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Mapping Canada's Refugee
Determination System:
1950-2020

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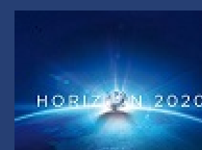

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Mapping Canada's Refugee Determination System: 1950-2020

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1. Introduction

In 1986, Canada was awarded the Nansen medal by the United Nations High Commissioner for Refugees, in recognition of their, "major and sustained contribution to the cause of refugees" (CCR, 2009). The Nansen medal, established in 1954, is awarded annually to an individual, group or, organization in recognition of outstanding service and commitment to the cause of refugees and displaced or stateless people (CCR, 2009). This is in part due to Canada's ongoing commitment to improve the country's refugee determination process to ensure an accessible, fair, and efficient determination process. Although Canada's determination system is not without flaws, over the course of the second half of the twentieth century, the country made several amendments and improvements to the refugee determination system (RDS) through a variety of policy and legislative reforms. This report will examine the evolution of Canada's RDS over the course of the second half of the twentieth century. Between the years 1950 to 2020, Canada saw a tremendous shift and introduction of a variety of reforms, policies, and legislation that drastically changed the RDS. Among such changes include: the adoption of the *1951 Refugee Convention*; *The Immigration Act* of 1976; the extension of Canada's *Charter of Rights and Freedoms* to non-citizens; and the establishment of the Immigration and Refugee Board (IRB) of Canada, Canada's immigration and refugee adjudication body. Importantly, the creation of the IRB drastically changed the terrain of refugee law and protection in Canada. As will be evident throughout the report, the IRB becomes the primary actor, in tandem with the Canadian courts, in creating guidelines, policies, and special programs that help to better secure the protection of refugee claimants in Canada. As such, this report will serve as an overview of the various reforms and will explore the impact of such reforms on Canada's refugee determination system with a particular focus on Canada's response to War Refugees.

2. 1948-1976 RSD Process. Canadian Immigration and Refugee Legislation 1948-1976: Post-War Humanitarianism

The history of Canada's immigration system, specifically policy and practice provide important insights into several aspects of refugee determination. Canada's immigration policy in the post-war decade was characterized by questionable practices that were discriminatory (Burtseva, 2017, 206). This came at a time when the Canadian government was developing new immigration policies that addressed many issues and challenges related to immigration and refugees. Among them were displaced persons after the Second World War including those in UN European Shelters that had survived concentration and labour camps as well as war brides who had married Canadian fighters (Knowles, 2007 in Burtseva, 2017, 71). While there was a reluctance and rejection among the authorities to liberalize Canada's immigration policy, the Canadian government had pledged to the United Nations to ease restrictions and reduce barriers to immigration. In 1947, Canada admitted displaced persons from Europe who had been in refugee camps with the help of the International Refugee Organization. Five Canadian teams with immigration experts had been sent to Austria and Germany to select individuals for resettlement from UN refugee camps. In 1948 the Canadian government permitted the entry of Baltic refugees in addition to 261 refugees from Sweden (Burtseva, 2017, 72).

The United Nations General Assembly in Paris in 1948 saw the adoption of the Universal Declaration of Human Rights where the "the promotion of universal respect for and observance of human rights and fundamental freedoms" became an international legislation. Accordingly, all persons were recognized as free and entitled to equality of rights (social, economic, political, legal). All persons were also entitled to practice their beliefs, traditions, mobility, and religion freely without discrimination, torture or persecution on the basis of colour, race, sex, language,

nationality, political thought, or being part of a social group (UN General Assembly, 1948). All countries as members of the United Nations were to adhere to the Declaration by reflecting it in national and international policies as well as law (Burtseva, 2017, 210). Canada did not sign the Declaration until 1969 citing security threats that would not allow the government to be able to deport those it suspected were communists (Epp, 2017, 13).

In 1949, legislation defined categories of people that can be admitted to Canada as immigrants. The first included a "favored group" like citizens from Britain, Ireland, France and the United States who did not have a criminal history and were deemed as healthy individuals. The second were the relatives of Canadian citizens or anyone that was "legal" in Canada. The third group included farm labourers, those working in mining or the forest industries as well as those in agriculture (Burtseva, 2017). Refugees were subject to the same rules and regulations as economic immigrants. "The Canadian National Committee for Refugees advised a parliamentary committee that Canadian law should be changed to exempt refugees from ordinary restrictions on immigration and subject them only "to whatever special restrictions on immigration considered by Parliament to be necessary and justifiable in face of the moral claim of the refugees to the right of sanctuary."" (as cited by the Canadian Council for Refugees, n.d.). In 1950, an Order In Council (P.C. 2856) passed as part of the Canadian government's efforts to liberalize its immigration policy. However, this document was seen as discriminatory because just like the three categories of who can be admitted to Canada, it outlined what a "suitable" newcomer should be. Those admitted had to be "desirable in their peculiar customs, habits, modes of life and needed to become readily adapted and integrated into the life of the Canadian community" according to conditions like social, economic, climatic, industry and labor (Burtseva, 2017, 79). More specifically, admittance was not allowed for those from the Asiatic race (Order re landing of immigrants in Canada, 1950 in Burtseva, 2017, 79).

In 1950, another international development played a role in shaping Canada's immigration policy, the adoption of the 1951 Refugee Convention. The purpose of this act was to oblige countries to guarantee the rights of refugees like protecting their family and children, freedom of mobility, and equality in labor and social rights among others. Further, refugees were to not be penalized over method of entry, specifically illegal entry, or have any charges or taxes imposed on them (Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951 in Shoyelle, 2004, 548). Canada did not ratify the *Convention relating to the Status of Refugees* (Refugee Convention) until 1969, 15 years after the Convention entered into force in 1954. As stated by the Canadian Council for Refugees, "the Ministers were concerned that the Convention would impede Canada's ability to deport persons they considered a security risk, especially Communists. More generally, they worried that the Convention would confer rights, including "the right to be represented in the hearing of his appeal against deportation" (CCR, 2009).

Shortly after in 1952, the Canadian government adopted a new Immigration Act where the Governor in Council would be responsible for deportations as well as authorizing or prohibiting admissions into Canada for various reasons, including nationality, ethnicity, citizenship, class, country of origin, occupation or even customs or habits that are deemed "peculiar" (*Immigration Act*, 1952 in Burtseva, 2017, 80). Despite the restrictive policies outlined in the 1952 *Immigration Act* regarding the entry of non-Europeans as well as not signing the 1951 Refugee Convention, Canada participated and continued to support international refugee initiatives. For example, Canada admitted Palestinian refugees from the Middle East (United Nations, 2020, 2). In 1955, the Canadian Department of External Affairs announced in a press release that it has "tentatively decided to admit a limited number of Palestinian refugees as immigrants to Canada" (Malloy in Burtseva, 2017, 82). As a result of the Israeli occupation, over 900,000 Palestinian Arabs were

displaced to camps in Syria, Lebanon and Jordan (United Nations, 2020, 2). The United Nations Relief and Rehabilitation Administration (UNRRA) requested from Canada to resettle Palestinian refugees according to its international obligations under the Convention (Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951 in Burtseva, 2017, 81). Canada resettled 39 Palestinian refugees- after a visit to Lebanon and Jordan- that spoke either English or French and were skilled professionals in order to ensure employment and integration into Canadian society (Knowles, 2007, 81). These efforts would set a precedent for the decades to come regarding admission of refugees from non-Asian countries (United Nations, 2020, 2).

In 1956, resettlement efforts continued for displaced persons as a result of the Soviet invasion of Hungary. Between 1956-7, Canada admitted 37 000 Hungarian refugees through special programs like the Assistance of Provincial Governments in the Resettlement of Hungarian Refugees, Emergency Assistance for Hungarian Refugees, and Air Bridge to Canada in addition to a $676 666 contribution to the United Nations Appeal for Hungarian Refugees (Report on Hungarian Refugees, 1957 in Burtseva, 2017). The case of Hungarian refugees represents an important moment in Canadian history. Prior to this, “Never before had such a large number of refugees arrived in Canada in such a short time” (Knowles, 2016, 14). The political discourse at the time highlighted the importance of refugee intake to avoid a communist victory. The Minister of Citizenship and Immigration, Mr. Pickersgill, decided to remove barriers for as many Hungarian refugees “as want to come and for whom we can provide transportation” (Eayrs, 1959 in Rawlyck, 1962, 295). This open door policy was soon shut by Minister Pickersgill following political pressure from the Ontario government where the majority of refugees settled. At the time, there were many unemployed Canadians that voiced concerns about immigration as well as a sentiment that “too many immigration from Continental Europe were being admitted to Canada” (Rawlyck, 1962, 295). In 1957, Minister Pickersgill announced that large-scale immigration would come to a halt in an effort to decrease the number of people who have no “connection” to Canada (Rawlyck, 1962, 295).

While this addressed the concerns of some groups in Canada, there were many factors that saw a continued intake of refugees. These factors included a recognition that there was an insufficient growth in Canada’s population which made immigration necessary (Epp, 2017, 13). Other factors included international pressures, decolonization in parts of the world like Latin America, Africa and Asia, civil war and a growing activism and advocacy movement that pushed for non-discrimination and a humanitarian approach to refugee policy (Epp, 2017, 13). This was reflected in refugee admissions. For example, in 1959 and 1960, 325 refugees who had tuberculosis as well as 500 family members were admitted despite policies (as outlined in the 1952 *Immigration Act*) that required refugees to be healthy (Government of Canada, 2021; Epp, 2017, 13).

In 1962, an Order-In-Council was introduced by Conservative Minister of Citizenship and Immigration Ellen Fairclough to eliminate overt racial discrimination in Canada’s admission policy for newcomers (Van Dyk, n.d.). This made immigration policy more oriented towards a focus on skills rather than country of origin or ethnicity. This followed the introduction of the *Canadian Bill of Rights* in 1960 by Prime Minister John Diefenbaker prohibiting discrimination on the basis of race, religion, nationality, sex, and color. It also recognized and declared rights and freedoms including the right to life, liberty and security of the person, equality before the law, freedom of religion, speech, assembly and freedom of the press (*Canadian Bill of Rights* S.C. 1960, c. 44). This along with the anti-discrimination legislation both represented a shift in policy and was momentous for individual freedom, at least on a symbolic level (Clement, 2009, 47). In fact, the legislation growingly was unused and was also weakly enforced (Clement, 2009, 47). For example,

the *Canadian* Bill of Rights outside of the 1960s was “never used to invalidate government legislation”. It was seen as a vague document that was not only limited but also was “elementary”, “pretentious” and “ineffective”, amount to what human rights activists call a “weakness” in Canada’s policies (Clement, 2009, 49).

Despite these objections, the 1967 Protocol Relating to the Status of Refugees was introduced in an attempt to provide a degree of clarity pertaining to the term refugee and Canada’s commitment to individuals that fall outside of the Convention Refugee Status (Shoyelle, 2004, 549). The Protocol stated that, “the term refugee shall mean any person within the definition of article 1 of the Convention as if the words ‘as a result of events occurring before 1 January 1951’ and ‘ as a result of such events in article 1 (A)(2)’ were omitted” (Shoyelle, 2004, 549). As legal scholar Olubgbenga Shoyelle notes, that although the Protocol formally extended the scope of the term ‘refugee’, there is a caveat to the effect that those States which had already made the declaration under Article 1 (B)(1)(A) of the Convention to restrict its application in their jurisdiction to European refugees could maintain that restriction (Shoyelle, 2004, 549). She goes on to state that:

> “The failure of the protocol to substantively alter the definition also implies that it is only persons who are forced to migrate by reasons of fear of persecution on the ground of civil and political status are still entitled to the benefits of international protection which derives from the Convention. In effect, most developing nations’ refugees whose flights are prompted by civil strife, political instability, and natural disasters remain excluded from the purview of the 1951 Convention and the 1967 Protocol.” (Shoyelle, 2004, 550).

Despite this criticism, the 1970s saw the admission of 7000 South Asian refugees who had been forced to leave Uganda (Government of Canada, 2021; Epp, 2017, 14). These refugees were brought to Canada on flights that were chartered by the government and with the help of the military. The public welcomed refugees and the discourse at the time painted them as “non threatening” and “exotic” refugees (Epp, 2017, 14). To expand on the image of accepting non-White refugees Canada also welcomed in 1975 10 000 Lebanese refugees from the Middle East (Epp, 2017, 15). Up until this point in time, refugees fell under the umbrella of immigration and were not seen as distinct categories of immigrants. This changed in 1973 when the Canadian government established a framework through a formal administrative process that determined the eligibility of refugee claims (Raska, 2020, n.p.). Through an interdepartmental committee that included members from the Department of External Affairs as well as the Department of Manpower and Immigration would meet and assess the credibility of asylum claims. This committee would then send their recommendations to the Minister of Manpower and Immigration who had the power to determine whether a refugee claimant was eligible to remain in Canada or be deported (Raska, 2020, n.p.). This was the first process that determined the eligibility of refugee claimants. In 1976 this framework for refugee status determination was enhanced through the introduction of a (new) Immigration Act that would create a shift in the landscape of the refugee determination system in Canada.

3. 1976-1985: A shift in the landscape of refugee determination

In 1976 a new *Immigration Act* recognized refugees as a distinct class of immigrants and made significant changes to refugee determination in Canada (Segal, 1988; Epp, 2017). For the first time in Canadian history refugees were given legal recognition as well as status on the basis of the Refugee Convention (Epp, 2017). This created a designation for different refugee groups, like asylum seekers, who now had a “legal process” to determine their refugeehood. A Refugee Status Advisory Board was formed to assess the legitimacy of these claims.

