons, the hearing must be held as soon as feasible after that time limit:

(a) for reasons of fairness and natural justice;

(b) because of a pending investigation or inquiry relating to any of sections 34 to 37 of the Act; or

(c) because of operational limitations of the Refugee Protection Division.

33.2.1 Regulation 159.9(1)(a): Hearings are to be held within 30 or 45 days for claimants from Designated Countries of Origin, but no such countries are designated

Section 159.9(1) of the Regulation establishes mandatory timelines for scheduling refugee hearings. Section 159.9(1)(a) establishes timelines for claimants referred to in subsection 111.1(2) of the Act, which is the regime for designation of countries of origin established in the Act. In effect, the regime allows the Minister to designate particular countries of origin where there is a low success rate for claims at the Division and/or the country is one where there is an independent judicial system, basic democratic rights and freedoms are recognized, and mechanisms for redress are available if those rights or freedoms are infringed, and civil society organizations exist.^[1] For the time being, this provision is something of a dead letter since the Minister has not designated any countries under this provision.^[2] As such, the operative provision in s. 159.9 of the Regulation is 159.9(1)(b), which provides that the date fixed for a hearing before the Refugee Protection Division must be not later than 60 days after the day on which the claim is referred to the Refugee Protection Division.

33.2.2 Regulation 159.9(1)(b): Hearings are to be held within 60 days of the claim being referred to the RPD, but this provision is not currently being followed

Section 159.9(1)(b) of the Regulation provides that the date fixed for a hearing before the Refugee Protection Division must be not later than 60 days after the day on which the claim is referred to the Refugee Protection Division. This provision, too, is something of a dead letter since the policy of the referring officers and the Board is not to schedule such cases within 60 days of referral. Instead, because of s. 159.9(3)(c) ("operational limitations of the Refugee Protection Division") the practice is to not advise claimants of a date and time on which their claim is scheduled when the matter is referred to the Refugee Protection Division, but instead to schedule their claim at a later point, generally giving them 2 to 3 months notice of the hearing then. The Board announced this as follows in a press release in 2018:

The Immigration and Refugee Board of Canada (IRB) is changing its scheduling practice for refugee hearings and will now be hearing claims primarily in the order in which they were received. ... In December 2012, time limits for scheduling were incorporated into regulations. The result was that new cases had to be prioritized over old ones. The regulations allow for an exception to the time limits due to the operational limitations of the Board. With rising intake, the Refugee Protection Division (RPD) has been obligated to remove a certain percentage of hearings from its schedule under this exception because it does not have the capacity to hear them.^[3]

The IRB stated at that point that the expected wait time for status determination under the new schedule was expected to be approximately 20 months.^[4] By January 2020, the average wait for a hearing at the Refugee Protection Division had grown to 22 months.^[5] The Federal Court has noted that given that the Board is generally not following the timelines expressed in the Regulations, the timelines expressed therein are of limited relevance:

It is not clear to me why the RPD expressed a concern about the need for a hearing within 30 days in accordance with s 159.9(1) of the *Regulations* when it was operating well outside of those parameters in accordance with the exceptions found in s 159.9(3). Indeed, Mr. Gallardo's hearing was initially scheduled to be heard more than eight (8) months after referral to the RPD. This history detracts from the rationale for a strict adherence to fast-track scheduling and effectively renders the RPD discussion of it irrelevant.^[6]

33.2.3 Regulation 159.9(1): The Board will provide priority scheduling for certain types of claims

The Board has stated that notwithstanding the general "First In First Out" scheduling policy noted above, it may provide priority scheduling for certain types of claims, including:

- Unaccompanied minors:^[3] *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* provides that "The claim should be given scheduling and processing priority because it is generally in the best interests of the child to have the claim processed as expeditiously as possible. There may be circumstances, however, where in the best interests of the child the claim should be delayed. For example, if the child is having a great deal of difficulty adjusting to Canada, he or she may need more time before coming to the CRDD for a hearing." A 2019 audit of the system by the Auditor General found that the Immigration and Refugee Board of Canada was able to prioritize protection decisions for unaccompanied minors. For the 628 claims made by unaccompanied minors over their audit period, most had hearings within 60 days and received protection decisions an average of two months earlier than other claims.^[7]
- Vulnerable persons:^[3] *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB* states that vulnerable persons may be given scheduling priority in appropriate cases. Guideline 8 underlines that "the uncertainty and anxiety caused by delay can be particularly detrimental to some vulnerable persons." Therefore, it is possible for the Board to grant priority processing as a procedural accommodation under Guideline 8.
- Claimants with family members in dangerous and precarious situations in their home country: The Division has control over its hearing schedule and, in the particular circumstances of a case, it may find on the evidence before it that the situation of family members justifies an earlier hearing date in priority to other claims. That said, many claimants may face difficulties relating to family circumstances in their countries of origin, and the Division must be fair to all claimants who are waiting for their claim to be heard. Therefore, while the situation of family members by itself may not be determinative in most cases, it remains a factor that can assist in appreciating the nature of a claimant's vulnerability and in determining whether priority scheduling should be granted.
- Board scheduling strategies to ensure integrity and efficiency: The Board states that it may also make exceptions to its "First In First Out" policy for certain claims or groups

of claims where the Board decides to implement specific scheduling strategies to ensure the integrity and efficiency of the refugee determination process.^[3]

For more detail, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#A party is entitled to a hearing without unreasonable delay that causes serious prejudice².

33.2.4 Regulation 159.9(3)(b): The process for investigations and inquiries related to sections 34 to 37 of the Act is referred to as the FESS process

The sections of the Act referred to in Regulation section 159.9(3)(b) are those at *Immigration and Refugee Protection Act*, ss. 34-37.^[8] The provisions in question are lengthy and verbose, and for that reason, they are not reproduced here. The Board has a policy which guides its actions to await such inquiries, the *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-End Security Screening*. The instructions read as follows:

In those cases where confirmation of security screening has not been received in time for the initially scheduled hearing, the IRB will remove the hearing from the schedule and set a new date and time for the hearing as soon as feasible upon confirmation of the security screening. Parties will be advised in accordance with the process outlined in [the Notification section of the Instructions].

In those cases where confirmation of security screening has not been received at six (6) months from the date of referral, the RPD will normally proceed to schedule and hear the claim unless the CBSA files an application change the date and time that is granted by the IRB. In considering such an application, the RPD will provide an opportunity to the claimant to make representations.

In those cases where the IRB grants a delay and confirmation of security screening is subsequently received, it will be rescheduled as soon as feasible.

In cases where confirmation of security screening remains pending at twelve (12) months from the date of referral, the RPD will convene a conference with the claimant, counsel and Minister's counsel and may fix a date for a hearing.^[9]

CBSA states that prior to a hearing at the IRB, a front end security screening (FESS) is completed on all adult asylum claimants.^[10] The service standard for FESS is that CBSA is to complete 80% of front-end screening within 55 days.^[11]

33.2.5 Comparison of the interpretation of the different exceptions to the mandatory timelines

If found eligible, a hearing date is to be set within 30 days for claimants from a designated country of origin, and within 60 days for others. These timelines are set out in s.159.9 of the Immigration and Refugee Protection Regulations and they are mandatory. The section sets out the situations in which there may not be compliance with the timelines:

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#A_party_is_entitled_to_a_hearing_without_unreasonable_delay_that_causes_serious_prejudice

- (a) for reasons of fairness and natural justice;
- (b) because of a pending investigation or inquiry relating to any of sections 34 to 37 of the Act; or
- (c) because of operational limitations of the Refugee Protection Division.

While the Board appears to be taking a very restrictive view of timelines set out in s.159.9(1)(a) of IRPR (see commentary on Rule 54), the BC Public Interest Advocacy Centre has noted that the Board's interpretation of 159.9(1)(b) is much more liberal,^[12] and there is a broad policy of providing time for the Minister to engage in initial security screening. The Minister does not need to apply for more time, as the Board will not proceed with a hearing in the first six months if the Minister has not provided confirmation that front end security screening is complete:

In those cases where confirmation of security screening has not been received in time for the initially scheduled hearing, the IRB will remove the hearing from the schedule and set a new date and time for the hearing as soon as feasible upon confirmation of the security screening. ... In those cases where confirmation of security screening has not been received at six (6) months from the date of referral, the RPD will normally proceed to schedule and hear the claim unless the CBSA files an application to change the date and time that is granted by the IRB.^[13]

In *Alhaqli v. Canada* the court was asked to consider this issue. In that case, the applicants submitted that the Board's process of automatically postponing hearings where FESS has not been completed breaches procedural fairness because the policy gives rise to a reasonable apprehension of institutional bias by granting the Minister a cancellation of a refugee hearing without following the procedures for the scheduling and postponement of refugee claims as provided in the *IRPA*, *Regulations*, and *Rules*. As a result, the claimants argued that the Minister is provided preferential treatment via an automatic postponement whenever the CBSA has not performed its statutory duties in accordance with the prescribed timeframes, because the Minister neither has to establish that the legislative and regulatory criteria for a postponement have been satisfied nor move for the relief sought.^[14] In that case, the court declined to rule on the issue, holding that the matter as raised was moot. The fact that the Board may treat the Minister and claimants differently in this respect appears to originate from the language of the regulation. There are many examples of such differential treatment in the *IRPA*. For example, in *Muheka v. Canada* the Immigration Appeal Division considered an argument that the fact that under the statute the Minister has a *de novo* appeal at the IAD but a claimant does not offend the *Canadian Bill of Rights*. The panel accepted the Minister's submissions that the Respondent cannot compare himself to the Crown and demand equal treatment as if the Crown were an individual, relying on the following *Charter* s. 15(1) jurisprudence:

With respect to the issue of whether the appellants have received unequal treatment, it must be apparent that the Crown cannot be equated with an individual. The Crown represents the State. It constitutes the means by which the federal aspect of our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the Federal Government. Henry J., in my opinion, properly applied the decision in *R. v. Stoddart, supra*. I agree with the words of Tarnopolsky J.A., speaking for the

court in that case, at pp. 362–63, where he stated: The Crown is not an “individual” with whom a comparison can be made to determine a s. 15(1) violation.^[15]

33.3 The Board's actions on its own motion (*ex proprio motu*)

Rule 54, the RPD rule on changing the date and time of proceedings discussed herein, concerns applications from parties to change the date or time of a proceeding. The Board also has the power to act on its own motion to reschedule a matter, which is referred to as its power to act *ex proprio motu*. Where the Board so acts, it must act in a manner that is consistent with the requirements of the IRPA and the regulation, but Rule 54 does not apply to the Board's decision, since that Rule applies only to applications from parties.

In a 2019 audit of the refugee system, the Auditor General concluded that about 65% of hearings were postponed at least once before a decision was made.^[16] The reasons for the postponements indicate that they are mostly done on the Board's own motion:

Reasons for postponed hearings	Percentage of postponed hearings
Board member unavailable (operational limitations)	49%
Claimant or claimant’s counsel unavailable	14%
Security screening results still pending	10%
Lack of time to complete a hearing	6%
Need to hear family members’ claims together or separately	5%
Waiting for documents or late disclosure of documents	4%
Interpreter unavailable	3%
Other	9%

33.3.1 The Board may have an obligation to reschedule a matter on its own motion in certain circumstances

There will be circumstances in which fairness requires the Board to act on its own motion to reschedule a matter. In *Alvarez v. Canada*, the Court found a breach of natural justice in circumstances where the tribunal proceeded despite the fact that it was clear that the applicant was not understanding the proceedings.^[17] This was so even though the claimant had not formally requested an adjournment at the time of the hearing. However, the mere fact that a claimant is proceeding without counsel does not mean that the panel is obliged to postpone the proceedings and insist upon them obtaining counsel; claimants have the right to represent themselves. The court reached this conclusion in *Tandi v. Canada*, despite counsel's argument that “given Mr. Tandi’s age [22] and risk to his life” the panel should have insisted upon the claimant obtaining counsel.^[18] For more detail, see: Canadian

Refugee Procedure/Counsel of Record#A panel may be obliged to postpone a hearing to give a claimant an opportunity to obtain counsel upon request in certain circumstances³.

33.3.2 Even when acting on its own motion, the Board should consider relevant Board guidelines

When exercising their discretion, panels of the Board should consider any applicable guidelines issued by the Chairperson of the Board. The Chairperson is empowered to issue written guidelines on any matter within his or her purview, including the procedure to be followed by the RPD in fixing the time of a hearing: ss. 159(1)(h) and 159(1)(f) of the *IRPA*:

Chairperson

- 159 (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson
- (f) apportions work among the members of the Board and fixes the place, date and time of proceedings;
 - (h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties;

The most relevant such guideline is the *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding*.^[19] Furthermore, the Board's guidelines on vulnerable persons may be relevant: Canadian Refugee Procedure/Guideline 8 - Concerning Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada⁴.

33.4 RPD Rule 54(1)-(3) - Process for making an application to change the date or time of a proceeding

The text of the relevant rule reads:

Changing the Date or Time of a Proceeding

Application in writing

- 54 (1) Subject to subrule (5), an application to change the date or time of a proceeding must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

Time limit and content of application

- (2) The application must
 - (a) be made without delay;
 - (b) be received by the Division no later than three working days before the date fixed for the proceeding, unless the application is made for medical reasons or other emergencies; and
 - (c) include at least three dates and times, which are no later than 10 working days after the date originally fixed for the proceeding, on which the party is available to start or continue the proceeding.

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#A_panel_may_be_obliged_to_postpone_a_hearing_to_give_a_claimant_an_opportunity_to_obtain_counsel_upon_request_in_certain_circumstances

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Guideline_8_-_Concerning_Procedures_with_Respect_to_Vulnerable_Persons_Appearing_Before_the_Immigration_and_Refugee_Board_of_Canada

Oral application

(3) If it is not possible for the party to make the application in accordance with paragraph (2)(b), the party must appear on the date fixed for the proceeding and make the application orally before the time fixed for the proceeding.

33.4.1 Terminology about adjournments and postponements

The terminology of this rule is that the Board is entertaining and application to change the date and time of the proceeding. Nonetheless, many terms borrowed from court proceedings seep into such decisions. For example, postponements (changing the date of a hearing prior to any evidence being heard), adjournment (adding a new day to a proceeding once some evidence has been heard), and recesses (a break in the proceeding).^[20]

33.4.2 Roles of Board, parties, and Minister's officers in scheduling

The roles of officers for CBSA and IRCC, counsel for the parties, and the ability of the Board to reschedule on its own motion are discussed at the following commentary regarding Rule 3, which concerns initial scheduling decisions: Canadian Refugee Procedure/Information and Documents to be Provided#Roles of officers, parties, and Board in scheduling matters⁵.

33.4.3 Time limit for the written application to change the date or time of the proceeding

As per Rule 54(1), applications to change the date or time of a proceeding are to be made in accordance with Rule 50, which requires that they be made in writing, unless the party could not have applied without unreasonable effort.^[21] Per Rule 54(2), such applications must "be made without delay". The Board's public commentary to the previous version of the RPD Rules commented on this requirement, noting that "An application to change the date or time of a proceeding should normally be made in writing and at the earliest opportunity before the proceeding".^[22] As per Rule 54(2)(b), such applications must be received by the Division no later than three working days before the date fixed for the proceeding. However, consistent with the requirements of Rule 54(2), this three-day rule is a minimum, not a target to aim for, and if an application can be made prior to that, it should be. According to 54(3) and 54(2)(b) of the Rules, applications less than three days before the hearing should be made orally at the hearing. It is a best practice to make such applications in writing in an event, even if one or two days prior to the hearing, even though parties cannot count on the Board receiving the application prior to the hearing. This is consistent with the Board's commentary to the previous version of the RPD Rules which read: "A party who wants to make an application orally for a change of date or time of the proceeding should make every effort to notify the Division and any other party of his or her intention to apply and the reasons for that request. This should be done in writing and at the earliest opportunity before the proceeding."^[22]

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Roles_of_officers,_parties,_and_Board_in_scheduling_matters

33.4.4 When an oral application should be allowed at the hearing

According to Rule 54(2)(b), an application may be made orally at the hearing where there is a medical reason "or other emergency" which is the cause of the application. As the Court stated in *Guyllas v. Canada*, this exception to the requirement to apply in writing applies where the party "could not have applied without unreasonable effort".^[23] Some guidance on this provision was provided in *Freeman v. Canada*, where the claimant's ground for an adjournment was a recent change in counsel, allegedly as a result of the incompetence of prior counsel, which necessitated witness preparation and the additional filing of documents. The court held in that case that this did not constitute a medical or other emergency which would warrant an oral application for an adjournment. As such, the request for an adjournment was not properly before the Board.^[24]

33.4.5 History of requirement to provide three dates and times when the party will be available

A draft of this rule originally required counsel to provide three days when they would be available within five days of the original hearing. This requirement was modified as a result of stakeholder feedback: "Several respondents expressed concern regarding the tight timelines in the rule pertaining to an application for a change of date or time of a proceeding. The rule required that the claimant, when requesting a change of date or time, provide three days on which they would be available to proceed which fall within five working days after the date originally fixed for the proceeding. Respondents felt that this was unrealistic, particularly given the anticipated busy schedules of counsel." Noting this concern along with the overall scheme of the IRPA and the IRPR as well as the scheme of the RPD Rules, the IRB has changed the rule such that claimants provide three dates within a window of ten working days. Similarly, the rules state that the new date fixed by the Division must be no later than ten working days, or as soon as possible thereafter.^[25] This compares to the previous version of the RPD Rules in which the obligation on counsel was that "A party applying for a change of date or time of a proceeding must give a minimum of six alternative dates within the following three months, or such other time period as the Division specifies, when the party is available to proceed."^[22]

That said, despite the requirement that counsel provide such dates, it is rare that a hearing that is being rescheduled will be rescheduled within 10 days of the old date. According to a 2019 Auditor General report, fewer than 10% of hearings where the date or time was changed were rescheduled within this 10-day timeframe. The Board's schedule is generally fully booked for at least three months ahead. As a result, when a claim is postponed the usual delay is of several months.^[16]

33.5 RPD Rule 54(4) - Factors to consider

Factors

- (4) Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as
- (a) the change is required to accommodate a vulnerable person; or
 - (b) an emergency or other development outside the party's control and the party has acted diligently.

33.5.1 History of this provision

The old pre-2012 RPD Rules required the RPD to consider numerous factors in deciding whether to grant a change of date or time.^[26] Specifically, section 48 of the prior RPD Rules set out eleven factors that were to be considered in dealing with a request to change the time of the hearing:

- (a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;
- (b) when the party made the application;
- (c) the time the party has had to prepare for the proceeding;
- (d) the efforts made by the party to be ready to start or continue the proceeding;
- (e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;
- (f) whether the party has counsel;
- (g) the knowledge and experience of any counsel who represents the party;
- (h) any previous delays and the reasons for them;
- (i) whether the date and time fixed were preemptory;
- (j) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and
- (k) the nature and complexity of the matter to be heard.^[27]

However, the current Rules, last amended on December 15, 2012, do not include that list of factors. Instead, as set out above, the Rules provide that the RPD *must not* change the date or time unless there are exceptional circumstances.

33.5.2 Board's general approach to (re)scheduling

The guiding principle, as noted in *Mohammed v. Canada*, is that the exercise of discretion has been severely limited under the revised RPD Rules, with strict timelines in place to obtain an order changing the date or time of a proceeding.^[28] As the RPD-specific portion of the *Chairperson's Guideline 6: Scheduling and Changing the Date or Time of a Proceeding* states, "The RPD expects parties and their counsel to be ready to proceed on the date and time scheduled for the hearing. Applications to change the date or time of the hearing will be granted only in exceptional circumstances and, where the application would cause the hearing to be heard outside the statutory timeframes, only if the evidence indicates that it is necessary in order to conform with the principles of natural justice."^[29]

33.5.3 The Board must consider all relevant factors when determining whether there are exceptional circumstances, not merely the two examples listed above

The Federal Court commented in *Tung v. Canada* that in exercising its discretion to reschedule a case, the Board must generally take into account all relevant factors. This will include the exceptional circumstances listed in Rule 54(4) (accommodating a vulnerable person or an emergency or other development outside of a party's control where the party has acted diligently) as well as any other relevant factors. Where the Board fails to take into account relevant factors and refuses an adjournment request, it will have acted unreasonably.^[30] This is the case even where the Board considers a claimant's vulnerability or whether there was an emergency beyond a party's control. As the court notes in *Tung v. Canada*, these Rule 54(4) factors are merely examples of exceptional circumstances, not an exhaustive definition of all relevant exceptional circumstances. In that case, the Federal Court concluded that the Board had erred because it "appeared not to consider whether Ms Tung's personal situation amounted to exceptional circumstances in the broader sense."^[30] Furthermore, the panel should consider any relevant exceptional circumstances, both individually and cumulatively. As the Federal Court commented in *Gallardo v. Canada*, "while any one factor may not [tip] the balance, several factors taken together may [do so]."^[31] Per the Federal Court, "all relevant factors should be considered and then weighed against the need for administrative efficiency."^[32]

33.5.4 What exceptional circumstances have, and have not, been found to justify an application to change a date and time?

Changes required to accommodate vulnerable persons

Rule 54(4)(a) provides that the Division must not allow an application to reschedule a hearing unless there are exceptional circumstances, such as the change being required to accommodate a vulnerable person. "Vulnerable person" is a defined term in the rules, and per RPD Rule 1⁶ it "means a person who has been identified as vulnerable under the Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB issued under paragraph 159(1)(h) of the Act." As such, the term "vulnerable person" should be used consistently throughout the Canadian refugee status determination regime. What should be considered when determining whether a claimant's vulnerability constitutes an exceptional circumstances justifying the rescheduling of a proceeding? The following are some factors that emerge from past decisions:

- Does the claimant lack representation? The RAD has noted that the guiding principle is that the RPD has an obligation to ensure a fair proceeding, especially where refugee claimants are without representation and suffering from apparent mental health issues.^[33] As noted by the Federal Court, the right to counsel is important and can be a determinative factor in the outcome of these decisions, particularly where there is some sense that the applicants are vulnerable: "The failure to have counsel present at the hearing generally leaves the clients at a serious disadvantage when new issues arise, or where the RPD member asks a question that would normally give rise to reply questions by counsel to elucidate a matter."^[34] As Justice Rouleau wrote in *Biro v. Canada*, "the need

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions

to fast-track the hearings should not deprive parties of their right to representation and equitable treatment.”^[35] The Federal Court of Appeal states that “In the past when the courts have addressed the issue of whether the duty of fairness includes a right to counsel in particular circumstances, one of the primary factors considered was whether the questions are of a legal or complex nature such that the individual's ability to participate effectively without a lawyer was in question”^[36] - refugee proceedings will generally be held to meet this complexity threshold, as indicated by *Gabor v. Canada*.^[37]

- **Lack of sophistication:** In one case, the RAD held that the RPD had erred in refusing an adjournment request from an unrepresented claimant who was unprepared as of the date of the hearing, had been hospitalized for several days prior to the refugee hearing as a result of mental-health issues, and, in the RAD's words, was “clearly unsophisticated as to the appropriate CDT procedures”.^[33] Similarly, in *Galamb v. Canada* the court commented on the fact that the applicants were 20 and 21 years of age and had only completed an eight-grade education and noted that in the circumstances they “clearly did not understand what was required of them on several points”, which meant that they could not “participate in a meaningful way at the hearing”.^[38] In *Gallardo v. Canada*, the court held that a decision on an application to change the date and time of a hearing was deficient because the panel had made no inquiry into Mr. Gallardo’s capacity to represent himself despite counsel’s advice that Mr. Gallardo had not been properly prepared and the claim had been inadequately put together without the assistance of counsel.^[39]
- **Inability to speak English or French:** As noted by the Federal Court, a factor to be considered in such assessments is a claimant's ability in the official language of the proceeding: “In this matter, the applicants were not conversant in English and there appear to have been some issues with respect to the quality of the interpretation”.^[34] The BC Public Interest Advocacy Centre, in a report on the refugee system, observes that “The ability of a claimant to effectively review hundreds of pages of detailed country condition documentation is often very limited, even in cases where they can read English.”^[40]
- **Past trauma:** As the BC Public Interest Advocacy Centre notes in a report, many refugee claimants have experienced severe trauma before arriving in Canada. Some have survived or witnessed torture, killing and other forms of inhumanity. Many live with mental or physical disabilities, often linked to past persecution in the form of injuries or psychological scars that manifest in conditions like post- traumatic stress disorder. They write that “these challenges make it incredibly difficult for some claimants to be able to tell their story in a coherent way and to remain engaged in the system without assistance. Collecting documents, filling out forms, and providing testimony at a hearing are very difficult for many claimants.”^[41]
- **Detained persons:** The BC Public Interest Advocacy Centre notes that being detained is a significant barrier to accessing legal representation and preparing for one's claim.^[42] At times, however, this factor will point in the opposite direction where, by virtue of being detained, a claimant has been repeatedly provided with counsel to represent them in their detention reviews. For further discussion of this, see the commentary to Rule 30: Canadian Refugee Procedure/Claimant or Protected Person in Custody⁷.
- **Mental health challenges:** Persons who are deeply depressed, suicidal, experiencing ongoing psychological impacts of trauma, and experiencing other mental health issues may justifiably argue that their ability to prepare for their hearing was impeded by such issues.

⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Claimant_or_Protected_Person_in_Custody

^[43] In appropriate cases, this may justify changing the date of their hearing and providing them with additional time to prepare their claim.

Emergencies and other developments outside of a party's control where the party has acted diligently

Rule 54(4)(b) provides that the Division must not allow an application to reschedule a hearing unless there are exceptional circumstances, such as an emergency or other development outside the party's control and the party has acted diligently. How has this been considered in past decisions?

- A recent change of counsel, incompetency of old: A recent change of counsel, required by alleged incompetence, which necessitated witness preparation and the filing of further documents does not constitute an emergency: *Freeman v. Canada*.^[44] In contrast, *Castroman v. Canada* is an example of the exceptional situation where the claimant's counsel withdrew in the middle of the hearing, leaving the claimant unrepresented.^[45] The Court concluded that the Board's decision to deny a request for an adjournment to enable the claimant to find new counsel was unfair in the circumstances.
- Legislative changes potentially rendering a claimant ineligible: Legislative changes may constitute developments outside of a party's control. For example, as a result of legislative changes which render claimants ineligible where they have previously made a claim in another country, the Minister was obliged to redetermine the eligibility of many claimants who have previously been referred to the Board: Canadian Refugee Procedure/Exclusion, Integrity Issues, Inadmissibility and Ineligibility#Section 101(1)(c.1): What evidence the Minister considers regarding refugee claims made to another country⁸.
- Another related legal proceeding: The Federal Court has upheld decisions of the Division to refuse to postpone a proceeding on account of a pending related legal matter, such as an outstanding application for leave and judicial review: *Bernataviciute v. Canada*.^[46]

For requests that involve counsel's availability (or lack thereof) see the following section below: Canadian Refugee Procedure/Changing the Date or Time of a Proceeding#Factors for assessing requests to reschedule a hearing based on the (un)availability of counsel⁹.

Assessments of whether a party has acted diligently

- Inability to obtain counsel at an earlier date for financial reasons: The Division should consider any difficulty a claimant has had obtaining financial assistance to retain counsel when deciding on a request for a postponement.^[39] An issue that arises with some regularity is where a claimant lacks money to have counsel represent them and then secures counsel at a late stage in the proceeding. The court commented on one such situation and concluded that it was consistent with a claimant having acted with due diligence as follows: "The male applicant outlined his problems with obtaining funding. I am satisfied

⁸ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#Section_101\(1\)\(c.1\):_What_evidence_the_Minister_considers_regarding_refugee_claims_made_to_another_country](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#Section_101(1)(c.1):_What_evidence_the_Minister_considers_regarding_refugee_claims_made_to_another_country)
⁹ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Factors_for_assessing_requests_to_reschedule_a_hearing_based_on_the_\(un\)availability_of_counsel](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Factors_for_assessing_requests_to_reschedule_a_hearing_based_on_the_(un)availability_of_counsel)

that the applicants were acting in good faith at all times – they understood their disadvantage in not being represented and made diligent attempts to obtain counsel. They finally succeeded at the last moment, but given the short time-frame, their lawyer explained the situation to the RPD and requested a short postponement to allow him to represent the applicants.”^[47]

- Inability to have all evidence at their disposal because it has not been received: When considering a request to postpone because of documents that have been requested, but have not arrived, it is relevant to consider the timeline for when the applicant sought the documents, what they are, how they are relevant, and how long they would take to arrive.^[48]

Other exceptional circumstances and considerations about whether such circumstances properly qualify as exceptional

The courts have made the following comments that relate to other exceptional circumstances that may be considered when assessing rescheduling requests:

- Steps the applicant has taken to be represented by counsel: The Board commentary on the previous version of these rules stated: “Where counsel accepts a retainer in a case for which a hearing date has been set, the Division expects counsel to appear on that date, prepared to proceed. Where, for any reason, counsel is unable to appear at a proceeding, counsel is expected to make diligent efforts to arrange for a replacement. Counsel who applies for a change of date or time of a proceeding because counsel is unable to arrange for a replacement or considers the use of a replacement inappropriate is expected to provide particulars.”^[22] Where counsel does not comply with such obligations and a claimant is abandoned at the last minute, this points towards granting a request to reschedule. For example, in *Singh v. Canada* the court the decision to deny the adjournment was unreasonable given that the applicant's previous counsel had withdrawn two days before the hearing.^[49]
- The number of previous adjournments granted: In *Perez v. Canada*, the Court set aside a negative determination in a refugee claim due to breach of the right to counsel. The Court found that the tribunal erred because it did not weigh the unfairness of proceeding without counsel against the need for an expeditious hearing in light of the fact that this was the first request for an adjournment.^[50]
- Whether the date and time fixed were peremptory: “Peremptory” is a legal term which means “not open to appeal or challenge; final”. As noted above, whether the date and time fixed were peremptory used to be one of the explicitly enumerated factors in the previous version of this rule. While the rule has been reformulated, the fact that a hearing date was fixed peremptorily may be relevant to assessing the nature of any circumstances that could justify a change in the date or time of the proceeding and whether they are sufficiently exceptional. While the fact that a hearing has been set down as peremptory is relevant, this fact was not determinative of whether a matter has to proceed on the date set. It is open to the Board to reconsider its earlier determination that a matter would proceed on a peremptory basis, as the Board cannot overlook its procedural fairness obligations.^[51]
- The duration of the requested adjournment: The short duration of any requested adjournment is an important factor that points towards granting an adjournment.^[52] The Court has commented that when there is some question about the duration that has been

requested, one option for the Board is that "any dates that were available could have been stipulated by the RPD on a take-it-or-leave-it basis".^[47] In *Gallardo v. Canada* the Federal Court commented that the fact that counsel had provided several early dates when he could be available was relevant to the request for a postponement and should have been considered by the Board.^[39]

- The effect on the immigration system: In overturning decisions, the court has commented that "There is no indication on the record that the RPD could not have accommodated a postponement to the proposed dates or that any other operational considerations would have prevented the case from being reassigned to another date."^[47] However, the court has also noted that "In an assignment procedure where dates are set long in advance of their occurrence, the need for a restrictive policy on adjournments can be understood."^[53]
- Consent of the parties: The Board commented in its previous commentary to the old version of the Rules that "The Division has discretion to allow or not to allow an application for a change of date or time of a proceeding. Consent of the parties is a factor, but it is not the only one that the Division will consider in exercising its discretion. Therefore, parties who consent to a change of date or time should not presume that the application will be allowed."^[22]
- When the party made the application: In *Gallardo v. Canada* the Federal Court held that in deciding a request to change the date and time of a proceeding, the Division should have considered the fact that the adjournment request was made in writing two days before the scheduled hearing, noting that this was a factor that favoured an adjournment.^[39] See also commentary at: Canadian Refugee Procedure/Changing the Date or Time of a Proceeding#When an oral application should be allowed at the hearing¹⁰.
- The efforts made by the party to be ready to start or continue the proceeding: The Division will consider whether the party making the application has demonstrated good faith and reasonable diligence.^[22]
- The knowledge and experience of any counsel who represents the party:
 - *Timing of retainer:* The timing of obtaining counsel is important in considering the knowledge that that counsel will have related to the file in question. If counsel is retained too late to be able to work effectively on a claimant's case, then access to counsel has not been meaningful.^[54] As Lorne Waldman puts it, "in order to ensure that the person's right to counsel is meaningful, counsel must be given a reasonable opportunity to prepare the case."^[55] In *Madoui v. Canada*, the Court found a breach of natural justice and set aside a decision when the tribunal refused to adjourn in order to allow newly retained counsel to prepare.^[56] That said, this must be balanced with the Federal Court's holding in *Aseervatham v. Canada* that "A claimant has the right to select counsel for himself. At the same time, if the counsel he chooses is not able to appear because he is too busy or for any other reason, he cannot expect the tribunal to adjust to the requirements of that counsel."^[57]
 - *Experience of counsel:* The quality of counsel is also important. Simply being able to retain a lawyer who has little or no experience in refugee law is not proper access to counsel in the context of a refugee claim with high stakes for a claimant.^[54]
 - *Whether the claimant has particular counsel of choice:* There is some jurisprudence that would suggest that the right to counsel may also include the right to counsel of choice.

¹⁰ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#When_an_oral_application_should_be_allowed_at_the_hearing

^[58] In *Rosales v. Canada*, the Member refused to grant an adjournment of six weeks to a date when the applicant's counsel of choice would be willing to proceed. The Member stated in his reasons for refusing the adjournment that there were many competent counsel in Winnipeg who could be retained to act on behalf of the applicant. The Court found that, given that the adjournment was only for six weeks, this was not an unreasonable delay, and issued a prohibition prohibiting the Member from proceeding with the hearing until the applicant's counsel of choice was present.^[59]

- Any previous delays and the reasons for them: Where past delays have been caused by factors outside of a claimant's control, such as the illness of their counsel, this should not rightfully be held against the claimant, as the court concluded in *N. v. Canada*: "Here, the Board considered the timing of the request and the fact that there had been a previous postponement of the hearing. Had it considered the other relevant factors, it would have noted that Ms. M.C.S.N. was to blame for neither adjournment. The first resulted from her counsel's illness, and the second was due to his unavailability."^[60]
- The nature and complexity of the matter to be heard: In some cases claimants will face possible exclusion from refugee protection due to status in a third country, or because of the alleged commission of serious crimes. The application of the exclusion provisions has been described as "often complex and involving a substantial and changing body of law".^[41] This may properly point towards allowing a request to reschedule a matter. Similarly, in *N. v. Canada* the court commented that "hers was a fairly complex case, raising difficult legal issues such as nexus, state protection and internal flight alternative. She could not have been expected to make any meaningful submissions on those issues, especially through an interpreter." As a result, the court concluded that proceeding in the absence of counsel created a risk of injustice."^[61]
- Any alternatives to allowing the application: The Division should consider the feasibility of any alternative to allowing an application to change the date or time of a proceeding.^[22] For example, the *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding* states that "If a party requests a change of date or time of the proceedings for the purpose of obtaining documentation, the RPD generally proceeds and will determine at the end of the hearing whether or not it is necessary to grant a delay to obtain and provide the documents."^[62]
- Whether needless delay would result.
- Whether the applicant is to blame.
- Whether the party has counsel.
- Whether allowing the application would unreasonably delay the proceedings or likely cause an injustice.
- The time the party has had to prepare for the proceeding.

For requests that involve counsel's availability (or lack thereof) see the following section below: Canadian Refugee Procedure/Changing the Date or Time of a Proceeding#Factors for assessing requests to reschedule a hearing based on the (un)availability of counsel¹¹.

11 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Factors_for_assessing_requests_to_reschedule_a_hearing_based_on_the_\(un\)availability_of_counsel](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Date_or_Time_of_a_Proceeding#Factors_for_assessing_requests_to_reschedule_a_hearing_based_on_the_(un)availability_of_counsel)

33.6 RPD Rule 54(5) - Counsel retained or availability of counsel provided after hearing date fixed

Counsel retained or availability of counsel provided after hearing date fixed

- (5) If, at the time the officer fixed the hearing date under subrule 3(1), a claimant did not have counsel or was unable to provide the dates when their counsel would be available to attend a hearing, the claimant may make an application to change the date or time of the hearing. Subject to operational limitations, the Division must allow the application if
- (a) the claimant retains counsel no later than five working days after the day on which the hearing date was fixed by the officer;
 - (b) the counsel retained is not available on the date fixed for the hearing;
 - (c) the application is made in writing;
 - (d) the application is made without delay and no later than five working days after the day on which the hearing date was fixed by the officer; and
 - (e) the claimant provides at least three dates and times when counsel is available, which are within the time limits set out in the Regulations for the hearing of the claim.

33.6.1 Subrule 54(5) sets out circumstances where an adjournment is mandatory, does not restrict the Board's ability to otherwise grant adjournments

This rule sets out circumstances where the Board *must* grant a postponement of the hearing. Where those circumstances do not exist, the Board nonetheless has the discretion to grant an adjournment where the applicant's personal situation warrants it.^[63]

33.6.2 There is no blanket rule that a new lawyer must be ready to go with an existing hearing date when they pick up a file

The *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding* provide guidance on how to consider requests that a hearing be rescheduled. The guidelines state at para. 3.6.2 that the Board does not generally allow applications to change the date of a proceeding where newly retained counsel is not available on the date scheduled for the hearing:

If counsel is retained after a date has already been set for a proceeding, the party is responsible for making sure that counsel is available and ready to proceed on the scheduled date. The IRB does not generally allow applications to change the date or time of a proceeding if a party chooses to retain counsel who is not available on a date that has already been fixed.^[64]

Even though it is the case that the Board will not *generally* allow an application to change the date of a proceeding because of the unavailability of newly retained counsel, there is no blanket rule that a new lawyer must be ready to go with an existing hearing date when they pick up a file. In *Guylas v. Canada*, the Member commented "if [a new] lawyer picks up a file he has to be ready to go at the hearing. Yours wasn't. So you have to go ahead [in the absence of counsel]." The court held that this was a misstatement of the law and rules on point.^[65] There was a more fulsome discussion of the law on point in *Pierre v. Canada*:

What is commonly referred to as the right to counsel requires only that the person be afforded a reasonable opportunity to retain, to represent him before the officer or tribunal. In exercising the choice of counsel, there are certain qualifications which must

circumscribe the manner in which this choice is exercised. Where the person has a right to choose counsel to represent him, a choice must be from amongst those who are ready and able to appear on his behalf within the reasonable time requirements of the officer or tribunal. Thus, a person cannot select the busiest counsel in the area and insist on being represented by him when that counsel, on account of prior commitments, would not be able to appear before the council without unduly delaying the course of the proceedings. If the person has been made aware of his right to choose counsel, and at the end of a reasonable time, has refused or failed to retain counsel ready and able to represent him, according to the exigencies of the situation, he also has not been denied the right to counsel.^[66]

33.6.3 Factors for assessing requests to reschedule a hearing based on the (un)availability of counsel

The Federal Court commented in *Tung v. Canada* that in exercising its discretion to reschedule a case, the Board must generally take into account all relevant factors. This will include the exceptional circumstances listed in Rule 54(4) (accommodating a vulnerable person or an emergency or other development outside of a party's control where the party has acted diligently) as well as any other relevant factors. *Siloch v. Canada* provides the following factors for assessing applications to reschedule where the right to counsel is at issue:

- whether the applicant has done everything in their power to be represented by counsel;
- the number of previous adjournments granted, including any peremptory adjournments;
- the duration of the requested adjournment;
- the effect on the immigration system;
- whether needless delay would result; and
- whether the applicant is to blame.

The *Siloch v. Canada*^[67] factors above are still considered to be good law despite the fact that the case pre-dates the changes made to the RPD Rules in 2012 (*Tung v. Canada*).^[68] Where the Board fails to take into account relevant factors cited above and refuses an adjournment request, it will have acted unreasonably.^[30] This is the case even where the Board considers a claimant's vulnerability or whether there was an emergency beyond a party's control. As the court notes in *Tung v. Canada*, the latter are merely examples of exceptional circumstances, not an exhaustive definition of all relevant exceptional circumstances. In that case, the Federal Court concluded that the Board had erred because it "appeared not to consider whether Ms Tung's personal situation amounted to exceptional circumstances in the broader sense."^[30] That said, the above factors need not take on a check-list quality: the Federal Court of Appeal has rejected the argument that the factors in *Siloch* must be considered whenever a party requests an adjournment, it being a non-exhaustive list of the sorts of factors a judge deciding the case may find useful to consider.^[69] The Federal Court in *Mohammed v. Canada* concluded that this decision is relevant to the refugee context.^[70]

The Chairperson Guideline 6 dealing with scheduling and adjournments states that "The fact that counsel wants to take time off, fulfil other professional duties or attend to personal matters that are neither urgent nor unforeseen are not sufficient reasons to allow an application to change the date or time of a proceeding."^[71] The Federal Court commented

on this as follows in *Gallardo v. Canada*: "Although this Guideline expresses a generally negative sentiment toward adjournments based on counsel availability, it does not rule out that possibility. Article 3.6.4 also says that personal or professional conflicts of a non-urgent nature are insufficient to justify an adjournment. This suggests that professional conflicts of a more urgent nature need to be taken into account and may support an adjournment."^[72] However, when considering such factors, it is relevant to consider the size of the counsel's law firm or practice. For example, when dealing with requests by the Minister to postpone hearings on the basis that no officer is available to attend, the IAD has stated "as the institutional litigant the Minister's office is expected to marshal the necessary resources to meet the number of courts that are scheduled in any given week, especially as the schedule is set months in advance."^[73]

33.7 RPD Rule 54(6)-(8) - Medical Reasons

Application for medical reasons

(6) If a claimant or protected person makes the application for medical reasons, other than those related to their counsel, they must provide, together with the application, a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate. A claimant or protected person who has provided a copy of the certificate to the Division must provide the original document to the Division without delay.

Content of certificate

(7) The medical certificate must set out

- (a) the particulars of the medical condition, without specifying the diagnosis, that prevent the claimant or protected person from participating in the proceeding on the date fixed for the proceeding; and
- (b) the date on which the claimant or protected person is expected to be able to participate in the proceeding.

Failure to provide medical certificate

(8) If a claimant or protected person fails to provide a medical certificate in accordance with subrules (6) and (7), they must include in their application

- (a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;
- (b) particulars of the medical reasons for the application, supported by corroborating evidence; and
- (c) an explanation of how the medical condition prevents them from participating in the proceeding on the date fixed for the proceeding.

33.7.1 Commentary

See the discussion of the very similar rules regarding medical certificates in the context of the RPD Rules on Abandonment: Canadian Refugee Procedure/Abandonment#Rules 65(5)-(7) - Medical reasons¹².

33.7.2 Requests to change the date or time of a hearing based on medical reasons relating to counsel

Rule 54(6) provides that if a claimant or protected person makes an application for medical reasons, other than those related to their counsel, they must provide the listed information.

¹² [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#Rules_65\(5\)-\(7\)_-_Medical_reasons](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#Rules_65(5)-(7)_-_Medical_reasons)

As this language indicates, requests to change the date or time of a proceeding based on medical issues related to counsel shall be considered by the Division, but they need not involve supplying all of the information specified above. Indeed, there is a duty on the Board to reasonably accommodate a counsel who has scheduling restrictions due to medical issues, per section 15 of the *Charter* and section 5 of the *Canadian Human Rights Act*. In *Biro v. Canada (Minister of Immigration and Citizenship)*, 2006 FC 712, the Federal Court overturned the RPD's decision declaring a claim abandoned in a case where counsel could not appear due to medical reasons.

33.8 RPD Rule 54(9) - Subsequent applications

Subsequent application

(9) If the party made a previous application that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

33.9 RPD Rule 54(10) - Duty to appear

Duty to appear

(10) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.

33.10 RPD Rule 54(11) - Scheduling the new date

New date

(11) If an application for a change to the date or time of a proceeding is allowed, the new date fixed by the Division must be no later than 10 working days after the date originally fixed for the proceeding or as soon as possible after that date.

33.10.1 Commentary

The courts have held that fundamental justice does not provide for a specific amount of time within which to prepare for a hearing.^[74] The phrase "as soon as possible after that date" has a specific meaning in the refugee law context considering the history of changes to the IRPA. Section 48(2) of the Act mandates that "If a removal order is enforceable, ... the order must be enforced as soon as possible." The phrase "as soon as possible" used in that portion of the Act replaced the previous version of the statute in which the phrase read "as soon as is reasonably practicable." As such, where the phrase "as soon as possible" is used in this regime, as it is here, it connotes a different, and arguably stronger, obligation than that connoted by the phrase "reasonably practicable".^[75]

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34 Joining or Separating Claims or Applications (RPD Rules 55-56)

34.1 RPD Rule 55

The text of Rule 55 reads:

Joining or Separating Claims or Applications

Claims automatically joined

55 (1) The Division must join the claim of a claimant to a claim made by the claimant's spouse or common-law partner, child, parent, legal guardian, brother, sister, grandchild or grandparent, unless it is not practicable to do so.

Applications joined if claims joined

(2) Applications to vacate or to cease refugee protection are joined if the claims of the protected persons were joined.

34.1.1 History of this Rule

Rule 55 is identical to Rule 49 in the former RPD Rules which were in place from 2002 to 2012.^[1]

34.1.2 In claims that are heard jointly, one claimant will be considered the principal claimant and the others associate claimants

In claims that are heard jointly, the nomenclature "principal claimant" and "associate claimant(s)" are used. When filing a refugee claim through the online portal that is presently used, claimants are obliged to choose a "head of family";^[2] this person normally becomes the "principal claimant" once the claim is referred from IRCC or CBSA to the Immigration and Refugee Board of Canada.

34.1.3 Even where claims are joined as per RPD Rule 55, each claim is still considered individually

Even where claims are joined as per RPD Rule 55, each claim is still considered individually. This flows from the principle that if an applicant has the citizenship or nationality of a country where he or she has no well-founded fear of persecution, protected person status will be denied. The Federal Court has held on several occasions that there is no concept of family unity incorporated into the definition of Convention refugee.^[3] See also: Canadian

Refugee Procedure/The right to be heard and the right to a fair hearing#Each claim should be considered individually¹.

34.1.4 Ongoing obligation on claimants to amend forms in order to disclose relationships

Claimants are under an ongoing obligation to update their Basis of Claim form to ensure that it reflects the above relationships. For example, if a claimant marries or becomes a common-law partner to another person after submitting the BOC form, but prior to a hearing being held, then the form should be updated so that any assessment required by Rule 55(1) can be conducted where the new spouse is also a claimant. The obligation to provide such updates arises from, and is reflected in, Rule 9 ("Changes or additions to Basis of Claim Form"), the fact that claimants swear or affirm at the beginning of their hearing that their Basis of Claim form is "complete, true, and correct",^[4] the instruction on the BOC form that "if your information changes or if you want to add information, you must inform the IRB",^[5] the statements in the IRB's Claimant's Guide that "If you find a mistake on your BOC Form or realize that you forgot something important, or receive additional information, you must tell the RPD",^[6] and caselaw that all the important facts of a claim for refugee protection must appear in the BOC Form.^[7]

34.1.5 Situations in which it is "not practicable" to join claims

It is mandatory for the Division to join the claims of the family members listed in Rule 55 unless it is not practicable to do so. How should the Division determine whether or not joinder is practicable in a given case? Joinder will be considered impracticable where, *inter alia*, the resultant proceeding would be procedurally unfair, inefficient, or otherwise unjust. For example, RAD Member Philip MacAulay found in one case that "if the joinder is maintained, that result would be in violation of the appellant wife's procedural fairness rights" and on this basis separated the claims.^[8] Recourse may also be had to the factors in Rule 56(5) for discerning when it is not practicable to join claims.

While it is not necessary for the claimants to consent to their claims being joined (it being automatic that they be joined) information to this effect may support a determination that such joinder is practicable. Conversely, the instructions on the Basis of Claim form invite claimants to provide information of their own accord which would point to such joinder not being practicable. The BOC form states: "Although the confidentiality of the personal information you give in your BOC Form is protected, your information may be used in other claims that are related to yours or similar to yours, even if the other person is not claiming refugee protection with you."^[5] The instructions go on to note that "The IRB will not release the information if there is a serious possibility that releasing it will put someone's life, liberty or security in danger or is likely to cause an injustice. If you do not want your personal information to be released, please explain on a separate sheet of paper why you think there is a serious possibility that releasing your information may put someone's life, liberty or security in danger or is likely to cause an injustice." Such information regarding a listed family member would be strong *prima facie* evidence of joinder not being practicable.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Each_claim_should_be_considered_individually

Where the Board will act on its own motion to determine that it is "not practicable" to join claims, it is acting pursuant to Rule 70(a) of the RPD Rules, and should provide parties with the notice and opportunity to object described therein. See Canadian Refugee Procedure/Joining or Separating Claims or Applications#Division's power to, on its own motion, separate the claims of persons listed in Rule 55(1) after they have been joined² below for more details.

34.1.6 Division's power to, on its own motion, join the claims of classes of persons not listed in Rule 55(1)

It is mandatory for the Division to join the claims of the family members listed in Rule 55 unless it is not practicable to do so. Presumptively, the claims of those in relationships that are not listed in the rule need not be joined by the Division. This reflects the principle of statutory interpretation *expressio unius est exclusio alterius*, the concept that when one or more things of a class are expressly mentioned, others of the same class are excluded by virtue of not having been listed. Put another way, Rule 55 could have been crafted to specify that all family members, for instance, presumptively be joined. The fact that the rule was not written this way reflects a judgment about the best way to balance efficiency, justice, and consistency in refugee proceedings. For other claims, for example the claims of friends from a country claiming at the same time, or the claims of more extended family members, the Division retains the discretion per Rules 69 and 70(a) to join them on a case-by-case basis. When exercising such discretion, as Waldman states in his text, the primary interests of the Board are efficiency and consistency.^[9] Specifically, efficiency will often point against joinder (hearings growing more complex and lengthy with more claimants, counsel, etc.) but consistency may point towards joinder in circumstances where, reading the claims jointly, some issue of program integrity arises. The factors in Rule 56(5) discussed below do not strictly apply to such a decision, but so long as this is acknowledged (see discussion of *Koky v. Canada* below) they may usefully guide such exercises of discretion.

Where the Board will act on its own motion to join claims for persons not listed in the above rule, it is acting pursuant to Rule 70(a) of the RPD Rules. This rule provides that "the Division may, after giving the parties notice and an opportunity to object, (a) act on its own initiative, without a party having to make an application or request to the Division". As such, where the Board will join claims of persons who are not listed in Rule 55(1), it is required by the Rules to provide parties with notice and opportunity to object before so acting.

34.1.7 Division's power to, on its own motion, separate the claims of persons listed in Rule 55(1) after they have been joined

The Division has the power to act on its own motion to separate claims at any time. Rule 55(1) indicates that the listed claims must be joined "unless it is not practicable to do so". The rule does not specify a timeline for assessing practicability. The relevant principle of statutory interpretation is that the law is considered to always be speaking. Section 10 of

² [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Joining_or_Separating_Claims_or_Applications#Division's_power_to,_on_its_own_motion,_separate_the_claims_of_persons_listed_in_Rule_55\(1\)_after_they_have_been_joined](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Joining_or_Separating_Claims_or_Applications#Division's_power_to,_on_its_own_motion,_separate_the_claims_of_persons_listed_in_Rule_55(1)_after_they_have_been_joined)

the federal *Interpretation Act* provides that "The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."^[10] As such, where a provision is written in the present tense, as with Rule 55(1), it is considered to be "always speaking" throughout the duration of the Board's proceedings. The Division may thus act to separate claims if it becomes clear that it is no longer practicable for them to remain joined. This is supported by the Board's plenary jurisdiction provided for in Rules 69 and 70(a), the latter of which requires that the Board give the parties notice and an opportunity to object prior to acting.

34.1.8 Once claims are joined, information on one claim is properly available to the other joined claimants

Refugee proceedings are, by default, confidential. This principle is enshrined in section 166 of the IRPA, which provides that proceedings before the Refugee Protection Division must be held in the absence of the public.^[11] As stated on the Basis of Claim form, "the confidentiality of the information you provide in this form is protected by the *Privacy Act*. Your personal information may be disclosed only in the circumstances where such disclosure is permitted under the terms of that Act and of the *Access to Information Act*."^[5] Sections 7 and 8 of the *Privacy Act* specify the circumstances under which an individual's personal information can be used and disclosed. The relevant section for this analysis is 8(2)(a), which provides that personal information may be disclosed for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose.^[12] The purpose for which this type of refugee claim information is obtained has been characterized as "the determination of the applicant's claim for Convention refugee status".^[13] Where proceedings are joined, by default all of the information from each claim is available to each other joined claimant as per RPD Rule 21(6).^[14] This use and disclosure of the information to ongoing claims by a claimant and their family members is considered to be consistent with the purpose for which the information was obtained.^[15] Claimants should expect that when they file a claim, if their spouse, common-law partner, child, parent, legal guardian, brother, sister, grandchild, or grandparent is also filing a claim, then their information will ordinarily be disclosed to those family members. This is reflected in the instructions provided in the Basis of Claim form that "All members of your family who are claiming refugee protection must provide their own BOC Form, even though your claims will be processed together. The information given in each person's BOC Form will be used to make decisions in the claims of the other family members."

There will be cases in which claimants are not comfortable with their personal information being disclosed to their family members. The BOC form states: "The IRB will not release [your] information if there is a serious possibility that releasing it will put someone's life, liberty or security in danger or is likely to cause an injustice. If you do not want your personal information to be released, please explain on a separate sheet of paper why you think there is a serious possibility that releasing your information may put someone's life, liberty or security in danger or is likely to cause an injustice."^[5] Claimants should identify any concerns with such information-sharing that they have when filing their claim and then it can be taken into account by the Board when determining whether it is practicable to join the claims:

Canadian Refugee Procedure/Joining or Separating Claims or Applications#Situations in which it is "not practicable" to join claims³.

34.1.9 Rule 55 decisions and confidentiality

A question can arise about providing reasons not to join claims pursuant to Rule 55(1) and the disclosure of confidential information. Rule 55(1) provides that the Division must join the claims of the above-listed family members unless it is not practicable to do so. Where the Division determines that it is not practicable to join the claims of such family members, it is expected that the Division will provide reasons for this determination to all of the claimants that would have been joined in the normal course. This is consistent with the ordinary expectation that administrative decisions will be "transparent, intelligible and justified."^[16] It is also consistent with the requirement in RPD Rule 70(a) that where the Division acts on its own initiative (in this case, to make a determination that it is not practicable to join the claims), then it will give the parties notice and an opportunity to object.

Does the Division err, or violate privacy if, in providing reasons about why it is not practicable to join claims, it discusses aspects of those claims, for example, that the languages of the proceedings differ, that the counsel involved differ, or that the subject-matter of the claims differ? No - the Division does not err where it does so. This is because claimants are told to expect that this will happen and there is no rule that prevents the RPD from doing so. First, the Basis of Claim form that claimants complete advises them to expect such disclosure: "All members of your family who are claiming refugee protection must provide their own BOC Form, even though your claims will be processed together. The information given in each person's BOC Form will be used to make decisions in the claims of the other family members." Second, Rule 21 of the RPD Rules is the rule governing disclosure of personal information, and pursuant to RPD Rule 21(3), the Division may disclose information about one claim where doing so is necessary to permit another claimant to make an informed decision about a matter involving sharing information between two claims. While there is no directly analogous provision under Rule 55, the Division has the power to disclose such information in a like manner pursuant to Rule 69 [the RPD Rule which applies in situations where there is no other applicable rule - Canadian Refugee Procedure/General Provisions#Rule 69 - No applicable rule⁴]. Third, the *Privacy Act* does not prohibit such disclosure as, per s. 8(2)(a), the information is being disclosed for the purpose for which the information was obtained, namely determining the claimant's claim for refugee status, and making preliminary decisions about the manner in which that hearing will occur. The is akin to the Court's holding in *Ossé v. Canada* that the claimant had consented to her information being provided to a third party.^[17]

Such a result may be different where a claimant makes it clear in providing the information that they do not consent to the information being provided to a particular third party, for example because of a particularized security concern that they enumerate upon filing their claim. *AB v. Canada* is a relevant case, where the then-PIF form stated "Moreover,

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Joining_or_Separating_Claims_or_Applications#Situations_in_which_it_is_%quot;not_practicable%quot;_to_join_claims
⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/General_Provisions#Rule_69_-_No_applicable_rule

this form and the information it contains may be used as evidence at the hearings of other claimants who are related to you or whose claims appear to be closely linked to yours. Should you have a reasonable objection to this use please state it below. The Refugee Division will consider your objection based on whether the use of your form and information would endanger the life, liberty or security of any person or would be likely to cause an injustice.” In the space provided under the above wording, the applicant wrote: ”Requests for disclosure will be considered on a case-by-case basis. Otherwise, consent is denied.”^[18] In that case, the Federal Court set aside the Board's decision to release the claimant's personal information in a related proceeding.

34.1.10 Statistics about joinder

What percentage of claims are heard jointly, where the claim of a principal claimant is heard alongside associate claimants? Of RPD new system cases in 2018, there were 14,051 principal claimants who received a decision in their claims, and of those 4,881 had their claims joined with associate claimants. In other words, about 2/3 of all hearings involved just one claimant.^[19] Claimants from some countries are disproportionately to have their claims joined to other family members, while claimants from other countries are disproportionately likely to be claiming solo. The following are the data for each country where the Board adjudicated more than 30 new system claims in 2018:

Country	Number of principal claimants	Number of hearings with associate claimants	% of claims that were joined
Slovakia	117	87	74%
Colombia	257	182	71%
Czech Republic	47	32	68%
Hungary	269	166	62%
Venezuela	279	171	61%
Jordan	63	35	56%
Palestine	146	80	55%
El Salvador	191	101	53%
Syria	240	126	53%
Nigeria	1161	597	51%
Romania	225	114	51%
Honduras	71	35	49%
Saudi Arabia	71	34	48%
Bangladesh	116	55	47%
Lebanon	126	59	47%
Libya	108	49	45%
Angola	39	17	44%
Egypt	239	102	43%
Sudan	219	90	41%
Guatemala	58	23	40%
Iran	322	122	38%
Mexico	437	164	38%
Iraq	289	105	36%
Turkey	769	275	36%
Haiti	1573	546	35%
Russia	44	15	34%
Pakistan	569	192	34%
Yemen	259	81	31%
India	430	134	31%
Azerbaijan	135	42	31%
Burundi	235	67	29%
Djibouti	196	54	28%
Ukraine	153	42	27%
Algeria	51	13	25%

Eritrea	436	107	25%
Bahamas	53	13	25%
United States of America	73	17	23%
Zimbabwe	74	16	22%
China	752	162	22%
Ethiopia	233	48	21%
Congo, Democratic Republic	191	38	20%
Afghanistan	321	63	20%
Albania	77	15	19%
Guinea	33	6	18%
Kenya	67	11	16%
Georgia	106	17	16%
Jamaica	71	11	15%
Sri Lanka	130	20	15%
Rwanda	65	10	15%
Nepal	103	14	14%
Tanzania	42	5	12%
Chad	77	9	12%
Somalia	468	47	10%
Uganda	99	7	7%
Ghana	123	8	7%
Cameroon	141	7	5%

34.2 RPD Rule 56

Application to join

56 (1) A party may make an application to the Division to join claims or applications to vacate or to cease refugee protection.

Application to separate

(2) A party may make an application to the Division to separate claims or applications to vacate or to cease refugee protection that are joined.

Form of application and providing application

(3) A party who makes an application to join or separate claims or applications to vacate or to cease refugee protection must do so in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration. The party must also

- (a) provide a copy of the application to any person who will be affected by the Division's decision on the application; and
- (b) provide to the Division a written statement indicating how and when the copy of the application was provided to any affected person, together with proof that the party provided the copy to that person.

Time limit

(4) Documents provided under this rule must be received by their recipients no later than 20 days before the date fixed for the hearing.

Factors

(5) In deciding the application to join or separate, the Division must consider any relevant factors, including whether

- (a) the claims or applications to vacate or to cease refugee protection involve similar questions of fact or law;
- (b) allowing the application to join or separate would promote the efficient administration of the Division's work; and
- (c) allowing the application to join or separate would likely cause an injustice.

34.2.1 Rule 56 only applies to applications from parties, not actions on the Division's own motion

Where the Division acts of its own initiative to join or disjoin claims, it does not act pursuant to Rule 56. As is apparent from the text of this rule, it pertains to disjoinder upon application by a party. In *Koky v. Canada*, the Federal Court held that were the Minister had not intervened in a claim, the only parties were the claimants, and as they did not bring a motion for disjoinder, then the Division was wrong to cite Rule 56 in disjoining claims on its own motion.^[20] Instead, as per that case, where the Division wishes to act on its own motion to join or disjoin claims that are not covered by the circumstances detailed in Rule 55, then it does so through its plenary powers. See Canadian Refugee Procedure/General Provisions⁵ for a discussion of those powers, which include rules 69 and 70, and the requirements that the Division must follow before utilizing such powers, including giving parties an opportunity to object.

34.2.2 Application of factors in Rule 56(5)

In deciding an application to join or separate, the Division must consider any relevant factors, including those specified in Rule 56(5):

- **(a) the claims or applications to vacate or to cease refugee protection involve similar questions of fact or law:**
 - **Similar facts:** If two cases rely on much of the same evidence, efficiency and consistency would rule in favour of joinder. This involves several considerations, including:
 - *Consistent decisions:* The value of consistency promotes the Board's mission by ensuring that like cases receive like dispositions, and where dispositions are unlike, reasons are articulated for the differing outcomes. For example, in *Hayek v. Canada*, joinder was considered appropriate where two friends from Ethiopia made references to each other in their written narratives.^[21]
 - *Program Integrity:* Issues of program integrity are entwined with issues of consistency, for example where two claims discuss the same events, but are either inconsistent or suspiciously similar in a way that raises credibility issues. Where such issues arise, this may point towards joinder.
 - *Workload and efficiency:* Where claims will involve hearing the same evidence, hearing from the same witnesses, and having the same claimants act as witnesses in each other's hearings, this would point towards the efficiency of joinder because this may save hearing and member preparation time. In contrast, the fact that there are different countries of reference for different claimants will usually point against joinder on the basis that the facts to be considered will be different.
 - **Similar law:** Even where two matters involve similar questions of fact, it may be that the questions of law are dissimilar and thus militate against joining the matters. For example, Member Tock of the Refugee Protection Division rejected an application by the Minister to join a cessation and vacation application on the basis that "although the vacation and cessation applications may deal with similar issues, the assessment of each matter is different. The Minister is relying on the same package of evidence for both matters. However, each application requires a different assessment of the

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/General_Provisions

same evidence; as such, the evidence needs to be assessed in a different light for each application. Therefore, it is neither efficient and nor does it allow me to combine the same questions of law when deciding each of the applications, in accordance with the factors set out in RPD Rule 56.”^[22]

- **(b) allowing the application to join or separate would promote the efficient administration of the Division’s work:** Factors that may be considered here include:
 - Counsel: Whether the claimants have the same counsel (it may be cumbersome to conduct a hearing with multiple counsel).
 - Language: Whether the proceedings will be in the same language (it may duplicate or slow work if one claimant wishes to proceed in French and the other in English or if multiple interpreters are required to interpret the proceedings into different languages). This may also involve issues of fairness where counsel for one claimant does not understand the language that the other claimant is proceeding in (e.g. if one claimant is proceeding in English but counsel is only able to read documents in French, or vice versa). As a matter of fairness, in such circumstances the IRB should consider paying for the translation of all documents if it is not appropriate to separate the claims.
 - Location: Whether the claimants are in the same location or whether joining the claims would require transferring files or the use of videoconferencing. While the use of videoconferencing is not, in and of itself, unfair, it does create logistical hurdles where multiple counsel are not located in the same place and would thus face challenges conferring privately.
 - Type and stage of proceeding: This factor may point both for and against joinder, as in the following cases:
 - *File-review or short hearing processes*: For example, if a claim would be eligible for the file-review process but for a US-born child that could be joined to the claim, then joinder may be inappropriate. Conversely, such factors may support separating claims where, say, but for the claim of a US-born child, all of the remaining claimants would be eligible for the file-review process.
 - *Designated Countries of Origin*: The Federal Court has commented on this issue as follows: ”The *Refugee Protection Division Rules*, SOR/2012-256, (Rules) require that claims of family members be joined. When, as here, this means the joining of DCO and non-DCO claims, the hearing will be scheduled along the DCO timelines, which are shorter than for non-DCO claims. However, Rule 56(2) allows a refugee claimant to make an application to the RPD to separate claims. Therefore, a procedural vehicle does exist to correct defects that can arise from joining claims together.”^[23]
 - *Extradition Act*: Similarly, when the Division receives information regarding a refugee claimant for whom an authority to proceed has been issued under section 15 of the *Extradition Act*, and that person is part of a family claim, the Division may, on its own initiative, wish to separate that person’s claim from the other family members’ claims to promote the efficient administration of the Division’s work. This is because, as per s. 105(1) of IRPA, the Refugee Protection Division shall not commence or shall suspend consideration of any matter concerning a person against whom an authority to proceed has been issued under section 15 of the *Extradition Act* with respect to an offence under Canadian law that is punishable under an Act of Parliament by a maximum term of imprisonment of at least 10 years, until a final decision under the *Extradition Act* with respect to the discharge or surrender of the person has been made.

- Readiness to proceed: If one claimant is not prepared to proceed and joining claims will delay the hearing of both claims, or would require rescheduling an existing hearing, then this may point against joinder and point towards the Board proceeding with the claimant that is ready individually.
- Timeliness of application: Rule 56(4) requires that an application be made at least 20 days prior to the hearing. Where an application is made after this, and granting the application would necessitate cancelling a hearing and setting new hearing dates, this will point strongly against accepting the application. For example, the court endorsed the following submission from the Minister in *Frederick v. Canada*: "The Board could not reasonably have joined the claims, as it would have had to either preserve the applicant's testimony up to that point on the record despite the unfairness to Handra of doing so, or else remove the two hours of testimony from the record and severely impact its ability to assess the applicant's credibility. Given this difficult situation, as well as the applicant's failure to bring Handra's claim to the Board's attention in a timely manner, the respondent submits that it was reasonable for the Board to refuse to join the claims and to delay the remainder of the applicant's hearing until Handra's claim was ready to be heard."^[24]
- **(c) allowing the application to join or separate would likely cause an injustice:**
 - Complexity of the proceeding: Combining issues may make a proceeding "exponentially more complex", limit counsel's ability to adequately prepare for the hearing, and thereby cause an injustice. For example, Member Tock of the Refugee Protection Division rejected an application by the Minister to join a cessation and vacation application involving the same claimant on this basis, stating that "although joining the matters may result in a marginally quicker conclusion, doing so would negatively impact the fairness of the proceedings. I agree with counsel's submissions that joining the matters will exponentially complicate the case. I find that it would not be procedurally fair to the respondent to expect him to prepare to proceed with all the issues within the vacation and cessation applications at the same time."^[25]
 - The ability of one claimant to testify may be compromised by the presence of another claimant: One situation where fairness may mitigate against joinder is where there is evidence that the ability of one claimant to testify will be adversely affected by the presence of another. For example, in *Amin v. Canada* there was psychiatric evidence before the Board that suggested that one claimant would have difficulty testifying before another.^[26] In contrast, where claimants live together at the same address *per* the claimant address forms provided, this may point to it being appropriate to process their claims jointly, absent contrary information. Expected difficulty testifying may also be ameliorated in other ways, such as where the claimant that may have difficulty testifying can be represented by an independent designated representative who can provide testimony on their behalf, as with children providing testimony in cases where it is alleged that they have been kidnapped (see *A.B. v. Canada* as an example of such a case which was not separated).^[27]
 - A joint proceeding could inhibit a claimant's ability to disclose their SOGIESC: Section 3.9 of the *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* stipulate that "In some circumstances, individuals with diverse SOGIE may be part of joint claims or appeals that inhibit their ability to disclose their sexual orientation or gender identity or expression. When a decision-maker becomes aware that the individual wishes to assert an independent claim or appeal based on sexual orientation or gender identity or

expression, the claims or appeals should, where appropriate, be separated.”^[28] That said, instead of separating claims, at times panels of the Board have allowed one claimant to testify while the other claimant(s) are excused from the hearing room. Provided that all claimants consent to this, it may be an appropriate process. The claimants will, of course, need to agree on the process to be used should any credibility issues emerge during testimony while the other claimants are excused from the hearing room, should those credibility concerns impact the other joined claims, for example that the claimant who was out of the room could then listen to the audio recording. For more detail, see the commentary to section 164 of the Act: Canadian Refugee Procedure/Presence of parties and use of telecommunications for hearings⁶.

- A joint proceeding could inhibit a woman's ability to disclose gendered violence: International best practices for refugee status determination provide that ensuring women have the possibility of being interviewed separately from their family (both at screening and during any substantive claim) should be prioritized. Some women who have experienced and/or fear gender-based violence may not disclose in front of family members, including small children.^[29] That said, this arguably does not reflect the common practice of the IRB, which has generally been reticent to conduct separate proceedings in such circumstances.
- A conflict of interest between claimants: The Federal Court held in *Resmuves v. Canada* that where two claimants are opposed in interest, their claims should be separated so that one may cross-examine the other. The court reasoned as follows: “In the circumstances, the refusal of the disjoinder motion amounted to a violation of procedural fairness because Mr. and Ms. Resmuves were opposed in interest, Mr. Resmuves was questioned about his views on Ms. Resmuves’ claim, Ms. Resmuves was not afforded the opportunity to cross-examine Mr. Resmuves and his views about her truthfulness were used by the Member as the primary reason to reject her claim. This is fundamentally unfair as Ms. Resmuves had no ability to test the unfavourable evidence of her estranged spouse nor to point out the rather obvious reasons why, following their separation, he might be pre-disposed against her.”^[30] The reasoning in this case arguably no longer applies since the current version of the rules does not limit the ability to ask questions of, or summon, any person (see, particularly, Rule 44). However, it may nonetheless be impractical to expect two claimants adverse in interest to put forward claims in the same proceeding given that this would inevitably require some degree of cooperation between the parties. For this reason, the RAD has continued to rely on this case when interpreting the current RPD rules.^[31]
- Danger to a person: Where joining claims would endanger the life, liberty, or security of any person, then it will presumptively be considered unjust. This may be the case, for instance, where spouses are both claiming and one of the spouses is experiencing domestic violence from the other spouse and wishes to keep information about their whereabouts confidential from their spouse.

Furthermore, given the requirement in the rule that the Division consider “any relevant factors”, in addition to considering the above factors, including whether *allowing* the application would likely cause an injustice, the Division should also consider whether *refusing* the application could be expected to cause an injustice.

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Presence_of_parties_and_use_of_telecommunications_for_hearings

34.2.3 Common types of applications to separate and usual practice

Whether to separate the claims of children from their parent when there is a suspicion of abduction

One of the circumstances in which applications to separate arise is from designated representatives assigned to represent children in cases where their accompanying parent is accused of having kidnapped them. While each decision will turn on its own facts, the usual practice is to have the claims remain joined. The rationale for this was articulated by RAD Member David Lowe when responding to one such application to disjoin in his reasons in a 2018 case.^[32] Similarly, in the leading cases on child abduction and how it intersects with 1F(b) exclusion in the refugee context, the claims of the parent and child have remained joined, as in *Kovacs v. Canada*,^[33] *A.B. v. Canada*,^[34] and *Rodriguez v. Canada*.^[35] However, in *Montoya v. Canada* the claims of the children were separated from the parent's claim to be heard on another date.^[36]

The Board's practice in this respect appears to be consistent with guidance in the UNHCR Handbook that "If the will of the parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt."^[37] This would point towards the claim remaining joined with the parent's so that more information may be admitted and considered when assessing the child's claim.

Whether to separate the claims of family members where one family member has their claim suspended

In some cases, the Minister will act to suspend a refugee claim pursuant to section 103 of the Act: Canadian Refugee Procedure/103-104 - Suspension or Termination of Consideration of Claim⁷. Similarly, under the *Practice notice: RPD and RAD processing for individuals applying under government of Canada public policies* the Board commits that upon notification by IRCC that a refugee claimant has made an application under one of the listed public policies, the RPD will stop processing that claim pending the outcome of the application.^[38] A question can arise about how to proceed with that claimant's remaining family members' claims, provided that their claims are not also suspended. It is common practice for the Board to disjoin the claims and proceed with those claims which are not suspended.

34.2.4 Standard of review for decisions to join or separate claims

Insofar as decisions to join or separate claims may affect the fairness of the resultant proceeding, such decisions should be assessed by reviewing bodies such as the RAD and Federal Court for whether they are correct and deference should not be shown to the decision of the Division.^[39]

⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/103-104_-_Suspension_or_Termination_of_Consideration_of_Claim

34.3 References

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2. Immigration, Refugees and Citizenship Canada, *Guide 0174 – Application Guide for Inland Refugee Claims Submitted through the IRCC Portal*, Date modified: 2023-07-12 <⁹> (Accessed September 21, 2023).
3. *Chavez Carrillo, Diego Antonio v. M.C.I.*, (F.C., No. IMM-3170-12), Noël, October 22, 2012, 2012 FC 1228, at para 15.
4. Community Legal Education Ontario (CLEO), *Refugee Rights in Ontario: Answering questions at the hearing*, Updated Jan 29, 2014, Accessed January 5, 2020, <¹⁰>.
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18. *AB v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 471 (CanLII), [2003] 1 FC 3, para. 53.
19. Sean Rehaag, “2018 Refugee Claim Data and IRB Member Recognition Rates” (19 June 2019), online: <https://ccrweb.ca/en/2018-refugee-claim-data>
20. *Koky v. Canada (Citizenship and Immigration)*, 2015 FC 562 (CanLII), para. 37 <¹⁷>.

