

**Immigration and Refugee Protection Act:
Balancing Individual Rights and National Security**
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Thesis Abstract

Early in 2001 the federal government tabled Bill C-11, the *Immigration and Refugee Protection Act* (IRPA), new comprehensive legislation intended to overhaul Canada's immigration laws. By this time, refugees had become singled out above other classes of immigrants as a threat to Canadian national security because a backlog of applicants had permitted thousands of failed refugee claimants to remain in Canada and allowed a small number of undesirable individuals to commit serious crimes and to plan and support terrorist activities. This led to public concern that refugees were a potential threat to public safety, national security, and even Canada-US relations. As a result, there were calls for Canada to tighten up its refugee system by adopting a more restrictive adjudication process for refugee claims. At the same time, there were calls for Canada to maintain a fair and open refugee system. This thesis uses discussions from parliamentary committees, an ethical analysis of the right of liberal states to exert sovereignty at the expense of their obligation to protect refugees, and key provisions in both the 1976 Immigration Acts and IRPA, to compare how the two important public goods discussed above, the rights of refugees and the need to protect national security, were balanced in the IRPA. Three major research questions guide this analysis: What provided the impetus for extra legal and security provisions in the IRPA related to refugees? Did amendments in the IRPA constitute a fundamental change to Canada's refugee determination system? Did the IRPA strike a right balance between safeguarding the rights of refugees and safeguarding national security? These questions represent key elements of the refugee/security nexus, a problem that the IRPA was designed to address. My thesis finds that for the most part the IRPA provided a balanced legislative response to this problem and that it protected the rights of refugees and moderately enhanced provisions related to public safety and national security, although for the latter it did not constitute a marked improvement, nor for the former did it address the outstanding issue of security certificates. But these two deficiencies in the IRPA serve to highlight the inherent tension Canada has had enacting security measures while maintaining fundamental rights for refugees in a changing geo-political environment.

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List of Abbreviations

CAT	Convention Against Torture and Other, Inhuman or Degrading Treatment or Punishment
CBSA	Canadian Border Services Agency
CCR	Canadian Council for Refugees
CIC	Citizenship and Immigration Canada
CRDD	Convention Refugee Determination Division
CSIS	Canadian Security Intelligence Service
IAB	Immigration Appeal Board
IAD	Immigration Appeal Division
ID	Immigration Division
IRB	Immigration Refugee Board
IRPA	Immigration and Refugee Protection Act
PDRCCC	Post-Determination Refugee Claimants in Canada Class
PRRA	Pre-removal Risk Assessment
RAD	Refugee Appeal Division
RCMP	Royal Canadian Mounted Police
RPD	Refugee Protection Division
RSAC	Refugee Status Advisory Committee
UNHCR	UN High Commissioner for Refugees

Chapter 1: Introduction

1.0 Background

In Canada, immigration and refugee policies are treated as more than management strategies; many see them as being “a defining characteristic of Canada.”¹ The political rhetoric of immigration used in Canadian political discourse proclaims that Canada is seen by the world as a nation that welcomes newcomers, promotes the unification of families, tries to maximize the economic benefits of immigration, and endeavours to treat justly both new immigrants and refugees. For example, Joe Fontana, the Chair of the House of Common’s Standing Committee on Citizenship and Immigration, addressed the committee on its first meeting of the 37th Parliament, 1st Session (March 2001) with the following statement:

I think we have a great opportunity, as a committee and as a Parliament, for the first time in 30 years to strike a new immigration act and refugee act for this country. We all know that immigration has been an absolutely positive asset in helping build this country over the past 130 years or so, and that Canada has a proud history and tradition of compassion for those bona fide refugees who have been persecuted in their own lands. And so we have a great opportunity, working together as a committee and as a Parliament, I believe, to strike the new immigration act for the new century to help build our country. ²

“Rather than seeing the immigrant as a threat to the nation-state,” Margaret E. Beare writes, “Canada recognizes that immigration is a vital tool for social, cultural and economic nation-building.”³ These statements demonstrate how immigration is often discussed in terms of it being an elevated Canadian social value. Nevertheless, throughout their history Canadians have struggled with finding the right balance between the rights and safety of immigrants and refugees and the national security and safety of the country.

¹ The Honourable Denis Coderre, *2003 Annual Immigration Plan*, (Ottawa: Department of Citizenship and Immigration Canada, 2003) 3.

² Canada, Parliament, House of Commons Standing, Committee on Citizenship and Immigration, *Minutes of Proceeding*, (Meeting No.2, March 1, 2001), 37th Parliament, 1st Session. (Online), available at: <http://cmte.parl.gc.ca/cmte/CommitteePublications.aspx?SourceId=54458&PARLSES:371&JNT=0&COM=212>. [July 30, 2004].

³ Margaret E. Beare, *Policy with a National Security Agenda*, Paper prepared for Heritage Canada, Commissioned Paper, (February, 2003), 14.

The relationship between safeguarding the rights of immigrants and refugees and safeguarding the national and public security of Canada has been a longstanding issue in Canadian history; both historians and political scientists have explored these two subjects.⁴ In recent years that relationship came under greater scrutiny in Canada, especially after the terrorist attacks in New York and Washington on September 11, 2001. The impetus for such scrutiny stems not only from concerns about threats to national and public security as a result of the terrorist attacks in the United States and elsewhere prior to and after 2001, but also from growing concerns regarding the threats to the rights and safety of refugees and immigrants because of changes to government policy and the growing exploitation of asylum-seekers by criminal organizations and other unscrupulous individuals who profit financially from international migration movements and refugee flows.⁵ The issues of refugees, security and rights have been discussed, interrelated and more fully explored under the topic of protection: a concept related both to protecting Canada from those who are dangerous and who illegally access our country and its refugee determination system, and to protecting access to Canada for the genuinely persecuted who have a claim to our protection.

These concerns were reflected in the provisions of Bill C-11, the *Immigration and Refugee Protection Act* (IRPA) which became law in 2002. The IRPA marked the federal

⁴ See for example, Reg Whitaker's, *Double Standard*, and Bohdan Kordan's, *Enemy Aliens, Prisoners of War: Internment in Canada During the Great War*.

⁵ In 1999 when four boats carrying Chinese migrants arrived off the shores of British Columbia, the debate over immigration and refugee policies was intensely rekindled. Some 600 Chinese migrants survived arduous conditions, but arrived without documents, and most claimed refugee status. The public reacted negatively when it was revealed that the recruitment of these migrants was facilitated by criminal organizations; and, even though most had claimed refugee status in Canada, their intended destination was New York City. Almost all of these claimants were detained pending their hearings; the government feared that they would either flee or be harassed by the criminal agents that had facilitated their arrival into Canada. Once again, the immigration policy of the government, which had been since 1993 administered by the department of *Citizenship and Immigration Canada* (CIC), was placed under intense scrutiny: both for its protection policies for refugee claimants and for its security policies for Canadian citizens. See, Joan Leishman, "Immigration: Searching for Safety," Produced by the *National*, (Canadian Broadcasting Corporation; Toronto, November 26, 2001), available at <http://www.cbc.ca/news/national/indepth/immigration>. [February 16, 2004].

government's first major overhaul in twenty-four years of the legislation and regulations that govern Canadian immigration policy. Contrary to conventional thinking, the IRPA was not enacted in response to the tragic events of September 11, 2001, which one commonly referred to as 9/11. Although the IRPA did not come into force until June 22, 2002, the statute was actually formulated, debated, and approved at the third reading stage in the House of Commons before 9/11. However, at the time of the terrorist attack on 9/11, Bill C-11 had still not been approved by the Senate. Nonetheless, legislators and the public had already begun to debate the question of whether some refugees posed a national security threat, and if they did, how could Canada maintain an open and fair refugee determination system and still protect its citizens. This thesis will mimic the same debate and will pose three central research questions: What provided the impetus for extra legal and security provisions in the IRPA related to refugees? Did amendments in the IRPA constitute a fundamental change to Canada's refugee determination system? Did the IRPA strike a right balance between safeguarding the rights of refugees and safeguarding national security?

In order to answer to these questions one has to look at events that preceded the IRPA. Before it made it through third reading in the Senate and then again before it was proclaimed, considerable attention was devoted to the IRPA to determine whether its provisions sufficed to safeguard not only Canada's national and public security, but to some extent also American national and public security. The reason for this is that notwithstanding the fact that none of the 19 hijackers involved in the September 11th attacks entered across the Canadian border, some U.S. and Canadian media reports depicted Canada as a haven for terrorists who exploited Canada's comparatively liberal refugee and immigration system.⁶

The refugee policies of both countries had elicited, and continue to elicit, concern about their security implications. Of particular concern for the American government is that Canada,

⁶ See, for example, the April 28, 2002 60 Minutes segment on CBS TV, "North of the Border," about terrorism and Canada's immigration and refugee system.

unlike the United States, has not had a policy of detaining asylum seekers until their cases are heard. As a result, Canadian refugee policy was perceived as having serious monitoring and control problems because, on average, each year approximately 10,000 failed refugee claimants who had exhausted their appeals had not shown up for their scheduled hearings and others had disappeared without informing authorities.⁷ Such data, combined both with the terrorist events prior to, on and after 9/11 and the cumulative effects of countless critiques of the immigration and refugee determination system during the previous two decades created extensive concerns in Canada and the United States regarding the adequacy of the measures to safeguard Canada's national and public security. This is still true in the aftermath of 9/11. For example, an article published in 2006 in the *New Republic* stated:

Meanwhile, Canada, which prides itself on having a more tolerant society than the United States, created one of the world's most generous systems of asylum. In the Canadian asylum system, few refugees are turned away, the interpretation of political asylum is extremely broad, and, until very recently, the government almost never detained refugees who could not prove their identity. This generosity has allowed undocumented migrants to stay in Canada, without government surveillance, for years before a status hearing. As a result, Canada takes in roughly twice as many refugees and immigrants, on a per capita basis, as the United States. Once in Canada, these refugees can take advantage of the generous welfare system.⁸

This perception of Canada's asylum system has been fueled by reports that not enough has been done to check the security risk of prospective immigrants, thus allowing terrorists to enter Canada easily and by extension to threaten the security of the United States. Media stories and polling data that helped to reinforce these perceptions include the following:

D.L. Brown conjoined the refugee and security issue in his article, "Attacks Force Canadians to Face Their Own Threat," in *The Washington Post* (23 September 2001: A36). J. Bagole et al echoed the same perception in *The Wall Street Journal* on 24 September 2001. In Canada, many media reports shared the same sentiments. Stewart Bell wrote an article in the *National Post* entitled, "A

⁷Aristide Zolberg, "Guarding the Gates in a World on the Move," Social Science Research Council, (November 2001), available at: http://www.ssrc.orgsept11/essays/zolberg_text_only.htm. [July 12, 2005], n. pag.

⁸ Joshua Kurlantzick, "Terrorism Suspect: Canada's Terrorism Problem," *The New Republic Online*, (Posted July 6, 2006), available at: <http://magazines.eneews.com/doc.mhtml?i=w060605&s=Kurlantzick060706>. [March 7, 2007].

conduit for terrorists” (13 September 2001). Diane Francis wrote about, “Our neighbour’s upset over our loose refugee system” in the *Financial Post* (22 September 2001). A poll conducted for the Council for Canadian Unity indicated that the support for reduced immigration rose after 9/11 from 29% to 45%. However, an even larger percentage, 80% according to Léger Marketing, demanded stricter controls over immigration.⁹

Even though many in the media correctly reported that none of the terrorists involved in 9/11 had entered the United States via Canada, the coverage and polling cited were revealing regarding the relationship between support for the immigration and refugee intake program and how Canadians feel that their personal safety and security are affected by the latter. More specifically, it revealed that support for immigration and its value for Canadians could be weakened if it is viewed as a security risk. The media coverage cited above also demonstrated that for many within the media and in the public, the issue of security and immigration has been co-joined with asylum policy and its link to terrorist activities.

Such suspicion leads to arguments in favour of limiting the rights of refugees. In addition, national security concerns have increased in recent decades with an increase in the number of refugee claims made within Canada, a process commonly referred to as making an inland claim. During the past decade, concerns have been articulated regarding the link between refugees and national security. First, the government has been criticized for not having control of its refugee determination system and by extension its border. This perception has existed even though since the Immigration and Refugee Board (IRB) was established in 1989 there has been a formal security screening process for all refugee claimants who receive status in Canada. However, before the IRPA, inland refugees, unlike those who applied from abroad, were not

⁹ Howard Adelman, “Governance, Globalization, and Security: the Harmonization of Immigration Policy Canada and the United State,” (Draft Paper, Institute of Intergovernmental Relations conference, *Globalization, Multilevel Governance, Democracy: Continental, Canadian, and Global Perspectives*, May, 2002, Kingston Ontario), available at: <http://www.iigr.ca/conferences/archives/pdfs1/adelman.pdf>. [August 4, 2005], 11.

submitted to a formal security check for criminal and terrorist backgrounds until they received refugee status.¹⁰

The lack of a front-end security check for inland claimants was criticized by those on the security and control side of the refugee issue who argued that a reasonable certainty about the identity of those trying to get into the country through a refugee claim should be established before claimants were permitted to make their claims. The Auditor General reported in 2003 that almost 60 percent of refugee claimants in 2002 had presented false documents on arrival or reported when making their claims that they had lost their documents before entering Canada.¹¹ This situation represented a security concern because the refugee hearing process on average took between two to three years to complete. Critics of the refugee screening system charged that, together, the uncertainty around the identity of certain claimants and length of time to process claims weakened the integrity of the Canadian refugee system from a security standpoint. Another security concern for critics of the refugee system was the fact that annually 15 percent of referrals to the IRB had not shown up for their hearings.¹²

Refugee advocates have countered that one of the reasons that refugees either do not have documents or have fraudulent ones upon arrival is because they are fleeing civil war or political oppression. This can make it nearly impossible for refugees to get passports or visas, and under certain circumstances requires them to use false documents. Furthermore, refugee claimants get rid of their fraudulent documents before making their claims, in order not to jeopardize their chances of being accepted.¹³ Nonetheless, without such documents it is difficult to verify the identity of those making refugee claims in Canada and a long determination process ensues. This problem is compounded because many claimants have never been fingerprinted and some of them use different names. In addition, it is difficult for officials to conduct security screening quickly

¹⁰ Martin Collacott, "Canada Still Soft on Terror," *Fraser Forum*, (May, 2004), 9.

¹¹ Ibid.

¹² Leishman, "Immigration: Searching for Safety," n.pag.

¹³ Ibid.

and accurately when they cannot obtain the information from the applicants' country of origin because either the government in that country does not have the capacity to produce such documents or, in many circumstances, it is reluctant to provide them, especially since it is being accused of persecuting the person applying for asylum in Canada.¹⁴

Another major criticism leveled at the refugee determination system was the lack of adequate detention of refugee claimants. Critics suggested that the imperatives of administrative procedures and Canadian jurisprudence discourage the detention of refugee claimants until their case had been heard. Part of the reason for this is that Canada's international treaty obligations prohibit the detention of refugee claimants. The result of these procedures and protocols is that it is difficult for officials to detain refugee claimants, even those suspected of being a security concern.¹⁵ These concerns have sometimes been warranted, as in the examples of international terrorists and criminals using the Canadian refugee determination system to gain entry into Canada, and for using Canada as a base to support their causes.¹⁶

The aforementioned security issues do not alter the fact that since 1946, Canada has accepted thousands of displaced persons, and since 1976 has formally defined humanitarian concerns as a priority in its Immigration Act.¹⁷ In addition, government policy to deal with security concerns associated with the refugee system must adhere to the constitutional rights regime in Canada fully entrenched through the Charter of Rights and Freedoms. As Reg Whitaker explains,

In 1985 the Supreme Court, in the case of *Singh vs. the Minister of Employment and Immigration*, ruled that anyone, including non-citizens, subject to the application of Canadian law could avail themselves of the protection of the Charter of Rights. The import of this decision can hardly be overestimated. Governments now found themselves much more constrained than in the past in setting policy.¹⁸

¹⁴ Ibid.

¹⁵ Reg Whitaker, "Refugees: the Security Dimension," *Citizenship Studies*, Vol. 2, No.3, (1998), 417.

¹⁶ Ibid.

¹⁷ Reg Whitaker, *Canadian Immigration Policy Since Confederation*, Canada's Ethnic Groups Booklet, no. 15, (Ottawa: Canadian Historical Association, 1991), 21.

¹⁸ Ibid., 23.

It is not surprising, therefore, that Bill C-11 contained provisions both to refuse inland refugee claimants perceived as security risks as well as to make provisions geared towards maintaining Canada's obligation to accept genuine refugee claimants fleeing persecution. Such provisions reflected the dual thrust of the new immigration Act implied in the double entendre inherent in its title which explicitly indicates that the statute deals with 'refugee and immigrant protection' but leaves it to the reader to determine precisely who or what is being protected, and from whom. More specifically, it leaves it to the reader to determine whether it is designed to protect immigrants and refugees, Canadian citizens, Canadian national security or, possibly all of those. The objective in the remainder of this chapter is to outline the importance of this thesis, the analytical framework, the sources of information, and how it is organized.

1.1 Objective and Research Question(s)

The central objective of this thesis is to examine what can be described as the dual thrust of the IRPA regarding safeguarding the rights and safety of refugees and safeguarding national security and public safety in Canada. More specifically the objective is to examine the relationship between the federal government's international obligation to protect refugees, and its responsibility to protect both the national security and the public safety of its citizens and permanent residents. Although some attention is devoted to the relevance of the IRPA both for immigrants and refugees, the principal focus will be on refugees. The decision to focus on refugees, rather than both immigrants and refugees, is based on the fact that the latter more often than the former, have been characterized as a security threat in Canada. One of the main reasons for this perception is that the nature of a UN Convention refugee claim can arouse suspicion by citizens, politicians, and bureaucrats in host countries. As Reg Whitaker explains:

[a] well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion arises out of political conflicts that are unlikely to be contained within the country of origin. Spread of such conflicts to the host country is always a fear, and in the age of international terrorism and the global telepolitics of violence, this fear is not always imaginary.¹⁹

Citizens within refugee receiving states like Canada can at times be suspicious of those who seek protection on grounds of political persecution. This thesis will try to examine how the IRPA dealt with the public suspicion of refugees and if it was justified to some extent in addressing this issue. To this effect, the three research questions that will guide this thesis are as follows: What provided the impetus for extra legal and security provisions in the IRPA related to refugees? Did amendments in the IRPA constitute a fundamental change to Canada's refugee determination system? Did the IRPA strike a right balance between safeguarding the rights of refugees and safeguarding national security? These questions represent key elements of the refugee/ security nexus, a problem that the IRPA was designed to address and that is a subject in the next section.

1.2 The Importance of the Thesis

Although this thesis is a case study on the reformulation of immigration and refugee policy in Canada, its focus and findings have implications beyond Canada. In an era of security and globalization, with the free movement of people and goods at unprecedented levels, the question of how countries confront the ethical demands that immigration and refugee movements represent for their sovereignty is now high on the policy agenda of many national governments. Countries are faced with the question of what constitutes a reasonable and just response on their part in trying to meet their treaty obligations towards foreign asylum seekers. The response to such demands has varied from country to country. Canada's approach to the admission and treatment of refugees, like that of many other nations, has been based on principles embodied both in domestic laws as well as in international conventions and protocols to which they are

¹⁹ Reg Whitaker, "Refugees: the Security Dimension," 416.

signatories.²⁰ However, the principles and obligations outlined in these agreements are contentious, for they deal with the obligations and limits of state sovereignty.

For the most part the debate over the refugee/security nexus has been divided between the supporters of open cosmopolitan migration policies and supporters of realist state-centric migration policies. At the centre of the refugee/security nexus is the ethical consideration of whether greater controls over refugee admittance compromise states' responsibilities to UN Convention refugees; the meaning of the word 'protection' and how it applies to refugees is the contested issue in this debate. Howard Adelman outlines two leading ideological positions in this debate as the following:

Cosmopolitans, who appear to predominate in the research field of refugee studies, push global and less restrictive measures that will liberalize access of migrants, particularly refugee claimants, to entry to a state. Liberal neo-realists try to construct improved bilateral and multilateral regimes that will do a better job for the state in exercising its sovereign prerogative to select entrants and members while, at the same time, providing protection to genuine convention refugees.²¹

The two ideological positions discussed above will be the touchstone from which the refugee/security issue and its relation to the IRPA will be explored. Moreover, this thesis will examine whether the IRPA signified a shift in how Canada viewed the potential threat of asylum-seekers, and if so whether it was justified in adopting this position.

It is clear that security issues affect public support for immigrant and refugee programs in Canada. Furthermore, the refugee determination system has come under fire as a possible threat to Canada's security for failing to guard against individuals associated with terrorism and serious criminality. By examining the security measures in the IRPA one can gain a better understanding of how the government and other actors interpreted and planned to address the criticisms

²⁰ The 1951 *UN Convention on the Status of Refugees* has served as the basis for Canada's fundamental commitment to provide protection to migrants in refugee like situations. Canada's commitment to provide non-citizens the same access to Charter rights, as well as its recent incorporation of the *UN Convention against Torture* into the new *Immigration and Refugee Protection Act* are another two legal instruments that refugee claimants can use in order to obtain protection from the Canadian state.

²¹ Howard Adelman, "Towards Harmonization: the Effective Functioning of Asylum and Humanitarian Policies, Research Needed Concerning Policy and Program Development," (Paper prepared for the fifth National Metropolis Conference, October 16-20, 2001), 3.

associated with Canada's refugee determination system. Furthermore, this line of inquiry can help to deduce whether the charges against Canada's asylum system are warranted.