The *Immigration Act of 1976* established many of the principles and procedures of contemporary Canadian immigration law, including classes of immigrants, refugee protection mechanisms, family reunification, and federal/provincial consultations (Jones & Baglay, 2007, 10). The Act provided three avenues of refugee admission: in-land determination; resettlement through private (privates groups of five individuals) and government sponsorship; and special programs for people from specified countries (Jones & Baglay, 2007, 10-11). Additionally, three special programs – for the Indochinese, Latin American political prisoners, and Eastern European self-exiles – allowed for admission of asylum seekers within each program even if they did not fully satisfy the requirements of the Refugee Convention. In 1979-80 approximately 60,000 people were sponsored by the government as well as by churches and other voluntary associations (Knowles, 2007, 174). The Inland refugee determination process under the *Immigration Act* was complex and multi-stage. If a person was out of status at the time of launching a claim, he or she was subjected to an immigration inquiry that was adjourned to allow for the refugee claim to be decided. The first stage of the determination process involved an examination of the claim by an immigration officer. Claimant's counsel could be present and could pose questions, but witnesses were not allowed. A transcript of the examination was sent to the claimant and their counsel as well as the Refugee Status Advisory Committee (RSAC) in Ottawa. The RSAC was responsible for reviewing asylum claims and making recommendations to the Minister on their acceptability. These reviews and recommendation were based in large part on the transcript of the interview of the refugee claimant (Epp, 2017, 16).

Prior to 1976, the IAB had the responsibility of granting relief to refugees (inland) on the basis of humanitarian and compassionate grounds (Segal, 1988, 736). The new Act changed that role by giving the Minister's Special Review Committee to grant non-Convention refugees status or eligibility (Immigration Act, 1976, ss. 45 to 48 and 70 to 71; Segal, 1988). The initial determination of whether an individual is a Convention refugee did not include hearing. Section 45 of the Immigration Act, 1976 describes the procedure as follows:

45. (1) Where, at any time during an inquiry, the person who is the subject of the inquiry claims that he is a Convention refugee, the inquiry shall be continued and, if it is determined that, but for the person's claim that he is a Convention refugee, a removal order or a departure notice would be made or issued with respect to that person, the inquiry shall be adjourned and that person shall be examined under oath by a senior immigration officer respecting his claim.

(2) When a person who claims that he is a Convention refugee is examined under oath pursuant to subsection (1), his claim, together with a transcript of the examination with respect thereto, shall be referred to the Minister for determination.

(3) A copy of the transcript of an examination under oath referred to in subsection (1) shall be forwarded to the person who claims that he is a Convention refugee.

(4) Where a person's claim is referred to the Minister pursuant to subsection (2), the Minister shall refer the claim and the transcript of the examination under oath with respect thereto to the Refugee Status Advisory Committee established pursuant to section 48 for consideration and, after having obtained the advice of that Committee, shall determine whether or not the person is a Convention refugee.

(5) When the Minister makes a determination with respect to a person's claim that he is a Convention refugee, the Minister shall thereupon in writing inform the senior immigration officer who conducted the examination under oath respecting the claim and the person who claimed to be a Convention refugee of his determination.

(6) Every person with respect to whom an examination under oath is to be held pursuant to subsection (1) shall be informed that he has the right to obtain the services of a barrister or solicitor

or other counsel and to be represented by any such counsel at his examination and shall be given a reasonable opportunity, if he so desires and at his own expense, to obtain such counsel.

Persons recognized as refugees were given Minister's permits and processed for landing as permanent residents. Rejected claimants could apply to the Immigration Appeal Board (IAB) for a redetermination of their claim, a process which involved an oral hearing. This determination and appeal system was designed to handle only as small number of refugee claims and was unprepared to handle the changing refugee realities of the 1980's. Until the 1980's resettlement was the main avenue for refugee admission. However, beginning in the 1980's a growing number of individuals sought protection through the inland determination system. As a result, pressure mounted on the inland determination system and exposed its inadequacies. A serious backlog of inland applications started growing when the number of asylum arrivals climbed from 200-400 people annually in the 1970's to 3400-5200 claimants annually in the 1980s (Epp, 2017,17).

Furthermore, immigration policy would now incorporate a resettlement stream as well as an inland stream that processed the arrival of refugees at the border. This was Canada's first direct implementation of the Refugee Convention (Report of the Independent Review of the Immigration and Refugee Board, 2018). While Canada up until the 70s had a strong humanitarian reputation through the sponsorship and resettlement of refugees, the newly established inland asylum system was more of a response to international obligations, specifically the principle of non-refoulement which is prohibited by the Convention (Segal, 1988, 737). The number of asylum seekers soared in the 1980s. Every year approximately 4 000 people were claiming asylum by crossing the Canadian border (Epp, 2017).

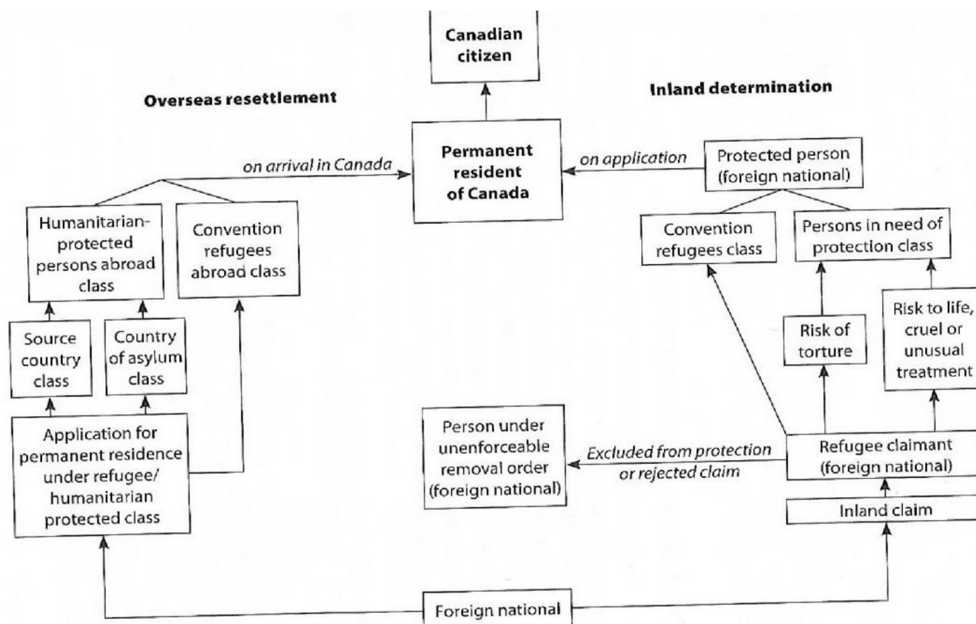
3.1. Overseas Applicants

In addition to individuals who seek refugee protection within Canada, other individuals seek related protection by Canada from outside of Canada. A majority of individuals to whom Canada offers refugee or refugee-related protection are outside of Canada. Some of these individuals may be offered protection as a result of qualifying as a Convention refugee or the overseas equivalent of persons in need of protection, other individuals may qualify under looser criteria that do not directly correspond with the inland categories (Jones & Baglay, 200, 75). In order to qualify for resettlement, an applicant must satisfy four requirements: Be in need of protection; Be outside of Canada; Seek to establish permanent residence in Canada; Have no reasonable prospect of durable solution outside Canada within a reasonable period of time (Jones & Baglay, 2007, 200).

The immigration legislation distinguishes two classes of persons who can be granted protection through resettlement: Convention refugees abroad and Humanitarian-Protected Persons Abroad. This classification reflects the grounds on which protection is granted and the refugee's personal
circumstances. The Convention Refugees Abroad class is constituted by persons who satisfy the Refugee Convention definition; where as, the Humanitarian-Protected Persons Abroad class applies to persons in refugee-like situations who do not meet one of the Convention's criteria. Applications for resettlement are assessed by visa officers either in Canadian diplomatic missions overseas or within refugee camps (Jones & Baglay, 2007, 201).[15] In addition to demonstrating need for protection, refugees must also demonstrate availability of financial resources for resettlement in Canada (Jones & Baglay, 2007, 201).[16] The possibility of making a claim – and a determination process that created options for those not considered 'Convention' refugees – on Canadian soil, along with greater ease of transportation, resulted in a notable increase in asylum-seekers. During the 1980s the number of people making claims for refugee protection at Canadian borders and also 'inland' rose dramatically. By the middle of the decade, about 4,000 individuals per year were

making a claim from inside the borders, an increase from just several hundred in the previous decade, but much less than the nearly 40,000 in the early 1990s (today averaging about 20,000 per year). Nevertheless, greater recognition of refugee issues and systems implemented to respond to them was often accompanied by efforts to limit the admissibility of refugee claimants. Economic recession in the 1980s contributed to a tightening of refugee policy through Bill C- 55 and C-84 (in effect as of 1989), which restructured the refugee determination process dramatically. Another measure to decrease numbers was contained within Bill C-86, passed in 1992, which introduced the 'safe third country' provision (Jones & Baglay, 2007, 21).
The following graph provides an illustration of the differences between the two streams of refugee claims: overseas resettlement versus inland determination:

Fig. 1. Jones & Baglay, 2007, 77.



3.2. Canadian Response to the new Asylum process

The new asylum process was met with criticism through a comparison with Canada's Sponsorship program, specifically, its private sponsorship component which was formalized in 1979 (Epp, 2017). Settlement from third countries was criticized for being more discretionary than inland determination (Segal, 1988). In other words, visa officers had the power to admit refugees meanwhile asylum seekers underwent a lengthy process to determine their eligibility (Segal, 1988). While 95% of the annual intake of refugees constituted those resettled from abroad (Segal, 1988) and the recognition of the right to seek asylum through a new system, there were "efforts to limit the admissibility of refugee claimants" (Epp, 2017). This was due to economic reasons (Epp, 2017, 17), bureaucratic "red tape and procedural disputes" (Raskal, 2020) as well as what was seen as an inevitable overload of cases (Segal, 1988). Resettlement policy remained the main avenue for refugee admission in Canada until the 1980s (Baglay and Martin 2017, 11). Every year approximately 4,000 people claimed asylum in Canada in the 1980s (Epp, 2017). As noted by Hathaway, the successful inland claims for refugee status averaged well below 1,000 persons per

year in the early 1980s (1988, 703). The asylum system was designed to handle only a small number of refugee claims.

To resolve these issues, the Minister of Employment and Immigration, Lloyd Axworthy, in 1980 created a task force on Immigration Practices and Procedures to improve and streamline the refugee determination system (Raskal, 2020; Canadian Council for Refugees, 2009). The findings were presented in a National Symposium on Refugee Determination by the Minister in Toronto (Refuge, 1982, 1). The Symposium highlighted the shortcomings in implementing international law and meeting international law standards (Refuge, 1982). Three recommendations emerged and were implemented from the task force. The first involved the creation of the Refugee Status Advisory Committee (RSAC) as a body that was independent from the Department of External Affairs and the department of Employment and Immigration. The second included a more holistic approach to the Convention. In other words, aside from the direct application of the Convention, policies were to address the "spirit" of the Convention. Lastly, an oral hearing where claimants can present their case was suggested by the task force. In 1983 a pilot in Toronto and Montreal introduced oral hearings for asylum claimants (Raskal, 2020, n.p.). In 1985, oral hearings were affirmed in a Supreme Court of Canada's *Singh v. Minister of Employment and Immigration* decision (1 S.C.R 177) that granted claimants the right to a hearing and protected their rights under the *Canadian Charter of Rights and Freedoms* (1982).

3.3. (New) Categories of Refugees in Canadian Refugee Law under the 1976 Immigration Act

As previously stated, the passage of the new Immigration Act in 1976 allowed for a significant revision of previous legislation. For the first time in Canadian law, refugees were a distinct category of immigrants with legal recognition and status according to the Convention as overseen by the United Nations High Commissioner for Refugees (UNHCR). And if a refugee met the criteria of the UN Convention – and was thus a 'Convention refugee' – he or she could be sponsored by either the government or private individuals and organizations. The Act also allowed for admission of those who did not fit the Convention definition but were in 'designated' groups that experienced refugee-type hardships. This latter category would become more predominant in the midst of global upheavals in the 1980s and later (this will be explored in greater depth in the following section pertaining to war refugees). Consequently, the question of refugee selection became significant: in particular, what should be the criteria for admission? Importantly, with refugees now a distinct category within immigration policy, the government began to set quotas for the numbers it would accept as part of overall immigration intake. Although Canada, as a signatory to the refugee Convention, was legally required to consider claims for asylum at its borders, it had no such obligation towards the many refugees overseas seeking new homes. Noteworthy for the case of Canada, quotas for the number admitted were entirely up to government discretion (Epp, 2017, 16). The following section will attempt to provide the newly understood definitions of refugee claimants and the impact the 1976 Immigration Act had on Canada's understanding of Convention Refugees.

3.4. Refugee Claimants

Refugee claimants are persons who have made a claim for refugee protection in Canada and whose claim has not yet been decided. The term 'refugee protection', is something of a misnomer; an individual seeking refugee protection may be seeking protection on the basis of their membership in one or more classes: 1) the category of Convention refugees, 2) the category of persons in need of protection (Jones & Baglay, 2007, 72). As the determination of a claim by the Board or the Minister of Citizenship and Immigration can take many months, individuals who are awaiting a decision of a claim to protection are provided with various rights and entitlements. The category of

refugee claimants applies only to individuals seeking refugee protection within Canada; individuals seeking Canada's protection outside of Canada are not members of this category. With respect to the former, the Refugee Convention only requires a state to offer protection to individuals within their jurisdiction. An individual abroad is generally not within a state's jurisdiction. With respect to the latter, many of the protections for refugee claimants in Canadian law relate to the prohibition on removing a refugee claimant – a power that the Canadian government does not hold over individuals who are abroad.