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10 <https://refugee.cleo.on.ca/en/answering-questions-hearing>

11 https://irb-cisr.gc.ca/en/forms/Documents/RpdSpr0201_e.pdf

12 <https://irb-cisr.gc.ca/en/refugee-claims/Pages/ClaDemGuide.aspx>

13 <https://www.canlii.org/en/ca/irb/doc/2015/2015canlii56636/2015canlii56636.html>

14 <https://www.canlii.org/en/ca/irb/doc/2016/2016canlii105239/2016canlii105239.html>

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21. *Hayek v. Canada (Minister of Citizenship & Immigration)*, [2005] F.C.J. No. 1055, 2005 FC 848.
22. *X (Re)*, 2017 CanLII 147883 (CA IRB), para. 9 <¹⁸>.
23. *Alomari v. Canada (Citizenship, Immigration and Multiculturalism)*, 2015 FC 573 (CanLII), para. 14.
24. *Frederick v. Canada (Citizenship and Immigration)*, 2012 FC 649 (CanLII), paras. 16-17 <¹⁹>.
25. *X (Re)*, 2017 CanLII 147883 (CA IRB), para. 8 <²⁰>.
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27. *A.B. v. Canada (Citizenship and Immigration)*, 2016 FC 1385 (CanLII).
28. Immigration and Refugee Board of Canada, *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics, Revised: December 17, 2021*, Accessed August 31, 2023, <²¹>.
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30. *Rezmuves v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 973 (CanLII), at para. 26.
31. *X (Re)*, 2016 CanLII 105239 (CA IRB), para. 55 <²³>.
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37. UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at: ²⁵ [accessed 26 January 2020], para. 219.
38. Immigration and Refugee Board of Canada, *Practice notice: RPD and RAD processing for individuals applying under government of Canada public policies*, Date modified: 2021-06-14 <²⁶> (Accessed August 31, 2023).
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19 <https://www.canlii.org/en/ca/fct/doc/2012/2012fc649/2012fc649.html>

20 <https://www.canlii.org/en/ca/irb/doc/2017/2017canlii147883/2017canlii147883.html>

21 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>

22 <https://rm.coe.int/conventionistanbularticle60-61-web/1680995244>

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25 <https://www.refworld.org/docid/5cb474b27.html>

26 <https://irb.gc.ca/en/legal-policy/procedures/Pages/rpd-rad-pn-processing-claimants.aspx>

35 Proceedings Conducted in Public (RPD Rule 57)

35.1 RPD Rule 57 - Proceedings Conducted in Public

The text of the relevant rule reads:

Proceedings Conducted in Public

Minister considered party

57 (1) For the purpose of this rule, the Minister is considered to be a party whether or not the Minister takes part in the proceedings.

Application

(2) A person who makes an application to the Division to have a proceeding conducted in public must do so in writing and in accordance with this rule rather than rule 50.

Oral application

(3) The Division must not allow a person to make an application orally at a proceeding unless the person, with reasonable effort, could not have made a written application before the proceeding.

Content of application

(4) In the application, the person must

- (a) state the decision they want the Division to make;
- (b) give reasons why the Division should make that decision;
- (c) state whether they want the Division to consider the application in public or in the absence of the public;
- (d) give reasons why the Division should consider the application in public or in the absence of the public;
- (e) if they want the Division to hear the application orally, give reasons why the Division should do so; and
- (f) include any evidence that they want the Division to consider in deciding the application.

Providing application

(5) The person must provide the original application together with two copies to the Division. The Division must provide a copy of the application to the parties.

Response to application

(6) A party may respond to a written application. The response must

- (a) state the decision they want the Division to make;
- (b) give reasons why the Division should make that decision;
- (c) state whether they want the Division to consider the application in public or in the absence of the public;
- (d) give reasons why the Division should consider the application in public or in the absence of the public;
- (e) if they want the Division to hear the application orally, give reasons why the Division should do so; and
- (f) include any evidence that they want the Division to consider in deciding the application.

Providing response

(7) The party must provide a copy of the response to the other party and provide

the original response and a copy to the Division, together with a written statement indicating how and when the party provided the copy to the other party.

Providing response to applicant

(8) The Division must provide to the applicant either a copy of the response or a summary of the response referred to in paragraph (12)(a).

Reply to response

(9) An applicant or a party may reply in writing to a written response or a summary of a response.

Providing reply

(10) An applicant or a party who replies to a written response or a summary of a response must provide the original reply and two copies to the Division. The Division must provide a copy of the reply to the parties.

Time limit

(11) An application made under this rule must be received by the Division without delay. The Division must specify the time limit within which a response or reply, if any, is to be provided.

Confidentiality

(12) The Division may take any measures it considers necessary to ensure the confidentiality of the proceeding in respect of the application, including

- (a) providing a summary of the response to the applicant instead of a copy; and
- (b) if the Division holds a hearing in respect of the application,
 - (i) excluding the applicant or the applicant and their counsel from the hearing while the party responding to the application provides evidence and makes representations, or
 - (ii) allowing the presence of the applicant's counsel at the hearing while the party responding to the application provides evidence and makes representations, upon receipt of a written undertaking by counsel not to disclose any evidence or information adduced until a decision is made to hold the hearing in public.

Summary of response

(13) If the Division provides a summary of the response under paragraph (12)(a), or excludes the applicant and their counsel from a hearing in respect of the application under subparagraph (12)(b)(i), the Division must provide a summary of the representations and evidence, if any, that is sufficient to enable the applicant to reply, while ensuring the confidentiality of the proceeding having regard to the factors set out in paragraph 166(b) of the Act.

Notification of decision on application

(14) The Division must notify the applicant and the parties of its decision on the application and provide reasons for the decision.

35.1.1 By default, the Act requires proceedings to be conducted in private

By default, the IRPA requires that hearings before the RPD be conducted in camera: Canadian Refugee Procedure/Proceedings must be held in the absence of the public¹. That said, the Board may open a refugee hearing to the public in exceptional circumstances. The Irwin Law text *Refugee Law* states that this almost always happens with the consent of the claimant.^[1] It notes, by way of example, that in recent years, several high-profile refugee claims have been heard in public with the consent of the claimants, including the claims of US military deserters Jeremy Hinzman and Brandon Hughey; US marijuana campaigner Steven Kubby and his family; and Chinese businessman Lai Cheong Sing and his family.^[1]

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Proceedings_must_be_held_in_the_absence_of_the_public

35.1.2 The Board may order that proceedings be conducted in private, in whole or in part

The Board's public commentary on the analogous Immigration Division rules states that "The [Division] may take any necessary measures to ensure the confidentiality of the proceeding, such as: a) hearing in private the evidence concerning the factors to be taken into consideration; and b) ordering that the proceeding be conducted in private, in whole or in part."^{2]} A panel can attach conditions to its order, for example in *Key (Re)*, a panel of the Refugee Protection Division provided for the following conditions on allowing the media to observe a hearing: "only non-disruptive audio equipment be allowed in the hearing room during proceedings and cameras to take still photographs only be allowed in the hearing room when the hearing was not in progress."^{3]}

35.1.3 The Board may order a publication ban, in whole or in part

The Board's public commentary on the analogous Immigration Division rules states that "Even if it allows the proceeding to be conducted in public, the [Division] may take any necessary measures to ensure the confidentiality of the proceeding, such as: 1. hearing in private the evidence concerning the factors to be taken into consideration; and 2. ordering a ban on publication of the proceedings, in whole or in part."^{2]}

35.2 References

1. Martin David Jones and Sasha Baglay. *Refugee law (Second Edition)*. Irwin Law, 2017, page 297.
2. Immigration and Refugee Board of Canada, *Commentaries to the Immigration Division Rules*, Date modified listed on webpage: 2018-06-23, <<https://irb-cisr.gc.ca/en/legal-policy/act-rules-regulations/Pages/CommentIdSi.aspx>> (Accessed January 27, 2020).
3. *Key (Re)*, 2010 CanLII 62705 (CA IRB), par. 3, <²>, retrieved on 2020-08-16.

² <http://canlii.ca/t/2d3c7#par3>

36 Observers (RPD Rule 58)

36.1 RPD Rule 58

The text of the relevant rule reads:

Observers

Observers

58 (1) An application under rule 57 is not necessary if an observer is a member of the staff of the Board or a representative or agent of the United Nations High Commissioner for Refugees or if the claimant or protected person consents to or requests the presence of an observer other than a representative of the press or other media of communication at the proceeding.

Observers - factor

(2) The Division must allow the attendance of an observer unless, in the opinion of the Division, the observer's attendance is likely to impede the proceeding.

Observers - confidentiality of proceeding

(3) The Division may take any measures that it considers necessary to ensure the confidentiality of the proceeding despite the presence of an observer.

36.1.1 RPD Rule 58 should be read in conjunction with section 166(e) of the IRPA

Section 166(e) of the IRPA provides:

166 Proceedings before a Division are to be conducted as follows:

...

(e) despite paragraphs (b) to (c.1), a representative or agent of the United Nations High Commissioner for Refugees is entitled to observe proceedings concerning a protected person or a person who has made a claim for refugee protection or an application for protection;

For further details, see: Canadian Refugee Procedure/Proceedings must be held in the absence of the public¹.

36.1.2 It is best practice to provide counsel with an opportunity to comment on the presence of any observers who are RPD employees

In *Azanor v. Canada*, an opportunity was provided to counsel to comment on the presence of persons observing the hearing, and it was not taken. The court concluded that "it is conceivable that the presence in the hearing room of the Principal Applicant's two children, and the two observers from the IRB, created some awkwardness and discomfort for the Principal Applicant. Nevertheless, objections to this were not raised by the Principal Applicant

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Proceedings_must_be_held_in_the_absence_of_the_public

or her counsel at the time of the hearing. These objections were only raised afterwards. In the absence of complaint, the RPD Member did not err in proceeding with the sensitive yet relevant line of questioning concerning the Principal Applicant's sexual identity."^[1]

36.2 References

1. *Azanor et al v. CIC* (F.C. no. IMM-4472-19), Mosley, May 12, 2020, 2020 FC 613.

37 Withdrawal (RPD Rule 59)

In certain circumstances, claimants may wish to withdraw a claim. This may happen, for example, if they have otherwise acquired status in Canada or if they wish to leave Canada.
[1]

37.1 IRPA Section 168(2)

Abuse of process

168(2) A Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules.

37.2 RPD Rule 59

The text of the relevant rule reads:

Withdrawal

Abuse of process

59 (1) For the purpose of subsection 168(2) of the Act, withdrawal of a claim or of an application to vacate or to cease refugee protection is an abuse of process if withdrawal would likely have a negative effect on the Division's integrity. If no substantive evidence has been accepted in the hearing, withdrawal is not an abuse of process.

Withdrawal if no substantive evidence accepted

(2) If no substantive evidence has been accepted in the hearing, a party may withdraw the party's claim or the application to vacate or to cease refugee protection by notifying the Division orally at a proceeding or in writing.

Withdrawal if substantive evidence accepted

(3) If substantive evidence has been accepted in the hearing, a party who wants to withdraw the party's claim or the application to vacate or to cease refugee protection must make an application to the Division in accordance with rule 50.

37.2.1 No decision is required from the Board to accept a withdrawal notice where no substantive evidence has been accepted

Board member Daniel Tucci has commented in one decision that "once the Notice to withdraw the claim is filed with the RPD, the claim is considered withdrawn and no decision is required by the RPD."^[2] This principle was explained by the Federal Court in *Arndorfer v. Canada*, a case considering a previous version of the RPD Rules which applies with equal force to the present rule:

The applicants complained in their affidavits that they were not contacted in order to confirm that they were withdrawing their claims. Such a complaint is not justified. As

discussed above, the CRDD is entitled to rely on documents which it receives, and is entitled to presume that they have been properly executed. In addition, the abandonment hearings to which applicants have a right under s. 69.1(6) of the Act are not necessary in the case of a withdrawal. The applicant who is found by the CRDD to have abandoned a claim requires, as a matter of procedural fairness, the right to be heard by the body that is making that decision with regard to his or her claim. In the case of a withdrawal, the applicant is the one who makes the decision and exercises his right to put an end to his claim.^[3]

37.3 References

1. Martin David Jones and Sasha Baglay. *Refugee Law (Second Edition)*. Irwin Law, 2017, page 306.
2. *X (Re)*, 2016 CanLII 65021 (CA IRB), par. 5, <¹>, retrieved on 2020-01-29.
3. *Arndorfer v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 2007 (CanLII), [2002] F.C.J. No 1659).

¹ <http://canlii.ca/t/gtxqh#5>

38 Reinstating a Withdrawn Claim or Application (RPD Rules 60-61)

38.1 RPD Rule 60 - Reinstating a Withdrawn Claim or Application

The text of the relevant rule reads:

Reinstating a Withdrawn Claim or Application

Application to reinstate withdrawn claim

60 (1) A person may make an application to the Division to reinstate a claim that was made by the person and was withdrawn.

Form and content of application

(2) The person must make the application in accordance with rule 50, include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer, and provide a copy of the application to the Minister.

Factors

(3) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application.

Factors

(4) In deciding the application, the Division must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay.

Subsequent application

(5) If the person made a previous application to reinstate that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

38.1.1 Rule 60(3): The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice ...

Pursuant to RPD Rule 60(3), the Division must not allow an application to reinstate a withdrawn claim unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application. How is the Board to approach the question of whether "it is established that there was a failure to observe a principle of natural justice"? The full range of violations of natural justice may potentially be considered here. For a discussion of this, see: Canadian Refugee

Procedure/The right to be heard and the right to a fair hearing¹. Where an applicant acted voluntarily and without constraint and any failure on the part of a claimant to inform themselves of the consequences of their withdrawal did not result from a breach of natural justice by the RPD or counsel, then a violation of procedural fairness will generally not be found.^[1]

38.1.2 Rule 60(3): The Division must not allow the application unless ... it is otherwise in the interests of justice to allow the application

Pursuant to RPD Rule 60(3), the Division must not allow an application to reinstate a withdrawn claim unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application. How is the Board to approach the question of whether it is "otherwise in the interests of justice to allow the application"?

As an aside, one can note that this provision relating to the reinstatement of "withdrawn" refugee claims differs from applications to reopen a refugee claim that has been "decided" or "declared abandoned." For those types of applications, RPD Rule 62(6) only provides that the application must not be allowed unless "it is established that there was a failure to observe a principle of natural justice." Contrary to applications to reinstate withdrawn refugee claims, the RPD is not required to consider whether it is "in the interests of justice" to allow an application to reopen a refugee claim that has been declared abandoned. See: Canadian Refugee Procedure/Reopening a Claim or Application#Rule 62(6) - Application must not be allowed absent a failure to observe a principle of natural justice².

As a starting point, the Federal Court noted in *Ohanyan v Canada*, the term "otherwise in the interests of justice" is a broad one, which gives the Board a wide discretion to reinstate.^[2] At the same time, the court has held that reinstatement is an exception to the norm and must be interpreted and applied in that context.^[2]

Second, with respect to the phrase "otherwise in the interests of justice," subsection 60(3) of the RPD Rules does not use the language "unless it is established" that applies to a failure to observe a principle of natural justice. That fact that the term "unless it is established" does not apply to the "interests of justice" portion of the rule can be more easily seen in the French-language version of the rule: «*si un manquement à un principe de justice naturelle est établi ou qu'il est par ailleurs dans l'intérêt de la justice de le faire*». The provision rather requires the RPD to determine if "it is otherwise in the interests of justice" to allow the reinstatement application. The Federal Court concluded in *Rajput v. Canada* that the different wording used in the provision vests the RPD with a specific obligation to consider, on its own and in light of the particular circumstances of each case, the "interests of justice" at stake, whether or not specific submissions on the issue have been made by an applicant.^[3]

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing

2 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Rule_62\(6\)_-_Application_must_not_be_allowed_absent_a_failure_to_observe_a_principle_of_natural_justice](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Rule_62(6)_-_Application_must_not_be_allowed_absent_a_failure_to_observe_a_principle_of_natural_justice)

38.1.3 Rule 60(4): In deciding an application, the Division must consider any relevant factors

Pursuant to Rule 60(4), in deciding an application under RPD Rule 60, the Division must consider any relevant factors.

The Board's reasons must deal with the "interests of justice" that both favour *and* militate against reinstatement.^[4] As such, in making these determinations, the Board must weigh all the circumstances of a case and it is not just to approach the question from the vantage point of an applicant's interests^[2] or from the vantage point of the Board (The court has said that "if this were so, few, if any, applications for reinstatement would ever succeed"^[5]). As Waldman puts it in his text, "it is clear that the tribunal must consider all of the circumstances that are placed before it when assessing whether or not it would be in the interests of justice to allow the claim to be reinstated. This requires the tribunal to assess the circumstances from the perspective of the applicant and from that of the tribunal."^[6] With respect to the consideration of the "interests of justice" under Rule 60(3), the Federal Court has held that this requirement to consider all of the circumstances that are placed before the tribunal applies whether or not specific submissions on the issue have been made by an applicant:

It was...the RPD's duty, as a decision maker, to assess and determine whether it was in the interests of justice to allow Ms. Rajput's application for reinstatement, considering all the relevant factors and the evidence before the panel. I agree with Ms. Rajput that, in conducting this assessment, the RPD had to take a holistic and contextual approach, considering all of the circumstances before it, and that the panel could not simply ask itself whether Ms. Rajput had provided evidence and made submissions on the interests of justice at play.^[7]

Factors that past panels have considered have included:

- Did the claimant make an informed decision to withdraw their claim? The starting point is that a claimant should be presumed to have understood and intended the effect of their past withdrawal. The Board has noted in past decisions that the form a claimant signs to withdraw their claim involves them stating that they acknowledge that they are aware of the consequence of withdrawing their claim.^[8] Specifically, the form that a claimant signs to withdraw their claim includes the following statement: "I am freely withdrawing my claim for refugee protection, and I am fully aware of the consequences of this withdrawal. I am aware that as a result of the withdrawal of my claim, the Canada Border Services Agency may require me to leave Canada, and I will not be permitted to make another claim for refugee protection in Canada."^[9] There are strong policy reasons for presuming that a claimant's signature on this form was an informed one, as the court articulated in *Arndorfer v. Canada* where they stated that "the IRB and the respondent must be able to rely on what is communicated to them by claimants. If the IRB and the Minister had to impose on themselves a waiting period before acting on such notices as the Notice of Withdrawal, or impose extra steps on themselves simply to ensure that the statement of the claimant is indeed his or her final answer, the refugee claims process would be encumbered, which would in turn worsen an already critical backlog in the refugee claims system."^[10] When considering a claimant's argument that their decision was not informed, decision-makers have considered the following:
 - Did the claimant make a free decision to withdraw their claim?

- Was the decision to withdraw made under duress? The court has overturned Board decisions failing to reinstate claims where it was clear that the applicant was under duress. In *Kaur v. Canada*, the “pressure on her was such that she was not free to speak about the situation she was in and unable to retain counsel to assist her in her choices”.^[11] In *Acevedo v. Canada*, the applicant had presented evidence that “the abuse she suffered at the hands of her husband . . . had prevented her from participating in the claim”.^[12] The fact that a claimant was under stress or pressure does not necessarily mean that the claimant was under duress. The claimant may still have made a personal and voluntary decision to withdraw their claim.
- Was a designated representative acting in the best interests of a minor or incompetent persons when withdrawing a claim? In *Castillo v. Canada* the principal applicant and her son (a minor) applied for refugee protection in Canada on the basis that they feared persecution by the principal applicant’s abusive ex-partner. The Board rejected their application to reinstate their claims, but this decision was found to be unreasonable by the court on the basis that the decision contained “no reference to the personal circumstances of the Minor Applicant who cannot be blamed for the decision of the Principal Applicant to withdraw their refugee application.”^[13] The Board's *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* provide that “in determining the procedure to be followed when considering the refugee claim of a child, the CRDD should give primary consideration to the best interests of the child.”^[14] That said, a designated representative must be appointed by the Board. There will be a period of time in which claims, including those of a minor have been made, but the designated representative relationship has not been established by the Board. This does not preclude the parent from acting on the child's behalf to withdraw the claim during this period notwithstanding the lack of a formal DR appointment: *Arndorfer v. Canada*.^[15]
- Associate claimants: At times, the tribunal has found that a principal claimant has withdrawn the claims of associate claimants without their knowledge and consent. Where this can be shown, and the associate claimants apply to reinstate their claims, this will usually point in favour of the tribunal allowing the application.
- Did the claimant consult with counsel and family members before withdrawing? The court has commented approvingly on the Board considering factors such as whether the applicant was unrepresented when they withdrew and what measures were taken to ensure that the claimant understood the consequences of the withdrawal of their refugee claim.^[16] RPD Member Daniel Tucci considered this factor as follows in one claim: “The claimant’s decision was done with the advice of counsel and in consultation with his wife. Although the application was filed in a timely manner, the timeliness is not sufficient to overcome the fact that the claimant had time to consult with counsel and his wife before completing the withdrawal form and that he freely chose to withdraw knowing what the consequences of that decision would be.”^[17] Even where the claimant has not consulted with family and counsel prior to withdrawing, this fact will not be determinative: in *Dezsone v. Canada*, the court stated that “In the circumstances, I do not believe that...it is otherwise in the interests of justice to require that the RPD ensure that Ms. Dezsone had consulted her children and her counsel before withdrawing her refugee protection claim.”^[18]
- Was the decision to withdraw made by mistake? The court commented that this is a relevant factor to consider in *Ohanyan v. Canada*.^[19]

- Allegation of a mistake induced by the negligence of counsel: In *Arndorfer v. Canada*, the applicants argued that they had not intended to withdraw their claims for refugee protection and that as a result the withdrawal of their claims was *non est factum*; in other words, it was not an act that they knowingly and willingly performed. In that case, they argued that the reason for their act was that they were misled by their counsel, and, if it were not for the misleading acts of counsel, they would not have signed the forms. In that case, the facts did not disclose that there had been any deficiency in counsel's conduct. In any event, this factor of mistake (or *non est factum*) appears to have a limited role in this analysis because if counsel really has misled the claimants, then this will likely be considered a procedural fairness violation and the reinstatement application could be accepted pursuant to the first part of Rule 60(3). In contrast, where there has not been such a procedural fairness violation, then the ordinary result is that stated by the court in *Arndorfer*, subject to the exceptions described in the following excerpt: "The Court made reference to earlier jurisprudence describing *non est factum* as being a state in which the mind of a party did not follow his hand at the time of the execution of the document. Carelessness in a situation where reasonable care could have, and should have been taken, precludes a party from claiming that his or her mind did not follow the hand. The Court raised the policy concern that allowing *non est factum* to be pleaded in a case where a party was careless would essentially have the effect of shifting to an innocent third party harm or loss which could have been prevented by greater care on the part of the parties. The policy considerations related to concerns for reliability and security are present to some extent in the case before this Court. Counsel, who act for refugee claimants, ought to be able to rely on the expressed wishes of their clients, subject to a duty to ensure that clients with a limited understanding of English or of the law, are aware of the consequences of acting on those wishes. Similarly, the IRB and the respondent must be able to rely on what is communicated to them by claimants."^[20]
- Allegation of a mistake induced by the Board: In *Cuni v. Canada*, the court found that the applicant had withdrawn her refugee claim because she had been given incorrect evidence by the RPD. As such the court found that it was in the interests of justice that her case be allowed to proceed.^[21] The facts in that case were described in the case as follows: "June 28, 2008 is a day that Zymryte Cuni will never forget. That is the day she last saw her husband. That was the day she and her infant son Tigran arrived in Canada. They filed a refugee claim. Her husband was supposed to join them but was detained in England and never made it here. Relying on misinformation, she withdrew their claim for refugee protection in an attempt to reunite with her husband. However, she could not leave Canada because she had no travel documents. She attempted to reinstate their claim. Her application was rejected by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. This is a judicial review of that decision." The court went on to make the following finding of fact: "The information given to Ms. Cuni by someone at the RPD office on Victoria Street in Toronto was incorrect. She did not need to withdraw her refugee claim in order to leave the country. Her problem is that without proper travel documents no airline will accept her. Had she had a valid passport, she could have left the country without notifying the RPD, which in due course would have come to the conclusion that she had abandoned her claim."^[22]

- Did a medical condition vitiate the claimant's intention to withdraw? The Board should consider any medical conditions through the lens of how they affected the claimant's decision to withdraw. Where a past medical condition may be said to have vitiated the claimant's intention to withdraw, this points towards it being in the interests of justice to allow the application. An example of this is where a claimant was affected by schizophrenia when they withdrew and the claimant then reconsiders that decision when in a different state of mind. In contrast, where a medical condition may have caused upset and distress but did not impact the decision to withdraw the claim, then this would not support a reinstatement application, as with the following comments from RPD Member Daniel Tucci: "The RPD has also considered the claimant's health problems. The evidence before the RPD indicates that the claimant received medical attention in Canada at least twice. It appears that the claimant is suffering from a heart ailment. The RPD accepts that the claimant was upset and distressed with his medical condition. That being said, the RPD finds that the claimant's medical condition was not sufficient to impact the decision he made to withdraw his claim. The RPD finds that the claimant freely and knowingly made the decision to withdraw his refugee claim despite his medical condition. The RPD has not been presented with any medical reports stating that the claimant's medical condition impaired his ability to understand his actions."^[23] Similarly, in *Dezsone v. Canada* the court commented on the necessity of evidence regarding the effects of any medical issues: "Although the issue of Ms. Dezsone's mental state was raised, there was no evidence adduced in that regard. At best, it can be said that she made a bad decision, a decision that she wishes she had not made."^[24]
- Did language issues prevent the claimant from understanding the withdrawal form? The form that a claimant completes to withdraw their claim requires a claimant to either declare that "I declare that I am able to read English and that I fully understand the entire content of this notice in English" or else to have an interpreter declare that "I (please print clearly), _____, certify that I have accurately translated the entire content of this form for the claimant from the English language to the _____ language. The claimant indicate that he/she fully understands the entire content of this notice as translated."^[9] A claimant's ability to understand what they have signed has been considered in past decisions, for example in *Dezsone v. Canada* the court noted that: "Ms. Dezsone signed a notice of withdrawal willingly, a notice that had, moreover, been translated for her from French to Hungarian."^[25]
- Whether the application to reinstate was made in a timely manner: Pursuant to Rule 60(4), in deciding the application, the Division must consider whether the application was made in a timely manner (and the justification for any delay).
- The claimant's diligence in making the reinstatement application can be assessed: In *Arcila v. Canada*, the applicant withdrew her claim and then waited more than 2 months before asking that it be reinstated. The applicant stated that she was awaiting her PIF before making her application to reinstate and had difficulty in obtaining it. The RPD commented that, had the applicant made the request for her PIF to the RPD office, she would have received a copy. The RPD stated in its reasons that, pursuant to [the then] Rule 44 of the *RPD Rules*, an application to reinstate a refugee claim must be made without delay. The RPD found that the applicant had not acted without delay, as she did not apply to reinstate until nearly three months after withdrawing her claim. This conclusion was upheld by the court.^[26]

- A timely application is a factor, but is not determinative: RPD Member Daniel Tucci considered this factor as follows in one case, finding the factor not to be determinative: "The RPD acknowledges that the application for reconsideration was made in a timely manner. Counsel for the claimant informed the RPD on December 14, 2015 that the claimant no longer wished to withdraw his refugee claim. Following the RPD's decision to accept the withdrawal, counsel for the claimant filed the application to reinstate the claim. ... Although the application was filed in a timely manner, the timeliness not sufficient to overcome the fact that the claimant had time to consult with counsel and his wife before completing the withdrawal form and that he freely chose to withdraw knowing what the consequences of that decision would be."^[17]
- Is the claimant's behaviour consistent with someone seeking protection? When the Board has considered reinstatement applications, it has often looked at the applicant's behaviour in totality to assess whether it is consistent with the behaviour that would be expected of someone seeking protection. Where this is not found to be the case, this will properly indicate that the interests of justice do not require reinstating the claim.
- A claimant's actions over time evince a desire to return to their country: Where a claimant undertakes a series of steps over time that evince a desire to return to their country, then this will not be considered behaviour consistent with someone who has a genuine fear of persecution or who anticipates harm in their country. For example, in *Arcila v. Canada*, the applicant was as a minor claimant in her mother's claim for refugee protection. Her PIF was signed and filed by her mother, as she was only 17 years old at the time. She stated that she and her mother had a serious argument on December 29, 2010, and, as a result, she made the dangerous and irrational decision to call Immigration and ask to cancel her refugee claim so she could obtain her passport and return to Colombia. The RPD acknowledged the applicant's evidence that she withdrew the claim impulsively and recklessly because of the fight with her mother. However, based on all of the evidence, the Board did not accept that the decision was a simple mistake made in a moment of pique. Instead, in that case, the RPD found that the applicant's behaviour was not that of someone with a genuine fear for her life if she returned to Colombia. The claimant had taken steps over a series of months, even after becoming an adult, to return to Colombia, including by asking her father to send her passport on December 20, 2010 (before any confrontation with her mother) and then booking a flight home, writing to the Board to request her passport, and then waiting months before asking for her claim to be reinstated.^[27]
- A claimant was more focused on obtaining status quickly than on pursuing their refugee claim: For example, in *Sathasivam v. Canada* the applicant had filed a claim for protection, then got married and, on the advice of his counsel, withdrew his claim and attempted to obtain status in Canada through a spousal sponsorship. When this spousal sponsorship application was denied, the claimant subsequently attempted to reinstate his refugee claim. The Board declined to do so, stating: "The claimant came to Canada as a Convention Refugee alleging a fear of persecution in Sri Lanka. Within a year of his arrival in Canada, the claimant decided to renounce his refugee claim only in order to expedite his landing in Canada. Despite alleging today a continued fear of persecution in Sri Lanka, the panel is not persuaded that the claimant's behaviour in Canada is consistent with the behaviour of someone seeking protection. The Refugee Protection system exists to protect refugees and is not a means of obtaining immigrant status in Canada. Thus, if the claimant came to Canada for the reasons alleged in his Personal Information Form (PIF), why would he renounce to them so quickly? The

panel is not persuaded by claimant's explanation as having to wait a longer period for a full refugee claim hearing.”^[28]

- Gender guidelines should be considered where appropriate: In *Castillo v. Canada*, Ms. Diaz Ordaz Castillo says she fled to Canada order to escape her abusive ex-partner. She filed a refugee claim, contacted a lawyer, acquired a Legal Aid certificate, and set up an appointment with counsel to fill out her personal information form (PIF). She arrived late for the appointment and could not re-schedule another prior to the due date for her PIF. Nor could she obtain the assistance of anyone else over the holiday period. As a result, she failed to submit her PIF by the deadline. Ms. Diaz Ordaz Castillo’s ex-partner contacted her at that point and asked her to return to Mexico. Because she was feeling depressed and isolated, and was having difficulty raising her son on her own, she agreed. She formally withdrew her refugee claim at a hearing convened to determine whether she had abandoned it. However, Ms. Diaz Ordaz Castillo then changed her mind. Her ex-partner continued to contact her and was now becoming verbally abusive, accusing her of having slept with his best friend. She decided that it was not safe for her to return to Mexico after all, so she submitted an application to reinstate her claim. The Board dismissed it. Ms. Diaz Ordaz Castillo submits that the Board failed to appreciate that her mental state at the point in time when she withdrew her refugee claim was affected by the abusive relationship she had fled. In effect, she was unable to make a free and informed decision about her claim. Further, Ms. Diaz Ordaz Castillo submits that the Board failed to consider the Gender Guidelines applicable to women making refugee claims, as well as and an affidavit she had filed describing, in general terms, why women sometimes choose to remain in abusive relationships. In the court's view, the Board did not ignore the evidence of Ms. Diaz Ordaz Castillo’s mental state. However, the evidence before the Board member did not suggest that her mental state had prevented her from making an informed decision to withdraw her claim. She spoke of feeling “alone and isolated”, “defeated” and “without hope” and that these feelings caused her to agree to return to Mexico. The court stated: “While these feelings were no doubt genuine and perhaps natural in her circumstances, I cannot fault the Board for concluding that there had been no breach of natural justice.”^[29] While the gender guidelines will not preordain any particular result or finding in a reinstatement application, their discussion of the cycle of abuse and issues like Battered Women's Syndrome are appropriately considered at this stage of the analysis.
- Related legal proceedings: The existence of related legal proceedings may point towards or away from a conclusion that it would be in the interests of justice to allow a claim to be reopened.
- The fact that a claimant decided to abandon a claim knowing that their family members were still pursuing claims: A family will often file claims altogether, even if some of the claimants are more at risk than others. A decision by a claimant to withdraw their claim where they have the knowledge that their family members' claims are proceeding, may reflect a reasoned judgement about relative risks and merits. For example, RPD Member Daniel Tucci considered such a situation and concluded that the fact that the applicant's family were still pursuing their claims, and that the claimant was aware of this prior to withdrawing his, was a factor pointing against accepting his application to reinstate, as follows: “The RPD also takes into consideration that his wife and child are pursuing their refugee claims. This could be an important factor if the evidence before the RPD showed that the claimant was not in contact with his wife prior to making the decision to withdraw his claim. In this case, the claimant spoke to his wife

on two occasions on December 4, 2015 and the purpose of the call was to discuss his withdrawal. One call was made before he consulted with legal counsel and a second call was made after his consultation with legal counsel. The RPD finds that the claimant made the decision to withdraw his refugee claim knowing that his wife and child would pursue their claim.”^[30]

- A Hague Convention proceeding: In *Zagroudnitski v. Canada*, the court considered allegations of child abduction against the applicant who wanted to reinstate his claim. The court concluded that a related Hague Convention application and the facts related thereto pointed strongly against accepting the reinstatement application: ”On May 2, 2014, in the context of an *Application under the Convention on Civil Aspects of International Child Abduction*, [1983] Can TS 35 (the Hague Convention), filed by the minor Applicant’s mother, who lives in France, Justice L.S. Parent of the Ontario Court of Justice ordered the return of the minor Applicant to France, and held that the mother had custody rights in respect of the child at the time of father’s removal of the child. The father’s removal and retention of the child was wrongful and breached the mother’s rights under the Hague Convention (*N.A. v A.Z.*, 2014 ONCJ 293; Affidavit of Irena Kakowska, dated March 11, 2015). ... Upon review of the Certified Tribunal Record and the parties’ submissions, which depict an alarming portrait, to say the least, of allegations of parental abduction, abuse, instability and detention in regard to the child in the proceedings, it is clear that the application cannot succeed.”^[31]
- The efficient use of Board resources: This is a proper consideration for the Board when considering the interests of justice under this rule. For example, in *Castillo v. Canada* the Board noted that it offered a hearing at which the issue of abandonment could have been addressed but that the claimant chose to withdraw her application instead. Therefore, the Board concluded that to grant the reinstatement request would be to duplicate the process that had already been provided to her and which she had declined. The Board noted that a member and an interpreter had already been assigned to hear and consider her submissions and that, accordingly, allowing the reinstatement of the claim would prejudice Board’s efforts to deal with these matters efficiently and in a timely manner and would not be in the interests of justice for that reason. In that case, the court appears to accept that it was proper for the Board to consider this criterion, even if this criterion, on its own, was not determinative.^[32]
- Considerations related to events developing in the claimant's home country:
 - A desire to return to one's country because of a family member's medical condition is not generally a good reason to withdraw a claim: In *Dezsone v. Canada* the claimant left Hungary for Canada to claim refugee protection on the basis of her Roma origins. Shortly afterwards, she learned that her grandson had been hospitalized in Hungary. She then decided to return there, but the Canadian authorities were in possession of her passport. To get it back, she withdrew her refugee protection claim. In the end, Ms. Dezsone did not return to Hungary. She instead decided to file an application to reinstate her refugee protection claim. That reinstated application was not approved by the Board and the court upheld the reasonableness of that decision.^[33]
 - The re-emergence of the risk that is at the heart of the claim is generally not a sound basis for reinstatement: A common issue that arises in applications for reinstatement is a change of circumstances in the claimant's country or the claimant's knowledge of the risk in their country. For example, in *Ohanyan v. Canada*, the Applicant was a 29 year old citizen of Armenia who claimed refugee protection. Shortly thereafter he withdrew his claim because his wife informed him that government agents had stopped

looking for him and it was safe to return. A few weeks later his wife advised him that the government agents had returned to his house looking for him. The Applicant then applied to reinstate his refugee claim. The court concluded that the Board was right to reject the claimant's reinstatement application: "The Applicant made a strategic decision which apparently did not work to his advantage. The Rule is not designed to protect applicants from the consequences of their freely chosen course of conduct even where they have made a decision or taken a step which did not work out as they may have hoped."^[19] If the claimant made an assessment of risk and decided to return to their country, only to change their assessment upon receiving new information, the proper process for the claimant is to avail themselves of the PRRA process that is designed to consider such new information, not to attempt to reinstate their claim.

38.1.4 Those unable to reinstate a claim still entitled to PRRA

It should be noted that it does not necessarily follow that a claimant whose application to reinstate is refused will be removed to a country where she was allegedly persecuted (or had a well-founded fear thereof). As the court states, "[they are] still entitled to a pre-removal risk assessment (PRRA). Under sections 112 and 113 of the *Immigration and Refugee Protection Act*, [a] PRRA will address all of the risks listed in sections 96 and 97 of the Act."^[34]

38.1.5 An oral hearing is unnecessary when deciding reinstatement applications, unless credibility is at issue

In *Ohanyan v. Canada*, the Board denied the claimant's application to reinstate his withdrawn claim. As is the usual practice, the Board assessed the claimant's written application to reinstate the claim but did not hold an oral hearing for the application. The court held that failing to have an oral hearing was not a breach of natural justice "because a hearing was unnecessary". The court noted that in the application "neither the Applicant's credibility nor any of the relevant facts were in issue. The Applicant was able to make all of his representations in writing."^[35] In contrast, in *Sathasivam v. Canada* the Board drew negative inferences about the credibility of some of the evidence tendered by the applicant without giving him an opportunity to reply; this was held to be in error: "In my opinion, the Board erred in law in relying upon its own knowledge of the applicant's former counsel to discredit, and to disbelieve his evidence that he had been misled by counsel's advice, without giving the applicant notice of its doubt about that evidence and an opportunity to address that doubt. ... Failure to provide notice to the applicant, and an opportunity to respond to the CRDD's conclusion that key evidence, concerning alleged advice from former counsel, was implausible and not to be believed, constituted procedural unfairness in this case, warranting the Court's intervention."^[36]

38.1.6 "Full" written reasons for an application to reopen are not required, but the rationale of the decision-maker should be provided

The court concluded in *Ahmad v. Canada* that "full written reasons" are not required for interlocutory decisions, only final ones.^[37] That decision went on to note that "decisions

regarding refusals to reopen or grant leave to appeal have always been considered interlocutory decisions". As such, the court held that they do not require full written reasons. The court cited with approval *Faghihi v. Canada* in which Evans J. stated: "I am prepared to assume for present purposes that a motion to reopen a decision is an "interlocutory matter" because, if granted, it will not be a final disposition of the case. It will simply open the gate to a redetermination of the claim by the Refugee Division".^[38] The court went on to note that on the record before it, "in this case, the Board gave an extensive endorsement which certainly indicates the rationale of the decision maker." It noted that such endorsements "can take the place of written reasons".^[39] An endorsement appears to be a shorter set of reasons for decision provided by the decision-maker that are often written on a pre-printed form and may be in highly summary form. While *Ahmad* concerned an application to reopen a claim, not reinstate a withdrawn one, the ratio of that decision is equally persuasive when consideration reinstatement applications, *mutatis mutandis*.

In practice, however, courts have been willing to overturn decisions not to reinstate on the basis that they did not adequately grapple with the evidence and record before them. For example, in *Castillo v. Canada* the court overturned a decision on the basis that it was not persuaded that the Board had regard to all of the evidence before it. The decision states:

I agree with the Respondent that, in general, the Board is presumed to have considered all of the evidence, and has no obligation to refer to every document in the record. However, in this case the Board refers to no documents. It is widely accepted that where a document is important to a determination by the Board it is necessary for the decision-maker to explicitly address that document. There were many documents before the Board that were relevant to the determination of what was "in the interests of justice" and should have been considered. It is not sufficient for the Board to baldly state "I am not swayed by the evidence submitted".^[40]

38.1.7 A claim can only be reinstated pursuant to this rule after it has been referred to the Board

Section 100(3) of the IRPA provides that the Refugee Protection Division may not consider a claim until it is referred by an officer. The RPD has considered the interaction of this provision of the Act with Rule 60. In that case, the claimant was intercepted and interviewed by CBSA officers when the claimant disembarked from his flight to Canada. After indicating that he wished to make a claim, that same day the claimant signed and completed the Withdrawal of a Claim for Refugee Protection Prior to Referral to the Refugee Protection Division. As the name of the form implies, this was done before the claim had been referred to the RPD. The Board held that the claimant could not attempt to reinstate the claim pursuant to Rule 60 because the Board lacked jurisdiction since the claim was never referred to the Board:

I have also considered Section 162(1) of the IRPA. This provisions gives the RPD wide authority, but only with respect to matters "brought before it." In particular, this section provides that in respect of proceedings brought before it, the RPD has sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction. However, for the reasons given above, it cannot be said that the refugee claim has been brought before the RPD, which reinforces the fact that the RPD does not have jurisdiction. The applicant made submissions to the effect that Rule 60 allows

the RPD to reinstate a claim in the circumstances of this case. However, the RPD Rules are a subordinate set of legislation that cannot conflict with the statute that enables them, in this case, the IRPA. In simpler terms, an application made under Rule 60 to reinstate a claim does not confer jurisdiction where the RPD would not otherwise have jurisdiction. Again, in reviewing the evidence there is a signed Withdrawal of a Claim for Refugee Protection Prior to Referral to the Refugee Protection Division on the file which in my view by its very name would clearly suggest that the person concerned is signing a withdrawal form prior to it being referred to the RPD.^[41]

This conclusion is consistent with the court's reasoning in *Duri v. Canada*.^[42]

38.2 RPD Rule 61 - Application to reinstate withdrawn application to vacate or to cease refugee protection

Application to reinstate withdrawn application to vacate or to cease refugee protection

61 (1) The Minister may make an application to the Division to reinstate an application to vacate or to cease refugee protection that was withdrawn.

Form of application

(2) The Minister must make the application in accordance with rule 50.

Factors

(3) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application.

Factors

(4) In deciding the application, the Division must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay.

Subsequent application

(5) If the Minister made a previous application to reinstate that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

38.3 References

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32. *Diaz Ordaz Castillo v. Canada (Citizenship and Immigration)*, 2009 FC 1227 (CanLII), par. 15, <<http://canlii.ca/t/26wwt#15>>, retrieved on 2020-01-29
33. *Ambrus Dezsone v. Canada (Citizenship and Immigration)*, 2011 FC 1396 (CanLII), par. 2, <<http://canlii.ca/t/fpdxt#2>>, retrieved on 2020-01-29
34. *Ambrus Dezsone v. Canada (Citizenship and Immigration)*, 2011 FC 1396 (CanLII), par. 9, <<http://canlii.ca/t/fpdxt#9>>, retrieved on 2020-01-29
35. *Ohanyan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078 (CanLII), par. 8, <<http://canlii.ca/t/1p8cj#8>>, retrieved on 2020-01-29
36. *Sathasivam v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1080 (CanLII), par. 17, <<http://canlii.ca/t/mr7#17>>, retrieved on 2020-01-29
37. *Ahmad v. Canada (Citizenship and Immigration)*, 2005 FC 279 (CanLII)
38. *Faghihi v. Canada (M.C.I.)* 1999 CanLII 9370 (FC), [2000] 1 F.C 249 at para 28
39. *Wackowski v. Canada (M.C.I.)* [2004] FC 280
40. *De Lourdes Diaz Ordaz Castillo v. Canada (Citizenship and Immigration)*, 2010 FC 1185 (CanLII), par. 11, <¹²>, retrieved on 2020-01-29
41. *X (Re)*, 2018 CanLII 140557 (CA IRB).
42. *Duri v. Canada (Citizenship and Immigration)*, 2010 FC 125 (CanLII), par. 14, <<http://canlii.ca/t/27xqn#14>>, retrieved on 2020-01-29.

¹⁰ <http://canlii.ca/t/gtxqh#26>

¹¹ <http://canlii.ca/t/ghhr6#6>

¹² <http://canlii.ca/t/2dq12#11>

39 Reopening a Claim or Application (RPD Rules 62-63)

39.1 Section 170.2 of the IRPA

The legislative provision reads:

No reopening of claim or application

170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground - including a failure to observe a principle of natural justice - a claim for refugee protection, an application for protection or an application for cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination.

39.1.1 What jurisdiction does the Board have to reopen a decision that it has reached?

The principle of *functus officio* provides that judgments are final and that a decision-maker loses jurisdiction once a formal decision is rendered, signed, and communicated to the parties. The principle is that, as a starting point, such decisions cannot be re-opened. Mr. Justice Francis Muldoon in *Jimenez v. Canada* articulated the principle of *functus officio* in the immigration context as follows:

[T]he principle of *functus officio* favours the finality of proceedings, although it is flexible in its application in the case of administrative tribunals. By this it is meant that whether or not the parties agree with the decision rendered, the case cannot be reopened unless it can be established that there was an error in expressing the manifest intention of the decision-maker or if there is a clerical error that needs to be corrected: *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.* Recently, Justice Nadon of this Court also recognized that cases may be reopened if necessary to adhere to the principles of natural justice: *Zelzle v. Canada*. The principle specifically does not allow a tribunal to revisit a decision.^[1] [internal citations in quotation omitted]

As such, per the principle of *functus officio*, a decision, once made (and even if wrongly made), is still a binding decision. In the absence of statutory authority, a decision once made cannot be administratively revisited. That said, as Justice Nadon held in *Zelzle v. Canada*, "while the principle of *functus officio* favours the finality of proceedings, its application is flexible in the case of administrative tribunals. Proceedings may be reopened if justice requires it."^[2] Exceptions to the principle of *functus officio* provide that a matter may be reopened in the following circumstances:

- **Clerical error or slip:** There was a clerical error in drawing up the formal judgement that needs to be corrected.^[3] For example, in *Chen v. Canada* the tribunal issued amended reasons which "amalgamated a few paragraphs, corrected a number of footnotes to correctly cite to the National Documentation Package that was before it and made three

amendments to the text of the decision”.^[4] The court held that “the amendments made by the Board do not alter its original decision in any meaningful way and were made to correct a slip; accordingly, the doctrine of *functus officio* is inapplicable.”^[5]

- Error expressing the manifest intention of the decision-maker: There was an error expressing the manifest intention of the decision-maker.^[3] This exception cannot simply reflect a decision-maker having changed their mind; as a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind.^[6] However, in *Canadian National Railway Company v. National Transportation Agency*, the agency was found to possess jurisdiction to detail more precisely the types of documents it had ordered disclosed in its initial decision on the point.^[7]
- Denial of natural justice: There was a denial of natural justice which makes the decision rendered a nullity.^[8] This, however, cannot simply reflect a realization that the tribunal made an error of law; as a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal made an error within jurisdiction.^[6] Instead, as the court stated in *Zelzle v. Canada*, the “breach of natural justice exception” to the principle of *functus officio* was established to allow an administrative tribunal to reopen proceedings where, if the hearing of an application has not been held according to the rules of natural justice, the administrative tribunal may treat its decision as a nullity and reconsider the matter.^[9] For example, the court commented in *Sainflina v. Canada* that, in a situation in which a panel of the Board mistakenly dismissed a claim on the basis of a lack of perfection because the Board misplaced the Appellant's appeal submissions, the principle of *functus officio* would not prevent the RAD from correcting the failure in procedural fairness by reopening the file and rendering a decision on the file's merits.^[10]
- New information: Should new information be brought to light, a decision can be reconsidered.^[11] However, the information cannot simply reflect a change in circumstances; as a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because there has been a change of circumstances.^[6]
- Strictly procedural decisions: There is a question about whether the *functus officio* principle applies to a decision that is strictly procedural in nature.^[12]

As such, the Board has the power to revisit its decisions in limited circumstances. The only limit on this jurisdiction in the statute is section 170.2 of the IRPA, above, which provides that the RPD lacks jurisdiction to reopen on any ground once the Federal Court or RAD has made a final determination of a matter and RPD Rule 70(a) which provides that the Division may only act on its own initiative, without a party having to make an application or request to the Division, if it first gives the parties notice and an opportunity to object (Canadian Refugee Procedure/General Provisions#Rule 70 - Power to change a rule, excuse a person from a rule, extend a time limit, or act on its own initiative¹).

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/General_Provisions#Rule_70_-_Power_to_change_a_rule,_excuse_a_person_from_a_rule,_extend_a_time_limit,_or_act_on_its_own_initiative

39.1.2 Once reopened, is a claim to be heard *de novo* or as a redetermination based on the previous record?

A “true *de novo* proceeding” is a proceeding where the second decision-maker starts anew: the record below is not before them and the original decision is ignored in all respects.^[13] A hearing *de novo* is, as the term implies, an altogether fresh or new hearing and is not limited to an inquiry to determine if the tribunal acted properly and correctly on the evidence and material before it.^[14] Black's Law Dictionary defines, “hearing *de novo*” in the following manner: “Generally, a new hearing or a hearing for the second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing.”^[15] Whether a claim, once reopened, will include the evidence and testimony previously on record is a question of procedural fairness that must be decided in each case. Where a denial of natural justice taints the whole proceeding, the tribunal must start afresh.^[16] In some cases, a procedural fairness violation in the original proceeding will be of such a nature that it would be unfair for the newly constituted panel to be presented with the previous, tainted evidence (for example in the case of interpretation inaccuracies). In other cases, a panel will have the discretion to consider the prior evidence, provided the applicants are given an opportunity to make representations and to provide explanations regarding the prior testimony.^[17] Doing so is generally discretionary; an RPD panel is not *required* to have regard to the transcript from a prior hearing on reconsideration: *Huang v. Canada*.^[18] Where possible, not having to repeat existing testimony is an efficient course of action consistent with a panel's mandate to “deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.” (Canadian Refugee Procedure/Board Jurisdiction and Procedure#IRPA Section 162(2) - Obligation to proceed informally and expeditiously²) A panel's choice to have recourse to the testimony given at a prior sitting is not generally indicative of bias or of having pre-judged a matter.^[19] As a matter of procedure, the Board will generally have its legal services staff review matters that have been reopened or remitted in order to make a recommendation to the Division's management about what should remain on the record for the new panel, and whether certain documents should be removed from the record to avoid tainting the panel.

See also:

- Canadian Refugee Procedure/The right to an impartial decision-maker#A Member considering prior testimony during a redetermination of a claim is not, in itself, indicative of bias³
- Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The record on a court-ordered redetermination⁴

2 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Board_Jurisdiction_and_Procedure#IRPA_Section_162\(2\)_-_Obligation_to_proceed_informally_and_expeditiously](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Board_Jurisdiction_and_Procedure#IRPA_Section_162(2)_-_Obligation_to_proceed_informally_and_expeditiously)
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_impartial_decision-maker#A_Member_considering_prior_testimony_during_a_redetermination_of_a_claim_is_not,_in_itself,_indicative_of_bias

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_record_on_a_court-ordered_redetermination

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_record_on_a_court-ordered_redetermination

39.2 RPD Rule 62(1) - Who may make an application to reopen when

The text of the relevant rules reads:

Reopening a Claim or Application

Application to reopen claim

62 (1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.

39.2.1 History of this provision

Under the previous version of the RPD Rules, the equivalent rule read: "55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned."^[20]

39.2.2 Rule 62(1) applies to applications that have either been decided on their merits or declared abandoned

Rule 62(1) provides that the claimant or the Minister may make an application to the Division to reopen a claim at any time before the RAD or Federal Court has made a final determination in respect of a claim for refugee protection that has been either decided or declared abandoned. As such, reopening applications can be made both to reopen claims that have been abandoned (e.g. *Noel v. Canada*^[21]) as well as those that have been determined on their merits and either accepted or rejected (e.g. *Simmons v. Canada*^[22]).

39.2.3 Limitation on reopening where a final determination has been made by the RAD or Federal Court

Rule 62(9) should be read in conjunction with s. 170.2 of the IRPA which forecloses any reopening of a claim for refugee protection or a claim for protection, pursuant to section 96 and subsection 97(1), respectively, of the Act, when a "final determination" has been made by either the Refugee Appeal Division or the Federal Court:

170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — a claim for refugee protection, an application for protection or an application for cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination.

39.2.4 Burden of proof

As stated in Rule 62(1), either a claimant or the Minister may make an application to the Division to reopen a claim. The burden of proof is on the applicant.^[23] As the Division has held, this burden of proof should be relied upon by the Board and "The role of the Division hearing an application to re-open does not include a fact-finding mission on behalf of the applicants."^[24]

39.3 RPD Rule 62(2) - Form of the application for reopening

The text of the relevant rules reads:

Form of application

(2) The application must be made in accordance with rule 50 and, for the purpose of paragraph 50(5)(a), the Minister is considered to be a party whether or not the Minister took part in the proceedings.

39.3.1 Full Rule 50 requirements apply to such applications

Per Rule 50, the application will have to consist of a notice specifying the grounds on which the application is made, an affidavit setting out the facts [a requirement currently waived by the Covid-19 practice notice], and a statement of law and of argument that is to be relied upon by the applicant: Canadian Refugee Procedure/Applications#Rule 50 - How to Make an Application.⁵

39.4 RPD Rule 62(3) - Contact information

Contact information

(3) If a claimant makes the application, they must include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer.

39.5 RPD Rule 62(4) - Allegations against counsel

Allegations against counsel

(4) If it is alleged in the application that the claimant's counsel in the proceedings that are the subject of the application provided inadequate representation,
(a) the claimant must first provide a copy of the application to the counsel and then provide the original application to the Division, and
(b) the application provided to the Division must be accompanied by a written statement indicating how and when the copy of the application was provided to the counsel.

39.5.1 A claimant must follow the process set out in the relevant Board Practice Notice

See the IRB Practice Notice on Allegations Against Former Counsel.^[25] For more details on the right to counsel, and making arguments about the incompetence thereof, see: Canadian Refugee Procedure/Counsel of Record#Deficiencies of counsel's conduct are properly attributed to their client⁶.

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Applications#Rule_50_-_How_to_Make_an_Application

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#Deficiencies_of_counsel's_conduct_are_properly_attributed_to_their_client

39.6 RPD Rule 62(5) - Copy of the notice of appeal or pending application

Copy of notice of appeal or pending application

(5) The application must be accompanied by a copy of any notice of pending appeal or any pending application for leave to apply for judicial review or any pending application for judicial review.

39.7 RPD Rule 62(6) - Application must not be allowed absent a failure to observe a principle of natural justice

Factor

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

39.7.1 History of this rule

The Federal Court has noted that the RPD's "power to reopen a refugee claim is very limited" and that "the Rules are highly prescriptive". Rule 62(6) states the RPD "must not allow the application unless it is established that there was a failure to observe a principle of natural justice" [emphasis added]. This rule updated the Rule 55(4) found in the previous version of the *Refugee Protection Division Rules*, (SOR/2002-228), which was broader in scope and read that the RPD "must allow the application if it is established that there was a failure to observe a principle of natural justice" [emphasis added].^[26]

39.7.2 Rule 62(6) limits applications to reopen to circumstances where there was a failure to observe a principle of natural justice

Rule 62(6) provides that the Division "must not allow" an application (from a party) to reopen unless it is established that there was a failure to observe a principle of natural justice. As discussed below, there is no requirement that the failure to observe a principle of natural justice arise from an error or mistake by the Board: Canadian Refugee Procedure/Reopening a Claim or Application# "Any relevant factors"⁷.

39.7.3 What is a principle of natural justice and is this the same thing as procedural fairness?

As the Federal Court stated in *Huseen v. Canada*, one can interpret Rule 62(6) as permitting the RPD to reopen a claim where there has been either a denial of natural justice *or* a denial of procedural fairness to the applicant.^[27] This reflects the history of the terms "natural justice" and "procedural fairness". Originally, there was a distinction between the stricter rules of natural justice as they applied to judicial or quasi-judicial decisions ("natural justice") and those rules of fairness which would apply only to administrative decisions ("procedural fairness"). However, this distinction has been eroded and at present

⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#"Any_relevant_factors"

the Courts have accepted that there only exists a general duty of fairness which can be referred to by using either the term “natural justice” or the term “procedural fairness”.^[28]

39.7.4 An applicant may request that the Board reopen for a reason other than a failure to observe a principle of natural justice

The Board has affirmed that the onus is on the applicant to establish on a balance of probabilities there was a denial of a principle of natural justice.^[29] The limited scope of this rule may be contrasted with RPD Rule 60, concerning reopening withdrawn claims, which provides that the may reopen both if “it is established that there was a failure to observe a principle of natural justice” or if “it is otherwise in the interests of justice to allow the application”. Which see: Canadian Refugee Procedure/Reinstating a Withdrawn Claim or Application⁸.

Nonetheless, it is open to a claimant to request that the Board act via Rule 70 to allow an application to reopen on a ground other than procedural fairness (Canadian Refugee Procedure/General Provisions#Rule 70 - Power to change a rule, excuse a person from a rule, extend a time limit, or act on its own initiative⁹). This reflects the fact that it is clear from s. 170.2 of the Act that a panel may reopen on multiple grounds (“any ground”), of which a failure to observe a principle of natural justice is just one (Canadian Refugee Procedure/Reopening a Claim or Application#Section 170.2 of the IRPA¹⁰).

That said, it is arguable that when considering the scheme of the Act, panels should be reticent to waive the requirement of Rule 62(6) that matters only be reopened in situations where a principle of natural justice was not observed, particularly where a panel seeks to re-open for new evidence to be considered. Parliament chose to not make a Pre-Removal Risk Assessment (PRRA) available for 12 months following a refugee decision,^[30] and chose to place limits on adducing new evidence at the Refugee Appeal Division.^[31] A very liberal allowance for reopening to consider new evidence could run contrary to these aspects of the scheme of the Act, and hence these parliamentary choices. The Board has held that the role of the Division hearing an application to re-open does not include a fact-finding mission on behalf of the applicants, and the Division is not to second-guess the assessment of the situation of the original member who presided over the proceeding previously.^[24]

39.8 RPD Rule 62(7) - Factors

Factors

(7) In deciding the application, the Division must consider any relevant factors, including

- (a) whether the application was made in a timely manner and the justification for any delay; and
- (b) the reasons why
 - (i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or

⁸ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reinstating_a_Withdrawn_Claim_or_Application

⁹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/General_Provisions#Rule_70_-_Power_to_change_a_rule,_excuse_a_person_from_a_rule,_extend_a_time_limit,_or_act_on_its_own_initiative

¹⁰ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Section_170.2_of_the_IRPA

(ii) a party did not make an application for leave to apply for judicial review or an application for judicial review.

39.8.1 "Any relevant factors"

In deciding such an application, the Division must consider any relevant factors, including, but not limited to,^[32] those in (a) and (b) enumerated above. As the court noted in *Lopez v. Canada*, these factors must be relevant to the question of whether there has been a failure to observe a principle of natural justice (Rule 62(6)).^[33] The Board and courts have commented that these factors as follows:

- Whether the claimant was represented by counsel.^[34] There is nuance to this criterion, as the court noted in *Huseen v. Canada* wherein it stated "I wish to stress that a failure or delay in engaging counsel is, in itself, not an acceptable panacea to all the harm that results from missteps in the refugee process. Equally unacceptable, however, is a failure on the Board's part to consider an individual's circumstances in these situations."^[35]
- The language(s) the claimants speak. For example, in *Huseen v. Canada* the Board considered that the BOC kit was provided to the claimants in Arabic, their first language, and concluded that this properly pointed away from any conclusion that there had been a failure to observe a principle of natural justice in the case.^[36] The Federal Court also held that an applicant chose not to ask anyone to verify what correspondence about their hearing date said, and consequently missed their hearing, was indicative of how they were not diligently pursuing their refugee claim, notwithstanding their limited literacy.^[37]
- Whether the claimant complied with procedural obligations: Justice McHaffie ruled in *Perez* that "What is clear from the foregoing cases is that a failure to comply with procedural obligations does not automatically disqualify a claimant from relief on fairness grounds, but at some point a claimant will be considered the author of their own misfortune. The line between these two, and thus the assessment of procedural fairness, will be heavily dependent on the overall factual matrix and the conduct of the claimant."^[38] In *Aquirre Meza v. Canada*, the RPD concluded that the Applicant's refugee claim being denied was the result "of a chains of events which the claimant himself set in motion." and was thus not procedurally unfair.^[39]
- Deficiency of counsel: If an application was not made in a timely manner for reasons that had to do with deficiency of counsel, and thus procedural fairness implications arise, then there may have been a failure to observe a principle of natural justice.^[40]

In contrast, the courts have commented that the following factors will generally not be relevant to such an enquiry:

- Lack of prejudice to the Minister is not generally relevant: As the Federal Court commented when considering the analogous Refugee Appeal Division Rule, "it is difficult to see how a lack of prejudice to the Respondent is relevant to whether...there was a failure to observe a principle of natural justice. The Respondent certainly has a justifiable interest and obligation in ensuring that timelines are met. Otherwise, chaos would result. That is why there are time deadlines in the legislation and the relevant rules. Requiring any applicant to meet those timelines is not a breach of any principle of natural justice."^[41]
- There is no requirement that the failure to observe a principle of natural justice arise from an error or mistake by the Board: As stated in *Djilal v Canada*, a failure to observe

a principle of natural justice does not have to be the result of an error or mistake of the RPD.^[42] For example, negligence on the part of an applicant's counsel has been recognized, in certain circumstances, as being sufficient to cause the applicant to have been denied natural justice in relation to an abandonment hearing.^[43] However, but see *Kilave v. Canada*: "Applications to reopen may only be allowed where a breach of natural justice by the Board can be established at the abandonment hearing; arguments that the applicant's counsel was negligent or not diligent is relevant at the abandonment hearing, or on judicial review of the decision from the abandonment hearing, but become irrelevant hereafter. They are not relevant to whether the Board should reopen the claim. (2) The failure of the applicant's original lawyer to file the PIF on time or to obtain an extension, or to attend the abandonment hearing, is not a basis upon which the Court will set aside a Board decision not to reopen a refugee claim."^[44] An additional example of a failure to observe a principle of natural justice that may justify reopening a claim is where a claimant fails to disclose a criminal charge; this may cause a breach of natural justice by preventing the Minister from considering whether to suspend the applicant's refugee claim pursuant to s.103 of *IRPA* pending the outcome of the charges.^[45]

- The fact that a claimant misunderstood their obligations does not in itself establish that they were denied procedural fairness: In *Rokisini v. Canada* the claimant stated that he mistakenly believed that his appeal to the RAD had been perfected. It had not been as the claimant had not submitted an application required, which is required. When the claimant failed to submit his application record by the required deadline, the RAD dismissed the appeal. On judicial review to the Federal Court, the claimant submitted that he misunderstood the obligations to file an appeal, and that if he had properly understood the steps required of him, he would have complied with them. In light of the language of the forms that had been sent by the Board to the claimant advising about the additional steps that he was required to take, the Board held that the claimant's misunderstanding was not sufficient to establish that procedural fairness had been denied: "I am not persuaded by the Applicant's submissions that he *mistakenly assumed* that a hearing would be scheduled for the RAD appeal, and that the *notice of appeal*" was the equivalent of an *appellant's record*. A plain reading of the RAD Acknowledgement Letter would clearly compel the reader to take next steps".^[46]

39.8.2 Whether the application was made in a timely manner and the justification for any delay

Rule 62(7) requires that in deciding such an application, the Division must consider whether the application was made in a timely manner and the justification for any delay. Speed is often of the essence with applications to reopen, as claimants may be facing the prospect of imminent removal by CBSA, even prior to the Board arriving at a decision on the reopening application. A reopening application does not provide an automatic stay of removal. Reasons for delay that have been held to be "significant factors in play" in such cases have included:

- How long the applicant had access to any new evidence: In *Adgo v. Canada* the court considered the analogous RAD rule and concluded that the Division was reasonable in denying an application and finding that there was no breach of procedural fairness in a situation where an applicant requested reopening a claim so that it could consider

documents that the applicant had had access to for some months prior to the decision being rendered.^[47]

- Challenges finding counsel because of holidays. For example, in *Huseen v. Canada* the court noted that the claimants "had difficulty finding a lawyer between the move to Alberta on December 18, 2013 and the January 7, 2014 abandonment hearing due to the Christmas holiday season".^[34]
- Whether the claimant was diligent in keeping in touch with their counsel and the Board. For example, in *Garcia v. Canada* the Applicant could not be located despite (i) several months of both his counsel and the IRB trying unsuccessfully to locate and contact him, and (ii) the IRB thereafter rescheduling the hearing in the hope of giving the applicant a final chance. The court concluded that it was reasonable for the Board to refuse to reopen the claim in the circumstances.^[48] In contrast, in *Glowacki v. Canada*, the claim was abandoned after neither the claimant nor their counsel updated the claimants' contact information with the IRB when they moved. Counsel had gotten off the record because their legal aid certificate had been cancelled, but without providing the claimants' updated contact information. The claimants then did not receive the Notice to Appear for their hearing. In the circumstances, the court concluded that the Division's refusal to reopen the claim was unreasonable, noting that no slip or mistake of counsel should be permitted to bring about a miscarriage of justice.^[49]
- Whether the claimant was diligent in making attempts to understand the decision terminating their claim. For example, in *Driss v. Canada*, the claimant's claim was closed and then the claimant waited two years before attempting to reopen the claim. The court concluded that the evidence before the panel was that the claimant received the original decision terminating the claim in a timely manner but failed to understand its significance or to make any attempt to understand its content. The court upheld the Board's decision that the claimant's evidence was insufficient to justify a two-year delay.^[50] In contrast, in *Ravi v. Canada*, the claimant applied to have his negative decision re-opened approximately 20 months after the decision was made. The court concluded that in the circumstances, including the applicant's significant mental health issues, including auditory hallucinations, paranoia and distress affecting his functioning in society, the claim should have been re-opened despite the amount of time that had passed.^[51]

39.9 RPD Rule 62(8) - Subsequent application

Subsequent application

(8) If the party made a previous application to reopen that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

39.9.1 The Division should look at whether there is new evidence that was not before the original panel

Rule 62(8) provides that if a party made a previous application to reopen that was denied, the Division must not allow the subsequent application unless there are exceptional circumstances supported by new evidence. Such evidence must be new in the sense that it was not before the Division at the time of the original application to reopen.^[52]

39.9.2 The test for subsequent applications is whether there are exceptional circumstances supported by new evidence

As per Rule 62(6), the test for whether to allow an initial application to reopen focuses on whether there was a failure to observe a principle of natural justice: "The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice." As the Federal Court stated in *Brown v. Canada*, "the legal test is different for the first application to re-open. A first application to re-open a claim focuses on a breach of natural justice (s. 62(6) of the RPD Rules) as opposed to a second application which requires exceptional circumstances (s. 62(8) of the RPD Rules) for a file to be re-opened."^[53]

39.10 RPD Rule 62(9) - Other remedies and timing of decision

Other remedies

(9) If there is a pending appeal to the Refugee Appeal Division or a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of a claim, or dismiss the application.

39.11 RPD Rule 63 - Application to reopen application to vacate or to cease refugee protection

Application to reopen application to vacate or to cease refugee protection

63 (1) At any time before the Federal Court has made a final determination in respect of an application to vacate or to cease refugee protection that has been decided or declared abandoned, the Minister or the protected person may make an application to the Division to reopen the application.

Form of application

(2) The application must be made in accordance with rule 50.

Contact information

(3) If a protected person makes the application, they must include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer, and they must provide a copy of the application to the Minister.

Allegations against counsel

(4) If it is alleged in the application that the protected person's counsel in the proceedings that are the subject of the application to reopen provided inadequate representation,

- (a) the protected person must first provide a copy of the application to the counsel and then provide the original application to the Division, and
- (b) the application provided to the Division must be accompanied by a written statement indicating how and when the copy of the application was provided to the counsel.

Copy of pending application

(5) The application must be accompanied by a copy of any pending application for leave to apply for judicial review or any pending application for judicial review in respect of the application to vacate or to cease refugee protection.

Factor

(6) The Division must not allow the application unless it is established that

there was a failure to observe a principle of natural justice.

Factors

- (7) In deciding the application, the Division must consider any relevant factors, including
- (a) whether the application was made in a timely manner and the justification for any delay; and
 - (b) if a party did not make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made.

Subsequent application

- (8) If the party made a previous application to reopen that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

Other remedies

- (9) If there is a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of a claim, or dismiss the application.

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40 Applications to Vacate or to Cease Refugee Protection (RPD Rule 64)

40.1 IRPA Section 108: Cessation of Refugee Protection

Section 108 of the *Immigration and Refugee Protection Act* reads:

Cessation of Refugee Protection
Rejection

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

- (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.

Cessation of refugee protection

- (2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

Effect of decision

- (3) If the application is allowed, the claim of the person is deemed to be rejected.

Exception

- (4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

40.1.1 The responsible Minister for applications to cease refugee protection is the Minister of Citizenship and Immigration

Section 108(2) of the IRPA provides that "on application by the Minister, the Refugee Protection Division may determine that refugee protection [has ceased]". The responsible Minister for section 108(2), cessation, is the Minister of Citizenship and Immigration. This is so as, per section 4(1) of the IRPA, the Minister of Citizenship and Immigration is responsible for the administration of the IRPA except as otherwise provided: Canadian Refugee Procedure/4-6 - Enabling Authority¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/4-6_-_Enabling_Authority

Section 6 of the IRPA provides that the Minister responsible may designate any person or class of person as officers to carry out any purpose of any provision of the IRPA: Canadian Refugee Procedure/4-6 - Enabling Authority². The Minister's authority for making cessation applications has been delegated to CBSA hearings officers and IRCC senior immigration officers.^[1]

40.2 IRPA Section 109: Applications to Vacate

Section 109 of the *Immigration and Refugee Protection Act* reads:

Applications to Vacate
Vacation of refugee protection

109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

Rejection of application

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

Allowance of application

(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

40.2.1 History of this provision

Prior to the enactment of the *IRPA*, the vacation of a decision granting Convention refugee protection was dealt with under sections 69.2 and 69.3 of the *Immigration Act*, RSC 1985, c I-2 (as amended). Broadly speaking, subsection 69.2(2) of the *Immigration Act* corresponded to what is now subsection 109(1) of the *IRPA* and subsection 69.3(5) of the *Immigration Act* corresponded to what is now subsection 109(2) of the *IRPA*. Subsection 69.3(5) of the *Immigration Act* stated:

The Refugee Division may reject an application under subsection 69.2(2) that is otherwise established if it is of the opinion that, notwithstanding that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, there was other sufficient evidence on which the determination was or could have been based.^[2]

40.2.2 New evidence is allowed for the assessment of s. 109(1), but not s. 109(2)

At the vacation hearing, both the Minister and claimant may adduce new evidence relating to alleged misrepresentation at the determination hearing. While new evidence is not permitted under s.109(2) to uphold the original determination, it is permitted under s.109(1) on the issue of misrepresentation.^[3] For example, in *Bhuchung v. Canada*, the court held

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/4-6_-_Enabling_Authority

that in precluding a refugee from relying on new evidence capable of confirming his identity and rebutting the Minister's allegations of misrepresentation, the RPD erroneously applied the restrictions applicable to s.109(2) to s.109(1). This error both undermined the reasonableness of the RPD's decision as a whole and effectively deprived the refugee of procedural fairness in not being afforded a meaningful opportunity to answer the Minister's case.^[3]

40.3 RPD Rule 64

The text of rule 64 reads:

Applications to Vacate or to Cease Refugee Protection

Form of application

64 (1) An application to vacate or to cease refugee protection made by the Minister must be in writing and made in accordance with this rule.

Content of application

(2) In the application, the Minister must include

- (a) the contact information of the protected person and of their counsel, if any;
- (b) the identification number given by the Department of Citizenship and Immigration to the protected person;
- (c) the date and file number of any Division decision with respect to the protected person;
- (d) in the case of a person whose application for protection was allowed abroad, the person's file number, a copy of the decision and the location of the office;
- (e) the decision that the Minister wants the Division to make; and
- (f) the reasons why the Division should make that decision.

Providing application to protected person and Division

(3) The Minister must provide

- (a) a copy of the application to the protected person; and
- (b) the original of the application to the registry office that provided the notice of decision in the claim or to a registry office specified by the Division, together with a written statement indicating how and when a copy was provided to the protected person.