Furthermore, a related purpose for examining the security provisions in the IRPA is to help determine whether Canada has abrogated its commitment to both domestic and international laws that protect refugees and those who face persecution for the sake of better management of its asylum system. During the debate over Bill C-11, critics charged that the security measures in the IRPA were draconian and out of step with Canadian values. However, many of the measures cited in the new Act had already been enacted in previous legislation but had not been enacted in the regulations that governed the previous Immigration Act (e.g., the Safe Third Country Agreement).²² Still other security measures prescribed by the new Act had been recommended by all-party parliamentary reports just prior to the tabling of Bill C-11, such as security checks for all asylum claimants, and greater use of detention for asylum claimants without identification or with false identification. This thesis will compare how these kinds of security provisions measure up against some of the most salient normative positions that underlie the debate about security and refugees.

²² Bill C-55, which was introduced in 1987, contained controversial safe third country provisions whereby immigration officers were given the right to refuse the entry of claimants arriving from 'safe third' countries. By the mid-1980s 'safe-third' country agreements had been reached between numerous signatories of the UN and Geneva Conventions on refugees. These agreements were intended to provide some order to global refugee movements by ensuring that refugees made their claims in the first country in which they were able to safely claim refugee status. Proponents of the provision argued that these agreements were in keeping with the legal intention of the Geneva and UN Conventions. Furthermore, they argued that these agreements help to prevent what was termed as 'asylum shopping', whereby asylum-seekers who were rejected in one country moved to another in the hopes of being accepted. Opponents argued, however, that Canada and other countries were abrogating their responsibility to refugees and potentially placing them in danger by sending them to be reviewed by less refugee-friendly determination systems. Under Bill C-55 cabinet was provided with the statutory authority to draw up a list of acceptable 'safe third' countries but chose not to because of public pressure. Since one third of refugees entered Canada via the United States, and since the United States would have been on the list of safe countries, Canada would have been obliged to refuse the claims of these refugees. Bill C-55 gave precedence to humanitarian concerns over the need to better manage the asylum system; and after extensive debate, Bill C-55 was amended without an official 'safe third country list'. See Kelley and Trebilcock, p. 415-16.

1.3 Analytical Framework

In an attempt to provide a relatively comprehensive explanation of both the factors which shaped the IRPA and how it balanced the need to protect refugees and the need to protect the public, this thesis provides an analysis of each of the following: the philosophies underlying the refugee policies of countries such as Canada; the historical basis of the modern security measures in Canadian law; the link between refugees and terrorism in Canada; and the relevant security measures in the IRPA that affected asylum-seekers and refugees. Admittedly, this approach is only capable of producing a rough portrait of the security and protection measures in Canada's most recent immigration legislation. Hopefully, it provides a useful starting point for the analysis of this important policy issue.

In particular, these sources provide more useful analysis than only focusing on either media or academic accounts of the refugee/security determinants that affected the IRPA. David C. Corbett, one of the first scholars dedicated to the study of Canadian immigration policy, cautioned against making broad assertions about national attitudes towards immigration. In his 1957 book, *Canada's Immigration Policy: A Critique*, Corbett commented on the difficulty of pinpointing national sentiment concerning either the nature of immigration and refugee flows or government immigration and refugee policy.²³ In keeping with Corbett's suggestion, this thesis hypothesizes that there are multiple factors such as current normative theory and historical precedent that influence the content and adoption of modern immigration legislation like the IRPA.

1.4 Information Sources

The information for this thesis is derived from several sources. Government documents are one of the key primary sources for this thesis and include reports produced by the Auditor General, and House of Commons and Senate reports that dealt with the issue of security and

²³ David C. Corbett, *Canada's Immigration Policy: A Critique*, (Toronto: University of Toronto Press, 1957), 36.

refugees before and after Bill C-11 was introduced in Parliament. Other government sources include documents produced both by the Canadian Security Intelligence Service (CSIS) and the department of Citizenship and Immigration Canada (CIC), and two background research papers produced by the Library of Parliament, one on Bill C-11 and one on Canada's refugee system. In general, government sources provided information about the structure and content of Canada's refugee determination system, how protection and security issues have been framed within Canadian immigration legislation, and how these issues were addressed in the new law.

The second major source of information in this thesis includes academic commentaries, newspaper reports, and studies produced by research institutes. These sources provided valuable information about the *Immigration and Refugee Protection Act* and the wider philosophical and normative aspects of providing refugee protection in the current geopolitical context.

1.5 Organization

The remainder of this thesis consists of four chapters. Chapter two focuses on the immediate philosophical positions that were involved in the production of the *Immigration and Refugee Protection Act* (IRPA). Providing the normative context for the provision of refugee protection by liberal democracies is the objective of this chapter. To this end it will present the two leading philosophies of immigration in liberal states in order to provide a theoretical basis for understanding the normative cross-pressures of the refugee/security nexus. The two philosophical positions often cited in relation to migration policy are communitarian and liberal perspectives; they afford a perspective from which to examine key security provision in the new Act.

Chapter three provides an overview and analysis of the impetus for enacting the IRPA. For that purpose, it highlights how and why the inland refugee determination system has been directly associated with the public safety and security concerns in Canada. This chapter documents the historic rise in inland refugee claims in the 1980s and how this affected the management and control of the refugee/security issue in Canada. The debate surrounding the legislative amendments enacted prior to 2001 to deal with immigration and refugee related

security issues will also be analyzed in this chapter. This will serve as a point of reference for understanding the purposes of various protective measures embodied in the IRPA. Then specific examples of security breaches associated with the refugee system will be presented. Special attention is devoted to the threat of terrorism and how it has affected Canada's refugee, immigration and foreign policies. Furthermore, this chapter examines how the House of Commons Standing Committee on Immigration viewed the national security and refugee issue just before Bill C-11 was introduced and before public opinion was tainted by September 11. The Committee's Report, *Refugee Protection and Border Security: Striking a Balance* presented an all-party perspective of how parliamentarians and the government felt about this issue. It also underlined the major positions and issues at play in the debate over the meaning of 'protection' in Canadian immigration policy and had a direct impact on how the government drafted the IRPA.

Chapter four focuses on the security/protection measures contained in the IRPA. More specifically, it provides an overview and analysis of how the protection of immigrants and refugees was framed and balanced against changes made to the refugee determination system under Bill C-11 and the previous 1976 *Immigration Act*. In providing that analysis, the chapter concludes with commentary provided by the Senate Committee's hearings on Bill C-11 which were held only a few weeks after the events of September 11, a period in which the refugee/security issue was very prominent.

Chapter five provides a summary and analysis of the major findings. In analyzing the findings, the central focus is on the lessons learned regarding the array of security factors that influenced the focus, nature and scope of immigration and refugee policy in Canada at the turn of the 21st century. Furthermore, the concluding chapter will discuss the effect that the IRPA has had both on due process in the refugee determination process, and on striking a balance between protecting, both Canadians and refugees. The chapter will highlight how the IRPA maintains both Canada's international obligations to provide protection and its humanitarian traditions, and

the discretionary power of the Canadian to state restrict access to its territory by foreign nationals, refugees included, who may pose a threat to its public safety and security.

Chapter 2: Philosophical Values of the Refugee/Security Nexus

2.0 Introduction

This thesis is attempting to answer the following questions: What provided the impetus for extra legal and security provisions in the IRPA related to refugees? Did amendments in the IRPA constitute a fundamental change to Canada's refugee determination system? Did the IRPA strike a right balance between safeguarding the rights of refugees and safeguarding national security? In order to properly answer these questions one has to explore the principles and moral obligations outlined in agreements that Canada is a signatory to regarding refugees. These agreements have outlined Canada's ethical responses to refugee issues, including the refugee/security nexus. The refugee/security nexus is a fundamental issue for every country because the state's ability to decide to whom it will or will not grant asylum is integral to its ability to exercise sovereignty.²⁴ As Peter Nyers explains:

Since Hobbes, the modern state has asserted a monopoly over matters of security, claiming to protect citizens from both each other (through laws and police) and from external aggression of other states (through military, border, policing, etc.)... This monopoly we know is a crucial source for sovereign power.²⁵

When the issue of 'protection' has been contested in the field of immigration policy, it has either reshaped or maintained what Nyers states are, "...the traditional terms of political community."²⁶

Consequently, one of the most important aspects of the legal debate over 'protection' in immigration law is, according to Reg Whitaker, the fact that it "...draws a line between individual and group rights on the one hand and security on the other."²⁷ This is a particularly important issue where the rights of immigrants and refugees confront the right of the community to be protected from any threat that the former might pose.²⁸ This issue challenged the drafters of

²⁴ Peter Nyers, "Abject Cosmopolitanism: The Politics of Protection in the Anti-Deportation Movement," *Third World Quarterly*, Vol. 24, No. 6, 1071.

²⁵ Ibid., 1071.

²⁶ Ibid., 1070.

²⁷ Reg Whitaker, "Refugee Policy After September 11: Not Much New," *Refuge*, vol. 20(4), 30.

²⁸ Ibid.

the IRPA because it addressed matters affecting fundamental rights and freedoms. The two most important rights addressed in that legislation were the right to make a claim for refugee protection, and the right of the community to be protected from the possible threat represented by violent or false refugee claimants. Both rights involve fundamental legal principles embodied in immigration law such as a state's right not to admit foreigners, to detain and to arrest non-citizens, and to justify in special circumstances the non-disclosure of evidence used to detain and arrest individuals, as is the case with security certificates. At the same time immigration law also prescribes the state's responsibility to accept genuine refugees and the principles associated with the United Nations' Geneva Refugee Convention, such as non-refoulement, the obligation not to return a refugee to a country where they could face torture or a risk to their life.

These rights are representative of values enshrined in most national immigration laws. This chapter examines how these values are expressed in the broad meta-narrative of immigration and refugee policies in liberal democracies. Presenting the values and the principles embodied in immigration law will help to elucidate the debate about Canada's dual responsibility to protect refugees and to protect the security for its citizens. It also examines two leading ethical perspectives used to analyze refugee legislation--- liberal and communitarian philosophical positions. These two philosophies provide a touchstone from which to examine how liberal democracies balance humanitarian concerns and state sovereignty while determining their responsibility toward immigrants and refugees. An explanation of these philosophical positions will shed light on the normative cross-pressures regarding the rights of the state and the rights of refugees in the IRPA.

2.1 Values and Immigration

The environmental context that influences immigration law inherently involves values because immigration policy-making necessarily, according to Malcolm Maclaren, "concerns the conditions of membership in a given political community [which are]...never self-evident in

modern nation states.”²⁹ The uncertainty surrounding decisions about community membership has added tension to immigration and refugee policy-making as immigrant-receiving countries are forced to decide on whom they admit as asylum-seekers and potential citizens, and whom they think should remain outside of their borders.

With over 100 million people annually since the late 1980s living outside of their original country of birth, decisions about community membership have increasingly confronted all nations.³⁰ In 2004 the United Nations High Commissioner on Refugees (UNHCR) estimated the number of asylum seekers, refugees, and others of concern at over 17,000,000.³¹ The range of factors that have fueled such a high number of globally displaced people include, “...the flaming of violent civil wars, the deliberate targeting of civilian populations, and the problem of maintaining durable and humane state structures in conditions of poverty....”³² Furthermore, recent advancements in communications and increased access to transportation have greatly expanded the number of the world’s citizens with the motivation and the means to migrate in order to improve their low standard of living.³³ This has led to a situation where as Matthew Gibney explains:

Facing few avenues for entry to the West, economic immigrants have swelled the ranks of asylum seekers that is, people at the borders or inside a foreign state who claim to be refugees in order to be admitted or remain in that state seeking to enter liberal democracies. As western states have recently discovered, in an international environment characterized by steep inequalities, it is very difficult to maintain protection for refugees without attracting large numbers of migrants.³⁴

In the face of growing numbers of asylum claims in the West, citizens in many of the refugee receiving countries have expressed anxieties about the economic, cultural, and political

²⁹ Malcolm Maclaren, “Framing the Debate over the German Immigration Bill: Toward Reasoned Policy Making, *German law Journal*, Vol.2, No. 16, (October ,2001), available at: [http://www. Germanlaw journal.com/ article. php ?id=102](http://www.Germanlawjournal.com/article.php?id=102) [August 3, 2005], n.pag.

³⁰ Kelley and Trebilcock, 3.

³¹ The United Nations High Commissioner on Refugees, “Basic Facts,” available at: <http://www.unhcr.cch/cgi-bin/texis/utx/basic> [June 15, 2006].

³² Matthew Gibney, “Liberal Democratic States and Responsibilities to Refugees,” *The American Political Science Review*, Vol. 93, No. 1, (March. 1999), 169.

³³ Ibid, 168.

³⁴ Ibid.

costs of admitting needy strangers. As a result of these anxieties and the “anxiety exacerbated by the dubious legitimacy of many asylum claim many states have done little more than fulfill their international law duty not to return to a dangerous state or territory (refouler) the seekers of asylum who make it to their borders.”³⁵ Furthermore, in the name of the right of a society to choose its own members and in defence of state security, many states have used indiscriminate measures such as visa and carrier sanctions,³⁶ to prevent asylum seekers from arriving at points of entry. The dilemma of such a policy is that many refugees cannot secure passports or visas because they have fled failed states or persecuting states, and do not want their governments to know they are fleeing.

Canada’s treatment and acceptance of refugees, like that of all other liberal democracies, has been based on principles espoused in international conventions and protocols to which they are signatories. The 1951 *UN Convention on the Status of Refugees* has served as the basis for Canada’s fundamental commitment to provide protection to migrants in refugee like situations. As part of its annual intake of refugees, Canada admits United Nations-designated displaced persons living in camps abroad; the largest proportion of Canada’s refugee intake, however, comes from inland or ‘landed’ claims made by people already in Canada or at one of its ports of entry.³⁷ Both categories of refugees are designated under the UN Convention as individuals who, owing to a well-founded fear of persecution for reasons of political opinion, race, religion, nationality, and membership in a social group, are outside their country of nationality, and are

³⁵ Ibid, 171.

³⁶ Visa requirements allow countries to vet foreign visitors before they arrive, thus visa requirements for high refugee producing countries enable countries to refuse visitors before they apply for asylum. Carrier sanctions are fines that states levy on international airlines and other passenger carriers for bringing foreigners without visas to their borders. See Gibney, 176.

³⁷ In 2001 the total number of refugee claimants in Canada was 27, 899: in the refugee class for that year 8, 693 were government assisted United Nations sponsored claimants and 11, 891 were ‘landed’. Cited on the CIC website, *Facts and Figures*, available at: <http://www.cic.gc.ca/english/pub/facts2001/index.html#refugees> [January 19, 2006].

unable or, as a result of such fear, unwilling to return to it.³⁸ However, Matthew Gibney explains that:

In spite of its influence, this definition has serious limitations. For instance, it fails to include displaced people who have not crossed an international boundary...and those forced from their homeland by generalized states of violence rather than individual persecution.³⁹

This more expansive interpretation of what it means to be a refugee calls attention to the fact that often individuals are forced to flee their place of residences because of the inadequate provision of security where they live. According to Gibney "...the life and limb threatening circumstances that generate refugees often results from the inability of states to provide protection for their citizens, rather than government sponsored persecution."⁴⁰

The debate over the granting of protection to refugees has encompassed a broader interpretation of the legal definition of a refugee discussed above, and has continued to evolve in international and Canadian case law. A wider understanding of concepts like persecution, political opinion, religious belief, and protection has been used in the determination of refugee status in Canada. However, the more expansive legal definition of what it means to be a refugee in Canada has garnered both criticism and praise. Critics, according to Peter Reikai, "...maintain that definitions have been stretched to the point of becoming meaningless and that the lines between the persecuted and the economically motivated have become hopelessly blurred."⁴¹ According to Reikai, an alternative view articulated by refugee advocates is that states which advocate for expanded refugee admittance, "...contend that the current interpretations reflect the realities of complex modern global politics, with its varying and often subtle forms of oppression and persecution."⁴²

³⁸ Gibney, 170.

³⁹ Ibid. 172.

⁴⁰ Gibney, footnote,170.

⁴¹ Peter Reikai, "US and Canadian Immigration Policies: Marching Together to Different Tunes," *C.D. Howe Institute Commentary*, No. 171, (November, 2002), 13.

⁴² Ibid.

The foregoing perspectives have influenced how refugee-accepting states debate conflicting principles and administer their responsibilities toward asylum seekers. Moreover, the claims of asylum seekers have produced anxieties within and amongst liberal democracies primarily because of their responsibility to respect the principle of non-refoulement. This principle dictates that asylum seekers may reside within a state's territory temporarily if they can reach its borders, particularly if they have legitimate claims for refuge.⁴³ According to Gibney:

The state thus exercises little control over who enters (whether, for instance, they are legitimate applicants or are considered "integratable" by the state) and, in the absence of effective preventative and deterrent measures, over how many claimants enter.⁴⁴

However, Western states have always exerted some control over the volume and nationality of entrants they encounter. Furthermore, they have arguably done this, "at the expense of the spirit of non-refoulement, by issuing carrier sanctions, visas, and collective agreements⁴⁵...to limit the ability of asylum seekers to choose in which country they will apply for asylum."⁴⁶

2.2 Liberty, Community, and Immigration

The refugee issue presents a fundamental question: if states are motivated by moral considerations, to what extent would they be justified in restricting the entrance of refugees in order to protect their national interest? One way liberal democracies, including Canada, have approached the ethical dilemmas involved in immigration policy, and by extension refugee policy, has been to situate the issue as a choice between 'liberty' and 'community' as they relate

⁴³ Gibney, footnote, 179.

⁴⁴ Ibid.

⁴⁵ An example of this kind of agreement is the 1991 Dublin Convention which was designed to determine European Member states' individual responsibility for examining applications for asylum; the Geneva Convention did not address this matter. Therefore, the Dublin Convention was intended to uphold Member states' responsibility in order to ensure that every asylum seeker's application would be examined, unless a "safe" non-member country could consider the claim. The stated purpose of this Convention was to prevent situations where refugees were shuttled between states, with none accepting responsibility, as well as multiple or simultaneous applications for asylum by applicants. See Gibney, 178.

⁴⁶ Gibney, footnote, 179.

to state sovereignty.⁴⁷ The values of liberty and community manifest themselves in many definitions of state sovereignty, but according to Kelley and Trebilcock, “in the context of immigration policy, they can be fairly readily captured.”⁴⁸ Ideologically, a dichotomy exists between supporters of open immigration who base their claim on liberty and the supporters of closed immigration who base their claim on community. In other words, conflict arises in the immigration debate when the right of individual liberty and freedom of migrants comes up against the right of a community to uphold its traditions, compositional integrity, and national security at the expense of non-citizens if need be.

Thus, the debate over immigration in liberal democracies has tended to be conducted by proponents of liberal and communitarian philosophies. Proponents comprise two camps. In the first camp, contemporary liberal theory according to Malcolm MacLaren:

... may be usefully seen as comprising libertarian, social contractarian, and utilitarian strands. The justifications vary among the strands (individual property rights, universal brotherhood of man, and utility, respectively) and may be subject to restrictions (by other's rights for public order and security, and disutility, respectively). By emphasizing the equal moral worth of individuals, however, all dictate relatively open borders.⁴⁹

Whereas in the second camp, contemporary communitarian theory according to MacLaren:

... emphasizes in contrast the right of states to choose an admissions or rather exclusion policy. States like clubs and families, should on this view be free to determine the conditions of membership. Almost any limitations on entry that a state chooses to impose would be permissible.⁵⁰

These contesting philosophical positions confront one another in the economic, cultural, and humanitarian spheres of immigration policy. In the latter sphere, the issue of liberty and community is overtly apparent.

For example, the IRPA upheld the rights and freedoms associated with the liberty of non-citizens to seek protection from the state and also the right of the community to be protected from

⁴⁷ Kelly and Trebilcock., 5.

⁴⁸ Ibid.

⁴⁹ MacLaren, n.pag.

⁵⁰ Ibid..

non-citizens. These rights were elaborated under the “principles” section of the new Act. In section three of the new Act, the “Objectives and Application” section, clause 3(1)(i) states that a principle of Canadian immigration is, “to promote international justice and security by fostering respect for humans rights and by denying access to Canadian territory to persons who are criminals or security risks.”⁵¹ Furthermore, clause 3(2)(c) in the Act reconfirmed the principle in Canada, “to grant, as a fundamental expression of Canada’s humanitarian ideals, fair consideration to those who come to Canada claiming persecution.”⁵²

Thus, Canada’s newest immigration law contains provisions to support both the liberal objective of protecting refugees and immigrants in the community and the communitarian objective of protecting the community from immigrants and refugees that may pose a threat. Again, this points to the fact that there was a dual purpose to the word “protection” in Bill C-11 and it demonstrates that the liberal position in Canada’s refugee policy, at least as it is expressed in legislation, is closely aligned with the concept of protecting individual liberty. But also from the communitarian position, refugee policy permits the state to set strict limitations on who may enter the country. Two thinkers involved in this debate, Joseph Carens and Michael Walzer, provide the basis for a more detailed analysis of Canada’s and other liberal democracies’ positions on refugee policy.

2.3 A Liberal Position: Joseph Carens

Open immigration policies have been supported by liberal political theory. The liberal theorist, Joseph Carens, states that liberal theories generally support an open position because they all, “...begin with some kind of assumption about the equal moral worth of individuals. In one way or another, all treat the individual as prior to the community. Such foundation provide little basis for drawing fundamental distinctions between citizens and aliens who seek to become

⁵¹ Canada, Department of Justice, *Immigration and Refugee Protection Act, 2001, c.27*, (Consolidated Statutes and Regulations), available at: <http://laws.justice.gc.ca/en/1-2.5/64352.html>, [April 12, 2005].