3.5. Convention Refugees

The definition of refugee in Canadian law is based upon the definition adopted by the international community in the Refugee Convention. Canada adopted the essential elements of the Convention's definition of a refugee into its domestic law. However, while Canada's acceptance rate was high, numerous applications for asylum were tenuous, because many individuals did not clearly fit the Convention definition of refugee (Epp, 2017, 19). Resultingly, while Canada applied the definition set out in the Refugee Convention, it also offered protection to broader categories of individuals who do not strictly fall within the definition of "convention refugees" as persons in need of protection, such as war refugees.

3.6. Expanding the Convention Refugee Definition in Ward v. Canada

In *Canada (Attorney General) v. Ward* (1993), the Supreme Court of Canada elaborated on what constitutes social groups: "(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence." The Court also clarified what constituted as "political opinion," and declared to be "any opinion on any matter in which the machinery of state, government, and policy may be engaged" (Canada (Attorney General) *v.* Ward, [1993] 2 S.C.R. 689). As legal scholar Audrey Macklin notes, the Supreme Court of Canada's judgment in Canada (Attorney-General) v. Ward considers various aspects of the international Convention refugee definition. The claimant fled Northern Ireland to escape retaliation by the Irish National Liberation Army (INLA) for his effective defection from that organization. The Ward judgment reinforces the position that State complicity is not a pre-requisite to a determination of persecution by finding that the inability of the Irish and UK police to protect the claimant from INLA reprisal could suffice for purposes of establishing a well-founded fear of persecution. Second, the decision adopts a relatively expansive interpretation of the term 'particular social group' by linking the designation to concepts of anti-discrimination in Canadian and international law. In obiter, the Court declares that gender and sexual orientation are permissible bases for social group ascription. On the facts of this case, however, the claimant failed to establish that he was persecuted because of his membership in a particular social group. On the other hand, the Court was sympathetic to the alternative of political opinion. In its analysis of this ground, the Court confirms that a claimant may be persecuted for reasons of political opinion even where the opinion is inferred from conduct or wrongly imputed to the claimant. In the present case, Ward's political opposition to the tactics of the INLA could be inferred from his conduct in releasing hostages he was ordered to guard. Finally, the decision clarifies the scope of the 'dual nationality' exclusion that may be used to bar a refugee claim. In this case, the Court found that the Federal Court of Appeal had erred by failing to consider the fact that Ward was a citizen of the United Kingdom as well as Ireland, but cautioned that it might still be possible to conclude that the United Kingdom would be unable or unwilling to protect him from INLA retaliation (Macklin, 1994).

4. 1985-1988: The Importance of the Singh Case:

The *Singh v. Minister of Employment and Immigration* case of 1985 is regarded as one of the most influential factors in the creation of Canada's contemporary refugee determination system. In order to understand the relevance and magnitude of impact that the *Singh* case had on the refugee determination process, a brief summary of the case is warranted. Between the years 1977 and 1981, six citizens of India and one Guyanese citizen of Indian descent made separate refugee claims in Canada. All seven applicants had the surname, Singh. Each applicant argued that they would face persecution in their home countries, due to a variety of factors such as race, religion, and or their past political activities. All seven applicants were denied protection by the Canadian federal government as per the Refugee Status Advisory Committee's recommendation. The seven applicants engaged in the appeal process where refugee status appeals are heard by the Immigration Appeal Board, however the Board upheld the decisions to reject the applicants' various claims. In each individual case, the Board ruled that none of the seven applicants had valid grounds for refugee status, including a reasonable fear of persecution if deported.

One of the issues however, was that the applicants were forced to submit their arguments for appeal through written statements. In other words, none of the seven applicants were provided a face to face opportunity to explain their case and justify their application for refugee status. At the time, both the Refugee Status Advisory Committee and the Immigration Appeal Board would only accept written applications and written statements. This meant that refugee claimants filing for refugee status in Canada were not entitled to make an oral appeal to these panels, nor were they able to hear or reply to the arguments against their case. Both panels made decisions of immigration and refugee status determination in private and were only required to inform applicants of their decision through written statements of their final decisions. Given the similarities of legal issues between the seven Singh applications, they were all elevated to be heard at the Supreme Court of Canada as one single case, *Singh v. Minister of Employment and Immigration*.

In 1985, the Singh case was reviewed by six Supreme Court justices. The justices all allowed the appeal and ordered that the Immigration Appeal Board grant the seven applicants a full oral hearing before reaching a decision on their respective refugee claims. The justices reached their respective decisions by employing the *Canadian Charter of Rights and Freedoms* (1982) and extending section 7. of the Charter to all individuals physically present in Canada. The justices then concluded that by not providing refugee applicants an oral hearing the government was violating their section 7 rights under the Charter. Section 7 of the Charter guarantees that, "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 7, Canadian Charter of Rights and Freedoms). The justices concluded that the applicants did have a fear of persecution and by depriving them of a full oral hearing, the immigration system was in violation of the applicants' fundamental right to justice under the Charter. The justices also relied on the *Canadian Bill of Rights*, a statute passed by Canadian Parliament in 1960. They stated that the *Bill of Rights* guaranteed refugee applicants a full oral hearing of their claims before an immigration board (Singh v. Minister of Employment).

The outcome of this decision meant that all refugee applicants physically in Canada were protected under the *Charter of Rights and Freedoms* and were therefore entitled to an oral hearing and as such, to a face to face encounter wherein they could plead their case and respond to any rebuttal claims posed by the panel or government. This decision however sparked a great deal of controversy, primarily, the federal government argued that the time, expense, and complexity of affording every refugee applicant an oral hearing would place an unnecessarily large burden on the immigration system. The government attempted to argue, at the Supreme Court of Canada, that

denying the applicants their section 7 rights was a reasonable limit as allowed under section 1 of the Charter. However, the justices disagreed and upheld their decision. As such, the immigration system was tasked with creating a new tribunal that would be able to facilitate and hear oral testimonies from every refugee applicant physically within Canada. Thus, enshrining that where the credibility of the claimant is at stake, they are entitled to an oral hearing (Adelman, 1985, 3). By the 1985 Singh decision, the refugee determination system had approximately 63,000 pending claims. As a result, the Canadian government decided to grant amnesty to refugee claimants who had entered Canada before May 21st of 1986 and were already employed or likely to secure employment in the near future (Raska, 2020). By the end of 1988, the backlog had grown to 85,000 refugee claims, ultimately requiring a drastic shift in Canada's response to refugee determination (Ninette & Trebilcock, 1988, 98). Due to the increasing number of refugee claims and subsequent backlog issues, pressure and demand began to increase for the government to create a new review process for refugee claimants.

4.1. Crafting the new refugee review system

While the importance of *Singh* cannot be understated, given that the Supreme Court's decision resulted in the extension of section 7 of the Charter being applied to refugee applicants – it should not be the only consideration when examining the creation of Canada's 'new' immigration system. Following the *Singh* ruling, between the years of 1985 and 1988, the federal government set out to create a tribunal that would be able to facilitate the new precedent of oral hearings. In 1985, parliament, at the direction of the Minister of Employment and Immigration, John Roberts, commissioned a report to explore a variety of models that could meet the new requirements of Canada's refugee determination system. Minister Roberts appointed Rabbi Gunther Plaut to, "find a means of providing a scrupulously fair system for the determination of refugee claims in Canada that is also expeditious and viable given the financial and human resource constraints that apply in the public sector" (Plaut, 1985, 26). Plaut was a refugee himself having fled from Nazi Germany and was provided refugee status in Canada in 1936 (Adelman, 1985, 3). Plaut indicated that he had the expertise to complete such a report given that his experience allowed him to "know the heart of a refugee, a person who desperately seeks for a place to stand, for the opportunity to be accepted as an equal amongst fellow humans" (Plaut, 1985, 7). On April 17th, 1985 Plaut submitted the 221 page report, entitled the *Plaut Report on Refugee Determination in Canada* to Canada's Employment and Immigration Commission (Adelman, 1985, 4). During a press release in July of 1985 Minister Roberts promised Canadians that the report would form the basis of a major and comprehensive overhaul of legislation affecting refugee determination by the Fall.

The Plaut Report outlined three essential characteristics that the future tribunal must have, the first being independence. Plaut placed the refugee determination process in the context of the tension between the responsibilities of immigration authorities to control entry into Canada as a sovereign nation and the fact that, "Canada, by adhering to the Refugee Convention and having made its principles part of Canadian law, has voluntarily limited its sovereignty in this one respect" (Plaut, 1985, 46). Plaut suggested that in order to resolve such tension and ensure the separation of concerns, all decisions pertaining to refugee claims must be made by an independent body, a Refugee Board separate from government and separate from immigration considerations. Thus, ensuring the only consideration during a refugee claim hearing would be of the refugee's circumstances and not broader political objectives. With that being said, Plaut did not believe that the Refugee Board should be fully autonomous with no liaison between the government and the Board. As such, the report proposes the creation of a new role of Refugee Officers whose primary function would be to liaise between the Refugee Board and Canada's Employment and

Immigration Commission. Plaut proposed that the refugee officers were to be jointly appointed by the Refugee Board and the Commission. The officers would be trained by the Refugee Board for a minimum of a three-year term. The intent as outlined by the report was that the officers would operate within the Commission and would provide counselling and support to refugee claimants. In addition to this function, Plaut also suggested that the role of the officers would be to provide and present evidence at the oral hearing when deemed appropriate, however, Plaut stipulated that the officers should only provide evidence in an information sharing capacity and not in an adversarial way (Plaut, 1985, 88). However, currently, this role typically tends to be adversarial rather than simply information sharing. As such, the role of the Refugee Officer would create a quasi-independent review board as opposed to a fully independent review board. Nevertheless, Plaut felt that official communication channels between the Refugee Board and the Commission was necessary. Nevertheless, although Plaut strongly recommended an independent or nearly independent Refugee Board, the federal government was still considering two additional structures of authority and management. The other two structures in consideration were to have the refugee determining authority be part of a court of record. While the second structure in consideration was to have the refugee determining authority be directly supervised in its administrative capacities by the Minister of Employment and Immigration. Initially, the government favoured the proposed Board being directly supervised by the Minister, however, as will become evident in the following sections, as per Plaut's recommendation a quasi-independent review board was established (Hathaway, 1989, 355).

The second essential characteristic of the Refugee Board identified in the Plaut Report was fairness. Plaut argued that in order for the Board to be fair, it must be non-adversarial (Plaut, 1985, 90). Plaut placed this duty to ensure a non-adversarial process with the newly created role of the hearing officers under the new tribunal. He argued that it would be the initial training and abilities of the hearing officers that would ensure a fair process. In order to ensure that the hearing officers were equipped to uphold the necessity for a fair process, the report recommended that the refugee board create both an educational and a documentation division, as well as ensure a quality selection and training procedure for both refugee officers and members of the Board. In addition to the proposed training of Board members, Plaut located the issue of access to the system as central to ensuring a fair procedure. As such, Plaut rejected any recommendation previously proposed to utilize a pre-screening tool in order to determine which refugee claims are entitled to an oral hearing. Rather, Plaut argued that any refugee claim made under the Refugee Convention has a right to a full oral hearing. In addition, Plaut also rejected any proposition of a time-limit imposed on refugee claim applications, arguing that a time limit would interfere with the principle of fairness.

The third essential characteristic identified in the Plaut Report was the necessity for an expeditious review process. Plaut linked the need for an expeditious process with the principles of fairness. As such, he proposed three possible models for the Refugee Board, as well as, his final recommendation for which model should be used in order to ensure independence, fairness, and an expeditious procedure. Plaut outlined the three potential models through the use of graphs, which can be seen below.