40.3.1 History

The process for cessation and vacation applications has evolved over time. When the Convention Refugee Determination Division was founded, the Minister could make an application to it for cessation or vacation of a person's refugee status, but an application for vacation first required leave 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.^[4] The leave requirement was eventually eliminated and one-person panels instead began to decide such applications. When the CBSA was created in the early 2000s, it took on the mandate for the cessation or vacation of refugee protection (see: Canadian Refugee Procedure/History of refugee procedure in Canada#Post-IRPA measures³). Then, in 2012, the legislation was modified such that cessation proceedings would revoke a refugee's PR status per the *Protecting Canada's Immigration System Act*.^[5] Then, in 2013-14 the CBSA identified cessation and vacation applications as a priority and set itself an internal annual target of 875 applications.^[6]

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/History_of_refugee_procedure_in_Canada#Post-IRPA_measures

In January 2021, IRCC received the delegated authority to file cessation applications, in addition to CBSA.

40.3.2 Use of this rule where a previous application to cease or vacate protection has been withdrawn

A question can arise about the interaction between this rule, which allows the Minister to commence an application to vacate or cease refugee protection, and Rule 61, which allows the Minister to reinstate a withdrawn application to vacate or to cease refugee protection: Canadian Refugee Procedure/Reinstating a Withdrawn Claim or Application#Rule 61 - Application to reinstate withdrawn application to vacate or to cease refugee protection⁴. Where the Minister wishes to reinstate a previous application to vacate or cease refugee protection, they must use Rule 61. However, where the Minister wishes to make a new application based on new facts and allegations, then they may make a new application to cease or vacate refugee status, notwithstanding the existence of a previous withdrawn application for same that was based on different facts. This issue arose in *Cohen v. Canada*, a case in which a previous Minister's application to vacate refugee protection had been withdrawn by the Minister. The Minister then filed a subsequent application to vacate the applicant's refugee status pursuant to Rule 64 of the Rules. The RPD found that the Minister's vacation application filed pursuant to Rule 64 as a "new" application was filed in error and that the application should have been filed pursuant to Rule 61(1) as a reinstatement of the withdrawn application to vacate.^[7] The answer as to whether Rule 61 or Rule 64 should be used in a particular case will be a factual one. If the application is substantially based on the previous allegations, or information which, while new to the Minister was obtainable with reasonable diligence, then the Minister should proceed by way of reinstatement. In contrast, where new events occur subsequent to the withdrawal of a previous application, for example a new act of reavailment of a country's protection, then this will point to the use of Rule 64 being appropriate for a new application. Any other result could lead to absurd consequences, for example tying the Minister's hands to bring a new application to cease protection even where a claimant has engaged in new, obvious, and high-profile instances of reavailment that could bring the refugee protection system into disrepute.

40.3.3 Rule 64(3): The Minister must provide a copy of the application to the protected person

Rule 64(3) requires that the Minister provide a copy of the application to the protected person and that the Minister provide a written statement indicating how and when a copy was provided to the protected person. In some circumstances, the Minister may not be able to locate the protected person to serve a copy of the application.^[8] In those circumstances, the Minister is required to make an application under RPD Rule 40 to vary or be excused from the service requirement. That rule also provides that the RPD must not allow such an application unless it is satisfied that reasonable efforts have been made to provide the document as required: Canadian Refugee Procedure/Documents#Rule 40 - Application if

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reinstating_a_Withdrawn_Claim_or_Application#Rule_61_-_Application_to_reinstate_withdrawn_application_to_vacate_or_to_cease_refugee_protection

unable to provide document⁵. This service issue is distinct from issues that arise where a protected person has been served with an application and then does not keep their contact information current with the IRB and Minister; once a protected person has been served with an application, pursuant to RPD Rule 12, the onus is on that person to notify the Division and Minister of any address changes for themselves or their counsel: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 12 - Supplying contact information after an Application to Vacate or to Cease Refugee Protection⁶.

40.3.4 Rule 64(3): The Minister must provide a copy of the application to the protected person and this can be done even where the protected person is located outside of Canada

Rule 64(3) requires the Minister to provide a copy of the application to the protected person. Where the protected person is no longer in Canada, the Minister may be permitted to serve the protected person at an address outside Canada and the person may participate by telephone or other appropriate means.^[8] The fact that a protected person is located outside of Canada thus does not relieve the Minister of their service obligation.^[9]

40.3.5 Timeliness of the Minister making an application to cease or vacate protection

At times applicants have argued that the Minister engaged in an abuse of process by filing an application for cessation years after having known that the applicant had returned to their country of origin. This argument was rejected in *Seid v. Canada*, with Justice LeBlanc holding that for a delay to constitute an abuse of process, it “must have been part of an administrative or legal proceeding that was already under way.”^[10]

See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#A party is entitled to a hearing without unreasonable delay that causes serious prejudice⁷ and Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Abuse of process and actions of parties and the Board⁸.

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7. *Cohen v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1101 (CanLII) <¹³>
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9. See, as an example, *Seid, Faradj Mabrouk v. M.C.I.* (F.C. no. IMM-2555-18), LeBlanc, November 21, 2018; 2018 FC 1167 at paragraph 16 (protected person served in Chad).
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41 Abandonment (RPD Rule 65)

The RPD may declare a claim to be abandoned. A determination that a claim has been abandoned means that the claimant is "in default in the proceedings", per s. 168 of the Act. Most declarations of abandonment occur because a claimant failed to complete and submit a BOC. However, a significant number of declarations of abandonment occur after a claimant fails to appear for a hearing.^[1]

41.1 Subsection 168(1) of the Act

The relevant provision of the IRPA reads:

Abandonment of proceeding

168 (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

41.1.1 The Board should produce written reasons for its determination that a claim has been abandoned

For a discussion of the obligation to produce written reasons for the abandonment of a claim, see: Canadian Refugee Procedure/Decisions#Must the Board provide written reasons for its determination that a claim has been abandoned?¹

41.1.2 A claim is not automatically abandoned upon a claimant's departure from Canada

The Federal Court has noted that, all things being equal, a refugee claim is not automatically abandoned when a claimant leaves Canada. Instead, it should only be considered abandoned when the IRB makes a decision to that effect pursuant to section 168 of IRPA.^[2] Even where a claimant is outside of Canada, the Division may have jurisdiction regarding a claim that is properly before it.^[3] That said, there will be circumstances where the reason why an individual is outside of Canada indicates that their refugee claim has been extinguished, for example the Ontario Court of Appeal has accepted that the execution of a removal order under subsection 40(3) of Ontario's *Childrens Law Reform Act* extinguishes a refugee claim.^[4]

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#Must_the_Board_provide_written_reasons_for_its_determination_that_a_claim_has_been_abandoned?

41.1.3 Decisions about abandonment may not be appealed to the Refugee Appeal Division

Decisions regarding abandonment are not eligible for appeal to the RAD, but such decisions may be judicially reviewed. For an example of such a direct judicial review of an RPD abandonment decision that was considered by the court, see *Singh v. Canada*.^[5]

41.1.4 A Division may determine that any proceeding before it has been abandoned, not just a refugee claim

Section 168 of the IRPA provides that a Division may determine that a proceeding before it has been abandoned. The term "proceeding" in the Act and Rules is interpreted broadly to include, for example, pre-hearing applications and Minister's applications to cease protection: Canadian Refugee Procedure/Definitions².

41.2 RPD Rule 65(1) - Opportunity to Explain

The text of Rule 65 (concerning abandonment) reads:

Abandonment

Opportunity to explain

65 (1) In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned,
(a) immediately, if the claimant is present at the proceeding and the Division considers that it is fair to do so; or
(b) in any other case, by way of a special hearing.

41.2.1 Minor claimants must have a representative appointed for them prior to any decision on abandonment being made

As the Federal Court of Appeal commented in *Stumpf v. Canada*, "the age of the minor claimant was apparent from the outset, and the matter of designating a representative for her should have been considered at least at the point at which abandonment proceedings were in contemplation.... The failure of the Board to do so was an error that vitiates the decision...".^[6]

41.2.2 This particular rule does not apply to situations where Minister's counsel does not appear for a cessation or vacation proceeding

In *Singh v. Canada*, the RPD noted that Rule 65 of the *Rules*, which only outlines a process for abandonment proceedings where a refugee claimant fails to appear, does not apply to a situation where the Minister's counsel fails to appear.^[7] However, in such circumstances, the Division has broad discretion, including to postpone a hearing and send a written

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions#Commentary_on_the_definition_of_'proceeding';

communication to the Minister inquiring into the reasons why they did not attend the hearing on their application.^[8]

41.3 RPD Rule 65(2) - When the BOC Abandonment hearing must be scheduled

Special hearing - Basis of Claim Form

(2) The special hearing on the abandonment of the claim for the failure to provide a completed Basis of Claim Form in accordance with paragraph 7(5)(a) must be held no later than five working days after the day on which the completed Basis of Claim Form was due. At the special hearing, the claimant must provide their completed Basis of Claim Form, unless the form has already been provided to the Division.

41.3.1 The timeline for when the Division must receive a BOC form set out in paragraph 7(5)(a) has been modified during the Covid-19 pandemic

For details, see: Canadian Refugee Procedure/Information and Documents to be Provided#When a claimant must provide their BOC form³.

41.3.2 The normal timeline for scheduling a special hearing on abandonment for failure to provide a BOC form is suspended during the Covid-19 pandemic

The *Refugee Protection Division: Practice Notice on the resumption of in-person hearings* states that during the Covid-19 pandemic, "Although special hearings are usually held no later than five working days after the date the BOC Form is due, during the COVID-19 pandemic, the RPD may conduct these hearings beyond the five working days."^[9]

41.3.3 This rule applies whether the BOC form is not supplied at all or whether the BOC form is only partially filled out

The Board provided the following commentary to the previous version of the RPD Rules, which applies equally to this wording:

The [Form must] be *complete*. If the Division does not receive the [Form] or if the [Form] is not complete, a special hearing will be held ... to decide whether the claim should be declared abandoned (*Immigration and Refugee Protection Act*, subsection 168(1)). The claimant will be given a chance to explain the delay or default and give reasons why the claim should not be declared abandoned.^[10]

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#When_a_claimant_must_provide_their_BOC_form

41.4 RPD Rule 65(3) - When the special hearing for failure to appear must be scheduled

Special hearing - failure to appear

(3) The special hearing on the abandonment of the claim for the failure to appear for the hearing of the claim must be held no later than five working days after the day originally fixed for the hearing of the claim.

41.4.1 Where a claimant leaves the hearing early, should the Board schedule a resumption or commence the show cause abandonment?

Nanava v. Canada is a case which raises the question of when the Board should commence the abandonment procedure. Specifically, in that case a hearing before the RPD was commenced on March 2, 2017. At that hearing, Mr. Nanava became ill and fainted. Security personnel attended to him until emergency medical staff arrived. Mr. Nanava eventually regained consciousness and was transported to Mount Sinai Hospital in Toronto by the emergency medical staff. Counsel then applied to schedule a new sitting for the hearing of the claim to resume. The Member denied that request, and instead held that the proper procedure was that the claimant should demonstrate why he had not abandoned his claim by fainting and being taken to the hospital. The court commented on the Board's decision thusly:

I note that the RPD's decision to embark upon a show cause hearing was also unreasonable. Given that Mr. Nanava and Counsel attended the scheduled March 2 hearing fully prepared to argue Mr. Nanava's refugee claim, and that they were interrupted during the hearing by medical circumstances beyond Mr. Nanava's control, it would have been appropriate to adjourn the substantive hearing to another date. In my view, Mr. Nanava was not in default in the proceedings. It follows that the conditions necessary to move into a show cause hearing were not met.^[11]

In contrast, in *Liang v. Canada* the claimant appeared at the hearing but was not prepared to proceed and refused to do so. In that case, the court found that it was proper for the abandonment process to be triggered when the claimant refused to proceed and left the hearing.^[12]

41.5 RPD Rule 65(4) - Factors to consider at an abandonment hearing

Factors to consider

(4) The Division must consider, in deciding if the claim should be declared abandoned, the explanation given by the claimant and any other relevant factors, including the fact that the claimant is ready to start or continue the proceedings.

41.5.1 The Board should consider whether the claimant has pursued their claim with diligence

When determining whether a claim has been abandoned, the test to be applied is whether the refugee claimant's conduct amounts to an expression of intention by that person that

they do not wish to pursue (or has shown no interest in pursuing) their claim with diligence.^[13] It is said that *the central consideration with respect to abandonment proceedings is whether the claimant's conduct amounts to an expression of his or her intention to diligently prosecute his or her claim.*^[14] Another way that this test has been phrased is that it "must determine whether [the claimant's] absences could reasonably be deemed an expression of his intention to no longer pursue his refugee claim with diligence, bearing in mind his obligation to provide a reasonable excuse for his failure to appear, as well as all of the other relevant factors which bear upon the matter".^[15] Subrule 65(4) directs the RPD to consider, in determining if a claim should be declared abandoned, "the explanation given by the claimant", whether *the claimant is ready to start or continue the proceedings*, as well as *any other relevant factors*. The RPD must decide whether the Applicant's conduct showed that they did not wish or had no interest in pursuing their claim with diligence.^[16] The Court has held that a person whose safety is threatened in his or her country of origin and who is seeking the protection of a country of refuge is necessarily keen to comply with the legal framework that has been established for that purpose, and that it should not tolerate laxity.^[17] Furthermore, by the very wording of section 168(1) of the IRPA, the power to declare the abandonment of a proceeding is a discretionary power. The RPD is entitled to make such a declaration "if it is of the opinion" that the refugee protection claimant is in default in the proceedings.^[18] Factors that have been considered when assessing a claimant's diligence:

The explanation given by the claimant

- Whether inability to proceed is caused by counsel instead of the claimant: In *Mayilvahanam v. Canada*, the evidence was that the applicant wished to proceed but was newly left on his own by counsel and did not wish to proceed without counsel. The court held that it had been unreasonable for the Division to abandon the claim as "The Member did not take into account all the relevant facts but merely focused on the length of time that the application had been in the IRB system. The evidence clearly establishes that the Applicant wished to proceed. The only evidence of abandonment is abandonment by counsel of his client."^[19] In contrast, in *Singh v Canada* a claim was abandoned because a complete BOC form was not provided to the Board, despite the claimant having been specifically advised of this deficiency and having been provided with time to remedy it, on the basis that the delict was the claimant's given the evidence before the tribunal that the claimant refused to attend at his counsel's office to remedy the deficiency, despite his counsel's entreaties to do so.^[20]
- Whether the claimant has provided credible testimony to explain the delay: In *Parveen v. Canada*, the panel found that the claimant's explanation of a medical reason for her failure to attend her hearing was not credible as her explanation was shifting, evasive, and inconsistent. The court accepted that this incredible testimony reasonably supported the Board's conclusion that the claimant was not pursuing her claim diligently.^[21] Similarly, in *Konya v. Canada*, the court concluded that the fact that the claimant had submitted a fraudulent medical certificate to attempt to obtain a postponement of the hearing supported the Board's conclusion that they were not pursuing their claim diligently.^[22] In contrast, in *Nanava v. Canada* the claimant's counsel appeared at the claimant's abandonment hearing with medical evidence to show cause for Mr. Nanava's absence from the abandonment hearing. Even though this evidence did not meet all of the requirements

of Rules 65(5)-(7), the court still held that it was relevant to the claimant's continuing intention to pursue his claim.^[23]

Attendance and scheduling history before the Division

- Whether the claimant and/or counsel have attended past proceedings before the Board: The Board's claimant guide instructs claimants that "the RPD may declare that your claim has been abandoned if you do not go to your refugee protection claim hearing or do not go to your special hearing on the abandonment of your claim, if you are required to do so."^[24] As such, whether or not the claimant is appearing at the Board's proceedings is a very relevant consideration when determining whether or not the claimant has abandoned their claim. In *Nanava v. Canada*, the fact that Mr. Nanava and Counsel were at Mr. Nanava's scheduled refugee claim hearing on March 2, 2017 in order to pursue Mr. Nanava's substantive claim (but were unable to proceed) and the fact that counsel attempted to reschedule the abandonment hearing to a different date when he would be available so that he could reiterate his client's intent to pursue his claim and show cause for Mr. Nanava's absence were factors that pointed towards the claimant's continuing interest in pursuing his claim.^[23] In contrast, counsel for the Minister argued that "the Member reasonably decided that Mr. Nanava had abandoned his claim after Mr. Nanava failed to show on two separate occasions, and failed to provide a proper medical certificate as evidence of his inability to attend." The court rejected that argument on the facts of that case, but in general this would appear to be a proper consideration to be balanced amongst others.
- Whether past scheduling accommodations have been provided by the Board: For example, in *Uandara v. Canada* the Minister highlighted the number of accommodations that the claimants received, including two hearing postponements, the transferring of their file, and the scheduling of a videoconference. The court held that such factors were important in assessing the case: "For people who claim to fear returning to Namibia, the Applicants appear to have made little effort to establish their claim for refugee protection in Canada. The record suggests repeated accommodation by the Board and failures to appear by the Applicants that are more consistent with an attitude of avoidance than an attempt to assert a claim."^[25]

Documents and information that the claimant has provided

- Whether the claimant has been diligent in keeping the Board up to date with their current and correct contact information: RPD Rule 4 requires claimants to provide any changes to their contact information in writing to the Division without delay: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 4 - Claimant's contact information⁴. The Board's claimant guide also instructs claimants about the importance of providing the Board with their current contact information, warning that "the RPD may declare that your claim has been abandoned if you do not provide your current and correct contact information."^[24] The court has tended to be sympathetic where a claimant did not receive a notice from the Board as a result of a mistake, even where it is the claimant's mistake. Some examples follow:

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_4_-_Claimant's_contact_information

- A claimant should not be faulted for using the wrong form to supply updated contact information to the IRB: In *Huseen v. Canada*, the court commented on the Board's decision to abandon a claim in circumstances where a claimant had moved and had provided the Board with their updated contact information: "the Board had the opportunity and time to contact the [claimant] to inquire about any desire to abandon her claim. Indeed, the [location] change request form had her telephone number and the address at which the [claimant] could have been reached in Alberta. However, the Board did not do so, choosing instead to presume that she intended to have her claim abandoned, despite the message implicit in her change of venue request."^[26] The court held in that case that the Board had acted unreasonably.
- A claimant should not generally be faulted where their counsel or interpreter was at fault in not providing updated contact information: The steps that the claimant took are relevant, whether or not updated contact information was actually received the Board. For example, in *Andreoli v Canada*, the claimant had told an interpreter about a change in address, and the interpreter had said they would advise the RPD but failed to do so; the resultant abandonment was held by the Court to be unfair in the circumstances.^[27] Similarly, in *Kabende v. Canada*, there was an administrative error on the part of claimant's counsel which meant that updated contact information did not reach the IRB; while noting that the Board could not be faulted, the court nonetheless allowed the claimant's application to reinstate their claim.^[28]
- Leeway should be shown where a claimant has supplied updated contact information to IRCC or CBSA, even if not the IRB: In *Karagoz v. Canada*, the claimant had mistakenly provided his change of address to CBSA but not the IRB; in the result, the court allowed the judicial review of a refusal to open a claim that had been declared abandoned. In that case, the court held that the claimant demonstrated a continuing *bona fide* intention to pursue his claim and the only reason he did not receive his Notice to Appear was a mistake.^[29]
- Whether the claimant has complied with the Division's rules:
 - Whether the claimant has complied with the requirements of the RPD rules to provide information and forms: As the Board indicated in its public commentary to the previous version of the rules, "Where a party, whether represented by counsel or not, is not prepared to proceed, the Division may determine that the proceeding before it has been abandoned if the Division is of the opinion that the party is in default in the proceedings".^[10] The Irwin Law text *Refugee Law* notes that "although technically a claim may be declared abandoned for any default, including the failure to file documents, only the most serious defaults will generally lead to abandonment proceedings."^[1] As a result, where a party attends their hearing but is manifestly unready to proceed, for example without a complete BOC form that has been appropriately interpreted to them, then this is a factor that may rightfully point towards abandonment. *Singh v. Canada* was one such case in which the court upheld an IRB decision to declare a claim abandoned on the basis that the PIF was incomplete because it lacked an interpreter's declaration, despite the Board previously having advised the claimant of this deficiency and having provided time to rectify it.^[30] Similarly, RPD Member Kivlichan concluded in 2012 that a claim should be abandoned because, *inter alia*, required information about family members was not included in the PIF form.^[31]
 - Whether the claimant has complied with the Rules about providing medical documents, where applicable: In *Parveen v. Canada*, the court upheld a Board decision that

this factor pointed towards the claimant having abandoned their claim, noting that the claimant lacked diligence in pursuing her claim by not presenting the required medical documentation.^[21] Even where a claimant's medical certificate does not comply with Rules 65(5)-(7), this is but one factor that the Board must consider in a global assessment of "any relevant factors". For example, the court commented as follows in *Nanava v. Canada*: "Under the circumstances, I am not satisfied the Member considered any factors other than the purported inadequacy of Mr. Nanava's medical evidence. Such an approach is inconsistent with the broad language of subsection 65(4) of the *Rules* and with the jurisprudence."^[15]

- The extent to which the claimant has submitted documents to support the case: In *Parveen v. Canada*, the court upheld a Board decision that this factor pointed towards the claimant having abandoned their claim, noting that "While her claim has been pending for over six years, the Applicant has not submitted any supporting documents and has not given notice of any witnesses to be called. When asked why she had not submitted any supporting documents, the Applicant answered: 'They are ... they are there. If you give me two to three weeks, yes, I can come along with those documents' In these circumstances, it was reasonable for the RPD to find that the Applicant was not ready to pursue her claim on the date originally scheduled or on the date of the show cause hearing."^[32] In contrast, in *Nanava v. Canada* the claimant's counsel appeared at the claimant's abandonment hearing with documents pertaining to a substantive part of Mr. Nanava's refugee claim in order to reiterate his client's intent to pursue his claim. The court held that this was a factor pointing towards the claimant's continuing interest in pursuing his claim with diligence.^[23]

41.6 RPD Rules 65(5)-(7) - Medical reasons

Medical reasons

(5) If the claimant's explanation includes medical reasons, other than those related to their counsel, they must provide, together with the explanation, the original of a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate.

Content of certificate

(6) The medical certificate must set out

- (a) the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim, or otherwise pursuing their claim, as the case may be; and
- (b) the date on which the claimant is expected to be able to pursue their claim.

Failure to provide medical certificate

(7) If a claimant fails to provide a medical certificate in accordance with subrules (5) and (6), the claimant must include in their explanation

- (a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;
- (b) particulars of the medical reasons included in the explanation, supported by corroborating evidence; and
- (c) an explanation of how the medical condition prevented them from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim or otherwise pursuing their claim, as the case may be.

41.6.1 This rule about providing medical certificates is waived during the Covid-19 pandemic

Until further notice, as a result of Covid-19, where the RPD Rules contain a requirement to provide a medical certificate, this requirement as well as the requirement to explain why there is no medical certificate, is waived.^[33] However, even though a medical certificate need not be provided, the same content that would ordinarily be expected in a medical certificate should nonetheless be provided, albeit just not in the form of a formal medical note.

41.6.2 Does the claimant's medical certificate comply with the requirements of Rule 65(5) and 65(6)?

Rule 65(6)(a): Does the medical certificate set out the particulars of the medical condition?

Rules 65(6) requires that a claimant provide a medical certificate which sets out the particulars of their medical condition, without specifying the diagnosis, that prevented the claimant from pursuing their claim. The Board should assess the sufficiency of the reasons offered in light of the test above, namely which the claimant is diligently pursuing their claim. So, for example, in *Uandara v. Canada*, the claimants, residing in Edmonton, provided a doctor's note saying that the female Applicant "probably should not be flying on an airplane to Toronto at this time." The court held that this would not explain why the claimants could not attend the hearing by videoconference given that the claimants had been advised that they did not need to travel to Toronto for the hearing, that their counsel was participating in the hearing by videoconference, and that the claimant were told that they could participate from Edmonton by videoconference. The court noted that "There is no explanation from the Applicants, or anyone else, as to why they did not ask to attend by videoconference. They simply informed the Board that they would not be attending the hearing and the doctor's note they eventually provided only speaks to air travel."^[34] As such, this is an example of where the claimant's medical condition, even if accepted, did not indicate why the claimant was prevented from appearing for the hearing of the claim. This is an example of the way in which Rule 65(6)(a) requires a medical certificate, but then establishes a legal test for assessing whether the medical reasons offered are sufficient to explain the claimant's non-participation in the hearing.

Rule 65(6)(b): When will a medical certificate have adequately stated when the claimant is expected to be able to pursue their claim?

Rule 65(6)(b) indicates that a claimant must provide a medical certificate which sets out the date on which the claimant is expected to be able to pursue their claim. This issue arose in *Guo v. Canada*, the applicant's hearing before the RPD was scheduled to take place on January 27, 2014. On January 23, 2014, applicant's counsel requested that the hearing be postponed because the applicant was sick. In support of this request, counsel filed a letter from the applicant's doctor dated January 23, 2014, indicating that the applicant: (i) had bronchitis and possibly hypertension, (ii) was prescribed antibiotics and cough syrup, and (iii) told his doctor that he had a fever on the night on January 22, 2014. The doctor's letter included a recommendation that the claimant stay home for one week. The RPD concluded that the claimant had abandoned his claim and that the medical note in question was

deficient by failing to indicate the date on which the applicant was expected to be able to pursue the claim. On judicial review, the court concluded that the RPD acted unreasonably in so concluding. The court commented on this issue this way: "It follows that the end of that week indicates the date on which the applicant could be expected to be available. To ask for more seems pedantic."^[35] As such, panels of the Board should not adopt an excessive technical or pedantic approach to the application of this rule. In contrast, in *Parveen v. Canada*, the claimant submitted a prescription and blood test results, documents which did not explain when the claimant would be able to pursue her claim. The court upheld the Board's determination that these documents did not comply with the requirements of Rule 65.^[36]

41.6.3 If the claimant has not provided a medical certificate, have they met the requirements of Rule 65(7)?

Rule 65(7)(a): The claimant must provide particulars of any efforts they made to obtain the required medical certificate

A claimant is to provide a medical certificate that complies with the requirements set out in rules 65(5) and 65(6). If they do not do so, they must include in the explanation that they provide to the Board particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence. Where they fail to do so, this will point against the claimant having sufficiently explained why they were not able to attend their hearing and will point towards them having abandoned their claim. For example, in *Parveen v. Canada*, the claimant had not supplied the required medical certificate and "no explanation was submitted as to why the Applicant was unable to provide a medical certificate containing the required information in the form prescribed by subrules 65(5) and 65(6) of the RPD Rules." The court concluded that this supported the reasonableness of the Board's conclusion that the medical evidence offered was not sufficient to explain why the claimant had been unable to attend the hearing.

Rule 65(7)(c): The claimant must explain how their medical condition prevented them from pursuing their claim

The mere fact that the claimant has received some medical attention is insufficient to explain why they could not pursue their claim or attend at a hearing. In *Parveen v. Canada*, the claimant had provided a prescription and the results of a blood test, both dated February 15, 2018. The court held that "these documents do not explain why the Applicant was not able to attend on February 16, 2018". The Board held that the medical evidence offered was not sufficient to explain why the claimant had been unable to attend the hearing. The court concluded that this was a reasonable finding on the evidence.^[36]

41.6.4 How should the panel determine whether the medical reasons offered are sufficient?

The documents offered should include details which "explain why the [claimant] was not able to attend" their hearing.^[36] When will the medical documents offer a sufficient explanation? Some principles emerge from the caselaw:

- A panel of the Board should not second-guess a doctor's recommendations: In *Guo v. Canada*, the claimant's doctor had diagnosed the claimant with acute bronchitis and had recommended that he stay home for a week. The Board concluded that the claimant's information about his medical condition was not sufficient to substantiate that the claimant would have been unable to participate in the hearing. The court stated that it was "not satisfied that the situation required that the applicant go against his doctor's recommendation".^[37] As such, where a doctor has provided a recommendation (in this case, to stay home) the Board should not second-guess that recommendation without good reason.
- Even where the technical requirements of the above rules on medical documents have not been complied with, this is just one factor to consider under 65(4) and should not automatically result in the claim being declared abandoned: For example, in *Nanava v. Canada*, the court commented that "the Member unreasonably fixated upon the technical deficiencies of Mr. Nanava's medical certificates and failed to consider other relevant factors in assessing whether Mr. Nanava had abandoned his claim. As noted above, such an approach is contrary to subsection 65(4) of the *Rules* and the jurisprudence. As a result, the Decision is unreasonable."^[38]

41.7 RPD Rule 65(8) - When the Division must start or continue the proceedings if it decides not to declare the claim abandoned

Start or continue proceedings

(8) If the Division decides not to declare the claim abandoned, other than under subrule (2), it must start or continue the proceedings on the day the decision is made or as soon as possible after that day.

41.7.1 At what point should the Board conclude that a claimant is not late, but instead is not appearing for their hearing?

The Chairperson Guidelines 7 *Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* state that "The hearing will begin promptly as scheduled. Participants must be present on time and ready to proceed by the scheduled start time. If a party or counsel appears within 15 minutes after the scheduled start time, the member will note the explanation for the late arrival on the record." The guidelines go on to state that "after 15 minutes, if it is a claimant who has not appeared, the member will either adjourn the hearing or the claimant will have to appear at a special hearing to explain why the claim should not be declared abandoned."^[39] The logic of this 15-minute presumption is bolstered by the fact that the Notice to Appear instructs claimants and counsel to arrive half an hour prior to the actual start time of the hearing (15 minutes in the case of virtual hearings), so if a party has not arrived 15 minutes after the start-time of the hearing, they are in that sense 45 (30) minutes late. Nonetheless, where a claimant advises the Board of their anticipated lateness or otherwise appears shortly afterwards, it may be possible for the Board to proceed nonetheless.

41.7.2 Front-End Security Screening (FESS) considerations where a claim is not declared abandoned and will then proceed to hearing

The Board's *Instructions Governing the Management of Refugee Protection Claims Awaiting Front-end Security Screening* state that "Abandonment hearings may proceed notwithstanding that confirmation of security screening has not been received. Should a claimant successfully argue that their claim should not be declared abandoned, the matter will then be scheduled for hearing in accordance with these Instructions."^[40]

41.7.3 Statistics about abandonment

By region

Of all dispositions for principal claimants in the most recent year for which data are available (2018), about 6.3% of dispositions (claims being accepted, rejected, withdrawn, abandoned, etc.) were abandonments in each of the Central (Toronto) and Eastern (Ottawa and Montreal) regions, but only 2.1% of claims were abandoned in the Board's Western region, which runs from BC to Manitoba.^[41]

New System RPD Claims for Principal Claimants in 2018			
Region	Abandoned Claims	Total Decisions	Abandonments as a Percentage of All Decisions
Central	482	7629	6.3%
Eastern	272	4273	6.3%
Western	47	2149	2.1%

By country

Claims from certain countries appear to have disproportionately high (e.g. India, Mexico) or low (e.g. Turkey, Iran) abandonment rates:^[41]

New System RPD Claims for Principal Claimants in 2018, Top 19 Countries with Most Abandonments

Country	Abandoned Claims	Total Decisions	Abandonments as a Percentage of All Decisions
India	156	430	36.3%
Mexico	116	437	26.5%
Romania	62	225	27.6%
Nigeria	54	1161	4.7%
Haiti	52	1573	3.3%
Somalia	44	468	9.4%
China	44	752	5.9%
Pakistan	17	569	3.0%
Czech Republic	13	47	27.7%

New System RPD Claims for Principal Claimants in 2018, Top 19 Countries with Most Abandonments

United States of America	11	73	15.1%
Colombia	11	257	4.3%
Eritrea	11	436	2.5%
Congo, Democratic Republic	10	191	5.2%
Hungary	9	269	3.3%
Jamaica	8	71	11.3%
Sri Lanka	8	130	6.2%
Iran	8	322	2.5%
Gambia	7	24	29.2%
Turkey	7	769	0.9%
Grand Total	801	14051	5.7%

By counsel

About half of all claimants that abandon their claims do not have counsel (398 out of 801 principal claims declared abandoned in 2018). In contrast, overall about 94% of claimants are represented in their new system proceedings before the Board.^[41] For example, of the 44 abandonment hearings held in British Columbia in 2013, claimants were represented by counsel at only 16 (or 36 percent). The rate at which claims were declared abandoned was almost twice as high for unrepresented claimants (21 out of 28, or 75 percent) than those who had counsel (7 out of 16, or 44 percent).^[42]

There are a number of hypotheses and explanations about why claimants without counsel are disproportionately likely to abandon their claims, including:

- The importance of a relationship of trust with counsel in encouraging vulnerable claimants to continue with the process: Part of this may relate to having a trusting relationship with counsel that guides the claimant through the process. In an academic research study, one lawyer interviewed commented on this issue as follows: "establishing a trusting relationship is more than just, you know, something to check off the list. It's the foundation of your legal representation because vulnerable clients tend to drop off the map if they don't trust their lawyer."^[43] Some lawyers note that "It's very difficult for people who have low or little education to navigate a complex legal system."^[44]
- Counsel may be unwilling to take cases with a low chance of success: In one UNHCR report, they note that "there is some controversy relating to statistics for Roma asylum seekers, but it is clear that the success rate is low for claimants from Hungary and that a high number have also abandoned (or withdrawn) their claims over the last couple of years. One may presume that implicit in the governmental view on the abandonment/withdrawal rate is that these claimants are not represented (i.e. legal counsel would presumably want to win cases they accept to represent)."^[44]
- Claimants may be denied legal aid based on an assessment of the merit of their claim: Another aspect is that claimants without counsel may be disproportionately likely to have been rejected by legal aid on the basis that their claim lacked merit, and thus they may be disproportionately likely to abandon their claim for reasons associated with likelihood

of success, with on UNHCR report stating "it is likely that many unrepresented claimants were refused legal aid following a "chance of success" screening and that their claims may have been relatively weak or unfounded."^[45]

- Unrepresented claimants may be more likely to miss deadlines for submitting paperwork.

41.8 References

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42 Notice of Constitutional Question (RPD Rule 66)

42.1 RPD Rule 66 - Notice of Constitutional Question

The text of the relevant rule reads:

Notice of constitutional question

66 (1) A party who wants to challenge the constitutional validity, applicability or operability of a legislative provision must complete a notice of constitutional question.

Form and content of notice

(2) The party must complete the notice as set out in Form 69 of the Federal Courts Rules or any other form that includes

- (a) the party's name;
- (b) the Division file number;
- (c) the date, time and location of the hearing;
- (d) the specific legislative provision that is being challenged;
- (e) the material facts relied on to support the constitutional challenge; and
- (f) a summary of the legal argument to be made in support of the constitutional challenge.

Providing notice

(3) The party must provide

- (a) a copy of the notice to the Attorney General of Canada and to the attorney general of each province of Canada, in accordance with section 57 of the Federal Courts Act;
- (b) a copy of the notice to the Minister;
- (c) a copy of the notice to the other party, if any; and
- (d) the original notice to the Division, together with a written statement indicating how and when the copies of the notice were provided under paragraphs (a) to (c), and proof that they were provided.

Time limit

(4) Documents provided under this rule must be received by their recipients no later than 10 days before the day on which the constitutional argument is made.

42.1.1 Commentary

The RPD possesses jurisdiction to decide questions of law pursuant to subsection 162(1) of the Act, which provides as follows:

162. (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

However, such constitutional questions must be raised while the Board retains jurisdiction to consider a claim.^[1] A claimant cannot return to the Board to raise a constitutional issue

after having lost a judicial review at the Federal Court because of s. 170.2 of the Act which provides that:

170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — a claim for refugee protection, an application for protection or an application for cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination.

Similarly, a claimant cannot raise a constitutional issue before a panel of the Refugee Protection Division regarding a provision of the IRPA that the RPD does not have the jurisdiction to consider or apply.^[2]

42.2 References

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43 Decisions (RPD Rules 67-68)

43.1 IRPA Section 169

The Act includes the following provisions regarding the obligation to provide reasons:

Decisions and reasons

169 In the case of a decision of a Division, other than an interlocutory decision:

- (a) the decision takes effect in accordance with the rules;
- (b) reasons for the decision must be given;
- (c) the decision may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing;
- (d) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;
- (e) if the person who is the subject of proceedings before the Board or the Minister requests reasons for a decision within 10 days of notification of the decision, or in circumstances set out in the rules of the Board, the Division must provide written reasons; and
- (f) the period in which to apply for judicial review with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later.

43.1.1 Section 169 of the IRPA specify circumstances in which written reasons must be provided, circumstances which do not include interlocutory decisions

Section 169 of the IRPA specifies a number of circumstances in which written reasons for a decision must be provided. For example, per s. 169(1)(d), if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister. Relatedly, s. 169(1)(c) provides that in the case of a decision, other than an interlocutory decision, the Refugee Appeal Division must render the decision in writing. This is also to be read in conjunction with RPD Rule 67(2), which provides a number of other circumstances in which written reasons for a decision are required, including when the Division makes a decision on an application to vacate or to cease refugee protection (RPD Rule 67(2)(c)), and if the Minister was not present when the Division rendered an oral decision and reasons allowing a claim for refugee protection (RPD Rule 67(2)(b)). One thing that is notably exempt from these provisions is any requirement to provide written reasons for oral interlocutory decisions. There is jurisprudence that suggests that when a motion is decided at an RPD hearing with reasons for dismissing it given orally, the RPD does not have to repeat its reasons in its subsequent written decision.^[1]

The above section of the Act does not apply to interlocutory decisions. Interlocutory decisions can be contrasted with those that deny or allow a refugee claim.^[2] For example, a decision to reopen a refugee claim pursuant to RPD Rule 62 (Canadian Refugee Proce-

ture/Reopening a Claim or Application#Rule 62(1) - Who may make an application to reopen when¹) is an interlocutory decision, not a final one.^[3]

43.1.2 The Board should provide written reasons for a determination that a claim has been abandoned

In *Parveen v. Canada*, the Board provided an oral decision that the claim in question had been abandoned. The court noted that in that case, the RPD's decision was rendered orally and in the presence of the claimant, her counsel and an interpreter. The court stated that the reasons were "detailed and comprehensive, setting out not only the findings but also the reasons they were made." The claimant had obtained a copy of the transcript of the hearing. The claimant argued on judicial review that the RPD's failure to provide written reasons amounted to a breach of procedural fairness. The court noted that "it could be argued that the determination that a proceeding has been abandoned is a final decision which entails the rejection of the refugee claim, and that the RPD has an obligation to provide reasons in written form, as per paragraph 169(d) of the IRPA":

Decisions and reasons

169 In the case of a decision of a Division, other than an interlocutory decision:

—
(d) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;

The court then went on to note that "on the other hand, it can be said that a determination that a claim has been abandoned is not a decision under section 169 of the IRPA, because it does not decide the merits of a claim, but the more circumscribed question of whether an applicant has abandoned his or her claim. This abandonment of a proceeding is rather dealt with in subsection 168(1) of the IRPA". In that case, the court accepted that "the letter of the law may impose a duty to provide written reasons". The court went on not to grant the judicial review on the basis that the claimant had not been sufficiently prejudiced, but the case does appear to indicate that the law imposes the same obligation to provide written reasons in the case of an abandonment as it does in the case of a rejection of a claim.^[4]

43.1.3 What percentage of refugee decisions are made publicly available?

A small percentage of the RPD's decisions are anonymized and made publicly available on services such as CanLII. In *Devinat v. Canada*, the Board discussed the percentage of decisions which become publicly available, a percentage being published that seems roughly similar to its current practice:

Excluding claims where there was a waiver or discontinuance, the CRDD rendered 16,630 decisions during 1996 and we anticipate that it will render 19,900 decisions in 1997. The vast majority of CRDD hearings are held behind closed doors to protect claimants' identity. Its decisions and reasons, if any, are communicated to the parties only and not to the public. Some decisions (295 in 1996) are summarized in our publication *RefLex* (see para. 16) and published in the Quicklaw database. These decisions are edited to

¹ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Rule_62\(1\)_-_Who_may_make_an_application_to_reopen_when](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application#Rule_62(1)_-_Who_may_make_an_application_to_reopen_when)

remove identifying information before they are made public and entered in the Quicklaw database.^[5]

43.2 RPD Rule 67 - Requirement for a Notice of Decision and when written reasons must be provided

The text of the relevant rule reads:

Decisions

Notice of decision and reasons

67 (1) When the Division makes a decision, other than an interlocutory decision, it must provide in writing a notice of decision to the claimant or the protected person, as the case may be, and to the Minister.

Written reasons

(2) The Division must provide written reasons for the decision together with the notice of decision

- (a) if written reasons must be provided under paragraph 169(1)(d) of the Act;
- (b) if the Minister was not present when the Division rendered an oral decision and reasons allowing a claim for refugee protection; or
- (c) when the Division makes a decision on an application to vacate or to cease refugee protection.

Request for written reasons

(3) A request under paragraph 169(1)(e) of the Act for written reasons for a decision must be made in writing.

43.2.1 How do the written reasons required under Rule 67(2) relate to the oral reasons that are offered for a decision on the day of a hearing?

Rule 67(2) provides that the Division must provide written reasons for a decision that the Division makes together with the notice of decision in the circumstances specified. This relates to Rule 10(8) which provides that "A Division member must render an oral decision and reasons for the decision at the hearing unless it is not practicable to do so" (Canadian Refugee Procedure/Information and Documents to be Provided#Rule 10 - Order of questioning in hearings, oral representations, oral decisions, limiting questioning²). It is evident that, even where a decision is provided orally, the written reasons need not be identical. For example, in *Isiaku v. Canada*, the Division delivered oral reasons for decision, but the recording equipment normally used to provide a transcript of the hearing was not functioning during the time the Board delivered its oral reasons.^[6] As such, the Board did not have the benefit of a transcript of the oral reasons to use in preparing the written reasons for decision. In its written reasons, the Board stated that it had relied on its recollection of what was stated in the oral reasons. In such a situation, the Board will usually note this in its reasons along with a notation such as the following:

The recording of this oral decision is not available because of what appears to be a technical malfunction. Therefore, this written version of the reasons offered in this case

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_10_-_Order_of_questioning_in_hearings,_oral_representations,_oral_decisions,_limiting_questioning

is based not on a recording but on the notes used by the member in rendering the oral decision on <date>.

The court in *Isiaku v. Canada* expressed no concern with that approach, and in fact preferred the Member's recollection of the decision rendered orally over that of the claimant who had contested some aspects of what was written.^[6] Nonetheless, what is clear is that after a Member provides oral reasons the Member is *functus officio*, and the written reasons which follow from an oral decision should not differ substantially from the oral reasons that were offered.^[7] Appellate bodies may review the reasons provided to determine whether there is "any material difference...between the oral and written reasons".^[8]

43.2.2 What is the significance of a Notice of Decision issued by the Board registry?

Member Maria De Andrade of the Refugee Appeal Division considered a case where, on December 9, 2014, the Board sent the appellant a positive notice of decision. There were no reasons included with the notice of decision. Then on December 23, 2014, the IRB sent the appellant a negative notice of decision, and the reasons included with the notice of decision were dated and signed December 3, 2014. The claimant argued that the RPD was *functus officio* when it sent the appellant a negative notice of decision on December 23, 2014, after it had already sent a positive notice of decision on December 9, 2014. According to the *functus officio* principle, a decision-maker no longer has jurisdiction over a matter once he or she has delivered the decision: the decision is final after it is signed and has been disclosed to the parties.^[9] The RAD rejected this argument, concluding that the *functus officio* principle did not apply in this case because the first notice of decision was sent as a result of a clerical error by the RPD Registry.^[10] The RAD noted rules 67 and 68 of the *Refugee Protection Division Rules* which stipulate that the Division must provide a notice of decision to the refugee protection claimant and to the Minister together with written reasons. As no written reasons were provided for the positive decision, and the only evidence was that the member signed and dated the reasons for decision on December 3, 2014, that was the only decision made as per Rule 68(1)(b). A similar issue has been raised with regards to oral decisions. Member Veena Verma of the Refugee Appeal Division considered a case where a decision was rendered orally on March 22, 2016 at the hearing and the notice of decision and a copy of the reasons were sent out on May 6, 2016. The RAD commented on these dates as follows:

I believe it is necessary to clarify the relevant date when considering the admission of new evidence on appeal before the RAD. Subsection 110(4) of the Act refers to the admission of evidence either after or at the time of the rejection. The RPD rendered its oral decision and reasons on March 22, 2016 which is also the date when the decision came into effect. The RPD member did not "sign" his decision on May 6, 2016, rather this is the date on which the RPD Registrar sent the Appellant the Notice of Decision, pursuant to Rule 67 of the *Refugee Protection Division Rules*, and a written transcript of the decision. In other words, the date of the rejection, and the relevant date in assessing the new evidence under ss. 110(4) of the Act, is March 22, 2016, not May 6, 2016.^[11]

43.2.3 In what language or languages must written decisions be made available?

The *Official Languages Act* applies to the IRB. Section 20 of the *Official Languages Act* specifies the circumstances in which a final decision must be made available in both official languages, either simultaneously (s. 20(1)) or in one language and then the other "at the earliest possible time" (s. 20(2)):

Decisions, orders and judgments that must be made available simultaneously
20 (1) Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where
(a) the decision, order or judgment determines a question of law of general public interest or importance; or
(b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.

Other decisions, orders and judgments

(2) Where

(a) any final decision, order or judgment issued by a federal court is not required by subsection (1) to be made available simultaneously in both official languages, or
(b) the decision, order or judgment is required by paragraph (1)(a) to be made available simultaneously in both official languages but the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance,

the decision, order or judgment, including any reasons given therefor, shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective.

It is notable that the *Official Languages Act* provides that the above obligations apply to "federal courts". This is a defined term which, per s. 3(2) of that Act, provides that the IRB is considered a "federal court" for the purposes of the preceding obligations: "In this section and in Parts II and III, *federal court* means any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament."^[12] The Federal Court of Appeal considered the applicability of this provision of the Immigration and Refugee Board in *Devinat v. Canada*, upholding the following summary of the law from the motions judge in the case:

In my view, the terms of section 20 of the OLA are clear. They require all federal courts, including the respondent [the IRB], to issue their decisions, orders and judgments in both official languages at the earliest possible time in most cases or simultaneously in the cases provided for in paragraph 20(1)(a), unless this would be seriously prejudicial to the public or result in injustice or hardship to any party, and in paragraph 20(1)(b).^[13]

As a practical matter, in *Devinat v. Canada* the Federal Court ordered that where the Board makes a decision available to the public, say via the Quicklaw website, they must do so in both official languages.^[14] In contrast, there are no provisions in the IRPA or in the RPD Rules that require written reasons be translated into the language of interpretation other than English or French. When it comes to providing reasons to an individual, the court commented *obiter* in *Nambazisa v. Canada* that there is "arguably a positive obligation upon a decision maker like the RPD to provide the Decision to [the claimant in their

language of choice], in light of the RPD's duty to communicate and offer services to any member of the public in the language of his choice".^[15] Indeed, the Minister states that when the original version of a set of reasons is not written in an applicant's preferred language of choice or in the language of record, the Board's usual practice is to issue decisions in both official languages at the same time.^[16] Where the tribunal fails to do so, this may raise issues with the reasonableness of the decision:

When, as the RPD did in the case of Mr. Nambazisa, an administrative decision maker issues a decision in an official language other than the litigant's preferred official language or the official language of record, without making a translation simultaneously available, it in fact abdicates its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived to its conclusion. This, again, clearly does not pass the test of reasonableness laid out in *Vavilov*, and calls for the Court's intervention.^[17]

Furthermore, even where a translation is made available, the mere act of a decision maker having written a decision "in a language other than the official language of the trial chosen by an applicant can create uncertainty and doubts about the decision maker's language abilities."^[18]

For more context to the above excerpt from the Official Languages Act, see: Canadian Refugee Procedure/Official Languages Act#Section 20: Decisions, orders and judgments³.

43.2.4 Each version of reasons that have been translated into French or English are equally authoritative

Section 20 of the *Official Languages Act* requires that final decisions, orders and judgments issued by the Board be made available in both official languages, not issued in one language and "translated" into the other. This means that both versions are equally authoritative.^[19]

43.3 RPD Rule 68(1) - When a decision of a single member panel takes effect

When decision of single member takes effect

68 (1) A decision made by a single Division member allowing or rejecting a claim for refugee protection, on an application to vacate or to cease refugee protection, on the abandonment of a claim or of an application to vacate or to cease refugee protection, or allowing an application to withdraw a claim or to withdraw an application to vacate or to cease refugee protection takes effect (a) if given orally at a hearing, when the member states the decision and gives the reasons; and (b) if made in writing, when the member signs and dates the reasons for the decision.

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Official_Languages_Act#Section_20:_Decisions,_orders_and_judgments

43.3.1 A decision takes effect when a Member signs the reasons and this can be an electronic signature

As per the Division's *Practice Notice: Use of Electronic Signatures*, effective November 26, 2019 an electronic signature will satisfy the requirement for members to sign their reasons for decision under Rules 68(1)(b) of the RPD Rules.^[20]

43.4 RPD Rule 68(2) - When a decision of a three member panel takes effect

When decision of three member panel takes effect

(2) A decision made by a panel of three Division members allowing or rejecting a claim for refugee protection, on an application to vacate or to cease refugee protection, on the abandonment of a claim or of an application to vacate or to cease refugee protection, or allowing an application to withdraw a claim or to withdraw an application to vacate or to cease refugee protection takes effect (a) if given orally at a hearing, when all the members state their decision and give their reasons; and (b) if made in writing, when all the members sign and date their reasons for the decision.

43.4.1 A decision takes effect when the Members sign the reasons and these can be electronic signatures

As per the Division's *Practice Notice: Use of Electronic Signatures*, effective November 26, 2019 an electronic signature will satisfy the requirement for members to sign their reasons for decision under Rules 68(2)(b) of the RPD Rules.^[20]

43.4.2 Policy and legislation on three-member panels

The IRB has a policy on the designation of three-member panels at the Refugee Protection Division.^[21] Under the *Immigration and Refugee Protection Act* (IRPA), hearings by a single member of the Refugee Protection Division (RPD) are the norm. This presumption is reflected in the wording of section 163 of the IRPA, which reads: "Matters before a Division shall be conducted before a single member unless, except for matters before the Immigration Division, the Chairperson is of the opinion that a panel of three members should be constituted." The Chairperson's authority to designate three-member panels for matters before the RPD has been delegated to the Deputy Chairperson (DC) and to the Assistant Deputy Chairpersons (ADCs) of the RPD. Under this delegation cases may only be designated to be heard by three-member panels for training purposes. There were 94 new system hearings in 2018 in which a three-member panel was designated (0.7% of all hearings).^[22]

43.4.3 History of two-member panels at the Board

The court has observed that throughout the 1990s, the Board carried a very heavy caseload and had a large membership. Its approximately 200 members sat across Canada in panels of two. That ended with the Introduction of the IRPA in the early 2000s.^[23]

43.5 References

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10. *X (Re)*, 2015 CanLII 81070 (CA IRB), paras. 28-34 <¹¹>.
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8 <https://canlii.ca/t/4bld>

9 <https://canlii.ca/t/4bld#par25>

10 <https://canlii.ca/t/g6l3c>

11 <https://www.canlii.org/en/ca/irb/doc/2015/2015canlii81070/2015canlii81070.html>

12 <https://www.canlii.org/en/ca/irb/doc/2017/2017canlii52321/2017canlii52321.html>

13 <http://canlii.ca/t/530s1#sec3subsec2>

14 <http://canlii.ca/t/4110#57>

15 <https://canlii.ca/t/4110#par73>

16 <https://canlii.ca/t/jx7n4#par43>

17 <https://canlii.ca/t/jx7n4#par35>

18 <https://canlii.ca/t/jx7n4#par51>

18. *Tchiianika v. Canada (Immigration, Refugees and Citizenship)*, 2022 FC 1119 (CanLII), at para 28, <¹⁹>, retrieved on 2023-06-27.
19. This was the position of the Commissioner of Official Languages in *Devinat v. Canada* and it should be regarded as persuasive. See: *Devinat v. Canada (Immigration and Refugee Board)*, 1999 CanLII 9386 (FCA), [2000] 2 FC 212, at para 56, <²⁰>, retrieved on 2022-09-07,
20. Immigration and Refugee Board of Canada, *Practice Notice: Use of Electronic Signatures*, November 26, 2019 <²¹> (Accessed June 21, 2021).
21. Immigration and Refugee Board of Canada, *Designation of three-member panels - Refugee Protection Division*, Effective Date: September 2, 2015, Accessed January 6, 2020, <²²>.
22. Sean Rehaag, “2018 Refugee Claim Data and IRB Member Recognition Rates” (19 June 2019), online: <https://ccrweb.ca/en/2018-refugee-claim-data>
23. *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 (CanLII), [2006] 4 FCR 377, para. 55.

19 <https://canlii.ca/t/jwf7j#par28>

20 <https://canlii.ca/t/4110#par56>

21 <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/electronic-signatures-rpd.aspx>

22 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolRpdSpr3MemCom.aspx>

44 General Provisions (RPD Rules 69-71)

The court has stated that the purpose of the following collection of rules "is to give the [Divisions] the flexibility to control their own processes by applying rules liberally to deal with proceedings in an informal and expeditious manner."^[1]

44.1 RPD Rule 69 - No applicable rule

The text of the relevant rules reads:

General Provisions

No applicable rule

69 In the absence of a provision in these Rules dealing with a matter raised during the proceedings, the Division may do whatever is necessary to deal with the matter.

44.1.1 This rule relates to the common law that tribunals control their own processes

This rule relates to the common law as articulated in *Siloch v. Canada* where Déary J.A. recalled the general rule that, "It is well settled that in the absence of specific rules laid down by statute or regulation, administrative tribunals control their own proceedings ... subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."^[2]

44.2 RPD Rule 70 - Power to change a rule, excuse a person from a rule, extend a time limit, or act on its own initiative

Powers of Division

70 The Division may, after giving the parties notice and an opportunity to object,

- (a) act on its own initiative, without a party having to make an application or request to the Division;
- (b) change a requirement of a rule;
- (c) excuse a person from a requirement of a rule; and
- (d) extend a time limit, before or after the time limit has expired, or shorten it if the time limit has not expired.

44.2.1 The procedural notice requirement in Rule 70 is a precondition for a panel to rely on it

In engaging Rule 70 to amend the Rules, the RPD is required to take action, including by providing notice to parties that it is considering taking any of the actions listed in Rule 70, such as waiving a requirement of a rule. As noted in *Cohen v. Canada*, Rule 70 only applies when its requirements have been complied with, and it is not engaged if the Division does not take any explicit actions as required by the rule.^[3] The requirement that before a Division of the IRB acts on its own initiative, it will give prior notice to the parties and give them an opportunity to object, was a substantive change to a previous draft of the Rules that resulted from the feedback of the Standing Joint Committee for the Scrutiny of Regulations.^[4]

44.3 RPD Rule 71 - Failure to follow a rule

Failure to follow rule

71 Unless proceedings are declared invalid by the Division, a failure to follow any requirement of these Rules does not make the proceedings invalid.

44.3.1 Effect of Rule 71 where the Division has explicitly changed the requirement of a rule

The Federal Court commented on the meaning of what is now Rule 71 in *Cohen v. Canada*, noting that this provision appears to relate to the authority of the RPD to act to change the requirement of a Rule. That is, the failure to follow a Rule once changed does not render a proceeding invalid.^[5] This is exemplified by the following decision from the RAD, interpreting its analogous rule, where the panel concluded that, despite the fact that an application to withdraw an appeal was not made in conformity with the relevant rule, it would nonetheless be accepted:

Rule 54 of the RAD Rules states that unless proceedings are declared invalid by the RAD, a failure to follow any requirement of these Rules does not make the proceedings invalid. Having analyzed the notice to withdraw submitted by the appellant on September 8, 2016, I am of the opinion that it is necessary, in the circumstances, to accept this withdrawal, even though it was not made in accordance with subrule 47(3) of the RAD Rules.^[6]

44.3.2 Effect of Rule 71 where the Division has not explicitly changed the requirement of a rule

Rule 71 is also relevant to cases where a rule was not been followed, but this divergence from the rules was not explicitly authorized by the Division. Member Favreau of the Refugee Appeal Division commented on this in a case where the Minister had intervened in a case but, despite the requirement in Rule 29(2)(a) that the Minister identify the purpose of their intervention in their intervention notice, the Minister had not done so. The question for the Refugee Appeal Division in that case was whether that breach of the rules should lead to the original refugee determination proceeding being set aside. The RAD declined to set

aside the RPD determination on the basis that the breach of the Rules was not necessarily a breach of procedural fairness:

The purpose of the Rules in question is intended to ensure a claimant knows the case against them. The RAD takes note that Rule 71 states that, unless proceedings are declared invalid by the Division, a failure to follow any requirement of these Rules does not make the proceedings invalid. While it can be true in some cases that a failure to follow the Rules may result in a breach of procedural fairness, it is not true in the present case. The RAD must consider what impact that breach of the Rules had on the affected parties, in this case, the Appellants.^[7]

In this way, Rule 71 emphasizes that a failure to follow any requirements of the Rules does not, in and of itself, make proceedings invalid; such a breach may point, however, to the proceedings having been unfair.

44.4 References

1. *Ahmed v. Canada (Citizenship and Immigration)*, 2018 FC 1157 (CanLII), para. 42.
2. *Siloch v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 10 (FCA).
3. *Cohen v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1101 (CanLII), para. 16 <¹>.
4. Immigration and Refugee Board of Canada, *RPD Rules Regulatory Impact Analysis Statement*, Date modified: 2018-07-04, Accessed January 3, 2020 <²>.
5. *Cohen v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1101 (CanLII), para. 12 <³>.
6. *X (Re)*, 2016 CanLII 98458 (CA IRB), para. 3.
7. *X (Re)*, 2016 CanLII 107460 (CA IRB), para. 11 <⁴>.

1 <https://www.canlii.org/en/ca/fct/doc/2018/2018fc1101/2018fc1101.html>

2 <https://irb-cisr.gc.ca/en/legal-policy/act-rules-regulations/Pages/RiasReir.aspx>

3 <https://www.canlii.org/en/ca/fct/doc/2018/2018fc1101/2018fc1101.html>

4 <https://www.canlii.org/en/ca/irb/doc/2016/2016canlii107460/2016canlii107460.html>

45 Coming into Force (RPD Rule 74)

45.1 RPD Rule 74

The text of the relevant rule reads:

74 These Rules come into force on the day on which section 26 of the Balanced Refugee Reform Act comes into force, but if they are registered after that day, they come into force on the day on which they are registered.

45.2 Commentary

46 Schedules to the RPD Rules

46.1 RPD Rules Schedule 1 - Claimant's Information and Basis of Claim

The text of this schedule to the rules follows:

SCHEDULE 1
(Rule 1)

Claimant's Information and Basis of Claim

Item	Information
1	Claimant's name.
2	Claimant's date of birth.
3	Claimant's gender.
4	Claimant's nationality, ethnic or racial group, or tribe.
5	Languages and dialects, if any, that the claimant speaks.
6	Claimant's religion and denomination or sect.
7	Whether the claimant believes that they would experience harm, mistreatment or threats if they returned to their country today. If yes, description of what the claimant expects would happen, including who would harm, mistreat or threaten them and what the claimant believes would be the reasons for it.
8	Whether the claimant or the claimant's family have ever experienced harm, mistreatment or threats in the past. If yes, a description of the harm, mistreatment or threats, including when it occurred, who caused it, what the claimant believes are the reasons for it and whether similarly situated persons have experienced such harm, mistreatment or threats.
9	Whether the claimant sought protection or help from any authority or organization in their country. If not, an explanation of why not. If yes, the authority or organization from which the claimant sought protection or help and a description of what the claimant did and what happened as a result.
10	When the claimant left their country and the reasons for leaving at that time.
11	Whether the claimant moved to another part of their country to seek safety. If not, an explanation of why not. If the claimant moved to another part of their country, the reasons for leaving it and an explanation why the claimant could not live there or in another part of their country today.
12	Whether the claimant moved to another country to seek safety. If yes, details including the name of the country, when the claimant moved there, length of stay and whether the claimant claimed refugee protection there. If the claimant did not claim refugee protection there, an explanation of why not.
13	Whether minors are claiming refugee protection with the claimant. If yes, whether the claimant is the minor's parent and the other parent is in Canada, or whether the claimant is not the minor's parent, or whether the claimant is the minor's parent but the other parent is not in Canada. If the claimant is not the minor's parent or if the claimant is the minor's parent but the other parent is not in Canada, details of any legal documents or written consent allowing the claimant to take care of the minor or travel with the minor. If the claimant does not have such documents, an explanation of why not.
14	If a child six years old or younger is claiming refugee protection with the claimant, an explanation of why the claimant believes the child would be at risk of being harmed, mistreated or threatened if returned to their country.
15	Other details the claimant considers important for the refugee protection claim.
16	Country or countries in which the claimant believes they are at risk of serious harm.

- 17 The country or countries in which the claimant is or has been a citizen, including how and when citizenship was acquired and present status.
- 18 Name, date of birth, citizenship and place and country of residence of relatives, living or dead, specifically the claimant's spouse, common-law partner, children, parents, brothers and sisters.
- 19 If the claimant or the claimant's spouse, common-law partner, child, parent, brother or sister has claimed refugee protection or asylum in Canada or in any other country - including at a Canadian office abroad or from the United Nations High Commissioner for Refugees - the details of the claim including the name of the person who made the claim, and the date, location, result of the claim and IRB file number or CIC client ID number, if any.
- 20 Whether the claimant applied for a visa to enter Canada. If yes, for what type of visa, the date of the application, at which Canadian office the application was made and whether or not it was accepted. If the visa was issued, the date of issue and the duration of the visa. If the application was refused, the date and reasons of refusal.
- 21 Claimant's contact information.
- 22 Whether the claimant has counsel and if so, details concerning counsel - including what counsel has been retained to do and counsel's contact information.
- 23 Claimant's choice of official language for communications with and proceedings before the Board.
- 24 Whether the claimant needs an interpreter during any proceeding, and the language and dialect, if any, to be interpreted.

46.2 RPD Rules Schedule 2 - Information To Be Provided About the Claimant by an Officer

SCHEDULE 2 (Paragraph 3(5)(d))

Information To Be Provided About the Claimant by an Officer

- | Item | Information |
|------|---|
| 1 | Name, gender and date of birth. |
| 2 | Department of Citizenship and Immigration client identification number. |
| 3 | If the claimant is detained, the name and address of the place of detention. |
| 4 | Claimant's contact information in Canada, if any. |
| 5 | Contact information of any counsel for the claimant. |
| 6 | Official language chosen by the claimant as the language of proceedings before the Board. |
| 7 | Date the claim was referred or deemed to be referred to the Division. |
| 8 | Section of the Act under which the claim is being referred. |
| 9 | Officer's decision about the claim's eligibility under section 100 of the Act, if a decision has been made. |
| 10 | The country or countries in which the claimant fears persecution, torture, a risk to their life or a risk of cruel and unusual treatment or punishment. |
| 11 | Whether the claimant may need a designated representative and the contact information for any proposed designated representative. |
| 12 | Whether the claimant needs an interpreter, including a sign language interpreter, during any proceeding, and the language and dialect, if any, to be interpreted. |
| 13 | If a claim of the claimant's spouse, common-law partner or any relative has been referred to the Division, the name and Department of Citizenship and Immigration client identification numbers of each of those persons. |
| 14 | When and how the officer notified the claimant of the referral of the claim to the Division. |
| 15 | Whether the claim was made at a port of entry or inside Canada other than at a port of entry. |
| 16 | Any other information gathered by the officer about the claimant that is relevant to the claim. |

46.3 RPD Rules Schedule 3 - Information and Declarations — Counsel Not Representing or Advising for Consideration

SCHEDULE 3
(Rules 5 and 13)

Information and Declarations - Counsel Not Representing or Advising for
Consideration

Item Information

- 1 IRB Division and file number with respect to the claimant or protected person.
- 2 Name of counsel who is representing or advising the claimant or protected person and who is not receiving consideration for those services.
- 3 Name of counsel's firm or organization, if applicable, and counsel's postal address, telephone number, fax number and email address, if any.
- 4 If applicable, a declaration, signed by the interpreter, that includes the interpreter's name, the language and dialect, if any, interpreted and a statement that the interpretation is accurate.
- 5 Declaration signed by the claimant or protected person that the counsel who is representing or advising them is not receiving consideration and the information provided in the form is complete, true and correct.
- 6 Declaration signed by counsel that they are not receiving consideration for representing or advising the claimant or protected person and that the information provided in the form is complete, true and correct.

46.4 Commentary

47 Annotated Refugee Appeal Division Rules

48 Interpretation and Definitions (RAD Rule 1)

48.1 RAD Rule 1

The text of the relevant rule reads:

Interpretation

Definitions

1 The following definitions apply in these Rules.

Act means the Immigration and Refugee Protection Act. (Loi)

appellant means a person who is the subject of an appeal, or the Minister, who makes an appeal to the Division from a decision of the Refugee Protection Division. (appellant)

contact information means, with respect to a person,

(a) the person's name, postal address and telephone number, and their fax number and email address, if any; and

(b) in the case of counsel for a person who is the subject of an appeal, if the counsel is a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, in addition to the information referred to in paragraph (a), the name of the body of which the counsel is a member and the membership identification number issued to the counsel. (coordonnées)

Division means the Refugee Appeal Division. (Section)

interested person means a person whose application to participate in an appeal under rule 46 has been granted. (personne intéressée)

party means,

(a) in the case of an appeal by a person who is the subject of an appeal, the person and, if the Minister intervenes in the appeal, the Minister; and

(b) in the case of an appeal by the Minister, the person who is the subject of the appeal and the Minister. (partie)

proceeding includes a conference, an application, or an appeal that is decided with or without a hearing. (procédure)

registry office means a business office of the Division. (greffe)

Regulations means the Immigration and Refugee Protection Regulations. (Règlement)

respondent means a person who is the subject of an appeal in the case of an appeal by the Minister. (intimé)

UNHCR means the United Nations High Commissioner for Refugees and includes its representative or agent. (HCR)

vulnerable person means a person who has been identified as vulnerable under the Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB issued under paragraph 159(1)(h) of the Act. (personne vulnérable)

working day does not include Saturdays, Sundays or other days on which the Board offices are closed. (jour ouvrable)

48.1.1 Commentary

For commentary, see the concomitant RPD rule: Canadian Refugee Procedure/RPD Rule 1 - Definitions¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_1_-_Definitions

49 Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal (RAD Rules Part 1)

49.1 RAD Rules - Part 1

The text of the relevant rules reads:

PART 1

Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal

49.2 RAD Rules 2-3: Filing and Perfecting an Appeal

Filing and Perfecting an Appeal

49.3 RAD Rule 2: Filing appeal

Filing appeal

2 (1) To file an appeal, the person who is the subject of the appeal must provide to the Division three copies of a written notice of appeal.

Copy provided to Minister

(2) The Division must provide a copy of the notice of appeal to the Minister without delay.

Content of notice of appeal

(3) In the notice of appeal, the appellant must indicate

(a) their name and telephone number, and an address where documents can be provided to them;

(b) if represented by counsel, counsel's contact information and any limitations on counsel's retainer;

(c) the identification number given by the Department of Citizenship and Immigration to them;

(d) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that they received the written reasons for the decision;

(e) the language - English or French - chosen by them as the language of the appeal; and

(f) the representative's contact information if the Refugee Protection Division has designated a representative for them in the proceedings relating to the decision being appealed, and any proposed change in representative.

Time limit

(4) The notice of appeal provided under this rule must be received by the Division within the time limit for filing an appeal set out in the Regulations.

49.3.1 RAD Rule 2(1): The requirement to provide three copies of the written notice of appeal has been waived

The *Practice Notice: Exchange of documents through Canada Post epost Connect™ to the Refugee Appeal Division* states that multiple copies of documents do not need to be submitted where required in the Rules.^[1]

49.3.2 RAD Rule 2(4): The notice of appeal must be received by the Division within the time limit for filing an appeal set out in the Regulations

The time limit for filing an appeal is set out in s. 159.91 of the Regulation:

Appeal to Refugee Appeal Division

Time limit for appeal

159.91 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act,

(a) the time limit for a person or the Minister to file an appeal to the Refugee Appeal Division against a decision of the Refugee Protection Division is 15 days after the day on which the person or the Minister receives written reasons for the decision; and

(b) the time limit for a person or the Minister to perfect such an appeal is 30 days after the day on which the person or the Minister receives written reasons for the decision.

For more context to this part of the regulations, see: Canadian Refugee Procedure/IRPR s. 159.91: Appeal to Refugee Appeal Division¹. For more details about requesting an extension of time to file or perfect, see: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#RAD Rule 6: Extension of Time².

49.4 RAD Rule 3: Perfecting Appeal

Perfecting appeal

3 (1) To perfect an appeal, the person who is the subject of the appeal must provide to the Division two copies of the appellant's record.

Copy provided to Minister

(2) The Division must provide a copy of the appellant's record to the Minister without delay.

Content of appellant's record

(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

(a) the notice of decision and written reasons for the Refugee Protection Division's decision that the appellant is appealing;

(b) all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript in the appeal, together with a

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPR_s._159.91:_Appeal_to_Refugee_Appeal_Division
2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#RAD_Rule_6:_Extension_of_Time

- declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;
- (c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal;
 - (d) a written statement indicating
 - (i) whether the appellant is relying on any evidence referred to in subsection 110(4) of the Act,
 - (ii) whether the appellant is requesting that a hearing be held under subsection 110(6) of the Act, and if they are requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing, and
 - (iii) the language and dialect, if any, to be interpreted, if the Division decides that a hearing is necessary and the appellant needs an interpreter;
 - (e) any documentary evidence that the appellant wants to rely on in the appeal;
 - (f) any law, case law or other legal authority that the appellant wants to rely on in the appeal; and
 - (g) a memorandum that includes full and detailed submissions regarding
 - (i) the errors that are the grounds of the appeal,
 - (ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,
 - (iii) how any documentary evidence referred to in paragraph (e) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant,
 - (iv) the decision the appellant wants the Division to make, and
 - (v) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held.

Length of memorandum

- (4) The memorandum referred to in paragraph (3)(g) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Time limit

- (5) The appellant's record provided under this rule must be received by the Division within the time limit for perfecting an appeal set out in the Regulations.

49.4.1 Rule 3(1): The requirement to provide two copies of the appellant's record has been waived

The *Practice Notice: Exchange of documents through Canada Post epost Connect™ to the Refugee Appeal Division* states that multiple copies of documents do not need to be submitted where required in the Rules.^[1]

49.4.2 Rule 3(3)(b): The appellant's record must contain all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript in the appeal

Rule 3(3)(b) provides that the appellant's record must contain all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript in the appeal, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate. That said, the *Practice Notice: Exchange of documents through Canada Post epost Connect™ to the Refugee Appeal Division* states that the RAD removes (waives) the requirement in the rules for signatures on documents and RAD forms submitted in support of an appeal.^[1]

The intent of this rule is that a transcript of relevant portions of the hearing will be provided by the appellant if the appellant wants to rely on a transcript on appeal. The IRB has a policy and objective of producing transcripts for all hearings that last more than two hours. While members of the public are not legally entitled to transcripts and documents from RAD proceedings, available transcripts are shared when requested by appellants and their counsel.^[2] That said, while the RAD produces transcripts for all English hearings, as of 2022 it did so for only 37.5% of French hearings.^[2] See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The Board is not obliged to provide a transcript of an RPD proceeding, regardless of whether or not a recording of the proceeding was made³.

Rule 3(3)(b) is to be read in conjunction with Rule 3(3)(g)(ii) which provides that the appellant may, as an alternative to relying on a transcript, point to specific sections or an "audio or other electronic recordings of the Refugee Protection Division hearing".

49.4.3 Rule 3(3)(c): The appellant's record must contain any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal

RAD Rule 3(3)(c) provides that the appellant's record must contain any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal. These documents need not be assessed as new evidence in accordance with subsection 110(4) of the *Immigration and Refugee Protection Act*.^[3] Instead, if they were improperly excluded, then the RAD may consider them.^[4]

For documents provided to the RPD at or before a hearing, but not within required time-lines, the relevant RPD rule is number 36: Canadian Refugee Procedure/RPD Rules 31-43 - Documents#RPD Rule 36 - Use of undisclosed documents⁴. For documents provided after a hearing, but prior to the RPD rendering its decision, the relevant RPD rule is number 43: Canadian Refugee Procedure/RPD Rules 31-43 - Documents#RPD Rule 43 - Additional documents provided as evidence after a hearing⁵.

Placing the onus on the appellant to provide such documents in the appellant's record relates to RAD Rule 21(3)(c), which provides that the Refugee Protection Division record is to contain all documentary evidence that the Refugee Protection Division accepted as evidence, during or after the hearing, but that it need not contain evidence that was not accepted.^[5] See: Canadian Refugee Procedure/RAD Rules Part 3 - Rules Applicable to All Appeals#RAD Rule 21: Refugee Protection Division Record⁶. If the rejected documents

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_Board_is_not_obliged_to_provide_a_transcript_of_an_RPD_proceeding,_regardless_of_whether_or_not_a_recording_of_the_proceeding_was_made

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#RPD_Rule_36_-_Use_of_undisclosed_documents

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#RPD_Rule_43_-_Additional_documents_provided_as_evidence_after_a_hearing

6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_3_-_Rules_Applicable_to_All_Appeals#RAD_Rule_21:_Refugee_Protection_Division_Record

are not before it, the RAD cannot review whether the RPD was correct to exclude the evidence.^[6]

49.4.4 Rule 3(3)(e): The appellant's record must contain any documentary evidence that the appellants want to rely on in the appeal, but this is subject to rules on admitting new evidence

Rule 3(3)(e) provides that the appellant's record must contain any documentary evidence that the appellants want to rely on in the appeal, but where such evidence is new evidence, it must be admissible as per IRPA s. 110: Canadian Refugee Procedure/110-111 - Appeal to Refugee Appeal Division#IRPA Section 110(4)-(5): Evidence that may be presented⁷. The phrase "documentary evidence" implies that where "evidence" is used without modification elsewhere in the rules, it can include both documentary evidence and non-documentary evidence, such as oral evidence. See also RAD Rule 24, which refers to "written evidence", a subset of all "evidence": Canadian Refugee Procedure/RAD Rules Part 3 - Rules Applicable to All Appeals#RAD Rule 24: Specialized Knowledge⁸.