⁵²Ibid.

citizens.”⁵³ Carens draws heavily from arguments in John Rawls’ *A Theory of Justice* (1971) to prove that liberal theory supports relatively open borders. Borrowing from Rawls but contrary to his own opinion, Carens discusses what an immigration policy would look like if constructed behind a ‘veil of ignorance’. This veil would preclude members of society when choosing the principles that govern it, from regarding their own and others’ personal situations (e.g., class, race, sex, personal abilities, religious beliefs, values, and so on). The purpose of the ‘veil of ignorance’ is to eliminate the arbitrary distinctions between people that put them at odds.⁵⁴

Furthermore, the ‘veil of ignorance’ imagines a hypothetical situation where people, deprived of knowledge about the personal circumstances of others, must make a choice between egalitarian principles and less egalitarian principles. Rawls hypothesized that if individuals found themselves in this situation they would choose broadly based egalitarian principles, compelled by either a sense of fairness or because it would be the best way to ensure their own interests.⁵⁵ Rawls, furthermore, believed that the decision making process that would emerge from behind the ‘veil’ would lead to two fundamental principles: the first principle would guarantee equal liberty to all, and the second would allow social and economic inequalities only if they advantaged the least well-off in society.⁵⁶

The moral reasoning associated with the ‘veil of ignorance,’ according to Carens, assumes that, “...we can take it as a basic presupposition that we should treat all human beings, not just members of our own society, as free and equal moral persons.”⁵⁷ Carens states in “Aliens and Citizens: The Case for Open Borders,” that two fundamental differences that set people apart in this world are whether one comes from a developed or underdeveloped nation, or whether if

⁵³ Joseph Carens, “Aliens and Citizens: The Case for Open Borders,” David Jacobson (ed.), *The Immigration Reader: America in a Multidisciplinary Perspective* (Oxford: Blackwell Publishers, 1998), 366.

⁵⁴ Kelley and Trebilcock, 6.

⁵⁵ Andrew Heywood, *Political Ideas and Concepts: An Introduction*, (London: Macmillan Press, 1994), 239.

⁵⁶ According to Heywood, Rawls’ first principle reflects a traditional liberal commitment to formal equality, and the second principle, termed the ‘difference principle,’ leads societies to adopt measures that promote social justice. *Ibid.*, 239.

⁵⁷ Carens, 369-370.

one is an alien attempting to become a citizen. These differences are at the forefront of any debate over immigration policy, but they should be ignored in this kind of debate which is based on the principle of procedural fairness. According to Carens, Rawls' first principle requires that all personal attributes be excluded, including nationality and citizenship, when the matter of granting or restricting liberties, of which national admission policies are included, is discussed.

Accordingly, Carens believes that liberal theory would hold that immigration policy should not originate from a national perspective, but rather from a global view. Kelley and Trebilcock discussing Carens' work conclude that, "behind this global veil of ignorance, and considering possible restrictions on freedom, the perspective of those who would be most disadvantaged by the restrictions—in this case the perspective of the alien who wants to emigrate—should be adopted."⁵⁸ Consequently, from this perspective, few prohibitions on immigration can be morally justified according to Carens.⁵⁹ However, Carens' arguments for open borders appear to be outside much of liberal theory's foundational assumptions which usually have not addressed questions of justice that go beyond the boundaries of a particular community or nation state. For example, according to Catherine Dauvergne, Rawls explicitly assumes a closed society where questions about immigration do not arise.⁶⁰ Dauvergne clarifies that Rawls in "Justice as Fairness: Political not Metaphysical" (1985), "...emphasizes that his conception of justice is political rather than metaphysical. It is framed to apply to the basic structure of modern constitutional democracy, rather than to enunciate a universal truth."⁶¹ Therefore according to

Dauvergne:

In Rawlsian theory, the non-metaphysical society where justice is modeled is a closed system that one joins at birth and leaves at death. People do not enter or leave such a society on a permanent basis so there is no need to examine when and how arrivals or departures might be considered just or unjust.⁶²

⁵⁸ Kelley and Trebilcock, 6.

⁵⁹ Ibid.

⁶⁰ Catherine Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law," *Canadian Journal of Law and Jurisprudence*, Vol. 10, No. 2, (July, 1997), 326.

⁶¹ Ibid.

⁶² Ibid.

Carens' assertion that liberalism cannot justify a restrictive immigration policy because it rests on the idea that there does not exist any fundamental moral difference between individuals is also challenged by another important theory of Rawls, namely that liberty may be restricted for the sake of liberty. Rawls acknowledges that all liberties are dependent for their existence on public order and security.⁶³ According to Carens, Rawls' 'public order principle' would only apply to immigration policy if it supported a system that was too open and by association threatened the stability of an immigrant receiving nation. In this situation the basic liberties of aliens and citizens alike in the receiving country would be diminished; therefore, some restrictions on the size and form of immigration to that receiving country would be justified. However, the public order principle does reveal Rawls privileging of a state's right to uphold the security of its citizens over non-citizens. So not even liberals like Rawls would throw the borders wide open; indeed only natural law theory postulates the complete and unfettered freedom of mobility for all humans.⁶⁴

Yet Carens, like any liberal, maintains that a hypothetical possibility of a threat to public order would not alone justify restrictions on liberty. A threat to public order and proposed restrictions that would counter that threat would have to be justified by what Carens describes as, "evidence and ways of reasoning acceptable to all."⁶⁵

⁶³ Carens, 372.

⁶⁴ Natural law theorists of the seventeenth century such as Locke, Grotius, and Vattel, believed that the control of territory by states opened them up to the call of necessity especially if a state possessed more territory than it required for its citizens. These theorists worked from the Christian assumption that the world was given to humankind from God for a common purpose. This assumption did not rule out the establishment of private property by an individual or a state if the exercise of such property could be shown to be fair and in the interest of all. However, as soon as the exercising of exclusive right to property risked serious injury or death to another who needed the protection that that property afforded, the right to exclusive ownership lapsed. In this regard natural law theorists attempted to grapple with the normative issues raised by the communal control of territory and the disputes over entrance to that territory. See, Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, (Cambridge: Cambridge University Press, 2004), 38-39.

⁶⁵ Carens., 373.

Moreover, liberties could only be restricted to the extent that they clearly do preserve public order. Carens claims that national security is a vital form of public order, and therefore, “states are clearly entitled to prevent the entry of people (whether armed invaders or subversives) whose goal is the overthrow of just institutions. On the other hand, the strictures against an expansive use of the public order argument also apply to claims about national security.”⁶⁶ Carens warns against restricting the admission of immigrants from societies where liberal democratic values are weak based on the argument that these individuals may represent a threat to the maintenance of public order. He maintains that as with all issues related to public order, decisions should be based on reasonable expectations as opposed to hypothetical judgments. Past nationalist immigration policies, some of which were racist and bigoted and based on hypothetical speculation about the threat posed by immigrants, should give pause to any new policies that would discriminate on the basis of nationality and ethnicity.⁶⁷ Nonetheless, in theorizing about justice across borders, Carens has chosen to disregard the fact that much of liberal thought draws a distinction between aliens and citizens.

2.4 A Communitarian Position: Michael Walzer

A counter perspective on immigration policy is provided by the communitarian position. Proponents of communitarian values assert, that in the context of immigration policy, the state has a right to control immigration in order to maintain its communal character.⁶⁸ A well-known contemporary proponent of this view is the philosopher Michael Walzer. His views on immigration are grounded in the principle of state sovereignty. Walzer equates the self-determination of nations to the personal autonomy of an individual: nations like individuals are free to decide whether and under what conditions they will enter into a relationship with a stranger. Commenting on Walzers’s claim, Judith Shklar states, “Nations are taken to be like

⁶⁶ Ibid.

⁶⁷ Ibid., 374.

⁶⁸ Kelley and Trebilcock, 7.

clubs, and self-determination is their right.”⁶⁹ In Walzer’s *Spheres of Justice* (1983), a major argument of the book, according to Shklar, is “that the citizens of a state are entitled to have a government not merely of their choice, but one that shares their group identity and their traditional values.”⁷⁰

Walzer provides a the analogy of nation states being similar to clubs in order to elucidate his community-centered vision of society. His concept of citizenship holds that being a citizen is not all that different from being a member of a club, a place where individuals bond and share similar outlooks and loyalties. More importantly, in a club members are free to determine the circumstances of membership.⁷¹ Walzer supposes:

The distribution of membership is not pervasively subject to the constraints of justice. Across a considerable range of the decisions that are made, states are simply free to take in strangers (or not) – much as they are free, leaving aside the claims of the needy, to share their wealth with foreign friends, to honor the achievements of foreign artists, scholars, and scientists, to choose their trading partners, and to enter into collective security arrangements with foreign states. But the right to choose an admission policy is more basic than any of these, for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.⁷²

From this vantage point Walzer sets up a comparison between the state as a club and the state as a neighbourhood. Proponents of open borders, he argues, hold the latter position toward the state.

The complex and open form of association embodied in the concept of the neighbourhood is analogous to the liberties enjoyed by citizens of democratic states. Internally, within liberal democracies, as in neighbourhoods, there is no organized or legally enforceable

⁶⁹ Judith N. Shklar, *Political Thought and Political Thinkers*, Stanley Hoffman (ed.), (Chicago: University of Chicago Press, 1998), 384.

⁷⁰ Ibid.

⁷¹ Kelley and Trebilcock, 8.

⁷² Michael Walzer, “Membership,” David Jacobson (ed.), *The Immigration Reader: America in a Multidisciplinary Perspective*, (Oxford: Blackwell Publishers, 1998), 362.

admissions policy. Strangers can come and go as they please and they cannot be either admitted or excluded. As Walzer states:

In principle, individuals and families move into a neighborhood for reasons of their own; they choose but are not chosen. Or, rather, in the absence of legal controls, the market controls their movement. Whether they move is determined not only by their own choice but also by their ability to find a job and a place to live. Ideally, the market works independently of the existing composition of the neighborhood. The state upholds this independence by refusing to enforce restrictive covenants and by acting to prevent or minimize discrimination in employment.⁷³

Walzer presents a vision of liberal democratic societies granting their citizens the right to either enter or exit communal associations at will in order for them to protect their individual freedom and liberty. The analogy Walzer uses is the ability of citizens in liberal democracies to either move into or out of neighbourhoods. An individual citizen should have the right to live wherever they please; however, the reciprocal side of this argument is that current residents should have the ability to move out of their neighbourhood if they do not like the individuals who are coming to live there. This is how the liberty of both individual citizens is maintained.

This concept, however, changes when the neighbourhood analogy is used to compare the relationship between states either individually or collectively and aliens as well as the relationship between citizens and non-citizens. Walzer postulates that if a state, like a neighbourhood, allowed the uncontrolled entry of aliens in any number and from anywhere, then the integrity of the state itself would be threatened. Using historical examples, Walzer concludes that: “if states ever became large neighborhoods, it is likely that neighborhoods will become little states. Their members will organize to defend their local politics and culture against strangers. Historically, neighborhoods have turned into closed or parochial communities whenever membership has been too open.”⁷⁴ Employing the example of parishes in seventeenth century England, Walzer illustrates how members of communities closed themselves off to strangers when they themselves became responsible for the welfare of the community instead of the church. In this case, the

⁷³ Ibid., 346.

⁷⁴ Ibid., 348.

English parishes raised and spent welfare monies locally, but excluded newcomers from their communities when they became responsible for the welfare of new members.⁷⁵ Examples like this, Walzer claims, demonstrate that only the nationalization of welfare, as well as the nationalization of culture and politics, allowed neighbourhood communities, and by association nation-states, to accept new members.⁷⁶

Neighbourhoods, then, can only be open if countries are, at least, partially closed. The state must choose would-be members and guarantee their loyalty, security, and welfare. This is the only way that local communities based on “indifferent” association, personal preferences, and market relations can form. Again, it is important to reiterate Walzer’s claim that if states became large neighbourhoods, (i.e. they had open admissions policies), neighbourhoods would become small states.⁷⁷ As he explains:

The politics and the culture of a modern democracy probably require the kind of largeness, and also the kind of boundedness, that states provide. I don’t mean to deny the value of sectional cultures and ethnic communities; I mean only to suggest the rigidities that would be forced upon both in the absence of inclusive and protective states.⁷⁸

For Walzer, membership is a social good that is constituted by our own understanding: “its value is fixed by our decisions and we are in charge of its distribution, for it is already ours by birth and can only be given out to strangers.”⁷⁹ The principle of “mutual aid” is, however, according to Walzer the only possible external principle for an open distribution of membership: “a principle not wholly dependent on the prevailing view of membership within a particular society.”⁸⁰ Refugees are a case for Walzer where the principle of “mutual aid” is most evident: their desperate situation morally demands that a country grant them asylum.⁸¹

⁷⁵ Ibid.

⁷⁶ Kelley and Trebilcock, 8.

⁷⁷ Walzer, 348.

⁷⁸ Ibid.

⁷⁹ Ibid., 342.

⁸⁰ Walzer states that the weight of this principle is uncertain partly because of its own vagueness, and partly because it comes up against different societal interpretations. Furthermore, its meaning only becomes clearer as it undergoes decision-making processes in a particular political community. In the absence of

The principle of “mutual aid” notwithstanding, Walzer’s theory appears to allow many justifications for states to enact entry limits. This is opposite to liberal theory, which implies few, if any limitations on entry. Two disputed aspects of Walzer’s theory are, according to Kelley and Trebilcock:

...the notion that political sovereignty is a near-absolute value—a view increasingly challenged by the evolution of human rights norms—and that only communities of character are those that reflect ethnic, religious, cultural, ideological commonalities—a view that many liberals would challenge on the grounds that common commitments to liberal civic institutions and mutual tolerance of intermediate sub-communities of interest can sustain communities of character.⁸²

Nonetheless, liberty and community are two core ideas associated with the relationship between citizens, non-citizens, and state sovereignty. Furthermore, these two ideas represent the ends of a philosophical spectrum that has been used to compose most developed countries’ immigration and refugee policies.⁸³

2.5 The Claims of States, Citizens, and Refugees

Both the perspective of global liberalism and the perspectives of communitarianism represent powerful and conflicting moral claims. State responsibilities towards refugees are embodied in particularism and impartialism. According to Gibney:

...particularism upholds the claims of justice of individuals as citizens, as members of particular political communities. Impartialism upholds the claims to equal concern and respect of human beings qua human beings. Both of these claims to justice resonate in contemporary liberal democratic thinking.⁸⁴

cooperative arrangements that set out a clear definition of “mutual aid”, Walzer uses the Good Samaritan story to ask what precisely we owe one another. He concludes that positive assistance is required if (1) one of the parties urgently needs help; and (2) if the risks and costs for the helping party are relatively low. See Michael Walzer, “Membership”, 342.

⁸¹ David Jacobson, “Introduction: An American Journey,” David Jacobson (ed.), *The Immigration Reader: America in a Multidisciplinary Perspective*, (Oxford: Blackwell Press, 1998), 14.

⁸² Kelley and Trebilcock, 8.

⁸³ Ibid.

⁸⁴ Gibney, 172.

The clash between these competing ethical claims, however, presents a problem when an attempt is made to imagine the ideal position that a state should adopt in its approach toward refugees. As Gibney explains:

Each approach captures an important moral claim raised by the current crisis, but neither can be said to represent an adequate balance or integration of the personal and impersonal moral claim. In the face of large numbers of refugees and other needy strangers in the contemporary world, accepting the full logic of the impartial approach would lead to policies that undermine the conditions necessary for communal self-determination and the provision of public goods. Going with the full implications of the partial view risks legitimating the current actions of states in paying scant regard to the claims of millions of refugees on the right to communal autonomy.⁸⁵

The above theories are instrumental in understanding the conflated issues of justice, state sovereignty, and refugees but an analysis by Howard Adelman also reminds those interested in a just policy response to this issue that:

Moral rules do not arise from a deductive rational moral science, but arise out of the interaction of precedent with experience. The task of applying these principles globally is one of negotiation and development rather than a direct product of abstract theory. The questions of justice vis-à-vis refugee policy cannot be examined by comparing an “ideal” model of justice with the second rate world we live in, but rather by examining our world and how questions of justice, in the context of refugee policy, have actually been adjudicated. To do that, we must go beyond deliberations about abstract justice to elucidate the categories in which actual policy decisions in this field have been made.⁸⁶

Thus, neither the impartial-liberal nor the partial-communitarian positions fully depicts the moral imperatives which confront states when they deal with refugees; for these two ethical claims only address an ideal situation where states are free to exercise their moral agency in a similar fashion as individuals. In reality the moral agency of states is constrained. The state must first weigh the claims of citizens before considering the claims of refugees because the modern state according to Gibney:

...is a particularistic moral agent, constituted by a set of duties owed to its citizens that are integral to its authority to act. The classical formulation of these

⁸⁵ Ibid., 173.

⁸⁶ Jackie King, *Justice and Refugee Policy: The Debate on Refugees and Open Borders*, Annual Conference of the Australian Political Studies Association, (October, 2000), 2.

responsibilities lies in the idea that states have a duty to ensure the security and provide the welfare of its citizens. In recent times, however, most modern states have come to see themselves as bound by a more stringent duty: to act in accordance with the wishes of their citizens, as expressed through regular elections...;[a]t least in principle, it is now the *demos* who decide which obligation the state will pursue.⁸⁷

For liberal democracies, then, the politics of refugee admission reflects how each individual state negotiates its responsibility toward refugees and the extent to which it and its citizens feel obliged to respect this responsibility; Canada is no different in this regard.

When tensions arise in liberal states over the claims of citizens versus the claims of new entrants, whether they are refugees or immigrants, the state will likely decide on these claims based on the particularistic arguments of its citizens first. “The claims to less competition in housing, in social security, and in employment,” according to Gibney, “appeal to the understanding that citizen interests deserve to be primary in state consideration.”⁸⁸ Moreover, according to Gibney, “the moral and practical obligation of liberal states to adhere to the majority view of its citizens is expressed through democratic politics; and, when it comes to the politics of refugees, a myriad of political factors can influence a state’s level of acceptance of new entrants.”⁸⁹

One of the most important factors is that the receiving state ensures that new entrants do not pose a threat to current residents and citizens, and that the system which oversees refugee determination status is competently managed so as to mitigate the aforementioned risk. By virtue of this fact, the public’s support is required for continuance of a liberal refugee policy. These constraints help to explain why the relationship between migration and security has come under greater scrutiny in Canada since 9/11.

⁸⁷ Gibney, 175

⁸⁸ Ibid., 175.

⁸⁹ Ibid., 176.

However, this topic was already in the minds of those responsible for drafting Canada's most recent immigration law, the 2001 *Immigration and Refugee Protection Act* (IRPA).

According to a Canadian Parliamentary study published in 2002:

The government has long feared that, without control, support for all immigration programs would be endangered. More so, following the events of September, 11th 2001, there was significant pressure to implement legal and administrative measures in order to alleviate American fears that Canada's refugee and immigration protection system was vulnerable to individuals and groups posing security risks.⁹⁰

Therefore, as a general conclusion, "public order" and "security" appear to be two extremely important factors associated with the maintenance of an open refugee and immigration policy.

2.6 Conclusion

The preceding quote demonstrates that the issue of refugees, whether the issue is framed as the right of individual liberty or the right of a community to set its standard of membership, is accentuated by domestic politics; the events of 9/11 serve to highlight this point. Furthermore, an important point to consider is that the need to protect and to adhere to the existing rights of citizens in liberal states will at times alter these states' policies based on illiberal justifications. The issue of security and refugees poses this kind of challenge for western liberal states. For example, according to Michael Samer, when liberal states mobilize against "threats to national security...., liberal states act illiberally because governments believe these are threats to the very 'liberal' institutions and the rule of law they seek to protect."⁹¹

Within the context of immigration policy, when a state's refugee determination system is perceived as being abused by illegitimate and possibly dangerous claimants, it can lead to the adoption of what appears to be illiberal measures by the state. This is the logic applied by states

⁹⁰ Benjamin Dolin and Margaret Young, *Canada's Immigration Program*, (Library of Parliament, Canada; revised, October 2004), 13.

⁹¹ Michael Samers, "Immigration and the Spectre of Hobbes: Some Comments for the Quixotic Dr. Bauder," *ACME: An International E-Journal for Critical Geographies*, Vol. 2, No.2, (2003), available at: <http://www.acme-journal.org/vol2/Samers.pdf> [February 17, 2005] 211.

to refugees when they are deemed a security threat. Exploring if and how refugees have become seen as a threat in Canada, and the justifications for this perception are subjects of the next chapter. The next chapter will also explore how refugees have become the subject of much controversy in Canada over the issue of ensuring whether enough appeal mechanisms are available to them. The latter issue demonstrates that states have become increasingly aware of their responsibilities towards refugees, an obligation that is recognized under international law and which cannot be ignored by national immigration policies.

Chapter 3:

Factors that Provided the Impetus for and Shaped the Immigration and Refugee Protection Act

3.0 Introduction

The first of three guiding research questions in this thesis is the following: What provided the impetus for extra legal and security provisions in the IRPA related to refugees? The intent of this chapter is to present a comprehensive analysis of the factors that prompted policy-makers and the federal government to introduce new expanded security and protection provisions related to refugee admission in the IRPA. When policy-makers and the government set out to amend the refugee provisions of the *1976 Immigration Act*, they had to balance a number of factors but a priority according to Benjamin Dolin and Margaret Young was that:

The law must embody the essence of the *Convention Relating to the Status of Refugees* and its Protocol. This requires signatories not to return people in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion. The law must also reflect Canada's obligation under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Of crucial importance is the *Canadian Charter of Rights and Freedoms*.⁹²

This chapter explores how the issue of adhering to the *Refugee Convention* and international law became entwined with security issues and became a controversy, especially over the debate of maintaining appeal mechanisms and procedural fairness in the refugee determination process versus the need for proper program management.