Fig. 2. Plaut Report

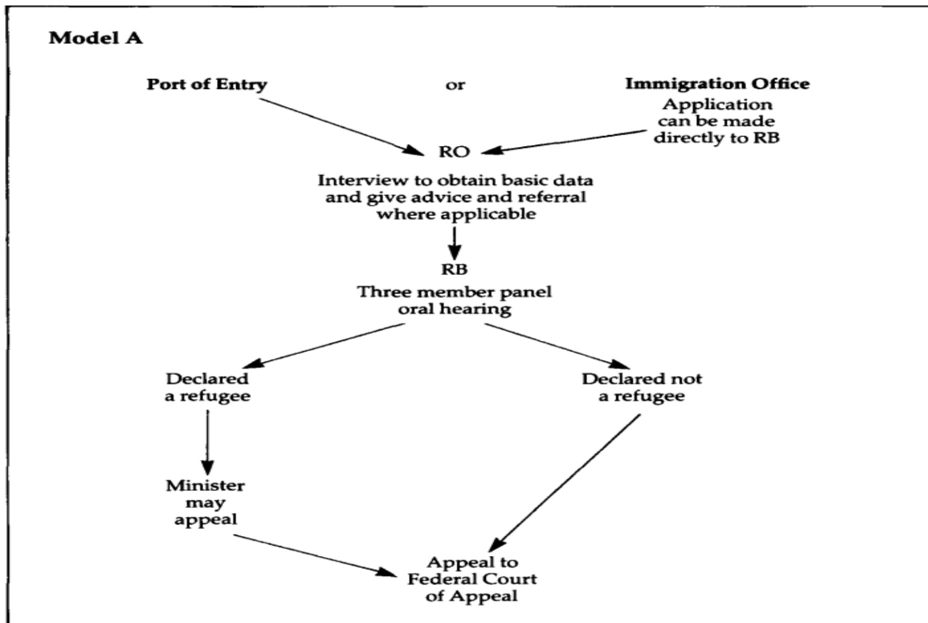


Fig. 3. Plaut Report

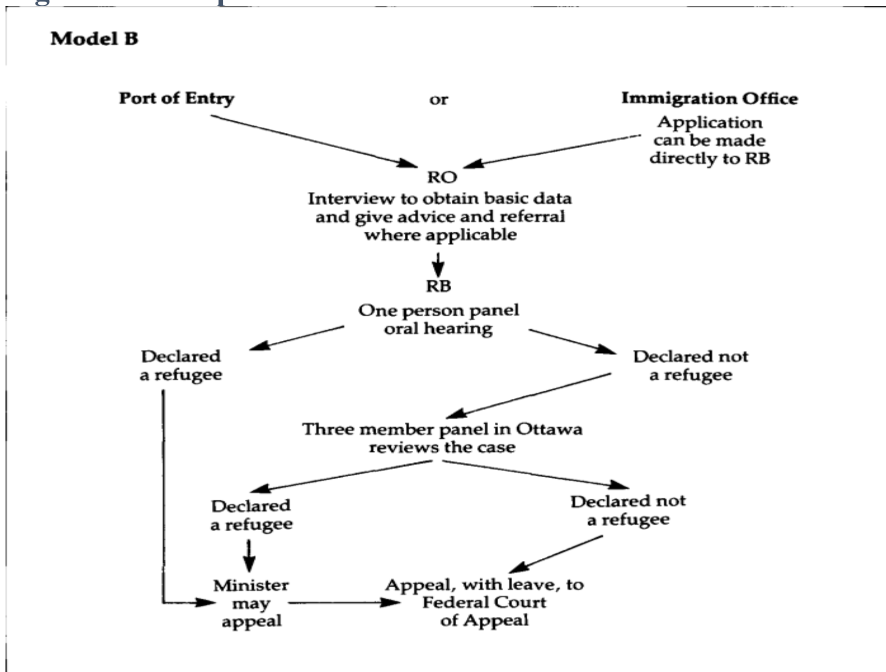
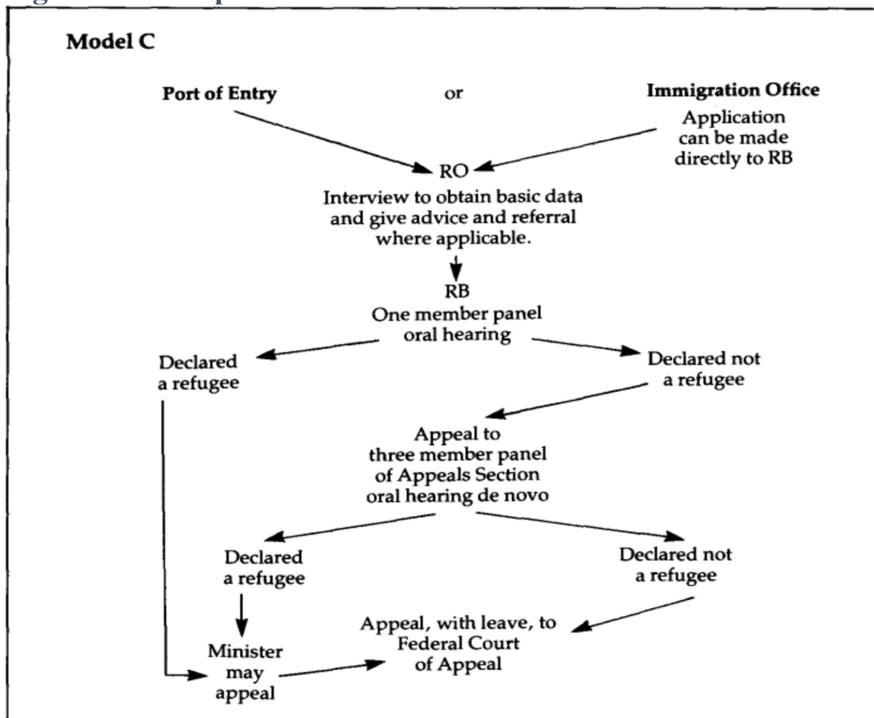


Fig. 4. Plaut Report



In Figure 1, Model A provides for an initial three-member panel but does not allow for any review under the system. Conversely, Model B has only a one-person panel oral hearing. Contrastingly, Model C allows for an oral hearing *de novo* (anew) with a three-member panel.

Plaut argued that despite the Supreme Court's decision to guarantee refugee claimants' rights under section 7 of the Charter, the question of quality of the review body remains. He argued that if the Refugee Board is not designed with careful consideration to the principles of fairness and independence that the requirement imposed by the Supreme Court to ensure an oral hearing would become obsolete if the review did not have the structure or capacity to facilitate fair and efficient oral hearings. As such, the ideal elements of each model were requested to be included in the new review board. In a number of briefs to the Minister, an initial three-member panel was requested together with an appeal procedure which will allow for *de novo* hearings. Elements of these requests will be apparent in the following section which examines the creation and implementation of the Immigration and Refugee Board of Canada.

However, simultaneous to the creation of the IRB, the arrival of 174 Sikh Boat People in 1987 received a great deal of negative media attention, which served to create and perpetuate existing negative perceptions of people seeking refuge in Canada. In response, Canadian Parliament was called for an emergency session in August 1987, wherein the meeting saw the introduction and passage of Bill C-84 the Refugee and Deterrent and Detention Bill which sought to ensure greater control over national borders, detention of undocumented arrivals, deportation of security threats, and state powers of search and seizure to fight people-smuggling (Ninette & Trebilcock, 1988, 98). This was largely seen as a reversal of what were seen to be compassionate and humanitarian refugee polices.

5. 1989-2000: Bill C-55 and the Creation of the Immigration and Refugee Board

Following the Plaut report of 1985 and the amnesty granted to a large number of refugee claimants that entered Canada prior to May 1986, the government proposed a tribunal model including some of the recommendations proposed by Plaut, as well as, a combination of elements seen within the three models presented above in Figures 1,2, and 3. The tribunal model was proposed within Bill C-55, an *Act to amend the Immigration Act* (Refugee Reform Bill), which was introduced in the House of Commons in 1986. The Bill sparked a great deal of controversy however, as constituents could not agree on what model was the best model, the degree of enforcement that should be present within the review board, as well as, the degree of independence that the tribunal should have. Dr. James Hathaway describes it in his *Overview of Refugee Law in Canada* (1988), as a "tug-of-war" between the House of Commons and the Senate over the substance of the Government's proposed refugee law reform within Bill C-55 (354). The Senate during 1987 and 1988 heard concerns from a number of legal and refugee advocates stating that the true intention of Bill C-55 and the proposed new refugee review tribunal sought to dissuade and discourage refugee claimants from seeking protection in Canada due to its inherent 'national protectionist' mission (Hathaway, 1988, 355). The Senate was persuaded to advocate for important changes to Bill C-55, and in turn, the government eventually yielded to some suggestions from the Senate to ensure the procedural fairness and fundamental protection of rights for refugee claimants seeking protection in Canada. Debates regarding Bill C-55 and the proposed new structure for Canada's refugee review board lasted between 1986 and 1989 (Zuidema, 1997, 56). The eventual passing of Bill C-55 is in large part due to the number of refugee claims in backlog reaching 85,000 by 1988 (Raska, 2020), only three years after the Supreme Court's decision in the *Singh* case.

As such, Bill C-55 was passed in 1989 and subsequently the Immigration and Refugee Board (IRB) of Canada was officially created as a non-adversarial, arms length and quasi-independent administrative tribunal that reports to Parliament through the Minister of Immigration, Refugees, and Citizenship. The new tribunal was vested with making refugee protection decisions in Canada, ensuring the principle of non-refoulement or non-return to risk of persecution (Act. 33 of the 1951 Refugee Convention). The IRB was comprised of two divisions: the existing, but reformed, Immigration Appeal Board (IAB) and a newly created Convention Refugee Determination Board (CRDB), which was created for the purpose of providing refugee claimants an oral hearing, thus ensuring procedural fairness and respecting the *Singh* decision (United Nations, 2020). The structure of the refugee determination process was as follows upon creation of the IRB: cases of refugee claims were referred by an immigration officer at a port of entry or at inland processing offices to two-member panels of decision makers at the IRB to independently assess the case for protection, including an oral hearing (Rousseau et al., 2002, 45). For the hearing, claimants present their case orally, in front of the CRDB, a two-person adjudication panel, which has the sole and exclusive jurisdiction to hear and determine all question of law and fact, including questions of jurisdiction (1985 Immigration Act, art. 67). The two board members (adjudicators) are assisted by the Refugee Claim Officer, as explored in the Plaut Report. Importantly, and as briefly discussed, the Refugee Officer is not a representative of the Minister, unless the case is of particular importance to the Minister's office. The primary function of the adjudicators is to assess the credibility of the oral testimonies and of the documentary evidence used to support the refugee's claim (Roussea et al., 2002, 44). In order for the two-person panel to reject a refugee claim, both members had to unanimously agree, otherwise, one positive decision led to an individual receiving refugee status in Canada (Raska, 2020).

With the emergence of the new tribunal, in the 1990s, the government committed to increasing refugee admittance under the Five-Year Immigration Plan. This increase in the number

of refugees that would be welcomed to Canada signaled the open and changing side of the Canadian immigration system. Unfortunately, this five-year plan presented a variety of logistical and procedural challenges to the IRB. Resultingly, in 1992, Bill C-86 was introduced which made significant changes to the Immigration Act, including to the refugee determination process, admissibility provisions related to health, criminality, security and removal procedures. Key changes in the Bill also included the creation of the Adjudication Division of the IRB and provided authority to the IRB Chairperson to issue Guidelines on important refugee subject matters. These Guidelines proliferated in the coming years, and allowed for further refinement of refugee adjudication and protection in Canada. Bill C-86 came into statutory force in 1993, bringing with it robust changes to the immigration determination system (CCR, n.d., 415). Many changes in the Bill captured the federal government's response to public opinion on excessive expenditures and its attempt to cut expenditures and curb abuse (Zuidema, 1997, 56) One of the most notable changes introduced under Bill C-86 was the decision to move the Adjudication Division from the Ministry of Citizenship and Immigration Canada to the IRB, where it became known as the Immigration Division, thus ensuring a greater degree of independence (Rousseau et al., 2002, 46). The newly termed, Immigration Division was moved from the Ministry of Citizenship and Immigration Canada to the IRB in order to provide authority to the IRB Chairperson to issue Guidelines on important refugee subject matters. This allowed for robust changes to be brought to the refugee determination system (United Nations, 2020). Since the latter part of the twentieth century the role of the Immigration Division has evolved and expanded to a comprehensive division of review at the IRB dealing with matters pertaining to immigration detention reviews and admissibility hearings (Rousseau et al., 2002, 45). However, despite completely overhauling Canada's refugee determination process and implementing a great number of Plaut's recommendations, the newly implemented tribunal was not impermeable to a number of issues. Namely, despite the hopes that the IRB would modernize an outdated and inefficient refugee review process, the previous issues of high numbers of case backlog persisted beyond the creation of the IRB. With Board Members estimating that each case would require two years to complete under the new model. The issue of case backlogs was difficult to address given the constant opposition to increased expenditures on the refugee determination system (Zuidema, 1997, 55). Thus, creating a political gridlock with minimal options to address the case backlogs, an issue that still currently persists.

5.1. Quality of Decision Making at the IRB

A second issue that arose during the first decade of the newly implemented refugee determination system pertained to the conduct of the IRB Members. In addition to the previously mentioned amendments brought forward under Bill C-86, one amendment warranting attention pertained to the conduct of the IRB's members (Zuidema, 1997, 80). The Bill sought to introduce and implement a formal review process in order to review the Board members' conduct and performance. The Convention Refugee Determination Division and Immigration Division received negative media attention during the mid 1990's due to inappropriate behaviour from the Board members, as well as, the questionable quality of some decisions. Despite the major amendments to the refugee determination system through the creation of the IRB, the appointment process of the IRB Members was deemed to be problematic. As previously explored, the IRB consisted of independent members appointed by the Cabinet. The Members were appointed following a screening by a committee which makes recommendations to the cabinet based on very general criteria which were not particularly meaningful (Rousseau et al., 2002, 45). Many appointees lacked experience in refugee issues and therefore were unable to understand the complexities of refugee claims or be able to evaluate the unique forms of evidence during the hearings (Rousseau

et al., 2002, 45). To provide an example of such inappropriate behaviour, during a Vancouver refugee determination hearing in 1996, a board member requested that a refugee claimant, seeking protection under grounds of torture, disrobe during the hearing in order to show a scar on their upper thigh (Zuidema, 1997, 81). The claimant's representative denied the request and the hearing was adjourned. Following this incident, several refugee advocates criticized the tribunal stating that if the board members were equipped with the proper training, asking a claimant to disrobe during the hearing would not have been a consideration in the first place. As such, in addition to the request for a formal review mechanism of Board Members, one of the amendments in Bill C-86 requested that all Board members be subjected to additional training and education, similar to the training models initially recommended in the Plaut report of 1985.

6. Special Programs - Examining the Immigration and Refugee Board's response to War Refugees

International and non-international (internal) armed conflicts have the likely potential to generate refugee producing situations. Such conflicts occur due to many reasons, some of which are associated with the group for persecution in the 1951 Convention Relating to the Status of Refugees (Shoyelle, 2004, 558). Armed national conflicts often produce refugee-like situations which force people to flee for safety. These conflicts could have started on the basis of reasons that have nexus with the 1951 Convention refugee grounds, such as: race, religion, nationality, membership of a social group or political opinion (Shoyelle, 2004, 562). Conflicts such as: Ethiopia, Sudan, Sri Lanka, and Lebanon can all, in part, be attributed to reasons found in the 1951 Convention listed grounds for protection (Shoyelle, 2004, 563). As such, many claims have been made by civilian non-combatants who are already in Canada but fear to return to a situation of civil war in their home State (Shoyelle, 2004, 565). The question that arises is whether a person in a foreign State can claim refugee status in that State on the basis of a civil war in his home State. The legal position is very clear in Canada and it is to the effect that claims involving situations of civil war, as in all other refugee claims, need to be supported by the satisfactory establishment, on the part of the claimant, of all of the elements of the statutory definition of Convention refugee (Shoyelle, 2004, 565).