All evidence that the RPD accepted as evidence is part of the RPD record and will be provided to the RAD by the RPD under rule 21 of the *RAD Rules*. Therefore, an appellant does not have to include this evidence in their appellant's record.^[7]

49.4.5 Rules 3(3)(e) and 3(3)(f): Legal authorities may be distinguished from evidence that an appellant wants to rely on

Rule 3(3)(f) provides that an appellant's record must contain "any law, case law or other legal authority that the appellant wants to rely on in the appeal". This rule is to be distinguished from Rule 3(3)(e), which provides that an appellant's record must also contain "any documentary evidence that the appellant wants to rely on in the appeal". In this way, legal authorities may be considered distinct from documentary evidence that an appellant seeks to rely on. While some documents clearly fall into one category or the other, often whether a document is evidence or a legal authority is ambiguous and may depend on the proposition which the appellant aims to establish from the document. As noted in *Basra v. Canada*, the hallmark of a document properly admitted pursuant to Rule 3(3)(f) is that it is either an authority in law or else it interprets the law.^[8] Where an applicant is referring to a document as objective evidence in support of their factual assertions, the document is properly considered under Rule 3(3)(e) and the accompanying new evidence provisions of the Act.^[8] Some examples which highlight this dichotomy follow:

- UNHCR guidelines may be considered legal authority or evidence: The Federal Court accepted in *Osemwenkhae v. Canada* that "UNHCR Guidelines are not new documents in the sense of being new evidence but rather should have been introduced as doctrinal or legal support for [the appellant's] position."^[9] But see *Valdez v. Canada* which held it was reasonable for the RAD to consider the UNHCR Handbook under the new evidence

⁷ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/110-111_-_Appeal_to_Refugee_Appeal_Division#IRPA_Section_110\(4\)-\(5\):_Evidence_that_may_be_presented](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/110-111_-_Appeal_to_Refugee_Appeal_Division#IRPA_Section_110(4)-(5):_Evidence_that_may_be_presented)

⁸ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_3_-_Rules_Applicable_to_All_Appeals#RAD_Rule_24:_Specialized_Knowledge

framework of subsection 110(4) of the IRPA in a circumstance where the appellant had argued that the Handbook was new evidence justifying an oral hearing.^[10]

- Prior cases may be considered legal authority or evidence: Prior tribunal decisions^[11] legal cases,^[12] and decisions of international bodies such as the United Nations Committee Against Torture^[13] may be considered legal authorities and not evidence. However, in *Ismailov v. Canada* the Appellant submitted a decision from the European Court of Human Rights.^[14] The RAD declined to admit it because it found that it was not bound by jurisprudence outside of Canada. The court concluded that this was in error because the decision was submitted as evidence, not a legal authority:

In my view, the fact that the RAD is not bound by jurisprudence outside of Canada is irrelevant. The Applicant did not submit this evidence for a point of law, but rather for its factual findings regarding the country conditions in Uzbekistan. In other words, this decision formed part of the new evidence that was submitted to the RAD. Thus, the RAD erred by dismissing it out of hand and refusing to determine whether the decision satisfied the test for new evidence.^[15]

But see the following commentary to RPD Rule 43, including a case concluding that under that rule past tribunal decisions should not be considered evidence: Canadian Refugee Procedure/Documents#Rule 43 applies to evidence, not submissions, caselaw, or other tribunal decisions⁹.

- Foreign law is considered to be a question of fact: Foreign law is considered by Canada's legal system to be a question of fact.^[16] In contrast, the content of Canada's international legal obligations has usually been held to be a question of law.^[17]
- Reports discussing and critiquing IRB decisions may be considered legal authority or evidence: In *Basra v. Canada*, the appellant submitted a 2004 report entitled *Comprehensive Discussion of the Internal Flight Option for Punjabi Sikh Survivors of Political Rape and other Forms of Institutionalized Violence* to the RAD as a legal authority.^[13] The RAD concluded that the document was not admissible as jurisprudence. The Federal Court upheld this decision, concluding that the content in the report was "factual in nature, containing discussion and opinion based on research and experience" and noting that the document was "analogous to many documents typically contained in a national documentation package" and that in his appeal submissions the applicant referred to the document as objective evidence in support of his factual assertions and not as jurisprudence or expressions of law.^[8]

49.4.6 Rule 3(3)(g)(i): The appellant's record must contain a memorandum with submissions regarding the errors that are the grounds of the appeal

Rule 3(3)(g) provides that the appellant's record must contain a memorandum that includes full and detailed submissions regarding (i) the errors that are the grounds of the appeal, and (ii) where the errors are located in the reasons for the Refugee Protection Division's decision or in a recording of the Refugee Protection Division hearing. A corollary of the obligation to identify such errors is that an applicant cannot reasonably fault the RAD for not going beyond the grounds of appeal or for not providing extensive reasons regarding the grounds

⁹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Rule_43_applies_to_evidence,_not_submissions,_caselaw,_or_other_tribunal_decisions

of appeal that the applicant did not previously challenge.^[18] The RAD cannot be expected to examine every piece of evidence and try to draw out arguments that could support an asylum claim.^[19] Where the grounds of appeal are not sufficiently clear in accordance with paragraph 3(3)(g) of the RAD Rules, it is open to the RAD to include in its analysis only the most intelligible submissions.^[20]

The memorandum with submissions discussed in subrule (g) is to be distinct from the documentary evidence that the appellant wants to rely on in the hearing discussed in subrule (e). That said, at times there may be overlap between these. Where an appellant submits an affidavit on appeal that is not new evidence pursuant to subsection 110(4) of the IRPA, but is instead more akin to submissions on the errors that are the grounds of the appeal, the RAD is entitled to treat the affidavit as submissions.^[21] Furthermore, the fact that the RAD states that it is treating such an affidavit as submissions does not mean that the RAD errs by referring to the material in the appellant's affidavit as an example of an inconsistency in the statements provided by the appellant that can properly detract from the appellant's credibility.^[22]

See also: Canadian Refugee Procedure/The Board's inquisitorial mandate#The Refugee Appeal Division must independently assess claims¹⁰.

49.5 RAD Rule 4: Intervention by the Minister

Intervention by the Minister

Notice of intervention

4 (1) To intervene in an appeal at any time before the Division makes a decision, the Minister must provide, first to the appellant and then to the Division, a written notice of intervention, together with any documentary evidence that the Minister wants to rely on in the appeal.

Content of notice of intervention

(2) In the notice of intervention, the Minister must indicate

- (a) counsel's contact information;
- (b) the identification number given by the Department of Citizenship and Immigration to the appellant;
- (c) the appellant's name, the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that the Minister received the written reasons for the decision;
- (d) whether the Minister is relying on any documentary evidence referred to in subsection 110(3) of the Act and the relevance of that evidence; and
- (e) whether the Minister is requesting that a hearing be held under subsection 110(6) of the Act, and if the Minister is requesting a hearing, why the Division should hold a hearing and whether the Minister is making an application under rule 66 to change the location of the hearing.

Minister's intervention record

(3) In addition to the documents referred to in subrule (1), the Minister may provide, first to the appellant and then to the Division, the Minister's intervention record containing the following documents, on consecutively numbered pages, in the following order:

- (a) all or part of the transcript of the Refugee Protection Division hearing if the Minister wants to rely on the transcript in the appeal and the transcript was not provided with the appellant's record, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;

¹⁰ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#The_Refugee_Appeal_Division_must_independently_assess_claims

- (b) any law, case law or other legal authority that the Minister wants to rely on in the appeal; and
- (c) a memorandum that includes full and detailed submissions regarding
 - (i) the grounds on which the Minister is contesting the appeal, and
 - (ii) the decision the Minister wants the Division to make.

Length of memorandum

- (4) The memorandum referred to in paragraph (3)(c) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Proof documents were provided

- (5) The documents provided to the Division under this rule must be accompanied by proof that they were provided to the appellant.

49.5.1 Rule 4: To intervene in an appeal the Minister must provide a written notice of intervention

Rule 4(1) provides that if it wants to intervene in an appeal, the Minister must provide a written notice of intervention, together with any documentary evidence that the Minister wants to rely on in the appeal. Where the Minister attempts to provide documentary evidence or argument without such a written notice of intervention that meets the requirements of RAD Rule 4, the Division has in the past refused to accept the document.

49.6 RAD Rule 5 - Reply

Reply to Minister's intervention

- 5 (1) To reply to a Minister's intervention, the appellant must provide, first to the Minister and then to the Division, a reply record.

Content of reply record

- (2) The reply record must contain the following documents, on consecutively numbered pages, in the following order:
 - (a) all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript to support the reply and the transcript was not provided with the appellant's record or by the Minister, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;
 - (b) any documentary evidence that the appellant wants to rely on to support the reply and that was not provided with the appellant's record or by the Minister;
 - (c) any law, case law or other legal authority that the appellant wants to rely on to support the reply and that was not provided with the appellant's record or by the Minister; and
 - (d) a memorandum that includes full and detailed submissions regarding
 - (i) only the grounds raised by the Minister,
 - (ii) how any documentary evidence referred to in paragraph (b) meets the requirements of subsection 110(4) or (5) of the Act and how that evidence relates to the appellant, and
 - (iii) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held and they did not include such a request in the appellant's record, and if the appellant is requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing.

Length of memorandum

- (3) The memorandum referred to in paragraph (2)(d) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Proof document was provided

- (4) The reply record provided to the Division must be accompanied by proof that it was provided to the Minister.

Time limit

(5) Documents provided under this rule must be received by the Division no later than 15 days after the day on which the appellant receives the Minister's notice of intervention, the Minister's intervention record, or any additional documents provided by the Minister, as the case may be.

49.7 RAD Rule 6: Extension of Time

Extension of Time

Application for extension of time to file or perfect

6 (1) A person who is the subject of an appeal who makes an application to the Division for an extension of the time to file or to perfect an appeal under the Regulations must do so in accordance with rule 37, except that the person must provide to the Division the original and a copy of the application.

Copy provided to Minister

(2) The Division must provide a copy of an application under subrule (1) to the Minister without delay.

Content of application

(3) The person who is the subject of the appeal must include in an application under subrule (1)

- (a) their name and telephone number, and an address where documents can be provided to them;
- (b) if represented by counsel, counsel's contact information and any limitations on counsel's retainer;
- (c) the identification number given by the Department of Citizenship and Immigration to them; and
- (d) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that they received the written reasons for the decision.

Accompanying documents - filing

(4) An application for an extension of the time to file an appeal under subrule (1) must be accompanied by three copies of a written notice of appeal.

Accompanying documents - perfecting

(5) An application for an extension of the time to perfect an appeal under subrule (1) must be accompanied by two copies of the appellant's record.

Application for extension of time to reply

(6) A person who is the subject of an appeal may make an application to the Division for an extension of the time to reply to a Minister's intervention in accordance with rule 37.

Factors - reply

(7) In deciding an application under subrule (6), the Division must consider any relevant factors, including

- (a) whether the application was made in a timely manner and the justification for any delay;
- (b) whether there is an arguable case;
- (c) prejudice to the Minister, if the application was granted; and
- (d) the nature and complexity of the appeal.

Notification of decision on application

(8) The Division must without delay notify, in writing, both the person who is the subject of the appeal and the Minister of its decision with respect to an application under subrule (1) or (6).

49.7.1 The Regulation sets out the process for extending the time limit for filing an appeal

RAD Rule 2(4) provides that the notice of appeal provided under this rule must be received by the Division within the time limit for filing an appeal set out in the Regulations. Section 159.91(2) of that regulation sets out the criteria to be granted an extension to that time limit:

Extension

159.91 (2) If the appeal cannot be filed within the time limit set out in paragraph 1)(a) or perfected within the time limit set out in paragraph (1)(b), the Refugee Appeal Division may, for reasons of fairness and natural justice, extend each of those time limits by the number of days that is necessary in the circumstances.

In short, this provision contains three elements:

1. It must not be possible for the appeal to be filed and perfected within the time limits of, respectively, 15 and 30 calendar days. Under this element, the party seeking an extension of time must provide an explanation for the delay and must show a continuing intention to appeal during the delay.
2. An extension must be for the number of days necessary in the circumstances. This requirement suggests that the delay should be as short as possible or, in other words, that every day of delay should be justified. The reference to "circumstances" implies an individualised assessment of the circumstances in each particular request for an extension of time.^[23]
3. Any extension must be for reasons of fairness and natural justice.^[24] Jurisprudence has established four factors to be considered in the applications for extension of time made before courts or administrative tribunals. These factors are not exhaustive and other factors may be considered, such as, for example, the complexity of an appeal, a factor mentioned in RAD Rule 6(7). All of the factors do not have to be met. The appropriate weight must be given to each factor in the context of a particular case. The four factors are to be applied in order to determine whether fairness and natural justice, in the circumstances, require an extension of time for a particular number of days:
 - a) there was and is a continuing intention on the part of the party presenting the motion to pursue the appeal;
 - b) the subject matter of the appeal discloses an arguable case;
 - c) there is a reasonable explanation for the defaulting parties delay; and
 - d) there is no prejudice to the other party in allowing the extension.^[25]

For more context to this part of the regulations, see: Canadian Refugee Procedure/IRPR s. 159.91: Appeal to Refugee Appeal Division¹¹.

¹¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPR_s._159.91:_Appeal_to_Refugee_Appeal_Division

49.8 RAD Rule 7: Decision without further notice

Disposition of an Appeal

Decision without further notice

7 Unless a hearing is held under subsection 110(6) of the Act, the Division may, without further notice to the appellant and to the Minister, decide an appeal on the basis of the materials provided

- (a) if a period of 15 days has passed since the day on which the Minister received the appellant's record, or the time limit for perfecting the appeal set out in the Regulations has expired; or
- (b) if the reply record has been provided, or the time limit for providing it has expired.

49.8.1 Rule 7 provides that the Division may, without further notice, decide the appeal, but further notice is required if the appeal is decided on a new ground

Rule 7 of the *RAD Rules* provides that, where a hearing is not warranted, the RAD may, “without further notice to the appellant and to the Minister, decide an appeal on the basis of the materials provided.” The Federal Court has recognized that, notwithstanding this rule, deciding an appeal on a new ground without first giving notice to the parties that the issue is in play can breach the requirements of procedural fairness. The duty of procedural fairness requires the RAD to provide the appellant with an opportunity to make submissions when considering an issue that was not raised by the appellant or by the RPD.^[26] Justice Hughes expressed this exception to the general rule as follows in *Husian v Canada*: “The point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions.”^[27] Furthermore, where the Division raises a new issue, the Minister should be given notice of the new issue, even if they are not a party to the proceeding.^[28]

49.8.2 What is a new issue requiring notice?

The RAD is obliged to conduct an independent review of the case, focusing on the errors identified by the appellant.^[29] In cases where a ground on which the RAD will decide a matter is legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues on appeal as framed by the parties, then procedural fairness requires notice to the parties that this new ground will be considered.^[30] Notice should be provided whenever new or additional arguments, reasoning, or analysis unknown to the parties is being considered by the Division.^[31] If there are additional substantive findings based on the record not addressed in the RPD decision, and therefore not raised by the parties on appeal, then notice must be provided prior to the Division making its findings.^[32] Essentially, this protects persons who are the subject of an appeal and the Minister against unfair surprise.

This said, “issues that are rooted in or are components of an existing issue” are not “new issues” necessitating such a notice.^[33] Furthermore, where an RPD finding is not challenged on appeal, then the RAD may uphold such non-challenged findings.^[34] See: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the

Subject of an Appeal#Rule 3(3)(g)(i): The appellant's record must contain a memorandum with submissions regarding the errors that are the grounds of the appeal¹².

Whether or not the issue was explicitly raised as an issue at the beginning of the RPD hearing by that panel is not determinative.^[35] Indeed, some issues are said to always be at issue in every claim, and need not be identified as a distinct issue by the RPD: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants have an expectation that a claim will only be rejected on the basis of a legal issue that a panel has identified as being at issue¹³. Regardless of the fact that certain issues, such as prospective risk, are central issues in any refugee protection claim, if the RPD did not make a clear and definitive finding on the issue, and it was not one of the grounds of appeal, then it would be unfair for a panel to dismiss a claim on that basis without providing notice.^[36]

Categories of cases in which the Board may err if notice is not provided include:

- Where the Board considers new evidence. Where new evidence is being considered on appeal, notice should be provided. For example, this applies where new country condition documentation comes up after the appeal has been perfected, such as a new NDP that is relevant.^[37] Specifically, the RAD is required to disclose the version of the NDP it used if the following two factors are present: (1) the version of the NDP that the RAD used to make its decision was not available or accessible to the public when the refugee protection claimant perfected their appeal and made their submissions, and (2) the most recent information in this version of the NDP is sufficiently different, novel and significant and shows a change in the general country conditions.^[38] For more discussion and nuance on this, see: Canadian Refugee Procedure/The Board's inquisitorial mandate#The Board should consider the most up-to-date country conditions evidence¹⁴, and Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Disclosure rights and obligations for the Board¹⁵, and also Canadian Refugee Procedure/RPD Rules 31-43 - Documents#The panel should consider the most recent National Documentation Package¹⁶.
- Where the Board considers a new legal issue. The RAD must provide notice where it wants to make a finding on an issue where the RPD did not make a clear and definitive finding on the issue and it was not among the grounds of appeal advanced by the parties.^[36] This includes where the RAD makes a finding on state protection,^[39] IFA,^[40] lack of prospective risk,^[41] a reconsideration of a claimant's credibility,^[42] and exclusion.^[43] This applies whenever the RPD did not make a clear and definitive finding on the issue^[36] and the issue was not raised in the appeal memoranda of the parties,^[44] regardless of whether the issue was canvassed by the RPD at the hearing^[45] or not raised at the initial hearing

12 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rule_3\(3\)\(g\)\(i\):_The_appellant's_record_must_contain_a_memorandum_with_submissions_regarding_the_errors_that_are_the_grounds_of_the_appeal](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rule_3(3)(g)(i):_The_appellant's_record_must_contain_a_memorandum_with_submissions_regarding_the_errors_that_are_the_grounds_of_the_appeal)

13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Claimants_have_an_expectation_that_a_claim_will_only_be_rejected_on_the_basis_of_a_legal_issue_that_a_panel_has_identified_as_being_at_issue

14 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board's_inquisitorial_mandate#The_Board_should_consider_the_most_up-to-date_country_conditions_evidence

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16 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#The_panel_should_consider_the_most_recent_National_Documentation_Package

at all,^[46] and regardless of whether the issue was not discussed by the RPD at all^[45] or was mentioned in passing in the RPD's reasons but not replied upon.^[44] The fact that the Minister provides a Notice of Intervention to the RAD and the person who is the subject of the appeal, along with arguments regarding an issue, suffices as "notice" that that issue is "in play".^[47] See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants have an expectation that a claim will only be rejected on the basis of a legal issue that a panel has identified as being at issue¹⁷.

- Where the Board makes additional substantive findings on a legal issue that is at issue in the appeal. In some circumstances, the Division should provide notice before making additional substantive findings on a legal issue that is at issue in the appeal, even though the issue was raised in the parties' appeal memoranda. That said, this area of the law is unclear and there are decisions that offer conflicting conclusions on the necessity of notice in such circumstances. Some discussion of the cases follows:
 - Credibility: While the RAD cannot raise a new issue without notice to the parties, it is entitled to make independent findings of credibility against an appellant without questioning the claimant or providing a further opportunity to make submissions^[48] where the following criteria are met: a) credibility was at issue before the RPD; b) the RPD's findings are contested on appeal; c) the credibility concerns from the RAD are linked to the applicant's appeal submissions; and d) the RAD's findings arise from the evidentiary record.^[49] For example, in *Popoola v. Canada* the court upheld a RAD decision which considered two additional credibility concerns (regarding the applicants' US visas and the alleged presence of a neighbour during a break-in at their home) in a case where credibility was already at issue.^[50] Similarly, in *Sun v. Canada*, the court found no breach of procedural fairness where the RAD raised new credibility issues about alleged inconsistencies in the claimant's evidence that had not been considered by the RPD and for which she was not given notice. The court held that the RAD was entitled to find an additional basis to question the applicant's credibility using the record that was before the RPD.^[51] In *Ahmed v. Canada*, the court upheld the RAD making an additional negative credibility conclusion related to delay in claiming where credibility was at issue on appeal, even though delay was not discussed by the RPD and the appellant was not specifically given notice regarding delay on appeal and invited to make submissions.^[52] In *Onwuanagbule v. Canada*, in contrast, the court held that the RAD should provide notice where it makes negative credibility inferences with respect to areas that were not addressed either by the RPD or in the appellant's memorandum (even where credibility is generally raised on appeal).^[53]
 - Genuineness of documents: The RAD is tasked with undertaking its own review of evidence, and may make additional or different credibility findings with respect to a document without this being a new issue that triggers a breach of procedural fairness.^[54] The RAD does not have a duty to confront a claimant about its concerns related to documents provided by the claimant where the issues raised and considered by the RAD are linked to the parties' submissions or the RPD's findings.^[55] That said, notice should be provided where the RAD raises new concerns about the genuineness of evidence tendered before the RPD which had not been discussed or put to the appellant prior.^[56] However, in *Zerihaymanot v. Canada*, the court held that the RAD did not

17 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Claimants_have_an_expectation_that_a_claim_will_only_be_rejected_on_the_basis_of_a_legal_issue_that_a_panel_has_identified_as_being_at_issue

raise a new issue when it commented on additional ways in which the applicant's birth certificate did not match the samples in the NDP that were not identified by the RPD (absence of signing official's name and language in document).^[57]

- **Forward-facing risk:** The courts have been prepared to accept in many cases that the forward-looking nature of the risk allegedly faced by the applicant was an inherent or implicit component of the RPD's and the RAD's analyses, as well as the applicant's express position on the appeal in his written memorandum to the RAD, and that notice that a new issue was going to be considered was consequently unnecessary.^[58] However, in *Mehra v. Canada*, the court concluded that the risk that the Appellant faced in their city that was considered their "home base" based on the address that they used in their documents was a new issue requiring notice because the Appellant had not ever lived in that city (or their country) and the RPD had not canvassed this issue.^[59]
- **IFA:** Notice should be provided where the RAD considers an IFA in a city not considered by the RPD, even where the RPD had raised IFA as an issue.^[60]

See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants should have a fair opportunity to respond to a panel's concerns¹⁸.

49.8.3 The notice must be sufficiently clear and specific

Any notice that is provided must be sufficiently specific such that the parties can appreciate the real concern of the RAD. For example, in *Nasr v. Canada*, the court concluded that the panel's notice regarding a credibility issue that the RAD was going to consider, but the RPD had not, was "vague" such that "the Applicants would have been unaware that the real concern of the RAD". As the credibility issue "had to be clearly put to [the Appellants] for response" and it was not, the court overturned the decision.^[61]

However, such notice requirements do not extend to requiring the Board to engage in an ongoing dialogue with a claimant. For example, in *Savit v. Canada*, the court concluded that once it had notified the applicant, it was reasonable for the RAD to point out a significant contradiction between the applicant's new statement made in response to the notice and her testimony before the RPD. The court held that if the applicant contradicted her initial testimony in addressing the RAD's concerns, she could not criticize the RAD for noticing this contradiction. In the court's view, the RAD was not required to give a second notice to give the applicant an opportunity to be confronted with her own contradictions; the requirement to give notice did not oblige the RAD to create a dialogue with her.^[62]

See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Claimants should have a fair opportunity to respond to a panel's concerns¹⁹.

18 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Claimants_should_have_a_fair_opportunity_to_respond_to_a_panel's_concerns

19 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Claimants_should_have_a_fair_opportunity_to_respond_to_a_panel's_concerns

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12. *Sami-Ullah v. Canada (Citizenship and Immigration)*, 2022 FC 1525 (CanLII), at para 26, <³⁰>, retrieved on 2023-06-27.
13. *Basra v. Canada (Immigration, Refugees and Citizenship)*, 2023 FC 707 (CanLII), at para 9, <³¹>, retrieved on 2023-07-06.
14. *Ismailov v. Canada (Citizenship and Immigration)*, 2015 FC 967 (CanLII), at para 67, <³²>, retrieved on 2022-09-09.
15. *Ismailov v. Canada (Citizenship and Immigration)*, 2015 FC 967 (CanLII), at para 67, <³³>, retrieved on 2022-09-09.
16. *Hunt v T&N PLC*, [1993] 4 SCR 289 at 306; J G Castel, *Canadian Conflict of Laws*, 4th ed (Toronto: Butterworths, 1997) at 155.
17. See *Jose Pereira E Hijos, SA v Canada (Attorney General)* (1996), 126 FTR 167; *Ielovski v Canada (Minister of Citizenship and Immigration)*, [2008] FC 739 at para 7.

20 <https://irb.gc.ca/en/legal-policy/procedures/Pages/notice-documents-epost-connect.aspx>

21 <https://canlii.ca/t/jn804#par5>

22 <https://canlii.ca/t/jlvh5>

23 <https://canlii.ca/t/gkb49#par14>

24 <https://canlii.ca/t/gkb49#par13>

25 <https://irb.gc.ca/en/refugee-appeals/Pages/RadSar3010Instruct.aspx>

26 <https://canlii.ca/t/jxd95#par15>

27 <https://canlii.ca/t/jnlcq#par7>

28 <https://canlii.ca/t/jnwwq#par17>

29 <https://canlii.ca/t/jprtr#par26>

30 <https://canlii.ca/t/jt2kd#par26>

31 <https://canlii.ca/t/jxd95#par9>

32 <https://canlii.ca/t/gkrb5#par67>

33 <https://canlii.ca/t/gkrb5#par67>

18. *Shalaiev, Dmytro v. M.C.I.* (F.C., No. IMM-6383-20), Roussel, April 1, 2022; 2022 FC 457.
19. *Chakroun c. Canada (Citoyenneté et Immigration)*, 2023 CF 1170 (CanLII), au para 18, <³⁴>, consulté le 2023-09-29.
20. *Ngandeu, Floriane Payo v. M.C.I.* (F.C., No. IMM-8158-21), Walker, December 1, 2022, 2022 FC 1651.
21. *Adekunle v. Canada (Citizenship and Immigration)*, 2023 FC 882 (CanLII), at para 20, <³⁵>, retrieved on 2023-09-11.
22. *Adekunle v. Canada (Citizenship and Immigration)*, 2023 FC 882 (CanLII), at para 21, <³⁶>, retrieved on 2023-09-11.
23. *X (Re)*, 2017 CanLII 149353 (CA IRB), at para 6, <³⁷>, retrieved on 2022-04-29.
24. *X (Re)*, 2013 CanLII 76391 (CA IRB), at para 17, <³⁸>, retrieved on 2022-04-28.
25. *Canada (Attorney General) v. Pentney*, 2008 FC 96, as cited and applied in the RAD context in *X (Re)*, 2017 CanLII 149353 (CA IRB), at para 6, <³⁹>, retrieved on 2022-04-29.
26. *Ehondor v. Canada (Citizenship and Immigration)*, 2016 FC 1253 (CanLII), at para 13, <⁴⁰>, retrieved on 2023-08-03.
27. *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10.
28. *Canada (Citizenship and Immigration) v. Alazar*, 2021 FC 637 (CanLII), <⁴¹>, retrieved on 2022-04-29
29. *Fatime v Canada (Citizenship and Immigration)*, 2020 FC 594 at para 19.
30. *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65 to 76.
31. *Kwakwa*, 2016 FC 600, para. 26.
32. *Husian*, 2015 FC 684, para. 10 and *Dalirani*, 2020 FC 258, paras. 29 and 20.
33. *Musthaffa v. Canada (Citizenship and Immigration)*, 2022 FC 59 (CanLII), at para 30, <⁴²>, retrieved on 2022-07-22.
34. *Shalaiev, Dmytro v. M.C.I.*, Roussel, April 1, 2022; 2022 FC 457.
35. *Yin v. Canada (Citizenship and Immigration)*, 2022 FC 564 (CanLII), at paras 25 and 31, <⁴³>, retrieved on 2022-11-14.
36. *Kaur v. Canada (Citizenship and Immigration)*, 2023 FC 1189 (CanLII), at para 17, <⁴⁴>, retrieved on 2023-09-29.
37. *Zhang v. Canada (Citizenship and Immigration)*, 2015 FC 1031 (CanLII)
38. *Kumar v. Canada (Citizenship and Immigration)* (F.C. IMM-1277-21), Lafrenière, October 21, 2022, 2022 FC 1440.
39. *Xu v. Canada*, 2019 FC 639, paras. 47 to 53.
40. *Cardenas*, 2017 FC 1194 at para. 3.

34 <https://canlii.ca/t/jzxbz#par18>

35 <https://canlii.ca/t/jxtq6#par20>

36 <https://canlii.ca/t/jxtq6#par21>

37 <https://canlii.ca/t/j46pm#par6>

38 <https://canlii.ca/t/g23dh#par17>

39 <https://canlii.ca/t/j46pm#par6>

40 <https://canlii.ca/t/gvqr5#par13>

41 <https://canlii.ca/t/jgr79>

42 <https://canlii.ca/t/jmswm#par30>

43 <https://canlii.ca/t/jnsrk#par31>

44 <https://canlii.ca/t/jzzjd#par17>

41. *Gonzalez Jimenez, Nerio Miguel v. M.C.I.* (F.C., No. IMM-3382-21), Roussel, April 5, 2022, 2022 FC 479. See also: *Kaur, Daljit v. M.C.I.* (F.C., no. IMM-5781-22), Rochester, September 1, 2023; 2023 FC 1189.
42. *Koanda*, 2019 FC 169, paras. 15 to 18 and *Laag*, 2019 FC 890, paras. 22-23.
43. *Milfort-Laguere*, 2019 FC 1361, para. 27.
44. *Laag v. Canada (Citizenship and Immigration)*, 2019 FC 890 (CanLII), at para 22, <⁴⁵>, retrieved on 2022-09-23.
45. *Ojarikre*, 2015 FC 896, paras. 22 and 23.
46. *Jianzhu*, 2015 FC 551, para. 12 and *Ching*, 2015 FC 725, paras. 66, 67 and 72.
47. *Gondal v. Canada (Citizenship and Immigration)*, 2023 FC 1226 (CanLII), at para 17, <⁴⁶>, retrieved on 2023-09-29.
48. *Mchedlishvili, Vasili v. M.C.I.* (F.C., no. IMM-360-21), Mosley, February 21, 2022; 2022 FC 6229.
49. *Salman v. Canada (Citizenship and Immigration)*, 2023 FC 340 (CanLII), at para 34, <⁴⁷>, retrieved on 2023-08-24.
50. *Popoola v. Canada (Citizenship and Immigration)*, 2022 FC 555 (CanLII), at para 28, <⁴⁸>, retrieved on 2022-05-13.
51. *Sun v. Canada (Citizenship and Immigration)* – (FC File number IMM-4459-21) Justice Brown, May 12, 2022; 2022 FC 710.
52. *Ahmed v. Canada (Citizenship and Immigration)*, 2023 FC 830 (CanLII), at para 31, <⁴⁹>, retrieved on 2023-09-08.
53. *Palliyaralalage*, 2019 FC 596; *Mei Ling He*, 2019 FC 1316, para. 80 and *Onwuanagbule*, 2020 FC 550, paras. 9 to 13.
54. *Gadafi v Canada (Citizenship and Immigration)*, 2021 FC 1011 at para 24; *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at para 40.
55. *Lemma v. Canada (Citizenship and Immigration)*, 2022 FC 770 (CanLII), at para 23, <⁵⁰>, retrieved on 2022-06-27.
56. *Ortiz*, 2016 FC 180, para. 22.
57. *Zerihaymanot, Brhane Ghebrihiwet, v. M.C.I.* (F.C., no. IMM-3077-21), McHaffie, April 26, 2022; 2022 FC 610.
58. *Musthaffa v. Canada (Citizenship and Immigration)*, 2022 FC 59 (CanLII), at para 31, <⁵¹>, retrieved on 2022-07-22.
59. *Mehra, Subesten Shyam v. M.C.I.* (F.C., no. IMM-4796-21), Sadrehashemi, November 21, 2022; 2022 FC 1591.
60. *Boluwaji v. Canada*, 2018 FC 1154, para. 20.
61. *Nasr v. Canada (Citizenship and Immigration)*, 2022 FC 757 (CanLII), at para 30, <⁵²>, retrieved on 2022-07-29.
62. *Savit, Aleksandra v. M.C.I.* (FC, IMM-1961-22), Grammond, February 9, 2023, 2023 FC 194.

45 <https://canlii.ca/t/j19kn#par22>

46 <https://canlii.ca/t/k03bv#par17>

47 <https://canlii.ca/t/jwf81#par34>

48 <https://canlii.ca/t/jp10h#par28>

49 <https://canlii.ca/t/jxm6d#par31>

50 <https://canlii.ca/t/jpj13#par23>

51 <https://canlii.ca/t/jmswm#par31>

52 <https://canlii.ca/t/jpgx9#par30>

50 Rules Applicable to Appeals Made by the Minister (RAD Rules Part 2)

50.1 RAD Rules - Part 2

The text of the relevant rules reads:

PART 2 - Rules Applicable to Appeals Made by the Minister

Filing and Perfecting an Appeal

Filing appeal

8 (1) To file an appeal in accordance with subsection 110(1.1) of the Act, the Minister must provide, first to the person who is the subject of the appeal, a written notice of appeal, and then to the Division, two copies of the written notice of appeal.

Content of notice of appeal

(2) In the notice of appeal, the Minister must indicate

- (a) counsel's contact information;
- (b) the name of the person who is the subject of the appeal and the identification number given by the Department of Citizenship and Immigration to them; and
- (c) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that the Minister received the written reasons for the decision.

Proof document was provided

(3) The notice of appeal provided to the Division must be accompanied by proof that it was provided to the person who is the subject of the appeal.

Time limit

(4) The notice of appeal provided under this rule must be received by the Division within the time limit for filing an appeal set out in the Regulations.

Perfecting appeal

9 (1) To perfect an appeal in accordance with subsection 110(1.1) of the Act, the Minister must provide, first to the person who is the subject of the appeal and then to the Division, any supporting documents that the Minister wants to rely on in the appeal.

Content of appellant's record

(2) In addition to the documents referred to in subrule (1), the Minister may provide, first to the person who is the subject of the appeal and then to the Division, the appellant's record containing the following documents, on consecutively numbered pages, in the following order:

- (a) the notice of decision and written reasons for the Refugee Protection Division's decision that the Minister is appealing;
- (b) all or part of the transcript of the Refugee Protection Division hearing if the Minister wants to rely on the transcript in the appeal, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;
- (c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the Minister wants to rely on the documents in the appeal;
- (d) a written statement indicating

- (i) whether the Minister is relying on any documentary evidence referred to in subsection 110(3) of the Act and the relevance of that evidence, and
- (ii) whether the Minister is requesting that a hearing be held under subsection 110(6) of the Act, and if the Minister is requesting a hearing, why the Division should hold a hearing and whether the Minister is making an application under rule 66 to change the location of the hearing;
- (e) any law, case law or other legal authority that the Minister wants to rely on in the appeal; and
- (f) a memorandum that includes full and detailed submissions regarding
 - (i) the errors that are the grounds of the appeal,
 - (ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the Minister is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing, and
 - (iii) the decision the Minister wants the Division to make.

Length of memorandum

- (3) The memorandum referred to in paragraph (2)(f) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Proof documents were provided

- (4) Any supporting documents and the appellant's record, if any, provided to the Division must be accompanied by proof that they were provided to the person who is the subject of the appeal.

Time limit

- (5) Documents provided under this rule must be received by the Division within the time limit for perfecting an appeal set out in the Regulations.

Response to an Appeal

Response to appeal

- 10 (1) To respond to an appeal, the person who is the subject of the appeal must provide, first to the Minister and then to the Division, a written notice of intent to respond, together with the respondent's record.

Content of notice of intent to respond

- (2) In the notice of intent to respond, the respondent must indicate
 - (a) their name and telephone number, and an address where documents can be provided to them;
 - (b) if represented by counsel, counsel's contact information and any limitations on counsel's retainer;
 - (c) the identification number given by the Department of Citizenship and Immigration to them;
 - (d) the Refugee Protection Division file number and the date of the notice of decision relating to the decision being appealed;
 - (e) the language - English or French - chosen by them as the language of the appeal; and
 - (f) the representative's contact information if the Refugee Protection Division has designated a representative for them in the proceedings relating to the decision being appealed, and any proposed change in representative.

Content of respondent's record

- (3) The respondent's record must contain the following documents, on consecutively numbered pages, in the following order:
 - (a) all or part of the transcript of the Refugee Protection Division hearing if the respondent wants to rely on the transcript in the appeal and the transcript was not provided with the appellant's record, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;
 - (b) a written statement indicating
 - (i) whether the respondent is requesting that a hearing be held under subsection 110(6) of the Act, and if they are requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing, and
 - (ii) the language and dialect, if any, to be interpreted, if the Division decides that a hearing is necessary and the respondent needs an interpreter;
 - (c) any documentary evidence that the respondent wants to rely on in the appeal;
 - (d) any law, case law or other legal authority that the respondent wants to rely

- on in the appeal; and
- (e) a memorandum that includes full and detailed submissions regarding
 - (i) the grounds on which the respondent is contesting the appeal,
 - (ii) the decision the respondent wants the Division to make, and
 - (iii) why the Division should hold a hearing under subsection 110(6) of the Act if the respondent is requesting that a hearing be held.

Length of memorandum

- (4) The memorandum referred to in paragraph (3)(e) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Proof documents were provided

- (5) The notice of intent to respond and the respondent's record provided to the Division must be accompanied by proof that they were provided to the Minister.

Time limit

- (6) Documents provided under this rule must be received by the Division no later than 15 days after
 - (a) the day on which the respondent receives any supporting documents; or
 - (b) if the Division allows an application for an extension of time to perfect the appeal under rule 12, the day on which the respondent is notified of the decision to allow the extension of time.

50.2 RAD Rule 11: Reply

Minister's reply

- 11 (1) To reply to a response by the respondent, the Minister must provide, first to the respondent and then to the Division, any documentary evidence that the Minister wants to rely on to support the reply and that was not provided at the time that the appeal was perfected or with the respondent's record.

Reply record

- (2) In addition to the documents referred to in subrule (1), the Minister may provide, first to the respondent and then to the Division, a reply record containing the following documents, on consecutively numbered pages, in the following order:
 - (a) all or part of the transcript of the Refugee Protection Division hearing if the Minister wants to rely on the transcript to support the reply and the transcript was not provided with the appellant's record, if any, or the respondent's record, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;
 - (b) any law, case law or other legal authority that the Minister wants to rely on to support the reply and that was not provided with the appellant's record, if any, or the respondent's record; and
 - (c) a memorandum that includes full and detailed submissions regarding
 - (i) only the grounds raised by the respondent, and
 - (ii) why the Division should hold a hearing under subsection 110(6) of the Act if the Minister is requesting that a hearing be held and the Minister did not include such a request in the appellant's record, if any, and if the Minister is requesting a hearing, whether the Minister is making an application under rule 66 to change the location of the hearing.

Length of memorandum

- (3) The memorandum referred to in paragraph (2)(c) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Proof documents were provided

- (4) Any documentary evidence and the reply record, if any, provided to the Division under this rule must be accompanied by proof that they were provided to the respondent.

50.3 RAD Rule 12: Extension of Time

Application for extension of time - Minister

12 (1) If the Minister makes an application to the Division for an extension of the time to file or to perfect an appeal under the Regulations, the Minister must do so in accordance with rule 37.

Accompanying documents - filing

(2) An application for an extension of the time to file an appeal under subrule (1) must be accompanied by two copies of a written notice of appeal.

Accompanying documents - perfecting

(3) An application for an extension of the time to perfect an appeal under subrule (1) must be accompanied by any supporting documents, and an appellant's record, if any.

Application for extension of time - person

(4) A person who is the subject of an appeal may make an application to the Division for an extension of the time to respond to an appeal in accordance with rule 37.

Content of application for extension of time to respond to appeal

(5) The person who is the subject of the appeal must include in an application under subrule (4)

- (a) their name and telephone number, and an address where documents can be provided to them;
- (b) if represented by counsel, counsel's contact information and any limitations on counsel's retainer;
- (c) the identification number given by the Department of Citizenship and Immigration to them; and
- (d) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that they received the written reasons for the decision.

Factors - respond

- (6) In deciding an application under subrule (4), the Division must consider any relevant factors, including
- (a) whether the application was made in a timely manner and the justification for any delay;
 - (b) whether there is an arguable case;
 - (c) prejudice to the Minister, if the application was granted; and
 - (d) the nature and complexity of the appeal.

Notification of decision on application

(7) The Division must without delay notify, in writing, both the person who is the subject of the appeal and the Minister of its decision with respect to an application under subrule (1) or (4).

50.3.1 Commentary

See the concordant rule for appeals made by the person who is the subject of the appeal: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#RAD Rule 6: Extension of Time¹.

50.4 RAD Rule 13: Disposition of an Appeal

Decision without further notice

13 Unless a hearing is held under subsection 110(6) of the Act, the Division

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#RAD_Rule_6:_Extension_of_Time

may, without further notice to the parties, decide an appeal on the basis of the materials provided

- (a) if a period of 15 days has passed since the day on which the Minister received the respondent's record, or the time limit for providing it set out in subrule 10(6) has expired; or
- (b) if the Minister's reply has been provided.

51 Rules Applicable to All Appeals (RAD Rules Part 3)

The text of Part 3 of the RAD Rules reads:

51.1 RAD Rules - Part 3

PART 3

Rules Applicable to All Appeals

Communicating with the Division

Communicating with Division

14 All communication with the Division must be directed to the registry office specified by the Division.

Change to contact information

15 If the contact information of a person who is the subject of an appeal changes, the person must without delay provide the changes in writing to the Division and to the Minister.

Regarding RAD Rule 15, see the commentary to RPD Rule 4: Canadian Refugee Procedure/RPD Rules 3-13 - Information and Documents to be Provided#RPD Rule 4 - Claimant's contact information¹.

51.2 RAD Rule 16: Counsel

Counsel

Retaining counsel after providing notice

16 (1) If a person who is the subject of an appeal retains counsel after providing a notice of appeal or a notice of intent to respond, as the case may be, the person must without delay provide the counsel's contact information in writing to the Division and to the Minister.

Change to counsel's contact information - person

(2) If the contact information of counsel for a person who is the subject of an appeal changes, the person must without delay provide the changes in writing to the Division and to the Minister.

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_3-13_-_Information_and_Documents_to_be_Provided#RPD_Rule_4_-_Claimant's_contact_information

51.2.1 A failure to copy the Minister on a change of counsel can be procedurally unfair

RAD Rule 16(2) provides that if the person who is the subject of the appeal retains new counsel, that person must without delay notify the Minister in writing. A failure to do so is potentially procedurally unfair and may justify setting aside the decision, as the Federal Court did in *Canada v. Miller*.^[1]

Change to counsel's contact information - Minister

(3) If the contact information of counsel for the Minister changes, the Minister must without delay provide the changes in writing to the Division and to the person who is the subject of the appeal.

51.3 RAD Rule 17: Declaration — counsel not representing or advising for consideration

Declaration - counsel not representing or advising for consideration

17 If a person who is the subject of an appeal retains counsel who is not a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, both the person who is the subject of the appeal and their counsel must without delay provide the information and declarations set out in the schedule to the Division in writing.

Becoming counsel of record

18 (1) Subject to subrule (2), as soon as counsel for a person who is the subject of an appeal provides on behalf of the person a notice of appeal or a notice of intent to respond, as the case may be, or as soon as a person becomes counsel after the person provided a notice, the counsel becomes counsel of record for the person.

Limitation on counsel's retainer

(2) If a person who is the subject of an appeal has notified the Division of a limitation on their counsel's retainer, counsel is counsel of record only to the extent of the services to be provided within the limited retainer. Counsel ceases to be counsel of record as soon as those services are completed.

Request to be removed as counsel of record

19 (1) To be removed as counsel of record, counsel for a person who is the subject of an appeal must first provide to the person and to the Minister a copy of a written request to be removed and then provide the written request to the Division.

Proof request was provided

(2) The request provided to the Division must be accompanied by proof that copies were provided to the person represented and to the Minister.

Request - if date for proceeding fixed

(3) If a date for a proceeding has been fixed and three working days or less remain before that date, counsel must make the request orally at the proceeding.

Division's permission required

(4) Counsel remains counsel of record unless the request to be removed is granted.

Removing counsel of record

20 (1) To remove counsel as counsel of record, a person who is the subject of an appeal must first provide to counsel and to the Minister a copy of a written notice that counsel is no longer counsel for the person and then provide the written notice to the Division.

Proof notice was provided

(2) The notice provided to the Division must be accompanied by proof that copies were provided to counsel and to the Minister.

Ceasing to be counsel of record

(3) Counsel ceases to be counsel of record when the Division receives the notice.

51.4 RAD Rule 21: Refugee Protection Division Record

Refugee Protection Division Record

Providing notice of appeal

21 (1) The Division must without delay provide a copy of the notice of appeal to the Refugee Protection Division after the appeal is perfected under rule 3 or 9, as the case may be.

Preparing and providing record

(2) The Refugee Protection Division must prepare a record and provide it to the Division no later than 10 days after the day on which the Refugee Protection Division receives the notice of appeal.

Content of record

(3) The Refugee Protection Division record must contain

- (a) the notice of decision and written reasons for the decision that is being appealed;
- (b) the Basis of Claim Form as defined in the Refugee Protection Division Rules and any changes or additions to it;
- (c) all documentary evidence that the Refugee Protection Division accepted as evidence, during or after the hearing;
- (d) any written representations made during or after the hearing but before the decision being appealed was made; and
- (e) any audio or other electronic recording of the hearing.

Providing record to absent Minister

(4) If the Minister did not take part in the proceedings relating to the decision being appealed, the Division must provide a copy of the Refugee Protection Division record to the Minister as soon as the Division receives it.

51.4.1 The onus is on the appellant to include in their appeal record any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal

See: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#Rule 3(3)(c): The appellant's record must contain any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal².

51.5 RAD Rule 22: Language of the Appeal

Language of the Appeal

Choice of language

[https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rule_3\(3\)\(c\):_The_appellant's_record_must_contain_any_documents_that_the_Refugee_Protection_Division_refused_to_accept_as_evidence,_during_or_after_the_hearing,_if_the_appellant_wants_to_rely_on_the_documents_in_the_appeal](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rule_3(3)(c):_The_appellant's_record_must_contain_any_documents_that_the_Refugee_Protection_Division_refused_to_accept_as_evidence,_during_or_after_the_hearing,_if_the_appellant_wants_to_rely_on_the_documents_in_the_appeal)

2

22 (1) A person who is the subject of an appeal must choose English or French as the language of the appeal. The person must indicate that choice in the notice of appeal if they are the appellant or in the notice of intent to respond if they are the respondent.

Language - Minister's appeals

(2) If the appellant is the Minister, the language of the appeal is the language chosen by the person who is the subject of the appeal in the proceedings relating to the decision being appealed.

Changing language

(3) A person who is the subject of an appeal may change the language of the appeal that they chose under subrule (1) by notifying the Division and the Minister in writing without delay and, if a date for a proceeding has been fixed, the notice must be received by their recipients no later than 20 days before that date.

51.6 RAD Rule 23: Designated Representatives

Designated Representatives

Continuation of designation

23 (1) If the Refugee Protection Division designated a representative for the person who is the subject of the appeal in the proceedings relating to the decision being appealed, the representative is deemed to have been designated by the Division, unless the Division orders otherwise.

Duty of counsel to notify

(2) If the Refugee Protection Division did not designate a representative for the person who is the subject of the appeal and counsel for a party believes that the Division should designate a representative for the person because the person is under 18 years of age or is unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing.

Exception

(3) Subrule (2) does not apply in the case of a person under 18 years of age whose appeal is joined with the appeal of their parent or legal guardian if the parent or legal guardian is 18 years of age or older.

Content of notice

(4) The notice must include the following information:
(a) whether counsel is aware of a person in Canada who meets the requirements to be designated as a representative and, if so, the person's contact information;
(b) a copy of any available supporting documents; and
(c) the reasons why counsel believes that a representative should be designated.

Requirements for being designated

(5) To be designated as a representative, a person must
(a) be 18 years of age or older;
(b) understand the nature of the proceedings;
(c) be willing and able to act in the best interests of the person who is the subject of the appeal; and
(d) not have interests that conflict with those of the person who is the subject of the appeal.

Factors

(6) When determining whether a person who is the subject of an appeal is unable to appreciate the nature of the proceedings, the Division must consider any relevant factors, including
(a) whether the person can understand the reason for the proceeding and can instruct counsel;
(b) the person's statements and behaviour at the proceeding;
(c) expert evidence, if any, on the person's intellectual or physical faculties, age or mental condition; and
(d) whether the person has had a representative designated for a proceeding in a

division other than the Refugee Protection Division.

Designation applies to all proceedings

(7) The designation of a representative for a person who is under 18 years of age or who is unable to appreciate the nature of the proceedings applies to all subsequent proceedings in the Division with respect to that person unless the Division orders otherwise.

51.6.1 Rule 23(7): Designation applies to all proceedings in the Refugee Appeal Division

Rule 23(7) specifies that the designation of a representative for a person who is under 18 years of age applies to all subsequent proceedings in the Refugee Appeal Division with respect to that person, unless the Division orders otherwise. A designated representative appointed by the RAD would not ordinarily establish such a relationship before another division, for example if the RAD remitted a matter to the RPD and had appointed a DR prior to that remittal. Instead, the fact that a person has had a representative designated for a proceeding in another division of the Board is simply one factor for the RPD to take account in such circumstances when determining whether the RPD should appoint a designated representative: Canadian Refugee Procedure/Designated Representatives#RPD Rule 20(5) - Factors for determining whether a claimant or protected person is unable to appreciate the nature of the proceedings³.

End of designation - person reaches 18 years of age

(8) The designation of a representative for a person who is under 18 years of age ends when the person reaches 18 years of age unless that representative has also been designated because the person is unable to appreciate the nature of the proceedings.

Termination of designation

(9) The Division may terminate a designation if the Division is of the opinion that the representative is no longer required or suitable and may designate a new representative if required.

Designation criteria

(10) Before designating a person as a representative, the Division must
 (a) assess the person's ability to fulfil the responsibilities of a designated representative; and
 (b) ensure that the person has been informed of the responsibilities of a designated representative.

Responsibilities of representative

(11) The responsibilities of a designated representative include
 (a) deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel;
 (b) making decisions regarding the appeal or assisting the represented person in making those decisions;
 (c) informing the represented person about the various stages and procedures in the processing of their case;
 (d) assisting in gathering evidence to support the represented person's case and in providing evidence and, if necessary, being a witness at the hearing;
 (e) protecting the interests of the represented person and putting forward the best possible case to the Division; and
 (f) informing and consulting the represented person to the extent possible when making decisions about the case.

³ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives#RPD_Rule_20\(5\)_-_Factors_for_determining_whether_a_claimant_or_protected_person_is_unable_to_appreciate_the_nature_of_the_proceedings](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives#RPD_Rule_20(5)_-_Factors_for_determining_whether_a_claimant_or_protected_person_is_unable_to_appreciate_the_nature_of_the_proceedings)

51.6.2 See related RPD rule for commentary

See: Canadian Refugee Procedure/RPD Rule 20 - Designated Representatives⁴.

51.7 RAD Rule 24: Specialized Knowledge

Specialized Knowledge

Notice to parties

24 (1) Before using any information or opinion that is within its specialized knowledge, the Division must notify the parties and give them an opportunity to,

- (a) if a date for a hearing has not been fixed, make written representations on the reliability and use of the information or opinion and provide written evidence in support of their representations; and
- (b) if a date for a hearing has been fixed, make oral or written representations on the reliability and use of the information or opinion and provide evidence in support of their representations.

Providing written representations and evidence

(2) A party must provide its written representations and evidence first to any other party and then to the Division.

Proof written representations and evidence were provided

(3) The written representations and evidence provided to the Division must be accompanied by proof that they were provided to any other party.

See the commentary on the equivalent RPD rule: Canadian Refugee Procedure/RPD Rule 22 - Specialized Knowledge⁵.

51.8 RAD Rule 25: Notice of Constitutional Question

Notice of constitutional question

25 (1) A party who wants to challenge the constitutional validity, applicability or operability of a legislative provision must complete a notice of constitutional question.

Form and content of notice

(2) The party must complete the notice as set out in Form 69 of the Federal Courts Rules or any other form that includes

- (a) the party's name;
- (b) the Division file number;
- (c) the specific legislative provision that is being challenged;
- (d) the material facts relied on to support the constitutional challenge; and
- (e) a summary of the legal argument to be made in support of the constitutional challenge.

Providing notice

(3) The party must provide

- (a) a copy of the notice to the Attorney General of Canada and to the attorney general of each province of Canada, in accordance with section 57 of the Federal Courts Act;
- (b) a copy of the notice to the Minister even if the Minister has not yet intervened in the appeal;
- (c) a copy of the notice to the UNHCR, if the UNHCR has provided notice of its intention to provide written submissions, and to any interested person; and
- (d) the original notice to the Division, together with proof that copies were

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_20_-_Designated_Representatives

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_22_-_Specialized_Knowledge

provided under paragraphs (a) to (c).

Time limit

(4) Documents provided under this rule must be received by their recipients at the same time as the Division receives the appellant's record, respondent's record or the reply record, as the case may be.

Deciding of constitutional question

(5) The Division must not make a decision on the constitutional question until at least 10 days after the day on which it receives the notice of constitutional question.

For commentary, see: Canadian Refugee Procedure/RPD Rule 66 - Notice of Constitutional Question⁶.

51.9 RAD Rule 26: Conferences

Conferences

Requirement to participate at conference

26 (1) The Division may require the parties to participate at a conference to discuss issues, relevant facts and any other matter in order to make the appeal fairer and more efficient.

Information or documents

(2) The Division may require the parties to give any information or provide any document, at or before the conference.

Written record

(3) The Division must make a written record of any decisions and agreements made at the conference.

51.10 RAD Rule 27: Documents

Documents

Form and Language of Documents

Documents prepared by party

27 (1) A document prepared for use by a party in a proceeding must be typewritten, in a type not smaller than 12 point, on one or both sides of 216 mm by 279 mm (8 $\frac{1}{2}$ inches x 11 inches) paper.

Photocopies

(2) Any photocopy provided by a party must be a clear copy of the document photocopied and be on one or both sides of 216 mm by 279 mm (8 $\frac{1}{2}$ inches x 11 inches) paper.

List of documents

(3) If more than one document is provided, the party must provide a list identifying each of the documents.

Consecutively numbered pages

(4) A party must consecutively number each page of all the documents provided as if they were one document.

⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_66_-_Notice_of_Constitutional_Question

51.10.1 Commentary

For commentary, see the equivalent RPD rule: Canadian Refugee Procedure/RPD Rules 31-43 - Documents#RPD Rule 31 - How to provide documents⁷.

51.11 RAD Rule 28: Language of Documents

Language of documents - person

28 (1) All documents used by a person who is the subject of an appeal in an appeal must be in English or French or, if in another language, be provided together with an English or French translation and a declaration signed by the translator.

Language of Minister's documents

(2) All documents used by the Minister in an appeal must be in the language of the appeal or be provided together with a translation in the language of the appeal and a declaration signed by the translator.

Translator's declaration

(3) A translator's declaration must include the translator's name, the language and dialect, if any, translated and a statement that the translation is accurate.

For commentary, see the equivalent RPD rules: Canadian Refugee Procedure/Documents#RPD Rule 32 - Language of Documents⁸.

51.12 RAD Rule 29: Documents or Written Submissions not Previously Provided

Documents or Written Submissions not Previously Provided

Documents or written submissions not previously provided - person

29 (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.

Application

(2) If a person who is the subject of an appeal wants to use a document or provide written submissions that were not previously provided, the person must make an application to the Division in accordance with rule 37.

Documents - new evidence

(3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister.

Factors

(4) In deciding whether to allow an application, the Division must consider any relevant factors, including

- (a) the document's relevance and probative value;
- (b) any new evidence the document brings to the appeal; and
- (c) whether the person who is the subject of the appeal, with reasonable effort,

⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#RPD_Rule_31_-_How_to_provide_documents

⁸ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_32_-_Language_of_Documents

could have provided the document or written submissions with the appellant's record, respondent's record or reply record.

Documents or written submissions not previously provided - Minister

(5) If, at any time before the Division makes a decision, the Minister, in accordance with paragraph 171(a.5) of the Act, submits documentary evidence or written submissions in support of the Minister's appeal or intervention that were not previously provided, the Minister must provide the documentary evidence or written submissions first to the person who is the subject of the appeal and then to the Division.

Proof documents or written submissions provided

(6) The additional documents or written submissions provided to the Division under subrule (5) must be accompanied by proof that they were provided to the person who is the subject of the appeal.

Reply to Minister's documents or written submissions

(7) The person who is the subject of the appeal may reply to the additional documents or written submissions in accordance with rule 5 with any modifications that the circumstances require.

51.12.1 In deciding whether to allow an application, the Division must consider any relevant factors, including those listed in Rule 29(4)

In deciding whether to allow an application under RAD Rule 29, the Division must consider any relevant factors, including, but not limited to, the three listed in RAD Rule 29(4). The RAD must consider all three criteria under subsection 29(4) of the RAD Rules, and cannot simply limit its analysis to one of the relevant factors, namely, whether the evidence could have been provided with the Appellants' perfected record.^[2] While the list of factors to be considered in Rule 37(3) is not exhaustive, the use of the word "including" rather than the words "such as" before the list of factors indicates the intent that each of the factors included in the sub-rule be considered. A failure to do so gives rise to a breach of procedural fairness.^[3]

51.12.2 RAD Rule 29 may apply even in cases where submissions are solicited on an issue by the RAD

RAD Rule 29(2) states that a person who wants to use a document or provide written submissions that were not previously provided must make an application. This is so even in cases where submissions are solicited by the RAD. In *Gomez Guzman v. Canada*, upon the reopening of the RAD's offices following a closure due to the COVID-19 pandemic, the RAD wrote to the Applicants' counsel giving 30 days to submit documents in support of the appeal which "[would] be accepted without an application." The RAD letter further specified that "other requirements of Rule 29 and 110(4) continue to apply."^[4] The panel did not accept the evidence, concluding that it did not meet the requirements of RAD Rule 29. The court upheld this decision, concluding that the panel was right to apply Rule 29, despite the submissions having been invited by the Division.^[5]

51.12.3 Whether and how RAD Rule 29 applies to court-ordered redeterminations

RAD Rule 29(1) provides that a person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division. As such, the intent of this rule is that a person who is the subject of an appeal does not need to satisfy the requirements of RAD Rule 29 when they are originally providing their appellant's record, respondent's record, or reply record, but they must do so where they provide documents or written submissions afterwards. A question can arise about how this rule should be interpreted in the case of a court-ordered redetermination of a file, as when a case is remitted by the Federal Court for reconsideration. The practice of the RAD is to send out a standard form letter regarding such cases which makes clear that the person who is the subject of the appeal may submit new evidence (subject to the statutory criteria thereon) and implicitly indicates that RAD Rule 29 does not apply provided that the evidence is received prior to the deadline specified in the letter:

Please be advised that any objections to the file content should be made in writing and any additional evidence should satisfy the admissibility requirements for new evidence (s. 110(4) of the *Immigration and Refugee Protection Act* and the criteria set out in *MCI v. Singh*, 2016 FCA 96), as well as be provided to every party and to the RAD no later than <date>. In instances where there was a RAD hearing, unless ordered to hold a new hearing by the Federal Court, the new panel may or may not decide to hold a new hearing.

See also: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#RAD Rule 3: Perfecting Appeal⁹. See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The record on a court-ordered redetermination¹⁰.

51.13 RAD Rule 30: Providing a Document

Providing a Document

General provision

30 Rules 31 to 35 apply to any document, including a notice or request in writing.

51.14 RAD Rule 31: Providing documents to RAD, RPD, Minister, and a person other than the Minister

Providing documents to Division

31 (1) A document to be provided to the Division must be provided to the Division's registry office that is located in the same region as the Refugee Protection Division's registry office through which the notice of decision under

9 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#RAD_Rule_3:_Perfecting_Appeal

10 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#The_record_on_a_court-ordered_redetermination

appeal was provided.

Providing documents to Refugee Protection Division

(2) A document to be provided to the Refugee Protection Division must be provided to the Refugee Protection Division's registry office through which the notice of decision under appeal was provided.

Providing documents to Minister

(3) A document to be provided to the Minister must be provided to the Minister's counsel.

Providing documents to person other than Minister

(4) A document to be provided to a person other than the Minister must be provided to the person's counsel if the person has counsel of record. If the person does not have counsel of record, the document must be provided to the person.

51.15 RAD Rule 32: How to provide document

How to provide document

32 A document may be provided in any of the following ways:

- (a) by hand;
- (b) by regular mail or registered mail;
- (c) by courier;
- (d) by fax if the recipient has a fax number and the document is no more than 20 pages long, unless the recipient consents to receiving more than 20 pages; and
- (e) by email or other electronic means if the Division allows.

51.15.1 The Division allows documents to be provided by email and other electronic means

RAD Rule 32(e) provides that a document may be provided by email or other electronic means if the Division allows. The Division has a practice notice on *Exchange of Documents through Canada Post epost Connect to the Refugee Appeal Division* which so allows.^[6] The *Practice Notice on Resumption of Time Limits at the Refugee Appeal Division (RAD)* also provides that the Division accepts documents by email to the email addresses listed.^[7]

51.16 RAD Rule 33: Application if unable to provide document

Application if unable to provide document

33 (1) If a party is unable to provide a document in a way required by rule 32, the party may make an application to the Division to be allowed to provide the document in another way or to be excused from providing the document.

Form of application

(2) The application must be made in accordance with rule 37.

Allowing application

(3) The Division must not allow the application unless the party has made reasonable efforts to provide the document to the person to whom the document must be provided.

Proof document was provided

34 (1) Proof that a document was provided must be established by

- (a) an acknowledgment of receipt signed by the recipient or a statement of service, if the document was provided by hand;
- (b) a confirmation of receipt if the document was provided by registered mail, courier, fax or email or other electronic means; or
- (c) a statement of service if the document was provided by regular mail.

Statement of service

(2) For the purpose of paragraph (1)(a) or (c), a statement of service consists of a written statement, signed by the person who provided the document, that includes the person's name and a statement of how and when the document was provided.

Statement - unable to provide proof

(3) If a party is unable to provide proof that a document was provided in a way required by paragraph (1)(a) to (c), the party must provide a written statement, signed by the party, that includes an explanation of why they are unable to provide proof.

51.17 RAD Rule 35: When document received by division

When document received by division

35 (1) A document provided to the Division or to the Refugee Protection Division is considered to be received on the day on which the document is date-stamped by that division.

When document received by recipient other than division

(2) A document provided by regular mail other than to the Division or to the Refugee Protection Division is considered to be received seven days after the day on which it was mailed. If the seventh day is not a working day, the document is considered to be received on the next working day.

Extension of time limit - next working day

(3) When the time limit for providing a document ends on a day that is not a working day, the time limit is extended to the next working day.

For commentary, see the concomitant RPD Rule 41: Canadian Refugee Procedure/RPD Rules 31-43 - Documents#RPD Rule 41 - When documents are considered received¹¹.

51.18 RAD Rule 36: Applications

Applications

General

General provision

36 Unless these Rules provide otherwise,

- (a) a party who wants the Division to make a decision on any matter in a proceeding, including the procedure to be followed, must make an application to the Division in accordance with rule 37;
- (b) a party who wants to respond to the application must respond in accordance with rule 38; and
- (c) a party who wants to reply to a response must reply in accordance with rule 39.

¹¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_31-43_-_Documents#RPD_Rule_41_-_When_documents_are_considered_received

51.19 RAD Rule 37: How to Make an Application

How to Make an Application

Form of application and time limit

37 (1) Unless these Rules provide otherwise, an application must be made in writing and without delay.

Oral application

(2) If a date for a hearing has been fixed, the Division must not allow a party to make an application orally at the hearing unless the party, with reasonable effort, could not have made a written application before that date.

Content of application

(3) Unless these Rules provide otherwise, in a written application, the party must

- (a) state the decision the party wants the Division to make;
- (b) give reasons why the Division should make that decision; and
- (c) if there is another party and the views of that party are known, state whether the other party agrees to the application.

Affidavit or statutory declaration

(4) Unless these Rules provide otherwise, any evidence that the party wants the Division to consider with a written application must be given in an affidavit or statutory declaration that accompanies the application.

Providing application to other party and Division

(5) A party who makes a written application must provide

- (a) to any other party, a copy of the application and a copy of any affidavit or statutory declaration; and
- (b) to the Division, the original application and the original of any affidavit or statutory declaration, together with proof that a copy was provided to any other party.

51.19.1 RAD Rule 37(4): The requirement to submit an affidavit or statutory declaration under RAD Rule 37(4) has been waived

The *Practice Notice: Exchange of documents through Canada Post epost Connect™ to the Refugee Appeal Division* states that the RAD will not require a signed affidavit or statutory declaration to accompany an application under Rule 37 if it is submitted electronically.^[6]

51.20 RAD Rule 38: How to Respond to a Written Application

How to Respond to a Written Application

Responding to written application

38 (1) A response to a written application must be in writing and

- (a) state the decision the party wants the Division to make; and
- (b) give reasons why the Division should make that decision.

Evidence in written response

(2) Any evidence that the party wants the Division to consider with the written response must be given in an affidavit or statutory declaration that accompanies the response. Unless the Division requires it, an affidavit or statutory declaration is not required if the party who made the application was not required to give evidence in an affidavit or statutory declaration, together with the application.

Providing response

(3) A party who responds to a written application must provide

- (a) to the other party, a copy of the response and a copy of any affidavit or statutory declaration; and
- (b) to the Division, the original response and the original of any affidavit or statutory declaration, together with proof that a copy was provided to the other party.

Time limit

- (4) Documents provided under subrule (3) must be received by their recipients no later than seven days after the day on which the party receives the copy of the application.

51.20.1 The requirement to submit an affidavit or statutory declaration under RAD Rule 38(2) has been waived

The *Practice Notice: Exchange of documents through Canada Post epost Connect™ to the Refugee Appeal Division* states that the RAD will not require a signed affidavit or statutory declaration to accompany an application under Rule 37 if it is submitted electronically. [6] Given that RAD Rule 38(2) provides that an affidavit or statutory declaration is not required if the party who made the application was not required to give evidence in that form, and given that this requirement has been waived for all applications, it cannot be said that the requirement in RAD Rule 38(2) applies either.

51.21 RAD Rule 39: How to Reply to a Written Response

How to Reply to a Written Response

Replying to written response

- 39 (1) A reply to a written response must be in writing.

Evidence in reply

- (2) Any evidence that the party wants the Division to consider with the written reply must be given in an affidavit or statutory declaration that accompanies the reply. Unless the Division requires it, an affidavit or statutory declaration is not required if the party was not required to give evidence in an affidavit or statutory declaration, together with the application.

Providing reply

- (3) A party who replies to a written response must provide
 - (a) to the other party, a copy of the reply and a copy of any affidavit or statutory declaration; and
 - (b) to the Division, the original reply and the original of any affidavit or statutory declaration, together with proof that a copy was provided to the other party.

Time limit

- (4) Documents provided under subrule (3) must be received by their recipients no later than five days after the day on which the party receives the copy of the response.

Joining or Separating Appeals

Appeals automatically joined

- 40 The Division must join any appeals of decisions on claims that were joined at the time that the Refugee Protection Division decided the claims.

Application to join

41 (1) A party may make an application to the Division to join appeals.

Application to separate

(2) A party may make an application to the Division to separate appeals that are joined.

Form of application and providing application

(3) A party who makes an application to join or separate appeals must do so in accordance with rule 37, but the party is not required to give evidence in an affidavit or statutory declaration. The party must also

(a) provide a copy of the application to any person who will be affected by the Division's decision on the application; and

(b) provide to the Division proof that the party provided the copy of the application to any affected person.

Time limit

(4) Documents provided under this rule must be received by their recipients,

(a) if the person who is the subject of the appeal is the applicant, at the same time as the Division receives the person's notice of appeal, notice of intent to respond or reply record; or

(b) if the Minister is the applicant, at the same time as the Division receives the Minister's notice of appeal, notice of intervention or reply.

Factors

(5) In deciding the application, the Division must consider any relevant factors, including whether

(a) the appeals involve similar questions of fact or law;

(b) allowing the application would promote the efficient administration of the Division's work; and

(c) allowing the application would likely cause an injustice.

Proceedings Conducted in Public

Minister considered party

42 (1) For the purpose of this rule, the Minister is considered to be a party even if the Minister has not yet intervened in the appeal.

Application

(2) A person who makes an application to the Division to have a proceeding conducted in public must do so in writing and in accordance with this rule rather than rule 37.

Oral application

(3) If a date for a hearing has been fixed, the Division must not allow a person to make an application orally at the hearing unless the person, with reasonable effort, could not have made a written application before that date.

Content of application

(4) In the application, the person must

(a) state the decision they want the Division to make;

(b) give reasons why the Division should make that decision;

(c) state whether they want the Division to consider the application in public or in the absence of the public;

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(d) give reasons why the Division should consider the application in public or in the absence of the public; and

(e) include any evidence that they want the Division to consider in deciding the application.

Providing application

(5) The person must provide the original application and two copies to the Division. The Division must provide a copy of the application to the parties.

Response to application

(6) A party may respond to a written application. The response must

(a) state the decision they want the Division to make;

(b) give reasons why the Division should make that decision;

(c) state whether they want the Division to consider the application in public or in the absence of the public;

(d) give reasons why the Division should consider the application in public or in the absence of the public; and

(e) include any evidence that they want the Division to consider in deciding the application.

Minister's notice

(7) If the Minister responds to a written application, the response must be accompanied by a notice of intervention in accordance with subrule 4(2), if one was not previously provided.

Providing response

(8) The party must provide a copy of the response to the other party and provide the original response and a copy to the Division, together with proof that the copy was provided to the other party.

Providing response to applicant

(9) The Division must provide to the applicant either a copy of the response or a summary of the response referred to in paragraph (13)(a).

Reply to response

(10) An applicant or a party may reply in writing to a written response or a summary of a response.

Providing reply

(11) An applicant or a party who replies to a written response or a summary of a response must provide the original reply and two copies to the Division. The Division must provide a copy of the reply to the parties.

Time limit

(12) An application made under this rule must be received by the Division without delay. The Division must specify the time limit within which a response or reply, if any, is to be provided.

Confidentiality

(13) The Division may take any measures it considers necessary to ensure the confidentiality of the proceeding in respect of the application, including

- (a) providing a summary of the response to the applicant instead of a copy; and
- (b) if the Division holds a hearing in respect of the appeal and the application,
 - (i) excluding the applicant or the applicant and their counsel from the hearing while the party responding to the application provides evidence and makes representations, or
 - (ii) allowing the presence of the applicant's counsel at the hearing while the party responding to the application provides evidence and makes representations, on receipt of a written undertaking by counsel not to disclose any evidence or information adduced until a decision is made to hold the hearing in public.

Summary of response

- (14) If the Division provides a summary of the response under paragraph (13)(a), or excludes the applicant and their counsel from a hearing in respect of the application under subparagraph (13)(b)(i), the Division must provide a summary of the representations and evidence, if any, that is sufficient to enable the applicant to reply, while ensuring the confidentiality of the proceeding having regard to the factors set out in paragraph 166(b) of the Act.

Notification of decision on application

- (15) The Division must notify the applicant and the parties of its decision on the application and provide reasons for the decision.

51.22 RAD Rule 43: Assignment of Three-member Panel

Assignment of Three-member Panel

Notice of order

- 43 (1) If the Chairperson of the Board orders a proceeding to be conducted by three Division members, the Division must without delay notify the parties - including the Minister even if the Minister has not yet intervened in the appeal - and the UNHCR in writing of the order.

Providing documents to UNHCR

- (2) The Division must provide the UNHCR with a copy of the following documents at the same time that it provides notice of the order:
 - (a) the Refugee Protection Division record; and
 - (b) the notice of appeal, appellant's record, notice of intent to respond, respondent's record, reply record, Minister's notice of intervention, Minister's intervention record, if any, Minister's reply, and Minister's reply record, if any.

UNHCR's notice to Division

- (3) If the UNHCR receives notice of an order, the UNHCR may provide notice to the Division in accordance with subrule 45(1) of its intention to provide written submissions.

Time limit

- (4) The Division may, without further notice to the parties and to the UNHCR, decide the appeal on the basis of the materials provided if a period of 15 days has passed since the day on which the Minister and the UNHCR receive notice of the order.