The analysis in this chapter will trace the development of this issue and pay special attention to six interrelated factors: the first is the procedural rules established in Canada to protect the rights of refugees and to ensure they have a fair hearing; the second is the administrative problems that the Canadian refugee determination system has had in ensuring procedural fairness; the third is the failure of the refugee system to adequately screen and deport

⁹² Benjamin Dolin and Margaret Young, *Canada's Refugee Protection System*, (Ottawa, On: Library of Parliament, 2002)3.

dangerous refugee claimants; the fourth is the rise in refugee applications from regions that have produced terrorist and security threats to Canada; the fifth is the effect Canada's refugee policy has on Canada-U.S. relations; and the sixth major factor that contributed to enhanced protection provisions in the IRPA was the House of Commons report, *Refugee Protection and Border Security: Striking a Balance* which was established to provide recommendations in response to the above mentioned security problems with the Canadian refugee system. The Report was tabled in the House of Commons in March 2000 and it was the most comprehensive government study to that date to examine the linkage between security and refugees. An analysis of that report in this chapter provides important insights on the respective positions of the Canadian government and Parliament towards the issue of security and refugees.

The House of Commons report presented a picture of an asylum system in Canada that was under tremendous stress. The government's response to deal with this problem was to establish three different sets of measures under the IRPA: some dealt with access; some dealt with processing refugees; and, some dealt with consequences, which meant removing people who were denied refugee status in Canada, refugees considered dangerous or refugees who had committed a serious crime. The idea was to have a more orderly handling of inland refugee claimants, to reduce potential abuses in the system, and to strengthen public confidence in it. Inland claimants have represented on average 60 percent of annual refugee flows to Canada.⁹³ This chapter will outline how a growing number of inland refugee claims at the Immigration and Refugee Board (IRB) and the administrative practices that governed the processing of them led to a backlog in the refugee system which allowed a few dangerous people to live in Canada under the pretext of needing Canada's protection.

⁹³ Dagmar Soennecken, "Justice Served: Legal Aid and Access to the Courts for Refugees in a Comparative Context," (paper presented at the annual meeting of the Canadian Political Science Association, Winnipeg, Man., June, 2004), 19.

3.1 Problematical Procedural Rules with the Establishment of Canada's Inland Refugee Determination System

Refugees had no official status under domestic Canadian law until the 1976 *Immigration Act*. The 1976 Act established a Refugee Status Advisory Committee (RSAC), which was responsible for assessing inland refugee claims until 1989. Rejected inland refugee claimants could appeal to the Immigration Appeals Board (IAB), an independent administrative body that heard appeals of certain deportation orders. If refugee claimants or those with refugee status were unsuccessful at either the RSAC or the IAB, they could request leave from the Federal Court to review points of law or interpretation related to their failed claim or appeal.⁹⁴

Although inland refugee claimants had access to both administrative and judicial appeal mechanisms, the quality of the appeals recourse available to rejected claimants was criticized by refugee advocates. Throughout the 1970s and 1980s non-government organizations and authors of government-commissioned reports criticized the government for the lack of an oral hearing before the RSAC or the IAB.⁹⁵ Critics pointed out a growing gap between the demands for administrative efficiency versus procedural justice. In the 1980s Canada was becoming increasingly concerned with not appearing arbitrary and unfair when it came to refugees. A government task force in 1981 came to the conclusion that to avoid acting arbitrarily towards refugees, Canada had to ensure that, “our refugee determination procedures reflect Canadian standards of procedural fairness as they had become manifest in our general concept of a fair hearing.”⁹⁶

The Supreme Court of Canada intervened fostered more debate in 1985 with its ruling in *Re: Singh vs. Minister of Employment & Immigration*. The Court ruled that refugee claimants

⁹⁴ *Ibid.*, 23.

⁹⁵ The 1984 *Ratushny Report* to the Minister of Employment and Immigration called for the establishment of an adjudicative appeals body within the RSAC. See: Gerald E. Dicks, *Controversy and Complexity: Canadian Immigration Policy in the 1980s*, (Montreal, Que.: McGill-Queens University Press, 1995), 81.

⁹⁶ From Citizenship, Employment and Immigration Canada, “The Refugee Determination Process: A Report of the Task Force on Immigration Practices and Procedures,” (1981), 5. Cited in Dirks, *Controversy and Complexity*, 84 fn. 13.

physically present in Canada were entitled to the protection of the *Charter of Rights and Freedoms*. As Dagmar Soennecken explains:

Accordingly, the refugee determination procedures had to comply with the standards of fundamental justice set out in s.7 of the Charter. These include the right to an oral hearing. Successfully, the government introduced amendments first allowing for an expansion of the IAB, but eventually revamped the entire procedure by creating a new decision-making body, the Immigration and Refugee Board (IRB), whose productivity and rate of acceptance immediately proved higher than that of its predecessor.⁹⁷

The Immigration and Refugee Board was established as an independent quasi-judicial tribunal, separate from government, though ultimately responsible to Parliament and accountable to Canadians through the courts. The IRB carries out three major functions: immigration inquiries and detention reviews; immigration appeals; and refugee determinations. These functions were performed by three divisions in the IRB, each with distinct functions: the Immigration Appeal Division (IAD), the Convention Refugee Determination Division (CRDD), and the Adjudication Division which was added to the IRB in 1993.

The IAD heard four types appeals on immigration matters: sponsorship appeals, removal orders, residency obligation appeals, and Ministers' appeals of the Adjudication Division's decisions in admissibility hearings. The Appeal Division heard appeals of refusals of sponsored applications for permanent residence and appeals against deportation orders issued against permanent residents. The Division also heard appeals made by persons in possession of valid visas seeking admission to Canada who had been detained, reported or ordered removed at ports of entry. The IAD could allow an appeal and set aside an original decision if there was an error in law or fact or a breach in the principles of natural justice. The IAD was a court of record with all the powers, rights, and privileges accorded such a body.⁹⁸

The Convention Refugee Determination Division (CRDD) was responsible for ensuring that the UN Convention refugee determination process and all refugee claimants were dealt with

⁹⁷ Soennecken., 19.

⁹⁸ Immigration and Refugee Board, "Immigration Appeal Division," *Immigration and Refugee Protection Act: Overview and Impact on the IRB*, (2006), available at: http://www.irb-cisr.gc.ca/en/about/publications/irpa/index_e.htm#iad. [May 7, 2007], n.pag..

fairly and expeditiously and in a manner consistent with Canada's humanitarian and international obligations.⁹⁹ Under the *Immigration Act*, the CRDD was given the authority to conduct two types of hearings: a hearing into a claim and a hearing into a Minister's application for cessation hearings. Almost all of the work of the CRDD concerned hearings into claims under the former situation.¹⁰⁰ A hearing into a claim before the CRDD was conducted by at least two division members and usually followed a "non-adversarial" format. This is evident by s. 69 of the *Immigration Act* which gave the claimant a full opportunity to participate at the hearing, but gave the Minister only a restricted opportunity. According to the *1999 CRDD Handbook* published by the IRB:

Under subparagraph 69.1(5)(a)(i) of the Act, the claimant is given a reasonable opportunity to present evidence, cross-examine witnesses and make representations;... under subparagraph 69.1(5)(a)(ii) of the Act, the Minister, in the usual case, is allowed only to present evidence, and is not allowed to cross-examine witnesses or make representations (although the Refugee Division may, if it considers it appropriate to do so, give the Minister a reasonable opportunity to question the claimant and any other witnesses and to make submissions [*Immigration Act*, s. 69.1(5)(b)].)¹⁰¹

In practice, the Minister did not often present evidence at a hearing into a claim. The process was usually non-adversarial; becoming more adversarial when a representative of CIC participated in the case to argue against the claim. A refugee protection officer assisted the IRB member by ensuring that credible and relevant evidence was presented. Representatives of the United Nations High Commissioner for Refugees could observe any hearing. Individuals whose claims for refugee protection were accepted by the IRB could apply to become permanent residents of Canada.¹⁰²

⁹⁹ Claims to Convention refugee status made by persons in Canada are determined in accordance with the Immigration Act, the Canadian Charter of Rights and Freedoms, the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol to the Convention.

¹⁰⁰ Immigration and Refugee Board, "1. Conduct of Refugee Division Proceedings," *CRDD Handbook*, (1999), available at: http://www.irb-cisr.gc.ca/en/references/legal/rpd/handbook/hb01_e.htm, [May 7, 2007], pt. 1.2.1. Nature of a Hearing: Overview.

¹⁰¹ *Ibid.*, Hearing Into a Claim, pt. 1.2.3.

¹⁰² Austin Lawrence, *A Synthesis of the Issues and Implications Raised by the Immigration and Refugee Legal Research*, (Ottawa, ON: Department of Justice, 2003), 31.

The Adjudication Division conducted immigration inquiries and detention reviews for people believed to be inadmissible to, or removable from, Canada. The adjudicators were officials of the Immigration Department. This examination was also referred to as an admissibility interview. An admissibility interview could be conducted by CIC at a port-of-entry or at an inland office. If, after an admissibility interview, a person was deemed inadmissible, an admissibility hearing was held at the request of a CIC officer. The CIC officer had to provide a report with reasons as to why he or she believed that the person should not be admitted or allowed to stay in Canada to the CIC Minister. If the Minister believed the reasons were well founded, the report would be referred to the IRB for an admissibility hearing. Reasons might have included: security considerations, human or international rights violations, serious criminality, organized crime, danger to public health, financial considerations, misrepresentation, non-compliance with the Act and an inadmissible family member.

IRB refugee hearings were non-adversarial, and more informal and investigatory than the previous RSAC process, reflecting a shared interest in establishing the facts.¹⁰³ However, the earlier RSAC's acceptance rate had averaged 25 percent while the IRB averaged 76 percent in the first year of its operation in 1989.¹⁰⁴ Over the years, significant backlogs of unprocessed claims developed, in particular during the IRB's first few years, with 85,000 claims being processed by the end of 1989.¹⁰⁵ This created long waiting periods and processing times. Since Canada has not enacted procedures to reject manifestly unfounded refugee claims like other major refugee receiving countries, which usually results in reduced appeal options, the key Canadian effort for

¹⁰³ Soennecken, 19

¹⁰⁴ Dirks, 95.

¹⁰⁵ Valerie Knowles, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1560-2006*, revised edition, (Toronto: Dundurn Press, 2007), 182.

reducing backlogs and processing times was to speed up the refugee determination process by fast-tracking manifestly well-founded cases.¹⁰⁶

The need for greater capacity in processing inland refugee claimants corresponded with ever-increasing global refugee movements: 2.5 million by 1970, 8 million by 1980, and 18 million worldwide by 1999.¹⁰⁷ Government and private sponsored refugees and overseas and inland asylum claimants in Canada increased from 27, 900 in 1979, to 40,500 in 1980, and back to 27, 950 in 2001. Nearly 560,000 refugee claims were made in Canada in the last twenty years and in 2002, the year that the IRPA became law, refugees represented 11 per cent of total admissions in Canada.¹⁰⁸ During this period there were over 10.4 million refugees worldwide.¹⁰⁹ Yet, the refugee determination process adopted in the 1976 *Immigration Act* and successive legislative amendments were not equipped to handle the increases in inland refugee claimants.¹¹⁰

However, during this period Canada received the prestigious UN Nansen Medal, the highest honour bestowed for protection of refugees, and was one of the first states to recognize gender-based persecution as a ground for establishing refugee status, particularly important for women fleeing prosecution when they do not come under the definition of refugee in the UN Refugee Convention.¹¹¹ Canada has also been heralded as, "...liberal with its refugee determination process...enshrining a humanitarian approach."¹¹² The proponents of expanding procedural rights for refugees in Canada such as the Canadian Council for Refugees (CCR) had argued successfully before the courts on the need to expand protection measures for refugees in Canada. This was reflected in the composition and procedures of the IRB.

¹⁰⁶ Soennecken, 19.

¹⁰⁷ Kelley and Trebilcock, 383.

¹⁰⁸ Citizenship and Immigration Canada, *Facts and Figures*, available at: http://www.cic.gc.ca/English/pub/facts_2002/index.html#refugees [January 19, 2006].

¹⁰⁹ United Nation High Commission on Refugees, "2002: The Year in Review," *Refuge*, Vol.4, No. 129, (2002), 16.

¹¹⁰ Reg Whitaker, *Canadian Immigration Policy Since Confederation*, 22.

¹¹¹ Don McMaster, *Asylum Seekers: Australia's Response to Refugees*, (Melbourne: Melbourne University Press, 2002), 125.

¹¹² *Ibid.*

3.2 Insufficient Administrative Capacity for the Refugee Determination System

Key security and protection measures in Bill C-11 relate back to the need for improved program management and the government being forced to change the refugee determination system in order to better manage access to it. Therefore, leading up to the introduction of the Bill C-11, the government stated that limiting the number of claimants in order to ensure the adequate operation of the refugee determination system in Canada was essential. This policy was necessitated on the premise that over half of the claimants appeared not to have been genuine in that they could not be indisputably deemed Convention refugees. Because of Canadian jurisprudence and administrative practice, no mechanism was established for the Canadian refugee system to reject manifestly unfounded claims; therefore, the need to process claims quickly became a paramount issue from a control and security standpoint, given that Canadian administrative practice also deterred the use of detention for refugee claimants, even if their identity was unknown.¹¹³

The issue of program management and program efficiency with the refugee system relates back to the *Singh Decision*.¹¹⁴ Administrative and fiscal problems associated with meeting the requirement of the *Singh* decision were caused by a substantial rise in inland claimants designated as “asylum seekers” arriving in Canada in the 1980s claiming refugee status but whose actual UN Convention refugee status was indeterminate.¹¹⁵ In 1986 it was estimated that two-thirds of the 18,000 refugee claimants for that year were not genuine refugees.¹¹⁶ This fact also pointed to the growing involvement of commercial and criminal smuggling in the refugee process in Canada.¹¹⁷ A contributing factor for this illegal activity was the phenomenal rise in world refugee movements that were accompanied by improved global communications and

¹¹³ Dolin and Young, *Canada's Refugee Protection System*, 2.

¹¹⁴ Knowles, 183.

¹¹⁵ Whitaker, *Canadian Immigration Policy Since Confederation*, 22.

¹¹⁶ Knowles, *Strangers at Our Gates*, 180.

¹¹⁷ *Ibid.*

accessible transportation, and a growing gap between developed and underdeveloped nations.¹¹⁸

Almost from the beginning of the implementation of the 1976 Act, these and other factors helped to form a backlog of claims that threatened to overwhelm the whole refugee determination system.¹¹⁹

Two other trends emerged at the same time which contributed to problems with administering a growing number of claimants within the Canadian refugee determination system: annually since the 1990s, 15 percent of referrals to the IRB have not shown up for hearings, and the growing number of unexecuted removal orders of failed claimants. In 2001, there were over 26,000 unexecuted removal orders.¹²⁰ The refugee system and the IRB have been associated with this problem even though the prosecution of deportation orders is the responsibility of Citizenship and Immigration Canada and other law enforcement agencies. Nevertheless, the imperatives of administrative practice and Canadian jurisprudence, which had not encouraged detention of refugee claimants and thus made it difficult for officials to keep track of claimants who were let free after having their claim referred to the IRB, had led to the refugee system being linked to the issues of failed removals, inefficiency, and security concerns. These issues were well established in the minds of policy-makers and the government in the lead up to Bill C-11.

It was reported for example, that by the late 1990s, the average processing time, the interval between filing a claim and the IRB producing a final decision on a claim, was 13 months.¹²¹ And in the event of a failed claim, the interval between the IRB's decision and the Department's assessment based on risk of return was almost 7 months, with another 10 months before a removal was enforced. Including the time it took to conduct a judicial review by the Federal Court, persons claiming refugee status in Canada could count on staying in the country

¹¹⁸ Simmons, "Economic Integration and Designer Immigrants: Canadian Policy in the 1990s," in Max Castro (ed.), *Free Markets, Open Societies, and Closed Borders: Trends in International Migration and Immigration Policy in the Americas*, (Miami: North South Press, 1999), 57.

¹¹⁹ Whitaker, *Canadian Immigration Policy Since Confederation*, 22.

¹²⁰ Joan Leishman, *The National*, (November 26, 2001).

¹²¹ Grant Schellenberg, *Inland Determination Refugees Before and After Landing: IMDB Research Paper Series*, (Ottawa: Citizenship and Immigration Canada, Strategic Policy, Planning and Research, 2001), pp i.

for more than 2.5 years while the validity of their claim was assessed.¹²² Furthermore, almost half of all claimants under deportation review did not show up for their hearings.¹²³

In order to handle the above mentioned factors involved in processing a refugee application in Canada, the refugee-determination system had placed a great deal of emphasis on attempting to identify, almost immediately upon arrival, whether a refugee applicant was admissible to Canada or not. The drafters of the IRPA foresaw the need to continue with this principle but also saw the need for enhanced control measures. Two other inter-related factors that influenced how Canada managed increased refugee flows were the amount of resources allocated to the refugee system and how those resources were implemented into administrative practices.

In 2001, the year that Bill C-11 the *Immigration and Refugee Protection Act*, was passed, over 44,000 claims were referred to Convention Refugee Determination Division (CRDD), the administrative body within the IRB that conducted formal hearings for refugee claimants.¹²⁴ That year, the CRDD conducted almost 23,000 full hearings.¹²⁵ Sinha and Young note, however, that, “the Board [the Immigration and Refugee Board] was originally given resources sufficient to conduct approximately 7,500 full hearings, based on 18,000 claims in total.”¹²⁶ Furthermore, when the IRB was created in 1989, according Dolin and Young:

The original drafters of the legislation assumed that a large number of claims would be weeded out at an early stage on the basis that they were not credible, and that safe third country agreements would result in the immediate return of a significant number of claimants to the countries through which they transited.¹²⁷

¹²² Canada, Auditor General of Canada, “Chapter 25: Citizenship and Immigration Canada and the Immigration and Refugee Board—The Processing of Refugee Claims,” in *1997 Report of the Auditor General of Canada*, (Ottawa, ON.: Auditor General of Canada, 1997), pt. 25.20.

¹²³ Ibid.

¹²⁴ Dolin and Young, *Canada’s Refugee Protection System*, 3.

¹²⁵ Jay Sinha and Margaret Young, *Bill C-11: The Immigration and Refugee Protection Act*, revised edition, (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2002)15.

¹²⁶ Ibid., 16.

¹²⁷ Dolin and Young, *Canada’s Refugee Protection System*, 2.

However, the assumptions of the original drafters did not materialize. An initial credibility basis hearing¹²⁸ designed to weed out claims was abandoned in 1992, and a safe third country agreement with the United States, the largest transit country for Canadian refugee claimants, was not implemented until after September 11, 2001. Furthermore, for the three years prior to September 11, the acceptance rate for claims before the IRB was 58 percent, the highest rate of any major refugee accepting country.¹²⁹

The traditional high acceptance rate of refugee claimants in Canada when coupled with a lack of resources has had a cumulative effect on the operational efficiency of the IRB. This, in turn, opened the refugee determination system up to criticism for leaving potentially dangerous individuals free to live and work in Canada as they waited for their claims to work their way through the refugee determination system.

3.3 Failure to Adequately Screen and Deport Dangerous Refugee Claimants

The introduction of Bill C-86 in 1992 amended the 1976 *Immigration Act* to include a provision that when a person made a refugee claim, a single official of the Immigration Department conducted an immediate eligibility hearing at the port of entry where the claim was made. At this time the claimant was asked to complete an identification form, and all available identification documents of the claimant were asked for by officials. The claimant was also fingerprinted and photographed, and then this information was forwarded to the RCMP and CSIS who were entrusted with the task of conducting domestic and foreign security checks on the

¹²⁸ In 1987 the Conservative government introduced Bill C-55 to ensure the integrity of the refugee determination system by immediately screening for bogus claims. In order to accomplish this task, the Bill set out an initial credible basis hearing for refugee claimants consisting of an inquiry conducted by an independent adjudicator within the Adjudication Branch of the Department and a CRDD member. The inquiry to determine the claimant's admissibility was adversarial in nature meaning that the claim could be opposed by the Minister. However, the claimant was entitled to an interpreter and counsel. If the claimant failed the credible basis hearing, he or she was to be removed within 72 hours even if an application for judicial review was filed with the Federal Court of Appeal, unless the court granted a stay of removal. Judicial review was available with leave for all refugee-related decisions, but was generally granted only on relatively narrow grounds of error of law or jurisdiction. See Knowles, *Strangers at Our Gates*, 185.

¹²⁹ Sinha and Young 16.

individual if they received refugee status and then applied for permanent residence. Barring claimants who were flagged immediately for security concerns, the vast majority were permitted to make a claim before the IRB, although security checks would proceed, and if a case before the IRB raised concerns, it could be halted.¹³⁰ Nonetheless, after initial contact with Immigration Department officials, most claimants were delayed for only a few hours, provided with information about filing a claim with the IRB and then were free to enter Canada.