6.1. Refugee Protection 1980-1990 - Sri Lanka and Lebanon

6.1.1. Sri Lanka

Following the SCC's hallmark Singh decision, the Government quickly responded by revamping the IAB to make it more inclusive. In 1985, Bill C-55 amended the IAB to ensure that all refugees had the opportunity to have oral hearings during appeal and increased the number of IAB members from eighteen up to fifty. Further amendments to Bill C-55 came in May 1987 resulting in the creation of the IRB, an independent, quasi-judicial body that had two divisions (Immigration Appeal Division (IAD) and the Convention Refugee Determination Division (CRDD) which allowed for an oral hearing for refugee claimants. As there was no appeal on the merits, applications could be made for judicial review at Federal Court for negative CRDD decisions. Tamil refugees in particular benefitted from these new provisions, as a number of programs aided in their settlement in Canada. These included a 1983 Special Measures Program that allowed Tamils to apply for landed status while already in Canada, the Administrative Deferral of Review program (ADR) of 1986, IRB oral hearings and the refugee backlog clearance designated class program of 1988 which granted landed status to many persons. The ADR program allowed for the processing of over 4,000 Sri Lankan claimants, but the "economic adaptability" of the refugees remained an

important criterion for acceptance of refugees (UNHCR, 2020, 13). The arrival of Sri Lankan Tamil refugees which had begun in the 1980s continued into the 1990s. During this period a total of 26,213 Sri Lankan Tamils had their refugee claims accepted, with acceptance rates being at 85% during 1989 – 1998 for this group. The IRB played the crucial role of deciding cases of thousands of Sri Lankan Tamil refugees who had fled persecution to seek protection in Canada. (2004).

6.1.2. Lebanon

Canada also implemented a special measures program for Lebanese refugees which initially began in 1979 but continued well into the 1980's. This program introduced reduced criteria which allowed Lebanese refugees to receive immigrant visas and apply for permanent status without leaving Canadian soil. By the year 1979, Canada had granted 11,010 immigrant visas to Lebanese refugees who were fleeing violence resulting from the civil war. In addition to reducing the criteria under which Lebanese refugees could apply for asylum, the Government also developed a pathway by which Lebanese visitors could apply for permanent status without leaving Canadian soil. By 1989, Canada had successfully resettled 6,100 Lebanese refugees (UNHCR, 2020, 12). The Tamil and Lebanese refugees integrated well over time in all aspects of Canadian life. A 2015 study showed that 56.8 percent of Tamil participants owned their own homes, 55.2 percent held gainful employment and only 14.2 percent received social support. These results showed that Tamil refugees had integrated into Canadian society a few decades after their resettlement and had become predominantly self-supporting. A large number of the Lebanese refugees that arrived in Canada at this time were investors and entrepreneurs (Beiser et al., 2015, 33).

6.2. Refugee Protection 1990-2000 – Somalia and Yugoslavia

6.2.1. Somalia

Following the overthrow of Somali President Mohamed Siad Barre's Government in 1991, a civil war broke out in the country which forcibly displaced thousands of Somalis. Estimates of number of Somali refugees arriving in Canada have ranged from 55,000 to 70,000 refugees during the period 1988 to 1996.126 The majority of Somali refugees came through Family Class immigration, many came as inland claimants with a limited number who arrived as GARs. Somali refugees have faced some hardships integrating in their new homes due to the higher prevalence of language barriers, psychological anguish of having lived through a violent conflict in their homeland, and difficulties finding adequate housing for larger families. Despite many of these earlier setbacks, a study by OCASI recognized the strong resilience shown by Somali refugees. Over time, service agencies have supported this group to navigate social services which has helped in the integration of Somalis (OCASI, 2016, n.p).

During the protracted civil war in their country, 20,000 Somalis were admitted in 1990 to 1997, although this followed more than a decade of minimal response to a considerable problem of displaced persons throughout Africa. This reluctance was evident in the lack of organized response to refugees from Sudan, the Democratic Republic of Congo, and Eritrea, for example – all conflict-ridden regions producing significant numbers of refugees right up to the present. Although Canada claimed to have a colour-blind immigration policy during this era, the restrictive stance towards African refugees suffers in comparison to the more generous approach to displaced white Europeans. Approximately 20,000 Bosnians settled in Canada in the 1990s, followed by 5,000 Kosovars in 1999 – all fleeing the ethnic and territorial conflict in the Balkan region. Even so, in the first decade of the new century, Canada was one of the few nations that welcomed small movements of persecuted ethnic minorities from Burma/Myanmar – Karen and Rohingya peoples

in particular (OCASI, 2016, n.p.). It was clear that the IRB's guidelines approached the issue of granting refugee status on a case-by-case basis. In the case of *Elmi v Canada,* Elmi was found by the CRDD to not be a Convention refugee:

> "Elmi was a citizen of Somalia from Kismayo who, when 16 years old, had claimed refugee status on the basis of a fear of persecution as a member of the Darod clan and the Majertan sub-clan, and as a young male subject to forcible recruitment. In denying the claim, the Refugee Division had found that Elmi had an IFA to Bossaso. The Federal Court (Trial Division) allowed Elmi's application and set aside the decision of the Refugee Division of the IRB. It held that in assessing the reasonableness of an IFA, the fact that an applicant was a child had to be taken into account. In spite of the fact that there was no serious possibility of Elmi being persecuted in the proposed IFA of Bossaso and the lack of evidence by the applicant to show that he would be unable to reach the IFA without travelling through unsafe areas, McKeown, J. decided that it was necessary for the Refugee Division to address the issues arising from Elmi's young age when assessing the reasonableness of his IFA to Bossaso. In his opinion, the CRDD would have to take into account evidence as to whether Elmi had ever been to Bossaso, whether he had any family members there, the fact that he had not lived in Somalia since the age of 10, whether or not hc had any means of supporting himself or earning income, whether he would have to live in dire poverty, and whether he would have any access to schools, hospitals or other services" (Shoyelle, 2004, 570).

6.2.2. Yugoslavia

In the later years of the decade, conflict persisted in different regions of the former Yugoslavia. Mounting tensions in the province of Kosovo resulting from calls for independence led to violence by Serb forces beginning in 1998. As part of the North Atlantic Treaty Organization (NATO), Canada participated in the humanitarian mission that was undertaken by deploying troops to help in Kosovo. As NATO members were actively carrying out their work in the region, UNHCR reported that "350,000 more civilians had fled Kosovo" in fear of their lives. Although Canada was already providing help in the form of the deployment of troops, the Canadian Government facilitated the airlifting of 5,000 Kosovar refugees to safety in 1999 and later allowed for the resettlement of an additional 2,000 refugees. The arrival of Sri Lankan Tamil refugees which had begun in the 1980s continued into the 1990s. During this period a total of 26,213 Sri Lankan Tamils had their refugee claims accepted, with acceptance rates being at 85% during 1989 – 1998 for this group (King, 2003, 27).

The first 5,000 Kosovar refugees were brought to Canada under the "Humanitarian Evacuation Program" under section 37(3) of the Immigration Act which allowed for Minister's permits to be issued to refugees and authorizing them to come to Canada. The Minister's permits were given in two ways: either through the special needs humanitarian plan or under a family reunification model which the additional 2,000 Kosovar refugees that came under with Canadian family member who sponsored them). Recognizing the urgency of the situation in the Kosovo region, Canada relaxed the eligibility criteria on language and financial requirements. The resettlement of Kosovar refugees to Canada was accomplished through the Joint Assistance Sponsorship (JAS) program, whereby the Canadian government would provide financial assistance to the newcomers for two years and groups of communities across the country would be responsible for the social support during this time (Raska, 2020, n.p.). Kosovar refugees, who arrived a few years after the Bosnian refugees were initially brought to military barracks in Trenton Camp which was located close to ethnic Albanian communities to make the them feel more at ease. Once the

refugees were moved out of the military barracks, efforts were made to ensure the refugees were not separated so that they could rely on one another for support. In a unique strategy, Kosovars were settled outside of large urban centers in the Greater Vancouver Area in British Columbia, again aimed at providing co-ethnic support. However, there were great disparities found over the jobs they previously held prior to displacement, and those they were able to find in Canada, which largely consisted of temporary, seasonal and part-time employment. The Joint Assistance Sponsorship program helped tremendously in the integration of the Kosovars as the "program provided up to 12 months [of] government financial assistance" for the refugees (King, 2003, 28).

Additionally, newcomers were "encouraged to find permanent employment" in Canada and did not have to pay a fee to receive authorization to work. Healthcare benefits that were provided to the Kosovar refugees were identical to the ones that Canadians received. Once the situation in Kosovo improved sufficiently for refugees to return, the Canadian Government provided them with the option of either returning to their homeland or making Canada their permanent home through a path that would eventually lead to citizenship. Many Kosovar refugees chose to make Canada their home, as can be deduced by data which shows "3,258 Kosovars [as having] obtained permanent residence" in Canada in 2000 (Labman, n.d., 103). The Joint Assistance Sponsorship program helped tremendously in the integration of the Kosovars as the "program provided up to 12 months [of] government financial assistance" for the refugees. Additionally, newcomers were "encouraged to find permanent employment" in Canada and did not have to pay a fee to receive authorization to work. Healthcare benefits that were provided to the Kosovar refugees were identical to the ones that Canadians received. Once the situation in Kosovo improved sufficiently for refugees to return, the Canadian Government provided them with the option of either returning to their homeland or making Canada their permanent home through a path that would eventually lead to citizenship. Many Kosovar refugees chose to make Canada their home, as can be deduced by data which shows "3,258 Kosovars [as having] obtained permanent residence" in Canada in 2000 (Labman, n.d., 103).

6.3. Insights

One final challenge to securing refugee protection on a case-by-case basis for those fleeing due to civil war pertains to the test for a well-founded fear of persecution. As Shoyelle notes, "the test for persecution in a civil war situation for purposes of Canadian jurisprudence has now shifted to what is depicted as a 'non-comparative approach'" (Shoyelle, 2004, 572). She analyzes the IRB's assessment through an examination of *Ali v. Canada* (Minister of Citizenship and Immigration), 1999. Wherein, upon review, the Federal Court of Appeal stated that it was in agreement with the IRB's proposition that the non-comparative approach does not place an emphasis on comparing the level of risk of persecution between the claimant and other individuals (including individuals in the claimant's own group) or other groups (Shoyelle, 2004, 572). Instead, the claimant's particular situation should be examined and that of his or her group in a manner similar to any other claim for Convention refugee status. As such, the issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war (Shoyelle, 2004, 572). In this respect, using a non-comparative approach raises certain concerns due to the focus of attention on whether the claimant's fear of persecution is by reason of a Convention ground.

With that being said, this decade saw salient changes in policies, jurisprudence along with the entry into Canada of thousands of refugees from Sri Lanka and Lebanon. The aforementioned special programs introduced reduced criteria which allowed Lebanese and Tamil refugees to

receive immigrant visas and apply for permanent status without leaving Canadian soil helped to combat the restrictive interpretation of who can and cannot be granted protection. It is evident that the IRB did not operate as a proactive actor in attempt to expand and ensure refugee protection for individuals arriving from all countries. With that being said, for the instances where the IRB *did* create special programs as opposed to operating on a case-by-case basis, it is clear that the acceptance rates were substantially higher.

6.4. The Protection of Non-State Persecuted Persons in Canada - Domestic Violence against Women

Canada also recognizes and offers protection for instances of persecution committed by a third-party or non-state actor. Greater awareness around women's rights and the barriers which were faced on account of gender led to some key significant developments in Canada. The Administrative Deferral of Review program (ADR) was created in 1986. To address the special needs and protections of refugee women, the Government launched a pilot version of the Women at Risk Program in 1987 which became official in 1989 (UNHCR, 2020, 12). By establishing the Women Risk at Risk program (AWR) program in 1987 and the ground-breaking IRB Guidelines on Women Refugee Claimants fearing Gender-related Persecution in 1993, Canada became the first country to establish formal procedures for refugees claims made by women which provided guidance to decision-makers on gender-related claims (Ramirez, n.d., 3).[29] Although violence against women does not warrant an instance of protection under the definition of a convention refugee; victims of domestic violence, residing outside of Canada, can seek refugee protection by Canada if the state/ country of origin is unable to provide protection. Throughout the latter part of the twentieth century, there were some policies created which sought to protect the rights of women internationally (such as the AWR program)[30], the protection afforded by Canada stems primarily from the jurisprudence on violence against women and refugee status from the 1990's. There is jurisprudence in the Federal Court involving cases in which domestic violence has been used as a ground to claim refugee status. In these cases, the claim can be based either on state indifference to the plight of a woman suffering domestic abuse or on state inability to provide protection.

6.4.1. Elcock v. Canada

Different views of state protection are revealed in the decision of Elcock v. Canada (1999).[31] In this case, the applicant was a citizen of Grenada. She suffered from spousal abuse. Her husband finally agreed to a divorce, but he threatened to harm her if she returned to Grenada. The Board found that the applicant did not meet the onus, although the applicant had given evidence that the police in Grenada are reluctant to intervene in domestic violence. She had also given evidence of her own experience and the fact that the two lawyers she had turned to had not been helpful. The Federal Court, overturning the Board's decision, made it clear that the resources such as counselling services and legal aid do not determine whether a state is able and willing to protect its citizens. The Court further went on to say that it is important to see not only whether a legislative and procedural framework for protection exists, but also whether the state, through the police, is able and willing to implement that framework effectively. The police should be looked at as the main source to protect the citizens (Waldman, 2021, 791; case synopsis presented by Waldman).