51.23 RAD Rule 44: These Rules apply to UNHCR and Interested Persons

UNHCR and Interested Persons

Rules applicable to UNHCR and interested persons

44 These Rules, with the exception of rules 25 (notice of constitutional question) and 47 to 49 (withdrawal, reinstatement, reopening), apply to the UNHCR and interested persons with any modifications that the circumstances require.

51.24 RAD Rule 45: UNHCR providing written submissions in an appeal conducted by a three-member panel

Notice to Division

45 (1) The UNHCR must notify the Division in writing of its intention to provide written submissions in an appeal conducted by a three-member panel, and include its contact information and that of its counsel, if any.

Notice to person and Minister

(2) The Division must without delay provide a copy of the UNHCR's notice to the person who is the subject of the appeal and to the Minister.

Providing written submissions to Division

(3) The UNHCR's written submissions must be received by the Division no later than 10 days after the day on which the UNHCR provided the notice.

Limitation - written submissions

(4) The UNHCR's written submissions must not raise new issues.

Length of written submissions

(5) The UNHCR's written submissions must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Providing written submissions

(6) The Division must without delay provide a copy of the UNHCR's written submissions to the person who is the subject of the appeal and to the Minister.

Response

(7) The person who is the subject of the appeal or the Minister may respond to the UNHCR's submissions in writing.

Limitation - response

(8) A response must not raise new issues.

Length of response

(9) A response must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Providing response

(10) The response must first be provided to the person who is the subject of the appeal or to the Minister, as the case may be, and then to the Division.

Proof response provided

(11) The response provided to the Division must be accompanied by proof that it was provided to the person who is the subject of the appeal or to the Minister, as the case may be.

Time limit

(12) Documents provided under subrules (10) and (11) must be received by their recipients no later than seven days after the day on which the person who is the

subject of the appeal or the Minister, as the case may be, receives the UNHCR's submissions.

51.25 RAD Rule 46: Application by person to participate in three-member panel

Application by person to participate

46 (1) Any person, other than the UNHCR, may make an application to the Division to be allowed to participate in an appeal conducted by a three-member panel. The person must make the application without delay and in accordance with this rule.

Form and content of application

(2) The application must be in writing and include

- (a) the applicant's name;
- (b) an explanation of why the applicant wants to participate;
- (c) the submissions the applicant wants to put forward and an explanation of how they are relevant to the appeal;
- (d) an explanation of the differences between the applicant's submissions and those of the person who is the subject of the appeal and the Minister;
- (e) an explanation of how the applicant's submissions may help the Division decide the appeal; and
- (f) the contact information of the applicant and their counsel, if any.

Providing application

(3) The Division must provide a copy of the application to the person who is the subject of the appeal and to the Minister.

Response

(4) The person who is the subject of the appeal or the Minister may respond to the application in writing.

Limitation - response

(5) A response must not raise new issues.

Length of response

(6) A response must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Time limit

(7) A response must be received by the Division no later than 10 days after the day on which the person who is the subject of the appeal or the Minister, as the case may be, receives the application.

Notification of decision on application

(8) The Division must without delay notify the applicant, the person who is the subject of the appeal and the Minister in writing of its decision on the application.

Providing documents

(9) If the Division allows the application, it must without delay provide the interested person with a copy of the following documents as soon as they are available:

- (a) the Refugee Protection Division record;
- (b) the notice of appeal, appellant's record, notice of intent to respond, respondent's record, reply record, Minister's notice of intervention, Minister's intervention record, if any, Minister's reply, and Minister's reply record, if any; and
- (c) the written submissions of any other interested person and the UNHCR.

Limitation - written submissions

(10) The interested person's written submissions must not raise new issues.

Length of written submissions

(11) The interested person's written submissions must not be more than 30 pages

long if typewritten on one side or 15 pages if typewritten on both sides.

Providing written submissions

(12) The interested person's written submissions must first be provided to the person who is the subject of the appeal and to the Minister and then to the Division.

Proof written submissions provided

(13) The written submissions provided to the Division must be accompanied by proof that they were provided to the person who is the subject of the appeal and to the Minister.

Response

(14) The person who is the subject of the appeal or the Minister may respond to the written submissions in writing.

Limitation - response

(15) A response must not raise new issues.

Length of response

(16) A response must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

Providing response

(17) The response must first be provided to the interested person, then to the person who is the subject of the appeal or to the Minister, as the case may be, and then to the Division.

Proof response provided

(18) The response provided to the Division must be accompanied by proof that it was provided to the interested person, and to the person who is the subject of the appeal or to the Minister, as the case may be.

Time limit

(19) Documents provided under subrules (17) and (18) must be received by their recipients no later than seven days after the day on which the person who is the subject of the appeal or the Minister, as the case may be, receives the interested person's written submissions.

51.26 RAD Rule 47: Withdrawal

Abuse of process

47 (1) For the purpose of subsection 168(2) of the Act, withdrawal of an appeal is an abuse of process if withdrawal would likely have a negative effect on the Division's integrity. If the requirements set out in rule 7 or 13, as the case may be, for deciding an appeal on the basis of the materials provided have not been met, withdrawal is not an abuse of process.

Withdrawal on notice

(2) If the requirements set out in rule 7 or 13, as the case may be, for deciding an appeal have not been met, an appellant may withdraw an appeal by notifying the Division in writing.

Application to withdraw

(3) If the requirements set out in rule 7 or 13, as the case may be, for deciding an appeal have been met, an appellant who wants to withdraw an appeal must make an application to the Division in accordance with rule 37.

51.26.1 Withdrawal is not an abuse of process if the requirements set out in rules 7 or 13 have not been met

See RAD Rule 7: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#RAD Rule 7: Decision

without further notice¹² and/or RAD Rule 13: Canadian Refugee Procedure/RAD Rules Part 2 - Rules Applicable to Appeals Made by the Minister#RAD Rule 13: Disposition of an Appeal¹³.

51.26.2 A Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules

Section 168(2) of the Act provides that a Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules. For more context, see the commentary to the RPD rule on withdrawal: Canadian Refugee Procedure/RPD Rule 59 - Withdrawal¹⁴.

51.27 RAD Rule 48: Reinstating a Withdrawn Appeal

Application to reinstate withdrawn appeal

48 (1) An appellant may apply to the Division to reinstate an appeal that was made by the appellant and was withdrawn.

Form and content of application

(2) The appellant must make the application in accordance with rule 37. If a person who is the subject of an appeal makes the application, they must provide to the Division the original and a copy of the application and include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer.

Documents provided to Minister

(3) The Division must provide to the Minister, without delay, a copy of an application made by a person who is the subject of an appeal.

Factors

(4) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application.

Factors

(5) In deciding the application, the Division must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay.

Subsequent application

(6) If the appellant made a previous application to reinstate an appeal that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

51.28 RAD Rule 49: Reopening an Appeal

Reopening an Appeal

12 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#RAD_Rule_7:_Decision_without_further_notice

13 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_2_-_Rules_Applicable_to_Appeals_Made_by_the_Minister#RAD_Rule_13:_Disposition_of_an_Appeal

14 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_59_-_Withdrawal

Rules Applicable to All Appeals (RAD Rules Part 3)

Application to reopen appeal

49 (1) At any time before the Federal Court has made a final determination in respect of an appeal that has been decided or declared abandoned, the appellant may make an application to the Division to reopen the appeal.

Form and content of application

(2) The application must be made in accordance with rule 37. If a person who is the subject of an appeal makes the application, they must provide to the Division the original and a copy of the application and include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer.

Documents provided to Minister

(3) The Division must provide to the Minister, without delay, a copy of an application made by a person who is the subject of an appeal .

Allegations against counsel

(4) If it is alleged in the application that the person who is the subject of the appeal's counsel in the proceedings that are the subject of the application provided inadequate representation,
(a) the person must first provide a copy of the application to the counsel and then provide the original and a copy of the application to the Division, and
(b) the application provided to the Division must be accompanied by proof that a copy was provided to the counsel.

Copy of pending application

(5) The application must be accompanied by a copy of any pending application for leave to apply for judicial review or any pending application for judicial review.

Factor

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

Factors

(7) In deciding the application, the Division must consider any relevant factors, including
(a) whether the application was made in a timely manner and the justification for any delay; and
(b) if the appellant did not make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made.

Subsequent application

(8) If the appellant made a previous application to reopen an appeal that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

Other remedies

(9) If there is a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of appeals, or dismiss the application.

51.28.1 Commentary

For commentary, see the equivalent RPD Rules: Canadian Refugee Procedure/RPD Rules 62-63 - Reopening a Claim or Application¹⁵. See also section 168 of the Act: Canadian Refugee Procedure/Section 168 IRPA: Abandonment of proceeding¹⁶.

51.29 RAD Rules 50-51: Decisions

Decisions

Notice of decision

50 (1) When the Division makes a decision, other than an interlocutory decision, it must provide in writing a notice of decision to the person who is the subject of the appeal, to the Minister and to the Refugee Protection Division. The Division must also provide in writing a notice of decision to the UNHCR and to any interested person, if they provided written submissions in the appeal.

Written reasons

(2) The Division must provide written reasons for the decision, together with the notice of decision, if a hearing

- (a) was not held under subsection 110(6) of the Act; or
- (b) was held under subsection 110(6) of the Act and the decision and reasons were not given orally at the hearing.

Request for written reasons

(3) A request under paragraph 169(1)(e) of the Act for written reasons for a decision must be made in writing.

When decision of single member takes effect

51 (1) A decision, other than an interlocutory decision, made by a single Division member takes effect

- (a) if made in writing, when the member signs and dates the reasons for the decision; and
- (b) if given orally at a hearing, when the member states the decision and gives the reasons.

When decision of three-member panel takes effect

(2) A decision, other than an interlocutory decision, made by a panel of three Division members takes effect

- (a) if made in writing, when all the members sign and date their reasons for the decision; and
- (b) if given orally at a hearing, when all the members state their decision and give their reasons.

51.29.1 Rule 50(2)(b) provides that a decision and reasons may be given orally, but this is not allowed by the statute

Rule 50(2)(b) provides that where the RAD holds a hearing, it may provide a decision and reasons for that decision orally at the hearing and that doing so obviates the need to provide written reasons. However, s. 169(c) of the Act provides that all decisions of the Refugee Appeal Division must be rendered in writing: Canadian Refugee Procedure/Decisions and Reasons¹⁷. To the extent of inconsistency between this provision of the rules and the statute, s. 169 of the statute is controlling. As such, RAD decisions may not be provided orally.

¹⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_62-63_-_Reopening_a_Claim_or_Application

¹⁶ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Section_168_IRPA:_Abandonment_of_proceeding

¹⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions_and_Reasons

It appears that this provision in the rules reflects an earlier version of the Act which had allowed oral reasons to be provided, and it was not updated when the Act was amended to preclude that.

51.30 RAD Rules 52-53: General Provisions

General Provisions

No applicable rule

52 In the absence of a provision in these Rules dealing with a matter raised during the proceedings, the Division may do whatever is necessary to deal with the matter.

Powers of Division

53 The Division may, after giving the parties notice and an opportunity to object,

- (a) act on its own initiative, without a party having to make an application or request to the Division;
- (b) change a requirement of a rule;
- (c) excuse a person from a requirement of a rule; and
- (d) extend a time limit, before or after the time limit has expired, or shorten it if the time limit has not expired.

Failure to follow rules

54 Unless proceedings are declared invalid by the Division, a failure to follow any requirement of these Rules does not make the proceedings invalid.

51.31 References

52 Rules Applicable to an Appeal for Which a Hearing Is Held (RAD Rules Part 4)

52.1 RAD Rules Part 4

The text of the relevant rules reads:

PART 4
Rules Applicable to an Appeal for Which a Hearing Is Held

52.2 RAD Rule 55 - Fixing a Date for a Hearing

Fixing a Date for a Hearing

Conference to fix date for hearing
55 The Division may require the parties to participate in a scheduling conference or otherwise give information to help the Division fix a date for a hearing.

52.3 RAD Rule 56 - Notice to Appear

Notice to appear
56 (1) When, in accordance with paragraph 171(a) of the Act, the Division gives notice to the person who is the subject of the appeal and to the Minister of any hearing, it must notify them in writing of the date, time and location fixed for the hearing and the issues that will be raised at the hearing.

Date fixed for hearing
(2) The date fixed for the hearing of an appeal must not be earlier than 10 days after the day on which the person who is the subject of the appeal and the Minister receive the notice referred to in subrule (1), unless they consent to an earlier date.

52.3.1 Hearings at the RAD will normally be scheduled 3-6 weeks from the date on which the hearing is ordered

RAD Rule 56(2) provides that the date fixed for the hearing of an appeal must not be earlier than 10 days after the day on which the person who is the subject of the appeal and the Minister receive the Notice to appear for the hearing. RAD policy is also that the hearing must be scheduled within 42 days (6 weeks) from the date that the hearing is ordered, which provides a window of several weeks during which the hearing will normally be scheduled.

52.4 RAD Rule 57 - Conduct of a Hearing

Conduct of a Hearing

Restriction of hearing

57 (1) A hearing is restricted to matters relating to the issues provided with the notice to appear unless the Division considers that other issues have been raised by statements made by the person who is the subject of the appeal or by a witness during the hearing.

Standard order of questioning

(2) Unless the Division orders otherwise, any witness, including the person who is the subject of the appeal, will be questioned first by the appellant, then by any other party, then by the appellant in reply, and then by the Division.

Limiting questioning of witnesses

(3) The Division may limit the questioning of witnesses, including the person who is the subject of the appeal, taking into account the nature and complexity of the issues and the relevance of the questions.

Oral representations

(4) Representations must be made orally at the end of a hearing unless the Division orders otherwise.

Limits on representations

(5) After all the evidence has been heard, the Division must
(a) set time limits for representations, taking into account the complexity of the issues and the amount of relevant evidence heard; and
(b) indicate what issues need to be addressed in the representations.

52.4.1 The order of questioning in RAD hearings is not the same as the order of questioning in RPD hearings

In hearings at the RAD, the rules provides that any witness will be questioned first by the appellant, including the person who is the subject of the appeal. In contrast, at the RPD, the rules provide that the Member will question first: Canadian Refugee Procedure/RPD Rules 3-13 - Information and Documents to be Provided#RPD Rule 10 - Order of questioning in hearings, oral representations, oral decisions, limiting questioning¹.

52.5 RAD Rule 58 - Person Who Is the Subject of an Appeal in Custody

Person Who Is the Subject of an Appeal in Custody

Custody

58 The Division may order a person who holds a person who is the subject of an appeal in custody to bring the person to a proceeding at a location specified by the Division.

52.6 RAD Rule 59 - Interpreters

Interpreters

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_3-13_-_Information_and_Documents_to_be_Provided#RPD_Rule_10_-_Order_of_questioning_in_hearings,_oral_representations,_oral_decisions,_limiting_questioning

Need for interpreter - person

59 (1) If a person who is the subject of an appeal needs an interpreter, the person must indicate the language and dialect, if any, to be interpreted in the appellant's record if they are the appellant or in the respondent's record if they are the respondent.

Changing language of interpretation

(2) A person who is the subject of an appeal may change the language and dialect, if any, that they specified under subrule (1), or if they had not indicated that an interpreter was needed, they may indicate that they need an interpreter, by notifying the Division in writing and indicating the language and dialect, if any, to be interpreted. The notice must be received by the Division no later than 20 days before the date fixed for the hearing.

Need for interpreter - witness

(3) If any party's witness needs an interpreter for a hearing, the party must notify the Division in writing and specify the language and dialect, if any, to be interpreted. The notice must be received by the Division no later than 20 days before the date fixed for the hearing.

Interpreter's oath

(4) The interpreter must take an oath or make a solemn affirmation to interpret accurately.

52.6.1 Commentary

See the equivalent RPD rule: Canadian Refugee Procedure/ RPD Rule 19 - Interpreters².

52.7 RAD Rule 60 - Observers

Observers

Observers

60 (1) An application under rule 42 is not necessary if an observer is the UNHCR or a member of the staff of the Board or if the person who is the subject of the appeal consents to or requests the presence of an observer other than a representative of the press or other media of communication at the proceeding.

Observers - factor

(2) The Division must allow the attendance of an observer unless, in the opinion of the Division, the observer's attendance is likely to impede the proceeding.

Observers - confidentiality of proceeding

(3) The Division may take any measures it considers necessary to ensure the confidentiality of the proceeding despite the presence of an observer.

Witnesses

Providing witness information

61 (1) If a party wants to call a witness, the party must provide the following witness information in writing to any other party and to the Division:

- (a) the witness's contact information;
- (b) a brief statement of the purpose and substance of the witness's testimony or, in the case of an expert witness, the expert witness's brief signed summary of the testimony to be given;

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_19_-_Interpreters

- (c) the time needed for the witness's testimony;
- (d) the party's relationship to the witness;
- (e) in the case of an expert witness, a description of the expert witness's qualifications; and
- (f) whether the party wants the witness to testify by means of live telecommunication.

Proof witness information provided

- (2) The witness information provided to the Division must be accompanied by proof that it was provided to any other party.

Time limit

- (3) Documents provided under this rule must be received by their recipients no later than 20 days before the date fixed for the hearing.

Failure to provide witness information

- (4) If a party does not provide the witness information, the witness must not testify at the hearing unless the Division allows them to testify.

Factors

- (5) In deciding whether to allow a witness to testify, the Division must consider any relevant factors, including
 - (a) the relevance and probative value of the proposed testimony; and
 - (b) the reason why the witness information was not provided.

Requesting summons

- 62 (1) A party who wants the Division to order a person to testify at a hearing must make a request to the Division for a summons, either orally at a proceeding or in writing.

Factors

- (2) In deciding whether to issue a summons, the Division must consider any relevant factors, including
 - (a) the necessity of the testimony to a full and proper hearing;
 - (b) the person's ability to give that testimony; and
 - (c) whether the person has agreed to be summoned as a witness.

Using summons

- (3) If a party wants to use a summons, they must
 - (a) provide the summons to the person by hand;
 - (b) provide a copy of the summons to the Division, together with proof that it was provided to the person by hand; and
 - (c) pay or offer to pay the person the applicable witness fees and travel expenses set out in Tariff A of the Federal Courts Rules.

Cancelling summons

- 63 (1) If a person who is summoned to appear as a witness wants the summons cancelled, the person must make an application in writing to the Division.

Application

- (2) The person must make the application in accordance with rule 37, but is not required to give evidence in an affidavit or statutory declaration.

Arrest warrant

- 64 (1) If a person does not obey a summons to appear as a witness, the party who requested the summons may make a request to the Division orally at the hearing, or in writing, to issue a warrant for the person's arrest.

Written request

- (2) A party who makes a written request for a warrant must provide supporting evidence by affidavit or statutory declaration.

Requirements for issue of arrest warrant

- (3) The Division must not issue a warrant unless
- (a) the person was provided the summons by hand or the person is avoiding being provided the summons;
 - (b) the person was paid or offered the applicable witness fees and travel expenses set out in Tariff A of the Federal Courts Rules;
 - (c) the person did not appear at the hearing as required by the summons; and
 - (d) the person's testimony is still needed for a full and proper hearing.

Content of warrant

- (4) A warrant issued by the Division for the arrest of a person must include directions concerning detention or release.

Excluded witness

- 65 If the Division excludes a witness from a hearing room, no person may communicate to the witness any evidence given while the witness was excluded unless allowed to do so by the Division or until the witness has finished testifying.

Changing the Location of a Hearing

Application to change location

- 66 (1) A party may make an application to the Division to change the location of a hearing.

Form and content of application

- (2) The party must make the application in accordance with rule 37, but is not required to give evidence in an affidavit or statutory declaration.

Time limit

- (3) Documents provided under this rule must be received by their recipients no later than 20 days before the date fixed for the hearing.

Factors

- (4) In deciding the application, the Division must consider any relevant factors, including
- (a) whether the party is residing in the location where the party wants the hearing to be held;
 - (b) whether a change of location would allow the hearing to be full and proper;

- (c) whether a change of location would likely delay the hearing;
- (d) how a change of location would affect the Division's operation;
- (e) how a change of location would affect the parties;
- (f) whether a change of location is necessary in order to accommodate a vulnerable person; and
- (g) whether a hearing may be conducted by means of live telecommunication with the person who is the subject of the appeal.

Duty to appear

- (5) Unless a party receives a decision from the Division allowing the application, the party must appear for the hearing at the location fixed and be ready to start or continue the hearing.

52.8 RAD Rule 67 - Changing the Date or Time of a Hearing

Changing the Date or Time of a Hearing

Application to change date or time

- 67 (1) A party may make an application to the Division to change the date or time fixed for a hearing.

Form and content of application

- (2) The party must
 - (a) make the application in accordance with rule 37, but is not required to give evidence in an affidavit or statutory declaration; and
 - (b) give at least six dates and times, within the period specified by the Division, on which the party is available to start or continue the hearing.

Notice of period specified by Division

- (3) The Division must provide notice of the period referred to in paragraph (2)(b) in a manner that will allow public access to it.

Hearing two working days or less away

- (4) If the party wants to make an application two working days or less before the date fixed for the hearing, the party must make the application orally on the date fixed for the hearing.

Factors

- (5) In deciding the application, the Division must consider any relevant factors, including
 - (a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;
 - (b) when the party made the application;
 - (c) the time the party has had to prepare for the hearing;
 - (d) the efforts made by the party to be ready to start or continue the hearing;
 - (e) in the case of a party who requests more time to obtain information in support of their arguments, the Division's ability to proceed in the absence of that information without causing an injustice;
 - (f) whether the party has counsel;
 - (g) the knowledge and experience of any counsel who represents the party;
 - (h) any previous delays and the reasons for them;
 - (i) whether the date and time fixed were preemptory;
 - (j) whether the change is required to accommodate a vulnerable person;
 - (k) whether allowing the application would unreasonably delay the hearing or likely cause an injustice; and
 - (l) the nature and complexity of the matter to be heard.

Subsequent application

(6) If the party made a previous application that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

Application for medical reasons

(7) If a person who is the subject of an appeal makes the application for medical reasons, other than those related to their counsel, they must provide, together with the application, a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate. A person who has provided a copy of the certificate to the Division must provide the original document to the Division without delay.

Content of certificate

(8) The medical certificate must set out

- (a) the particulars of the medical condition, without specifying the diagnosis, that prevent the person from participating in the hearing on the date fixed for the hearing; and
- (b) the date on which the person is expected to be able to participate in the hearing.

Failure to provide medical certificate

(9) If a person who is the subject of an appeal fails to provide a medical certificate in accordance with subrules (7) and (8), the person must include in their application

- (a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;
- (b) particulars of the medical reasons for the application, supported by corroborating evidence; and
- (c) an explanation of how the medical condition prevents them from participating in the hearing on the date fixed for the hearing.

Duty to appear

(10) Unless a party receives a decision from the Division allowing the application, the party must appear for the hearing at the date and time fixed and be ready to start or continue the hearing.

52.9 RAD Rule 68 - Abandonment

Abandonment

Abandonment after hearing scheduled

68 (1) In determining whether an appeal has been abandoned under subsection 168(1) of the Act after a date for a hearing has been fixed, the Division must give the appellant an opportunity to explain why the appeal should not be declared abandoned,

- (a) immediately, if the appellant is present at the hearing and the Division considers that it is fair to do so; or
- (b) in any other case, by way of a special hearing, after notifying the appellant in writing.

Factors to consider

(2) The Division must consider, in deciding if the appeal should be declared abandoned, the explanation given by the appellant and any other relevant factors, including the fact that the appellant is ready to start or continue the proceedings.

Medical reasons

(3) If the appellant is the person who is the subject of the appeal and the explanation includes medical reasons, other than those related to their counsel, they must provide, together with the explanation, the original of a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate.

Content of certificate

(4) The medical certificate must set out

- (a) the particulars of the medical condition, without specifying the diagnosis, that prevented the person from pursuing their appeal; and
- (b) the date on which the person is expected to be able to pursue their appeal.

Failure to provide medical certificate

(5) If a person who is the subject of an appeal fails to provide a medical certificate in accordance with subrules (3) and (4), the person must include in their explanation

- (a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;
- (b) particulars of the medical reasons included in the explanation, supported by corroborating evidence; and
- (c) an explanation of how the medical condition prevented them from pursuing their appeal.

Start or continue proceedings

(6) If the Division decides not to declare the appeal abandoned, it must start or continue the proceedings without delay.

52.9.1 The RAD may determine that any proceeding before it has been abandoned, not just one where a hearing is scheduled

The RAD rule on abandonment is part of Part 4 of the rules, namely "Rules Applicable to an Appeal for Which a Hearing Is Held". However, this should not restrict the RAD's discretion to declare other types of proceedings abandoned which is enshrined in the IRPA. For more information, see this discussion of the related RPD rule: Canadian Refugee Procedure/RPD Rule 65 - Abandonment#A Division may determine that any proceeding before it has been abandoned, not just a refugee claim³.

https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_65_-_Abandonment#A_Division_may_determine_that_any_proceeding_before_it_has_been_abandoned,_not_just_a_refugee_claim

3 Division may determine that any proceeding before it has been abandoned, not just a refugee claim

53 Coming into Force (RAD Rule 69)

53.1 RAD Rule 69 - Coming into Force

The text of the relevant rule reads:

Coming into Force
S.C. 2001, c. 27

*69 These Rules come into force on the day on which section 110 of the Immigration and Refugee Protection Act comes into force, but if they are registered after that day, they come into force on the day on which they are registered.

*[Note: Rules in force December 15, 2012, see SI/2012-94.]

53.1.1 This set of rules was new as of December 15, 2012

The Refugee Appeal Division Rules came into force on December 15, 2012. They were an all new set of rules, as previous versions of the RAD Rules had only reached the pre-publication stage.

54 Schedule to the RAD Rules

54.1 RAD Rules - Schedule

The text of the schedule to the rules reads:

SCHEDULE
(Rule 17)

INFORMATION AND DECLARATIONS - COUNSEL NOT REPRESENTING OR ADVISING FOR
CONSIDERATION

Item Information

- 1 IRB Division and file number with respect to the person who is the subject of the appeal.
- 2 Name of counsel who is representing or advising the person who is the subject of the appeal and who is not receiving consideration for those services.
- 3 Name of counsel's firm or organization, if applicable, and counsel's postal address, telephone number and fax number and email address, if any.
- 4 If applicable, a declaration, signed by the interpreter, that includes the interpreter's name, the language and dialect, if any, interpreted and a statement that the interpretation is accurate.
- 5 Declaration signed by the person who is the subject of the appeal that the counsel who is representing or advising them is not receiving consideration and that the information provided in the form is complete, true and correct.
- 6 Declaration signed by counsel that they are not receiving consideration for representing or advising the person who is the subject of the appeal and that the information provided in the form is complete, true and correct.

55 Annotated Immigration and Refugee Protection Regulations

56 IRPR s. 13: Regulations Regarding Documents and Certified Copies

56.1 IRPR s. 13

The text of the relevant section of the regulation reads:

DIVISION 3
Documents and Certified Copies

Production of documents

13 (1) Subject to subsection (2), a requirement of the Act or these Regulations to produce a document is met
(a) by producing the original document;
(b) by producing a certified copy of the original document; or
(c) in the case of an application, if there is an application form on the Department's website, by completing and producing the form printed from the website or by completing and submitting the form on-line, if the website indicates that the form can be submitted on-line.

Exception

(2) Unless these Regulations provide otherwise, a passport, a permanent resident visa, a permanent resident card, a temporary resident visa, a temporary resident permit, a work permit or a study permit may be produced only by producing the original document.

56.2 Commentary

56.3 References

1. *Canada (Citizenship and Immigration) v. Miller*, 2022 FC 1131 (CanLII), at para 72, <¹>, retrieved on 2022-08-03.
2. *Arisekola v. Canada (Citizenship and Immigration)*, 2019 FC 275 (CanLII), at para 10, <²>, retrieved on 2022-09-08.
3. *Arisekola v. Canada (Citizenship and Immigration)*, 2019 FC 275 (CanLII), at para 11, <³>, retrieved on 2022-09-08.
4. *Gomez Guzman v. Canada (Citizenship and Immigration)*, 2022 FC 152 (CanLII), at para 15, <⁴>, retrieved on 2022-09-08.
5. *Gomez Guzman v. Canada (Citizenship and Immigration)*, 2022 FC 152 (CanLII), at para 19, <⁵>, retrieved on 2022-09-08.

1 <https://canlii.ca/t/jr5nh#par72>

2 <https://canlii.ca/t/hxxcj#par10>

3 <https://canlii.ca/t/hxxcj#par11>

4 <https://canlii.ca/t/jm88g#par15>

5 <https://canlii.ca/t/jm88g#par19>

6. Immigration and Refugee Board of Canada, *Practice Notice: Exchange of Documents through Canada Post epost Connect to the Refugee Appeal Division*, June 15, 2020, <⁶> (Accessed September 16, 2022).
7. Immigration and Refugee Board of Canada, *Practice Notice on Resumption of Time Limits at the Refugee Appeal Division (RAD)*, June 12, 2020, <⁷> (Accessed September 16, 2022).

6 <https://irb.gc.ca/en/legal-policy/procedures/Pages/notice-documents-epost-connect.aspx>

7 <https://irb.gc.ca/en/legal-policy/procedures/Pages/rad-business-resumption.aspx>

57 IRPR s. 13.11: Regulations Regarding Disclosure of Personal Information

57.1 IRPR s. 13.11

The text of the relevant section of the regulation reads:

DIVISION 4.1

Use and Disclosure of Biometric Information and Related Personal Information

Disclosure of information

13.11 (1) Any biometric information and related personal information set out in subsection (2) that is collected under the Act and provided to the Royal Canadian Mounted Police may be used or disclosed by it to a law enforcement agency in Canada for the following purposes, if there is a potential match between fingerprints collected under the Act and fingerprints collected by it or submitted to it by a law enforcement agency in Canada:

- (a) to establish or verify the identity of a person in order to prevent, investigate or prosecute an offence under any law of Canada or a province; and
- (b) to establish or verify the identity of a person whose identity cannot reasonably be otherwise established or verified because of a physical or mental condition or because of their death.

Information that may be used or disclosed

(2) The following information in respect of a foreign national or a permanent resident may be used or disclosed by the Royal Canadian Mounted Police under subsection (1):

- (a) their fingerprints and the date on which they were taken;
- (b) their surname and first name;
- (c) their other names and aliases, if any;
- (d) their date of birth;
- (e) their gender; and
- (f) any file number associated with the biometric information or related personal information.

57.2 Commentary

57.3 References

58 IRPR ss. 28-52: Conduct of Examination

58.1 IRPR ss. 28-52

The text of the relevant sections of the regulation read:

DIVISION 3
Conduct of Examination
General
Examination

28 For the purposes of subsection 15(1) of the Act, a person makes an application in accordance with the Act by

- (a) submitting an application in writing;
- (b) seeking to enter Canada;
- (c) seeking to transit through Canada as provided in section 35; or
- (d) making a claim for refugee protection.

Medical examination

29 For the purposes of paragraph 16(2)(b) of the Act, a medical examination includes any or all of the following:

- (a) physical examination;
- (b) mental examination;
- (c) review of past medical history;
- (d) laboratory test;
- (e) diagnostic test; and
- (f) medical assessment of records respecting the applicant.

Exemptions from medical examination requirement

30 (1) For the purposes of paragraph 16(2)(b) of the Act, the following foreign nationals are exempt from the requirement to submit to a medical examination:

- (a) foreign nationals other than
 - (i) subject to paragraph (g), foreign nationals who are applying for a permanent resident visa or applying to remain in Canada as a permanent resident, as well as their family members, whether accompanying or not,
 - (ii) foreign nationals who are seeking to work in Canada in an occupation in which the protection of public health is essential,
 - (iii) foreign nationals who

- (A) are seeking to enter Canada or applying for renewal of their work or study permit or authorization to remain in Canada as a temporary resident for a period in excess of six consecutive months, including an actual or proposed period of absence from Canada of less than 14 days, and
- (B) have resided or stayed for a period of six consecutive months, at any time during the one-year period immediately preceding the date that they sought entry or made their application, in an area that the Minister determines, after consultation with the Minister of Health, has a higher incidence of serious communicable disease than Canada,
- (iv) foreign nationals who an officer, or the Immigration Division, has reasonable grounds to believe are inadmissible under subsection 38(1) of the Act,
- (v) foreign nationals who claim refugee protection in Canada, and
- (vi) foreign nationals who are seeking to enter or remain in Canada and who may apply to the Minister for protection under subsection 112(1) of the Act, other than foreign nationals who have not left Canada since their claim for refugee protection or application for protection was rejected;
- (b) a person described in paragraph 186(b) who is entering or is in Canada to carry out official duties, unless they seek to engage or continue in secondary employment in Canada;
- (c) a family member of a person described in paragraph 186(b), unless that family member seeks to engage or continue in employment in Canada;
- (d) a member of the armed forces of a country that is a designated state as defined in the Visiting Forces Act, who is entering or is in Canada to carry out official duties, other than a person who has been designated as a civilian component of those armed forces, unless that member seeks to engage or continue in secondary employment in Canada;
- (e) a family member of a protected person, if the family member is not included in the protected person's application to remain in Canada as a permanent resident; and
- (f) a non-accompanying family member of a foreign national who has applied for refugee protection outside Canada.
- (g) [Repealed, SOR/2017-78, s. 3]

Subsequent examination

- (2) Every foreign national who has undergone a medical examination as required under paragraph 16(2)(b) of the Act must submit to a new medical examination before entering Canada if, after being authorized to enter and remain in Canada, they have resided or stayed for a total period in excess of six months in an area that the Minister determines, after consultation with the Minister of Health, has a higher incidence of serious communicable disease than Canada.

Medical certificate

- (3) Every foreign national who must submit to a medical examination, as required under paragraph 16(2)(b) of the Act, and who seeks to enter Canada must hold a medical certificate - based on the most recent medical examination to which they were required to submit under that paragraph and which took place within the previous 12 months - that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand.

SOR/2004-167, s. 9SOR/2010-78, s. 1SOR/2012-154, s. 3SOR/2017-78, s. 3
Public health

31 Before opining whether a foreign national's health condition is likely to be a danger to public health, an officer who is assessing the foreign national's

health condition shall consider

- (a) any report made by a health practitioner or medical laboratory with respect to the foreign national;
- (b) the communicability of any disease that the foreign national is affected by or carries; and
- (c) the impact that the disease could have on other persons living in Canada.

SOR/2022-39, s. 3
Conditions

32 In addition to the conditions that are imposed on a foreign national who makes an application as a member of a class, an officer may impose, vary or cancel the following conditions in respect of any foreign national who is required to submit to a medical examination under paragraph 16(2)(b) of the Act:

- (a) to report at the specified times and places for medical examination, surveillance or treatment; and
- (b) to provide proof, at the specified times and places, of compliance with the conditions imposed.

SOR/2012-154, s. 4
Public safety

33 Before opining whether a foreign national's health condition is likely to be a danger to public safety, an officer who is assessing the foreign national's health condition shall consider

- (a) any reports made by a health practitioner or medical laboratory with respect to the foreign national; and
- (b) the risk of a sudden incapacity or of unpredictable or violent behaviour of the foreign national that would create a danger to the health or safety of persons living in Canada.

SOR/2022-39, s. 4
Excessive demand

34 (1) An officer who is assessing a foreign national's health condition shall analyze all relevant medical factors that apply to a determination of whether the foreign national's health condition might reasonably be expected to cause excessive demand and shall prepare an opinion based on their analysis.

Medical factors

- (2) Medical factors referred to in subsection (1) include
 - (a) any reports made by a health practitioner or medical laboratory with respect to the foreign national;
 - (b) any condition identified by a medical examination required under paragraph 16(2)(b) of the Act;
 - (c) the availability of and anticipated costs for health services and social services arising from the foreign national's health status; and
 - (d) a consideration of whether a mitigation plan, if any, submitted by the foreign national would provide for appropriate treatment for the health condition and would be permitted under the rules regulating the delivery of health care in Canada.

Non-medical factors

- (3) The officer shall not consider non-medical factors, including

- (a) the foreign national's intent and financial ability to mitigate any excessive demand; and
- (b) the feasibility of a mitigation plan, if any, submitted by the foreign national.

SOR/2022-39, s. 5
Transit

35 (1) Subject to subsection (2), the following persons are not seeking to enter Canada but are making an application under subsection 15(1) of the Act to transit through Canada:

- (a) in airports where there are United States' in-transit preclearance facilities, in-transit preclearance passengers; and
- (b) in any airport, passengers who are arriving from any country and who are transiting to a country other than Canada and remain in a sterile transit area.

Obligatory examination

- (2) Any person seeking to leave a sterile transit area must appear immediately for examination.

Actions not constituting a complete examination

36 An inspection carried out aboard a means of transportation bringing persons to Canada or the questioning of persons embarking on or disembarking from a means of transportation, or the examination of any record or document respecting such persons before they appear for examination at a port of entry, is part of an examination but does not constitute a complete examination.

End of examination

37 (1) Subject to subsection (2), the examination of a person who seeks to enter Canada, or who makes an application to transit through Canada, ends only when

- (a) a determination is made that the person has a right to enter Canada, or is authorized to enter Canada as a temporary resident or permanent resident, the person is authorized to leave the port of entry at which the examination takes place and the person leaves the port of entry;
- (b) if the person is an in-transit passenger, the person departs from Canada;
- (c) the person is authorized to withdraw their application to enter Canada and an officer verifies their departure from Canada; or
- (d) a decision in respect of the person is made under subsection 44(2) of the Act and the person leaves the port of entry.

End of examination - claim for refugee protection

(2) The examination of a person who makes a claim for refugee protection at a port of entry or inside Canada other than at a port of entry ends when the later of the following occurs:

- (a) an officer determines that their claim is ineligible under section 101 of the Act or the Refugee Protection Division accepts or rejects their claim under section 107 of the Act;
- (b) a decision in respect of the person is made under subsection 44(2) of the Act and, in the case of a claim made at a port of entry, the person leaves the port of entry.

SOR/2004-167, s. 10(F)SOR/2016-136, s. 3(F)SOR/2018-60, s. 1
Alternative Means of Examination
Means

38 For the purposes of subsection 18(1) of the Act, the following persons may - unless otherwise directed by an officer - be examined by the means indicated as alternative to appearing for an examination by an officer at a port of entry:

- (a) persons who have previously been examined and hold an authorization issued under section 11.1 of the Customs Act, in which case examination is effected by the presentation of the authorization by those persons at a port of entry;
- (b) persons who are seeking to enter Canada at a port of entry where facilities are in place for automatic screening of persons seeking to enter Canada, in which case examination is performed by automatic screening;
- (c) persons who leave Canada and proceed directly to a marine installation or structure to which the Oceans Act applies, and who return directly to Canada from the installation or structure without entering the territorial waters of a foreign state, in which case examination is conducted by an officer by telephone or other means of telecommunication;
- (d) members of a crew of a ship that transports oil or liquid natural gas and that docks at a marine installation or structure to which the Oceans Act applies, for the purpose of loading oil or liquid natural gas, in which case examination is conducted by an officer by telephone or other means of telecommunication;
- (e) members of a crew of a ship registered in a foreign country, other than members of a crew referred to in paragraph (d), in which case examination is conducted by an officer by telephone or other means of telecommunication;
- (f) members of a crew of a ship registered in Canada, in which case examination is conducted by an officer by telephone or other means of telecommunication;
- (g) citizens or permanent residents of Canada or the United States who are seeking to enter Canada at remote locations where no officer is assigned or where there are no means by which the persons may report for examination, in which case examination is conducted by an officer by telephone or other means of telecommunication; and
- (h) citizens or permanent residents of Canada or the United States who seek to enter Canada at places, other than a port of entry, where no officer is assigned, in which case examination is conducted by an officer by telephone or other means of telecommunication.

Permitted Entry
Entry permitted

39 An officer shall allow the following persons to enter Canada following an examination:

- (a) persons who have been returned to Canada as a result of a refusal of another country to allow them entry after they were removed from or otherwise left Canada after a removal order was made against them;
- (b) persons returning to Canada under a transfer order made under the Mutual Legal Assistance in Criminal Matters Act and who, immediately before being transferred to a foreign state under the transfer order, were subject to an unenforced removal order; and
- (c) persons who are in possession of refugee travel papers issued to them by the Minister that are valid for return to Canada.

SOR/2015-46, s. 1
Conduct of Examination Measures
Direction to leave

40 (1) Except in the case of protected persons within the meaning of subsection 95(2) of the Act and refugee protection claimants, an officer who is unable to examine a person who is seeking to enter Canada at a port of entry shall, in writing, direct the person to leave Canada.

Service

(2) A copy of the direction shall be served on the person as well as on the owner or person in control of the means of transportation, if any, that brought the person to Canada.

Ceasing to have effect

(3) The direction ceases to have effect when the person appears again at a port of entry and an officer proceeds to examine the person.

58.2 IRPR s. 41 - Direct back

Direct back

41 Unless an authorization has been given under section 23 of the Act, an officer who examines a foreign national who is seeking to enter Canada from the United States shall direct them to return temporarily to the United States if

- (a) no officer is able to complete an examination;
- (b) the Minister is not available to consider, under subsection 44(2) of the Act, a report prepared with respect to the person;
- (c) an admissibility hearing cannot be held by the Immigration Division; or
- (d) the foreign national is prohibited from entering Canada by an order or regulation made by the Governor in Council under the Emergencies Act or the Quarantine Act.

58.2.1 Commentary

Canada and the US have both employed what is termed the "direct back policy", which is related to, but distinct from the *Safe Third Country Agreement*. The "direct back policy" refers to the process whereby an asylum seeker approaches a port of entry at a time when border officials are unable to process the claim and the asylum seeker is returned to the other country (primarily, returned to the U.S. from Canada^[1]) after having been given a scheduled time to return for an interview. Prior to 21 May 1986, claimants arriving from the United States to claim refugee status remained temporarily in the United States until a Canadian immigration inquiry could be scheduled. On 21 May 1986, a blanket admission policy was introduced, allowing individuals to wait inside Canada for determination of their claim, or to receive an automatic permit to remain and work, depending on their country of origin.^[2] From then on, until 2003, the direct back policy was used only in exceptional cases.^[3] That year, after the *Safe Third Country Agreement* was signed, but before it was implemented,^[4] the direct back policy was used as there was a large and sudden influx of persons arriving from the United States who wanted to lodge their claims in Canada before the entry into force of the *Safe Third Country Agreement*.^[5] The procedure prompted a complaint in 2004 by several national and international organizations to the Inter-American Commission on Human Rights.^[3] The UNHCR subsequently criticized this policy on the basis that many claimants are not allowed to subsequently re-enter Canada to attend their scheduled interviews, writing in a report on the subject that "This has been especially problematic for asylum-seekers directed back from Canada to the United States, as a number were detained in the United States and unable to attend their scheduled interviews."^[6] Canadian authorities stated that they largely phased out the use of "direct back policies" as of August 2006,^[7] and going forward, they would be used only in exceptional cases.^[8] See the 2007 amendments to Canadian policy manuals for details regarding the current parameters of Canada's direct back policy.^[9] The "direct back policy" was revived again during the Covid-

19 pandemic as part of the implementation of an Order-in-Council restricting travel into Canada.^[10]

See also: Canadian Refugee Procedure/Safe Third Countries#The "Direct Back Policy"¹.

58.3 IRPR s. 42 - Withdrawing application

Withdrawing application

42 (1) Subject to subsection (2), an officer who examines a foreign national who is seeking to enter Canada and who has indicated that they want to withdraw their application to enter Canada shall allow the foreign national to withdraw their application and leave Canada.

Exception - report

(2) If a report is being prepared or has been prepared under subsection 44(1) of the Act in respect of a foreign national who indicates that they want to withdraw their application to enter Canada, the officer shall not allow the foreign national to withdraw their application or leave Canada unless the Minister decides either not to make a removal order or not to refer the report to the Immigration Division for an admissibility hearing.

Obligation to confirm departure

(3) A foreign national who is allowed to withdraw their application to enter Canada must appear without delay before an officer at a port of entry to confirm their departure from Canada.

SOR/2018-5, s. 1

Application of Section 23 of the Act Conditions

43 (1) An officer must impose the following conditions on every person authorized to enter Canada under section 23 of the Act:

- (a) to report in person at the time and place specified for the completion of the examination or the admissibility hearing;
- (b) to not engage in any work in Canada;
- (c) to not attend any educational institution in Canada;
- (d) to report in person to an officer at a port of entry if the person withdraws their application to enter Canada; and
- (e) to comply with all requirements imposed on them by an order or regulation made under the Emergencies Act or the Quarantine Act.

Effect of authorization to enter

(2) A foreign national who is authorized to enter Canada under section 23 of the Act does not, by reason only of that authorization, become a temporary resident or a permanent resident.

SOR/2020-91, s. 3

Obligation to Appear at an Admissibility Hearing Class

44 (1) The class of persons who are the subject of a report referred for an admissibility hearing under subsection 44(2) of the Act is prescribed as a class of persons.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Safe_Third_Countries#The_"Direct_Back_Policy";

Members

(2) The members of the class of persons who are the subject of a report referred for an admissibility hearing under subsection 44(2) of the Act are the persons who are the subject of such a report.

Obligation

(3) Every member of the class prescribed under subsection (1) must appear at their admissibility hearing before the Immigration Division if they are given notice of the hearing by the Division.

Deposits or Guarantees

Deposit or guarantee required on entry

45 (1) An officer can require, in respect of a person or group of persons seeking to enter Canada, the payment of a deposit or the posting of a guarantee, or both, to the Minister for compliance with any conditions imposed.

Amount

(2) The amount of the deposit or guarantee is fixed by an officer on the basis of

- (a) the financial resources of the person or group;
- (b) the obligations that result from the conditions imposed;
- (c) the costs that would likely be incurred to locate and arrest the person or group, to detain them, to hold an admissibility hearing and to remove them from Canada; and
- (d) in the case of a guarantee, the costs that would likely be incurred to enforce it.

SOR/2004-167, s. 11(F)

Application

46 Sections 47 to 49 apply to deposits and guarantees required under subsections 44(3), 56(1), 58(3) and 58.1(3) of the Act and section 45 of these Regulations.

SOR/2020-92, s. 1

General requirements

47 (1) A person who pays a deposit or posts a guarantee

- (a) must not have signed or co-signed another guarantee that is in default; and
- (b) must have the capacity to contract in the province where the deposit is paid or the guarantee is posted.

Requirements if guarantee posted

- (2) A person who posts a guarantee must
- (a) be a Canadian citizen or a permanent resident, physically present and residing in Canada;
 - (b) be able to ensure that the person or group of persons in respect of whom the guarantee is required will comply with the conditions imposed; and
 - (c) present to an officer evidence of their ability to fulfil the obligation arising from the guarantee.

Money illegally obtained

(3) If an officer has reasonable grounds to believe that a sum of money offered

by a person as a deposit was not legally obtained, or that a sum of money that a person may be obliged to pay under a guarantee would not be legally obtained, the officer shall not allow that person to pay a deposit or post a guarantee.

Factors to consider

(4) An officer, the Immigration Division or the Minister must consider the following factors in assessing whether the person who posts a guarantee has the ability to ensure that the person or group of persons in respect of whom the guarantee is required will comply with the conditions imposed:

- (a) their relationship to the person or group of persons in respect of whom the guarantee is required;
- (b) their financial situation;
- (c) any previous history posting a guarantee;
- (d) their criminal record; and
- (e) any other relevant factor in determining their ability to ensure that the person or group of persons in respect of whom the guarantee is required will comply with the conditions imposed.

SOR/2004-167, s. 12(F)SOR/2020-92, s. 2
Conditions if guarantee posted

48 (1) In addition to any other conditions that are imposed, the following conditions are imposed on a person or group of persons in respect of whom a guarantee is required:

- (a) to provide the Department or the Canada Border Services Agency, depending on which one requires the information, with the address of the person posting the guarantee and to advise the Department or the Canada Border Services Agency, as the case may be, before any change in that address; and
- (b) to present themselves at the time and place that an officer or the Immigration Division requires them to appear to comply with any obligation imposed on them under the Act.

Conditions if deposit paid

(2) In addition to any other conditions that are imposed, the following conditions are imposed on a person or group of persons in respect of whom a deposit is required:

- (a) to provide the Department or the Canada Border Services Agency, depending on which one requires the information, with their address and to advise the Department or the Canada Border Services Agency, as the case may be, before any change in that address; and
- (b) to present themselves at the time and place that an officer or the Immigration Division requires them to appear to comply with any obligation imposed on them under the Act.

SOR/2010-195, s. 1(F)SOR/2017-214, s. 2
Acknowledgment of consequences of failure to comply with conditions

49 (1) A person who pays a deposit or posts a guarantee must acknowledge in writing

- (a) that they have been informed of the conditions imposed; and
- (b) that they have been informed that non-compliance with any conditions imposed will result in the forfeiture of the deposit or enforcement of the guarantee.

Receipt

(2) An officer shall issue a receipt for the deposit or a copy of the guarantee, and a copy of the conditions imposed.

Return of deposit

(3) If an officer determines that the person or group of persons in respect of whom the deposit was required has complied with the conditions imposed, the deposit shall be returned.

Breach of condition

(4) A sum of money deposited is forfeited, or a guarantee posted becomes enforceable, on the failure of the person or any member of the group of persons in respect of whom the deposit or guarantee was required to comply with a condition imposed.

58.4 IRPR s. 50 - Documents Required

Documents Required

Documents - permanent residents

50 (1) In addition to the permanent resident visa required of a foreign national who is a member of a class referred to in subsection 70(2), a foreign national seeking to become a permanent resident must hold

- (a) a passport, other than a diplomatic, official or similar passport, that was issued by the country of which the foreign national is a citizen or national;
- (b) a travel document that was issued by the country of which the foreign national is a citizen or national;
- (c) an identity or travel document that was issued by a country to non-national residents, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality or who have no country of citizenship or nationality;
- (d) a travel document that was issued by the International Committee of the Red Cross in Geneva, Switzerland, to enable and facilitate emigration;
- (e) a passport or travel document that was issued by the Palestinian Authority;
- (f) an exit visa that was issued by the Government of the Union of Soviet Socialist Republics to its citizens who were compelled to relinquish their Soviet nationality in order to emigrate from that country;
- (g) a passport issued by the United Kingdom to a British National (Overseas), as a person born, naturalized or registered in Hong Kong;
- (h) a passport issued by the Hong Kong Special Administrative Region of the People's Republic of China; or
- (i) a passport issued by the United Kingdom to a British Subject.

Exception - protected persons

(2) Subsection (1) does not apply to a person who is a protected person within the meaning of subsection 95(2) of the Act and holds a permanent resident visa when it is not possible for the person to obtain a passport or an identity or travel document referred to in subsection (1).

58.5 IRPR s. 50.1 - Designation of unreliable travel documents

Designation of unreliable travel documents

50.1 (1) The Minister may designate, individually or by class, passports or travel or identity documents that do not constitute reliable proof of identity or nationality.

Factors

(2) The Minister shall consider the following factors in determining whether to designate any passport or travel or identity document, or class of passport or travel or identity document, as not being reliable proof of identity or

nationality:

- (a) the adequacy of security features incorporated into the passport or document for the purpose of deterring its misuse or unauthorized alteration, reproduction or issuance; and
- (b) information respecting the security or integrity of the process leading to the issuance of the passport or document.

Effect of designation

- (3) A passport or travel or identity document that has been designated under subsection (1) is not a passport or travel or identity document for the purpose of subsection 50(1) or 52(1).

Public notice

- (4) The Minister shall make available to the public a list of all passports or travel or identity documents designated under subsection (1).

58.5.1 Commentary

See: Canadian Refugee Procedure/RPD Rules 3-13 - Information and Documents to be Provided#RPD Rule 11 - Documents Establishing Identity and Other Elements of the Claim².

See also the following list of unreliable travel documents: ³.

58.6 IRPR s. 51 - Examination - permanent residents

Examination - permanent residents

51 A foreign national who holds a permanent resident visa and is seeking to become a permanent resident must, at the time of their examination,

- (a) inform the officer if
 - (i) the foreign national has become a spouse or common-law partner or has ceased to be a spouse, common-law partner or conjugal partner after the visa was issued, or
 - (ii) material facts relevant to the issuance of the visa have changed since the visa was issued or were not divulged when it was issued; and
- (b) establish that they and their family members, whether accompanying or not, meet the requirements of the Act and these Regulations.

SOR/2008-253, s. 2

Documents - temporary residents

52 (1) In addition to the other requirements of these Regulations, a foreign national seeking to become a temporary resident must hold one of the following documents that is valid for the period authorized for their stay:

- (a) a passport that was issued by the country of which the foreign national is a citizen or national, that does not prohibit travel to Canada and that the foreign national may use to enter the country of issue;
- (b) a travel document that was issued by the country of which the foreign

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_3-13_-_Information_and_Documents_to_be_Provided#RPD_Rule_11_-_Documents_Establishing_Identity_and_Other_Elements_of_the_Claim

3 <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2010/190-march-12-2010.html>

national is a citizen or national, that does not prohibit travel to Canada and that the foreign national may use to enter the country of issue;

(c) an identity or travel document that was issued by a country, that does not prohibit travel to Canada, that the foreign national may use to enter the country of issue and that is of the type issued by that country to non-national residents, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality or who have no country of citizenship or nationality;

(d) a laissez-passer that was issued by the United Nations;

(e) a passport or travel document that was issued by the Palestinian Authority;

(f) a document that was issued by the Organization of American States and is entitled "Official Travel Document";

(g) a passport issued by the United Kingdom to a British Overseas Citizen;

(h) a passport issued by the United Kingdom to a British National (Overseas), as a person born, naturalized or registered in Hong Kong;

(i) a passport issued by the Hong Kong Special Administrative Region of the People's Republic of China; or

(j) a passport issued by the United Kingdom to a British Subject.

(1.1) [Repealed, SOR/2003-260, s. 1]

Exceptions

(2) Subsection (1) does not apply to

(a) citizens of the United States;

(b) persons seeking to enter Canada from the United States or St. Pierre and Miquelon who have been lawfully admitted to the United States for permanent residence;

(c) residents of Greenland seeking to enter Canada from Greenland;

(d) persons seeking to enter Canada from St. Pierre and Miquelon who are citizens of France and residents of St. Pierre and Miquelon;

(e) members of the armed forces of a country that is a designated state for the purposes of the Visiting Forces Act who are seeking entry in order to carry out official duties, other than persons who have been designated as a civilian component of those armed forces;

(f) persons who are seeking to enter Canada as, or in order to become, members of a crew of a means of air transportation and who hold an airline flight crew licence or crew member certificate issued in accordance with International Civil Aviation Organization specifications; or

(g) persons seeking to enter Canada as members of a crew who hold a seafarer's identity document issued under International Labour Organization conventions and are members of the crew of the vessel that carries them to Canada.

(3) [Repealed, SOR/2010-54, s. 3]

SOR/2003-197, s. 1 SOR/2003-260, s. 1 SOR/2004-167, s. 14(F) SOR/2010-54, s. 3 SOR/2010-195, s. 2(F) SOR/2011-125, s. 2

58.7 References

1. Citizenship and Immigration Canada, *A Partnership for Protection: One Year Review*, Executive Summary (November 2006) at 13.
2. Alan Nash, *International Refugee Pressures and the Canadian Public Policy Response*, Discussion Paper, January 1989, Studies in Social Policy, page 51.
3. Kelley, Ninette, and Michael J. Trebilcock. *The Making of the Mosaic: A History of Canadian Immigration Policy*. Toronto: University of Toronto Press, 2010 (Second Edition). Print. Page 444.
4. Obiora Chinedu Okafor, *Refugee Law After 9/11: Sanctuary and Security in Canada and the US*, UBC Press, 2020, ISBN 9780774861502⁴, page 211.
5. Canadian Council for Refugees, *Closing the Front Door on Refugees: Report on the Safe Third Country Agreement, Six Months after Implementation*, August 2005, <⁵> (Accessed August 23, 2020), at 23.
6. *Canadian Council for Refugees v. Canada*, 2008 FCA 229 (CanLII), [2009] 3 FCR 136, par. 95, <⁶>, retrieved on 2020-03-22.
7. *Canadian Council for Refugees v. Canada*, 2008 FCA 229 (CanLII), [2009] 3 FCR 136, par. 96, <⁷>, retrieved on 2020-03-22.
8. Standing Committee on Citizenship and Immigration, House of Commons, "Testimony of Francisco Rico-Martinez", 39th Parl, 1st Sess (February 8, 2007) at 7.
9. Immigration, Refugees and Citizenship Canada, *ENF-4: Port of Entry Examinations*, Dated 2019-08-15 <⁸> (Accessed March 22, 2020) at, *inter alia*, page 5.
10. Nicholas Keung, *Why choosing the wrong 'door' may have cost this man his chance to claim asylum in Canada and rejoin his wife*, Toronto Star, April 23, 2021, <⁹> (Accessed April 25, 2021).

4 <https://en.wikibooks.org/wiki/Special:BookSources/9780774861502>

5 <https://ccrweb.ca/files/closingdoordec05.pdf>

6 <http://canlii.ca/t/1z69f#par95>

7 <http://canlii.ca/t/1z69f#par96>

8 <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf04-eng.pdf>

9 <https://www.thestar.com/amp/news/canada/2021/04/23/why-choosing-the-wrong-door-may-have-cost-this-man-his-chance-to-claim-asylum-in-canada-and-rejoin-his-wife.html>

59 IRPR ss. 159-159.7: Regulations Regarding Eligibility to Claim and Safe Third Countries

59.1 IRPR s. 159 - Determination of Eligibility of Claim

The text of the relevant section of the regulation reads:

Determination of Eligibility of Claim

Working day

159 For the purposes of subsections 100(1) and (3) of the Act,

- (a) a working day does not include Saturdays or holidays;
- (b) a day that is not a working day is not included in the calculation of the three-day period; and
- (c) the three-day period begins from the day on which the claim is received.

Definitions

159.1 The following definitions apply in this section and sections 159.2 to 159.7.

Agreement means the Agreement dated December 5, 2002 between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. (Accord)

claimant means a claimant referred to in paragraph 101(1)(e) of the Act. (demandeur)

designated country means a country designated by section 159.3. (pays désigné)

family member, in respect of a claimant, means their spouse or common-law partner, their legal guardian, and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece. (membre de la famille)

legal guardian, in respect of a claimant who has not attained the age of 18 years, means a person who has custody of the claimant or who is empowered to act on the claimant's behalf by virtue of a court order or written agreement or by operation of law. (tuteur légal)

United States means the United States of America, but does not include Puerto Rico, the Virgin Islands, Guam or any other United States of America possession or territory. (États-Unis)

Non-application - former habitual residence

159.2 Paragraph 101(1)(e) of the Act does not apply to a claimant who is a stateless person who comes directly or indirectly to Canada from a designated country that is their country of former habitual residence.

Designation - United States

159.3 The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.

Non-application - ports of entry other than land ports of entry

159.4 (1) Paragraph 101(1)(e) of the Act does not apply to a claimant who seeks to enter Canada at

- (a) a location that is not a port of entry;
- (b) a port of entry that is a harbour port, including a ferry landing; or
- (c) subject to subsection (2), a port of entry that is an airport.

In transit exception

(2) Paragraph 101(1)(e) of the Act applies to a claimant who has been ordered removed from the United States and who seeks to enter Canada at a port of entry that is an airport while they are in transit through Canada from the United States in the course of the enforcement of that order.

Non-application - claimants at land ports of entry

159.5 Paragraph 101(1)(e) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(a) to (c) establishes, in accordance with subsection 100(4) of the Act, that

- (a) a family member of the claimant is in Canada and is a Canadian citizen;
- (b) a family member of the claimant is in Canada and is
 - (i) a protected person within the meaning of subsection 95(2) of the Act,
 - (ii) a permanent resident under the Act, or
 - (iii) a person in favour of whom a removal order has been stayed in accordance with section 233;
- (c) a family member of the claimant who has attained the age of 18 years is in Canada and has made a claim for refugee protection that has been referred to the Board for determination, unless
 - (i) the claim has been withdrawn by the family member,
 - (ii) the claim has been abandoned by the family member,
 - (iii) the claim has been rejected, or
 - (iv) any pending proceedings or proceedings respecting the claim have been terminated under subsection 104(2) of the Act or any decision respecting the claim has been nullified under that subsection;
- (d) a family member of the claimant who has attained the age of 18 years is in Canada and is the holder of a work permit or study permit other than
 - (i) a work permit that was issued under paragraph 206(b) or that has become invalid as a result of the application of section 209, or
 - (ii) a study permit that has become invalid as a result of the application of section 222;
- (e) the claimant is a person who
 - (i) has not attained the age of 18 years and is not accompanied by their mother, father or legal guardian,
 - (ii) has neither a spouse nor a common-law partner, and
 - (iii) has neither a mother or father nor a legal guardian in Canada or the United States;
- (f) the claimant is the holder of any of the following documents, excluding any document issued for the sole purpose of transit through Canada, namely,
 - (i) a permanent resident visa or a temporary resident visa referred to in section 6 and subsection 7(1), respectively,
 - (ii) a temporary resident permit issued under subsection 24(1) of the Act,
 - (iii) a travel document referred to in subsection 31(3) of the Act,
 - (iv) refugee travel papers issued by the Minister, or
 - (v) a temporary travel document referred to in section 151;
- (g) the claimant is a person
 - (i) who may, under the Act or these Regulations, enter Canada without being required to hold a visa, and
 - (ii) who would, if the claimant were entering the United States, be required to hold a visa; or
- (h) the claimant is
 - (i) a foreign national who is seeking to re-enter Canada in circumstances where they have been refused entry to the United States without having a refugee claim adjudicated there, or
 - (ii) a permanent resident who has been ordered removed from the United States and is being returned to Canada.

Non-application - claimants at land ports of entry and in transit

159.6 Paragraph 101(1)(e) of the Act does not apply if a claimant establishes, in accordance with subsection 100(4) of the Act, that the claimant

- (a) is charged in the United States with, or has been convicted there of, an offence that is punishable with the death penalty in the United States; or
- (b) is charged in a country other than the United States with, or has been convicted there of, an offence that is punishable with the death penalty in that country.
- (c) [Repealed, SOR/2009-210, s. 1]

Temporal operation

159.7 (1) For the purposes of paragraph 101(1)(e) of the Act, the application of all or part of sections 159.1 to 159.6 and this section is discontinued, in accordance with subsections (2) to (6), if

- (a) a notice of suspension of the Agreement setting out the period of suspension is publicized broadly in the various regions of Canada by the Minister via information media and on the website of the Department;
- (b) a notice of renewal of the suspension of the Agreement setting out the period of renewal of suspension is published in accordance with subsection (6);
- (c) a notice of suspension of a part of the Agreement is issued by the Government of Canada and the Government of the United States; or
- (d) a notice of termination of the Agreement is issued by the Government of Canada or the Government of the United States.

Paragraph (1)(a) - notice of suspension of Agreement

(2) Subject to subsection (3), if a notice of suspension of the Agreement is publicized under paragraph (1)(a), sections 159.2 to 159.6 are rendered inoperative for a period of up to three months that shall be set out in the notice, which period shall begin on the day after the day on which the notice is publicized.

Paragraph (1)(b) - notice of renewal of suspension of Agreement

(3) If a notice of renewal of the suspension of the Agreement is published under paragraph (1)(b), sections 159.2 to 159.6 are rendered inoperative for the further period of up to three months set out in the notice.

Paragraph (1)(c) - suspension of part of Agreement

(4) If a notice of suspension of part of the Agreement is issued under paragraph (1)(c), those provisions of these Regulations relating to the application of the Agreement that are referred to in the notice are rendered inoperative for a period that shall be set out in the notice. All other provisions of these Regulations continue to apply.

Paragraph (1)(d) - termination of Agreement

(5) If a notice of termination of the Agreement is issued under paragraph (1)(d), sections 159.1 to 159.6 and this section cease to have effect on the day set out in the notice.

Publication requirement - Canada Gazette

(6) Any notice referred to in paragraph (1)(b), (c) or (d) shall be published in the Canada Gazette, Part I, not less than seven days before the day on which the renewal, suspension in part or termination provided for in the notice is effective.

59.1.1 Section 102 of the Act concerns eligibility to claim, the safe third country agreement, and the criteria for listing a country

Section 102 of the IRPA reads as follows:

Regulations

102 (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

- (a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
- (b) making a list of those countries and amending it as necessary; and
- (c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).

Factors

(2) The following factors are to be considered in designating a country under paragraph (1)(a):

- (a) whether the country is a party to the Refugee Convention and to the

Convention Against Torture;

(b) its policies and practices with respect to claims under the Refugee

Convention and with respect to obligations under the Convention Against Torture;

(c) its human rights record; and

(d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

Review

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

For more detail and context, see: Canadian Refugee Procedure/100-102 - Examination of Eligibility to Refer Claim#IRPA Section 102: Regulations and Safe Third Country Agreement¹.

59.1.2 Text of the Safe Third Country Agreement

The above regulatory provisions implement the text of the *Safe Third Country Agreement* in Canadian law; see this citation for the text of the agreement between Canada and the US itself.^[1]

See also: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#Responsibility sharing and burden sharing between states are fundamental principles of the Refugee Convention² and Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#The Act should be interpreted in a way that prevents the possibility of “refugees in orbit”³.

59.1.3 Factual background to the *Safe Third Country Agreement*

The political background against which the safe third country agreement operates is the much higher number of refugee claims that Canada receives *per capita* than does the United States. The United States and Canada are both popular asylum-seeker destinations that conduct Refugee Status Determination on a relatively large scale. The United States consistently receives more asylum applications than any other country; in 2012, it received 17.4% of the total number of asylum applications lodged worldwide. Canada tends to hover in the top five receiving countries; in 2008 it was the second most popular and in 2012 it was sixth, with 4.3% of worldwide applications. As is apparent, Canada receives far more asylum seekers per capita than does the United States - during the five-year period between 2006 and 2010, for example, Canada received one asylum application for every 236 residents; in the United States, the ratio was one asylum application per every 1200 residents.^[2] Furthermore, many claimants in Canada have traversed the United States before arriving in this country. For example, from 1995 to 2001, approximately one-third of all refugee claims in Canada were made by claimants known to have arrived from or through the U.S.^[3]

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/100-102_-_Examination_of_Eligibility_to_Refer_Claim#IRPA_Section_102:_Regulations_and_Safe_Third_Country_Agreement

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#Responsibility_sharing_and_burden_sharing_between_states_are_fundamental_principles_of_the_Refugee_Convention

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#The_Act_should_be_interpreted_in_a_way_that_prevents_the_possibility_of_%E2%80%9Crefugees_in_orbit%E2%80%9D

Legislative provisions regarding safe third countries have been part of the *Immigration Act* since 1988. At that point, the provision was enacted, but no country was listed. For more detail, see: Canadian Refugee Procedure/History of refugee procedure in Canada#Post-IRPA measures⁴.

59.1.4 The "Direct Back Policy"

See: Canadian Refugee Procedure/IRPR ss. 28-52 - Conduct of Examination#IRPR s. 41 - Direct back⁵.

59.1.5 Constitutionality of the *Safe Third Country Agreement* with the United States

The constitutionality of the *Safe Third Country Agreement* regime has been repeatedly challenged in Canadian courts. All of the challenges to it have been dismissed. The first two challenges were dismissed for procedural reasons - by the Supreme Court of Canada in 1992^[4] and the Federal Court of Appeal in 2008.^[5] The third challenge resulted in the Supreme Court of Canada partially upholding the constitutionality of the regime in 2023, while remitting the gender-based aspect of the challenge to the Federal Court for future proceedings.^[6]

59.2 References

1. Government of Canada, *Final Text of the Safe Third Country Agreement*, December 5, 2002 <⁶> (Accessed August 22, 2020).
2. Hamlin, Rebecca. *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia*. New York: Oxford University Press, 2014. Print. Page 26.
3. Francois Crepeau, *The Foreigner and The Right to Justice in The Aftermath of September 11*, Refugee Watch Newsletter, <<http://refugeewatch.org.in/RWJournal/25.pdf>> (Accessed June 26, 2021) at item 1.6.
4. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC), [1992] 1 SCR 236, <⁷>, retrieved on 2021-04-24.

"The constitutionality of the safe third country provision was first challenged in 1989, immediately after the amended *Immigration Act, 1976* came into force and more than a decade before the Canada–U.S. STCA was implemented. In *Canadian Council of Churches v Canada*,⁶³ the Supreme Court of Canada disallowed the challenge on the ground that the Canadian Council of Churches lacked standing." - Library of

⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/History_of_refugee_procedure_in_Canada#Post-IRPA_measures

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPR_ss._28-52_-_Conduct_of_Examination#IRPR_s._41_-_Direct_back

⁶ <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html>

⁷ <https://canlii.ca/t/1fsg5>

Parliament, *Overview of the Canada–United States Safe Third Country Agreement*, 2021-01-15 <⁸> (Accessed October 6, 2022).

5. *Canadian Council for Refugees v. Canada*, 2008 FCA 229 (CanLII), [2009] 3 FCR 136, <⁹>, retrieved on 2021-04-24.
6. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 (CanLII), <¹⁰>, retrieved on 2023-07-02.

8 https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/202070E

9 <https://canlii.ca/t/1z69f>

10 <https://canlii.ca/t/jxp04>

60 IRPR s. 159.8: Regulations Regarding Time Limits for Providing Documents

60.1 IRPR s. 159.8

The text of the relevant section of the regulation reads:

Documents and Information

Time limit - provision of documents and information to officer

159.8 (1) For the purpose of subsection 99(3.1) of the Act, a person who makes a claim for refugee protection inside Canada other than at a port of entry must provide an officer with the documents and information referred to in that subsection not later than the day on which the officer determines the eligibility of their claim under subsection 100(1) of the Act.

Time limit - provision of documents and information to Refugee Protection Division

(2) Subject to subsection (3), for the purpose of subsection 100(4) of the Act, a person who makes a claim for refugee protection inside Canada at a port of entry must provide the Refugee Protection Division with the documents and information referred to in subsection 100(4) not later than 15 days after the day on which the claim is referred to that Division.

Extension

(3) If the documents and information cannot be provided within the time limit set out in subsection (2), the Refugee Protection Division may, for reasons of fairness and natural justice, extend that time limit by the number of days that is necessary in the circumstances.

60.2 Commentary

60.2.1 Time limit for persons to complete and provide the Basis of Claim form

For a discussion of the deadlines for persons providing their BOC forms, whether they are making a POE claim, an inland claim, or are detained, see the commentary to Rule 7: Canadian Refugee Procedure/Information and Documents to be Provided#When a claimant must provide their BOC form¹. The commentary to Rule 8 discusses the interpretation of this regulation and the way that the extension provision (s. 159.8(3)) should be inter-

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#When_a_claimant_must_provide_their_BOC_form

preted: Canadian Refugee Procedure/Information and Documents to be Provided#Rule 8
- Application for an extension of time to provide BOC².

60.2.2 If a claimant does not meet the above timeline, the the BOC Abandonment process will commence

If a claimant does not submit their BOC form within the timeline specified above, then the process for BOC Abandonment specified in Rule 65 will be triggered: Canadian Refugee Procedure/Abandonment#Rule 65(2) - When the BOC Abandonment hearing must be scheduled³

60.3 References

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Rule_8_-_Application_for_an_extension_of_time_to_provide_BOC

³ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#Rule_65\(2\)_-_When_the_BOC_Abandonment_hearing_must_be_scheduled](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Abandonment#Rule_65(2)_-_When_the_BOC_Abandonment_hearing_must_be_scheduled)

61 IRPR s. 159.9: Regulations Regarding Time Limits for Holding Hearings

61.1 IRPR s. 159.9

The text of the relevant section of the *Immigration and Refugee Protection Regulations*^[1] reads:

Hearing Before Refugee Protection Division

Time limits for hearing

159.9 (1) Subject to subsections (2) and (3), for the purpose of subsection 100(4.1) of the Act, the date fixed for the hearing before the Refugee Protection Division must be not later than

(a) in the case of a claimant referred to in subsection 111.1(2) of the Act,

(i) 30 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada other than at a port of entry, and

(ii) 45 days after the day on which the claim is referred to the Refugee Protection Division, if the claim is made inside Canada at a port of entry; and

(b) in the case of any other claimant, 60 days after the day on which the claim is referred to the Refugee Protection Division, whether the claim is made inside Canada at a port of entry or inside Canada other than at a port of entry.

Exclusion

(2) If the time limit set out in subparagraph (1)(a)(i) or (ii) or paragraph (1)(b) ends on a Saturday, that time limit is extended to the next working day.

Exceptions

(3) If the hearing cannot be held within the time limit set out in subparagraph (1)(a)(i) or (ii) or paragraph (1)(b) for any of the following reasons, the hearing must be held as soon as feasible after that time limit:

(a) for reasons of fairness and natural justice;

(b) because of a pending investigation or inquiry relating to any of sections 34 to 37 of the Act; or

(c) because of operational limitations of the Refugee Protection Division.