Refugee claimants were subject to a conditional removal order from the time that their claim was made until a final decision was made by the IRB. If an unsuccessful decision before the IRB was rendered, refugee claimants would have their removal order considered in effect. Failed claimants were normally required to leave Canada soon after the decision on their claim was rendered. Moreover, pursuant to the regulations of the *Immigration Act*, there were sanctions for non compliance. Claimants risked having their claim declared abandoned if they did not file the correct documents on time. Also, claimants who did not comply with a departure order within 30 days were issued an automatic deportation order; this virtually foreclosed legal re-entry into the country. And for serious violations such as not appearing for an examination, inquiry, or removal order, the *Immigration Act* permitted for an arrest warrant to be issued.¹³¹ In general, the *Immigration Act* provided procedures for the removal from Canada for all non-citizens, regardless of their length of residence. The most common procedures were deportations which barred a person from Canada for life, a twelve month exclusion order, and a departure notice for criminal code infractions not based on serious grounds.¹³²

Under the old Act, the removal process for permanent residents and individuals with refugee status began at the Adjudication Division where:

¹³⁰ For example, from 1993 to 1997, over 99 percent of claims were judged eligible. Auditor General of Canada, "Chapter 25: Citizenship and Immigration Canada and the Immigration and Refugee Board-The Processing of Refugee Claims," pt. 25.42.

¹³¹ Canada, Parliament, House of Commons Standing Committee on Citizenship and Immigration, "The Citizenship and Immigration Committee's Approach: section D, Not Just the Numbers and Detention," *Immigration Detention and Removal*, (Ottawa: The Committee, June 1998), available at: www.parl.gc.ca/committee/CommitteePublication.aspx?com/09&Lang=1&sourceid=36193. [April 15, 2006], n.pag.

¹³² Kelley and Trebilcock, 430.

...[a] designated officer presented the department's case before an adjudicator within the department, who would also hear the case before the person concerned. The adjudicator's decision was appealable in most cases to the Immigration Appeal Board, on grounds of law, fact, or compassionate considerations in the case of a permanent resident.¹³³

The 1992 amendments to the *Immigration Act*, established circumstances that made a refugee claim ineligible; this meant that the claim could not be heard before the Convention Refugee Determination Division of the IRB. The purpose of this exclusion order was to facilitate the removal as quickly as possible from Canada of an individual not deemed eligible to receive Canada's protection. Inadmissibility clauses generally applied to those claimants considered dangerous criminals, persons who had already been granted refugee status in another country, terrorists, war criminals, and those who had been denied refugee status in Canada within a period of 90 days.¹³⁴

If a claimant received a negative ruling before the IAD, extra review mechanisms were made available to them after a deportation order was filed against them. First, they were entitled to reassessment of their need for protection based on their risk of return. Second, they could also apply for permanent residence based on humanitarian grounds through what was designated by the regulations as a Humanitarian and Compassion (H&C) hearing. A failed refugee claimant could apply for an H&C hearing, for example, if they had a Canadian born child or Canadian spouse. However, even though refugee claimants had access to apply for residence based on humanitarian grounds at any time during the course of their claim, most appeals based on this kind of situation were launched only after the claimant was ordered to leave Canada. Overall, the Department had difficulty resolving these cases quickly which led to a slow and complex appeals process.¹³⁵

The ministerial appeal process was also available to failed claimants and those who were ordered deported. For example, using the Minister's discretionary power to create special classes

¹³³ Ibid., 430.

¹³⁴ The Auditor General of Canada, pt. 25.41.

¹³⁵ Ibid., pt. 25.114.

of people under the *Immigration Act*, Bill C-86 of 1992 created a new class of persons called the Post-Determination Refugee Claimants in Canada Class (PDRCCC). This class was administered by the Department and was, “designated to protect claimants who fail[ed] to meet the UN Convention’s definition of a refugee but who nonetheless would face personal risk or harm if forced to leave Canada.”¹³⁶ The creation of this class formalized a practice that the Department had used since 1989. The amendment stated that in order to qualify under this class: “the risk must be compelling consisting of a threat to life, extreme sanctions or inhumane treatment-and it must be personal-that is directed at the individual rather than based on a generalized situation of risk in the country.”¹³⁷ This review was available to all claimants, and previously with few exceptions, all claimants who failed the IRB hearing automatically had their risk of return reviewed by a post-claims determination officer of the Immigration Department.¹³⁸ Although the risk criteria under review with this process appeared to be limited, this process did represent an expansion of the *UN Convention* definition of protection previously used by Canada to assess asylum-seekers’ claims.¹³⁹

Enhanced appeal procedures for refugees garnered Canada praise on the international stage but by the mid 1990s these same procedures were becoming associated domestically with security deficiencies and lack of criminal enforcement. In the 1990’s, negative attention was focused on the nearly 26,000 annual unexecuted deportation orders.¹⁴⁰ Even though many of these orders had received a temporary stay of removal, by implication this implied abuse of the system by immigrants and asylum seekers and a lack of serious enforcement by the government. The murder of two individuals in 1994, a young woman and a police officer, both from Toronto, by a failed refugee claimant and a permanent resident caused a public sensation and put into question the efficacy of removal procedures. In one of the cases, it was revealed that a Jamaican permanent

¹³⁶ The Auditor General of Canada, pt. 25.117.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ McMaster, 123.

¹⁴⁰ Leishman, n.pag.

resident, although ordered deported, was permitted a stay of removal by the Adjudication Division even though he had previous convictions in Canada for assault and weapons charges.¹⁴¹ The other case involved another Jamaican refugee claimant who had been ordered deported, and had failed to get a stay of removal from the IAD; however, the Immigration Department failed to carry out his removal.¹⁴²

As a result of these sensationalized cases, the government ordered a study of the Immigration Appeal Division. According to Kelley and Trebilcock:

A review of the decisions of the Immigration Appeal Division of the Immigration and Refugee Board revealed that many permanent residents who were granted stays in 1993 had criminal records, frequently for drug related offences, robberies, and assaults. Included in this group were convicted sexual offenders and an applicant from El Salvador who had been convicted of manslaughter.¹⁴³

With these findings in hand, the government felt compelled to answer for what was being described in the media as too much leniency in the refugee appeal process.¹⁴⁴ In response, the government enacted a further amendment to the *Immigration Act*, with Bill C-44 in 1995. That piece of legislation, according to Kelley and Trebilcock:

Addressed security concerns by making it easier to remove permanent residents with a serious criminal background. Those who had been convicted of a 'serious' criminal offence in Canada, defined as one carrying a sentence of ten years or more, would be denied the right to appeal a removal order to the IRB or to submit a refugee claim to the CRDD, if the minister was of the opinion they constituted a danger to the public in Canada, and the processing of permanent residents' citizenship applications would be suspended pending the outcome of any Immigration Act proceedings.¹⁴⁵

Furthermore, with Bill C-44, if the minister was satisfied that any non-citizen, who might be a UN Convention refugee, "represent[ed] a danger to the public and [had] already been found by an

¹⁴¹ Kelley and Trebilcock, 433.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid., 434.

¹⁴⁵ Ibid.

adjudicator to be a member of an inadmissible class for serious criminality, he or she [could] not appeal his or her removal from Canada to the Immigration Appeal Division.”¹⁴⁶

3.3.1 Terrorists Slip Through the Security Screen

The failure to adequately screen and deport dangerous refugee claimants left the entire refugee determination system vulnerable to criticism and provided a significant impetus for the enactment of greater security measures in the IRPA, especially after critics could point to empirical examples of refugee claimants with terrorist connections being able to slip through the Canadian security net by using the refugee system. Although Canada had in place mechanisms to screen and deport migrants with a criminal past or who committed crimes while their applications were being processed, it had not been entirely secure. The modern geo-political context, which has generated a phenomenal rise in transnational migration and refugee flows, had increased breaches in Canada’s security screen. The result was that terrorists had become part of the transnational migration process and had found the means to enter Canada. In 2001, the RCMP commented on how terrorists had been using the Canadian refugee determination system. A spokesman for the force described the situation as follows:

[t]errorists entering Canada all have the same modus operandi: the first step is to claim refugee status, allowing the claimant to remain in Canada while their case works its way through Canada’s often cumbersome immigration and refugee regulations. Next come applications for Canadian benefits-welfare and health cards granting access to medical care. That provides a base salary as they establish themselves. The terrorists then typically link with others in Canada who are engaged in crime to boost their income.¹⁴⁷

While explaining how the refugee system had been used by terrorists, the RCMP spokesman also made clear that only a fraction of refugee claimants had terrorist affiliations.

¹⁴⁶ Ibid.

¹⁴⁷ Adrian Humphreys, “Ottawa Unwittingly Assists Terrorism: RCMP,” *National Post*, (October 17, 2001).

Nevertheless, it was clear that the refugee system had been vulnerable to penetration by terrorists.¹⁴⁸ Canada, like other nations, had experienced terrorist attacks carried out by national insurgency movements linked to ethnic and national diasporas and state sponsored terrorists. Reg Whitaker provides the following pre 9/11 survey of this phenomenon in Europe and Canada:

Palestinian terrorism outside of the Middle East began in the 1960s and Islamic terrorism continues in the 1990s. Croatian and Armenian terrorism abroad predated the collapse of the Communist bloc. Kurdish terrorist acts have taken place in Europe, especially in Germany. Sikh terrorism has been linked to the destruction of the Air India flight originating from Canada in 1985, and Libyan terrorism to the bombing of a Pan American flight over Lockerbie Scotland in 1988. Recently, concern has been expressed in France that Algerian Islamic militants may be using that country as a base of activities against the Algerian government.¹⁴⁹

Similarly, the Canadian Security Intelligence Service (CSIS) has reported that Canada has been used as base for support, recruitment, and fundraising for insurgency movements linked to national terrorist movements such as: the Real Irish Republican Army, militant Sikh organizations, Hamas, Hezbollah, the Kurdistan Workers Party (PKK), and the Liberation Tigers of Tamil Eelam (LTTE).¹⁵⁰ Furthermore, by the 1990s, Canada's intelligence, police, and immigration services had warned, "the government knew for years that world's major terrorist groups had all established offshore bases in Canadian cities and that they were using Canada as a staging ground for political and religious violence around the world."¹⁵¹

The LTTE provides an example of how criminal activities linked to refugee and émigré communities, in this case Sri Lankan Tamils who began arriving in Canada as refugees in the 1980s, have been used to support homeland insurgency movements and terrorist acts overseas by fundraising for these activities in Canada.¹⁵² The LTTE was found by the Security Intelligence Review Committee (SIRC), a body of bi-partisan civilian appointees charged with reviewing the

¹⁴⁸ Ibid.

¹⁴⁹ Kelly and Trebilcock, 433-434.

¹⁵⁰ Canada, The Canadian Security Intelligence Service, "International Terrorism: The Threat to Canada," *Report II, 2000/04*, (May, 2004), available at: www.csis-scrs.gc.ca/eng/misdocs/200004_e.html#N_13 . [July 24, 2006], n.pag.

¹⁵¹ Stewart Bell, "Blood Money: International Terrorist Fundraising in Canada," in Norman Hillmer and Maureen Appel Molot (eds.), *Canada Among Nations 2002: A Fading Power*, (Don Mills ON.: Oxford University Press Canada, 2002), 186.

¹⁵² Ibid., 173.

activities of CSIS and the Security Certificate process in the *Immigration Act*, to be a terrorist organization responsible for assassinations, suicide bombings, ethnic cleansing, torture and rape. Furthermore, the 1999-2000 SIRC review named the Tamil Eelam Society in Canada as a front for the LTTE for which it had raised an estimated \$2 million annually for the military purchasing arm of the Tamil Tigers since the mid 1990s.¹⁵³ The RCMP has arrested fraudulent refugee claimants associated with the LTTE like Manickavasagam Suresh, a UN Convention refugee who was provided asylum by Canada but was subsequently ordered deported for lying about criminal convictions related to terrorism and for extorting money from new Tamil refugees in Canada. These funds were given to Eelam Society for LTTE military purchases.¹⁵⁴ Consequently, by 2001, CIC had ceased funding the Tamil Eelam Society, which had till then received government support to provide services to Sri Lankan refugees and immigrants.¹⁵⁵

3.3.2 Islamist Terrorists and Their Implication for Canada's Refugee System, North American Security and Canada-US Relations

Problematical procedural rules with the establishment of Canada's Inland refugee determination system which included a lack of administrative capacity to adequately screen and deport refugee claimants contributed to terrorists and other dangerous individuals being able to gain entry into Canada. This significant security problem gained notoriety prior to the introduction of the IRPA in Canada and were also well-known to US lawmakers, especially when it became evident that Islamist terrorists had used Canada's inland refugee system to gain entry into North America where they had planned attacks on both countries. Extremist Islamic fundamentalists had entered Canada posing as refugees and by July 2001, "CSIS was advising that the threat of a terrorist attack involving Canadians had never been greater, and that radical

¹⁵³ Howard Adelman, "Refugees and Border Security Post-September 11," *Refuge*, Vol. 20, No.4, (August, 2002), 7.

¹⁵⁴ Bell, 179.

¹⁵⁵ Adelman, "Refugees and Border Security Post-September 11," 7.

Islamic groups were a particular concern—a warning issued barely two months before 9/11.”¹⁵⁶ These groups and their individual members have been tied to global terrorist networks like al-Qaeda, which began planning and perpetrating attacks on western targets in the 1990s. The admittance of refugee claimants belonging to these groups was singled out as one of the most glaring deficiencies in Canada’s refugee determination system and has been a major irritant for Canada-U.S. relations. This was a major factor which provided the impetus for enacting enhanced security provisions in the IRPA.

The American government and media had been critical of Canada’s management of its high acceptance rate of inland refugees and its lack of due diligence in screening and monitoring refugee claimants.¹⁵⁷ During the 1990s, Canada’s inland refugee-determination rate was 61.8 percent during a period when none of the other major destination countries, including the U.S., approached 50 percent.¹⁵⁸ This fact, coupled with U.S. fears about the way Canada was handling the 25,000-40,000 people that claimed inland refugee status annually, led to American accusations that Canada’s refugee policy was a magnet¹⁵⁹ that was drawing a significant supply of illegal and possibly dangerous migration towards North America and ultimately towards the United States. American elected officials were expressing such concerns and criticisms even before 9/11.

In 2000 Steven Lee wrote that, “for the Americans the border is no less real—their sense of other includes Canada as part of a vague, increasingly unfriendly, and potentially threatening world outside the U.S.”¹⁶⁰ This threatening worldview included Canada’s immigration and border control policies, as was expressed in the United States House of Representatives in 2000. The Chair of the House Subcommittee on Immigration, Lamar Smith (R. Texas), said in January that

¹⁵⁶ Bell, 187.

¹⁵⁷ Adelman, “Refugees and Border Security Post-September 11,” 3.

¹⁵⁸ *Ibid.*, 22.

¹⁵⁹ *Ibid.*, 4.

¹⁶⁰ Steven Lee, “Real Borders in a Not so Borderless World,” in Maureen Appel Molat and Fen Osler Hampson (eds.), *Canada Among the Nations 2000: Vanishing Borders*, (Don Mills Ont.: Oxford University Press Canada, 2000), 212.

year: “Countering the threat of terrorism tops the agenda of the US Congress this week and our country’s porous border with Canada may be the place to start cleaning house. Americans want increased security in an increasingly unfriendly world.”¹⁶¹ Such comments demonstrate that American interest in the Canadian border based on the perception that it was a potential threat to U.S security was evident even prior to September 11, 2001.

American critics of Canada’s inland refugee determination system could justify their criticism based on empirical evidence that was established before 9/11 between Canada’s immigration and refugee determination system and at least one successful Islamist terrorist attack and two other foiled attacks in the United States. The first was the 1993 bombing of the World Trade Towers in which six people were killed. The lead organizer for that attack was Ramzi Yousef, an al-Qaeda member who used forged Canadian immigration papers to gain access to the United States.¹⁶² Yousef was one of 15,000 people who the U.S. Immigration and Naturalization Services (INS) estimated attempted to illegally enter the United States from Canada annually in the 1990s.¹⁶³ Illegal entry to the United States was also a factor in another intended terrorist attack on the U.S. that would have originated in Canada.

This occurred in July 1997 when New York City police raided a Brooklyn apartment and caught two men, Ghazi Ibrahim Abu Mezer and Lafi Khali, in the act of preparing explosive devices that they intended to detonate in the New York City subway system. As it turned out, both men were illegal aliens in the U.S., with Abu Mezer having come to the U.S. via Canada.¹⁶⁴

¹⁶¹ Ibid.

¹⁶² Adelman, “Refugees and Border Security Post-September 11,” 7.

¹⁶³ Christopher Sands, “Fading Power or Rising Power: 11 September and the Lessons from the Section 110 Experience,” *Canada Among the Nations 2002: A Fading Power*, Norman Hillmer and Maureen Appel Molot (eds.), (Don Mills Ont.: Oxford University Press, 2002), 54.

¹⁶⁴ A Palestinian, Abu Mezer received a student visa from Canada in 1993, and shortly after arriving applied for refugee status based on fear of persecution from Israel. He had been arrested several times in Israel, where authorities believed he was a member of Hamas, a Palestinian political party that has been linked to terrorist activities by western intelligence services. Abu Mezer admitted belonging to Hamas during his initial refugee application, but he denied any personal involvement with terrorist activities. Almost immediately upon his arrival in Canada he began the first of many applications for a U.S. visitor visa for which he was repeatedly denied. He was also convicted of two felony charges while in Canada, one for credit card fraud and one for assault. However, Abu Mezer remained in Canada until 1997 when he was

Abu Mezer's Canadian connection gained the notice of the U.S. Senate Judiciary Committee charged with investigating the attempted New York City bombing. Furthermore, one of the Committee's key findings was that it was easy for criminal and terrorist elements to gain entry into Canada through its immigration and asylum systems and that they could remain in Canada for years without serious threat of removal.¹⁶⁵

The case of Ahmed Ressam has been the most celebrated example of alleged security failures in Canada's immigration and asylum system. In 1999, Ressam was caught carrying bomb-making ingredients at the border crossing in Port Angeles, Washington. He later confessed that he was a member of al-Qaeda and had planned an attack on the Los Angeles International Airport during the then up-coming millennium celebration. The Algerian born Ressam had entered Canada without documents of any kind and claimed refugee status. He did not appear at the hearing scheduled by the Canadian government to review his case and subsequently lived in Canada where he was arrested several times without being deported despite his flaunting of Canada's immigration laws. Ressam's eventual apprehension at the Port Angeles border crossing was the result of a custom agent's hunch during a routine car check.¹⁶⁶

In addition, Ressam and fellow Algerian refugee claimant Samir Ait Mohamed had planned attacks on Canada. At Ressam's trial, it was revealed that Mohamed had entered Canada in 1997 with a false Belgian passport and a fake name. However, immediately after he arrived in Canada Mohamed claimed refugee status but was denied. He was allowed, however, to remain in Canada after his 1998 refugee hearing because the Federal Court reversed the refugee tribunal's original negative ruling. Both Ressam and Mohamed confirmed during their trials that they had planned to blow up a gasoline truck at the busy Montreal intersection of Laurier and Park: an intersection situated in Outrement, a neighbourhood that houses Montreal's Hasidic Jewish

caught for the third time trying to cross into the U.S. illegally. At this point, Canada refused him re-entry whereupon he was lost in the U.S. immigration bureaucracy. *Ibid.*, 58-59.

¹⁶⁵ *Ibid.*, 60.

¹⁶⁶ *Ibid.*

community. The two men had also planned to bomb a busy commercial district of Montreal, along Ste. Catherine Street.¹⁶⁷

The above examples demonstrate that in order to protect its citizens from acts of violence such as the ones discussed above, Canada, like other host countries, has had to screen individuals carefully. Although the international principles on refugee determination require host countries to assume from the beginning of the determination process that refugees are fleeing genuine situations of risk and persecution, in today's geopolitical context a proper risk assessment of individual claimants is warranted. However, the factors that determine if a claimant poses a threat are not always clear. For example, claimants whose countries of origin are located in regions known to produce nationalist insurgency and terrorist movements may find that their refugee claims for protection are scrutinized much more extensively and rigorously. Decisions on screening are complicated because some politically active and militant groups can be multifaceted. Some of them have complex operational structures that serve legitimate political concerns and functions, but are also tarnished by the actions of cells which tend to employ terrorist tactics in pursuit of their objectives. Some examples of such organizations include the Kurdish Workers Party which claims to represent the interests of the Kurdish minority in Turkey, and Hezbollah and Hamas which claim to represent the political interests of Palestinians.

In the absence of a fully functioning state devoted to providing them with education, health, and social services, a people involved in an independence struggle may turn to organizations that sometimes employ what are or may be depicted as terrorist methods.¹⁶⁸

Furthermore, Reg Whitaker claims that:

Being involved with these groups may not have anything to do with terrorism; however, there is a tendency among security officials simply to categorize such groups as 'terrorist,' especially those with 'leftist' ideas, and thus anyone associated with them is, ipso facto, a terrorist.¹⁶⁹

¹⁶⁷ Adelman., "Refugees and Border Security Post-September 11," 7.

¹⁶⁸ Whitaker, *Refugees: The Security Dimension*, 426.

¹⁶⁹ Ibid.

Another issue that makes it difficult to determine the validity of whether or not a refugee claimant represents a terrorist threat is the quality and interpretation of the information used in the determination process. In many instances intelligence derived from sources could be politically biased and perhaps violate the spirit of the UN Convention if it comes from intelligence services that serve states that have a poor human rights record or are a source of persecution against refugee claimants.¹⁷⁰

For example, it could be argued that if Canada relied solely on the Indian Security Service to assess the threat of either Sikh or Tamil Sri Lankan claimants, it could prejudice these claimants' refugee determination hearings since the Indian government openly opposes the Sikh and Tamil independence causes. However, it is rather unlikely that Canada would rely exclusively on information provided under these circumstances unconditionally. The acceptance of Tamil refugees by Canada attests to this fact.¹⁷¹ This raises an important point about security screening, however. "Despite the faith placed in it by politicians," security screening according to Whitaker, "is not like medical screening for viruses. It reflects political biases, with a very uneven impact on different kinds of refugees."¹⁷²

Clearly both international and domestic politics influence the refugee/security nexus. Before Bill C-11 was introduced in 2001 and the 9/11 attacks in the United States, Washington had been critical of Canada for allowing refugee claimants to slip over the U.S. border. Untracked refugee claimants in Canada like Ahmed Ressam clearly demonstrated that they could pose a security threat to the United States and exposed flaws in the Canadian refugee system. But, according to Peter Rejai, Ressam's story, "raised a broader range of questions than the refugee

¹⁷⁰ Ibid., 427.