6.4.2. King v. Canada

When women who have suffered from domestic violence seek refugee status in Canada, the question of whether they can get protection from their own states becomes a crucial issue. In King v. Canada (2005), the applicant, a citizen of St. Vincent and Barbados, had been abused physically

by her husband, and had been hospitalized more than once. She never reported her injuries to the police as she was afraid of retaliation from her husband. The Board found that the applicant had not established that state protection was not available to her. The Federal Court, overturning the Board's decision, looked at the evidence on responses of the police to domestic violence. Police officers do not take domestic violence on women seriously, so few abusers are arrested or they are released quickly. Police officers were often the perpetrators themselves. Court in King held that the Board had failed to see that the state is not capable of protecting battered women where the police are not willing or capable (Waldman, 2021, 791).

7. Looking into the 21st Century

Although Canada's refugee system saw a great deal of reform and improvement over the second half of the twentieth century, it is evident that a number of issues persisted into the early twenty-first century that ultimately challenge the refugee determination system's ability to remain fair and efficient.

Two major reports to the Auditor General were prepared in December of 1997, nearly a decade after the creation of the IRB. Both reports recommended improvement to management of the systems and many of the detailed proposals remain relevant today. The first report entitled *The Processing of Refugee Claims* identified a variety of issues and reforms required for the improvement of Canada's (relatively) new refugee determination system in order to improve the fairness and efficiency of the refugee determination process. The report was broken down into several categories for improvement: receiving claims; determination of refugee status; handling failed refugee claims; and accountability and information to parliament. The report concluded that a thorough and complete review of the system was required in order to improve the, "slow, complex, and ineffective process" (IRB Report, 2018, 132). The report highlighted a number of key areas warranting review such as (1) determining the eligibility of refugee claimants, the report called for an expansion of refugee eligibility; (2) an effort to improve the selection for Board member in order to avoid misconduct and abuse; (3) improving training to ensure that Board members are making equitable and fair decisions; (4) improvement of the organizational culture of the IRB in order to develop a common vision amongst the employees; (5) more rigour in evaluating Humanitarian and Compassionate Grounds; as well as, (6) a need for more complete and relevant information to parliamentarians. This list is by no means exhaustive, however it provides a brief summary of the key areas that report indicated that require examination in order to improve the refugee determination process.

The second report submitted to the Auditor General in 1997, entitled *Not Just Numbers, a Canadian Framework for Future Immigration* dedicated an entire section to refugee protection (Aiken, 1999, 13). The chapter on refugee protection was divided into the following sections: establishing a structure for protection; the overseas protection process; the inland protection process; protected status; and removals. In summary, this report calls for greater protection for vulnerable people and refugee claimants under Canada's refugee determination system. Namely, the report calls for a comprehensive Immigration and Refugee Protection Act, included several considerations such as expanded protection for refugees, a centralized protection agency, and increased procedural fairness at the IRB in refugee status decisions. As such, the two aforementioned reports provide much of the basis for the enactment of the *Immigration and Refugee Protection Act* (2001) and the *Immigration and Refugee Protection Regulations* (2002), which provide statutory weight to the expansion of the term 'refugee' (Shoyelle, 2004, 551).

7.1. The Immigration and Refugee Protection Act (IRPA)

The enactment of the *Immigration and Refugee Protection Act* (IRPA) in 2001 and the implementation of the Refugee Appeal Division (RAD) in 2012 are key milestones in Canada's refugee status determination in the 21st century. Prior to IRPA that replaced the *Immigration Act* (1976), the only category of person who was entitled to protection was a person who fell under the definition of "Convention refugee". IRPA expanded the categories of persons who are entitled to refugee protection to persons who are at risk of torture as defined in Article 1 of the UN Convention Against Torture, and to persons who are at risk of cruel and inhumane treatment upon deportation to their country of nationality or former habitual residence (IRPA s. 97(1)). Moreover, to further reinforce the principle of *non-refoulement*, IRPA introduced the pre-removal risk assessment which allows any person in Canada to apply to an officer for assessment, as to whether he or she would be at risk of persecution, torture or other forms of cruel and inhumane treatment (Waldman 2021, 17-18).

7.2. The Current Refugee Status Determination (RSD) Process

The following section outlines the current refugee status determination process to discuss the mandates and roles of different institutions and agencies in Canada's asylum architecture. A person can make a claim for refugee protection in Canada either at a port of entry when they arrive in Canada, or at an inland office. At a port of entry, a Canada Border Services Agency (CBSA) officer decides whether the claim is eligible to be referred to the IRB. At an inland office, it can be either a CBSA or an IRCC officer who decides on the claim's eligibility. Eligible claims are referred to the Refugee Protection Division (RPD) of the IRB for refugee status determination (IRPA ss. 99–100). The Refugee Protection Division (RPD) of the IRB is responsible for the adjudication of refugee claims made in Canada. In accordance with its obligations under international law, Canada grants protection to persons who have a well-founded fear of persecution because of race, nationality, religion, political opinion, or membership in a particular social group (Colaiacovo, 2013, 4). In addition, a person may request protection in Canada on the basis of his or her fear of torture, risk to life or risk of cruel and unusual treatment or punishment (Colaiacovo, 2013, 4).

The RPD process revolves around assessing the credibility of oral testimonies and of documentary evidence submitted by the claimant. Credibility assessments determine whether the claimant's account of feared persecution is genuine (Rehaag 2015, 39). If the refugee claim is accepted by the RPD, the individual can remain in Canada as a refugee and apply for permanent residence 6 months after receiving refugee status. If the claim is rejected or if the individual withdrew or abandoned the claim, the individual must leave Canada or the CBSA will enforce the removal. Refused claimants can appeal the RPD decision to the Refugee Appeal Division (RAD) of the IRB (IRPA, s. 110 (1) and IRPA, s.159.91). Established in 2012, the RAD reviews the merits of decisions by the RPD, ultimately deciding to confirm the decision, set it aside and substitute its own decision, or refer it back to the RPD for redetermination. Furthermore, claimants who receive a negative decision from the RAD and those who do not have access to the RAD can file an application for leave and for judicial review of the RAD decision or the RPD decision with the Federal Court (Atak et al. 2018). Asylum seekers are generally eligible for legal aid, although access to legal aid varies from province to province. They also benefit from other procedural rights, such as the right to an interpreter.

7.3. The Creation of the Canada Border Services Agency (CBSA)

As the number of refugees under UNHRC's mandate soared from 12 million in 2001 and to 20.7 in 2020, Canada has experienced an increase in inland asylum claims (Tomkinson 2018, 186).

Irregular arrivals of asylum seekers are deemed a challenge to state sovereignty. They are typically met with public backlash and political opposition, particularly, in case of group arrivals. The above-mentioned positive developments in Canada's inland asylum system have paradoxically been accompanied by securitising practices towards asylum seekers. For instance, the arrival of four boats of Chinese nationals on the coast of British Columbia in 1999 spurred several legislative changes that expanded powers of detention (CIC 2002). The 9/11 terrorist attacks in the US exacerbated this trend, linking asylum seekers to security threats and fraud.

The establishment of the Canada Border Services Agency (CBSA) in 2003 is an important element of Canada's integrated response to the 9/11 attacks (Atak et al 2019, 10). The CBSA is a federal agency that provides integrated border services that support national security and public safety priorities and facilitate the movement of people and goods across the border. The CBSA is intended to act serve as a 'first line of defence' against threats to national security (Atak et al., 2019, 6) – their mandate in relation to the refugee determination process is to conduct the primary assessment for eligibility. The CBSA reports to the Minister of Public Safety and Emergency Preparedness. The Agency is vested with the power to identify and deny entry to Canada of persons deemed 'inadmissible', according to the IRPA. Inadmissible persons are investigated and removed by the Agency. To that end, CBSA officers can make representations before the IRB and request the exclusion of asylum seekers from Canada. It has been observed however (as will be further explored in the following sections) that the IRB over-relies on such decision thereby granting the CBSA an extended adjudicative role.

Before the creation of the CBSA in 2003, the Federal Immigration Ministry, called Immigration, Refugees, Citizenship Canada (IRCC; formerly Citizenship and Immigration Canada (CIC)) was simultaneously responsible for immigration enforcement, immigrant selection and integration, refugee protection, and granting of citizenship. In 2003, the CBSA has become solely responsible for immigration enforcement and criminal investigations of IRPA offences, which includes responsibility for arrests, detentions, removals, and representing ministers at immigration and refugee proceedings. The division of immigration operations into separate institutions has produced serious implications for how migration is managed, underscoring the securitization of asylum in Canada (Atak et al 2019).

7.4. The Creation of the Refugee Appeal Division (2012)

As stated previously, most asylum seekers whose claims are refused by the Refugee Protection Division of the IRB have the right to appeal to the IRB's Refugee Appeal Division (IRPA ss 110 (1) and 159.91). The RAD was established in 2012. Its role is to review the merits of decisions by the RPD, ultimately deciding to confirm the decision, set it aside and substitute its own decision, or refer it back to the RPD for redetermination. The RAD will base its decision on the documents provided by the parties involved and the RPD record. In most cases, there will be no hearing. As well, the RAD cannot consider new evidence that was not submitted to the RPD unless this evidence was not available to the appellant or did not exist at the time of the RPD hearing (RAD Rules). An appeal to the RAD of the IRB results in an automatic stay of removal (IRPA s 49(2)(c)).

7.5. Federal Court and Judicial Review

Once a claimant has exhausted their right to appeal at the RAD they can then turn to judicial review of the federal court. Similar to the process of the RAD, reviews at the federal court are based purely on reasonableness of the claim. A review by the Federal Court is a two -stage process: the first stage is the leave state and the second is the judicial review stage (IRCC, 2019, n.p.). In the Leave Stage, the Court reviews the documents about the claimant's case. The claimant must show the

Court that the decision was not fair or reasonable, or that there was an error. If the Court gives leave, it means it agrees to examine the decision in depth. An agreement to examine the decision then triggers the second stage, the Judicial review. At this stage, the claimant (often with legal representation) can attend an oral hearing before the court and explain why they believe the original IRB decision was wrong (IRCC, 2019, n.p.). As Sean Rehaag notes, judicial review is often the only way to correct errors made by the Immigration and Refugee Board in refugee determinations (Rehaag, 2012, 1). The stakes are high for refugee claimants confronting deportation to countries where they may face persecution, torture or death. Rehaag questions whether cases heard at the Federal Court are truly adjudicated based off reasonableness and merit of the case, or whether cases are decided based off which judge is assigned to decide the application. Rehaag refers to this as, "luck of the draw".

In addition to the potential of bias, there are a number of procedural issues that pose challenges for claimants attempting to appeal the decision of the IRB. Namely, the timelines for applications for leave are tight: the application must be filed within 15 days after the RAD sends written reasons. The respondent has ten days to indicate opposition to the application by filing a notice to appear. The application must be perfected within 30 days by filing an application record, which includes the decision under review, a memorandum of argument and supporting affidavits. If the respondent wants to oppose the application for leave, the respondent then has 30 days to file a memorandum of argument and supporting affidavits, and the applicant may file a reply within ten days. A single Federal Court judge (the leave judge) decides whether to grant leave in any given case. Applications are not screened before being assigned to a particular leave judge, so cases are effectively assigned at random. In other words, leave judges—unlike RPD Members who make first-instance refugee determinations—do not specialize in particular types of applications, or applications involving claimants from particular countries (Rehaag, 2012, 5-6). Reasons for granting or denying leave are not typically provided. When leave is denied, there is no further appeal. Resultingly, there is very little guiding jurisprudence discussing leave requirements.

In 2006, Canadian Council for Refugees v Canada, Hughes J characterized the test for leave in these terms: "the standard for granting an Order permitting judicial review is low. The matter at that point is to be dealt with in a summary way. The standard on a leave application is whether or not a fairly arguable case is disclosed" (para 20). In Level v Canada (Minister of Citizenship and Immigration), Russell J noted that "while the leave judge determines if there is a serious question to be tried, it is the judge on judicial review who has the opportunity to fully consider and weigh the merits of the application. . . . On leave to commence an application, the merits of the parties' arguments are not to be considered" (para 58). The test for leave has therefore been variably described in the following terms: a reasonably arguable case; a fairly arguable case; a serious question to be tried; and whether it is plain and obvious that the applicant has no reasonable prospect of success. However formulated, the test is highly permissive: leave should be granted unless it is clear that the judicial review application has no reasonable chance of success, namely, where it is so obvious that the application must fail that a determination on the merits is unnecessary (Rehaag, 2012, 9).

A Federal Court judge (JR judge), other than the leave judge, presides over the hearing. The JR judge must determine whether the applicant has established that the RPD committed a reviewable and material error. The Federal Court can overturn a RAD decision where the RAD (1) acted outside or beyond its jurisdiction; (2) breached principles of natural justice or procedural fairness; (3) erred in law; (4) made findings of fact that were perverse or capricious, or were made without due regard to the available evidence; (5) acted as a result of fraud or perjury; or (6) acted contrary to law (Rehaag, 2012, 9). In reviewing such findings it applies a standard of

"reasonableness", on which the question is not whether the JR judge would have made different findings but whether the findings that were made were reasonably open to the RPD Member and were adequately justified (Rehaag, 2012, 10). As the Supreme Court put it in Vavilov (2019), a reasonable decision is based on an internally coherent reasoning, is justified in light of the legal and factual constraints that bear on the decision:

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the "correct" solution to the problem. .... Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led —was unreasonable (Canada (Minister of Citizenship and Immigration) *v.* Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653, para. 83).

Ultimately, if the Court agrees with the IRB's original decision and finds there was no error, the claimant will be ordered to leave Canada. However, if the court finds that an error did occur, the claimant's case is returned to the IRB for reconsideration – this does not mean that the IRB will automatically reserve the decision (IRCC, 2019, n.p.).