61.2 Commentary

For a discussion of the issues raised in the interpretation of this regulation, see the commentary for RPD Rule 54: Canadian Refugee Procedure/RPD Rule 54 - Changing the Date or Time of a Proceeding¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_54_-_Changing_the_Date_or_Time_of_a_Proceeding

61.3 References

1. Immigration and Refugee Protection Regulations, SOR/2002-227

62 IRPR s. 159.91: Regulations Regarding Time Limits for Appeals

62.1 IRPR s. 159.91

The text of the relevant section of the *Immigration and Refugee Protection Regulations*^[1] reads:

Appeal to Refugee Appeal Division

Time limit for appeal

159.91 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act,

- (a) the time limit for a person or the Minister to file an appeal to the Refugee Appeal Division against a decision of the Refugee Protection Division is 15 days after the day on which the person or the Minister receives written reasons for the decision; and
- (b) the time limit for a person or the Minister to perfect such an appeal is 30 days after the day on which the person or the Minister receives written reasons for the decision.

Extension

(2) If the appeal cannot be filed within the time limit set out in paragraph 1)(a) or perfected within the time limit set out in paragraph (1)(b), the Refugee Appeal Division may, for reasons of fairness and natural justice, extend each of those time limits by the number of days that is necessary in the circumstances.

Time limit for decision

159.92 (1) Subject to subsection (2), for the purpose of subsection 110(3.1) of the Act, except when a hearing is held under subsection 110(6) of the Act, the time limit for the Refugee Appeal Division to make a decision on an appeal is 90 days after the day on which the appeal is perfected.

Exception

(2) If it is not possible for the Refugee Appeal Division to make a decision on an appeal within the time limit set out in subsection (1), the decision must be made as soon as feasible after that time limit.

62.2 Commentary

For commentary on the interpretation of s. 159.91(2) regarding extensions of time to file an appeal, see the commentary to RAD Rule 2: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#RAD Rule 2: Filing appeal¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#RAD_Rule_2:_Filing_appeal

62.3 References

1. Immigration and Refugee Protection Regulations, SOR/2002-227

63 IRPR ss. 315.21, et al.: Regulations Regarding Information Sharing Between Countries

63.1 IRPR part 19.1

The text of the relevant section of the regulation reads:

PART 19.1
Information Sharing Between Countries

63.2 Commentary

These provisions are quite lengthy and so they are not produced here, but see them on CanLII.^[1]

63.3 References

1. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 315.21 <¹> retrieved on 2020-01-31

1 <http://canlii.ca/t/543bm#sec315.21>

64 Annotated Immigration and Refugee Protection Act (IRPA) Provisions

65 Summary of provisions of the IRPA concerning refugees

Subject	Legislative Reference
Objectives and application of the IRPA as concerns refugees	A2, A3
The right of the Minister of PSEP or IRCC to intervene at the RPD	A170
Definition of refugee protection	A95(1)
Definition of protected person	A95(2)
Definition of person in need of protection	A97
Definition of Convention Refugee	A96
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Pre-removal risk assessment (PRRA)	A112 to A116 ^[1]

65.1 References

1. ENF 24 Ministerial interventions Policy <¹>, page 8.

¹ <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf24-eng.pdf>

66 IRPA Sections 2-3: Definitions, objectives, and application of the IRPA

66.1 IRPA Section 2

Section 2 of the *Immigration and Refugee Protection Act* reads:

Interpretation

Definitions

2 (1) The definitions in this subsection apply in this Act.

Board means the Immigration and Refugee Board, which consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division. (Commission)

Convention Against Torture means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed at New York on December 10, 1984. Article 1 of the Convention Against Torture is set out in the schedule. (Convention contre la torture)

designated foreign national has the meaning assigned by subsection 20.1(2). (étranger désigné)

foreign national means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person. (étranger)

permanent resident means a person who has acquired permanent resident status and has not subsequently lost that status under section 46. (résident permanent)

Refugee Convention means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule. (Convention sur les réfugiés)

Act includes regulations and instructions

(2) Unless otherwise indicated, references in this Act to “this Act” include regulations made under it and instructions given under subsection 14.1(1).

66.1.1 The Act's definitions section should be read in conjunction with the definitions section for the RPD Rules and related policies and documents

The RPD Rules have a definitions section: Canadian Refugee Procedure/RPD Rule 1 - Definitions¹. See also the following more general discussions of terms, acronyms, and definitions related to refugee procedure: Canadian Refugee Procedure/Glossary².

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_1_-_Definitions

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Glossary

66.1.2 The Designated Foreign National regime is set out at section 20.1 of the Act

For more detail on the term "designated foreign national", see: Canadian Refugee Procedure/20.1-20.2 - Designated Foreign Nationals³.

66.2 IRPA Section 3

Section 3(2) and 3(3) of the *Immigration and Refugee Protection Act* read:

Objectives - refugees

- (2) The objectives of this Act with respect to refugees are
- (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
 - (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
 - (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
 - (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
 - (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;
 - (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;
 - (g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and
 - (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

Application

- (3) This Act is to be construed and applied in a manner that
- (a) furthers the domestic and international interests of Canada;
 - (b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;
 - (c) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;
 - (d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;
 - (e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and
 - (f) complies with international human rights instruments to which Canada is signatory.

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/20.1-20.2_-_Designated_Foreign_Nationals

66.2.1 Interpretation

For a discussion of these legislative provisions, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#IRPA ss. 3(2) and 3(3): Interpretation principles as derived from the Act⁴.

66.3 References

⁴ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_ss._3\(2\)_and_3\(3\):_Interpretation_principles_as_derived_from_the_Act](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_ss._3(2)_and_3(3):_Interpretation_principles_as_derived_from_the_Act)

67 IRPA Sections 4-6: Enabling Authority

67.1 IRPA Sections 4-5

Sections 4-6 of the *Immigration and Refugee Protection Act* read:

Enabling Authority

Minister of Citizenship and Immigration

4 (1) Except as otherwise provided in this section, the Minister of Citizenship and Immigration is responsible for the administration of this Act.

Designated Minister

(1.1) The Governor in Council may, by order, designate a minister of the Crown as the Minister responsible for all matters under this Act relating to special advocates. If none is designated, the Minister of Justice is responsible for those matters.

Minister of Public Safety and Emergency Preparedness

(2) The Minister of Public Safety and Emergency Preparedness is responsible for the administration of this Act as it relates to

- (a) examinations at ports of entry;
- (b) the enforcement of this Act, including arrest, detention and removal;
- (c) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or
- (d) declarations referred to in section 42.1.

Minister of Employment and Social Development

(2.1) In making regulations under paragraphs 32(d.1) to (d.4), the Governor in Council may confer powers and duties on the Minister of Employment and Social Development.

Specification

(3) Subject to subsections (1) to (2), the Governor in Council may, by order,
(a) specify which Minister referred to in any of subsections (1) to (2) is the Minister for the purposes of any provision of this Act; and
(b) specify that more than one Minister may be the Minister for the purposes of any provision of this Act and specify the circumstances under which each Minister is the Minister.

Publication

(4) Any order made under subsection (3) must be published in Part II of the Canada Gazette.

Regulations

5 (1) Except as otherwise provided, the Governor in Council may make any regulation that is referred to in this Act or that prescribes any matter whose prescription is referred to in this Act.

Application

(1.1) Regulations made under this Act that apply in respect of sponsorship applications or applications for permanent or temporary resident visas, permanent or temporary resident status or work or study permits may, if they so provide, apply in respect of any such applications that are pending on the day

on which the regulations are made, other than

- (a) applications to become a permanent resident made in Canada by protected persons; and
- (b) applications for permanent resident visas made by persons referred to in subsection 99(2) and sponsorship applications made in respect of those applications.

Tabling and referral of proposed regulations

(2) The Minister shall cause a copy of each proposed regulation made under sections 17, 32, 53, 61, 87.2, 102, 116, 150 and 150.1 to be laid before each House of Parliament, and each House shall refer the proposed regulation to the appropriate Committee of that House.

Alteration of proposed regulation

(3) A proposed regulation that has been laid before each House of Parliament under subsection (2) does not need to be so laid again, whether or not it has been altered.

Making of regulations

(4) The Governor in Council may make the regulation at any time after the proposed regulation has been laid before each House of Parliament under subsection (2).

67.2 IRPA Section 6: Designation of officers and delegation of powers

Designation of officers

6 (1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.

Delegation of powers

(2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.

Exception

(3) Despite subsection (2), the Minister may not delegate the power conferred by subsection 20.1(1), section 22.1 or subsection 42.1(1) or (2) or 77(1).

67.2.1 The Minister may designate any persons or class of persons as officers to carry out any purposes of this Act

Generally speaking, the Division and its officers are not designated pursuant to this section. For an example of how this designation and delegation has been carried out, see: Canadian Refugee Procedure/Applications to Vacate or to Cease Refugee Protection#The responsible Minister for applications to cease refugee protection is the Minister of Citizenship and Immigration¹.

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Applications_to_Vacate_or_to_Cease_Refugee_Protection#The_responsible_Minister_for_applications_to_cause_refugee_protection_is_the_Minister_of_Citizenship_and_Immigration

68 IRPA Sections 15-17: Immigration to Canada - Examination

68.1 IRPA Sections 15-17

Sections 15-17 of the *Immigration and Refugee Protection Act* read:

DIVISION 2

Examination

Examination by officer

15 (1) An officer is authorized to proceed with an examination if a person makes an application to the officer in accordance with this Act or if an application is made under subsection 11(1.01).

Provincial criteria

15(2) In the case of a foreign national referred to in subsection 9(1), an examination of whether the foreign national complies with the applicable selection criteria shall be conducted solely on the basis of documents delivered by the province indicating that the competent authority of the province is of the opinion that the foreign national complies with the province's selection criteria.

Inspection

(3) An officer may board and inspect any means of transportation bringing persons to Canada, examine any person carried by that means of transportation and any record or document respecting that person, seize and remove the record or document to obtain copies or extracts and hold the means of transportation until the inspection and examination are completed.

Instructions

(4) The officer shall conduct the examination in accordance with any instructions that the Minister may give.

Health insurance policy

15.1 A health insurance policy purchased from an insurance company outside Canada that is approved by the Minister satisfies any requirement in an instruction given under subsection 15(4) that a foreign national who applies for a temporary resident visa in order to visit their Canadian citizen or permanent resident child or grandchild for an extended period must have private health insurance.

Obligation - answer truthfully

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

Obligation - appear for examination

(1.1) A person who makes an application must, on request of an officer, appear for an examination.

68.1.1 An officer has jurisdiction and authority to examine a refugee claimant pursuant to subsection 16(1.1) after the claim has been referred to the Refugee Protection Division for determination

A delegate of the *Minister of Public Safety and Emergency Preparedness* has jurisdiction and authority to examine a refugee claimant pursuant to subsection 16(1.1) of the *Immigration and Refugee Protection Act* about his or her refugee claim after the claim has been referred to the Refugee Protection Division for determination.^[1]

Obligation - relevant evidence

- (2) In the case of a foreign national,
- (a) the relevant evidence referred to in subsection (1) includes photographic and fingerprint evidence; and
 - (b) subject to the regulations, the foreign national must submit to a medical examination.

Obligation - interview

- (2.1) A foreign national who makes an application must, on request of an officer, appear for an interview for the purpose of an investigation conducted by the Canadian Security Intelligence Service under section 15 of the Canadian Security Intelligence Service Act for the purpose of providing advice or information to the Minister under section 14 of that Act and must answer truthfully all questions put to them during the interview.

Evidence relating to identity

- (3) An officer may require or obtain from a permanent resident or a foreign national who is arrested, detained, subject to an examination or subject to a removal order, any evidence - photographic, fingerprint or otherwise - that may be used to establish their identity or compliance with this Act.

Regulations

- 17 The regulations may provide for any matter relating to the application of this Division, and may include provisions respecting the conduct of examinations.

68.2 References

1. *Canada (Citizenship and Immigration) v. Paramo de Gutierrez*, 2016 FCA 211 (CanLII), [2017] 2 FCR 353, at para 56, <¹>, retrieved on 2023-08-21.

¹ <https://canlii.ca/t/gt6qj#par56>

69 IRPA Sections 20.1-20.2: Designated Foreign Nationals

69.1 IRPA Sections 20.1-20.2

Sections 20.1-20.2 of the *Immigration and Refugee Protection Act* read:

Designation - human smuggling or other irregular arrival

- 20.1 (1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she
- (a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility - and any investigations concerning persons in the group - cannot be conducted in a timely manner; or
 - (b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

Effect of designation

- (2) When a designation is made under subsection (1), a foreign national - other than a foreign national referred to in section 19 - who is part of the group whose arrival is the subject of the designation becomes a designated foreign national unless, on arrival, they hold the visa or other document required under the regulations and, on examination, the officer is satisfied that they are not inadmissible.

Statutory Instruments Act

- (3) An order made under subsection (1) is not a statutory instrument for the purposes of the Statutory Instruments Act. However, it must be published in the Canada Gazette.

Application for permanent residence - restriction

- 20.2 (1) A designated foreign national may not apply to become a permanent resident
- (a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;
 - (b) if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
 - (c) in any other case, until five years after the day on which they become a designated foreign national.

Suspension of application for permanent residence

- (2) The processing of an application for permanent residence of a foreign national who, after the application is made, becomes a designated foreign national is suspended
- (a) if the foreign national has made a claim for refugee protection but has not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;
 - (b) if the foreign national has made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
 - (c) in any other case, until five years after the day on which the foreign national becomes a designated foreign national.

Refusal to consider application

- (3) The officer may refuse to consider an application for permanent residence if
- (a) the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and
 - (b) less than 12 months have passed since the end of the applicable period referred to in subsection (1) or (2).

69.1.1 "Designated Foreign National" is a term defined in section 2 of the IRPA

Section 2 of the IRPA, the Act's definitions section, provides that "designated foreign national has the meaning assigned by subsection 20.1(2). (étranger désigné)". See: Canadian Refugee Procedure/Definitions, objectives, and application of the IRPA#IRPA Section 2¹.

69.1.2 An "irregular arrival" is the arrival of a group of persons who meet the conditions specified

Section 20.1(1) of the Act provides that the Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a "group" of persons. A "group" is left undefined and has generally been considered 2 or more persons. Professor Jennifer Bond writes that "It is significant to note that the Bill does not define the term "group," meaning that any claimant who does not arrive alone may be susceptible to being declared a designated foreign national."^[1]

69.1.3 The Designated Foreign Nationals regime was established pursuant to the *Protecting Canada's Immigration System Act* in 2012

The PCISA reforms established a regime for what are termed Designated Foreign Nationals.^[2] DFNs, as defined in the Act, are groups of two or more refugee claimants suspected by the Minister of Public Safety 'irregular arrival' with the aid of smugglers.^[3] The implications of being so designated include that DFNs will be automatically detained until their refugee claim is determined if they are sixteen years of age or older.^[4] This built on the way that mandatory detention had already been utilized in Canada after the arrival of Tamil refugees aboard the MV *Ocean Lady* and MV *Sun Sea* in 2010.^[5] Furthermore, even if their claim is accepted, DFNs are unable to apply for permanent residence status for five years,^[4] as well as being unable to obtain a travel document and unable to sponsor family members.^[3] For more context to this legislation, see: Canadian Refugee Procedure/History of refugee procedure in Canada#Refugee reform in 2010 and 2012².

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions,_objectives,_and_application_of_the_IRPA#IRPA_Section_2

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/History_of_refugee_procedure_in_Canada#Refugee_reform_in_2010_and_2012

69.2 References

1. Bond, Jennifer. "Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act." *Osgoode Hall Law Journal* 51.2 (2014) : 377-425, <³>, page 393.
2. Shauna Labman, *Crossing Law's Border: Canada's Refugee Resettlement Program*, 2019, UBC Press: Vancouver, page 51.
3. Audrey Macklin & Joshua Blum, Country Fiche: Canada, *ASILE: Global Asylum Governance and the European Union's Role*, January 2021, <⁴> (Accessed April 2, 2021), page 8.
4. George Melnyk and Christina Parker, *Finding Refuge in Canada: Narratives of Dislocation*, February 2021, Athabasca University Press, ISBN 9781771993029, page 12.
5. Harsha Walia, *Border & Rule*, Winnipeg: Fernwood Publishing, 2021, ISBN: 9781773634524, page 102.

3 <http://digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss2/1>

4 https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_CANADA_Final_Pub.pdf

70 IRPA Section 25: Humanitarian and compassionate considerations

70.1 IRPA Section 25

Section 25 of the *Immigration and Refugee Protection Act* reads:

Humanitarian and compassionate considerations - request of foreign national
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible - other than under section 34, 35 or 37 - or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada - other than a foreign national who is inadmissible under section 34, 35 or 37 - who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Restriction - designated foreign national

(1.01) A designated foreign national may not make a request under subsection (1)
(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;
(b) if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
(c) in any other case, until five years after the day on which they become a designated foreign national.

Suspension of request

(1.02) The processing of a request under subsection (1) of a foreign national who, after the request is made, becomes a designated foreign national is suspended
(a) if the foreign national has made a claim for refugee protection but has not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;
(b) if the foreign national has made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
(c) in any other case, until five years after the day on which they become a designated foreign national.

Refusal to consider request

(1.03) The Minister may refuse to consider a request under subsection (1) if
(a) the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and
(b) less than 12 months have passed since the end of the applicable period referred to in subsection (1.01) or (1.02).

Payment of fees

(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.

Exceptions

(1.2) The Minister may not examine the request if

- (a) the foreign national has already made such a request and the request is pending;
- (a.1) the request is for an exemption from any of the criteria or obligations of Division 0.1;
- (b) the foreign national has made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division;
- (b.1) the foreign national made a claim for refugee protection that was determined to be ineligible to be referred to the Refugee Protection Division and they made an application for protection to the Minister that is pending; or
- (c) subject to subsection (1.21), less than 12 months have passed since
 - (i) the day on which the foreign national's claim for refugee protection was rejected or determined to be withdrawn - after substantive evidence was heard - or abandoned by the Refugee Protection Division, in the case where no appeal was made and no application was made to the Federal Court for leave to commence an application for judicial review, or
 - (ii) in any other case, the latest of
 - (A) the day on which the foreign national's claim for refugee protection was rejected or determined to be withdrawn - after substantive evidence was heard - or abandoned by the Refugee Protection Division or, if there was more than one such rejection or determination, the day on which the last one occurred,
 - (B) the day on which the foreign national's claim for refugee protection was rejected or determined to be withdrawn - after substantive evidence was heard - or abandoned by the Refugee Appeal Division or, if there was more than one such rejection or determination, the day on which the last one occurred, and
 - (C) the day on which the Federal Court refused the foreign national's application for leave to commence an application for judicial review, or denied their application for judicial review, with respect to their claim for refugee protection.

Exception to paragraph (1.2)(c)

- (1.21) Paragraph (1.2)(c) does not apply in respect of a foreign national
- (a) who, in the case of removal, would be subjected to a risk to their life, caused by the inability of each of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, to provide adequate health or medical care; or
 - (b) whose removal would have an adverse effect on the best interests of a child directly affected.

Non-application of certain factors

- (1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

Provincial criteria

- (2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

70.2 References

71 IRPA Sections 33-43: Inadmissibility

71.1 IRPA Sections 33-43

Sections 33-43 of the *Immigration and Refugee Protection Act* read:

DIVISION 4
Inadmissibility

Rules of interpretation

33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

- (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
- (b) engaging in or instigating the subversion by force of any government;
- (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
- (c) engaging in terrorism;
- (d) being a danger to the security of Canada;
- (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
- (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

(2) [Repealed, 2013, c. 16, s. 13]

Human or international rights violations

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

- (a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;
- (b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act;
- (c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association;
- (d) being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the Special Economic Measures Act on the grounds that any of the circumstances described in paragraph 4(1.1)(c) or (d) of that Act has occurred; or
- (e) being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law).

Clarification

(2) For greater certainty, despite section 33, a person who ceases being the subject of an order or regulation referred to in paragraph (1)(d) or (e) is no longer inadmissible under that paragraph.

Serious criminality

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

- (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
- (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
- (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

- (a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;
- (b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;
- (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or
- (d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Application

(3) The following provisions govern subsections (1) and (2):

- (a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;
- (b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;
- (c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;
- (d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and
- (e) inadmissibility under subsections (1) and (2) may not be based on an offence
 - (i) designated as a contravention under the Contraventions Act,
 - (ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or
 - (iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.

Organized criminality

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

- (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or
- (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other

proceeds of crime.

Application

(2) Paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

Health grounds

38 (1) A foreign national is inadmissible on health grounds if their health condition

- (a) is likely to be a danger to public health;
- (b) is likely to be a danger to public safety; or
- (c) might reasonably be expected to cause excessive demand on health or social services.

Exception

(2) Paragraph (1)(c) does not apply in the case of a foreign national who

- (a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;
- (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
- (c) is a protected person; or
- (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

Financial reasons

39 A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.

Misrepresentation

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation

- (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
- (b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;
- (c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or
- (d) on ceasing to be a citizen under
 - (i) paragraph 10(1)(a) of the Citizenship Act, as it read immediately before the coming into force of section 8 of the Strengthening Canadian Citizenship Act, in the circumstances set out in subsection 10(2) of the Citizenship Act, as it read immediately before that coming into force,
 - (ii) subsection 10(1) of the Citizenship Act, in the circumstances set out in section 10.2 of that Act, or
 - (iii) subsection 10.1(3) of the Citizenship Act, in the circumstances set out in section 10.2 of that Act.

Application

(2) The following provisions govern subsection (1):

- (a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and
- (b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

Inadmissible

(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).

Cessation of refugee protection - foreign national

40.1 (1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.

Cessation of refugee protection - permanent resident

(2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d).

Non-compliance with Act

41 A person is inadmissible for failing to comply with this Act

- (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and
- (b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

Inadmissible family member

42 (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if

- (a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or
- (b) they are an accompanying family member of an inadmissible person.

Exception

(2) In the case of a foreign national referred to in subsection (1) who is a temporary resident or who has made an application for temporary resident status or an application to remain in Canada as a temporary resident,

- (a) the matters referred to in paragraph (1)(a) constitute inadmissibility only if the family member is inadmissible under section 34, 35 or 37; and
- (b) the matters referred to in paragraph (1)(b) constitute inadmissibility only if the foreign national is an accompanying family member of a person who is inadmissible under section 34, 35 or 37.

Exception - application to Minister

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

Exception - Minister's own initiative

(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.

Considerations

(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.

Regulations

43 The regulations may provide for any matter relating to the application of this Division, may define, for the purposes of this Act, any of the terms used in this Division, and may include provisions respecting the circumstances in which a class of permanent residents or foreign nationals is exempted from any of the provisions of this Division.

71.1.1 Commentary

See: Canadian Refugee Procedure/RPD Rules 26-28 - Exclusion, Integrity Issues, Inadmissibility and Ineligibility¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_26-28_-_Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility

71.2 References

72 IRPA Sections 44-53: Loss of Status and Removal

72.1 IRPA Sections 44-53

Sections 44-53 of the *Immigration and Refugee Protection Act* read:

DIVISION 5
Loss of Status and Removal

Report on Inadmissibility

Preparation of report

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Conditions

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

Conditions - inadmissibility on grounds of security

(4) If a report on inadmissibility on grounds of security is referred to the Immigration Division and the permanent resident or the foreign national who is the subject of the report is not detained, an officer shall also impose the prescribed conditions on the person.

Duration of conditions

(5) The prescribed conditions imposed under subsection (4) cease to apply only when

- (a) the person is detained;
- (b) the report on inadmissibility on grounds of security is withdrawn;
- (c) a final determination is made not to make a removal order against the person for inadmissibility on grounds of security;
- (d) the Minister makes a declaration under subsection 42.1(1) or (2) in relation to the person; or
- (e) a removal order is enforced against the person in accordance with the regulations.

Admissibility Hearing by the Immigration Division

Decision

45 The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

- (a) recognize the right to enter Canada of a Canadian citizen within the meaning of the Citizenship Act, a person registered as an Indian under the Indian Act or a permanent resident;
- (b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;
- (c) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or
- (d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

Loss of Status

Permanent resident

46 (1) A person loses permanent resident status

- (a) when they become a Canadian citizen;
- (b) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;
- (c) when a removal order made against them comes into force;
- (c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d);
- (d) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination to vacate a decision to allow their application for protection; or
- (e) on approval by an officer of their application to renounce their permanent resident status.

Effect of renunciation

- (1.1) A person who loses their permanent resident status under paragraph (1)(e) becomes a temporary resident for a period of six months unless they make their application to renounce their permanent resident status at a port of entry or are not physically present in Canada on the day on which their application is approved.

Effect of ceasing to be citizen

- (2) A person becomes a permanent resident if he or she ceases to be a citizen under
 - (a) paragraph 10(1)(a) of the Citizenship Act, as it read immediately before the coming into force of section 8 of the Strengthening Canadian Citizenship Act, other than in the circumstances set out in subsection 10(2) of the Citizenship Act, as it read immediately before that coming into force;
 - (b) subsection 10(1) of the Citizenship Act, other than in the circumstances set out in section 10.2 of that Act; or
 - (c) subsection 10.1(3) of the Citizenship Act, other than in the circumstances set out in section 10.2 of that Act.

2001, c. 27, s. 46 2012, c. 17, s. 19 2013, c. 16, s. 20 2014, c. 22, s. 43 2017, c. 14, s. 26

Temporary resident

47 A foreign national loses temporary resident status

- (a) at the end of the period for which they are authorized to remain in Canada;
- (b) on a determination by an officer or the Immigration Division that they have failed to comply with any other requirement of this Act; or
- (c) on cancellation of their temporary resident permit.

Enforcement of Removal Orders
Enforceable removal order

48 (1) A removal order is enforceable if it has come into force and is not stayed.

Effect

- (2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.

2001, c. 27, s. 48
2012, c. 17, s. 20
In force

49 (1) A removal order comes into force on the latest of the following dates:

- (a) the day the removal order is made, if there is no right to appeal;
- (b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and
- (c) the day of the final determination of the appeal, if an appeal is made.

In force - claimants

(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:

- (a) the day the claim is determined to be ineligible only under paragraph 101(1)(e);
- (b) in a case other than that set out in paragraph (a), seven days after the claim is determined to be ineligible;
- (c) if the claim is rejected by the Refugee Protection Division, on the expiry of the time limit referred to in subsection 110(2.1) or, if an appeal is made, 15 days after notification by the Refugee Appeal Division that the claim is rejected;
- (d) 15 days after notification that the claim is declared withdrawn or abandoned; and
- (e) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(c) or (d).

2001, c. 27, s. 49
2012, c. 17, s. 21
Stay

50 A removal order is stayed

- (a) if a decision that was made in a judicial proceeding - at which the Minister shall be given the opportunity to make submissions - would be directly contravened by the enforcement of the removal order;
- (b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;

(c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;

(d) for the duration of a stay under paragraph 114(1)(b); and

(e) for the duration of a stay imposed by the Minister.

Void - permanent residence

51 A removal order that has not been enforced becomes void if the foreign national becomes a permanent resident.

No return without prescribed authorization

52 (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

Return to Canada

(2) If a removal order for which there is no right of appeal has been enforced and is subsequently set aside in a judicial review, the foreign national is entitled to return to Canada at the expense of the Minister.

Regulations

Regulations

53 The regulations may provide for any matter relating to the application of this Division, and may include provisions respecting

(a) conditions that may or must be imposed, varied, or cancelled, individually or by class, on permanent residents and foreign nationals;

(a.1) the form and manner in which an application to renounce permanent resident status must be made and the conditions that must be met before such an application may be approved;

(b) the circumstances in which a removal order shall be made or confirmed against a permanent resident or a foreign national;

(c) the circumstances in which status may be restored;

(d) the circumstances in which a removal order may be stayed, including a stay imposed by the Minister and a stay that is not expressly provided for by this Act;

(e) the effect and enforcement of removal orders, including the consideration of factors in the determination of when enforcement is possible;

(f) the effect of a record suspension under the Criminal Records Act on the status of permanent residents and foreign nationals and removal orders made against them; and

(g) the financial obligations that may be imposed with respect to a removal order.

72.2 References

73 IRPA Sections 72-75: Judicial Review

73.1 IRPA Sections 72-75

Sections 72-75 of the *Immigration and Refugee Protection Act* read:

DIVISION 8
Judicial Review

Application for judicial review

72 (1) Judicial review by the Federal Court with respect to any matter - a decision, determination or order made, a measure taken or a question raised - under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.

Application

(2) The following provisions govern an application under subsection (1):

- (a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;
- (b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;
- (c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;
- (d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and
- (e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

Right of Minister

73 The Minister may make an application for leave to commence an application for judicial review with respect to any decision of the Refugee Appeal Division, whether or not the Minister took part in the proceedings before the Refugee Protection Division or Refugee Appeal Division.

Judicial review

74 Judicial review is subject to the following provisions:

- (a) the judge who grants leave shall fix the day and place for the hearing of the application;
- (b) the hearing shall be no sooner than 30 days and no later than 90 days after leave was granted, unless the parties agree to an earlier day;
- (c) the judge shall dispose of the application without delay and in a summary way; and
- (d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

Rules

75 (1) Subject to the approval of the Governor in Council, the rules committee established under section 45.1 of the Federal Courts Act may make rules governing the practice and procedure in relation to applications for leave to commence an application for judicial review, for judicial review and for appeals. The rules are binding despite any rule or practice that would otherwise apply.

Inconsistencies

(2) In the event of an inconsistency between this Division and any provision of the Federal Courts Act, this Division prevails to the extent of the inconsistency.

73.2 References

74 IRPA Sections 91-91.1: Representation or Advice

74.1 IRPA Sections 91-91.1

Sections 91-91.1 of the *Immigration and Refugee Protection Act* read:

Representation or Advice

Representation or advice for consideration

91 (1) Subject to this section, no person shall knowingly, directly or indirectly, represent or advise a person for consideration - or offer to do so - in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.

74.1.1 Section 91 restricts who can represent or advise a person for consideration, there are separate rules for those providing services that are unremunerated

Section 91(1) of the Act provides no person shall represent or advise a person for consideration - or offer to do so - except as authorised by s. 91 of the Act. For the RPD rule governing Counsel who are representatives without fee, see: Canadian Refugee Procedure/Information and Documents to be Provided#RPD Rule 5 - Declaration where counsel is not acting for consideration¹. If there are allegations or concerns that a representative, who is not a member of the specific regulated professions listed above, is being paid for their services before the IRB, this is governed by the IRB's *Policy for Handling Immigration and Refugee Board of Canada Complaints Regarding Unauthorized, Paid Representatives*.^[1] See also: Canadian Refugee Procedure/Counsel of Record#The Board has jurisdiction to control who can appear before it as counsel².

Persons who may represent or advise

(2) A person does not contravene subsection (1) if they are
(a) a lawyer who is a member in good standing of a law society of a province or a notary who is a member in good standing of the Chambre des notaires du Québec;
(b) any other member in good standing of a law society of a province or the Chambre des notaires du Québec, including a paralegal; or
(c) a member in good standing of the College, as defined in section 2 of the College of Immigration and Citizenship Consultants Act.

Students-at-law

(3) A student-at-law does not contravene subsection (1) by offering or providing representation or advice to a person if the student-at-law is acting under the supervision of a person mentioned in paragraph (2)(a) who is representing or advising the person - or offering to do so - in connection with the submission

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#RPD_Rule_5_-_Declaration_where_counsel_is_not_acting_for_consideration
2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_Board_has_jurisdiction_to_control_who_can_appear_before_it_as_counsel

of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act.

Agreement or arrangement with Her Majesty

(4) An entity, including a person acting on its behalf, that offers or provides services to assist persons in connection with the submission of an expression of interest under subsection 10.1(3) or an application under this Act, including for a permanent or temporary resident visa, travel documents or a work or study permit, does not contravene subsection (1) if it is acting in accordance with an agreement or arrangement between that entity and Her Majesty in right of Canada that authorizes it to provide those services.

(5) [Repealed, 2019, c. 29, s. 296]

(5.1) [Repealed, 2019, c. 29, s. 296]

(6) [Repealed, 2019, c. 29, s. 296]

(7) [Repealed, 2019, c. 29, s. 296]

Québec Immigration Act

(7.1) For greater certainty, the Québec Immigration Act, CQLR, c. I-0.2.1, applies to, among other persons, every person who, in Quebec, represents or advises a person for consideration - or offers to do so - in connection with a proceeding or application under this Act and is a member of the College, as defined in section 2 of the College of Immigration and Citizenship Consultants Act.

(8) [Repealed, 2019, c. 29, s. 296]

Penalties

(9) Every person who contravenes subsection (1) commits an offence and is liable

(a) on conviction on indictment, to a fine of not more than \$200,000 or to imprisonment for a term of not more than two years, or to both; or

(b) on summary conviction, to a fine of not more than \$40,000 or to imprisonment for a term of not more than six months, or to both.

Meaning of proceeding

(10) For greater certainty, in this section, proceeding does not include a proceeding before a superior court.

74.1.2 IRPA s. 91(10): A proceeding under this Act does not include a proceeding before a superior court, and as such an immigration consultant may not provide representation on judicial review

Section 91(2) provides that persons may represent or advise for consideration in connection with a proceeding or application under this Act if they are a member in good standing of the College of Immigration and Citizenship Consultants or the Chambre des notaires du Québec. However, this provision of the Act does not include a proceeding before a superior court. Therefore, this provision does not authorise an Immigration Consultant or a Québec notary to represent a client on a judicial review of an IRB decision.

Regulations

91.1 (1) The regulations may

- (a) establish a system of administrative penalties and consequences - including of administrative monetary penalties - applicable to the violations designated in regulations made under paragraph (b) and set the amounts of those administrative monetary penalties;
- (b) designate as a violation the contravention - including a contravention committed outside Canada - of any specified provision of this Act or of the regulations by any person who, directly or indirectly, represents or advises a person for consideration - or offers to do so - in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act;
- (c) prohibit acts in relation to the activity of representing or advising - or offering to do so - described in paragraph (b); and

(d) provide for the power to inspect - including the power to require documents to be provided by individuals and entities for inspection - for the purpose of verifying compliance with the provisions specified in regulations made under paragraph (b).

Right to request review

(2) Any regulation made under paragraph (1)(a) must provide that a person referred to in any of subsections 91(2) to (4) who is the subject of a notice of violation has the right to request, from a person appointed under subsection (3), a review of the notice or of the penalty imposed.

Appointment - order

(3) The Governor in Council may, by order, appoint one or more Canadian citizens or permanent residents to conduct reviews in respect of notices of violation issued, or penalties imposed, under a regulation made under paragraph (1)(a) and to perform any other function conferred on them by a regulation made under that paragraph.

Tenure

(4) A person appointed by order under subsection (3) holds office during good behaviour for a term that the Governor in Council may specify, by order, but may be removed for cause by the Governor in Council at any time.

74.2 References

1. In the Matter of the Conduct of Gabriel Bazin before the Immigration and Refugee Board, 2022 CanLII 50884 (CA IRB), at para 12, ³, retrieved on 2022-06-30.

³ <https://canlii.ca/t/jprvq#par12>

75 IRPA Sections 95-97: Refugee Protection, Convention Refugees and Persons in Need of Protection

75.1 IRPA Sections 95-97

Sections 95-97 of the *Immigration and Refugee Protection Act* read:

DIVISION 1

Refugee Protection, Convention Refugees and Persons in Need of Protection

Conferral of refugee protection

95 (1) Refugee protection is conferred on a person when

- (a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;
- (b) the Board determines the person to be a Convention refugee or a person in need of protection; or
- (c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

Protected person

(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - (iv) the risk is not caused by the inability of that country to provide adequate

health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

75.2 References

76 IRPA Section 98: Exclusion — Refugee Convention

76.1 IRPA Section 98

Section 98 of the *Immigration and Refugee Protection Act* reads:

Exclusion - Refugee Convention

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

76.1.1 Commentary

See RPD Rules: Canadian Refugee Procedure/RPD Rules 26-28 - Exclusion, Integrity Issues, Inadmissibility and Ineligibility¹.

76.2 References

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_26-28_-_Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility

77 IRPA Section 99: Claim for Refugee Protection

77.1 IRPA Section 99

Section 99 of the *Immigration and Refugee Protection Act* reads:

Claim for Refugee Protection

Claim

99 (1) A claim for refugee protection may be made in or outside Canada.

Claim outside Canada

(2) A claim for refugee protection made by a person outside Canada must be made by making an application for a visa as a Convention refugee or a person in similar circumstances, and is governed by Part 1.

Claim inside Canada

(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

Claim made inside Canada - not at port of entry

(3.1) A person who makes a claim for refugee protection inside Canada other than at a port of entry must provide the officer, within the time limits provided for in the regulations, with the documents and information - including in respect of the basis for the claim - required by the rules of the Board, in accordance with those rules.

Permanent resident

(4) An application to become a permanent resident made by a protected person is governed by Part 1.

77.2 References

78 IRPA Sections 100-102: Examination of Eligibility to Refer Claim

78.1 IRPA Sections 100-101: Examination of Eligibility to Refer Claim

Sections 100-102 of the *Immigration and Refugee Protection Act* read:

100 (1) An officer shall, after receipt of a claim referred to in subsection 99(3), determine whether the claim is eligible to be referred to the Refugee Protection Division and, if it is eligible, shall refer the claim in accordance with the rules of the Board.

Burden of proof

(1.1) The burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on the claimant, who must answer truthfully all questions put to them.

Decision

(2) The officer shall suspend consideration of the eligibility of the person's claim if

- (a) a report has been referred for a determination, at an admissibility hearing, of whether the person is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality; or
- (b) the officer considers it necessary to wait for a decision of a court with respect to a claimant who is charged with an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years.

Consideration of claim

(3) The Refugee Protection Division may not consider a claim until it is referred by the officer.

Documents and information to be provided

(4) A person who makes a claim for refugee protection inside Canada at a port of entry and whose claim is referred to the Refugee Protection Division must provide the Division, within the time limits provided for in the regulations, with the documents and information - including in respect of the basis for the claim - required by the rules of the Board, in accordance with those rules.

Date of hearing

(4.1) The referring officer must, in accordance with the regulations, the rules of the Board and any directions of the Chairperson of the Board, fix the date on which the claimant is to attend a hearing before the Refugee Protection Division.

Quarantine Act

(5) If a traveller is detained or isolated under the Quarantine Act, the period referred to in subsections (1) and (3) does not begin to run until the day on which the detention or isolation ends.

Ineligibility

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if

- (a) refugee protection has been conferred on the claimant under this Act;
- (b) a claim for refugee protection by the claimant has been rejected by the

Board;

- (c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;
- (c.1) the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws;
- (d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;
- (e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or
- (f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).

Serious criminality

- (2) A claim is not ineligible by reason of serious criminality under paragraph (1)(f) unless
 - (a) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
 - (b) in the case of inadmissibility by reason of a conviction outside Canada, the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

78.1.1 The process set out in ss. 100-102 of the Act is designed to be an expeditious summary review

Section 101 enumerates the situations where an applicant is ineligible to claim refugee status. The Federal Court has held that the expeditious and relatively straightforward process set out in sections 100 to 102 of the IRPA is intended to screen certain claims out of the Refugee Protection Division's jurisdiction on the basis of a summary review by an immigration officer.^[1] This was so as Bill C-84, which created the predecessor to this regime in the 1980s, aimed to preclude individuals who had been certified to be a danger to the public from making a refugee claim. The previous legislation had allowed such individuals to make a claim; only if such a claim was successful would a decision be made concerning deportation.^[2] In the words of the Minister of the time, the intent of this legislation was to "close a loophole by which people who are criminals or terrorists can use the refugee claims system to defer their removal from Canada for many years".^[3]

In the vast majority of cases, the facts triggering these provisions are easily ascertainable and their application does not give rise to any controversy. For example, whether an applicant's claim was previously rejected (paragraph 101(1)(b)) or withdrawn (paragraph 101(1)(c)) can be proved by official records. However, certain ineligibility provisions may require a more elaborate factual inquiry, for example whether an applicant can be returned to a country where they have been granted refugee status (paragraph 101(1)(d)).^[4]

78.1.2 RPD Rules 26-28 create a regime requiring notice to the Minister where select issues emerge in a claim

For a discussion of the interpretation of the RPD notice requirements which refer to these provisions of the Act, see the commentary to RPD Rules 26–28: Canadian Refugee Procedure/RPD Rules 26-28 - Exclusion, Integrity Issues, Inadmissibility and Ineligibility#RPD Rule 28 - Possible Inadmissibility or Ineligibility¹.

78.1.3 Section 101(1)(c.1): What evidence the Minister considers regarding refugee claims made to another country

Section 101(1)(c.1) of the Act provides that "A claim is ineligible to be referred to the Refugee Protection Division if the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws." There are several components to this provision:

- the claimant must have made the prior claim: In the vast majority of cases, whether an applicant made a claim in another country will be proved by a confirmation issued by that country's authorities. Nevertheless, deciding whether "the claimant . . . made a claim for refugee protection" (or, in French, whether there was a "*demande d'asile antérieure faite par la personne*") may sometimes require a look beyond the foreign authorities' confirmation.^[5] In *Garces v. Canada*, the court noted that children presumptively lack legal capacity,^[6] and so in the case of an unaccompanied minor who lacks legal capacity in a foreign state, it is incumbent upon the Minister to explain how they can be considered to have "made a claim" within the meaning of this provision.^[7]
- the claim must have been made before the claim for refugee protection was made in Canada: Importantly, the ineligibility ground applies regardless of whether a decision was ever made on a previous claim.^[8] The Minister will often cite in its procedural fairness letters that the claimant was in possession of paperwork pertaining to the claim when the claimant entered Canada.
- the claim must have been made after this provision came into force: This provision applies to all claims made after June 21, 2019. For claims made between April 8, 2019 and June 21, 2019, the provision does not apply if substantive evidence was heard by the RPD or the RPD allowed the claim without a hearing prior to June 21, 2019. This transitional provision arises from s. 309(b) of the *Budget Implementation Act, 2019* (Bill C-97) which provides that paragraph 101(1)(c.1) of the IRPA applies to claims for refugee protection made during the period beginning on the day on which the Bill is introduced [April 8, 2019] and ending on the day on which it receives royal assent [June 21, 2019], unless, as of the day on which it receives royal assent [June 21, 2019] substantive evidence has been heard by the Refugee Protection Division in respect of the claim or that Division has allowed the claim without a hearing.
- the claim must have been made to a country (not, say, UNHCR itself); and

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_26-28_-_Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#RPD_Rule_28_-_Possible_Inadmissibility_or_Ineligibility

- the fact of its having been made must be confirmed through the type of information-sharing arrangement specified: Canada has information-sharing agreements or arrangements with the US, Australia, New Zealand, and the UK. A 2009 Data-Sharing Protocol allows these countries to conduct ‘immigration checks’ through biometric data exchanges.^[8] The Minister will often cite in its procedural fairness letters that the claimant's biometrics were matched to their immigration record in the other country.

78.1.4 Section 101(1)(d): The claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country

When considering whether a claimant “can be sent or returned to that country”, the question is whether they can “physically and legally be re-admitted” to the country in question.^[9] In *Jekula v. Canada* (a decision affirmed by the Federal Court of Appeal, without reasons) the court held that the words *can be returned* did not require an immigration officer to determine whether the claimant had a well-founded fear of persecution in the country that has already granted asylum.^[10] A key reason for this is the history of the statutory provision in question. In *Kaberuka v. Canada*, the Federal Court noted that *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, s. 36(1) repealed the previous version of s. 46.01(2) of the *Immigration Act*, which had permitted those with Convention refugee status elsewhere to make Convention refugee claims against their countries of asylum. The Court concluded that this indicated Parliament had chosen to exclude persons recognized as Convention refugees by another country from claiming to have a well-founded fear of persecution in their country of asylum.^[11] One of the rationales for this, as noted by the court in *Farah v. Canada* is the presence of other provisions in the IRPA designed to address such circumstances, including s. 115 of the Act (quoted below), and the availability of relief through processes including a stay of removal and a Pre-Removal Risk Assessment.^[12]

115(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

As such, the Federal Court holds that it is sufficient for an immigration officer determining the eligibility of a claim for refugee protection in Canada to ensure that a person already recognized as a Convention refugee by another country will, if required, be able to obtain the necessary travel documents in order to be returned to the country of asylum (unless the person, when ready to be returned, tells the CBSA enforcement officer that they prefer to be returned to their country of nationality rather than the country of asylum).^[13]

78.2 IRPA Section 102: Regulations and Safe Third Country Agreement

Regulations

102 (1) The regulations may govern matters relating to the application of

sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

- (a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
- (b) making a list of those countries and amending it as necessary; and
- (c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).

Factors

- (2) The following factors are to be considered in designating a country under paragraph (1)(a):
 - (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
 - (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
 - (c) its human rights record; and
 - (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

Review

- (3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

78.2.1 The Safe Third Country Agreement provisions are at s. 159 of the Regulations

See the commentary to s. 159 of the Regulation: Canadian Refugee Procedure/Safe Third Countries².

78.3 References

1. *Wangden v Canada (Citizenship and Immigration)*, 2008 FC 1230 at para 76.
2. Alan Nash, *International Refugee Pressures and the Canadian Public Policy Response*, Discussion Paper, January 1989, Studies in Social Policy, page 58.
3. Alan Nash, *International Refugee Pressures and the Canadian Public Policy Response*, Discussion Paper, January 1989, Studies in Social Policy, page 61-62.
4. *Garces v. Canada (Public Safety and Emergency Preparedness)*, 2023 FC 798 (CanLII), at para 14, <³>, retrieved on 2023-07-06.
5. *Garces v. Canada (Public Safety and Emergency Preparedness)*, 2023 FC 798 (CanLII), at para 15, <⁴>, retrieved on 2023-07-06.
6. *Garces v. Canada (Public Safety and Emergency Preparedness)*, 2023 FC 798 (CanLII), at para 16, <⁵>, retrieved on 2023-07-06.
7. *Garces v. Canada (Public Safety and Emergency Preparedness)*, 2023 FC 798 (CanLII), at para 17, <⁶>, retrieved on 2023-07-06.

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Safe_Third_Countries

³ <https://canlii.ca/t/jxp1n#par14>

⁴ <https://canlii.ca/t/jxp1n#par15>

⁵ <https://canlii.ca/t/jxp1n#par16>

⁶ <https://canlii.ca/t/jxp1n#par17>

8. Idil Atak, Zainab Abu Alrob, Claire Ellis, *Expanding refugee ineligibility: Canada's response to secondary refugee movements*, *Journal of Refugee Studies*, December 14, 2020, ⁷ at page 2.
9. *Farah v. Canada (Citizenship and Immigration)*, 2017 FC 292 (CanLII), [2018] 1 FCR 473, para. 14, <⁸>, retrieved on 2020-01-25.
10. *Jekula v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9099 (FC), [1999] 1 FC 266 (affirmed by the Federal Court of Appeal, without reasons, at [2000] FCJ No. 1956).
11. *Kaberuka v Canada (Minister of Employment and Immigration)*, 1995 CanLII 3519 (FCA), [1995] 3 FC 252, at pages 269-270.
12. *Farah v. Canada (Citizenship and Immigration)*, 2017 FC 292 (CanLII), [2018] 1 FCR 473, para. 27, <⁹>, retrieved on 2020-01-25.
13. *Paulos Teddla v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1109 (CanLII), par. 22, <¹⁰>, retrieved on 2020-12-21.

7 <https://doi-org.ezproxy.library.yorku.ca/10.1093/jrs/feaa103>

8 <http://canlii.ca/t/h2svb#14>

9 <http://canlii.ca/t/h2svb#27>

10 <http://canlii.ca/t/jc709#par22>

79 IRPA Sections 103-104: Suspension or Termination of Consideration of Claim

/103-104 - Suspension or Termination of Consideration of Claim¹

¹ https://en.wikibooks.org/w/index.php?title=/103-104_-_Suspension_or_Termination_of_Consideration_of_Claim&action=edit&redlink=1

80 IRPA Section 106: Claimant Without Identification - Credibility

80.1 IRPA Section 106

Section 106 of the *Immigration and Refugee Protection Act* reads:

Claimant Without Identification

Credibility

106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

80.1.1 For commentary, see RPD Rule 11

See: Canadian Refugee Procedure/Information and Documents to be Provided#RPD Rule 11 - Documents Establishing Identity and Other Elements of the Claim¹.

80.2 References

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#RPD_Rule_11_-_Documents_Establishing_Identity_and_Other_Elements_of_the_Claim

81 IRPA Section 107: Decision on Claim for Refugee Protection

81.1 IRPA Section 107: Decision on Claim for Refugee Protection

Section 107 of the *Immigration and Refugee Protection Act* reads:

Decision on Claim for Refugee Protection

Decision

107 (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.

81.1.1 Section 107(1): The Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or a person in need of protection

Section 107(1) of the IRPA states that the Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection. This language creates a right for those who meet the criteria to be so recognized. This tracks the language of the 1985 Rabbi Plaut report that led to the founding of the Immigration and Refugee Board, which noted that "declaring a claimant to be a refugee is not a privilege we grant, but rather a right we acknowledge."^[1] This was not always the conception of refugee protection embodied in Canadian legislation - prior to 1976, the refugee had no rights under Canadian law since the relief granted by the Immigration Appeal Board was discretionary in nature.^[2] See also: Canadian Refugee Procedure/The Board's inquisitorial mandate#Refugee Status Determination is declaratory, not constitutive¹.

81.2 IRPA Section 107(2): No Credible Basis

No credible basis

(2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#Refugee_Status_Determination_is_declaratory,_not_constitutive

81.2.1 A finding that a claim has no credible basis affects appeal rights to the RAD

A finding that a claimant has no credible basis prevents a claimant from appealing a decision to the RAD.^[3]

81.2.2 Where a claimant is self-represented, the panel should ensure that they understand what a no credible basis finding means during the hearing

In *Olifant v. Canada*, the court noted that the RPD has a positive duty to ensure that a self-represented applicant understands both the nature of the proceedings and the salient aspects of the hearing to be conducted. The court concluded that the RPD had not fulfilled this obligation:

Given the seriousness of all of the circumstances, taken together, it was unfair for the RPD to not take at least some positive steps to ensure he understood what it meant if his claim was found to have no credible basis. A careful reading of the transcript reveals that the Board did not take any positive measures to introduce the seriousness of what was to occur or explain the Minister's Counsel would question him. Though the Board did ask if he had any questions about the process and determinative issues, it is in my view still the case that this was insufficient to ensure he understood the nature of the hearing and its salient aspects given he was an unsophisticated Applicant representing himself. Indeed, both the fact that Minister's Delegate was present and would be participating in the manner they did (turning the matter into a far more adversarial one and rightly so on these facts), the no credible basis aspect and the implications thereof, are not things that the Applicant ought necessarily to have known. It would not take much for the RPD to ensure that he understood this – a simple check-in of “do you understand what these specific aspects of the hearing mean” or informing him of them at the outset of the hearing would suffice – but the failure to do so was, in my view, procedurally unfair.^[4]

For more information on the Board's obligations with respect to self-represented claimants, see: Canadian Refugee Procedure/Counsel of Record#The Board has a heightened duty of procedural fairness when dealing with self-represented claimants².

81.3 IRPA Section 107.1: Manifestly unfounded claims

Manifestly unfounded

107.1 If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent.

81.3.1 History of this provision

Provision in the legislation for differently processing manifestly founded claims have been in the Act since the 1976 *Immigration Act*. At that point, the guidelines used by the Refugee

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record#The_Board_has_a_heightened_duty_of_procedural_fairness_when_dealing_with_self-represented_claimants

Status Advisory Committee created four categories of manifestly unfounded claims: 1) claims that presented no evidence of any of the five essential criteria of the definition; 2) claims where the evidence presented was so manifestly unreliable "that no reasonable person could believe it"; 3) claims made under Section 45 of the Act when the claimant had already submitted an in-status claim and the second claim presented no new information; and 4) claims made by the spouse of a rejected claimant when the claim was based solely on the rejected spouse's claim.^[5]

81.4 References

1. W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, page 17.
2. W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, page 55.
3. *Perez Aquila, Jose Rodolfo v. M.C.I.* (F.C., No. IMM-1722-21), Walker, February 21, 2022, 2022 FC 231.
4. *Olifant v. Canada (Citizenship and Immigration)*, 2022 FC 947 (CanLII), at para 19, <³>, retrieved on 2022-07-26.
5. From the *Immigration Manual*, as cited in Alan Nash, *International Refugee Pressures and the Canadian Public Policy Response*, Discussion Paper, January 1989, Studies in Social Policy, page 42.

3 <https://canlii.ca/t/jq0sf#par19>

82 IRPA Section 108: Cessation of Refugee Protection

82.1 IRPA Section 108

Section 108 of the *Immigration and Refugee Protection Act* reads:

Cessation of Refugee Protection

Rejection

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

- (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.

Cessation of refugee protection

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

Effect of decision

(3) If the application is allowed, the claim of the person is deemed to be rejected.

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

82.1.1 The Board must consider "compelling reasons" under s. 108(4) when determining whether an individual qualifies as a refugee

In every case in which the RPD concludes that a claimant has suffered past persecution, but there has been a change of country conditions, the Refugee Division is obligated under s. 108(4) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes this subsection. That being said, the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.^[1]

82.1.2 Commentary

For commentary, see RPD Rule 64: Canadian Refugee Procedure/RPD Rule 64 - Applications to Vacate or to Cease Refugee Protection¹.

82.2 References

1. *Jalloh v. Canada (Citizenship and Immigration)*, 2023 FC 948 (CanLII), at para 8, <²>, retrieved on 2023-09-29.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_64_-_Applications_to_Vacate_or_to_Cease_Refugee_Protection
² <https://canlii.ca/t/jz5nz#par8>

83 IRPA Section 109: Applications to Vacate

83.1 IRPA Section 109

Section 109 of the *Immigration and Refugee Protection Act* reads:

Applications to Vacate
Vacation of refugee protection

109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

Rejection of application

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

Allowance of application

(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

83.1.1 For commentary, see RPD Rule 64

Canadian Refugee Procedure/Applications to Vacate or to Cease Refugee Protection¹

83.2 References

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Applications_to_Vacate_or_to_Cease_Refugee_Protection

84 IRPA Sections 110-111: Appeal to Refugee Appeal Division

84.1 IRPA Sections 110-111: Appeal to Refugee Appeal Division

Sections 110 and 111 of the *Immigration and Refugee Protection Act* read:

Appeal to Refugee Appeal Division

Appeal

110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.

84.1.1 The jurisdiction of the RAD is to hear appeals on a question or law, of fact, or of mixed law and fact against a decision of the RPD

As per s. 110(1) of the IRPA, the jurisdiction of the RAD is to hear appeals on a question or law, of fact, or of mixed law and fact against a decision of the RPD. The RAD is to proceed on the basis of the record of the proceedings of the RPD, unless the provisions below for allowing new evidence are engaged. This has implications for the jurisdiction of the RAD to hear and consider new issues. Where a claim could have been raised before the RPD, but was not, the evidence supporting it may not be presented at the RAD unless it complies with the new evidence provisions. As such, in *Vasli v. Canada*, the court concluded that the RAD reasonably found that a claim based upon wearing the hijab could have been raised before the RPD and that statements in support of it were not admissible before the RAD.^[1] See also: Canadian Refugee Procedure/110-111 - Appeal to Refugee Appeal Division#IRPA 111(1)(c) and 111(2): the Refugee Appeal Division may refer the matter to the Refugee Protection Division for re-determination in specified circumstances¹.

Notice of appeal

110(1.1) The Minister may satisfy any requirement respecting the manner in which an appeal is filed and perfected by submitting a notice of appeal and any supporting documents.

Restriction on appeals

(2) No appeal may be made in respect of any of the following:

(a) a decision of the Refugee Protection Division allowing or rejecting the

¹ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/110-111_-_Appeal_to_Refugee_Appeal_Division#IRPA_111\(1\)\(c\)_and_111\(2\):_the_Refugee_Appeal_Division_may_refer_the_matter_to_the_Refugee_Protection_Division_for_re-determination_in_specified_circumstances](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/110-111_-_Appeal_to_Refugee_Appeal_Division#IRPA_111(1)(c)_and_111(2):_the_Refugee_Appeal_Division_may_refer_the_matter_to_the_Refugee_Protection_Division_for_re-determination_in_specified_circumstances)

- claim for refugee protection of a designated foreign national;
- (b) a determination that a refugee protection claim has been withdrawn or abandoned;
- (c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded;
- (d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if
 - (i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and
 - (ii) the claim - by virtue of regulations made under paragraph 102(1)(c) - is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;
- (d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);
- (e) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased;
- (f) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection.

Making of appeal

- (2.1) The appeal must be filed and perfected within the time limits set out in the regulations.

84.2 IRPA Section 110(3): Procedure

Procedure

- (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

84.2.1 In the case of a matter that is conducted before a panel of three members, the RAD may accept documentary evidence and written submissions from UNHCR

IRPA section 110(3) provides that in the case of a matter that is conducted before a panel of three members, the Refugee Appeal Division may accept documentary evidence from a representative or agent of the United Nations High Commissioner for Refugees. But see RAD Rule 45, which provides that the UNHCR's written submissions must not raise new issues: Canadian Refugee Procedure/RAD Rules Part 3 - Rules Applicable to All Appeals#RAD Rule 45: UNHCR providing written submissions in an appeal conducted by a three-member panel².

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_3_-_Rules_Applicable_to_All_Appeals#RAD_Rule_45:_UNHCR_providing_written_submissions_in_an_appeal_conducted_by_a_three-member_panel

84.2.2 The RAD must proceed without a hearing on the basis of the record of the proceedings of the RPD, subject to listed exceptions, but this provision does not restrict the RAD from introducing new evidence

The Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, though, subject to subsections (3.1), (4) and (6), the RAD may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal, and, in the case of a matter that is conducted before a panel of three members, written submissions from the UNHCR and any other person specified in the rules of the Board.

What is omitted from this rule is any mention of the power of the RAD itself to introduce new evidence. Nor is the RAD's ability to act *suo moto* considered in subsections (3.1) [time limit for making a decision], (4) [evidence that may be presented by the person who is the subject of the appeal], or (6) [when the RAD may hold a hearing]. The RAD's ability to put new evidence on the record, e.g. disclose an updated National Documentation Package to the parties, is governed by other provisions of the Act, especially s. 165 IRPA [Powers of a commissioner]: Canadian Refugee Procedure/Powers of a Member#Section 165 of the IRPA³. There is no question that the RAD has such a power to introduce new evidence, indeed, the courts have stated that the RAD has an obligation to do so in some cases, e.g. in *Zhang v. Canada*, the court held that the RAD should consider the most recent information, given that it is assessing risk on a forward looking basis, including an updated National Documentation Package released by the Board subsequent to a appeal being perfected.^[2] The IRB *Policy on National Documentation Packages in Refugee Determination Proceedings* states that the use of NDPs does not preclude the disclosure of additional Country of Origin Information not contained in an NDP by the Division or a party to a proceeding.^[3] Similarly, the Board's *Instructions for Gathering and Disclosing Information for Refugee Appeal Division Proceedings* state that the RAD may decide to obtain information other than that provided in the RPD record and by the parties in the RAD proceedings.^[4]

84.3 IRPA Section 110(3.1): Time limit for making a decision

Time limits

(3.1) Unless a hearing is held under subsection (6), the Refugee Appeal Division must make a decision within the time limits set out in the regulations.

84.4 IRPA Section 110(4)-(5): Evidence that may be presented

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Powers_of_a_Member#Section_165_of_the_IRPA

in the circumstances to have presented, at the time of the rejection.

Exception

(5) Subsection (4) does not apply in respect of evidence that is presented in response to evidence presented by the Minister.

84.4.1 What is "evidence" and how is evidence distinct from other types of documents such as legal authorities?

On appeal, the person who is the subject of the appeal may present only evidence that meets the criteria stipulated above. This invites the question "what is 'evidence' and how is evidence distinct from other types of documents such as legal authorities?". For an exploration of this question, see: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#Rules 3(3)(e) and 3(3)(f): Legal authorities may be distinguished from evidence that an appellant wants to rely on⁴.

84.4.2 Section 110(4) applies to presenting additional evidence, not to whether evidence excluded by the RPD should in fact be included

Section 110(4) of the Act applies to the evidence that the person who is the subject of the appeal may present to the RAD. It does not concern evidence that was presented to the RPD but not accepted. Such evidence is distinct and covered by RAD Rule 3(3)(c) which concerns any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal: Canadian Refugee Procedure/RAD Rules Part 1 - Rules Applicable to Appeals Made by a Person Who Is the Subject of an Appeal#RAD Rule 3: Perfecting Appeal⁵.

84.4.3 Criteria for presenting new evidence

110(4) criteria

Subsection 110(4) of the *Immigration and Refugee Protection Act* limits the admission of new evidence on appeal to the following three circumstances: i) where the evidence arose after the rejection of the claim; ii) where the evidence was not reasonably available at the time of the rejection of the claim; or iii) where the evidence could not have reasonably been expected to be presented at the time of the rejection of the claim.^[5] The Federal Court of Appeal has held that these statutory conditions "leave no room for discretion on the part of the RAD" and must "be narrowly interpreted".^[6] This is so as "the role of the RAD is not to provide an opportunity to complete a deficient record submitted before the RPD".^[7] The onus is on the applicants to convince the RAD that their new evidence is

⁴ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rules_3\(3\)\(e\)_and_3\(3\)\(f\):_Legal_authorities_may_be_distinguished_from_evidence_that_an_appellant_wants_to_rely_on](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#Rules_3(3)(e)_and_3(3)(f):_Legal_authorities_may_be_distinguished_from_evidence_that_an_appellant_wants_to_rely_on)

⁵ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_1_-_Rules_Applicable_to_Appeals_Made_by_a_Person_Who_Is_the_Subject_of_an_Appeal#RAD_Rule_3:_Perfecting_Appeal

admissible.^[8] According to *Rule 3(3)(g)(iii)* of the *RAD Rules*, appellants must submit a memorandum that includes full and detailed submissions regarding how any documentary evidence they wish to rely on meets the requirements set out in subsection 110(4) of the *Act*. A consideration of each of these grounds for admitting new evidence follows:

- Did the evidence arise after the rejection of the claim? The newness of a piece of evidence cannot be tested solely by the date on which the document was created.^[9] What is important is the date of the event or circumstance sought to be proved by the documentary evidence.^[9] In *Amin v. Canada* the Federal Court upheld a RAD decision which concluded that donation receipts post-dating the RPD decision were inadmissible and that it was reasonably open to the RAD to reject them per s. 110(4) of the *Act* on the basis that the Applicants were improperly attempting to correct a deficient record given that (a) the RPD expressly rejected the Applicants' claim due to a lack of sufficient evidence, such as evidence of donations or communications related to religious activity or membership; and (b) the donation receipt was dated only days after the RPD's rejection of their claim.^[10] That said, the more common approach is to assess this type of consideration under the credibility criterion in *Singh v. Canada* discussed below, not as part of the s. 110(4) criteria.
- Was the evidence not reasonably available at the time of the rejection of the claim? Applicants bear the burden of putting their best foot forward and they may not submit new evidence whenever they are surprised by an outcome.^[11] Factors to consider include:
 - *Did the Appellant request leave to provide post-hearing submissions to the RPD?* The courts have noted that nothing prevents a party from requesting an opportunity to provide post-hearing submissions, and where they did not do so at the RPD, this is relevant to this new evidence admissibility analysis.^[12]
 - *Did the Appellant indicate to the RPD that the document existed?* In *Nsofor v. Canada* the RAD found that a document did not meet the s. 110(4) criteria as it concluded that the Appellant could reasonably have been expected in the circumstances to have indicated to the RPD prior to the rejection that such evidence existed.^[13]
 - *Did the RPD reserve its decision, and if so how much time passed prior to it being rendered?* When looking at the amount of time that elapsed between an RPD hearing and a panel of the RPD rendering a decision, to assess whether that duration was quick and meant that an applicant could not have reasonably submitted documents during that time period, the court in *Aregbesola v. Canada* noted that a 34-day timespan could not be considered "quick" in that case where country condition documents from the internet were at issue.^[14]
 - *Did the Appellant provide an explanation about how they were eventually able to obtain the documents?* In a case where evidence pre-dated the RPD's decision, but the Appellants maintain that they could not have reasonably presented the evidence sooner because of an inability to obtain help in securing the documents, the court held that "it was reasonable for the RAD to expect some explanation about how the Applicants were eventually able to obtain the documents."^[15] Absent a proper explanation, the court held in *Ali v. Canada* that it was reasonable to conclude that the documents could have been obtained and provided to the RPD sooner. In *Fardusi v. Canada*, the court held that the fact that the information in question was in the hands of the agent of persecution (until being subsequently served on the Appellant during a legal proceeding) was relevant to whether it was reasonably available to her.^[16] Similarly, in *Samaraweera v. Canada*, the court held that it was necessary to consider the sub-

mission that the applicant's family had deliberately concealed from the applicant the ongoing harassment and efforts to search for the applicant until after the RPD decision.^[17]

- *Was the Appellant's counsel negligent in not providing the document?* In *Singh v. Canada*, the court considered it relevant that the failure to produce the document was the fault of the claimant's lawyer.^[18]
- *Is the document a news story published just prior to the RPD decision?* In *Ogundipe v. Canada*, the Court concluded that the RAD should have accepted as new evidence an article that was published two days before the RPD decision and related to an event that occurred the day before the publication.^[19] In contrast, in *Collahua v. Canada*, the Court found *Ogundipe v. Canada* distinguishable because that case concerned articles dated six weeks before the RPD's decision; the court accepted that their refusal was reasonable.^[20]
- Was the evidence that which the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection? An Appellant cannot offer new evidence "every time he or she is surprised by the RPD's decision."^[21] It is where the evidence could not have reasonably been expected to be presented (or, according to the French version, "normally have been expected"^[22]) at the time of the rejection of the claim that it may be admitted on appeal. Factors to consider include:
 - *Did the issue arise at the hearing or only in the RPD's reasons?* If the issue arose at the hearing, then the issue will generally be one of whether the evidence was not reasonably available at the time of the rejection of the claim (above), including whether the appellant could have requested an adjournment, informed the RPD that they were trying to obtain additional information, and requested leave to provide post-hearing submissions under the RPD rules.^[23]
 - *Should the appellant have anticipated that the issue in question would have arisen?* Even if the issue only arose in the decision, the RAD must consider whether the appellant should reasonably have anticipated that the issue would have come up.^[24] In some cases, the answer will point to concluding that the person could not reasonably in the circumstances have been expected to have provided the evidence. For example, in *Ismailov v. Canada* the court concluded that it was unreasonable for the RAD to conclude that the Applicant should have reasonably been expected to submit articles to the RPD about the ability to leave Uzbekistan when one is being investigated by the prosecutor's office, as the Applicant could not have anticipated that the RPD would be suspicious about this fact (the documents established that it was common that such persons could leave the country).^[25] In other circumstances, the answer will point to concluding that the person could reasonably in the circumstances have been expected to have provided the evidence. For example, in *Hassan v. Canada*, Mr. Hassan argued that he had not anticipated the RPD would reject an initial letter from a Canadian Somali association that he provided to support his claim^[26] and that as a result he should be allowed to submit new letters from Canadian Somali associations affirming his identity as a Somali at the RAD.^[27] The court upheld the RAD's determination that, notwithstanding the fact that identity was at the centre of the RAD decision (the claim was rejected on that basis), the affidavits that Mr. Hassan submitted to the RAD did not contain any information that arose after the RPD's decision and so it was reasonable for the RAD to conclude that he had not provided a sufficient explanation for why the evidence could not have been presented before the RPD rendered its decision.^[28]

Personal factors, gender, trauma, language, and self-represented status

According to the IRB Gender Guidelines, the assessment of whether new evidence meets the admissibility test under subsection 110(4) of the IRPA and RAD Rule 29(4) should be undertaken using a trauma-informed approach that considers the difficulties faced by persons who have experienced gender-based violence.^[29] The fact that an applicant was self-represented and did not speak the language of the proceedings (English or French) does not itself establish that they could not reasonably in the circumstances have been expected to have presented the documents.^[30]

Additional Raza/Singh factors

In addition to the express statutory requirements in the statutory provision above, the RAD must ensure that the implied conditions of admissibility laid out by the Federal Court of Appeal are fulfilled, specifically credibility, relevance, and newness.^[31] Some Federal Court decisions add the requirement that the evidence be "material" to the decision to this list,^[32] but the better view is that the Federal Court of Appeal held that materiality should not be a requirement for admitting evidence at the RAD because materiality is dealt with under the new hearing provisions in the Act, not at the evidence admissibility stage.^[33] More information:

- **Newness:** Is the evidence new in the sense that it is capable of: (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or (c) contradicting a finding of fact by the RPD (including a credibility finding)? If not, the evidence need not be considered.^[34] Documents that essentially repeat the same information that was before the RPD will fail this newness criterion.^[35] In contrast, evidence that refers to an old risk should not be rejected as "not new" where it speaks to the development of the risk and is materially different evidence of that old risk.^[36]
- **Credibility:** Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.^[37] That said, the credibility analysis at this stage is not limited to specific grounds such as the "source" or the "circumstances in which [the evidence] came into existence."^[38] Factors that have been looked at in such analyses include:
 - *Is there reasonably expected corroborating evidence?* In *Nsofor v. Canada*, the Appellant indicated that he tried to obtain a document earlier, but was unable to do so because the police station had burned down. The RAD rejected the document on the basis that, among other things, there was no corroborating evidence regarding the alleged fire.^[39]
 - *Is there a sufficient explanation of the circumstances in which the document was obtained?* In *Nsofor v. Canada*, the the RAD rejected a document as not sufficiently credible given that there was no explanation given as to how and why the handwritten paper document was saved from an alleged police station fire.^[39]
 - *Has the original document been provided or only a copy thereof?* In *Nsofor v. Canada*, the court upheld a RAD determination that the fact that all that was provided was a WhatsApp screen shot of the document – not the document itself – properly detracted from the document's credibility in the circumstances.^[39]

- *Is the timing by which the document allegedly arose exceedingly fortuitous?* The RAD can regard the timing of evidence as dubious or convenient in a way which undermines its credibility.^[40] Past RAD panels have concluded that the production of alleged police and court documents which notably escalate efforts to find the appellant, days after the rejection of his claim, is suspicious.^[41] For example, in *Yusuf v. Canada*, the court held that the RAD reasonably found an affidavit was too fortuitous to be credible because it was extremely unlikely that the affiant, who was meant to be the applicant's reception upon arrival in Canada but did not appear at the airport and never communicated with the applicant in the subsequent three years, ran into the applicant by chance within weeks of the negative RPD decision.^[42] Such concerns about documents being obtained in implausible circumstances can serve to rebut the presumption of authenticity of foreign documents.^[43]
- *Is the document consistent with other evidence on file?* In *Tuncdemir v. Canada*, the court held that the RAD reasonably came to the conclusion that an affidavit lacked credibility in light of the fact that the affidavit contradicted certain parts of the Applicant's BoC narrative.^[44]
- *Has the appellant submitted other fraudulent documents?* When considering the source of the evidence, the tribunal is entitled to consider that the RAD has upheld other serious credibility concerns that involve the applicant's submission of fraudulent documents.^[45] However, the RAD must guard against engaging in circular reasoning by refusing to admit evidence because the content of the new evidence is not credible based on the RPD's findings.^[46] A general finding that a refugee claimant lacks credibility does not impugn all evidence that might corroborate his story.^[47]
- For further context, see also: Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(h) - May receive and base a decision on evidence considered credible or trustworthy⁶.
- **Relevance:** In determining the relevance of the new evidence, the RAD is required to determine whether the evidence was "capable of proving or disproving a fact that is relevant to the claim for protection".^[31] The RAD is required to assess relevance in the context of the applicants' submissions and how the items are being relied upon^[48] relative to the determinative issues that are outstanding for the claim.^[49] For example, in *Asim v. Canada* the court upheld a RAD decision which had rejected a doctor's letter as not relevant because the letter did not provide any specific information on how the applicant's condition could have affected his testimony.^[50] In that case, the determinative issue was the claimant's credibility and the RAD properly rejected the letter as not relevant because it did not prove or disprove the credibility findings of the RPD. Similarly, in *Kakar v. Canada* the court upheld the RAD's refusal to admit new evidence on the basis that "if the Mafia is not targeting Mr. Kakar, evidence concerning the situation of persons sought by the Mafia is simply irrelevant."^[51]

The additional requirements from *Canada v. Singh* do not need to be weighed against the statutory ones; if the new evidence does not meet the statutory requirements for admission in s. 110(4), there is no need to consider the further constraints at common law.^[52] Conservely, the RAD is under no obligation to analyze the explicit criteria of subsection 110(4) of the

[https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(h)_-_May_receive_and_base_a_decision_on_evidence_considered_credible_or_trustworthy)

6 [_Proceedings#IRPA_Section_170\(h\)_-_May_receive_and_base_a_decision_on_evidence_considered_credible_or_trustworthy](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(h)_-_May_receive_and_base_a_decision_on_evidence_considered_credible_or_trustworthy)

IRPA before analyzing these implied conditions of *Raza* and *Singh*.^[38] Furthermore, evidence must meet all of the above criteria; for example, if evidence is not credible, relevance and newness are irrelevant and the RAD can reasonably focus its analysis on the issue of credibility if it is determinative.^[38]

84.4.4 The RAD may exclude evidence but then provide an alternative analysis of how the evidence would affect the decision if it had been admitted

It is open to a panel of the RAD to determine that evidence does not meet the criteria to be admitted, but to state that in the event that it has erred in concluding that the documents should not be admitted into evidence, it will, in the alternative, consider them.^[53] In *Hashim v. Canada*, the Court found even though documents did not constitute new evidence and that it had not accepted them on that basis, the decision's further analysis of those documents "was not intended to lessen this finding, but rather was conducted as a matter of completeness."^[54]

84.4.5 The RAD may decline to consider whether or not new evidence is admissible if the new evidence would not change the outcome of the appeal

It is not necessary for a panel of the RAD to make a determination about whether new evidence is admissible or not if admitting it would not change the outcome of the appeal.^[55]

84.4.6 The RAD may reject evidence, accept evidence, or accept evidence only in part

RAD member R. Seyan provides an example of how the tribunal may accept evidence in part in this 2020 decision.^[56] Inadmissible evidence does not become admissible simply because it is commingled with, or bootstrapped onto, a document which is admissible. As such, for example, where an affidavit includes both admissible and inadmissible paragraphs a panel may admit some and reject others.