¹⁷¹ In comparison with Canada, other countries have accepted relatively few refugee claims from Sri Lankan Tamils as they do not consider them to have been persecuted. In 2003 Canada accepted 1,749 Sri Lankan claimants (UNHCR, 2003). Canada's acceptance rate was 76.3 percent, while the average for other countries was 15.8 percent. Altogether, Canada accepted over 37,000 claims from Sri Lankans between 1989 and 2004, more than any other country in the world. See Martin Collacott, *Canada's Inadequate Response to Terrorism: The Need for Policy Reform*, Fraser Institute Digital Publications, (February 2006) 35, available at: <http://www.fraserinstitute.ca>.

¹⁷² Whitaker, *Refugees: The Security Dimension*, 424.

issue, including concerns about Canada's ability to keep track of *people* subject to enforcement, execute removal orders and appropriately secure its passport procedures."¹⁷³

3.4 Recommendations of The House of Commons Standing Committee on Citizenship and Immigration Report

The sixth major factor which highlighted the need for influenced the design of security provisions in the IRPA was the *Refugee Protection and Border Security: Striking a Balance* Report of the House of Commons Standing Committee on Citizenship and Immigration produced in the spring of 2000. That report, which was based on extensive consultation, demonstrated not only that security and refugee issues had intersected before 9/11, but also how the conjoined issues were perceived by lawmakers and the government. The report was tabled in the House of Commons before the official consultations on Bill C-11 had begun, but it had the specific mandate to examine the security and refugee issue and was the only parliamentary committee entrusted with this particular mandate before the passing of Bill C-11. The intended purpose of the Report was to offer recommendations to the government before it introduced Bill C-31, the precursor to Bill C-11. Although the Committee's report highlighted some of the shortcomings related to national security and the refugee determination system and called for reform, it also re-stated Canada's obligation to protect refugees. The Report was released just one year before Bill C-11 was introduced. This factor makes it a valuable document from which to examine the security and protection reforms that parliamentarians had envisioned for implementation in the IRPA.

To begin with, the introductory remarks of the Report acknowledged the dual purpose of protection that had been embodied in Canadian law and past policy. In relation to refugees, the Report reiterated Canada's commitment to protect them and recognized that caution and fairness

¹⁷³ Reikai, 14.

must be exercised when determining a refugee claim. On this matter, the all-party Committee stated:

The Committee wishes at the outset to dispel any misconception that may have arisen because the committee was studying the refugee determination system and border control at the same time. Any inference that all individuals arriving as migrants and claiming refugee status should simply be labeled “illegal” is wholly unwarranted. Even if refugee claimants’ manner of arrival is irregular, we recognize that the flight to freedom is often fraught with peril, speed and the necessity to use whatever means are available to reach safety. Once here, claimants have certain legal rights, Canada has corresponding duties. Over the years, Canada has offered protection to many genuine refugees, and we feel strongly that Canada must continue to do so.¹⁷⁴

The Committee’s report made it clear that there were security implications and matters of illegality associated with some claimants who had sought refugee protection from Canada. But the Report also indicated the difficult task that the Immigration and Refugee Board (IRB), had had in its attempt to alleviate abuse and to ensure a procedurally fair adjudication process:

...it would be naïve to maintain that the refugee system is free from exploitation by those who make unfounded claims to refugee status as a way of staying in the country, or, more recently, by those who wish to buy time until they can enter the United States. The problem—and the challenge—is to distinguish swiftly between those with genuine claims and those who would take advantage of a refugee system that is generally acknowledged to be one of the best in the world. The truth is that it is often not easy to tell the two groups apart. Both often use fraudulent documents; both often employ smugglers to assist them; both may tell similar stories. Sorting the truth from false, as well as judging whether claims with some merit are sufficiently compelling to meet the stringent refugee definition in our law, which is virtually identical to that in the *Convention Relating to the Status of Refugees* is the job of the Refugee Division of the Immigration and Refugee Board (IRB).¹⁷⁵

Therefore, a central focus of the Report was to examine the functions of the IRB in relation to its delegated national security task of determining the legality and possible criminal and terrorist affiliation of refugee claimants. The connection between refugee determination and

¹⁷⁴ Canada, Parliament, House of Commons, Standing Committee on Citizenship and Immigration, *Refugee Protection and Border Security: Striking a Balance*. Report to the House, March 22, 2000 (Minutes of Proceedings and Evidence, 36th Parliament, 2nd Session, (Ottawa: 2000), available at: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=166&Lang=1&SourceId=36352>, [accessed July 14, 2006], Introduction.

¹⁷⁵ *Ibid.*, Introduction.

national security was linked by the committee report with the self-selected aspect of asylum-seeking as a form of migration; unlike immigrants, UN Convention refugee claimants had come to Canada without having undergone criminal and security checks. Furthermore, the Report reiterated that the multi-tiered adjudication process for inland refugee claimants had been criticized for being typically a slow process and, as stated above, for at times having failed to keep track of refugee claimants.¹⁷⁶ The Committee restated the fact that even though Canadian law permitted interim detention of refugee claimants who were considered a possible threat to the public or a flight risk a “lack of intelligence to identify high-risk claimants and a lack of detention facilities have limited the number of detention orders.”¹⁷⁷ But the Report reminded readers that, even under the *UN Refugee Convention*, there were clauses that allowed for potential claimants to be assessed for any potential security risk that they might pose¹⁷⁸ and those that posed a security risk were considered inadmissible under the *UN Convention*.¹⁷⁹

The Report clarified that the Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP) had conducted security checks on behalf of the former Immigration Department, which became *Citizenship and Immigration Canada* (CIC) in 1993. All immigrants and persons deemed UN Convention refugees by the IRB and who had wanted to apply for permanent residence status had had security checks done on them. However, the initial security check for inland refugee claimants had typically only involved the following procedures: upon arrival, they had been interviewed for a half hour; were fingerprinted; had their photographs taken, and finally were released with instructions to return for an admissibility hearing when contacted by CIC.¹⁸⁰ In general, it had taken at least two years, sometimes longer with appeals, to

¹⁷⁶ Rekai, 13.

¹⁷⁷ Ibid., 15.

¹⁷⁸ The Immigration Act incorporated exclusion clauses from the 1951 Refugee Convention, an example of which is clause F dealing with serious criminality. This clause does not allow persons who have been involved in crimes against peace, war crimes, crimes against humanity, serious non-political crimes, and acts against the principles and purposes of the United Nations to obtain refugee status. See, Joseph Rihkof, “Access, Asylum and Atrocities: An Unholy Alliance?,” *Refugee*, Vol. 19, No.4 (2001), 103.

¹⁷⁹ Adelman, “Refugees and Border Security,” 5.

¹⁸⁰ Rekai, 13.

determine if a refugee applicant had required protection. If they acquired refugee status, they could almost immediately apply for permanent residence, and three years after that, Canadian Citizenship. Thus, in Canada, on a positive note, almost all refugee claimants had been given the chance to integrate into the community, especially since they had been immediately given the right to work and to receive social benefits without having to wait for a security clearance.¹⁸¹ But the consequence of this policy had been that refugees were only screened for security purposes once they applied for permanent resident status. Thus, before 2001, thousands of foreign nationals living in Canada had not been screened for the security threat they might have posed.¹⁸² In response to this security concern, the House of Commons Report recommended that security and criminal checks should be initiated as soon as a person made a claim for refugee status.¹⁸³

However, the Committee stated that all recommended reforms of the refugee determination system were to be in accordance with established Canadian laws and regulations, and international obligations; the *Striking a Balance* Report reaffirmed that Canada should support a refugee determination system whereby:

Canadian law mandates a process for all individuals who arrive here and make a claim to protection on the basis that they fear persecution on specified grounds should they be returned to their country of origin. The law applies regardless of their manner of arrival, regardless of whether they have travel or identity documents, and regardless of their country of origin. Unless excluded from the process on criminal, security and certain other grounds, claimants are entitled to an oral hearing before two decision-makers of the Refugee Division of the Immigration and Refugee Board. A person who is found by the Board not to be a Convention refugee has a right to make an application for leave to apply for judicial review to the Federal Court — Trial Division. The leave provision is stringent, and few claimants are successful. A further appeal is available to the Federal Court of Appeal, but only if the lower court judge certifies that the case raises a serious question of general importance.¹⁸⁴

¹⁸¹ Gallagher, 11.

¹⁸² Canada, Canadian Security Intelligence Service, *Screening of Refugee Claimants*, (February 2004), available at: www.csis-scrs.gc.ca/eng/backgrnd/back/5_e.html, [accessed August 14, 2006], n.pag..

¹⁸³ *Ibid.*

¹⁸⁴ House of Commons Standing Committee, *The Refugee Status Determination System -Section A Detention*.

While the House Committee Report reaffirmed that the due process procedures which had become part of the refugee determination system should be upheld, it again reminded readers that security deficiencies had become a part of that same system. Given that the Report was initiated in the immediate aftermath of the Ressam case and the arrival of boatloads of illegal economic Chinese migrants on Canada's West Coast just one year prior, it is not surprising that the House of Commons Report reiterated that there were justifiable reasons to detain refugee claimants.¹⁸⁵ One reason cited was if there was evidence of trafficking. Human traffickers extort large sums from their clients and they often, "repay the traffickers through a lengthy period of virtual bondage in sweatshops, restaurants, or in prostitution."¹⁸⁶ Furthermore, the detention of refugee claimants who are suspected of being involved with traffickers sends a message to the individuals who conduct this activity. According to the Report, "detention removes the financial underpinnings of the trafficker's enterprise and thwarts the economic goals of migrants."¹⁸⁷

In the Chinese boatload case, given the fact that these migrants came to Canada with the help of an international organized crime syndicate that specialized in people smuggling, the Committee's Report recommended that future refugee claimants in similar situations be detained as flight risks until their claims could be verified. The Report also stated that refugee claimants who refused to co-operate in establishing their identities should be detained owing to the fact that on average 8 percent of annual refugee claimants were either undocumented or uncooperative or both. Uncooperative in this case meant that, "...in addition to arriving without any travel or identity documents, the individuals refuse to answer the most routine questions asked of them by immigration officials upon arrival."¹⁸⁸ The Committee acknowledged that some of these individuals might be too traumatized in certain instances to cooperate fully with authorities. For example, women fleeing situations of domestic abuse or sexual assault may feel uncomfortable

¹⁸⁵ Jim Bronskill, "Tighten Refugee Rules, MPs' Committee Says," *Ottawa Citizen*, (March 17, 2000), A.4.

¹⁸⁶ *Ibid.*,

¹⁸⁷ *Ibid.*,

¹⁸⁸ House of Commons Standing Committee, Section A-Detention.

being questioned by a male immigration officer. Furthermore, an engendered fear of government officials on the part of some claimants might also lead to uncooperative behaviour. However, the Report stated that even severely traumatized individuals should be able to respond to basic questions about their identities. Furthermore, the Committee stated that to allow people about which nothing is known to remain at large pending hearing of their refugee claims, “strains public confidence and credulity.”¹⁸⁹ However, the Committee was adamant that detained refugees should not be treated as common criminals and, therefore, if claimants were to be detained, they should be housed in separate and adequate correctional facilities.¹⁹⁰

Furthermore, the Report recommended changes to the way refugee claims were considered and conducted. The first change recommended by the Committee was for a one-member IRB panel to replace the two-member panel; this change was envisioned as a way to expedite the hearing process. It was hoped that this would allow the IRB to hear more claims, and by doing so, help to avert any future backlogs in the refugee determination system.¹⁹¹ Also, following a negative hearing at the Refugee Division, the Committee recommended that failed claimants at this stage should be removable from Canada. Problems had occurred at this stage in the system according to the Report because the whereabouts of most failed claimants were unknown. Furthermore, the majority of claimants often failed to report to immigration officials.¹⁹² Therefore, the House Committee recommended that the government tighten the procedures that follow after a claim is rejected in order to ensure that the person involved is actually removed from Canada. In order to accomplish this, the Committee suggested that refugee claimants should show up in person to receive their final decision on their cases, at which time if a deportation order had been issued it could be carried out.¹⁹³

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ House of Commons Standing Committee, Section C-Refugee Hearing.

¹⁹² Ibid.

¹⁹³ Ibid.

The Report also recommended that a formalized pre-removal risk review procedure for failed and repeat claimants be included in the new legislation as a way to expedite and consolidate the appeal process. This procedure had helped to determine if any new evidence regarding the claim or a change of circumstances in the person's country of origin warranted changing a negative decision to a positive one. If there had been no change since the time of a person's initial claim, then the person was to be removed from the country after the pre-removal review.¹⁹⁴ The Committee held firm to the idea that the pre-removal risk assessment was procedurally fair even though as an administrative practice it would deny repeat and failed claimants access to another full refugee hearing. An argument against the use of streamlined appeal processes, such as the pre-removal risk assessment, has been that the system in general is defective in catching mistakes; therefore, allowing repeat claims is essential to guarding against deficiencies in the hearing process. Moreover, refugee advocates have strongly criticized the lack of such a mechanism and the necessity of taking refused cases to the Federal Court, with leave.¹⁹⁵ The Committee held that this would be a compelling argument if there were no provisions in future legislation for a new appeal mechanism that would ostensibly catch any deficient application of the determination process. Furthermore, the Committee recommended that a summary procedure mechanism for dealing with repeat claims should be established through any pre-removal risk assessment process.

In the end, this appeal process was envisioned by the Committee as a reasonable method to conserve resources by avoiding appeals to the Federal Court and by discouraging a revolving door strategy employed by some claimants. Therefore, a new Refugee Appeal Division, as well as a pre-risk removal process, was called for in the report; these two procedures were to function in tandem as the internal appeal structure within the IRB. Moreover, the Committee saw these two procedures as a safety-net for refused claimants; they would expeditiously examine cases where

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

clear errors had occurred while helping to ensure that consistent decision making was adhered to at the IRB. By strengthening the internal appeal mechanisms within the IRB, the Committee hoped that this would end the automatic appeal by failed claimants to the Courts. Appeals to the Federal Court by failed refugee claimants have been associated with helping to build the refugee backlog and also had been blamed for allowing criminals and suspected terrorists the opportunity to avoid being removed from Canada.¹⁹⁶

The Standing Committee Report also suggested streamlining the refugee determination system process by improving travel document security, and creating a new offence in the Immigration Act to charge individuals who help others fraudulently gain entry into Canada.¹⁹⁷ The Committee recommended that the required period between repeat refugee claims be increased to one year from 90 days to serve as a disincentive for fraudulent refugee claimants, and that, upon arrival, claimants only would have 30 days to request a formal refugee hearing.¹⁹⁸ Related to these and the other recommendations in the Committee Report, a general theme emerged for the government to use more of the legal and regulatory tools at its disposal in order to ensure that the refugee system was better managed.¹⁹⁹

3.5 Conclusion

Canada, like other industrialized countries, was forced in the 1980s and 1990s to deal with the controversy over the appropriate response to an unprecedented increase in refugee claims: special attention was dedicated to inland refugee claims which, although greater in number during this period, still only represented a small percentage of total immigrants.²⁰⁰ Over the last twenty years, refugee numbers in Canada have ranged from 17,000 to 44,000 a year, whereas total immigrant numbers have ranged from 150,000 to 240,000. Nonetheless, the

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Jim Bronskill, "Tighten Refugee Rules, MPs' Committee Says," A.4.

¹⁹⁹ Ibid.

²⁰⁰ Kelley and Trebilcock, 437.

increase in refugee claimants has forced receiving-countries such as Canada to examine their, “moral and legal responsibilities to victims of persecution, oppression, and deprivation elsewhere in the world.”²⁰¹

Two important factors have been at work within this issue: first, most countries have maintained at a formal level that there is no ‘right’ of immigration as an element of their sovereignty; and second, refugees have claimed special legal obligations upon a host country different from ordinary immigrants. Moreover, because many refugee claimants have been self-selected, they have in a sense undermined the ability of receiving states to regulate and control the nature of their immigration intake. From the 1980s until the present, Canada has imposed new bureaucratic measures to handle and screen a growing number of refugee claimants. These measures were enacted in order to ensure the validity of refugee claims, to stem the inflow of claims, to provide legal protection for claimants so they received a fair and balanced review of their applications, and to ensure that claimants did not pose a security risk. However, on the latter point, it has been documented that the admittance and non-removal of dangerous individuals, including terrorists, has threatened Canada’s national security.

Moreover, the *Striking a Balance* Report confirmed that the idea of protection in Canadian immigration law does not solely apply to protecting the rights of refugees. Along with highlighting the dual nature of protection in Canadian immigration laws, the House of Commons Report discussed numerous reasons why refugee related issues have produced security concerns amongst policy-makers and the general public.

The Committee Report exhibited the same tension that relates back to the debate over the rights of citizens versus the claims of refugees; the claims of asylum seekers often run counter to the claims of a host country’s own citizens. One reason for this is that the majority of citizens in a host-country believe that, “...refugee recognition, with its consequent privileges, is a

²⁰¹ Ibid.

discretionary act of a sovereign state.”²⁰² On the opposite side of this issue, “...refugee advocates condemn this approach and seek to have the rights of asylum seekers treated on par with those of citizens.”²⁰³

However, the rights of citizens versus the rights of non-citizens and vice versa has been established under both international and national law, and been contested through legal processes in Canada. Moreover, judicial decisions have had major, precedent-setting implications for how a host-country must meet its international legal obligations and program-management functions related to refugees and immigrants.²⁰⁴ Host countries like Canada have, therefore, attempted to balance the rights of citizens and asylum-seekers by establishing a legal and procedural framework. The *Striking a Balance* Report restated this conceptual understanding of the dual nature of protection in Canadian immigration law, especially as it pertains to refugees. Furthermore, it reconfirmed Canada’s commitment to find a balance between these two principles, but also highlighted security deficiencies in the refugee determination system that could threaten Canadian national security.

Moreover, the House of Commons Report revealed that a debate was occurring in Canada over whether the possible threat posed by refugees should tilt the balance between human rights and national and public security in favour of the latter. The House of Commons Committee dealt with this issue and chose to highlight recommendations inspired by both camps. The *Striking a Balance* Report focused on a need to tighten the refugee security screening, determination, and appeal processes, but also reminded the public of Canada’s obligation to provide a just refugee determination system which adheres to its international obligations outlined in the *UN Convention on Refugees*. Thus, an all party House of Commons Committee presented many of the refugee security issues that had come to the fore of public debate in Canada before the IRPA. It

²⁰² James Gallagher, “Canada’s Dysfunctional Refugee Policy: A Realist Case for Reform,” *Behind the Headlines*, vol.58, no.4, (Summer 2001), 23.

²⁰³ *Ibid.*,

²⁰⁴ *Ibid.*

was then left to the Liberal government of the day to decide which of these recommendations it should enact when it tabled its new immigration legislation in the House of Commons in February 2001.

Chapter 4:

Comparative Overview of Canada's Refugee System Under the new Immigration and Refugee Protection Act and the 1976 *Immigration Act*

4.0 Introduction

The second guiding research question of this thesis is the following: Did amendments in the IRPA constitute a fundamental change to Canada's refugee determination system? The intent of this chapter is to present a comparative overview of Canada's refugee system under the IRPA and the 1976 *Immigration Act* in order to examine important administrative and procedural changes that arguably had consequences for the rights and procedural rules associated with the refugee hearing process in Canada under the IRPA. For example, the new legislation constituted provisions for one- member IRB panels; previously, two-member panels were the norm, and both members of the panel would have had to agree for a claim to be rejected. Bill C-11 also made it permissible for the Minister to intervene in any hearing before the IRB.²⁰⁵ Also noteworthy in Bill C-11 was a provision that stated all IRB decisions had to be accompanied by a reason placed on the official record either in written or oral form. In particular, the Refugee Protection Division was required to provide written reasons for its decisions. This measure was likely established in order to aid refugee claimants if they went before one the IRB's appeal bodies.²⁰⁶ Many of the changes to procedural rights for refugee claimants and enhanced security provisions were related to changes in the mandate and composition of the Immigration and Refugee Board (IRB) and its divisions.

4.1 The Structure of the Immigration and Refugee Board

Under the new Act, the refugee determination system is still co-administered by the IRB and the Department of Citizenship and Immigration with most of the procedural issues associated with refugee rights still located within the IRB. By the time Bill C-11 was introduced, the IRB had evolved into Canada's largest administrative tribunal, employing close to 200 board members

²⁰⁵ Stephen Gallagher, "Canada's Dysfunctional Refugee System: from a Comparative Perspective," 21.