7.6. Pre-Removal Risk Assessment (PRRA)

A PRRA is an assessment of the risk a non-citizen would face if removed from Canada. A refused refugee claimant is eligible to file a PRRA application, which is subject to judicial review by the Federal Court. Similarly, a non-citizen who is ordered deported from Canada for criminality can also file a PRRA application. PRRA submissions may only include new evidence of a risk of danger or persecution that arose after rejection of the refugee protection claim or deportation order. An Immigration, Refugees, and Citizenship Canada officer assesses the application and renders a decision. An applicant may request judicial review of a negative PRRA decision. Before 2012, most claimants whose refugee claims were not successful, and who had been given a removal order, could apply for a PRRA. They had 15 days to submit their application to IRCC, and 30 days to submit new documentation and evidence to IRCC. Pursuant to the *Balanced Refugee Reform Act* (2010) (see below), refused refugee claimants are barred to apply for a PRRA for one year following their final IRB decision. DFNs have no access to a PRRA for 36 months after a negative decision. While originally intended as a "safety net to capture exceptional cases where country conditions or circumstances have recently changed", these increased restrictions may be delaying protection by a year for claimants who would otherwise qualify for a PRRA (IRCC, 2009).

7.7. Refugee Protection Division (RPD) Trends 2000-2012

Refugee claims which were referred to the Immigration and Refugee Board of Canada (IRB) on or before December 15, 2012 are called *legacy claims*. These claims were heard before the new refugee determination system took effect, therefore, there seems to be generally less information available about these older claims. Looking at the number of referred claims to the Refugee Protection Division (RPD), some trends can be noted. In the year 2000, the decade started off with a total of 36,355 claims referred to the RPD within that year. In 2001, there was a significant

increase in the number of referred claims to the RPD by 47,823, which is 10,000+ more claims than they had received in the previous year. However, from 2002 to 2006, there is a steady decrease in the number of referred claims to the RPD per year as shown in the chart above (from 43,526 in 2002; 36,171 in 2003; 26,939 in 2004; 22,492 in 2005; and 24,592 in 2006). Between 2000-2012, the two highest peaks in the annual number of referred claims before the RPD was in 2001 (47,823) and 2008 (37,098). Despite these two peaks, when looking at the entire span of these 12 years altogether (2000-2012), there is a general decline in the annual number of referred claims to the RPD annually whereas in 2000, the RPD started off with 36,355 referred claims annually and in 2012, the RPD was referred 20,141 claims annually. According to Epp (2017), one group of asylum claimants Canada saw within this time period was the shipload of mostly Tamil people from Sri Lanka in 2010. Another group was the Hungarian Roma refugees who arrived between 2008-2011 (Mir, Syed & Alemayehu, 2020).

8. Significant changes in Canada's Refugee Status Determination (RSD) in 2000-2020

8.1. The broadening of the statutory grounds for refugee ineligibility

The ineligibility grounds are outlined in s. 101(1) of the *Immigration and Refugee Protection Act* (IRPA) and include: refugee protection has been conferred on the claimant under IRPA; a claim for refugee protection by the claimant has been rejected by the IRB; 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; the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country; or the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

8.1.1. The 2004 Canada-US Safe Third Country Agreement

A controversial refugee ineligibility ground is found in the *Canada-United States (US) Safe Third Country Agreement* (STCA) entered into force in 2004. Under IRPA section 101(1)(e), the Minister of Immigration, Refugees and Citizenship can designate a country as a safe third country. To date, the US is the only country that Canada has designated as a safe third country. The STCA bars most third-country nationals in the US from making an asylum claim at Canadian land ports of entry (2004, Art. 4.1). According to this Agreement, refugee protection claims must be made by asylum seekers in the *first* safe country -the US or Canada-, they pass through. The STCA applies to asylum seekers who present themselves at official ports of entry along the land border. These asylum seekers are returned to the US, with the exception of those who have family members in Canada, are unaccompanied minors, have valid documents (visa or work permit) or qualify for public interest exceptions (Art. 4.2). Those who manage to arrive on Canadian soil, albeit irregularly, are allowed to stay and make an asylum claim (Arbel 2015, p. 824).

As a burden sharing instrument, the Agreement aims to prevent and deter the secondary refugee movements between the US and Canada. However, the bilateral agreement is known to exacerbate the vulnerability of asylum seekers by pushing them to cross the US-Canada land border irregularly, between official ports of entry. It illustrates the government's aim to deter the mobility of some groups of asylum seekers by limiting their access to international protection. In 2017, a legal challenge was launched by civil society organizations, asking the Federal Court of Canada to suspend the STCA on the ground that the US is not a safe country for refugees. On 22 July 2020, the Federal Court of Canada determined that the STCA is unconstitutional. Noting that those

returned by Canadian officials are detained in the US as a penalty, and without regard to their circumstances, moral blameworthiness, or their actions. The Federal Court concluded that detention and the ensuing hardship and risks, including denial of access to a fair refugee process infringe upon asylum seekers' right to liberty and security protected in the *Canadian Charter of Rights and Freedoms* (*Canadian Council for Refugees* 2020 FC 770, paras. 135 and 146). In April 2021, the decision was overturned by the Federal Court of Appeal. As of November 2022, the case is pending before the Supreme Court of Canada. It should be noted that during the COVID-19 pandemic, the US and Canada have reached a temporary agreement which allows Canada to send back to the US, all asylum seekers entering Canada from the US, without authorization, between official ports of entry along the land border and at air and marine ports of entry (Government of Canada 2020). Although this agreement is no longer implemented, the STCA continues to block asylum seekers at the Canada-US border.

8.1.2. Ineligibility of asylum seekers with a previous claim in a Five Eyes country

Another controversial refugee ineligibility issue has been the new ground added to IRPA s. 101(1) in June 2019. The measure was Canada's response to the unprecedented increase in refugee movements from the US following the election of President Donald J. Trump in November 2016. More than 59 000 individuals irregularly crossed the Canada–US border to claim asylum in Canada between January 2017 and March 2020 when the international border was closed due to the COVID-19 pandemic. These movements have been perceived by the public as abuse of Canada's refugee system (Angus Reid Institute 2018). Increases in the number of asylum claims exacerbated the already overstretched administrative capacity of the IRB and contributed to a record level backlog of cases in 2019. Tensions heightened between the federal and provincial governments since new arrivals put the capacity of reception and settlement services under strain. The Liberal Federal government faced growing criticism from the opposition in Parliament for its border response (Atak et al. 2021). The new provision makes asylum seekers ineligible for protection in Canada if they have made a previous refugee claim in a country that Canada shares an information-sharing agreement with. Such agreements are currently in place with the US, Australia, the UK, and New Zealand (*Budget Implementation Act*, s. 306). The existence of a refugee claim in another country is confirmed through information sharing with the immigration divisions in partner countries. This ineligibility ground applies regardless of whether a decision was ever made on the previous claim. The asylum seekers will only have access to a Pre-Removal Risk Assessment (PRRA) which involves an evaluation of the risk they would face if removed from Canada. They are entitled to a hearing with a PRRA officer (IRPA s. 113.01) (see also below). The PRRA is not an appropriate substitute for IRB hearings (Canadian Council for Refugees (CCR) 2019). This remedy does not offer access to fair and efficient protection and can hardly be compared with the IRB's refugee status determination process.

What's more, unlike the STCA, the new eligibility provision does not include any exceptions or exemptions. It differs from the STCA in that there is no provision in the IRPA or the *Immigration and Refugee Protection Regulations* (IRPR) under which those who are deemed ineligible would be removed to the country where they made a prior claim. Instead, asylum seekers are subject to the usual deportation processes under the IRPR. In most cases, they are returned to their country of nationality (i.e. the country of feared persecution) which involves a risk of *refoulement*.

These policy developments illustrate how refugee law has been used to deter and punish certain groups of asylum seekers. The special status of refugees in international law does not necessarily guarantee their fair access to protection when other domestic and foreign policy considerations are prioritized over legal obligations under the 1951 Refugee Convention.

8.1.3. Access to procedure and refugee admissibility determination

As stated, the CBSA and IRCC are vested with the power to identify and deny entry to Canada of persons deemed 'inadmissible'. IRPA ss. 34–42 describe different grounds of inadmissibility for refugees, which include: security grounds, s. 34(1); human or international rights violations, s. 35(1); criminality and organized criminality, ss. 36(1) and 37(1); health grounds, s. 38(1); financial reasons, s. 39; misrepresentations, s. 40(1); non-compliance with Canadian immigration laws, s. 41; and, inadmissible family members, s. 42. If, in light of information collected through the FESS, the CBSA and IRCC believe that a person is inadmissible, they can make intervene before the Immigration and Refugee Board of Canada and request the inadmissibility to Canada of foreign nationals. These ministerial interventions have the objective of contesting some aspect of the claimant's submissions. More particularly, the CBSA intervenes in two situations: (i) cases involving serious criminality, security concerns, war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations, according to article 1F of the Refugee Convention; (ii) hybrid cases, that is, where there are combined programme integrity/credibility issues and criminality or security concerns. IRCC ministerial interventions are restricted to cases involving program integrity and credibility as well as cases where exclusion pursuant to article1E of the Refugee Convention arises (IRCC, 2016b, p. 6). Inadmissible persons are removed by the CBSA.

Ministerial interventions had been used as a tool to exclude refugee claimants arriving irregularly in Canada, in particular during the rule of the Conservative federal government (2006-2015) (Atak et al, 2019). A typical example of the treatment of nearly 600 Tamil asylum-seekers from Sri Lanka, who arrived irregularly in Canada aboard two boats in 2009 and 2010. The Conservative government (2005-2016) stigmatised the passengers as terrorists, migrant smugglers and bogus refugees. It suggested that the integrity of the immigration system was undermined by the costs of processing baseless claims made by the passengers. In an attempt to delegitimize their protection claims, the Minister of Immigration said: "We must act to avoid a two-tier immigration system: one for immigrants who wait in line – often for years – to come to Canada, and another for those who use the asylum system, not for protection, but to try to get through the back door into Canada" (CIC News 2010). Several asylum seekers aboard the boats were criminally prosecuted. The government intervened in every passenger's refugee claim, in an attempt to exclude them from refugee protection (Grant 2018). Moreover, the IRPA was amended to deter future irregular arrivals (the Balanced Refugee Reform Act (2010) and the Protecting Canada's Immigration System Act (2012)). The changes include mandatory detention, and elimination procedural rights, such as the right of appeal, for asylum seekers who arrive in Canada irregularly, in a group and with the help of a migrant smuggler.

Moreover, the *Protecting Canada's Immigration System Act* amended and expanded the definition of what constitutes "human smuggling" under IRPA s. 37. It imposed mandatory minimum prison sentences on convicted human smugglers. Those declared inadmissible under section 37 (as well as sections 34–36) were denied access to humanitarian and compassionate considerations and lost the right to appeal unfavourable IRB decisions and removal orders (IRPA s. 64). In 2015, the Supreme Court of Canada found the definition of human smuggling overbroad and ruled that acts of humanitarian and mutual aid (including aid between family members) should not constitute people smuggling under the IRPA (*R. v. Appulonappa*, 2015 SCC 59, par. 45). The Supreme Court recognized that Section 37(1)(*b*) of the *IRPA* performs a gatekeeping function and people who fall within it cannot have their refugee claims determined, regardless of the merits. In *B010*, the Court decided that 37(1)(*b*) applies only to people who act to further illegal entry of

asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. It concluded that a migrant who aids in his own illegal entry or the illegal entry of other refugees or asylum-seekers in their collective flight to safety is not inadmissible under s. 37(1)(*b*) (B010 *v.* Canada, 2015 SCC 58, par. 76).

8.2. Creation of new classes of refugee claimants with restricted access to procedure

The Balanced Refugee Reform Act (2010) and the Protecting Canada's Immigration System Act (2012), both of which amended the IRPA introduced new classes of refugee claimants in Canada. This legislation was adopted as a response to the above-mentioned irregular boat arrivals of Tamil asylum seekers in 2009 and 2010.

8.2.1. "Designated Foreign Nationals" (DFN)

The DFN policy allows the Minister of Public Safety to "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" (IRPA s. 20.1 [1]).

The policy targets those asylum seekers who arrive to Canada irregularly, in a group and with the help of a migrant smuggler. It mandates the arrest and detention of DFNs aged 16 and over (IRPA s. 55(3.1)). Other features are:

- DFNs should prepare the hearing, before the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), within 45 days of being found eligible; compared with 60 days for non-designated claimants and 18 months in the previous system;
- DFNs are ineligible to apply for a work permit until their claim is approved by the IRB, or until their claim has been in the system for more than 180 days and no decision has been made (IRPA s. 24(5));
- DFNs whose refugee claims are rejected by the RPD of the IRB are denied a right of appeal to the Refugee Appeal Division (RAD) (IRPA s. 110(2)(a)) and face immediate deportation;
- DFNs do not have the right to an automatic stay of removal upon applying for leave and for judicial review to the Federal Court, and can therefore be deported during their application;
- Finally, even when they obtain refugee status or the status of a "person in need of protection," DFNs are required to wait five years before applying for permanent residence and before they can sponsor their family members. By contrast, foreign nationals who obtain the status of "refugee" or "protected person" can apply for permanent residence after 180 days have passed, and sponsor family members once they gain permanent residence (IRPA s. 11(1.2)).

Despite being used only once since 2013, the DFN class is undoubtedly the best illustration of Canada's move toward the criminalization of its asylum system.

8.2.3. "Designated country of origin" Policy

Under the designated country of origin (DCO) policy, introduced in 2012, the Minister of Immigration had the authority to designate a country as "safe" if, among other criteria, the country was deemed to possess formal state institutions commensurate with democratic principles and the rule of law. Hence, asylum seekers from 42 DCOs, including several European Union member states, faced shorter timelines to prepare for an IRB hearing than non-DCO claimants. Initially, DCO claimants were denied the right to appeal a negative decision before the IRB's Refugee Appeal Division and faced a 36-month bar on the Pre-Removal Risk Assessment. They also had limited healthcare as well as delayed access to work permits. The lack of appeal before the RAD and restrictions to healthcare services were successfully challenged before courts and struck down (*Y.Z.*, 2015 FC 892; *Canadian Doctors*, 2014 FC 651). The Federal Court of Canada found that, in particular, the compressed timelines and reduced procedural safeguards made the policy discriminatory for claimants from the DCOs, depriving them of substantive equality vis-a-vis those from non-DCO countries and expressly imposing a disadvantage on the basis of national origin alone (*Y.Z.* 2015 FC 892). On 17 May 2019, the Federal Government removed all countries from the DCO list, which suspends the DCO policy, until it can be repealed through future legislative changes (Atak et al., 2019).