84.4.7 The RAD may conclude that new evidence meets the threshold for admissibility, even if it is ultimately held to lack reliability and credibility

In *Ariyibi v. Canada*, the court upheld a RAD decision which the RAD found that the new evidence met the threshold for admissibility, but assigned it little weight on the basis that the letters lacked reliability and credibility.^[57]

84.5 IRPA Section 110(6): Hearings

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

84.5.1 The RAD must exercise its discretion about whether to hold a hearing where the criteria in s. 110(6) are met, regardless of whether a party has requested a hearing

The RAD Rules put the onus on applicants to inform the RAD why they are requesting an oral hearing and to provide “full and detailed submissions” supporting this request.^[58] That said, while the RAD rules allow an appellant to request a hearing, IRPA does not actually impose a burden either to request, or to satisfy the RAD that the circumstances merit, an oral hearing.^[59] The onus rests with the RAD to consider and apply the statutory criteria reasonably.^[60] The RAD's reasons should show how it conducted a meaningful analysis of the criteria in subsection 110(6) and determined whether or not to hold an oral hearing.^[61]

While this is a discretionary provision,^[62] and oral hearings at the RAD are relatively unusual,^[63] a hearing must generally be held where these statutory requirements are met.^[64] While the RAD retains discretion to (not) hold a hearing under subsection 110(6), it will need to exercise that discretion reasonably in the circumstances.^[65] The Federal Court has concluded that “an oral hearing [will] generally be required where the statutory criteria have been satisfied” (*Zhuo v Canada*).^[66] Not exercising that discretion to hold an oral hearing simply because neither party requested a hearing does not meet the threshold of reasonableness.^[59] In Waldman's words, “although the language in both the RAD and PRRA context is permissive rather than imperative, the jurisprudence in the PRRA context would appear to indicate that hearings may be a mandatory component of procedural fairness in cases where credibility is central to the decision. This principle was first established by the Supreme Court in *Singh* and has been integrated into the jurisprudence on the PRRA regime.”^[67]

84.5.2 Interpretation of the section 110(6) criteria

Section 110(6) of the IRPA provides that the Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3) that meets the following three-part conjunctive test. The presumption, according to this statutory provision, is that there will be no oral hearing unless all three criteria under the tripartite test in subsection 110(6) are met as well as the conditions under subsection 110(4).^[68] The criteria for determining whether to hold an oral hearing set out in subsection 110(6) of the IRPA “are unquestionably related to the materiality of the new documentary evidence”.^[69] The following subsection 110(6) criteria are said to be “associated with the existence of new documentary evidence”.^[70]

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal. When approaching this question, a panel can consider whether the new evidence will alter credibility findings or “justify a reassessment of the overall credibility of the applicant”?^[71] Furthermore, the documentary evidence must raise a serious issue with the respect to the credibility of the *person* who is the subject of the

appeal; a hearing should not be held merely to assess the credibility of the evidence itself if that evidence does not raise a serious issue with respect to the person's credibility. In the words of *A.B. v. Canada*, the RAD is not required to hold an oral hearing to assess the credibility of new evidence—it is when otherwise credible and admitted evidence raises a serious issue with respect to the general credibility of the applicant that the determination of an oral hearing becomes relevant.^[72] As Justice Norris has observed in the analogous PRRA context, while it can be difficult to draw a bright line, “doubts about the veracity of evidence do not necessarily amount to concerns about an applicant’s credibility”.^[73] In approaching this question, a panel can consider the following questions:

- *Do credibility questions emerge from the evidence, or only questions regarding the weight and/or sufficiency of the evidence?* Section 110(6) requires that, before a hearing can be held, new documentary evidence must raise a serious issue with respect to the credibility of the person who is the subject of the appeal. Where the RAD does not have credibility concerns as a result of the evidence, but rather concerns about the evidence's weight, the criteria of s. 110(6) will not met.^[74] Similarly, where the RAD does not raise any “new” serious issues with respect to the credibility of the applicant, but instead bases its decision on a lack of sufficient evidence to prove the applicant's claim (e.g. the applicant's identity), then a hearing is not available.^[75]
- *Is there already similar evidence in the record?* Panels have generally considered whether there was already similar evidence in the record. If so, then the new, additional, evidence will generally not raise a serious issue with respect to credibility.^[76]
- *Is the new evidence clearly credible or not credible?* The RAD should not convene an oral hearing when the evidence does not raise a serious issue with respect to credibility. If, considering the evidence, the claim is clearly credible or not credible, then a hearing need not be convened. For example, if the RAD has an analytical foundation for disbelieving the new evidence, then it need not be accepted as per the *Singh v. Canada* criteria, and as a result, a hearing need not be held.^[77] As the court held in *Ajaguna v. Canada*, the RAD is not required to accept every story that a third party may be prepared to submit, however fanciful it may be.^[78] Conversely, if the new evidence does not raise a serious issue with respect to the credibility of the person because the evidence and claim are clearly credible, the evidence need not be further tested, and the claim can consequently be accepted forthwith, then convening a hearing will not be necessary.
- *Does the new evidence call into question the credibility of an appellant or of third parties?* In *Ariyibi v. Canada*, the court concluded that the RAD was not obligated to conduct an oral hearing to assess the credibility of the new evidence that had been offered, as the new evidence did not raise a serious issue with respect to the credibility of the appellants, but rather, called into question the credibility of the third parties who authored the new evidence.^[79] In *Kanakarathinam v. Canada*, the Federal Court noted that a credibility finding against a third party (for example, the applicant's mother) does not trigger the right to an oral hearing as this does not go directly to the applicant’s credibility.^[80]
- (b) that is central to the decision with respect to the refugee protection claim. When considering this branch of the test, panels have considered the following questions:
 - *Is the evidence central to the RPD's decision, or an aspect thereof?* The court notes that this criterion requires not that the new evidence be “central to the claim” but instead “central to the decision”.^[81] As such, evidence which is central to the claim but

on a point that was not at issue in the decision or reasons, would not be "central to the decision".

- *Is the evidence central with respect to one of the elements that has or needs to be proven to receive refugee protection?* This can be considered a materiality requirement; evidence is material if it could reasonably be expected to have affected the result of the RPD's decision.^[82] An example of a situation that would meet this criterion, but not the next, is where a claim was rejected on the basis of identity and IFA. New evidence related to identity would be central to the decision with respect to the refugee protection claim, even if, if accepted, it would not, in itself, justify allowing or rejecting the refugee protection claim.
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim. When considering this branch of the test, panels have considered the following questions:
 - *Does the evidence relate to a determinative issue?* In assessing this criterion, the RAD should look at the determinative issue(s) and whether the findings would be affected by the new evidence. See, for example, *Idugboe v. Canada*: "The evidence that was rejected on credibility grounds spoke to new instances of threats and attacks, none of which would have affected the determinative IFA issue. While the evidence arguably speaks to the motivation of Mr. Idugboe's family to find the Idugboes on their return, the IFA determination was based on a variety of factors, including their means and ability to locate the Idugboes in Port Harcourt, none of which was affected by this newly tendered evidence."^[83]
 - *Do the documents raise a new issue that could justify granting protection?* Where the new evidence that has been tendered raises a new issue that could justify granting protection, for example a *sur place* claim, then this will indicate that this criterion is met.^[84]
 - *Should the evidence be accorded sufficient weight such that it could justify allowing or rejecting the claim?* When making this determination, it is proper to consider the weight of the evidence that has been tendered; where new evidence has been admitted, but has been assigned very little weight such that it is insufficient to overcome previous negative credibility findings, then this may properly indicate that the new evidence which was accepted could not justify allowing the claim and the conditions in this subsection are thereby not met.^[85]

84.5.3 Applicability of PRRA jurisprudence

The factors listed in section 167 of the *Immigration and Refugee Protection Regulations* which govern when a Pre-Removal Risk Assessment (PRRA) officer will hold a hearing are nearly identical to those listed in subsection 110(6) of the Act.^[86] The Federal Court held in *Shen v. Canada* that the nearly identical factors appear to indicate Parliament's intention that similar analyses should be applied in each case.^[87] However, the court went to comment, "the similarity of the provisions does not automatically lead to the conclusion that the Court's jurisprudence under each provision is interchangeable".

84.5.4 Ability to conduct a *voir dire* to determine whether evidence will be admitted

The general practice of the RAD is to hold an oral hearing only after documentary evidence is already accepted as new evidence. An oral hearing in the nature of a *voir dire*, where a hearing is held in order to determine whether the documentary evidence ought to be admitted into evidence, is not generally held at the RAD. However RAD Member Rita Aggarwala has concluded that one may be.^[88]

As stated in *Mohamed v. Canada*, there is no question that the RAD may only convene an oral hearing where evidence meets the criteria of s. 110(4) of the Act: "subsection 110(6) permits the RAD to hold an oral hearing where, in its opinion, "there is documentary evidence referred to in subsection (3)" that meets the criteria in paragraphs (a), (b), and (c). The subsection thus only applies in circumstances where it determines there *is* evidence referred to in subsection 110(3). Such documentary evidence may only be filed by the claimant if they establish it meets the requirements of subsection 110(4). In other words, the RAD must determine whether there is evidence that meets the requirements of subsection 110(4) before conducting the subsection 110(6) assessment of whether that evidence (a) raises a serious issue of credibility, (b) is central to the decision on the refugee protection claim, and (c) would justify allowing or rejecting the claim."^[89]

A question arises, however, about whether evidence must in every case meet the *Canada v. Singh* criteria,^[77] including being judged to be credible, prior to an oral hearing being held. The better view of this matter is "no". This is so for several reasons, including that the text of s. 110(6)(c) of the IRPA implies that the decision about whether to admit the evidence or not need not be made at the time of the oral hearing, as that criterion is to be evaluated "à supposer qu'ils soient admis", i.e. "supposing they [the new documents] are admitted", employing the subjunctive mood for the verb être, which implies uncertainty and indeterminacy. Furthermore, it could be argued that the "if accepted" wording in this provision applies to the facts contained in the new documents, not to the documents themselves.

But see the following conflicting statements: the Federal Court has stated that the RAD can only hold an oral hearing after it decides to admit new evidence: "the RAD could not have held an oral hearing about whether to admit the new evidence—it had to have admitted the new evidence in order to have the statutory authority to hold an oral hearing."^[90] Similarly, in *Limonés Muñoz v. Canada* the court commented that "there must be a link between the documentary evidence admitted and the three elements listed in [section 110(6)]", indicating that the documentary evidence must have been admitted in order for a hearing to be convened.^[91]

84.6 IRPA Section 111: Decision and Referrals

Decision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

- (a) confirm the determination of the Refugee Protection Division;
- (b) set aside the determination and substitute a determination that, in its opinion, should have been made; or
- (c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers

appropriate.
(1.1) [Repealed, 2012, c. 17, s. 37]

Referrals

- (2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that
- (a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and
 - (b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

84.6.1 IRPA s. 111(1)(b): the Refugee Appeal Division may set aside the determination of the RPD and substitute a determination that, in its opinion, should have been made

The RAD has the power to set aside a determination made by the RPD and substitute its determination that, in its opinion, should have been made. As Waldman observes, this provision allows the RAD to substitute its decision for that of the RPD, even if no new evidence has been submitted and no error has been identified in the RPD decision.^[92]

84.6.2 IRPA ss. 111(1)(c) and 111(2): the Refugee Appeal Division may refer the matter to the Refugee Protection Division for re-determination in specified circumstances

When the RAD finds that the RPD erred, as per s. 111 of the Act it must provide a final determination by setting aside the decision and substituting its own determination of the merits of the claim, and “it is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination”.^[93]

Thus, per IRPA s. 111(2), the Refugee Appeal Division may refer a matter to the RPD only if it is of the opinion that (a) the RPD decision was incorrect in fact, law or both, and (b) the RAD cannot make its own determination of the issue on appeal without hearing evidence that was presented to the RPD. This is a conjunctive test.^[94]

111(2)(a) The RPD decision was incorrect in fact, law or both

Where, for example, the RAD does not articulate why the RPD decision was incorrect in fact, law, or both, but simply notes that new evidence has been adduced on appeal, and that new evidence does not contradict any existing factual findings, then the RAD may not remit the case to the RPD.^[95] For example, in *Canada v. Hayat*, the claimant stated to the RAD that his claim on the basis of sexual orientation at the RPD had been made up, that he was not gay, but that he wanted to present a different basis to claim related to political opinion. The RAD determined that the Appellant should be given the benefit of the doubt and remitted the matter to the RPD for a new hearing. The court held that this had been unreasonable, as the RAD had not identified any error with the RPD's original decision finding that the Appellant's sexual orientation-based claim was not credible.^[96] As such, the law did not permit the RAD to remit the matter to the RPD. See also: Canadian Refugee Procedure/110-111 - Appeal to Refugee Appeal Division#The jurisdiction of the

RAD is to hear appeals on a question or law, of fact, or of mixed law and fact against a decision of the RPD⁷.

111(2)(b) The RAD cannot make its own determination of the issue on appeal without hearing evidence that was presented to the RPD

The provision “acknowledges the fact that in some cases where oral testimony is critical or determinative in the opinion of the RAD, the RAD may not be in a position to confirm or substitute its own determination to that of the RPD”.^[97] As stated in *Malambu v. Canada*, a combined reading of sections 110 and 111 of the IRPA and of Rule 3 of the RAD Rules indicates that where no new evidence is submitted to the RAD, but the RAD is of the opinion that the RPD’s decision is wrong in law or fact or mixed law and fact, and that it can neither confirm nor set aside the decision appealed without itself holding a hearing to re-examine the evidence adduced, it must refer the matter back to the RPD.^[98]

A question can arise about whether this provision allows the RAD to refer a matter to the RPD where no evidence was canvassed at the RPD on a particular determinative issue. For example, in *Saghiri v. Canada* the RPD had not canvassed the issue of 1F(b) exclusion at the hearing, the RAD held that this was in error, no new evidence was submitted on appeal, and the appellant submitted that the RAD could not remit the matter to the RPD for further examination pursuant to this provision the issue was not canvassed during the RPD’s oral hearing.^[99] The plain text of the statutory provision can be read to call such jurisdiction into question given that it provides that the RAD may only refer a matter back to the RPD where it was not able to make a decision “without hearing *evidence that was presented* to the Refugee Protection Division [*emphasis added*]”. Similarly, the French-language provision speaks to only being able to refer a matter to the RPD for re-determination if it cannot make a decision without holding a new hearing in order to *réexamen* (which has been translated as re-examine,^[100] reconsider,^[101] review,^[102] or reappraise) the evidence that was presented to the RPD: “*qu’elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.*”

The Minister’s position is that a purposive interpretation of paragraph 111(2)(b) of *IRPA* “allows the RAD to remit a refugee claim for further evidence because otherwise restricting the evidence on the RPD’s redetermination would bring about an absurd consequence”, since the RAD can only confirm, substitute or return a decision under section 111(1) of *IRPA*. If the RAD needs more evidence, but cannot refer a claim to the RPD, then the RAD would be “hamstrung”.^[97] The court acknowledges that when looking at its particular wording, paragraph 111(2)(b) is “awkwardly written” in both English and French.^[97] *Saghiri v. Canada* upheld a RAD decision to remit a matter so that the RPD could ask questions on an additional issue as follows: “There was no or insufficient evidence before the RPD on the issue of exclusion which it could have heard that would have allowed it to confirm or substitute its own determination of the issue. Thus the only remedy was to send it back to the RPD for all of the evidence relating to the claim to be heard again in order to make an informed decision on the question of exclusion.”^[99]

⁷ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/110-111_-_Appeal_to_Refugee_Appeal_Division#The_jurisdiction_of_the_RAD_is_to_hear_appeals_on_a_question_or_law,_of_fact,_or_of_mixed_law_and_fact_against_a_decision_of_the_RPD

Also of note, in *Javed v. Canada*, the court stated that in a case where the RAD "concluded that the RPD did not have a meaningful advantage regarding findings of credibility,...it was not open to the RAD by operation of paragraph 111(2)(b), to refer the matter back to the RPD for re-determination."^[94] The converse can also hold: where the RPD did have a meaningful advantage regarding its credibility findings, then, as a general proposition, the RAD may not undertake a "wholesale review and reversal" of the RPD's credibility findings.^[103]

As a general proposition, even where an applicant establishes that the necessary conditions exist, the RAD retains a discretion about whether to refer a matter back to the RPD. It is under no obligation to do so.^[104] This discretion stems from the use of the word "may" in s. 111(2) ("may make the referral") as opposed to an imperative wording such as "shall". However, as the Federal Court of Appeal held in *Singh v. Canada*, where the RAD finds that all of the evidence should be heard again in order to make an informed decision, it must refer the case back to the RPD.^[105]

Once a matter is remitted, it is to follow the process set out in the IRB *Policy on Re-determinations Ordered by the Refugee Appeal Division*.^[106] See also: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#The record on a RAD-ordered redetermination⁸.

84.6.3 IRPA 111(1)(c): the Refugee Appeal Division may give the directions to the Refugee Protection Division that it considers appropriate when referring a matter for re-determination

Section 111(1)(c) of the IRPA provides that after considering an appeal, the Refugee Appeal Division may refer a matter to the Refugee Protection Division for redetermination, giving the directions to the Refugee Protection Division that it considers appropriate. There are any number of such directions that can be provided, including that:

- The matter is to be heard by the same RPD panel as initially heard the claim, if at all possible.^[107]
- In hearing and deciding the claim, the RPD is to consider only specific evidence that relates to the reasons why the matter is being remitted and the panel is to accept the findings of the first RPD panel unless those findings are disturbed by the new evidence.^[107]

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104. *Onwuamaizu v. Canada (Citizenship and Immigration)*, 2021 FC 1481 (CanLII), at para 29, <⁸⁵>, retrieved on 2022-09-20.
105. *Singh v. Canada (Citizenship and Immigration)*, 2016 FCA 96 (CanLII), [2016] 4 FCR 230, at para 51, <⁸⁶>, retrieved on 2023-09-29.
106. Immigration and Refugee Board of Canada, *Policy on Redeterminations Ordered by the Refugee Appeal Division*, September 9, 2014, <⁸⁷> (Accessed April 27, 2022).
107. *X (Re)*, 2013 CanLII 76391 (CA IRB), at para 66, <⁸⁸>, retrieved on 2022-04-28.

78 <https://canlii.ca/t/jnrrk#par18>

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80 <https://canlii.ca/t/gmlcg#par28>

81 <https://canlii.ca/t/jzgbf#par55>

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85 IRPA Sections 112-114: Pre-Removal Risk Assessment (PRRA)

85.1 IRPA Sections 112-114

Sections 112 to 114 of the *Immigration and Refugee Protection Act* read:

DIVISION 3
Pre-removal Risk Assessment
Protection

Application for protection

112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

Exception

(2) Despite subsection (1), a person may not apply for protection if

(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;

(b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since

(i) the day on which their claim for refugee protection was rejected - unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention - or determined to be withdrawn or abandoned by the Refugee Protection Division, in the case where no appeal was made and no application was made to the Federal Court for leave to commence an application for judicial review, or

(ii) in any other case, the latest of

(A) the day on which their claim for refugee protection was rejected - unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention - or determined to be withdrawn or abandoned by the Refugee Protection Division or, if there was more than one such rejection or determination, the day on which the last one occurred,

(B) the day on which their claim for refugee protection was rejected - unless it was rejected on the basis of section E or F of Article 1 of the Refugee Convention - or determined to be withdrawn or abandoned by the Refugee Appeal Division or, if there was more than one such rejection or determination, the day on which the last one occurred, and

(C) the day on which the Federal Court refused their application for leave to commence an application for judicial review, or denied their application for judicial review, with respect to their claim for refugee protection, unless that claim was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention; or

(c) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since

(i) the day on which their application for protection was rejected or determined to be withdrawn or abandoned by the Minister, in the case where no application was made to the Federal Court for leave to commence an application for judicial review, or

- (ii) in any other case, the later of
 - (A) the day on which their application for protection was rejected or determined to be withdrawn or abandoned by the Minister or, if there was more than one such rejection or determination, the day on which the last one occurred, and
 - (B) the day on which the Federal Court refused their application for leave to commence an application for judicial review, or denied their application for judicial review, with respect to their application for protection.
- (d) [Repealed, 2012, c. 17, s. 38]

Exemption

- (2.1) The Minister may exempt from the application of paragraph (2)(b.1) or (c)
- (a) the nationals - or, in the case of persons who do not have a country of nationality, the former habitual residents - of a country;
 - (b) the nationals or former habitual residents of a country who, before they left the country, lived in a given part of that country; and
 - (c) a class of nationals or former habitual residents of a country.

Application

- (2.2) However, an exemption made under subsection (2.1) does not apply to persons in respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by the Refugee Appeal Division.

Regulations

- (2.3) The regulations may govern any matter relating to the application of subsection (2.1) or (2.2) and may include provisions establishing the criteria to be considered when an exemption is made.

Restriction

- (3) Refugee protection may not be conferred on an applicant who
- (a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;
 - (b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;
 - (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or
 - (d) is named in a certificate referred to in subsection 77(1).

Consideration of application

113 Consideration of an application for protection shall be as follows:

- (a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;
- (b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;
- (c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;
- (d) in the case of an applicant described in subsection 112(3) - other than one described in subparagraph (e)(i) or (ii) - consideration shall be on the basis of the factors set out in section 97 and
 - (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or
 - (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and
- (e) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:
 - (i) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of less than two years - or no term of imprisonment - was imposed, and

(ii) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.

Mandatory hearing

113.01 Unless the application is allowed without a hearing, a hearing must, despite paragraph 113(b), be held in the case of an applicant for protection whose claim for refugee protection has been determined to be ineligible solely under paragraph 101(1)(c.1).

Effect of decision

114 (1) A decision to allow the application for protection has

- (a) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and
- (b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

Cancellation of stay

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay.

Vacation of determination

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.

Effect of vacation

(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.

85.2 References

86 IRPA Sections 115-116: Principle of Non-refoulement

86.1 IRPA Sections 115-116

Sections 115-116 of the *Immigration and Refugee Protection Act* read:

Principle of Non-refoulement

Protection

115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

Exceptions

(2) Subsection (1) does not apply in the case of a person
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

Removal of refugee

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

Regulations

116 The regulations may provide for any matter relating to the application of this Division, and may include provisions respecting procedures to be followed with respect to applications for protection and decisions made under section 115, including the establishment of factors to determine whether a hearing is required.

86.2 References

87 IRPA Sections 133-136: Prosecution of Offences

87.1 IRPA Sections 133-136

Sections 133-136 of the *Immigration and Refugee Protection Act* read:

Prosecution of Offences

Deferral

133 A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

87.1.1 The deferral of prosecutions provided for in s. 133 of the IRPA tracks Canada's obligations pursuant to the Refugee Convention

Refugee Convention Article 31(1) states that "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence". While this provision of the Convention was not reflected in the 1976 Immigration Act, the Act was subsequently amended to include section 133 of the IRPA. This provision was inserted into the Act following the report to the Minister of Rabbi Plaut, who noted that "Until a claim is finally disposed of, it cannot be determined if the claimant is entitled to the protection of Article 31." He therefore recommended that "the Act be further amended to prohibit any prosecutions for illegal entry or presence in Canada during the determination process."^[1] While it is possible that, if a refugee claim is rejected, a claimant's irregular entry into Canada could be a legal offence, in practice this is pursued only in exceptional circumstances, as simply asking people to leave or having the authorities remove them for not having a visa is easier and more efficient.^[2]

Limitation period for summary conviction offences

133.1 (1) A proceeding by way of summary conviction for an offence under section 117, 126 or 127, or section 131 as it relates to section 117, may be instituted at any time within, but not later than, 10 years after the day on which the subject-matter of the proceeding arose, and a proceeding by way of summary conviction for any other offence under this Act may be instituted at any time within, but not later than, five years after the day on which the subject-matter of the proceeding arose.

Application

(2) Subsection (1) does not apply if the subject-matter of the proceeding arose

before the day on which this section comes into force.

Defence - incorporation by reference

134 No person may be found guilty of an offence or subjected to a penalty for the contravention of a provision of a regulation that incorporates material by reference, unless it is proved that, at the time of the alleged contravention,

- (a) the material was reasonably accessible to the person;
- (b) reasonable steps had been taken to ensure that the material was accessible to persons likely to be affected by the regulation; or
- (c) the material had been published in the Canada Gazette.

Offences outside Canada

135 An act or omission that would by reason of this Act be punishable as an offence if committed in Canada is, if committed outside Canada, an offence under this Act and may be tried and punished in Canada.

Venue

136 (1) A proceeding in respect of an offence under this Act may be instituted, tried and determined at the place in Canada where the offence was committed or at the place in Canada where the person charged with the offence is or has an office or place of business at the time of the institution of those proceedings.

Where commission outside Canada

(2) A proceeding in respect of an offence under this Act that is committed outside Canada may be instituted, tried and determined at any place in Canada.

87.2 References

1. W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, page 161.
2. Monica Boyd & Nathan T.B. Ly (2021) Unwanted and Uninvited: Canadian Exceptionalism in Migration and the 2017-2020 Irregular Border Crossings, *American Review of Canadian Studies*, 51:1, 95-121, DOI: 10.1080/02722011.2021.1899743 at page 97.

88 IRPA Section 140: Seizure

88.1 IRPA Section 140

Section 140 of the *Immigration and Refugee Protection Act* reads:

Seizure

140 (1) An officer may seize and hold any means of transportation, document or other thing if the officer believes on reasonable grounds that it was fraudulently or improperly obtained or used or that the seizure is necessary to prevent its fraudulent or improper use or to carry out the purposes of this Act.

Interpretation

(2) Despite subsection 42(2) of the Canada Post Corporation Act, a thing or document that is detained under the Customs Act and seized by an officer is not in the course of post for the purposes of the Canada Post Corporation Act.

Regulations

(3) The regulations may provide for any matter relating to the application of this section and may include provisions respecting the deposit of security as a guarantee to replace things that have been seized or that might otherwise be seized, and the return to their lawful owner, and the disposition, of things that have been seized.

88.1.1 The Division and its Members are not designated to seize documents or other things pursuant to this provision

Section 140 of the Act provides that an officer may seize and hold the listed things if the listed conditions are met. Such officers who have this power are those designated by the Minister as per section 6 of the Act: Canadian Refugee Procedure/4-6 - Enabling Authority¹. This power must also be exercised in conformity with section 8 of the *Charter of Rights and Freedoms* which provides that everyone has the right to be secure against unreasonable search or seizure: Canadian Refugee Procedure/Charter of Rights and Freedoms#Section 8: Unreasonable search or seizure². The Division and its staff are not designated for the purposes of this section. That said, pursuant to their powers under the *Inquiries Act*, Members have the power of summoning before them any witnesses, and of requiring them to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine: Canadian Refugee Procedure/Powers of a Member#Part I of the Inquiries Act³.

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/4-6_-_Enabling_Authority

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Charter_of_Rights_and_Freedoms#Section_8:_Unreasonable_search_or_seizure

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Powers_of_a_Member#Part_I_of_the_Inquiries_Act

88.1.2 An officer designated by the Minister may seize documents from the Division pursuant to this power

An officer designated by the Minister may seize and hold a document if the officer believes on reasonable grounds that it was fraudulently or improperly obtained or used or that the seizure is necessary to prevent its fraudulent or improper use or to carry out the purposes of IRPA pursuant to section 140(1) of that Act. The section does not contain any limitations as to from whom such a document can be seized. Therefore, the designated immigration officer may exercise this power to seize a claimant's document that is in the possession of the Division.

88.2 References

89 IRPA Section 153: Chairperson and other members

89.1 IRPA Section 153

Section 153 of the *Immigration and Refugee Protection Act* reads:

Chairperson and other members

153 (1) The Chairperson and members of the Refugee Appeal Division and Immigration Appeal Division

(a) are appointed to the Board by the Governor in Council, to hold office during good behaviour for a term not exceeding seven years, subject to removal by the Governor in Council at any time for cause, to serve in a regional or district office of the Board;

(b) [Repealed, 2010, c. 8, s. 18]

(c) are eligible for reappointment in the same or another capacity;

(d) shall receive the remuneration that may be fixed by the Governor in Council;

(e) are entitled to be paid reasonable travel and living expenses incurred while absent in the course of their duties, in the case of a full-time member, from their ordinary place of work or, in the case of a part-time member, while absent from their ordinary place of residence;

(f) are deemed to be employed in the public service for the purposes of the Public Service Superannuation Act and in the federal public administration for the purposes of the Government Employees Compensation Act and any regulations made under section 9 of the Aeronautics Act;

(g) may not accept or hold any office or employment or carry on any activity inconsistent with their duties and functions under this Act; and

(h) if appointed as full-time members, must devote the whole of their time to the performance of their duties under this Act.

(1.1) [Repealed, 2012, c. 17, s. 84]

Deputy Chairperson and Assistant Deputy Chairpersons

(2) One Deputy Chairperson for each Division referred to in subsection (1) and not more than 10 Assistant Deputy Chairpersons are to be designated by the Governor in Council from among the full-time members of those Divisions.

Full-time and part-time appointments

(3) The Chairperson and the Deputy Chairpersons and Assistant Deputy Chairpersons of the Divisions referred to in subsection (1) are appointed on a full-time basis and the other members are appointed on a full-time or part-time basis.

Qualification

(4) The Deputy Chairperson of the Immigration Appeal Division and a majority of the Assistant Deputy Chairpersons of that Division and at least 10 per cent of the members of the Divisions referred to in subsection (1) must be members of at least five years standing at the bar of a province or notaries of at least five years standing at the Chambre des notaires du Québec.

90 IRPA Section 154: Disposition after member ceases to hold office

90.1 IRPA Section 154

Section 154 of the *Immigration and Refugee Protection Act* reads:

Disposition after member ceases to hold office

154 A former member of the Board, within eight weeks after ceasing to be a member, may make or take part in a decision on a matter that they heard as a member, if the Chairperson so requests. For that purpose, the former member is deemed to be a member.

91 IRPA Section 155: Disposition if member unable to take part

91.1 IRPA Section 155

Section 155 of the *Immigration and Refugee Protection Act* reads:

Disposition if member unable to take part

155 If a member of a three-member panel is unable to take part in the disposition of a matter that the member has heard, the remaining members may make the disposition and, for that purpose, are deemed to constitute the applicable Division.

92 IRPA Section 156: Immunity and no summons

92.1 IRPA Section 156

Section 156 of the *Immigration and Refugee Protection Act* reads:

Immunity and no summons

156 The following rules apply to the Chairperson and the members in respect of the exercise or purported exercise of their functions under this Act:

- (a) no criminal or civil proceedings lie against them for anything done or omitted to be done in good faith; and
- (b) they are not competent or compellable to appear as a witness in any civil proceedings.

92.1.1 See commentary

See: Canadian Refugee Procedure/The right to an independent decision-maker#Board Members are neither competent nor compellable witnesses as a result of the principle of deliberative secrecy¹.

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#Board_Members_are_neither_competent_nor_compellable_witnesses_as_a_result_of_the_principle_of_deliberative_secrecy

93 IRPA Section 159: Duties of Chairperson

93.1 IRPA Section 159

Section 159 of the *Immigration and Refugee Protection Act* reads:

Chairperson

159 (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson

- (a) has supervision over and direction of the work and staff of the Board;
- (b) may at any time assign a member appointed under paragraph 153(1)(a) to the Refugee Appeal Division or the Immigration Appeal Division;
- (c) may at any time, despite paragraph 153(1)(a), assign a member of the Refugee Appeal Division or the Immigration Appeal Division to work in another regional or district office to satisfy operational requirements, but an assignment may not exceed 120 days without the approval of the Governor in Council;
- (d) may designate, from among the full-time members appointed under paragraph 153(1)(a), coordinating members for the Refugee Appeal Division or the Immigration Appeal Division;
- (e) assigns administrative functions to the members of the Board;
- (f) apportions work among the members of the Board and fixes the place, date and time of proceedings;
- (g) takes any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay;
- (h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties; and
- (i) may appoint and, subject to the approval of the Treasury Board, fix the remuneration of experts or persons having special knowledge to assist the Divisions in any matter.

Delegation

- (2) The Chairperson may delegate any of his or her powers under this Act to a member of the Board, except that
- (a) powers referred to in subsection 161(1) may not be delegated;
 - (b) powers referred to in paragraphs (1)(a) and (i) may be delegated to the Executive Director of the Board;
 - (c) powers in relation to the Immigration Appeal Division and the Refugee Appeal Division may only be delegated to the Deputy Chairperson, the Assistant Deputy Chairpersons, or other members, including coordinating members, of either of those Divisions; and
 - (d) powers in relation to the Immigration Division or the Refugee Protection Division may only be delegated to the Deputy Chairperson, the Assistant Deputy Chairpersons or other members, including coordinating members, of that Division.

93.1.1 159(1)(h) The Chairperson may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides

Section 159(1)(h) of the *Act* gives the Chairperson two separate powers - 1) to issue guidelines and 2) to identify decisions as jurisprudential guides. These powers were provided to the Chairperson in an amendment to the *Immigration Act* in 1993^[1] and was swiftly used to introduce gender guidelines at the Board: Canadian Refugee Procedure/History of refugee procedure in Canada#Juridification of the refugee system and broader interpretations of the refugee definition¹. That said, the use of guidelines in the refugee program has a longer history. Under the system that existed prior to the creation of the Immigration and Refugee Board, the Minister had issued guidelines to its officers which reflected internationally accepted standards for refugee status determination. The Plaut report which led to the founding of the IRB recommended that those guidelines, together with the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, be used as a basis for the Board's guidelines.^[2] More information on this power is contained in the IRB *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides*.^[3] See also: Canadian Refugee Procedure/The right to an independent decision-maker#The IRB may use "soft law" instruments such as policy statements, guidelines, manuals, and handbooks².

Jurisprudential guides may relate to issues of fact

The Federal Court of Appeal holds that it is reasonable to interpret paragraph 159(1)(h) of the IRPA as conferring upon the Chairperson the authority to issue Jurisprudential Guides (JGs) on factual issues.^[4] This is consistent with international standards for refugee adjudication; for example, the United Kingdom now has more than 300 country guidance cases relating to asylum seekers from more than 60 countries. They were introduced in the refugee status determination process in the UK in 2002 to help provide consistency in decision-making when considering the same or similar issues and evidence.^[5] That said, as noted in the IRB *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides*, "country conditions, by their very nature, are bound to change, and the decision to designate a jurisprudential guide which provides guidance on country conditions should be taken with the utmost caution."^[3]

Jurisprudential guides may be distinguished from lead cases

In the words of Sharryn Aiken, *et. al.*, a lead case aims to identify a refugee claim on which to create a full evidential record that the hearing panel can use to make informed findings of fact and provide a complete analysis of the relevant legal issues. While not binding on other panels of the Board, the factual findings on country conditions and legal conclusions in a lead case are intended to guide future panels hearing similar cases and promote consistent, informed, efficient, and expeditious decision-making.^[6] A "lead case" is

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/History_of_refugee_procedure_in_Canada#Juridification_of_the_refugee_system_and_broader_interpretations_of_the_refugee_definition
2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#The_IRB_may_use_"soft_law";_instruments_such_as_policy_statements,_guidelines,_manuals,_and_handbooks

different from a jurisprudential guide (JG) in that a lead case is planned and organized before the case is heard, whereas a decision is identified as a JG after it has been rendered.^[7]

Simply referring to or adopting the framework of analysis contained in a revoked jurisprudential guide does not render a decision unreasonable

As noted in the IRB *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides*, a jurisprudential guide remains in effect unless the Chairperson revokes it. That policy notes that the decision whether or not to revoke the identification is at the Chairperson's discretion, after consulting with the Deputy Chairpersons, as applicable, and provides examples of situations in which the Chairperson may issue a notice of revocation, namely where a higher court subsequently overturns the underlying decision, country conditions have changed to a point where the reasoning in the jurisprudential guide no longer assists members, or there are other reasons that the jurisprudential guide no longer assists members.^[3] The Federal Court has considered the import of a decision having referred to or adopted the framework of analysis contained in a revoked jurisprudential guide, holding that this does not *per se* render the decision unreasonable.^[8]

The Board has other ways of designating decisions, besides its power to issue jurisprudential guides

Apart from the ability of the Chairperson to designate a decision as a jurisprudential guide pursuant to s. 159 of the IRPA, the Board may also designate decisions as being persuasive. "Persuasive decisions" are a more informal instrument and are not referred to in the *Immigration and Refugee Protection Act*, but the IRB's approach to the designation of persuasive decisions is set out in the IRB's *Policy Note on Persuasive Decisions*.^[9] Decisions are identified by a division head as persuasive because the reasons for decision hold persuasive value in developing the jurisprudence of the RPD or RAD.

93.1.2 The Chairperson's guideline-issuing and rule-making powers overlap

Section 159 of the IRPA, *supra*, sets out the Chairperson's guideline-issuing powers. Section 161 of the IRPA concerns the Chairperson's power to make rules: Canadian Refugee Procedure/161 - Functioning of Board and Division Rules³. As the IRB *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides* notes, "the Chairperson's guideline-issuing and rule-making powers overlap."^[3] That policy goes on to state that "that the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(a) of the IRPA will not normally invalidate it."^[10] It cites the Federal Court of Appeal's reasoning in *Thamotharem v. Canada* as support for this proposition.^[11]

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/161_-_Functioning_of_Board_and_Division_Rules

93.2 References

1. David Vinokur, *30 Years of Changes at the Immigration and Refugee Board of Canada*, CIHS Bulletin, Issue #88, March 2019, <⁴> (Accessed May 13, 2021), page 8.
2. W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, page 129.
3. Immigration and Refugee Board of Canada, *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides*, July 7, 2022, <⁵> (Accessed July 2022).
4. *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 (CanLII), par. 43, <⁶>, retrieved on 2020-11-17.
5. Joshi, Makesh D., *The use of country guidance case law in refugee recognition outside the UK*, Forced Migration Review; Oxford Iss. 65, (Nov 2020): 32 <⁷>.
6. Sharryn Aiken, et al, *Immigration and Refugee Law: Cases, Materials, and Commentary (Third Edition)*, Jan. 1 2020, Emond, ISBN: 1772556319, at page 207.
7. *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 (CanLII), par. 101, <⁸>, retrieved on 2020-11-17.
8. *Iribhogbe, Benedict Agbator v. M.C.I.* (F.C., no. IMM-3267-21), Roussel, April 7, 2022; 2022 FC 501.
9. Immigration and Refugee Board of Canada, *Policy Note on Persuasive Decisions*, May 7, 2009 <⁹> (Accessed September 29, 2023).
10. Immigration and Refugee Board of Canada, *Policy on the Use of Chairperson's Guidelines and Jurisprudential Guides*, July 7, 2022, <¹⁰> (Accessed July, 2022).
11. *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 (CanLII), [2008] 1 FCR 385, para. 106.

4 <https://senate-gro.ca/wp-content/uploads/2019/03/Bulletin-88-Final.pdf>
5 <https://irb.gc.ca/en/legal-policy/policies/Pages/policy-chairperson-guidelines-jurisprudential-guides.aspx>
6 <http://canlii.ca/t/jb1sl#par43>
7 <https://search.proquest.com/openview/9a7d9d88a5717cee4832caf3a5c5af2a/1?pq-origsite=gscholar&cbl=55113>
8 <http://canlii.ca/t/jb1sl#par101>
9 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/NotePersuas2009.aspx>
10 <https://irb.gc.ca/en/legal-policy/policies/pages/PolJurisGuide.aspx>

94 IRPA Section 161: Functioning of Board and Division Rules

94.1 IRPA Section 161

Section 161 of the *Immigration and Refugee Protection Act* reads:

Functioning of Board

Rules

161 (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons, the Chairperson may make rules respecting

(a) the referral of a claim for refugee protection to the Refugee Protection Division;

(a.1) the factors to be taken into account in fixing or changing the date of the hearing referred to in subsection 100(4.1);

(a.2) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, other than in respect of appeals of decisions of the Refugee Protection Division, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;

(b) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules;

(c) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and

(d) any other matter considered by the Chairperson to require rules.

Distinctions

(1.1) The rules made under paragraph (1)(c) may distinguish among claimants for refugee protection who make their claims inside Canada on the basis of whether their claims are made at a port of entry or elsewhere or on the basis of whether they are nationals of a country that is, on the day on which their claim is made, a country designated under subsection 109.1(1).

94.1.1 161(1)(b): The Chairperson may make rules respecting the conduct of persons in proceedings before the Board

Paragraph 161(1)(b) contemplates the issuance of rules relating to the conduct of persons appearing before the IRB. In its decision regarding *Mumtaz Khan*, the Board concluded that this provision codifies the Board's common law power to make rules regarding the conduct of persons in proceedings before the Board, but that this provision does not limit the Board's pre-existing powers to take action regarding misconduct.^[1]

94.2 References

1. *re: Mumtaz Khan*, December 18, 2020, <¹> (Accessed February 1, 2021).

¹ <https://irb-cisr.gc.ca/en/decisions/Pages/mumtaz-khan.aspx>

95 IRPA Section 162: The jurisdiction of the Board and its obligation to proceed quickly and informally

95.1 IRPA Section 162(1) - Board jurisdiction

Section 162(1) of the *Immigration and Refugee Protection Act* reads:

Sole and exclusive jurisdiction

162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

95.1.1 This provision of the Act provides the Board's plenary jurisdiction

The above provision of the IRPA provide what can be referred to as the Board's plenary powers to control its process. In the absence of a specific rule, they provide the Board with the authority to act. For example, in *Koky v. Canada* the Federal Court noted that in the absence of a specific provision in the rules for the Division disjoining claims on its own motion, it could rely on the authority conferred to it by the above provision in the Act.^[1]

95.1.2 This provision of the Act has been characterized as a privative clause

The Supreme Court of Canada has characterized s. 162 of the Act as a privative clause.^[2] There is a long history of privative clauses designed to deter judicial intervention in Canadian immigration legislation. The 1910 *Immigration Act* stated that "no court, and no judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge ... relating to the detention or deportation of any rejected immigrant ... upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."^[3] As Trebilcock and Kelley summarize, courts of the day, on the whole, respected these limitations imposed upon them.^[4] That type of strong privative clause is now absent from the Act, having been removed in 1973 following the report of Joseph Sedgwick whose second *Report on Immigration* recommended that appeals to the Federal Courts be provided for in the legislation, not proscribed.^[5]

See also: Canadian Refugee Procedure/History of refugee procedure in Canada#Establishment of the Federal Court and increasing judicial scrutiny of immigration decisions¹.

95.2 IRPA Section 162(2) - Obligation to proceed informally and expeditiously

Procedure

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

95.2.1 Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit

For more details regarding this, see: Canadian Refugee Procedure/Principles for the interpretation of refugee procedure#IRPA Section 3(2)(e) - Fair and efficient procedures that maintain integrity and uphold human rights².

95.2.2 Member workload

A typical full-time Member of the Refugee Protection Division who is not on a special team is expedited to complete 120 files per year. A member of the Refugee Appeal Division, 80 files. It is difficult to compare workload among different systems, but many others appear to provide for much less time for decision-making. For example, in the French refugee determination system the *rapporteurs* who research files for asylum judges participate in two to three full hearing days per month, each of which requires preparation of 13 files, totalling around 350 cases a year. This workload allows approximately half a working day for each file, with little room to deviate for complex cases.^[6] That said, it is difficult to compare workloads because of the differences in the nature of each role and the comparatively limited support that RPD Members receive to prepare for hearings.

95.3 References

1. *Koky v. Canada (Citizenship and Immigration)*, 2015 FC 562 (CanLII), para. 37 <³>
2. *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 SCR 339, par. 55, <⁴>, retrieved on 2021-07-02.

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/History_of_refugee_procedure_in_Canada#Establishment_of_the_Federal_Court_and_increasing_judicial_scrutiny_of_immigration_decisions

2 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_Section_3\(2\)\(e\)_-_Fair_and_efficient_procedures_that_maintain_integrity_and_uphold_human_rights](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Principles_for_the_interpretation_of_refugee_procedure#IRPA_Section_3(2)(e)_-_Fair_and_efficient_procedures_that_maintain_integrity_and_uphold_human_rights)

3 <https://www.canlii.org/en/ca/fct/doc/2015/2015fc562/2015fc562.html#par37>

4 <https://canlii.ca/t/22mvz#par55>

3. Kelley, Ninette, and Michael J. Trebilcock. *The Making of the Mosaic: A History of Canadian Immigration Policy*. Toronto: University of Toronto Press, 2010 (Second Edition). Print. Pages 140 and 212.
4. Kelley, Ninette, and Michael J. Trebilcock. *The Making of the Mosaic: A History of Canadian Immigration Policy*. Toronto: University of Toronto Press, 2010 (Second Edition). Print. Pages 165, 212-213.
5. Kelley, Ninette, and Michael J. Trebilcock. *The Making of the Mosaic: A History of Canadian Immigration Policy*. Toronto: University of Toronto Press, 2010 (Second Edition). Print. Page 370.
6. Hambly, J. and Gill, N. (2020), Law and Speed: Asylum Appeals and the Techniques and Consequences of Legal Quickening. *J. Law Soc.*, 47: 3-28. doi:10.1111/jols.12220.

96 IRPA Section 163: Composition of Panels

96.1 IRPA Section 163

The relevant provision of the *Immigration and Refugee Protection Act* reads:

Composition of panels
163 Matters before a Division shall be conducted before a single member unless, except for matters before the Immigration Division, the Chairperson is of the opinion that a panel of three members should be constituted.

96.2 Commentary

96.2.1 The Board only uses three-member panels for training purposes

The IRB publishes a policy instrument on their website entitled *Designation of three-member panels - Refugee Protection Division*. It notes that the Chairperson's authority to designate three-member panels for matters before the RPD has been delegated to the Deputy Chairperson (DC) and to the Assistant Deputy Chairpersons (ADCs) of the RPD and so the Chairperson need not form the above-noted opinion personally. However, under this delegation cases may only be designated to be heard by three-member panels for training purposes.^[1] That policy states that "assignment of three-member panels will be solely for training purposes" which appears to indicate that three-member panels will not be used in other circumstances, such as where a case is seen to be complex. For more details, see the commentary to Rule 68(2): Canadian Refugee Procedure/Decisions#Rule 68(2) - When a decision of a three member panel takes effect¹.

96.3 References

1. Immigration and Refugee Board of Canada, *Designation of three-member panels - Refugee Protection Division*, <²> (Accessed April 13, 2020).

¹ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#Rule_68\(2\)_-_When_a_decision_of_a_three_member_panel_takes_effect](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#Rule_68(2)_-_When_a_decision_of_a_three_member_panel_takes_effect)
² <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolRpdSpr3MemCom.aspx>

97 IRPA Section 164: Presence of parties and use of telecommunications for hearings

The IRB has successfully used videoconferencing and teleconferencing at hearings since the early 1990s. This section discusses the provision of the Act that relates most directly to this practice.

97.1 IRPA Section 164

The relevant provision of the *Immigration and Refugee Protection Act* reads:

Presence of parties

164 Where a hearing is held by a Division, it may, in the Division's discretion, be conducted in the presence of, or by a means of live telecommunication with, the person who is the subject of the proceedings.

97.1.1 Meaning of "telecommunication"

When interpreting the meaning of "live telecommunication", one can have recourse to the definition in the federal *Interpretation Act*: "*telecommunications* means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system; (*télécommunication*)".^[1]

97.1.2 History of the provision and its content

The repealed *Immigration Act*, which preceded the IRPA, contained no direct analogue to section 164.^[2] Section 164 was introduced, along with the rest of the IRPA, in 2001.^[3] The section came into force on June 28, 2002 and has not been amended.

An earlier version of the IRPA, which had been introduced as a bill in the previous session of Parliament, but died on the order paper, did not contain a direct analogue to s. 164.^[4] Instead, Bill C-31 had stated that, "subject to the other provisions of this section, proceedings must be held in public *and, as far as possible, in the presence of* the interested parties [*emphasis added*]"^[5] Furthermore, that bill had also stated that in all proceedings the RPD "must conduct a hearing in the presence of the foreign national concerned".^[6]

97.1.3 This section of the Act is frequently considered in applications to change the location of a proceeding

One of the ways that this section of the Act is frequently considered and relied upon is with applications to change the location of a proceeding where the Board elects to allow a claimant to appear by video from the place that they have moved to, rather than transferring the file to a different office in its entirety. See the commentary to RPD Rule 53(4)(g): Canadian Refugee Procedure/Changing the Location of a Proceeding¹.

97.1.4 Procedural fairness issues and best practices regarding videoconferencing

The use of videoconferencing is not *per se* unfair

Videoconferencing is widely used in refugee status determination procedures around the world, including Australia and the United States.^[7] Section 164 of the Act provides that the Board may conduct a hearing via live telecommunication here in Canada. The Board has a policy entitled *Use of Videoconferencing in Proceedings before the Immigration and Refugee Board of Canada* which sets out that it is the IRB's position that provided that it is carried out in accordance with appropriate technological and procedural standards, videoconferencing does not affect the quality of the hearing or decision-making and respects the principles of natural justice and procedural fairness.^[8]

Board policy specifies that videoconferencing is inappropriate for certain types of claims and claimants

It may be noted that many counsel do not like videoconferencing and academic commentators have called on the Board to "limit this practice as much as possible".^[9] The 2004 RPD *Policy on the Transfer of Files for Hearings by Videoconference* states at Section 5.5 that counsel may bring matters to the attention of the RPD that are inappropriate for videoconferencing, by making an application.

In what circumstances may issues with videoconferencing arise?

- **Disability issues:** In *Al-Gumer v. Canada* the appellant was hearing impaired and required the assistance of sign language interpreter at his hearing and, further, his counsel required a captionist or an ASL interpreter. In the circumstances, it was determined that it was not practical to conduct that hearing remotely given the technology available.^[10] This decision of the Immigration Appeal Division should be persuasive for the Refugee Protection Division.
- **Parties should have 'feedback screens':** The Board commissioned an external review of the use of videoconferencing at the IRB which recommended the the Board "install feedback screens in all of the claimant's rooms in the system." The report went on to state that "Fairness and effectiveness both require that both the claimants and their counsel be aware at all times of the picture of their room transmitted to the screen in the member's room."^[11] IRB management accepted this recommendation, stating that it is their policy

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Location_of_a_Proceeding

that "All offices with videoconferencing equipment currently have feedback screens: either picture-in-picture or a separate television screen. The Board, through the designated employee, will ensure that participants are using this technology correctly."^[12]

- Awareness of effects of video on the assessment of demeanour: Subtle lags inherent in the technology can affect perceptions of credibility according to psychological research.^[13] Board Members should be aware of this and consider this when thinking about their subjective assessment of witness credibility.
- Confidentiality: As per s. 166(c) of the IRPA, the Division, in all of its proceedings, must respect the confidential nature of refugee proceedings. If this would be compromised by proceeding virtually, then the Division should not require it.

97.1.5 A party may waive the right to be present at the hearing

The right to be present at the hearing can be waived if there is an express waiver by the claimant.^[14]

97.2 References

1. Interpretation Act, RSC 1985, c I-21, s 35, <²>, retrieved on 2022-08-23.
2. RSC 1985, c 1-2.
3. Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess, 37th Parl, 2001 (assented to 1 November 2001), SC 2001, c 27.
4. Bill C-31, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 2nd Sess, 36th Parl, 2000 (first reading 6 April 2000).
5. *Ibid* at cl 161(1)(a) [emphasis added].
6. *Ibid* at cl 165(b).
7. Mark Federman, "On the Media Effects of Immigration and Refugee Board Hearings via Videoconference" (2006) 19(4) *J of Refugee Studies* 433 at 434.
8. Immigration and Refugee Board of Canada, *Use of Videoconferencing in Proceedings before the Immigration and Refugee Board of Canada*, Policy dated 15 December 2010, Accessed January 2, 2019, <³>.
9. Acton, Tess, *Understanding Refugee Stories: Lawyers, Interpreters, and Refugee Claims in Canada*, 2015, Master of Laws Thesis, <https://dspace.library.uvic.ca/bitstream/handle/1828/6213/Acton_Tess_LLM_2015.pdf>, page 130 (Accessed January 25, 2020).
10. *Nazer Jassim Al-Gumer v. Canada (M.C.I.)* TA4-1257, Neron, November 2005.
11. S. Ronald Ellis, Q.C., *Videoconferencing in Refugee Hearings*, Published by Immigration and Refugee Board of Canada, Date October 21, 2004 <⁵> (Accessed January 26, 2020).

2 <https://canlii.ca/t/7vhg#sec35>

3 <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/Videoconf.aspx>

4 https://dspace.library.uvic.ca/bitstream/handle/1828/6213/Acton_Tess_LLM_2015.pdf?sequence=7&isAllowed=y

5 <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/Video.aspx>

12. Immigration and Refugee Board of Canada, *Immigration and Refugee Board Response to the Report on Videoconferencing in Refugee Hearings*, Date modified listed on webpage: 2018-06-26, <⁶> (Accessed January 26, 2020).
13. Mark Federman, "On the Media Effects of Immigration and Refugee Board Hearings via Videoconference" (2006) 19(4) J of Refugee Studies 433 at 442.
14. *Rodriguez-Moreno v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 1297, 70 F.T.R. 298 (F.C.T.D.).

6 <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/VideoRespRep.aspx>

98 IRPA Section 165: Powers of a Member

98.1 IRPA Section 165

The legislative provision reads:

Powers of a commissioner

165 The Refugee Protection Division, the Refugee Appeal Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the Inquiries Act and may do any other thing they consider necessary to provide a full and proper hearing.

98.1.1 History of this provision

Under the previous *Immigration Act*, the equivalent provision read as follows:

67. (1) The Refugee Division has, in respect of proceedings under sections 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

(2) The Refugee Division, and each member thereof, has all the powers and authority of a commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of a hearing,

(a) issue a summons to any person requiring that person to appear at the time and place mentioned therein to testify with respect to all matters within that person's knowledge relative to the subject-matter of the hearing and to bring and produce any document, book or paper that the person has or controls relative to that subject-matter;

(b) administer oaths and examine any person on oath;

(c) issue commissions or requests to take evidence in Canada; and

(d) do any other thing necessary to provide a full and proper hearing.

With the advent of the *Immigration and Refugee Protection Act*, the above provision was amended to read as follows:^[1]

165. The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the Inquiries Act and may do any other thing they consider necessary to provide a full and proper hearing.

98.1.2 See also the *Interpretation Act*

Section 31(2) of the *Interpretation Act* provides that "where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given."^[2]

98.1.3 This legislative provision allows the Board to unilaterally adjust timelines in appropriate cases

An example of this provision being relied upon is that during the Covid-19 epidemic, the Board lengthened the time period that claimants had to provide a Basis of Claim form after making a claim at the Port of Entry. The practice notice doing so cited this provision of the Act (“[The Division]...may do any other thing they consider necessary to provide a full and proper hearing”) as authority for that decision, as discussed in this commentary on RPD Rule 8: Canadian Refugee Procedure/Information and Documents to be Provided#This Rule applies to applications for an extension of time, but not decisions on the Board's own motion to extend the deadline¹.

98.1.4 A Division cannot rely upon the above provisions prior to or outside of a formal hearing

The court concluded in *Canada v. Kahlon* that the RPD has no power to compel evidence prior to or outside a formal hearing.^[3] That said, the Board may be obliged to assist an applicant in obtaining information, for example by requiring the Minister to make inquiries of relevant Canadian law enforcement agencies. For more details, see: Canadian Refugee Procedure/The Board's inquisitorial mandate#There is a shared duty of fact-finding in refugee matters².

98.1.5 This provision may be cited in favour of an argument that the Board can order the Minister to facilitate the return to Canada of a claimant outside of Canada

Section 165 of the IRPA invests members of the Division with the authority of a commissioner under Part 1 of the *Inquiries Act* and the authority to “do any other thing they consider necessary to provide a full and proper hearing”. If a matter comes before the Division the claimant is outside of Canada, and which cannot be adjudicated over telecommunications, this provision could arguably be relied upon as authority for the proposition that the Division can order the Minister to facilitate the return of the person concerned to Canada, for example by issuing that individual a travel document. But see IRPA s. 175(2), which provides that the IAD may require an officer to issue a travel document to an individual, a provision for which there is no equivalent applicable to the RPD and RAD, which could imply that those Divisions lack such authority.

98.2 Part I of the Inquiries Act

The complete text of Part I of the Inquiries Act reads:

PART I
Public Inquiries

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#This_Rule_applies_to_applications_for_an_extension_of_time,_but_not_decisions_on_the_Board%27s_own_motion_to_extend_the_deadline
2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#There_is_a_shared_duty_of_fact-finding_in_refugee_matters

Inquiry

2 The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

Appointment of commissioners

3 Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted.

Powers of commissioners concerning evidence

4 The commissioners have the power of summoning before them any witnesses, and of requiring them to
 (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and
 (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

Idem, enforcement

5 The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

98.2.1 These provisions allow a panel to compel testimony and the production of evidence

As stated in the text *The Conduct of Public Inquiries*, the central procedural feature of the Inquiries Act is to "authorize commissioners to compel testimony and the production of evidence".^[4] The RPD will exercise its power to summon individuals through the framework of RPD Rules 44-48: Canadian Refugee Procedure/Witnesses³. For a discussion of the Board's power to summon documents, see *Canada v. Kahlon*.^[5]

98.2.2 These powers must be employed fairly, which will generally require providing notice to the Minister

Division Members have the powers of a commissioner appointed pursuant to the Inquiries Act. This gives them the power to summon witnesses and of requiring them to give the evidence set out above in section 4 of the Act. Where a panel exercises these powers, it must do so in a manner that is fair to the Minister, whether or not it is a party to the proceeding as defined in the rules of the relevant Division. For example, in *Canada v. Miller*, the Minister had not intervened in proceedings and when the RAD sought further submissions from the Appellants, the Minister was not notified of this. The Federal Court held that this was procedurally unfair and set aside the decision on this basis.^[6] See also: Canadian Refugee Procedure/Definitions#Procedural fairness may be owed to the Minister despite them not being a party to a proceeding⁴.

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Witnesses
 4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions#Procedural_fairness_may_be_owed_to_the_Minister_despite_them_not_being_a_party_to_a_proceeding

98.3 Part III of the Inquiries Act

Part III of the Inquiries Act is a general provision that applies to commissioners with powers under Part I, as well as to commissioners appointed under Part II of the Act (which is not relevant to IRB Board Members):

PART III General

Employment of counsel, experts and assistants

11 (1) The commissioners, whether appointed under Part I or under Part II, may, if authorized by the commission issued in the case, engage the services of

- (a) such accountants, engineers, technical advisers or other experts, clerks, reporters and assistants as they deem necessary or advisable; and
- (b) counsel to aid and assist the commissioners in an inquiry.

Experts may take evidence and report

(2) The commissioners may authorize and depute any accountants, engineers, technical advisers or other experts, the services of whom are engaged under subsection (1), or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

Powers

(3) The persons deputed under subsection (2), when authorized by order in council, have the same powers as the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

Report

(4) The persons deputed under subsection (2) shall report the evidence and their findings, if any, thereon to the commissioners.

Parties may employ counsel

12 The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of an investigation, to be represented by counsel.

Notice to persons charged

13 No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

98.4 References

1. *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon*, 2005 FC 1000 (CanLII), [2006] 3 FCR 493, at para 21, <⁵>, retrieved on 2022-08-04.
2. *Interpretation Act*, RSC 1985, c I-21, s 31, <<https://canlii.ca/t/7vhg#sec31>>, retrieved on 2022-08-23.
3. *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon*, 2005 FC 1000 (CanLII), [2006] 3 FCR 493, at para 42, <⁶>, retrieved on 2022-08-04.
4. Ratushny, Ed, *The Conduct of Public Inquiries: Law, Policy and Practice*, Released 2009/09/28, Irwin Law: Toronto, online eBook: ⁷, page 301.
5. *Canada (Minister of Public Safety & Emergency Preparedness) v. Kahlon*, [2005] F.C.J. No. 1335, [2006] 3 F.C.R. 493 (F.C.).

5 <https://canlii.ca/t/11dlc#par21>

6 <https://canlii.ca/t/11dlc#par42>

7 <https://www.deslibris.ca/ID/432671>

6. *Canada (Citizenship and Immigration) v. Miller*, 2022 FC 1131 (CanLII), at para 60, <⁸>, retrieved on 2022-08-03.

8 <https://canlii.ca/t/jr5nh#par60>

99 IRPA Section 166: Proceedings must be held in the absence of the public

99.1 IRPA Section 166

The legislative provision reads:

166 Proceedings before a Division are to be conducted as follows:

- (a) subject to the other provisions of this section, proceedings must be held in public;
- (b) on application or on its own initiative, the Division may conduct a proceeding in the absence of the public, or take any other measure that it considers necessary to ensure the confidentiality of the proceedings, if, after having considered all available alternate measures, the Division is satisfied that there is
 - (i) a serious possibility that the life, liberty or security of a person will be endangered if the proceeding is held in public,
 - (ii) a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the societal interest that the proceeding be conducted in public, or
 - (iii) a real and substantial risk that matters involving public security will be disclosed;
- (c) subject to paragraph (d), proceedings before the Refugee Protection Division and the Refugee Appeal Division must be held in the absence of the public;
- (c.1) subject to paragraph (d), proceedings before the Immigration Division must be held in the absence of the public if they concern a person who is the subject of a proceeding before the Refugee Protection Division or the Refugee Appeal Division that is pending or who has made an application for protection to the Minister that is pending;
- (d) on application or on its own initiative, the Division may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to the proceedings if, after having considered all available alternate measures and the factors set out in paragraph (b), the Division is satisfied that it is appropriate to do so;
- (e) despite paragraphs (b) to (c.1), a representative or agent of the United Nations High Commissioner for Refugees is entitled to observe proceedings concerning a protected person or a person who has made a claim for refugee protection or an application for protection; and
- (f) despite paragraph (e), the representative or agent may not observe any part of the proceedings that deals with information or other evidence in respect of which an application has been made under section 86, and not rejected, or with information or other evidence protected under that section.

99.1.1 The purpose and history of section 166(c) with respect to refugees

The right to privacy is a fundamental human right.^[1] IRCC takes the position that the purpose of the provisions under s. 166 of the *IRPA* are to provide protection for the refugee and their family against harm that might occur from disclosure of their case in public.^[2] They note that "in many cases, refugees have family members that are not accompanying them and revealing their identity may put remaining family members in the country of persecution at risk" and that "protecting the confidentiality of a refugee claimant's identity,

the particulars of their claim for protection, and the fact that they had submitted a claim is 'vital to ensuring that no claimant is put at additional risk of serious harm, including persecution and torture. Otherwise, disclosure of information could lead to the country of persecution learning of the applicants' whereabouts, which could result in harm to the applicant.'^[2] This is consistent with guidance from the UNHCR that "confidentiality and data protection extend to all communications with current and former asylum-seekers and refugees, as well as all personal data or information obtained from or about them".^[3]

Under the 1910 *Immigration Act*, proceedings before boards that determined admissibility and deportation matters were not public.^[4] This was subsequently changed somewhat. Under the regime that existed prior to the creation of the IRB, the refugee determination scheme contained both a public and an *in camera* hearing. The examination under oath before an officer was not public and persons other than the claimant, the senior immigration officer, the interpreter, and the stenographer could be present only if the claimant consented.^[5] The re-determination hearing before the Immigration Appeal Board, however, was public.^[6] This changed with the legislation that created the IRB. The Plaut report which presaged the creation of the IRB articulated the rationale for closed hearings as follows:

There is no doubt that the public has a valid interest in legal proceedings generally, as do members of the media. In the refugee context, however, this interest is outweighed by the very real danger to the claimant (should the claim be refused) or to the claimant's family, if the fact of the claim and the testimony given at the hearing become public knowledge and come to the attention of the authorities in the country from which the claimant fled. It is therefore recommended that the claimant have the right to require that the hearing be held *in camera*.^[5]

The above recommendation was accepted and was incorporated into a provision introduced into the bill which led to the founding of the IRB in the late 1980s. In Bill C-86, tabled in the House of Commons on June 16, 1992, the government considered changing this provision back. As originally tabled, the bill provided for public hearings of refugee cases. This provision of the bill raised "a storm of protest" as, it was charged, public hearings would place refugee applicants in jeopardy. In response to this criticism the government reverted to the old rule that hearings before the refugee board would be *in camera*. Only in exceptional cases would they be held in public.^[7]

99.1.2 What is encompassed by the phrase "proceedings before the Refugee Protection Division"?

Section 166(c) provides that "...proceedings before the Refugee Protection Division...must be held in the absence of the public". What is encompassed by the term "proceedings" as it is used in this provision? For a discussion of that, see the definitions section of the RPD Rules, which comments on the definition of the term "proceeding": Canadian Refugee Procedure/Definitions#Commentary on the definition of "proceeding"¹.

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions#Commentary_on_the_definition_of_"proceeding";

99.1.3 What is entailed by the legislative requirement that proceedings be conducted in the absence of the public?

The personal information in refugee claim files is generally accorded "Protected B" status. This is defined as "information where unauthorized disclosure could cause serious injury to an individual, organization or government. Examples include: medical information, information protected by solicitor-client or litigation privilege, and information received in confidence from other government departments and agencies."^[8] The legal standards requiring the protection of information also stem from the *Directive on Departmental Security Management*^[9] and the *Privacy Act*, see: Canadian Refugee Procedure/Joining or Separating Claims or Applications#Once claims are joined, information on one claim is properly available to the other joined claimants².

Facilities in which proceedings are held shall be sufficiently private

The requirement in s. 166(c) that refugee proceedings be conducted in the absence of the public tracks Canada's international obligations. The UNHCR Executive Committee has outlined certain basic requirements for fair and effective status determination procedures.^[10] These requirements ensure that people seeking protection are provided with "necessary facilities," which is defined to include an interview space that respects the privacy of the individuals being assessed.^[11]

Issues can arise related to this where a witness is testifying remotely, for example over the telephone. In such situations, the interview should be conducted in a location that will provide the highest level of confidentiality and security to the interviewee. If no such place exists, then it may be more appropriate not to hear such testimony at all, unless the individual concerned provides their informed consent. The greatest risk arises in public places such as hotels or restaurants, where interviews may be overheard and where surveillance may be very likely.^[12]

RPD staff must maintain confidences and be sufficiently trustworthy

Persons who have access to "Protected B" information within the government must have "Reliability Status". This is defined as "The minimum standard of security screening required for individuals to have unsupervised access to Protected government information, assets or work sites. Security screening for Reliability Status appraises an individual's honesty and whether he or she can be trusted to protect the government's interests."^[8]

Part of this obligation is ensuring that only trusted intermediaries are used, for example that interpreters can also be trusted to maintain confidences.

Facilities in which information is stored must be sufficiently private

The facilities in which refugee claim information are stored must be sufficiently private. As stated in the UNHCR "Privacy Protection Guidelines", "refugee information must be filed

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Joining_or_Separating_Claims_or_Applications#Once_claims_are_joined,_information_on_one_claim_is_properly_available_to_the_other_joined_claimants

and stored in a way that is accessible only through authorized personnel and transferred only through the use of protected means of communication.”^[2] For example, protected information must not be carried in the open when it is being carried out of the office. When being handled outside of an operational zone, Protected B files must not be “in the open” but carried in an envelope or comparable mechanism.^[13]

Protected information should be transmitted and communicated in a way that is sufficiently secure and private

As stated in the UNHCR *Privacy Protection Guidelines*, refugee information must be transferred only through the use of protected means of communication.^[2] This has a number of implications: when contacting a claimant, the RPD should not leave a voicemail about their case on an unknown voicemail if there is an indication that their phone number may have changed.^[14] Furthermore, the RPD should not communicate Protected B-level information or higher by email. The Immigration Appeal Division (IAD) has a practice notice on communicating by email. It states that “the IAD will not transmit a document by email if it contains Protected B or higher information or it has been declared confidential or is subject to an order restricting publication, broadcasting or transmission by the IAD or any other competent authority.”^[15] The same principles should apply to the Refugee Protection Division emailing any such information.

Members shall not disclose confidential information, even to other staff, where doing so is not operationally required

IRB personnel are only permitted access to hearings held in the absence of the public as required for work-related purposes. In the words of the *Guideline for Employees of the Government of Canada: Information Management (IM) Basics*, the government should ensure that “protected information is only made available on a need-to-know basis to those who are authorized to access it.”^[16] The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that “Members shall not disclose or make known any information of a confidential nature that was obtained in their capacity as a member. This means disclosure outside of the IRB to other government departments or agencies or to the general public, as well as disclosure within the IRB to members or staff where such disclosure is not operationally required.”^[17] This is in keeping with the UNHCR “Privacy Protection Guidelines” which require that “refugee information must be filed and stored in a way that is accessible only through authorized personnel and transferred only through the use of protected means of communication.”^[2]

Members should only include necessary personal information in their decisions

The *Code of Conduct for Members of the Immigration and Refugee Board of Canada* provides that “Members have a responsibility to consider the privacy interests of individuals in the conduct of proceedings and the writing of decisions, ensuring that decisions contain only the personal information that is necessary to explain the reasoning of the decision.”^[18]

99.1.4 The federal *Privacy Act* applies to information submitted to the Refugee Protection Division

Quite apart from section 166 of the IRPA, the federal *Privacy Act* also places limitations on the ability of a government institution to use and disclose personal information under its control without the consent of the individual to whom it relates.^[19] Section 7 of the *Privacy Act* states that "personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or (b) for a purpose [listed in subsection 8(2) of the Act]."^[19]

What are uses consistent with the purpose for which information is obtained in the refugee context?

According to the Treasury Board *Interim Policy on Privacy Protection*, consistent use is defined as one that has a reasonable and direct connection to the original purpose(s) for which the information was obtained or compiled. This means that the original purpose and the proposed purpose are so closely related that the individual would expect that the information would be used for the consistent purpose, even if the use is not spelled out. In *Bernard v. Canada*, the Supreme Court of Canada noted that to qualify as a "consistent use" under paragraph 8(2)(a), a use need not be identical to the purpose for which information was obtained.^[20] There need only be a sufficiently direct connection between the purpose for obtaining the information and the proposed use, such that an individual could reasonably expect that the information could be used in the manner proposed.

The following are examples of consistent uses that have been identified in previous decisions:

- Disclosing a claimant's identity to a foreign government for the purpose of investigating their claim: In *Igbinosun v. Canada* the Federal Court held that disclosure of a claimant's identity to a foreign government for the purpose of investigating their potential exclusion from the refugee protection regime was a use of the information "consistent with [the purpose for which the information was obtained]" within the meaning of paragraph 8(2)(a) of the *Privacy Act*.^[21] The normal practice of the Minister in such circumstances was exemplified in *Moin v. Canada*, wherein the Minister disclosed the claimant's name to a foreign state (the alleged persecutors) but there was no indication that the Minister had advised authorities in the foreign country that the claimant had made a claim for asylum. As such, this inquiry was seen as unobjectionable by the court in that case.^[22] Where the Minister goes beyond providing a claimant's name and discloses additional information to the alleged persecutor, such as copies of documents that a claimant submitted, they may err. For example, in *Canada v. X*, Member McCool of the Refugee Protection Division stated: "In investigating the merits, bona fides or veracity of claims brought before the Division, the Minister must balance, and be seen to balance, the need to protect the individual, including those who have been determined to be Convention refugees, against the need, in the public interest, to detect and prevent fraud."^[23]
- Disclosing information regarding the conduct of authorized representatives to regulatory bodies: Section 13.1 of the Immigration and Refugee Protection Regulations provides that if a member of the Board or an officer determines that the conduct of a representative in connection with a proceeding before the Board is likely to constitute a breach of

the person's professional or ethical obligations, the Board may disclose information to a body that is responsible for governing or investigating that conduct or to a person who is responsible for investigating that conduct. The Board has a *Policy on Disclosing Information Regarding the Conduct of Authorized Representatives to Regulatory Bodies* which states that it is the view of the IRB that such disclosures are in accordance with paragraph 8(2)(b) of the *Privacy Act*, namely that it is for a purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes disclosure.^[24]

For further discussion of the *Privacy Act* in the refugee context, see: Canadian Refugee Procedure/Joining or Separating Claims or Applications#Once claims are joined, information on one claim is properly available to the other joined claimants³.

99.1.5 An application may be made to have the proceedings conducted in public

Applications to have proceedings conducted in public are considered under the rubric of RPD Rule 57: Canadian Refugee Procedure/Proceedings Conducted in Public#Rule 57 - Proceedings Conducted in Public⁴ or the equivalent rule at the RAD.