²⁰⁶ Jay Sinha and Margaret Young, *Bill C-11: The Immigration and Refugee Protection Act*, (Library of Parliament, Canada; revised, 31 January 2002), 40.

who were “independent’ in their decision-making.²⁰⁷ Bill C-11 maintains the previous administrative structure of the IRB; at the head of the organization is a Chairperson appointed by the Governor in Council who also appoints members of every IRB division except the Immigration Division (ID). Members of the Immigration Division remain public servants appointed under the *Public Service Employment Act*.²⁰⁸ Most importantly, refugee hearings at the IRB remained non-adversarial under the IRPA.²⁰⁹

The IRB was re-configured with four divisions: the Refugee Protection Division (RPD), formerly the Convention Refugee Determination Division (CRDD), which decides on claims made for refugee protection within Canada; the Immigration Division (ID), formerly the Adjudication Division, which conducts hearings for certain categories of people believed to be inadmissible to, or removable from, Canada, as well as review for those being detained in Canada; the Immigration Appeal Division (IAD), which continues under the same name and hears appeals from the Immigration Division as well as appeals of refused sponsorship applications, appeals from certain removal orders, and appeals by permanent residents outside Canada; and the Refugee Appeal Division (RAD) which will hear appeals from the Refugee Protection Division, though this division is still yet to be implemented.²¹⁰

4.2 Procedures for Checking the Security and Identity of Asylum Seekers

In general under the IRPA, on arrival, an asylum seeker will be screened by an officer of the Citizen and Immigration Canada department. The claimant is obliged to complete a questionnaire relating to issues such as their identity, travel documents, education, employment history, date of birth, family members, marital status, criminal record, route to Canada, and previous refugee claims. After reviewing the completed questionnaire, the immigration officer

²⁰⁷ Gallagher, “Canada’s Dysfunctional Refugee Policy: Canadian Policy from a Comparative Perspective,” 21.

²⁰⁸ Dolin and Young, *Canada’s Refugee Protection System*, 4.

²⁰⁹ Ibid.

²¹⁰ Ibid., 4.

determines whether or not the claimant is eligible to have the claim heard by the Refugee Protection Division, which will grant or deny refugee status. New in the IRPA is the requirement that the screening process must be completed within 3 days of the asylum seeker's arrival. If the initial claim is not completed within the 3 days as specified in the *IRPA*, it is deemed to have been referred to the Refugee Protection Division (RPD) where a decision is made on whether or not the claimant can gain refugee status.²¹¹ This means that claimants will not be waiting indefinitely for their claim to be referred to the Refugee Protection Division. Although not designated by statute, the government stated that with the enactment of the IRPA it expected through regulations to begin security screening at the commencement of a refugee claim. Before the IRPA security checks were initiated only when the claimant applied for permanent residence.²¹² Grounds of ineligibility include:²¹³

- prior asylum claim in Canada;
- coming from a prescribed safe (third) country
- prior recognition as a refugee in another country to which the person can be returned;
- being inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

If the immigration officer is of the opinion that a refugee claimant is inadmissible, he or she will prepare a report and transmit it to the Minister. If the Minister considers the report to be well founded an admissibility hearing will be held before the Immigration Division of the IRB.²¹⁴

As for inadmissibility based on safe-third country provisions, since 1989 when this ground was incorporated into the *Immigration Act*, the Governor in Council has had to prescribe a list of countries that would meet the definition of a "safe third country". Such a list was not established until after the IRPA became law and the Safe Third Country agreement with the United States was negotiated in 2002. The IRPA lists the factors that the Governor in Council has to consider when entering into a "safe third country agreement". These include:

²¹¹ *IRPA s.100(3)*.

²¹² Sinha and Young, 4.

²¹³ *IRPA s.101(1)*.

²¹⁴ Sinha and Young, 31.

(a) whether the country is a party to the Refugee Convention and to the Convention Against Torture; (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture; (c) its human rights record; and (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.²¹⁵

4.3 Grounds for Inadmissibility

Under Bill C-11 the Adjudication Division was replaced by the Immigration Division (ID) which maintains the functions of conducting admissibility hearings at ports of entry and at inland CIC offices at the request of the Minister for certain categories of people he/she believes are inadmissible to or removable from Canada. The ID will also oversee detention reviews for most persons being detained under the IRPA. Also, if at any time after an initial review, an immigration officer determines that an asylum seeker is a security threat, violator of human rights or has a record of serious criminality, then he/she can be deemed to be ineligible to be referred to the Refugee Protection Division.²¹⁶

When a refugee claimant is found to be removable from Canada, their refugee claim is suspended, and an admissibility report is referred to the ID.²¹⁷ Since 2003, the Canadian Border Services Agency (CBSA) has been in charge of initiating the inadmissibility and detention processes. First, it provides the Immigration Division with a report containing reasons for why it believes that a refugee claimant or individual with permanent resident or refugee status should not be admitted or allowed to stay in Canada. Then, a single member of the Immigration Division presides over an inadmissibility hearing, which is an adversarial process, unlike the formal refugee hearing. Hearing participants include a hearing officer who represents the Minister, and the person concerned, who has the right to be represented by counsel. Both parties can present

²¹⁵ IRPA s.102 (2)(a)(b)(c)(d).

²¹⁶ IRPA s. 100(2)(a).

²¹⁷ The Immigration and Refugee Board, "Highlights and Impacts on the Divisions: The Immigration Division," in *Immigration and Refugee Protection Act: Overview and Impact on the IRB*, available at: http://www.irb-cisr.gc.ca/en/about/publications/irpa/index_e.html#table, [June 17, 2005], n.pag..

evidence and call witnesses. At the end of the hearing, the ID adjudicator will either authorize the person concerned to enter or remain in Canada, or will order the person to leave the country.

The IRPA maintains a situation whereby the determination of admissibility is an on-going process. If at a later date, claimants who have been referred to the IRB for a refugee hearing are found to be ineligible to make a claim for protection, their hearing or other proceedings will be halted, and their cases will be transferred to the Immigration Division. Inadmissibility can result from past, present, and future events, and will also cover omissions. The Immigration Division has the authority under the new Act to "claw back" proceedings at any time during the claims process if it discovers that a claimant meets any of the above inadmissibility criteria. According to IRB chairperson, Peter Showler:

In other words, they can provide the board with notice that the person is of concern to them and could potentially be before an admissibility hearing. If they have significant concerns about security issues, they would then refer it to an adjudicator to determine whether the person is actually admissible to Canada.²¹⁸

Moreover, if the ID orders claimants removed on serious criminal and security grounds, they are denied access to the Refugee Appeal Division, and any decisions made by the IRB about their case are nullified.²¹⁹ In this situation, the provisional removal order issued for all new claimants upon arrival will be carried out by CIC. As well, in these cases all refugee and permanent residency applications will be suspended until inadmissibility hearings before the Immigration Division and court decisions are concluded.²²⁰

Section 100(2) of the IRPA ensures that suspected terrorists, members of groups engaging in organized crime, war criminals, security risks, or senior members of governments that have seriously violated human rights will also have their IRB proceedings suspended if

²¹⁸ Peter Showler, Parliament, Senate Standing Committee on Social Affairs, Science, and Technology, "Issue 26-Evidence," (Ottawa, Monday, October 1, 2001).

²¹⁹ Dolin and Young, *Canada's Refugee System*, 5.

²²⁰ *Ibid.*, 6.

negative information comes to light following their referral. If the information is confirmed, the refugee claim does not proceed.

However, a person ordered removed may still apply under the IRPA to the Federal Court of Canada Trial Division for leave for judicial review of any IRB decision. Permanent residents and refugee claimants issued a removal order for non-serious criminal offences may also appeal to the Immigration Appeal Division (IAD) of the IRB.²²¹ However, under Bill C-11 there will no longer be an automatic stay of removal if a refused or removable claimant files for judicial review of a negative decision before the IRB. Claimants found inadmissible, therefore, can be removed before their judicial appeals are completed.²²²

Under the old Immigration Act, rejected claimants at the initial entry interview, or at any other time during the determination process were allowed to apply for membership in the post-claims refugee determination in Canada class (PCRDC),²²³ or they could leave the country for sixty days and then try again to have their claim heard before the CRDD.²²⁴ This allowed them to reapply for a hearing by the IRB after sixty days. However, when Immigration Officers screen claimants for ineligibility under the IRPA they exclude from referral to the IRB those under a removal order and those claimants who have already received refugee protection in Canada, or in another country to which they can be returned. Failed claimants and individuals who withdrew or abandoned their refugee claims are disallowed under the IRPA from making another claim before the IRB, and can only make an application to Citizenship and Immigration Canada for a pre-removal risk assessment (PRRA) after being out of Canada for six months.²²⁵

²²¹ Ibid.,

²²² Sinha and Young, 22.

²²³ Sinha and Young, 41.

²²⁴ Michael Bossin, "Bill C-31: Limited Access to Refugee Determination and Protection," *Refuge*, vol.19, no.4, (February 2001), 56.

²²⁵ Ibid.,

In the new Act, a person inadmissible for human rights violations, security issues, and serious criminal activity or organized crime, will no longer be allowed to apply for refugee status. Previously, for a claimant to be ineligible on security grounds or human rights violations, the Minister had to be of the opinion that it would be contrary to the public interest to have the claim determined.²²⁶ Instead under the IRPA, they will be referred directly to a pre-removal process. They will have a determination, but it will be within the context of removal. They do not have access to the refugee system.²²⁷ That is a significant change which demonstrates that the IRPA was designed to stop persons who constituted criminal and terrorist threats from entering the refugee determination system. If they were identified later as threats they could be denied access to the refugee system by conducting an on-going review of their eligibility throughout the IRB determination process.

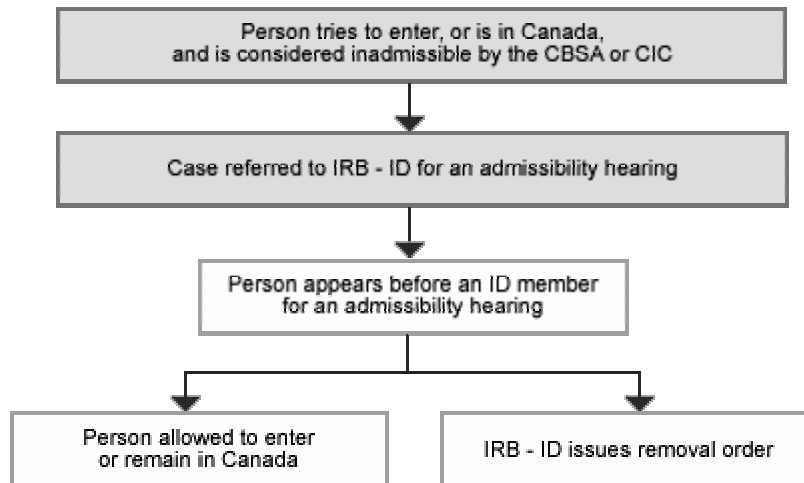
These provisions meant that asylum seekers could be denied access to Canada, and in certain cases this could mean the principle of non-refoulement could potentially be ignored. Canada is a signatory of the 1987 *Convention Against Torture*, article 3 of which prohibits refoulement. However, sections E and F of Article 1 of the *UN Refugee Convention* allow Canada to exclude those not believed to need protection or who are deemed to be a threat to the public.²²⁸ The exclusion grounds in the *UN Refugee Convention* included in the previous Act are also found in s.98 of the IRPA. As demonstrated by the preceding provisions, grounds for inadmissibility under the IRPA, as under the former Act, establish situations where the procedural rights of refugees are considered as being secondary to public safety and security measures.

²²⁶ Dolin and Young, *Canada's Refugee Protection System*, 14 fn. 36.

²²⁷ *Ibid.*,

²²⁸ *Ibid.*, 35.

Figure 4.3 Admissibility Hearing Process²²⁹



4.3.1 Inadmissibility on Grounds of Serious Criminality

Grounds for defining organized criminality were amended as part of the inadmissibility category in the IRPA. Serious criminality is defined as either: (a) a crime that carries a maximum term of imprisonment of ten years and for which the person received a term of imprisonment for at least two years; or (b) a conviction outside Canada, that if committed in Canada would carry a maximum punishment of ten years or more, and the Minister is of the opinion that the person would be a danger to the public.²³⁰ Previously, as Dolin and Young explain: “the danger opinion also applied to convictions in Canada; now, a prison sentence of two years or more serves as a proxy for serious criminality in the Canadian context.”²³¹

In the old Act, the definition of serious criminality had no reference to a prison sentence and the person had to be declared by the Minister a danger to the public in order to be ineligible to make a refugee claim or be deported. However, the requirement of a Minister’s ‘danger opinion’ for ineligibility grounds based on serious crimes committed abroad remains in the new

²²⁹ Source: Immigration and Refugee Board, *Procedures: Admissibility Hearing Process*, available at: http://www.irb-cisr.gc.ca/en/references/procedures/processes/id/ahp_e.htm, [May 21, 2007], n.pag..

²³⁰ Ibid.

²³¹ Ibid., 15 fn. 37.

Act and benefits refugees and permanent residents.²³² This provision is intended to prevent a situation whereby a refugee claimant is denied access to the IRB because of a conviction in their country of origin that could have been based on politically trumped up charges, or where the quality of evidence used to prosecute them was inadequate by Canadian standards.²³³

Maintaining the ministerial ‘danger opinion’ requirement for serious crime committed abroad protected against wrongful deportation of foreign and permanent residents. Historically, the designation of a ‘danger opinion’ required the minister to label refugee claimants, foreign nationals, and permanent residents a “danger to the public” before removal procedures could proceed against them, even though from the government’s point of view this was seen as a very time-consuming administrative process that allowed convicted criminals to remain in the country, namely because ‘danger opinions’ were often challenged in the courts. This, therefore, delayed the deportation of certain individuals deemed to be security and criminal risks.²³⁴

However, Bill C-11’s new definition of serious criminality committed in Canada is an instrument to speed up the removal of foreign nationals and permanent residents convicted of serious crimes. From the standpoint of protecting refugee rights, however, eliminating the requirement for a ministerial ‘danger opinion’ for serious crimes committed in Canada is a backward step. Mandatory application of the ‘danger opinion’ for crimes committed in Canada forced the Minister to consider the extenuating circumstances of the accused. Factors that were considered include: the actual sentence imposed by the court where the accused was convicted, the age of the offender, whether the conviction was a first offence, and, chance of rehabilitation.²³⁵ Therefore, critics argued that the rights of refugees and permanent residents were limited by this serious criminality provision in Bill C-11; this provision permitted Immigration

²³² Sinha and Young, 55.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Canadian Council for Refugees, *State of Refugees in Canada*, available at: <http://www.web.net/~ccr/state.html#Refugee%20Determination%20system>, [accessed May 28, 2007], n.pag.

Division adjudicators to ignore the extenuating circumstances of those convicted of a serious crime.²³⁶

Furthermore, Bill C-11 also denied those convicted of a serious crime an appeal of their removal or deportation orders before the IAD, the IRB's main appeal body.²³⁷ Balanced against this argument, however, is the fact that both the former *Immigration Act* and *IRPA* contained a 'rehabilitation exception' clause.²³⁸ This exception applies to individuals who satisfy the minister that they have rehabilitated themselves, and at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission to divulge the act had occurred.²³⁹

4.3.2 Inadmissibility Based on Security Grounds

According to subsection 34(1) of the *IRPA*, a permanent resident or a foreign national is inadmissible on security grounds for:

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (b) engaging in or instigating the subversion by force of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).²⁴⁰

As was the case in the previous Act, the Minister can admit such persons if their presence would not be considered detrimental to the national interest.

Importantly though, the terms "terrorism" and "member of an organization" remain undefined in the *IRPA*, just as they were in the former Act. Therefore, the inherently political

²³⁶ Ibid.

²³⁷ Sinha and Young, 55.

²³⁸ *IRPA* s. 36(3)(c).

²³⁹ Canada, The Immigration and Refugee Board, "10. Overview of the Inadmissibility Classes and Removal After Admission (ss 19 and 27)," in *Legislative Guide for the Adjudication Division*, (March 2000), available at: http://www.irb-cisr.gc.ca/on/about/tribunals/rd/legguide/Igid_e.pdf, 55.

²⁴⁰ *IRPA* s. 34(1)(a)-(f).

process of defining terrorism remains open to interpretation under the *IRPA* to definitions provided either by the Minister or other government agencies that handle security matters. But the lack of a definition also guard against too wide a net being cast around those under investigation for terrorism or those suspected of being a member of an organization that engages in terrorist activities because a judicial interpretation has usually been required in cases where terrorist charges have been laid. The definition of “terrorism” in Canadian immigration law, therefore, remained undefined until after the *IRPA* became law.

The Supreme Court of Canada rejected the broad definition of terrorism contained in the *IRPA* in the 2002 case *Suresh v. Canada*. The Court defined terrorism for the purpose of immigration law as the following:

...an act intended to cause death or serious injury to a civilian, or to any person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act by its nature or context is to intimidate a population or to compel a government or an international organization to do or abstain from doing any act.²⁴¹

Suresh dealt with a deportation order against an individual who argued that he would face torture if returned to his home country since *Suresh* was alleged to be a member and fundraiser for the Tamil Tigers. He made his case based on the fact that Canada had ratified the *Convention Against Torture (CAT)*, which explicitly prohibited state parties from returning people to torture. Article 3(1) states: “No Party shall expel, return, (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.”²⁴² This is supposed to be an inviolable provision for signatories of the *CAT*. Article 2(2) of the *CAT* reads: “No exceptional circumstances whatsoever, whether a state of war or threat of

²⁴¹ D. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002, SCC 1. Cited in Thomas Gabor, *The Views of Canadian Scholars on the Ant-Terrorism Act*, (Ottawa, On.: Department of Justice, 2004), 52.

²⁴² Articles 2(2) and 3(1), *The Convention Against Torture (CAT)*. Cited in Dolin and Young, *Canada’s Refugee Protection System*, 24.

war, internal political instability or any other public emergency, may be invoked as a justification of torture.”²⁴³

Directly contradicting this provision in the CAT is section 115(a)(b) of the IRPA that permits deportation to a country where the person’s life would be threatened if the person is inadmissible for any specified reason and has been designated to be a danger to the security of Canada.²⁴⁴ This Canadian law provides that under certain circumstances, people may be deported to face torture. However, the Court allowed Suresh’s appeal and ordered that he was entitled to a new deportation hearing based on the likelihood that he would be tortured if returned to his country of origin. But in making this decision the Court also upheld the legislation as valid, albeit with a restricted interpretation of when a deportation can take place. The Court stated:

We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s.7 of the Charter or under s.1...Insofar as Canada is unable to deport a person where there are substantial grounds to believe that he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government but because the fundamental justice balance under s.7 of the Charter generally precludes deportation to torture on a case-by-case basis.²⁴⁵

The effect of the *Suresh Decision* was such that, according to Dolin and Young: “In cases where there is evidence of a substantial risk of torture should the person be removed, the *Suresh* decision of the Supreme Court suggests that the Minister will be required to grant a stay of removal in almost all circumstances.”²⁴⁶ However, if a refugee claimant were to meet the inadmissibility criteria based on security and criminality grounds, the Minister or the Immigration Division had the prerogative to place a detention order against them.

²⁴³ Ibid.

²⁴⁴ IRPA s. 115(2)(a)(b).

²⁴⁵ *D. Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002, SCC 1. Cited in Dolin and Young, *Canada’s Refugee Protection System*, 25.

²⁴⁶ Dolin and Young, *Canada’s Immigration Program*, 29.

4.4 Detention of Refugee Claimants

Under the new legislation foreign nationals, other than a person with protected status²⁴⁷ or a permanent resident may be arrested and detained without warrant.²⁴⁸ Detention may be continued if the Immigration Division is satisfied that:

- they are a danger to the public;
- they are unlikely to appear for further proceedings;
- the Minister is taking steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security;
- or the Minister is of the opinion that identity has not been established and is making reasonable efforts to do so.²⁴⁹

Bill C-11 changes the policy of detention established by the previous Act — foreign nationals, including refugee claimants (but not individuals granted protected status) can be detained without a warrant based on the aforementioned grounds at anytime. The power to arrest and to detain for identity purposes was a power previously limited only to persons seeking entry to Canada.

However, Bill C-11 requires that an arrest warrant is issued in all circumstances for the detention and arrest of individuals with permanent resident and protection status.

The IRPA stipulates that the Immigration Division has to be notified immediately by CIC or CBSA when a foreign national has been detained at their initial port of entry interview. A review of the detainee's circumstances is required to occur within 48 hours and then again within seven days and every thirty days thereafter.²⁵⁰ Furthermore, the Immigration Division is required to review the reasons for detention at least once during the first seven day detention period and during each subsequent thirty day detention period.²⁵¹ Under the previous Act, the review cycle of '48 hours, 7days, and 30 days thereafter' was only prescribed with respect to persons who were detained as flight risks or for security reasons.²⁵² In general, under both acts, the major grounds for detention remain the same. They are if a person poses a danger to the public, is considered

²⁴⁷ Refer to p. 96 of this thesis for a definition of 'protected person'.

²⁴⁸ *IRPA* s. 55(2)(a)(b).

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*, 12.

²⁵¹ *IRPA*, s.57(1)(2).

²⁵² Jay Sinha and Margaret Young, 22.

unlikely to appear at procedures under the Act, or he/she needs to be picked up in the opinion of the Minister or an officer in order to establish their identity.²⁵³

New in the IRPA was a reference to “cooperation” in s.58 (1)(d) of the Act which provides grounds for detention if the Minister is of the opinion that the detained person has not reasonably cooperated by providing relevant information for establishing his/her identity.²⁵⁴ However s. 58 of the IRPA is balanced with s. 106 in the new Act which codifies the Immigration Division’s responsibility to consider a claimant’s reasonable explanation for his/her lack of documentation or his/her failure to reasonably secure it during the refugee determination process.²⁵⁵ This measure ensures that immigration officers take into account cultural differences when considering the use of detention. This provision also demonstrates sensitivity to the fact that in many countries, government officials are viewed with trepidation, and also that language and other barriers need to form part of the overall assessment to ensure that the detention provisions are applied in a non-discriminatory manner.²⁵⁶ Therefore, for asylum claimants failure to produce documents will not automatically lead to detention. However, if a claimant does not cooperate with authorities, this fact will be recorded and considered during any future detention review and during the hearing process for refugee and protection eligibility.²⁵⁷

In addition, permanent residents and persons already granted protected status can be detained upon entry if an officer considers it necessary to do so in order for the examination to be completed or has reasonable grounds to suspect that they are inadmissible on grounds of security or for violating human or international rights.²⁵⁸ The Immigration Division is required to order the

²⁵³ Howard Adelman, “Refugees and Border Security: Post September 11,” 13.