8.3. CBSA Ministerial Interventions

The CBSA agents interact with asylum seekers at different stages of the process and make decisions in the eligibility determination, security screening, and ministerial interventions before the IRB. During the eligibility assessment, the CBSA is not entitled to assess the credibility of the claim, but simply to verify the claimant's identity and whether the claim fulfils some basic requirements of eligibility. However, as the Standing Senate Committee pointed out, during the eligibility determination, the CBSA officers used interviews to leverage evidence of inadmissibility (Standing Senate Committee on National Security and Defence, Canada, 'Vigilance, Accountability and Security at Canada's Borders' (June 2015) 12). They tend to overstep their authority by delving into the merits of a claim, questioning the credibility of the claimant, and seeking information related to criminal and regulatory offences.

Additionally, there has been an increase in ministerial interventions in the last two decades, particularly under the former Conservative government (2006-2014) that used interventions as a tool to exclude refugee claimants arriving irregularly in Canada. If, in light of information collected through the FESS, the CBSA or IRCC believe that an asylum seeker is inadmissible, they will intervene in IRB hearings. More particularly, the CBSA intervenes in two situations: (i) cases involving serious criminality, security concerns, war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations, according to article 1F of the Refugee Convention; (ii) hybrid cases, that is, where there are combined programme integrity/credibility issues and criminality or security concerns. In contrast, IRCC ministerial interventions are restricted to cases involving programme integrity and credibility, as well as cases where exclusion pursuant to art 1E of the Refugee Convention arises. For more on this topic, see IRCC, 'Ministerial Intervention', ENF 24 (2016). The objective of a ministerial intervention is to contest some aspects of the refugee claimant's submission at the refugee hearing. Interventions include the introduction

of evidence (including documentary evidence and witness testimony) and cross-examination of the claimant.

Tab. 1. Refugee Protection Division (RPD) acceptance rates in cases where the CBSA intervened

Fiscal Year	Refugee Protection Granted	Refugee Protection Granted (%)	Total Decisions
2012–13	531	21.6	2,459
2013–14	529	26.9	1,960
2014–15	697	33.0	2,111
2015–16	631	40.4	1,562
2016–17	307	29.5	1,040
2017–18	300	28.6	1,049

Table 1 shows a high rejection rate of refugee claims in cases where the CBSA intervened (Atak et al., 2019)

By contrast, the overall Refugee Protection Division (RPD) grant rates during this period were quite high. To illustrate, the RPD acceptance rate was 54 per cent in 2013 (3,064 accepted out of 5,651 total finalized cases), 60.6 per cent in 2014 (7,156 accepted out of 11,813 total finalized cases), 63.8 per cent in 2015 (8,596 accepted out of 13,459 total finalized cases), 63.2 per cent in 2016 (9,972 accepted out of 15,761 total finalized cases) and 62.9 per cent in 2017 (13,553 accepted out of 21,513 total finalized cases).

The CBSA decisions have a considerable impact on the outcome of a refugee claim and therefore bear serious consequences for the life, safety, and security of the individuals concerned. More broadly, the CBSA holds powers that can deny or delay access to basic services, including health care and education; invade the privacy of asylum seekers; or deprive them of their liberty.

The security-oriented culture within the Agency can be explained by various factors, including the geopolitical context that led to its creation in the wake of 9/11. During the Conservative rule, national security and immigration enforcement became intertwined. Asylum seekers have been criminalized and the CBSA programmes have been enhanced through increased funding by the previous Conservative government. The institutional configuration and interests of the CBSA, as a body within the Public Safety portfolio exclusively in charge of immigration enforcement, is another factor that explains the prevalence of such a culture among CBSA officers as security professionals.

8.4. Review of the Immigration and Refugee Board (IRB)

In the last decade, significant changes have been made to improve the IRB decision-making, including members' appointment criteria and training (Rehaag 2019). The IRB decision-making process is subject to regular quality assessments by independent experts. Most notably, a review conducted in 2017 by Canadian legal practitioner, Kathy Laird, identified a number of key concerns pertaining to refugee determination at the IRB. The external audit of the IRB was commissioned in 2017 by chairperson, Mario Dion and was conducted over a seven-month period, wherein Laird completed a detailed review of over 300 randomly selected refugee determination decisions and detention reviews at the IRB under the IRPA. The audit was commissioned in large part due to the advocacy of several legal practitioners located in the Central Region (largely Ontario) that identified key concerns within the RPD and ID's refugee determination process which greatly impacted refugees' pathway to permanent residency or citizenship in Canada (IRB Audit, 2017,

4). Simultaneously however, several 'progressive' immigration and protection policies were being introduced and implemented throughout Canada. This could be in part due to the transfer of power from the everlasting conservative government led by former Prime Minister Stephen Harper to the Liberal government led by Prime Minister Justin Trudeau (Yuting Lin, 2017). As part of this transfer – the liberal government sought to introduce more 'progressive' and 'humane' immigration policy that would help to address issues of transparency, treatment of immigrants, and Canada's detention system. As the 2017 audit was being conducted – the former Minister of Public Safety, Ralph Goodale was implementing the National Immigration Detention Framework (NIDF) which posed large implications for the ID at the IRB. The findings of the 2017 audit report found that noticeable discrepancies existed between the expectation articulated by the court and the practises of the ID (IRB Audit, 2017, 5). In over 50 percent of the cases reviewed – the IRB failed to meet judicial standards during a refugee determination decision process (audit). Notably, decisions for detention and granting status to refugees often fall to the discretion of one sole adjudicator, rather than the collective decision-making authority of members at the ID (IRB Audit, 2017, 5) – this has far reaching implications for the RSD process, seeing as it increases the level of bias and discretion afforded to a sole adjudicator. A second notable cause for concern as presented within the audit report was the IRB adjudicators' overarching observations and assumptions, meaning that members often failed to, over the course of months or even years, assess the evidence placed in front of them, rather members would rely on past decisions made by their colleagues and the initial assessment conducted by the CBSA (IRB Audit, 2017, 7). This has also resulted in a number of inaccuracies and inconsistencies in the factual findings (IRB Audit, 2017, 6).

In order to try and address some of the concerns raised within the ongoing audits, IRB members are assisted by a number of Chairperson's Guidelines that provide principles for adjudicating and managing cases. Litigation and advocacy in immigration and refugee matters have been part of the efforts to ensure a better compliance of Canada with its international obligations (see for instance: *De Guzman v Canada (Minister of Citizenship & Immigration*, [2005] F.C.J. No. 2219). In addition, as Zinn and Perryman argued, the *Canadian Charter of Rights and Freedoms* (the Charter), entered into force in 1982, has been instrumental in the advancing constitutional protections for refugees, including procedural fairness (2013, 137). These factors led to the development of a sophisticated case-law on matters such as, refugeehood, exclusion and the human rights of asylum seekers.

8.5. Refugee Protection Division (RPD): 2013-2020 Trends

In 2013, there were a total of 10,465 referred claims to the RPD which is a notable drop from the previous year of 20,141. However, this may be a result of the newly adopted refugee determination system (likely along with other factors). The number of annually referred claims to the RPD increased each year for the following 6 years (between 2013 to 2019) to an eventual peak of 58,378 referred claims in the year of 2019. There is a significant jump from 2016 to 2017 from 23,350 annually referred claims in 2016 to 47,425 annually referred claims in 2017 which is more than a doubled increase, likely due to the influx of Syrian refugees arriving to Canada, as well as, the deterioration of conditions for refugee claimants in the United States since 2016 resulting in an unprecedented number of asylum claims made in Canada in 2019 (Macklin and Blum, 2021). In 2020, the unprecedented number of referred claims seen by the RPD in 2019 significantly dropped to a total of 18,500 referred claims to the RPD. This was likely a result of the border closures and restrictions imposed due to the Covid-19 pandemic.

In the case of the RPD, annual acceptance rates per year remained consistently greater than annual refusal rates per year between 2013 to 2020. From 2013 to 2015, annual acceptance rates

steadily increased while annual refusal rates simultaneously decreased (i.e., more claims were being accepted annually and less claims were being refused annually). From 2016 to 2017, annual acceptance rates remained the same while annual refusal rates decreased (i.e., the same percentage of claims were accepted annually while less claims were being refused annually). However, from 2017 to 2018, annual acceptance rates decreased while refusal rates increased (i.e., less claims were accepted annually while more claims were refused annually). Between 2013 to 2020, the year with the highest annual acceptance rate was 2015, and the year with the lowest annual acceptance rate was 2013. For refusals, the year with the highest annual refusal rate was 2013 while the year with the lowest annual acceptance rate was 2017. When looking at the relationship between acceptance/refusal rates and corresponding nationalities, a few trends were found. From 2013 to 2015, Pakistan, Syria and China (not listed in a particular order) remained as the top 3 nationalities for accepted RPD claims annually. However, China was also a top 3 nationality for refused claims within this same time period between 2013 to 2015. And, from 2017 to 2019, Turkey remained in the top 3 nationalities for accepted claims. At the same time, between 2017 to 2019, Haiti, China and Nigeria remained the top 3 nationalities for refused claims. Notably, in 2019 and 2020, Mexico became part of the top 3 nationalities of refused claims (IRB, 2022).

8.6. The Refugee Appeal Division (RAD): 2013-2020 Trends

Appeals Filed before the RAD (2013-2020)

Year	# of cases filed to RAD per year	Top 3 source countries
2013	1,146	China (110), Nigeria (96), Colombia (62)
2014	2,391	China (321), Nigeria (219), India (137)
2015	2,959	China (391), Nigeria (230), Pakistan (126)
2016	3,813	China (437), Nigeria (449), Hungary (216)
2017	4,905	Nigeria (830), China (457), Haiti (423)
2018	7,256	Nigeria (1,621), Haiti (1,337), China (428)
2019	11,817	Nigeria (3,910), Haiti (1,825), Mexico (899)
2020	6,894	Nigeria (1,812), Mexico (1,009), India (530)

For more information, visit: https://www.irb-cisr.gc.ca/en/statistics/protection/Pages/index.aspx

In 2013, a total of 1,146 appeals were filed with the RAD. The number of appeals filed increased annually from 2013 until 2019 with a peak of 11,817 appeals filed in 2019. The most significant increases seen within this period was between 2017 to 2018 from 4,905 to 7256 appeals filed, respectively, and between 2018 to 2019 from 7,256 to 11,817 appeals filed, respectively. In 2020 however, there was almost a half increase in the number of appeals filed in the previous year with 6,894 appeals filed in 2020. In general, the annual number of appeals filed before the RAD seem to follow the trends aforementioned with the annual number of referred claims to the RPD. In other words, there is also a steady increase seen from 2013 to 2019, with the highest peak in 2019, and a significant drop in 2020. In terms of country of origin, between 2013 to 2019, China and Nigeria remained amongst the top 3 source countries filing appeals before the RAD. Other top

3 source countries during this period included Colombia, India, Pakistan, Hungary, Haiti. and Hungary. From 2019 to 2020, Mexico became a top 3 source country for appeals filed alongside Nigeria. Interestingly, Nigeria remained a top 3 source country for appeals filed before the RPD for all 8 years examined (from 2013 to 2020).

From 2013 to 2020, annual refusal rates remained consistently higher than acceptance rates at the RAD. Between 2013 to 2016, annual acceptance rates by the RAD steadily increased while annual refusal rates also steadily increased (i.e., more appeals were being accepted annually while more appeals were also being refused annually). From 2017 to 2018, annual acceptance rates by the RAD slightly decreased while annual refusal rates increased (i.e., less appeals were being accepted annually while more appeals were being refused annually). In 2019 to 2020, annual acceptance rates by the RAD increased while annual refusal rates also increased (i.e., more appeals were being accepted annually while more appeals were also being refused annually). Between this 8-year period from 2013 to 2020, the year with the highest annual acceptance rate was 2020, and the year with the lowest annual acceptance rate was 2013. To explain the variations and trends seen in acceptance and refusal rates, Colaiacovo's (2013) study explains that the identity of the adjudicator affects whether or not an individual receives asylum. Similarly, Rehaag (2008) finds that some board members grant status in nearly all claims they adjudicate while others never grant status. Therefore, one explanation for the trends and variations in acceptance and refusal rates might be due to the adjudicator at hand. However, others have also argued that the securitization of Canada's borders as an aftermath of the attacks on September 11, 2001 has highly politicized Canada's response to potential refugees, and this meant that decisions were often motivated by anti-Muslim sentiments and ideologies (Epp, 2017). In this context, fluctuating acceptance and refusal rates may be a result of external events and ideologies, as well as systemic discrimination against claimants of certain backgrounds and nationalities.

9. Conclusion

In the last two decades, Canada has continued its efforts to improve the quality of decision making at the IRB. The implementation of the Refugee Appeal Division and a pre-removal risk assessment process have been important milestones in refugee protection. Simultaneously, Canada implemented several measures intended to reduce refugee backlogs and share responsibility with "like-minded" countries. The federal government hoped to deter asylum-seekers and remove refused claimants as soon as possible with a view to protecting the refugee system's integrity. This paper discussed some of the measures that significantly limit access to procedure for several classes of refugee claimants. Although some of the controversial policies were struck down by courts, many remain into force and impede equal access to the asylum system for everybody without discrimination.

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