99.1.6 Should a panel admit copies of decisions from other claims?

As section 166(c) of the Act provides, refugee proceedings are to be conducted in the absence of the public. Some decisions are anonymized and are posted on CanLII by the Board (for data on this, see: Canadian Refugee Procedure/Decisions#What percentage of refugee decisions are made publicly available?⁵). At times, counsel will want to provide decisions to a panel of the Board from other panels of the Board that have not been published. It is common practice that counsel will indicate that they have the consent of the claimant in question to provide the decision and that they will anonymize parts of the decision that disclose the claimant's identity. Where this is not done, panels of the Board have declined to admit such information. For example, in one such case Refugee Appeal Division Member Kim Polowek stated that:

The RAD notes that proceedings before the Refugee Protection Division and Refugee Appeal Division must be held in the absence of the public and should not be disclosed without the consent of the persons involved in the proceeding (i.e. the claimant). Given that the Appellant has not provided any confirmation which would indicate that each claimant referred to in these RPD decisions has provided consent for disclosure to the RAD, and the fact that despite the partial redactions, many personal details remain in each of the RPD decisions, the Appellant's Application [] to submit these RPD decisions to the RAD as new evidence fails.^[25]

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Joining_or_Separating_Claims_or_Applications#Once_claims_are_joined,_information_on_one_claim_is_properly_available_to_the_other_joined_claimants

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Proceedings_Conducted_in_Public#Rule_57_-_Proceedings_Conducted_in_Public

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#What_percentage_of_refugee_decisions_are_made_publicly_available?

That reasoning may be persuasive in similar cases. In contrast, where the consent of the claimant has been obtained and/or the decision has been well redacted of personally-identifying information, a panel may decide to admit such decisions.

99.2 References

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11. Azadeh Dastyari & Daniel Ghezelbash, *Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures*, International Journal of Refugee Law, eez046, <¹¹>.
12. United Nations Office of the High Commissioner for Human Rights, *Manual on human rights monitoring: Chapter 11 (Interviewing)*, <¹²>, page 7.

6 <http://canlii.ca/t/j0xlx#par24>

7 <https://senate-gro.ca/wp-content/uploads/2019/03/Bulletin-88-Final.pdf>

8 <https://en.wikibooks.org/wiki/Special:BookSources/9781459732858>

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13. Immigration and Refugee Board of Canada, *Audit of Information Management Report*, February 2014 <¹³> (Accessed March 25, 2020).
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18. Immigration and Refugee Board of Canada, *Code of Conduct for Members of the Immigration and Refugee Board of Canada*, Effective Date: April 9, 2019, <<https://irb-cisr.gc.ca/en/members/Pages/MemComCode.aspx>> (Accessed May 3, 2020), at section 36.
19. *Privacy Act*, RSC 1985, c P-21, ss. 7-8 <¹⁷>.
20. *Bernard v. Canada (Attorney General)*, 2014 SCC 13.
21. *Igbinosun v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1705 (F.C.T.D.) (QL).
22. *Moin v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 473.
23. *Canada (Public Safety and Emergency Preparedness) v. X*, 2010 CanLII 66495 (CA IRB), par. 37, <¹⁸>, retrieved on 2020-08-16.
24. Immigration and Refugee Board of Canada, *Policy on Disclosing Information Regarding the Conduct of Authorized Representatives to Regulatory Bodies*, Date modified: 2018-07-10, <¹⁹> (Accessed November 27, 2020).
25. *X (Re)*, 2019 CanLII 123992 (CA IRB), par. 16, <²⁰>, retrieved on 2020-03-29.

13 <https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/AudVerGesInfMan.aspx>

14 <http://canlii.ca/t/jc9b0#par30>

15 <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/iad-email-communication.aspx>

16 <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=16557§ion=HTML>

17 <http://canlii.ca/t/543h1#sec7>

18 <http://canlii.ca/t/2dcq0#par37>

19 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolCondRep.aspx>

20 <http://canlii.ca/t/j4cbg#par16>

100 IRPA Section 167: Right to counsel and representation by a designated representative

100.1 IRPA Section 167

The legislative provision reads:

Right to counsel

167 (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

Representation

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

100.2 Commentary

For a discussion of the right to counsel and issues that arise related thereto, see the commentary under the RPD Rule on Counsel of Record: Canadian Refugee Procedure/Counsel of Record¹. For a discussion of issues related to designated representatives, see the commentary under the relevant rule: Canadian Refugee Procedure/Designated Representatives².

100.3 References

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Counsel_of_Record

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives

101 IRPA Section 168: Abandonment of proceeding

101.1 IRPA Section 168

The legislative provision reads:

Abandonment of proceeding

168 (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

Abuse of process

(2) A Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules.

101.2 Commentary

For a discussion of abandonment, see the commentary under RPD Rule 65: Canadian Refugee Procedure/RPD Rule 65 - Abandonment¹. For a discussion of withdrawal, see the commentary under RPD Rule 59: Canadian Refugee Procedure/RPD Rule 59 - Withdrawal².

For the RAD, see RAD Rule 68: Canadian Refugee Procedure/RAD Rules Part 4 - Rules Applicable to an Appeal for Which a Hearing Is Held#RAD Rule 68 - Abandonment³.

101.3 References

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- 1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_65_-_Abandonment
 - 2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_59_-_Withdrawal
 - 3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_4_-_Rules_Applicable_to_an_Appeal_for_Which_a_Hearing_Is_Held#RAD_Rule_68_-_Abandonment

102 IRPA Section 169: Decisions and Reasons

102.1 IRPA Section 169

The legislative provision reads:

Decisions and reasons

169 In the case of a decision of a Division, other than an interlocutory decision:

- (a) the decision takes effect in accordance with the rules;
- (b) reasons for the decision must be given;
- (c) the decision may be rendered orally or in writing, except a decision of the Refugee Appeal Division, which must be rendered in writing;
- (d) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;
- (e) if the person who is the subject of proceedings before the Board or the Minister requests reasons for a decision within 10 days of notification of the decision, or in circumstances set out in the rules of the Board, the Division must provide written reasons; and
- (f) the period in which to apply for judicial review with respect to a decision of the Board is calculated from the giving of notice of the decision or from the sending of written reasons, whichever is later.

102.1.1 For commentary, see RPD Rule 67 and RAD Rule 50

See: Canadian Refugee Procedure/Decisions¹ and Canadian Refugee Procedure/RAD Rules Part 3 - Rules Applicable to All Appeals#Rules 50-51: Decisions².

102.2 References

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RAD_Rules_Part_3_-_Rules_Applicable_to_All_Appeals#Rules_50-51:_Decisions

103 IRPA Section 169.1 - Composition

103.1 IRPA Section 169.1

The relevant provision of the *Immigration and Refugee Protection Act* reads:

Refugee Protection Division

Composition

169.1 (1) The Refugee Protection Division consists of the Deputy Chairperson, Assistant Deputy Chairpersons and other members, including coordinating members, necessary to carry out its functions.

Public Service Employment Act

(2) The members of the Refugee Protection Division are appointed in accordance with the Public Service Employment Act.

103.2 References

104 IRPA Section 170: Proceedings

104.1 IRPA Section 170

The relevant provision of the *Immigration and Refugee Protection Act* reads:

Proceedings

170 The Refugee Protection Division, in any proceeding before it,

- (a) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;
- (b) must hold a hearing;
- (c) must notify the person who is the subject of the proceeding and the Minister of the hearing;
- (d) must provide the Minister, on request, with the documents and information referred to in subsection 100(4);
- (d.1) may question the witnesses, including the person who is the subject of the proceeding;
- (e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;
- (f) may, despite paragraph (b), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;
- (g) is not bound by any legal or technical rules of evidence;
- (h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and
- (i) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.

104.2 IRPA Section 170(a) - May inquire into any matter that it considers relevant to establishing whether a claim is well-founded

Proceedings

170 The Refugee Protection Division, in any proceeding before it,

- (a) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded; ...

104.3 IRPA Section 170(b) - Must hold a hearing

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

- (b) must hold a hearing;

104.3.1 The Division is required to hold a hearing in any proceeding before it, except where it allows a claim for refugee protection without a hearing in specific circumstances

Section 170(b) of the IRPA states that the Division must hold a hearing in any proceeding before it. This requirement is qualified by section 170(f), which provides that, despite paragraph (b), the Division may allow a claim for refugee protection without a hearing if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene. For more information on this, see the commentary on Rule 23: Canadian Refugee Procedure/Allowing a Claim Without a Hearing¹.

The requirement to hold a hearing provided for in section 170(b) of the Act is a comparatively strong requirement, which can be contrasted with the equivalent provision for the Immigration Division, which only requires that Division to hold a hearing "where practicable".^[1] This requirement stems from the Supreme Court of Canada's *Singh* decisions, which mandates an oral hearing in every case that went to the IAB, the IRB's predecessor.^[2] There were strong policy reasons for this, not only related to fairness so that apparent inconsistencies in the claimant's statement could be clarified, and the claimant's response to adverse evidence could be obtained, but also for reasons of efficiency. As Rabbi Gunther Plaut explained in his report on *Refugee determination in Canada* commissioned by the Minister of Employment and Immigration, prior to an oral hearing being provided in every case, in order to ensure fairness to the claimant, the Refugee Status Advisory Committee had adopted a procedure whereby the examination would be re-opened to elicit necessary evidence. This resulted in considerable delay and was a cumbersome procedure that became unnecessary with the advent of full oral reasons before the actual decision-maker.^[3]

104.4 IRPA Section 170(c) - Must notify the person who is the subject of the proceeding and the Minister of the hearing

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

(c) must notify the person who is the subject of the proceeding and the Minister of the hearing;

104.4.1 The person who is the subject of the proceeding must be notified, but such individuals are responsible for providing their contact information

The Refugee Protection Division has concludes that "claimants have the right to be notified of their hearing date and to be present at the hearing, but similarly share the responsibility of providing authorities with the information necessary to receive notice."^[4] See: Canadian Refugee Procedure/Information and Documents to be Provided#RPD Rule 4 - Claimant's contact information².

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Allowing_a_Claim_Without_a_Hearing
2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#RPD_Rule_4_-_Claimant's_contact_information

104.4.2 Minister must be notified of the hearing regardless of whether they are a party under the rules

As stated in the Board's public commentary to the previous version of the RPD Rules, "The Minister must be notified of the hearing of a claim for refugee protection even if the Minister has not intervened in the claim under...the Rules".^[5] For more detail, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Notice of the hearing³.

104.5 IRPA Section 170(d) - Must provide the Minister, on request, with the documents and information referred to in subsection 100(4)

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

(d) must provide the Minister, on request, with the documents and information referred to in subsection 100(4);

104.6 IRPA Section 170(d.1) - May question the witnesses, including the person who is the subject of the proceeding

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

(d.1) may question the witnesses, including the person who is the subject of the proceeding;

104.7 IRPA Section 170(e) - Must provide an opportunity to present evidence, question witnesses and make representations

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;

104.7.1 The person involved in any proceeding before the RPD must have a reasonable opportunity to present evidence, question witnesses and make representations

For a discussion of how this relates to the right to be heard, see: Canadian Refugee Procedure/The right to be heard and the right to a fair hearing#Parties are entitled to the opportunity to attend an oral hearing⁴.

3 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Notice_of_the_hearing

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_be_heard_and_the_right_to_a_fair_hearing#Parties_are_entitled_to_the_opportunity_to_attend_an_oral_hearing

104.7.2 The Minister must have a reasonable opportunity to present evidence, question witnesses and make representations

Section 170(e) of the IRPA provides that the RPD, in any proceeding before it, must give the Minister a reasonable opportunity to present evidence, question witnesses, and make representations. This was not the case when the Convention Refugee Determination Division was originally created. At that point, the Minister was entitled only to present evidence and could not cross-examine the claimant or make representations, save where exclusion was at issue.^[6] This was considered important at the time in order to ensure the non-adversarial nature of the refugee status determination inquiry. In subsequent years, however, this provision was amended so that it is now worded as above.

The RPD Rules require that the Minister be notified of certain issues, for example where there is a possibility of exclusion. If a panel proceeds without notifying the Minister as required, the Minister's right to be heard has been violated, as discussed in the commentary to Rule 26: Canadian Refugee Procedure/Exclusion, Integrity Issues, Inadmissibility and Ineligibility#Can a panel of the Board decline to provide such notice so long as it does not accept the claim?⁵. Similarly, if the Board accepts a claim without holding a hearing, and without providing advance notice to the Minister, then the Minister's right to participate in the hearing process may have been violated: Canadian Refugee Procedure/Allowing a Claim Without a Hearing#When may a Member decide a claim without having held a hearing?⁶.

104.8 IRPA Section 170(f) - May allow a claim without a hearing

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

(b) must hold a hearing; ...

(f) may, despite paragraph (b), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;

104.8.1 Commentary

For commentary on this provision, see RPD Rule 23: Canadian Refugee Procedure/Allowing a Claim Without a Hearing⁷.

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Exclusion,_Integrity_Issues,_Inadmissibility_and_Ineligibility#Can_a_panel_of_the_Board_decline_to_provide_such_notice_so_long_as_it_does_not_accept_the_claim?

6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Allowing_a_Claim_Without_a_Hearing#When_may_a_Member_decide_a_claim_without_having_held_a_hearing?

7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Allowing_a_Claim_Without_a_Hearing

104.9 IRPA Section 170(g) - Is not bound by any legal or technical rules of evidence

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...
(g) is not bound by any legal or technical rules of evidence;

104.9.1 The Division may receive evidence that does not comply with the *Canada Evidence Act* and common law rules of evidence

Section 170(g) of the Act provides that the Refugee Protection Division, in any proceedings before it, is not bound by any legal or technical rules of evidence. As such, the Board is not required to refuse to admit evidence merely because it does not comply with a rule of evidence. For example, a panel of the Board is not required to refuse to admit an affidavit merely because it does not meet the requirements of Part III of the *Canada Evidence Act*, which governs the taking of affidavits abroad.^[7] Similarly, the Board is not enjoined from compelling a party's spouse to testify about communications made to them in the course of their marriage, something that would ordinarily be prohibited by section 4(3) of the *Canada Evidence Act* which provides that "No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage."^[8] The Federal Court has held that the legislative intent behind IRPA section 170(g) is "to avoid the formalities which are attendant upon court hearings in civil or criminal proceedings."^[9]

That said, each *Canada Evidence Act* provision should be examined to determine how it interacts with s. 170(g) of the IRPA. In *Brown v. Canada*, when commenting on the scope of disclosure required of the Minister necessary for a matter to be procedurally fair, the Federal Court of Appeal made reference to the *Canada Evidence Act*, as follows: "Subject to recognized public interest privileges arising under section 38.01 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, relevant evidence of communications with a receiving country ought to be disclosed in advance of the hearing."^[10] They went on to note that "it would be a rare case where a member could properly exercise their discretion to continue detention in the absence of this evidence." In this way, despite the Immigration Division in that case not being "bound by any legal or technical rules of evidence"^[11] (the language of the relevant IRPA provision which applies to the Immigration Division), this *Canada Evidence Act* provision nonetheless applied as a result of the specific wording of the relevant provision of the CEA.

104.9.2 The Division must refuse to admit evidence where admitting it would violate a substantive rule of law such as solicitor-client privilege

Section 170(g) of the Act provides that the Refugee Protection Division, in any proceedings before it, is not bound by any legal or technical rules of evidence. This means that provisions of the *Canada Evidence Act* do not constrain the Board's ability to admit evidence. This principle applies to rules of evidence, such as spousal privilege, but not to rules of substantive law such as solicitor-client privilege.^[12] In this way, a panel of the RPD is obliged to respect solicitor-client privilege and must decline to admit information so protected, except where

a relevant exception applies. That said, the panel must consider whether such privilege in fact applies, for example, where a litigant relies on legal advice as an element of his or her claim or defence, the privilege which would otherwise attach to that advice is lost.^[13]

Similarly, a panel of the Board may be required to refuse to admit evidence where doing so is required by the *Charter of Rights and Freedoms* or specific statutes such as the *Privacy Act*. For more details, see: Canadian Refugee Procedure/Documents#The Board has jurisdiction to refuse to admit documents for reasons that are broader than the Rule 35 criteria⁸.

104.9.3 The Division must not fetter its discretion by refusing to admit evidence where the evidence does not meet the technical rules of evidence

See: Canadian Refugee Procedure/The right to an independent decision-maker#Members may not fetter their own discretion⁹.

104.9.4 While the Division is not bound by rules of evidence, the Division may still have regard to them

Section 170(g) of the IRPA is clear that the Refugee Protection Division is not bound by any legal or technical rules of evidence. That said, the Division may nonetheless have regard to such rules in a number of ways, including:

- When assigning weight to evidence: Lorne Waldman writes in his text that "in cases where the evidence is not normally admissible in a court of law, the Division must give careful consideration to the weight given to the evidence."^[14]
- When exercising residual discretion about whether to admit evidence: Simply because a panel of the Board may accept some evidence does not mean that it must; the panel has a discretion to decline to admit the evidence as part of the broader discretion that it has to control its own process and balance the probative value of evidence with its prejudicial effect, if any, on the hearing process. In the words of the Refugee Appeal Division, "since the RPD is not bound by any legal or technical rules of evidence, it must generally admit all evidence unless it is irrelevant, repetitive or prejudicial",^[15] highlighting this residual discretion to decline to admit certain prejudicial evidence. For example, see decisions regarding the Board's discretion to refuse to allow a lawyer to act as a witness in a matter where they are also acting as counsel: Canadian Refugee Procedure/Witnesses#Limitations on the ability of legal counsel to act as a witness in a proceeding¹⁰.
- When determining whether evidence should properly be considered credible and trustworthy: Section 31.1 of the *Canada Evidence Act* provides that "Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity

8 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#The_Board_has_jurisdiction_to_refuse_to_admit_documents_for_reasons_that_are_broader_than_the_Rule_35_criteria
9 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#Members_may_not_fetter_their_own_discretion
10 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Witnesses#Limitations_on_the_ability_of_legal_counsel_to_act_as_a_witness_in_a_proceeding

by evidence capable of supporting a finding that the electronic document is that which it is purported to be.” Recourse may be had to this provision when assessing whether a claimant has met their burden to establish that electronic evidence tendered is credible and trustworthy.

- When determining whether an individual may properly act as counsel: Common law principles preclude counsel from being the affiant who swears an affidavit in a matter that they will appear as counsel on.^[16] Such principles of evidence and potential conflict of interest may be considered when allowing evidence and allowing an individual to act as counsel.
- When determining what questions may appropriately be posed to a witness: For example, the *Chairperson’s Guideline 3: Proceedings Involving Minors at the Immigration and Refugee Board* specifies that when a minor under the age of 14 testifies they shall not be asked if they understand what promising to tell the truth means.^[17] The reference cited for this in the guideline is section 16.1 of the *Canada Evidence Act*.

104.10 IRPA Section 170(h) - May receive and base a decision on evidence considered credible or trustworthy

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ...

(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

104.10.1 History of this provision

The standard that evidence considered credible or trustworthy may be admitted and used for a decision has been a longstanding one in Canadian immigration proceedings. The 1910 *Immigration Act* articulated the duties and procedures of boards of inquiry to determine admissibility and deportation matters. At that time, a board could base its decision on any evidence it considered credible and trustworthy.^[18]

104.10.2 Burden of proof

The burden of proof rests on a claimant to show that they meet the definition of a 'person in need of protection' or Convention Refugee in the Act. For further discussion of this, see: Canadian Refugee Procedure/The Board's inquisitorial mandate#A claimant has an onus to show that they meet the criteria to be recognized as a refugee¹¹.

104.10.3 Standard of proof

The standard of proof for assessing evidence as well as credibility in Canadian law is a balance of probabilities, that is, the evidence is more likely than not true.^[19] This accords

https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_Board%27s_inquisitorial_mandate#A_claimant_has_an_onus_to_show_that_they_meet_the_criteria_to_be_recognized_as_a_refugee

with UNHCR guidance which states that the authorities need to decide if, based on the evidence provided, it is likely that the claim of the applicant is credible.^[20]

104.10.4 Where there is a dispute, the Division should explain why evidence was considered credible and trustworthy

Section 170(h) of the Act provides that the Refugee Protection Division, in any proceeding before it, may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances. In this way, a Division of the Board is entitled to rely on sources of information that may not be admissible evidence in a court proceeding, provided that the Division explains why the information is credible or trustworthy. The IRB's paper on weighing evidence notes that it is not the Board's normal practice to determine whether evidence is credible or trustworthy prior to admitting it:

The wording of the relevant provisions of the *IRPA* tends to support the position that the IRB should not receive, or admit, evidence unless it is determined to be credible or trustworthy. However, this does not reflect the normal practice at the ID, IAD, or RPD. There are two reasons for this. Once evidence is excluded, it is hard to later admit it. It is much simpler to admit the evidence and subsequently give it no weight if that is warranted. Further, it is preferable to assess the credibility of the evidence based on the total evidence presented. Credibility decisions are not always easy to make, and often require careful thought and analysis. The hearing process would become very slow and tedious if a ruling regarding credibility had to be made as each piece of evidence was tendered.^[21]

However, it is clear that before relying on evidence, the Board must first assess the reliability of the evidence.^[22] See a discussion of this in *Pascal v Canada*, which, while a decision relating to the Board's Immigration Division, applies *mutatis mutandis* to the Refugee Protection Division.^[23] See also *Fong v Canada*, a decision concerning the Board's Immigration Appeal Division, in which the IAD accepted police reports into evidence concerning a crime that Mr. Fong had been acquitted of.^[24] The Federal Court held that the IAD had erred in doing so because it had failed to determine that the police reports were either credible or trustworthy, as required by the Act:

in light of the acquittal of the applicant on the charges to which they related, [the police reports] were *prima facie* neither credible nor trustworthy as they set out the factual foundation for charges laid that were subsequently not proven. The police reports should not have been admitted into evidence in these circumstances.^[25]

This relates to James Hathaway's statement that it is not the case that "every piece of paper tendered [should] be received, even with the stipulation that differential weight will be accorded to less relevant materials" as the statutory reference to the admission only of evidence which is trustworthy or credible requires that evidence not logically probative of a legally material fact be excluded.^[26] See also: Canadian Refugee Procedure/Documents#Rule 35 - Documents relevant and not duplicate¹².

¹² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Rule_35_-_Documents_relevant_and_not_duplicate

104.10.5 How should the Division determine whether evidence should be considered credible or trustworthy?

”Credible” is that which is believable and ”trustworthy” evidence is that which falls into the broader category of reliable evidence. A full discussion of these principles is beyond the scope of this text. There are a number of tools utilized by refugee status determination bodies to this end, for example, UNHCR registration officers deploy tools such as checking the consistency of stories told to them by re-interviewing applicants.^[27] When it comes to assessing the credibility and reliability of documents that have been submitted, the Federal Court has endorsed applying the five criteria used in library and information science to determine the reliability of information—authority, accuracy, objectivity, currency, and coverage—as a framework.^[28] Decision-makers may also consider whether a party has failed to provide corroborative evidence and this relates to credibility in 2 cases: (1) where there are other valid reasons to doubt a claimant’s credibility; and (2) where such evidence would be reasonably expected to be available and filed, and the decision maker does not accept the claimant’s explanation for failing to produce it.^[29] The law also recognizes the inherent unreliability of certain types of evidence, such as hearsay evidence. There is no presumption of truth for hearsay and it can be accepted, but only on grounds of reliability and necessity – the burden to establish those conditions resting on the party introducing the evidence.^[30]

See also: Canadian Refugee Procedure/Information and Documents to be Provided#Inferences about credibility that may be made where a claimant does not supply documents¹³.

104.11 IRPA Section 170(i) - May take notice of facts

Proceedings

170 The Refugee Protection Division, in any proceeding before it, ... may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.

104.11.1 RPD Rule 22 on Specialized Knowledge relates to this provision of the Act

For a discussion of the interpretation of this provision, see the commentary to RPD Rule 22: Canadian Refugee Procedure/Specialized Knowledge¹⁴.

104.12 References

1. *Immigration and Refugee Protection Act*, SC 2001, c 27, s 173, <¹⁵>, retrieved on 2021-07-14.

¹³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Information_and_Documents_to_be_Provided#Inferences_about_credibility_that_may_be_made_where_a_claimant_does_not_supply_documents

¹⁴ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Specialized_Knowledge

¹⁵ <https://canlii.ca/t/7vwq#sec173>

2. W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, page 30.
3. W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, pages 33-34.
4. *Aguirre Meza v. Canada (Citizenship and Immigration)*, 2022 FC 1275 (CanLII), at para 16, <¹⁶>, retrieved on 2023-07-02.
5. Immigration and Refugee Board of Canada, *Commentaries to the Refugee Protection Division Rules*, Date Modified: 2009-05-22 <¹⁷> (Accessed January 28, 2020).
6. David Vinokur, *30 Years of Changes at the Immigration and Refugee Board of Canada*, CIHS Bulletin, Issue #88, March 2019, <¹⁸> (Accessed May 13, 2021), page 7.
7. *Dhesi, Bhupinder Kaur v. M.E.I.* (F.C.A., no. 84-A-342), Mahoney, Ryan, Hugessen, November 30, 1984.
8. *Muheka v Canada (Public Safety and Emergency Preparedness)*, 2017 CanLII 98239 (CA IRB), par. 28, <¹⁹>, retrieved on 2020-02-05.
9. *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 (CanLII), [2007] 1 FCR 107, par. 64, <²⁰>, retrieved on 2021-07-17.
10. *Brown et al. v. Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness*, 2020 FCA 130, <²¹>, para. 145.
11. *Immigration and Refugee Protection Act*, SC 2001, c 27, s 173 <²²> retrieved on 2020-08-08.
12. *R. v. Oland*, 2015 NBQB 247, affirmed by the New Brunswick Court of Appeal in *Oland v. R.*, 2016 CanLII 101484 (NBCA).
13. *Canada (Citizenship and Immigration) v Mahjoub*, 2011 FC 887 at paragraph 10, .
14. Waldman, Lorne, *Canadian Immigration & Refugee Law Practice*, Markham, Ont.: LexisNexis Butterworths, 2018, ISBN 9780433478928²³, ISSN 1912-0311²⁴, <<https://search.library.utoronto.ca/details?5022478>> (Accessed April 1, 2020) at page 1718 of the PDF.
15. *X (Re)*, 2017 CanLII 56261 (CA IRB), par. 55, <²⁵>, retrieved on 2020-08-09.
16. *Zheng v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8506 (FC), at para 2, <²⁶>, retrieved on 2023-07-05.
17. Immigration and Refugee Board of Canada, *Chairperson's Guideline 3: Proceedings Involving Minors at the Immigration and Refugee Board*, Effective date: October 31, 2023, <²⁷> (Accessed August 31, 2023), at 7.3.1.4.

16 <https://canlii.ca/t/jrw5f#par16>

17 <https://web.archive.org/web/20100704062357/http://www.irb-cisr.gc.ca/eng/brdcom/references/aclo/pages/rpdcomment.aspx>

18 <https://senate-gro.ca/wp-content/uploads/2019/03/Bulletin-88-Final.pdf>

19 <http://canlii.ca/t/hqr82#28>

20 <https://canlii.ca/t/1n3nx#par64>

21 <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/483607/index.do>

22 <http://canlii.ca/t/53z6t#sec173>

23 <https://en.wikibooks.org/wiki/Special:BookSources/9780433478928>

24 tel:1912-0311

25 <http://canlii.ca/t/h5p78#par55>

26 <https://canlii.ca/t/49nl#par2>

27 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir03-2023.aspx>

18. Ninette Kelley and Michael J. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*. Toronto: University of Toronto Press, 2010 (Second Edition). Print. Page 140.
19. *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.), at 605.
20. Note on Burden and Standard of Proof in Refugee Claims, UNHCR, Geneva, 16 December 1998, para. 8.
21. Immigration and Refugee Board of Canada, *Weighing Evidence*, December 31, 2020 <²⁸>, page 10.
22. *Cugliari v. Canada (Citizenship and Immigration)*, 2023 FC 263 (CanLII), at para 60, <²⁹>, retrieved on 2023-09-23.
23. *Pascal, Adrian Edmond v. M.C.I.* (F.C., no. IMM-3379-19), McHaffie, July 9, 2020; 2020 FC 751.
24. As discussed in Sharryn Aiken, et al, *Immigration and Refugee Law: Cases, Materials, and Commentary (Third Edition)*, Jan. 1 2020, Emond, ISBN: 1772556319³⁰, at page 193.
25. *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1134, at para. 13.
26. Hathaway, James C., *Rebuilding trust: A Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*, Refugee Studies Centre, Publisher: Osgoode Hall Law School, York University, December 1993, page 23.
27. Riva, S., Hoffstaedter, G. The aporia of refugee rights in a time of crises: the role of brokers in accessing refugee protection in transit and at the border. *CMS* 9, 1 (2021).³¹
28. *Almrei (Re)*, 2009 FC 1263 (CanLII), [2011] 1 FCR 163, at para 340, <³²>.
29. *Ni, Song Cui v. M.C.I.* (F.C., no. IMM-591-21), McHaffie, April 1, 2022; 2022 FC 460.
30. *Guo v. Canada (Citizenship and Immigration)*, 2022 FC 380 (CanLII), at para 18, <³³>, retrieved on 2022-11-15.

28 https://irb.gc.ca/en/legal-policy/legal-concepts/Documents/Evid%20Full_e-2020-FINAL.pdf

29 <https://canlii.ca/t/jvwng#par60>

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31 <https://doi.org/10.1186/s40878-020-00212-2>

32 <https://canlii.ca/t/271nd#par340>

33 <https://canlii.ca/t/jn7r5#par18>

105 IRPA Section 170.2: No reopening of claim or application

105.1 IRPA Section 170.2

The legislative provision reads:

No reopening of claim or application

170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground - including a failure to observe a principle of natural justice - a claim for refugee protection, an application for protection or an application for cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination.

105.2 Commentary

For a discussion of this legislative provision, see the commentary to Rules 62 and 63: Canadian Refugee Procedure/Reopening a Claim or Application¹.

105.3 References

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Reopening_a_Claim_or_Application

106 IRPA Section 171: Proceedings

106.1 IRPA Section 171

The relevant provision of the *Immigration and Refugee Protection Act* reads:

Proceedings

171 In the case of a proceeding of the Refugee Appeal Division,

(a) the Division must give notice of any hearing to the Minister and to the person who is the subject of the appeal;

(a.1) subject to subsection 110(4), if a hearing is held, the Division must give the person who is the subject of the appeal and the Minister the opportunity to present evidence, question witnesses and make submissions;

(a.2) the Division is not bound by any legal or technical rules of evidence;

(a.3) the Division may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

(a.4) the Minister may, at any time before the Division makes a decision, after giving notice to the Division and to the person who is the subject of the appeal, intervene in the appeal;

(a.5) the Minister may, at any time before the Division makes a decision, submit documentary evidence and make written submissions in support of the Minister's appeal or intervention in the appeal;

(b) the Division may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge; and

(c) a decision of a panel of three members of the Refugee Appeal Division has, for the Refugee Protection Division and for a panel of one member of the Refugee Appeal Division, the same precedential value as a decision of an appeal court has for a trial court.

106.1.1 Section 171 of the IRPA may be contrasted with s. 170, which provides what powers the RPD has

Section 171 sets out powers that the RAD has in a proceeding. Section 170 sets out those powers of the RPD. The two may be contrasted. While section 170 of the IRPA provides that the RPD "may inquire into any matter that it considers relevant to establishing whether a claim is well-founded", the RAD does not have a similar power prescribed by s. 171. For more detail on s. 170, see: Canadian Refugee Procedure/IRPA Section 170 - Proceedings¹.

106.2 IRPA Section 171(a.2)

Proceedings

171 In the case of a proceeding of the Refugee Appeal Division,

(a.2) the Division is not bound by any legal or technical rules of evidence;

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings

106.2.1 See the equivalent provision for the RPD, IRPA s. 170(g)

Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(g) - Is not bound by any legal or technical rules of evidence²

106.3 IRPA Section 171(a.3)

Proceedings

171 In the case of a proceeding of the Refugee Appeal Division, ...

(a.3) the Division may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

106.3.1 See the equivalent provision for the RPD, IRPA s. 170(h)

Canadian Refugee Procedure/IRPA Section 170 - Proceedings#IRPA Section 170(h) - May receive and base a decision on evidence considered credible or trustworthy³

106.4 IRPA Section 171(b)

Proceedings

171 In the case of a proceeding of the Refugee Appeal Division, ...

(b) the Division may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge;

106.4.1 See the commentary on the relevant RPD rule

See: Canadian Refugee Procedure/RPD Rule 22 - Specialized Knowledge⁴.

106.5 IRPA Section 171(c)

Proceedings

171 In the case of a proceeding of the Refugee Appeal Division, ...

(c) a decision of a panel of three members of the Refugee Appeal Division has, for the Refugee Protection Division and for a panel of one member of the Refugee Appeal Division, the same precedential value as a decision of an appeal court has for a trial court.

106.5.1 The Refugee Appeal Division has issued a policy on designation of three-member panels

As per s. 171(c) of the IRPA, a decision of a panel of three members of the RAD has, for the RPD and for a panel of one member of the RAD, the same precedential value as a decision

2 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(g\)_-_Is_not_bound_by_any_legal_or_technical_rules_of_evidence](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(g)_-_Is_not_bound_by_any_legal_or_technical_rules_of_evidence)

3 [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170\(h\)_-_May_receive_and_base_a_decision_on_evidence_considered_credible_or_trustworthy](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/IRPA_Section_170_-_Proceedings#IRPA_Section_170(h)_-_May_receive_and_base_a_decision_on_evidence_considered_credible_or_trustworthy)

4 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_22_-_Specialized_Knowledge

of an appeal court has for a trial court. Under the relevant RAD Policy, a three-member panel may be designated if one or more of the following criteria is met: (i) the appeal raises unusually complex or emerging legal issues; (ii) the appeal raises an issue in an area in which there is significant divergence or inconsistency in decision-making at either the RAD or the RPD; (iii) the appeal raises a serious question of general importance; (iv) the appeal raises an issue that may have a significant impact on practice and procedure at either the RAD or the RPD; or (v) any other relevant circumstances exist that make it appropriate that a three-member panel be designated.^[1]

106.6 References

1. Immigration and Refugee Board of Canada, *Designation of Three-Member Panels - Refugee Appeal Division*, April 12, 2013, <⁵> (Accessed April 28, 2022).

⁵ <https://www.irb-cisr.gc.ca/en/legal-policy/policies/pages/PolRadSar3MemCom.aspx>

107 IRPA Section 170.1: No reopening of appeal

107.1 IRPA Section 171.1

The relevant provision of the *Immigration and Refugee Protection Act* reads:

No reopening of appeal

171.1 The Refugee Appeal Division does not have jurisdiction to reopen on any ground - including a failure to observe a principle of natural justice - an appeal in respect of which the Federal Court has made a final determination.

107.2 References

108 Related Legislation

109 Charter of Rights and Freedoms

109.1 Charter of Rights and Freedoms

Selected provisions of the Canadian Charter of Rights and Freedoms applicable to refugee procedure follow:

The Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

109.1.1 Divisions of the IRB have the competency to determine matters related to the Charter of Rights and Freedoms

Divisions of the IRB are endowed with the power to decide questions of law, and accordingly have the authority to resolve constitutional questions that are inextricably linked to matters properly before them.^[1] See: Canadian Refugee Procedure/RPD Rule 66 - Notice of Constitutional Question¹.

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Mobility Rights

6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
(a) to move to and take up residence in any province; and
(b) to pursue the gaining of a livelihood in any province.
(3) The rights specified in subsection (2) are subject to
(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rule_66_-_Notice_of_Constitutional_Question

that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

109.2 Section 7: Legal rights, including life liberty, and security of the person

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

109.2.1 Deportation of a non-Citizen does not in and of itself infringe the right to liberty or security of the person

The deportation of a non-citizen does not in and of itself infringe the right to liberty guaranteed in section 7 of the Charter, because the liberty guaranteed in this section does not include "the freedom to be anywhere one wishes, regardless of the law."^[2] The answer is the same when security of the person is considered, as the Supreme Court of Canada held in *Medovarsky v. Canada*: "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada...[and that]...deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*".^[3] The answer to this may of course differ where an individual anticipates ill-treatment upon their return to their country of origin.

109.2.2 An individual is not facing deportation at the time of their hearing before the RPD or RAD

At times, applicants argue that a decision of a Division violates sections 7 of the *Charter* as they have a real and justifiable fear of torture or inhumane or degrading treatment upon return to their country. As the Federal Court held in *Singh v. Canada*, individuals before the RPD or RAD are not currently facing deportation, and so their arguments that deportation would violate the *Charter* are premature.^[4] Such arguments are best addressed at the stage of later proceedings where they can apply to stay their deportation.

This principle applies to exclusion and inadmissibility from the refugee regime as well. In the words of the Federal Court of Appeal, as the determination of exclusion or inadmissibility does not engage section 7, it necessarily follows that section 7 is not engaged by the denial of a section 96 risk assessment.^[5]

109.2.3 The right to liberty relates to the right to freedom of movement in the Refugee Convention

Section 7 of the *Canadian Charter of Rights and Freedoms* specifies that everyone has the right to liberty. Refugee Convention Article 31(1) states that "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present

themselves without delay to the authorities and show good cause for their illegal entry or presence”. The Refugee Convention then protects such refugees from restrictions on their freedom of movement ‘other than those which are necessary’, and only ‘until their status in the country is regularized or they obtain admission into another country’.^[6]

109.3 Section 8: Unreasonable search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

109.3.1 Searches at the border

Many refugee claims make a claim at a port of entry, at which point a Canada Border Services Agency officer may search their person or belongings in some cases. The Supreme Court of Canada has held that routine searches under the *Customs Act*, such as searches of suitcases, do not require reasonable grounds and are consistent with section 8 of the *Charter*. More intrusive searches, such as strip searches, require reasonable grounds: *R v Simmons*.^[7] The Customs Act cannot be read to permit broad, suspicionless searches of electronic devices during routine border screening^[8] as an unlimited and suspicionless search of a device would breach the *Charter*.^[9] Similarly, while some provisions of the IRPA authorize searches at the time that an individual makes a refugee claim, searches solely to look for criminality are not permitted.^[10] See also: Canadian Refugee Procedure/140 - Seizure².

109.4 Section 9: Arbitrary detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

109.5 Section 10: Rights on arrest or detention

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

109.5.1 Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right

See: Canadian Refugee Procedure/RPD Rules 14-16 - Counsel of Record#Canadian Charter of Rights and Freedoms³.

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/140_-_Seizure

³ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/RPD_Rules_14-16_-_Counsel_of_Record#Canadian_Charter_of_Rights_and_Freedoms

109.6 Section 12: Cruel and unusual treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

109.6.1 An individual is not facing deportation at the time of their hearing before the RPD or RAD

At times appellants will argue that a failure to accept their claim means that the RPD or RAD's decision is in violation of section 12 of the Charter.^[1] For details on how such arguments have been treated, see: Canadian Refugee Procedure/Charter of Rights and Freedoms#An individual is not facing deportation at the time of their hearing before the Division⁴.

109.7 Section 13: Self-incrimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

109.8 Section 14: Right to the assistance of an interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

109.8.1 Commentary

For commentary, see the section below on sections 14 and 16-22 of the Charter.

109.9 Section 15: Equality rights

Equality Rights

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Charter_of_Rights_and_Freedoms#An_individual_is_not_facing_deportation_at_the_time_of_their_hearing_before_the_Division

⁴ [Freedoms#An_individual_is_not_facing_deportation_at_the_time_of_their_hearing_before_the_Division](#)

109.10 Sections 14 and 16-22: Official Languages of Canada

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Official Languages of Canada

16.(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

17.(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18.(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20.(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

109.10.1 RPD Rules concerning language of proceedings, interpreters, and language of documents

For discussion of these provisions, see the commentary to RPD Rules 17 and 18, which concern language of proceedings (Canadian Refugee Procedure/Language of Proceedings⁵), RPD Rule 19, which concerns interpreters (Canadian Refugee Procedure/Interpreters⁶), and RPD Rule 32 which concerns language of documents (Canadian Refugee Procedure/Documents#RPD Rule 32 - Language of Documents⁷), and RPD Rule 67 and this commentary on the language of decisions (Canadian Refugee Procedure/Decisions#In what language or languages must the reasons for decisions be made available where they are publicly released?⁸).

109.11 Section 24: Enforcement

Enforcement

- 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.
30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.
31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

5 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Language_of_Proceedings
6 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Interpreters
7 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#RPD_Rule_32_-_Language_of_Documents
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#In_what_language_or_languages_must_the_reasons_for_decisions_be_made_available_where_they_are_publicly_released?
8

- 32.(1) This Charter applies
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.
- 33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the Canadian Charter of Rights and Freedoms.

109.12 References

1. *Torres Victoria v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1392, para. 38.
2. *Williams v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 646 (CA) at para 24, as cited in Martine Valois and Henri Barbeau, *The Federal Courts and Immigration and Refugee Law*, in Martine Valois, et. al., eds., *The Federal Court of Appeal and the Federal Court: 50 Years of History*, Toronto: Irwin Law, 2021, at page 325.
3. *Medovarski v. Canada* (Minister of Citizenship and Immigration); *Esteban v. Canada* (Minister of Citizenship and Immigration), 2005 SCC 51 (CanLII), [2005] 2 SCR 539, <⁹>, retrieved on 2021-12-19.
4. *Singh v. Canada (Citizenship and Immigration)*, 2021 FC 341 (CanLII), at para 18, <¹⁰>, retrieved on 2023-08-23
5. *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34.
6. Refugee Convention, art 31(2).
7. *R v Al Askari*, 2021 ABCA 204 (CanLII), at para 30, <¹¹>, retrieved on 2021-09-06.
8. *R v Al Askari*, 2021 ABCA 204 (CanLII), at para 33, <¹²>, retrieved on 2021-09-06.
9. *R v Al Askari*, 2021 ABCA 204 (CanLII), at para 58, <¹³>, retrieved on 2021-09-06.
10. *R v Al Askari*, 2021 ABCA 204 (CanLII), at para 116, <¹⁴>, retrieved on 2021-09-06.

9 <https://canlii.ca/t/11pk5>
 10 <https://canlii.ca/t/jhcn#par18>
 11 <https://canlii.ca/t/jg55r#par30>
 12 <https://canlii.ca/t/jg55r#par33>
 13 <https://canlii.ca/t/jg55r#par58>
 14 <https://canlii.ca/t/jg55r#par116>

11. e.g. *Davila Valdez c. Canada (Citoyenneté et Immigration)*, 2022 CF 596 (CanLII), au para 21, <¹⁵>, consulté le 2022-05-13.

¹⁵ <https://canlii.ca/t/jnwwq#par21>

110 Official Languages Act

Relevant provisions of the *Official Languages Act*^[1] read:

110.1 Section 3: Interpretation

Definitions

3 (1) In this Act,
Commissioner means the Commissioner of Official Languages for Canada appointed under section 49; (commissaire)

Crown corporation means

- (a) a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and
- (b) a parent Crown corporation or a wholly-owned subsidiary, within the meaning of section 83 of the Financial Administration Act; (sociétés d'État)

department means a department as defined in section 2 of the Financial Administration Act; (ministère)

federal institution includes any of the following institutions of the Parliament or government of Canada:

- (a) the Senate,
- (b) the House of Commons,
- (c) the Library of Parliament,
- (c.1) the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner,
- (c.2) the Parliamentary Protective Service,
- (c.3) the office of the Parliamentary Budget Officer,
- (d) any federal court,
- (e) any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of Parliament or by or under the authority of the Governor in Council,
- (f) a department of the Government of Canada,
- (g) a Crown corporation established by or pursuant to an Act of Parliament, and
- (h) any other body that is specified by an Act of Parliament to be an agent of Her Majesty in right of Canada or to be subject to the direction of the Governor in Council or a minister of the Crown,

but does not include

- (i) any institution of the Legislative Assembly or government of Yukon, the Northwest Territories or Nunavut, or
- (j) any Indian band, band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people; (institutions fédérales)

National Capital Region means the National Capital Region described in the schedule to the National Capital Act. (région de la capitale nationale)

Definition of federal court

(2) In this section and in Parts II and III, federal court means any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament.

110.2 Part III: Administration of Justice

PART III

Administration of Justice

Official languages of federal courts

14 English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

Hearing of witnesses in official language of choice

15 (1) Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.

Duty to provide simultaneous interpretation

(2) Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.

Federal court may provide simultaneous interpretation

(3) A federal court may, in any proceedings conducted before it, cause facilities to be made available for the simultaneous interpretation of the proceedings, including evidence given and taken, from one official language into the other where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so for members of the public in attendance at the proceedings.

Duty to ensure understanding without an interpreter

16 (1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that

- (a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;
- (b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and
- (c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.

Adjudicative functions

(2) For greater certainty, subsection (1) applies to a federal court only in relation to its adjudicative functions.

Limitation

(3) No federal court, other than the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, is required to comply with subsection (1) until five years after that subsection comes into force.

Authority to make implementing rules

17 (1) The Governor in Council may make any rules governing the procedure in proceedings before any federal court, other than the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, including rules respecting the giving of notice, that the Governor in Council deems necessary to enable that federal court to comply with sections 15 and 16 in the exercise of any of its powers or duties.

Supreme Court, Federal Court of Appeal, Federal Court and Tax Court of Canada

(2) Subject to the approval of the Governor in Council, the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada may make any rules governing the procedure in their own proceedings, including rules respecting the giving of notice, that they deem necessary to

enable themselves to comply with sections 15 and 16 in the exercise of any of their powers or duties.

110.3 Section 18: Language of civil proceedings where Her Majesty is a party

Language of civil proceedings where Her Majesty is a party

18 Where Her Majesty in right of Canada or a federal institution is a party to civil proceedings before a federal court,

- (a) Her Majesty or the institution concerned shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties unless it is established by Her Majesty or the institution that reasonable notice of the language chosen has not been given; and
- (b) if the other parties fail to choose or agree on the official language to be used in those pleadings, Her Majesty or the institution concerned shall use such official language as is reasonable, having regard to the circumstances.

110.3.1 Commentary

For commentary, see: Canadian Refugee Procedure/Documents#Ministerial obligations pursuant to Official Languages Act¹.

110.4 Section 19: Bilingual forms

Bilingual forms

19 (1) The pre-printed portion of any form that is used in proceedings before a federal court and is required to be served by any federal institution that is a party to the proceedings on any other party shall be in both official languages.

Particular details

(2) The particular details that are added to a form referred to in subsection (1) may be set out in either official language but, where the details are set out in only one official language, it shall be clearly indicated on the form that a translation of the details into the other official language may be obtained, and, if a request for a translation is made, a translation shall be made available forthwith by the party that served the form.

110.5 Section 20: Decisions, orders and judgments

Decisions, orders and judgments that must be made available simultaneously

20 (1) Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where

- (a) the decision, order or judgment determines a question of law of general public interest or importance; or
- (b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.

Other decisions, orders and judgments

(2) Where

- (a) any final decision, order or judgment issued by a federal court is not required by subsection (1) to be made available simultaneously in both official languages, or

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Documents#Ministerial_obligations_pursuant_to_Official_Languages_Act

(b) the decision, order or judgment is required by paragraph (1)(a) to be made available simultaneously in both official languages but the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance,

the decision, order or judgment, including any reasons given therefor, shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective.

Oral rendition of decisions not affected

(3) Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or delivery, in only one of the official languages, of any decision, order or judgment or any reasons given therefor.

Decisions not invalidated

(4) No decision, order or judgment issued by a federal court is invalid by reason only that it was not made or issued in both official languages.

110.5.1 Commentary

For commentary, see: Canadian Refugee Procedure/Decisions#In what language or languages must written decisions be made available?².

110.6 References

1. *Official Languages Act*, RSC 1985, c 31 (4th Supp), <³>.

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Decisions#In_what_language_or_languages_must_written_decisions_be_made_available?

³ <https://canlii.ca/t/530s1>

111 Privacy Act

Privacy is the default in the refugee status determination process in Canada. Within the Immigration and Refugee Protection Act, this is provided for by s. 166 of the Act, which stipulates that, subject to exceptions, proceedings before the Refugee Protection Division must be held in the absence of the public. For more detail, see: Canadian Refugee Procedure/Section 166 - Proceedings must be held in the absence of the public¹. This provision also interacts with the separate federal *Privacy Act*, as noted below.

111.1 Privacy Act

The *Privacy Act*^[1] provides Canadians, permanent residents, individuals physically present in Canada, and, as of July 2022,^[2] foreign nationals abroad with a right of access to their personal information held by the government. For more information, see: Canadian Refugee Procedure/The right to an independent decision-maker#Access to information rights under the Privacy Act and Access to Information Act apply to files and recordings made of hearings².

111.2 References

1. Privacy Act, RSC 1985, c P-21, <³> retrieved on 2021-09-02.
2. Canada Gazette, Part 2, Volume 155, Number 15: Privacy Act Extension Order, No. 3, <⁴> (Accessed September 2, 2021).

¹ https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Section_166_-_Proceedings_must_be_held_in_the_absence_of_the_public
https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#Access_to_information_rights_under_the_Privacy_Act_and_Access_to_Information_Act_apply_to_files_and_recordings_made_of_hearings

² https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/The_right_to_an_independent_decision-maker#Access_to_information_rights_under_the_Privacy_Act_and_Access_to_Information_Act_apply_to_files_and_recordings_made_of_hearings

³ <https://canlii.ca/t/55583>

⁴ <https://www.gazette.gc.ca/rp-pr/p2/2021/2021-07-21/html/sor-dors174-eng.html>

112 Chairperson's Guidelines

113 Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues

113.1 The Guideline

The text of the relevant Guideline reads as follows:^[1]

113.2 Introduction

Children, persons under 18 years of age, can make a claim to be a Convention refugee and have that claim determined by the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB). 'The Immigration Act' does not set out specific procedures or criteria for dealing with the claims of children different from those applicable to adult refugee claimants, except for the designation of a person to represent the child in CRDD proceedings. The procedures currently being followed by the CRDD for an adult claimant may not always be suitable for a child claimant.

The international community has recognized that refugee children have different requirements from adult refugees when they are seeking refugee status. The United Nations 'Convention on the Rights of the Child' (CRC) has recognized the obligation of a government to take measures to ensure that a child seeking refugee status receives appropriate protection. In addition, the United Nations High Commissioner for Refugees (UNHCR) has issued guidelines on the protection and care of refugee children.

There are three broad categories of children who make refugee claims at the IRB. In all three categories, there are procedural and evidentiary issues which affect the child claimant:

The first category consists of children who arrive in Canada at the same time as their parents or some time thereafter. In most cases, the parents also seek refugee status. In these situations, the child should be considered an accompanied child. If the child arrives at the same time as the parents, then his or her claim is usually heard jointly^{Note 6} with the parents but a separate refugee determination is made.

The second category consists of children who arrive in Canada with, or are being looked after in Canada by, persons who purport to be members of the child's family. If the CRDD is satisfied that these persons are related to the child, then the child should be considered an accompanied child. If the CRDD is not satisfied as to the family relationship, then the child should be considered an unaccompanied child.

The third category consists of children who are alone in Canada without their parents or anyone who purports to be a family member. For example, an older child may be living on his or her own or a child may be in the care of a friend of the child's family. These children should be considered unaccompanied.

These 'Guidelines' will address the specific procedural issue of the designation of a representative and the more general procedural issue of the steps to be followed in processing claims by unaccompanied children. The

'Guidelines' will also address the evidentiary issues of eliciting evidence in a child's claim and assessing that evidence.

113.3 Procedural Issues

In determining the procedure to be followed when considering the refugee claim of a child, the CRDD should give primary consideration to the best interests of the child.

The best interests of the child principle has been recognized by the international community as a fundamental human right of a child.⁷ In the context of these Guidelines, this right applies to the process to be followed by the CRDD. The question to be asked when determining the appropriate process for the claim of a child is what procedure is in the best interests of this child? With respect to the merits of the child's claim, all of the elements of the Convention refugee definition must be satisfied.⁸

The phrase best interests of the child is a broad term and the interpretation to be given to it will depend on the circumstances of each case. There are many factors which may affect the best interests of the child, such as the age, gender,⁹ cultural background and past experiences of the child, and this multitude of factors makes a precise definition of the best interests principle difficult.

113.3.1 This guideline is to be taken into account in a procedural, not a substantive manner

The *Chairperson Guidelines 3* are to be taken into account in a procedural, not a substantive manner: *Zidan v Canada*.^[2] The *Chairperson Guidelines 3* concern the fair conduct of a hearing and not deficiencies in the claim itself: *Newton v Canada*.^[3]

113.4 References

1. Immigration and Refugee Board of Canada, *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*, Effective date: September 30, 1996, <¹> (Accessed February 10, 2020).
2. *Zidan v Canada (Citizenship and Immigration)*, 2021 FC 170 [per Little J] at para 40.
3. *Newton v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15385 (FC) [per Pelletier J] at para 18.

1 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir03.aspx>

114 Guideline 4 - Gender Considerations in Proceedings Before the Immigration and Refugee Board

Women and girls constitute 47 percent of refugees and asylum-seekers globally.^[1] The adoption of guidelines for protection in cases of gender-related persecution has been described as an improvement in the implementation of the 1951 Refugee Convention by academic commentators.^[2] Canada's guidelines are part of an international trend to implement such guidelines or to legislate sex as an additional cause for recognition as a refugee, as has been done in El Salvador, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela.^[3]

114.1 The Guideline

The text of the relevant Guideline is available on the IRB website.^[4]

114.2 General commentary

114.2.1 The guidelines may only be applied where gender is at issue in the proceeding or claim

In *Agaman v. Canada*, the court held that the Chairperson's Guideline 4 could not be applied in the case because a fear of persecution based on gender was not alleged and there were no facts to support such persecution or other difficulties specific to the female applicant's gender:

Les demandeurs ont également fait valoir que la SPR n'a pas « bien pris en considération » les *Directives numéro 4*. À cet égard, ils affirment qu'étant donné qu'ils n'ont plus de statut permanent au Brésil, ils devront retourner en Haïti. Ils soutiennent que la SPR aurait dû examiner si la demanderesse bénéficierait d'une certaine protection en Haïti, celle-ci étant ciblée par les partisans de Lavalas en tant que conjointe du demandeur. Ils reprochent à la SPR de n'avoir posé aucune question à la demanderesse sur le sujet et de n'avoir fait aucune mention des *Directives numéro 4* dans ses motifs. La Cour estime cet argument mal fondé. La demanderesse n'a jamais allégué une crainte de persécution fondée sur le sexe et il n'y a pas de faits tendant à démontrer une telle persécution ni de difficultés spécifiques liées à son sexe. Les *Directives numéro 4* ne trouvent pas d'application dans toutes les situations où une femme demande la protection. Il faut que le sexe d'une demanderesse joue un rôle dans sa crainte de persécution. La crainte de persécution en l'espèce est exclusivement basée sur son association avec le père du demandeur et à son passé politique. Il n'a pas été question de persécution ou

discrimination fondée sur le sexe. Par ailleurs, la Cour n'a relevé aucune insensibilité à l'égard de la demanderesse.^[5]

114.2.2 Not mentioning the guidelines will not be fatal to a decision where the record demonstrates compliance with them

The Guidelines are intended to ensure that gender-based claims are heard with compassion and sensitivity.^[6] Even where the RPD has not mentioned the *Gender Guidelines* in its reasons, the RPD will not have erred where it has respected the intent and spirit of them in the case at hand. One RAD panel reaching this conclusion commented: "I note that the Appellant does not point to any evidence that the RPD was insensitive or inappropriate in its questions, or that it conducted the hearing in a way that was insensitive to the Appellant's emotional state or her well-being."^[7] As such, the RAD held in that case that despite not mentioning the guidelines in the original decision, this was not a basis on which to overturn the decision in and of itself. The failure to specifically mention the Gender Guidelines does not mean that they were not considered.^[8] On appeal to the RAD, a claimant should point to a specific issue regarding the RPD's application of the Gender Guidelines and explain how the alleged failure to consider the Gender Guidelines led to an erroneous finding.^[9] In contrast, however, where a panel has not meaningfully applied the Gender Guidelines, the decision should not generally be considered a reasonable one and the courts have frequently returned matters to the Board for redetermination.^[10]

114.2.3 The Board can consider the Gender Guidelines where a claim involves the "secondary victims" of gendered persecution, such as parents

The Refugee Appeal Division has concluded that "Although the Chairperson's Guideline 4 addresses the primary victim of rape, I find that the secondary victims, in this case the parents, must benefit from a certain sensitivity and appropriate understanding on behalf of the decision-maker when he questions them about this".^[11] That was a case in which the primary victim of the gendered persecution was not a party to the refugee claim, but the RAD nonetheless, on the basis of, *inter alia*, insensitive questions that had been posed to these parents, remitted the matter to the RPD for reconsideration and ordered that "The RPD must take into consideration the Chairperson's Guideline 4 in the adjudication of this case."^[12]

114.2.4 The Division is required to consider the guidelines where there are inconsistencies in testimony and the applicant has suffered abuse

If a woman has suffered abuse and has inconsistencies between her testimony and her BOC narrative, the RPD is obliged to weigh the evidence with the Gender Guidelines in mind.^[13] It is a best practice for the Division to show that it has considered the guidelines while it is making credibility findings, and not to simply consider them in a separate section at the end of its reasons.^[14] In *Okpanachi v. Canada*, the Federal Court found that the Board had erred when it did not do so:

Here, the RAD did not even refer to the Gender Guidelines in its credibility analysis, let alone assess why the omissions cannot be explained by the factors set out in the Gender Guidelines, before accepting the RPD's conclusion on credibility based on the omissions. As such, I find the RAD has not taken into account the Gender Guidelines "*in a meaningful way*" when it adopted the RPD's credibility finding based on the omissions in the BOC.^[15]

114.2.5 A medical diagnosis is not required for gender-related factors to be relevant in explaining a claimant difficulties in giving evidence

Footnote 31 of the guidelines states that "In *R v. Lavallee*, the Court indicated that expert evidence can assist in dispelling these myths and be used to explain why a woman would remain in a battering relationship." That said, nowhere do the Gender Guidelines state a medical diagnosis is required for gender-related factors to be relevant in explaining a claimant's difficulties in giving evidence. If a panel refuses to take into account the guidelines and gender in assessing a claimant's evidence on the basis that they have not provided a professional diagnosis, they will have acted on the basis of an irrelevant consideration.^[16]

114.3 References

1. UNHCR, *2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons (2009)*, available at <¹>, p. 2.
2. Andreas Zimmermann (editor), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*. Oxford University Press, 2011, 1799 pp, ISBN 978-0-19-954251-2², *Regional Developments: Americas*, Authors: Piovesan and Jubilut, at p. 216 (para. 44).
3. Murillo Gonzalez, J.C., LA PROTECCIÓN INTERNACIONAL DE REFUGIADOS EN EL CONTINENTE AMERICANO: NUEVOS DESARROLLOS, in *XXXV Curso de Derecho Internacional*, <³> pp. 351.
4. Immigration and Refugee Board of Canada, *Chairperson's Guideline 4: Gender Considerations in Proceedings Before the Immigration and Refugee Board*, Effective date: July 18, 2022, <⁴> (Accessed September 17, 2022).
5. *Elisias, Agaman v. M.C.I.* (F.C., No. IMM-974-19), Roussel, December 18, 2019; 2019 FC 1626, paras. 24-26.
6. *Singh v. Canada (Citizenship and Immigration)*, 2022 FC 1692 (CanLII), at para 33, <⁵>, retrieved on 2023-06-28
7. *X (Re)*, 2016 CanLII 106273 (CA IRB), par. 33, <⁶>, retrieved on 2020-05-13.
8. *Correa Juarez v Canada (Citizenship and Immigration)*, 2010 FC 890 at paras 17-18.

1 <http://www.unhcr.org/4a375c426.html>

2 <https://en.wikibooks.org/wiki/Special:BookSources/9780199542512>

3 https://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXV_curso_derecho_internacional_2008_Juan_Carlos_Murillo_Gonzalez_2.pdf

4 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx>

5 <https://canlii.ca/t/jtdwb#par33>

6 <http://canlii.ca/t/h5qg2#par33>

9. *Yu v. Canada (Citizenship and Immigration)*, 2021 FC 625 (CanLII), at para 22, <⁷>, retrieved on 2023-09-20.
10. e.g. *Okpanachi v. Canada (Citizenship and Immigration)*, 2022 FC 212 (CanLII), at para 33, <<https://canlii.ca/t/jmn5w#par33>>, retrieved on 2022-06-09.
11. *X (Re)*, 2020 CanLII 101262 (CA IRB), par. 14, <⁸>, retrieved on 2020-12-21.
12. *X (Re)*, 2020 CanLII 101262 (CA IRB), par. 21, <⁹>, retrieved on 2020-12-21.
13. *Harry v Canada (Citizenship and Immigration)*, 2019 FC 85 at para 34.
14. *Okpanachi v. Canada (Citizenship and Immigration)*, 2022 FC 212 (CanLII), at para 22, <¹⁰>, retrieved on 2022-06-09.
15. *Okpanachi v. Canada (Citizenship and Immigration)*, 2022 FC 212 (CanLII), at para 27, <¹¹>, retrieved on 2022-06-09.
16. *Nara v Canada (Citizenship and Immigration)*, 2012 FC 364 at para 35.

7 <https://canlii.ca/t/jghzb#par22>

8 <http://canlii.ca/t/jc75m#par14>

9 <http://canlii.ca/t/jc75m#par21>

10 <https://canlii.ca/t/jmn5w#par22>

11 <https://canlii.ca/t/jmn5w#par27>

115 Guideline 8 - Concerning Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada

115.1 The Guideline

The text of the Guideline is available on the IRB website.^[1] Commentary on it follows.

115.2 2. Definition of vulnerable persons

2.1 For the purposes of this guideline, vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity.

2.2 The definition of vulnerable persons may apply to persons presenting a case before the IRB, namely, to refugee protection claimants (in the RPD), appellants (in the IAD and in the RAD), and persons concerned (in the ID). In certain circumstances, close family members of the vulnerable person who are also presenting their cases before the IRB may qualify as vulnerable persons because of the way in which they have been affected by their loved one's condition.

2.3 Persons who appear before the IRB frequently find the process difficult for various reasons, including language and cultural barriers and because they may have suffered traumatic experiences that resulted in some degree of vulnerability. IRB proceedings have been designed to recognize the very nature of the IRB's mandate, which inherently involves persons who may have some vulnerabilities. In all cases, the IRB takes steps to ensure the fairness of the proceedings. This guideline addresses difficulties that go beyond those that are common to most persons appearing before the IRB. It is intended to apply to individuals who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability.

2.4 Wherever it is reasonably possible, the vulnerability must be supported by independent credible evidence filed with the IRB Registry.

115.2.1 The Practice Notice on Covid-19 does not explicitly speak to the provision of medical evidence for vulnerable person applications

Section 2.4 of the guideline provides that whenever it is reasonably possible, the vulnerability must be supported by independent credible evidence filed with the IRB Registry. This will normally take the form of expert evidence of the sort discussed at section 8 of the guideline

(below). During the Covid-19 period, the Board has issued a practice notice entitled *Refugee Protection Division: Practice Notice on the resumption of in-person hearings*. Section 3.2 of that practice notice is entitled "Waiver (removal) of requirement to file a medical certificate" and it reads "Until further notice, where the RPD Rules contain a requirement to provide a medical certificate, this requirement as well as the requirement to explain why there is no medical certificate, is waived. [emphasis added]".^[2] Footnote 6 of that practice notice lists what Rules it applies to, none of which relate to vulnerable persons:

This applies to applications to extend the time to provide the BOC Form (RPD Rules 8(3), (4) and (5)); applications to change the date or time of a hearing (RPD Rules 54 (6), (7), and (8)); and a certificate provided in support of explanations given at a special hearing on abandonment (RPD Rules 65(5), (6); and (7)).

Vulnerable persons are discussed in the RPD Rules, but they are not discussed in any of the aforementioned rules, instead they are discussed at Rules 1 (Canadian Refugee Procedure/Definitions¹) and 53 (Canadian Refugee Procedure/Changing the Location of a Proceeding²), among others. As such, the practice notice removing the requirement to file medical evidence during the Covid-19 period does not in and of itself modify Guideline 8. That said, as set out in the IRB's *Practice Notice – Special Measures Due to Covid-19*, the RPD commits to apply its rules flexibly where the parties have difficulty complying with them due to the COVID-19 pandemic.^[3]

115.2.2 2.3: This guideline applies to the more severe cases of vulnerability

Section 2.3 of the guideline states that "This guideline addresses difficulties that go beyond those that are common to most persons appearing before the IRB. It is intended to apply to individuals who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability." In *Conde v. Canada*, the claimant submitted a psychological assessment which diagnosed him with post-traumatic stress disorder (PTSD). The Member concluded that this fact alone, together with the details of the psychological assessment provided, did not indicate difficulties that go beyond what is common for those appearing before the RPD:

I find that neither of these psychological assessments indicate difficulties that go beyond what is common for those appearing before the RPD. Dr. Devins diagnosed the principal claimant with post-traumatic stress disorder (PTSD): however, this type of diagnosis is extremely common for people who appear before the RPD, as most claimants, if not all, have experienced trauma. In any event, Dr. Devins' assessments do not indicate a severe impairment. Dr. Devins indicates that the principal claimant responded directly to questions during the assessment and cooperated fully.^[4]

The court rejected this reasoning, stating "There is no indication of what qualifications the Member has to make this kind of assessment and decide that the PA's psychological trauma is the same as other applicants."^[5] This was in a context in which the court accepted that the claimant had experienced "severe trauma", including having been shot, trauma which

1 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Definitions

2 https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Changing_the_Location_of_a_Proceeding

the court found had a "continuing impact upon his psychological health."^[6] As such, *Conde v. Canada* emphasizes that when determining whether a given claimant faces "particular difficulty", one should not place undue emphasis on the fact that many persons appearing before the Board have PTSD diagnoses and should instead focus on the totality of their circumstances.

115.3 5. General principles

5.1 A person may be identified as vulnerable, and procedural accommodations made, so that the person is not disadvantaged in the presentation of their case. The identification of vulnerability will usually be made at an early stage, before the IRB has considered all the evidence in the case and before an assessment of the person's credibility has been made.

5.2 A person may be identified as vulnerable based, in part, on alleged underlying facts that are also central to the ultimate determination of their case before the IRB. An identification of vulnerability does not indicate the IRB's acceptance of the alleged underlying facts. It is made for the purpose of procedural accommodation only. Thus, the identification of a person as vulnerable does not predispose a member to make a particular determination of the case on its merits. Rather, a determination of the merits of the case will be made on the basis of an assessment of all the evidence.

5.3 Similarly, evidence initially used to identify a vulnerable person and to make procedural accommodations may not have been tested through credibility assessments or other means. If such evidence is then used to adjudicate the merits of the case, the member should ensure that the parties are given an opportunity to address this evidence as it relates to the merits of the case. This means that submissions may be made about the relevance of the evidence, and the evidence may be tested through such means as questioning by the parties and the member, and other methods. The credibility and probative value of the evidence may then be assessed by the member, even though the IRB previously accepted the evidence, for the purpose of identifying vulnerability and making procedural accommodations.

115.3.1 An identification of vulnerability will generally continue to apply to a redetermination of a claim

Section 5.1 of the Guideline notes that the identification of vulnerability will usually be made at an early stage in the process. In *Conde v. Canada*, the court considered a case where a claimant was designated as a vulnerable person, the Board's decision was overturned on judicial review, and at the redetermination of their claim, the panel considered whether they should continue to be recognized as vulnerable. In that case, the court noted that the Board "revoked" the claimant's vulnerable person status at the commencement of the new hearing redetermining the claim, implying that the fact that the claimant had been accepted as a vulnerable person at previous hearings meant that he should presumptively continue to be recognized as such at this new hearing.^[5] In this way, the effect of a vulnerable person designation appears to mirror the Board's rules for appointing a designated representative for a claimant, which also continue to apply to subsequent proceedings before the institution: Canadian Refugee Procedure/Designated Representatives#RPD Rule 20(6) - What proceedings the designation applies to³.

³ [https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives#RPD_Rule_20\(6\)_-_What_proceedings_the_designation_applies_to](https://en.wikibooks.org/wiki/Canadian_Refugee_Procedure/Designated_Representatives#RPD_Rule_20(6)_-_What_proceedings_the_designation_applies_to)

115.4 8. Expert evidence

8.1 A medical, psychiatric, psychological, or other expert report regarding the vulnerable person is an important piece of evidence that must be considered. Expert evidence can be of great assistance to the IRB in applying this guideline if it addresses the person's particular difficulty in coping with the hearing process, including the person's ability to give coherent testimony.

8.2 The IRB may suggest that an expert report be submitted but will not order or pay for it.

8.3 Generally, experts' reports should contain the following information:

- # the particular qualifications and experience of the professional that demonstrate an expertise that pertains to the person's particular condition;
- # the questions that were posed to the expert by the person who requested the expert report;
- # the factual foundation underlying the expert's opinion;
- # the methodology used by the expert in assessing the person, including whether an interview was conducted, the number and length of interviews, whether tests were administered, and, if so, what those tests were and the significance of the results;
- # whether the person is receiving treatment and, if so, the nature of the treatment and whether the treatment is controlling the condition;
- # whether the assessing expert was also treating the person at the time of producing the report; and
- # the expert's opinion about the person's condition and ability to participate in the hearing process, including any suggested procedural accommodations and why particular procedural accommodations are recommended.

8.4 Experts should not offer opinions on issues within the exclusive jurisdiction of the decision-maker, such as the merits of the person's case.

8.5 An expert's opinion is not in itself proof of the truthfulness of the information upon which it is based. The weight given to the report will depend, among other things, on the credibility of the underlying facts in support of the allegation of vulnerability.

8.6 The absence of expert evidence does not necessarily lead to a negative inference about whether the person is in fact vulnerable. The IRB will consider whether it was reasonably possible to obtain such evidence.

115.4.1 While expert evidence is helpful to the Board, it is not necessary and the Board may identify any individual as vulnerable even in the absence of expert evidence on point

Although an expert report or other independent credible evidence is the preferred way to prove vulnerability, it is not obligatory. The absence of expert evidence will not necessarily lead to a negative inference concerning vulnerability; the Board must consider whether it was "reasonably possible" to obtain such evidence, per para. 8.6 of the guidelines. As Janet Cleveland notes in an article on point, in several cases the IRB has concluded that a person was vulnerable based on a letter from counsel describing behaviour consistent with mental health problems.^[7] She states that there have also been cases in which the Board recognized the person as vulnerable and ordered an early hearing on its own initiative based simply on the claimant's BOC form as well as behaviour observed by Board staff.

115.4.2 The Board should not expect revised or updated expert evidence without reason

In *Conde v. Canada*, the claimant had submitted two medical reports, dated one and six years prior to the hearing. The claimant had been designated as a vulnerable person by a previous panel of the Board. The Board's previous decision had been overturned on judicial review and remitted to the Board for redetermination. On redetermination, the RPD revoked the claimant's vulnerable person status, stating "I considered both the psychological assessment of Dr. Devins dated October 9, 2013 and the updated psychological assessment dated January 11, 2018. The RPD was not provided with more up to date psychological assessment for this second re-determination." The court stated that, with respect to the panel's decision, "there was no reason, given the previous psychological evidence and the acceptance of the [applicant] as a vulnerable person at previous hearings, to expect that he needed to provide more psychological evidence without notice. Clearly, this was procedurally unfair."^{5]} As such, if a panel comments on a psychological report being dated, the panel should provide a reason as to why the passage of time reduces the weight that is properly attributed to the report.

115.5 References

1. Immigration and Refugee Board of Canada, *Guideline 8 - Concerning Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada*, Amended: December 15, 2012, <⁴> (Accessed February 9, 2020).
2. Immigration and Refugee Board of Canada, *Refugee Protection Division: Practice Notice on the resumption of in-person hearings*, June 23, 2020, <⁵> (Accessed August 1, 2020).
3. Immigration and Refugee Board of Canada, *Refugee Protection Division: Practice Notice on the resumption of in-person hearings*, June 23, 2020, <⁶> (Accessed August 1, 2020), section 3.5.
4. *Losada Conde v. Canada (Citizenship and Immigration)*, 2020 FC 626 (CanLII), par. 16, <⁷>, retrieved on 2020-08-31.
5. *Losada Conde v. Canada (Citizenship and Immigration)*, 2020 FC 626 (CanLII), par. 96, <⁸>, retrieved on 2020-08-31.
6. *Losada Conde v. Canada (Citizenship and Immigration)*, 2020 FC 626 (CanLII), par. 103, <⁹>, retrieved on 2020-08-31.
7. Cleveland, J. (2008). The Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada: A Critical Overview. *Refuge: Canada's Journal on Refugees*, 25(2), 119-131. Retrieved from ¹⁰, page 121.

4 <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>

5 <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/rpd-pn-hearing-resumption.aspx>

6 <https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/rpd-pn-hearing-resumption.aspx>

7 <http://canlii.ca/t/j8863#par16>

8 <http://canlii.ca/t/j8863#par96>

9 <http://canlii.ca/t/j8863#par103>

10 <https://refuge.journals.yorku.ca/index.php/refuge/article/view/26035>

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¹⁹ Chapter 117 on page 917

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