²⁵⁴ Sinha and Young, 23.

²⁵⁵ IRPA, s. 106.

²⁵⁶ Canada, Parliament, House of Commons Standing Committee on Citizenship and Immigration, “E. Enforcement and Program Delivery: v. Detention and Refugee Claimants,” *Hands Across the Border: Working Together at our Shared Border and Working Abroad to Ensure Safety, Security, and Efficiency*, (Ottawa, On.: The Committee, December 2001), available at: <http://cmte.parl.gc.ca/Content/HOC/committee/371/cimm/reports/rp1032046/cimm03rp/11-chap2-e.htm>, [accessed May 17, 2007], n.pag

²⁵⁷ Citizenship and Immigration Canada, *Overview: Bill C-11*, n.pag..

²⁵⁸ IRPA, s.55(3)(a)(b).

release of permanent residents or foreign nationals unless it is satisfied, taking into account other factors, that:

- they are a danger to the public; they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);
- the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights;
- the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing (sic) their identity;
- or the Minister is making reasonable efforts to establish (sic) their identity.²⁵⁹

These measures put a lot of pressure on unidentified individuals to cooperate by providing relevant information to officials.

In the four years preceding the IRPA, about eight thousand people were detained on average per year for an average of sixteen days in Canada.²⁶⁰ Citizenship and Immigration Canada and the Immigration Division consider specific factors before ordering detention, and during detention reviews. According to CIC:

[the] decision-maker will consider whether the foreign national: is involved with, or is under the influence of criminally organized smuggling or trafficking operations; is a fugitive from justice in another jurisdiction; has convictions in Canada or abroad or outstanding charges for serious offences; is affiliated with organized crime; length of time spent in detention; alternative detention.²⁶¹

Section 44 of the IRPA allows officers of both CIC and the ID to impose other conditions than detention that they deem are necessary or reasonable. These conditions could include alternatives to detention such as the payment of a cash deposit or the posting of a guarantee to ensure compliance with other conditions.²⁶² The person concerned or Citizenship and Immigration (CIC) may ask the Federal Court of Canada for leave to apply for judicial review of any decision rendered at a detention review hearing.

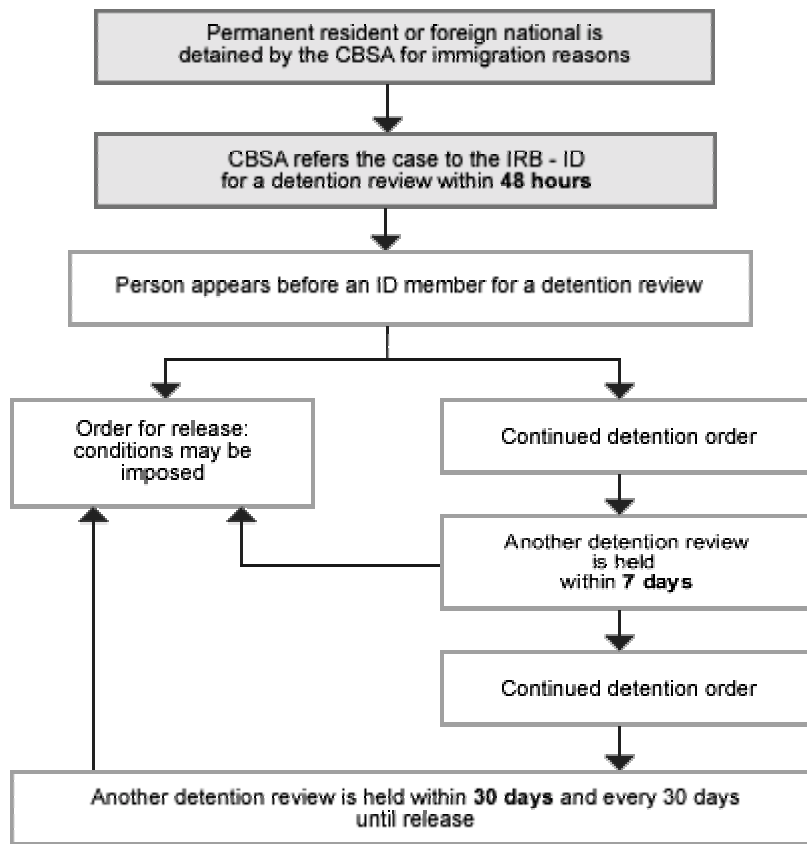
²⁵⁹ IRPA s. 58(1)(a)(b)(c)(d)

²⁶⁰ Howard Adelman, "Refugee and Border Security Post September 11", 13.

²⁶¹ Canada, Citizenship and Immigration Canada [CIC], *Overview: Bill C-11, Immigration and Refugee Protection Act*, available at: <http://www.cic.gc.ca/english/irpa/c11-overview.html>. [June 14, 2005], n.pag..

²⁶² Sinha and Young, 23.

Figure 4.4 Detention Review Process²⁶³



4.4.1 The Security Certificate Process

The most infamous use of detention in Canadian immigration law is the security certificate process. Canadian law permits the detention and deportation without any criminal conviction in Canada of non-Canadian citizens based on certain grounds prescribed in the Immigration and Refugee Protection Act (IRPA: Sections 77-85), including security, war crimes and organised crime. The ability to detain or deport non-Canadians under a certificate process was first introduced in 1978 as part of Canadian immigration law. Under the IRPA, the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration

²⁶³ Source: Immigration and Refugee Board, *Procedures; Detention Review Process*, available at: http://www.irb-cisr.gc.ca/en/references/procedures/processes/id/drp_e.htm, [May 21, 2007], n.pag..

can sign certificates in respect to protected persons and other non-Canadians who pose a security threat. The certificate process is only issued when there is sensitive information, usually provided by the Canadian Security Intelligence Service (CSIS), which needs to be protected for reasons of national security or the safety of any person. Intelligence information must be both reliable and supported by sufficient open-source information.²⁶⁴

According to CSIS, the certificate process has been necessary when the subjects involved are suspected of posing a danger to national security and detention is necessary to halt their activities. The following situations have been cited by the government as appropriate reasons to detain permanent residents and foreign nationals with certificates: “There may not be enough evidence for criminal charges, they may not have committed a criminal act, or their removal will disrupt the network and plans of terrorist organizations.”²⁶⁵ Moreover, Campbell Clark states that security officials, “privately argue that security certificates allow them to neutralize terrorists before they commit crime in Canada, when they do not have evidence against them.”²⁶⁶

Section 77 of the IRPA outlines how the security certificate process will be administered.

This provision holds that:

The Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration may sign a Security Certificate alleging a non-citizen to be inadmissible to Canada on grounds of security or serious criminality; the non-citizen is automatically detained without a warrant (detention of permanent residents require a warrant) simply on the basis of reasonable grounds to believe the subject is a danger to national security or the safety of any person, or is unlikely to appear for removal. A review of both the Security Certificate and the grounds for continued detention is required by the Federal Court, but the Court may hear the government's evidence in the absence of both the subject of the Certificate and his or her counsel. There is no requirement that the Government even inform the detainee of the precise nature of the allegations. Normal rules of evidence are dispensed with, including the

²⁶⁴ Sharryn J. Aiken, “Manufacturing ‘Terrorists’: Refugees, National Security, and Canadian Law,” *Refuge*, Volume 19, No. 3, (Dec.2000), 64.

²⁶⁵ Canadian Security Intelligence Service, *Security Certificates*, (2004), available at: http://www.csis-scrs.gc.ca/eng/backgrnd/back14_e.html, [accessed July 4, 2004], n.pag.

²⁶⁶ Campbell Clark, “Cotler seeks expanded anti-terror arsenal,” *The Globe and Mail*, (March 24, 2005), A-8.

right to cross-examine witnesses and to challenge evidence obtained through normally unacceptable means such as hearsay, plea-bargains or even torture.²⁶⁷

Furthermore, when a security certificate is issued all other immigration proceedings related to the subject of the certificate are suspended, except for the possibility of a ministerial review of an application for a pre-removal risk assessment by the permanent resident or foreign national, until the Federal Court makes a decision on the reasonableness of the certificate.

Permanent residents or foreign nationals must be provided with a summary of the evidence so that they are reasonably informed of the reason on which the decision to issue a certificate was based. However, the Department of Justice has stated before a House of Commons Committee that the summary of evidence excludes:

...information that would disclose the sources of information, particularly when the safety of the source would be at risk; information that would reveal investigative techniques; and information that was provided in confidence by foreign governments.²⁶⁸

The judge may also consider information excluded from the summary in coming to a decision on the reasonableness of the certificate if determined to be relevant.²⁶⁹ The judge may also receive into evidence “anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.”²⁷⁰

New in the IRPA is a provision whereby permanent residents would undergo the same review process as foreign nationals. This ended an automatic review of the circumstances of a permanent resident’s certificate by the Security Intelligence Review Committee (SIRC), which reviewed the intelligence information used in the security certificate and reported its findings to the Governor in Council who would direct the Minister to authorize the certificate, if it was in agreement with the grounds for issuing it. This step has been eliminated under the IRPA.

²⁶⁷ Howard Adelman, *Sovereignty in the Twenty-First Century: Security, Immigration and Refugees*, lecture for Dalhousie University Mackay Lecture Series, (March 22, 2005) 6.

²⁶⁸ Canada, Parliament, House of Commons Standing Committee on Citizenship and Immigration, *Detention Centres and Security Certificates*, (Ottawa, On.: The Committee, April 2007), 4.

²⁶⁹ IRPA, s.78(e).

²⁷⁰ *Ibid.*, s78(j).

However, permanent residents can still request a SIRC review of the background security check that was used to justify the issuance of their certificate.²⁷¹ But an automatic review by SIRC of a permanent resident's security background was not an effective appeal mechanism in any case because the government has never been compelled by law to adhere to the recommendations of a SIRC review.²⁷² For permanent residents, an initial review of detention must take place within 48 hours, then subsequently every six months. Foreign nationals, including those with protected status, are not automatically conferred a set time in which their detentions would be reviewed.²⁷³

After the hearing, if the judge has determined that the certificate is not reasonable then it and the security assessment of the Minister will be quashed. However, if the certificate is found reasonable, usually a removal order will be automatically put into effect for the subject of the certificate. Furthermore, no appeals are allowed for this type of Federal Court decision.²⁷⁴ If the certificate is deemed reasonable then it serves as conclusive proof under the law that the subject of a certificate is inadmissible. Furthermore, section 81 of the new Act stipulates that if a certificate is upheld, the recipient of the certificate is barred from making another application for protection; he/she is, however, allowed to apply for a pre-removal risk assessment during his/her certificate proceedings. And there is an automatic review of a claimant's case after a certificate is upheld. A federal immigration officer will assess whether the certificate holder faces a significant risk of torture if returned to his/her country of origin or country of habitual residence.

Furthermore, under section 84 of IRPA, once the reasonableness of a certificate is upheld by the Federal Court the foreign national or permanent resident is entitled to apply for a detention review if he or she has not been removed from Canada within 120 days. A judge may order release on conditions if satisfied that the person will not pose a danger to the national security of Canada if released.

²⁷¹ Sinha and Young, 26.

²⁷² Aiken, 65.

²⁷³ Peter J. Carver, "Shelter From the Storm: A Comment on Suresh V. Canada (the Minister of Citizenship and Immigration)," *Alberta Law Review*, vol. 40, (2002-2003), 468.

²⁷⁴ *Ibid.*, 469.

4.5 The Refugee and Protection Determination Process

Part 2 of the IRPA, Clauses 95-98 cover the definition of a “United Nations Convention refugee” and “person in need of protection,” while Clauses 99-111 set out the rules for conducting a refugee hearing. Once a person is found eligible to make a refugee claim, a conditional removal order is placed on the claimant. The case is referred to the Refugee Protection Division (RPD), and if the asylum seeker is determined to be a refugee, then the conditional removal order is not brought into effect. If the refugee claim is rejected or declared abandoned, then the removal order becomes effective, and the extradition provisions of the IRPA are brought into effect.²⁷⁵ Upon being referred to the Refugee Protection Division by the immigration officer, the asylum seeker has 28 days to submit a Personal Information Form (PIF) which makes up the main part of the application to the RPD. After lodging the PIF and the medical exams have been passed, the refugee claimant can apply for a work permit. If a refugee claimant does not file the PIF, the Board can declare the case abandoned which leads to the removal of the refugee claimant.

Under Bill C-11, the Refugee Protection Division (RPD) replaces the Convention Refugee Determination Division as the administrative body of the IRB that decides on claims deemed by CIC to be eligible for a protection hearing. Now under Bill C-11, even if CIC has not completed a full eligibility determination, a claim will be forwarded to the RPD within three days. The Refugee Protection Division will assess claimants’ information and then hold hearings to decide their cases. Section 104 of the *IRPA* provides authority for CIC to re-determine eligibility at any time after a claim has been referred to the RPD, in which case the RPD loses jurisdiction to determine the claim. This combination of measures gives the RPD jurisdiction to start the asylum status determination process quickly after claims are presented. This overcomes

²⁷⁵ IRPA, s.105.

problems that formerly occurred when referral of claims to the CRDD was delayed, sometimes for months.²⁷⁶

At the same time, claims that are subsequently discovered to be ineligible based on the inadmissibility criteria set forth in the IRPA can be pulled from the refugee determination process.²⁷⁷ The provisions of Part 1 in the IRPA cover the procedures related to detention, the criteria and definitions of inadmissibility (security, serious criminality, etc.) and the certificate process. A claim will be suspended or terminated for the following reasons:

...a claim could be stopped in the Refugee Protection Division or the Refugee Appeal Division for any reason relating to ineligibility if: a report had been made to the Immigration Division regarding ineligibility on grounds of security, serious criminality, etc.; or the person had been charged with a serious crime. Material misrepresentation or withholding information relevant to eligibility would also stop a claim in the Refugee Protection Division. Generally, where the claim was found to be ineligible, the proceedings would be terminated.²⁷⁸

Furthermore, section 106 of the IRPA requires the Refugee Protection Division to take into account with respect to the credibility of a claimant whether he/she possesses acceptable documentation to establish his/her identity, and if not, whether he/she has provided a reasonable explanation for the lack of documentation.

While refugees and asylum-seekers may be unable to obtain valid documents because of a well-founded fear of persecution by the issuing authorities in their country of origin, the intention of this provision would be to provide measures to deter the deliberate and unfounded destruction of documents and the problematic practice of trying to conceal a true identity.²⁷⁹

The above facts will be taken into consideration when the RPD assesses a claimant's credibility to make a claim for protection.

²⁷⁶ Immigration and Refugee Board, *The Immigration and Refugee Protection Act: Overview and Impact on the IRB*, (September 13, 2006), available at: http://www.irb-cisr.gc.ca/en/about/publications/irpa/index_e.htm#rp, [accessed May 3, 2007], IV.

²⁷⁷ Dolin and Young, 9.

²⁷⁸ Sinha and Young, 31.

²⁷⁹ *Ibid.*, 32.

Under Bill C-11, the IRB is required to provide notice of a hearing to the Minister, who can participate fully in the claimant's hearing. However, if the Minister or his/her representatives give notice to the RPD that they do not wish to intervene in the case, the RPD will commence an expedited process. Then, if a Refugee Protection Officer (RPO) of the RPD is satisfied that the claimant's identity has been established and the facts related to the country where persecution is claimed to have occurred are well founded, refugee status will be conferred on the claimant and no further hearings are required.²⁸⁰ If a person is found by the RPD to be a UN Convention refugee or in need of protection, his/her claim is considered successful and he/she can in most cases apply for permanent residency status within six months. Thus, the conferment of refugee status to a claimant by the RPD is the beginning of a process that can lead to him/her also receiving Canadian citizenship. This process, however, is contingent upon claimants proving that they qualify to receive Canada's protection.

If the Minister or the RPO concludes that the claim is not manifestly well-founded, then there is a full hearing. Most hearings are conducted by a single member of the RPD. The hearings are non-adversarial and although usually held in private, are open to the public, unless the Minister makes an application for non-disclosure of the proceedings based on prescribed confidentiality criteria.²⁸¹ The Minister also has a right, with notice to the claimant, to intervene in the proceeding. Both the Minister and the claimant are entitled to representation, and legal aid is available in most provinces to claimants.²⁸² A representative of the United Nations High Commissioner for Refugees (UNHCR) has the right to attend any hearing and to participate through written submissions.²⁸³ The RPD is not bound by any legal or technical rules of

²⁸⁰ Dolin and Young, *Canada's Refugee Protection System*, 10.

²⁸¹ See IRPA s. 166 (b)(i)(ii)(iii).

²⁸² Dolin and Young, *Canada's Refugee Protection System*, 11.

²⁸³ IRPA s. 166(e).

evidence and may base a decision on evidence that is considered credible or trustworthy in the circumstances.²⁸⁴

The previous Immigration Act contained only provisions relating to claims for UN Convention status but other grounds for protection had been incorporated into the Act through regulations, administrative practices of CIC, and the requirements established through case law. The definition of “Convention refugee” under the IRPA did not change:

(96)A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a)is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b)not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.²⁸⁵

In the previous Act, only Convention refugees were recognized but the new Act reflects Canada’s obligation under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the requirements of a number of important decisions by the Supreme Court of Canada in regards to the *Canadian Charter of Rights and Freedoms* and Canadian refugee and protection law.²⁸⁶ Therefore, the IRPA includes as a prescribed class “a person in need of protection” which describes someone who has received refugee protection, and whose claim or application had not subsequently been rejected or vacated.²⁸⁷

The definition of a “protected person” is very similar to the definition used in the previous Act for a member of the “post-determination refugee claimants in Canada Class” (PDRCCC).²⁸⁸ This class allowed refugee claimants who were not recognized by the IRB as UN

²⁸⁴ IRPA s. 170(g)(h).

²⁸⁵ IRPA s.96(a)(b).

²⁸⁶ Dolin and Young, *Canada’s Refugee Protection System*, 3.

²⁸⁷ Ibid.

²⁸⁸ PDRCC applications were assessed in an administrative, as opposed to a tribunal process. The risk assessment was made by a CIC officer based on a review of a written application, supplemented by the record from the CRDD status determination hearing and general information about conditions in the country to which an unsuccessful claimant might be removed. See Gallagher, 22.

Convention refugees to apply to CIC for consideration on general grounds relating to risk.²⁸⁹ The IRPA consolidates these protection decisions within the Refugee Protection Division (RPD) of the IRB by including the “protected persons” and expands the definition of risk to include those for whom there were substantial grounds to believe would face the danger of torture should they be returned to their country of origin.²⁹⁰ Under the IRPA, those who receive status before the IRB are called “protected persons” because they are either a “Convention” refugee or a “person in need of protection”.²⁹¹

Adding the term a “person in need of protection” to the Convention refugee definition in the new Act still implies that people seeking application for refugee or protected status face a substantial risk to life or torture if they were returned to their country of origin.²⁹² And as with the previous Act, according to Sinha and Young, the grounds for protection under the IRPA remain stringent in that:

...risk would have to be personal to that individual (in the sense that others in the country would not generally face the same risk), and would have to be faced in every part of the country. It would not be tied to the imposition of lawful sanctions unless those were beyond what were accepted internationally (“persecution not prosecution”), and could not be related to the inability of the country of origin to provide adequate health or medical care.²⁹³

Nonetheless, the title of the new Act indicates that the government was establishing a more expansive interpretation of who would qualify for asylum; for the first time the words “protection,” “immigration,” and “refugees” appeared side by side in the title of Canada’s immigration law. In addition, Bill C-11 clearly demarcated two separate Parts for immigrants and refugees in the new Act: Part 1 was entitled *Immigration to Canada* and Part 2 *Refugee Protection*. It was not clear, however, at the time, how consolidated grounds for protection would affect the actual refugee determination process.

²⁸⁹ Sinha and Young, 29.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

Bill C-11 contained streamlined procedures designed to expedite the refugee hearing process. The most significant change to the hearing process is the replacement of two-member panels with one member. Under the former two-person format a split decision generally led to a ruling in favour of the claimant. Theoretically, the two-person panel represented a more favourable mechanism for granting refugee protection. The change to one-member panels is particularly important when a claim is rejected. Both the old and new statutes stipulate that in cases where a claim is rejected decision-makers should consider any credible information on which a favourable decision could have been based. If no credible basis is found, then the claimant would be considered ineligible to receive an automatic stay of removal and administratively this could make him/her a priority for removal. If, however, the decision-maker states that the claim does in fact contain credible and trustworthy evidence, then a stay on the removal order is granted, so that the claimant can apply for an appeal.

Whereas under the old statute the credibility test was determined by a two-member panel, and both members had to agree that this situation was applicable to the claimant, under Bill C-11 the IRB Chairperson reserves the right to convene three-member panels in the event of complex hearings. Furthermore, the argument that two member panels afforded more procedural leeway to claimants can be contested. Historically, only 1 percent of cases before the IRB were split-decisions; this means, therefore, that members of CRDD and now the RPD have demonstrated a fairly consistent approach to decision-making.²⁹⁴

In addition the IRPA contains clauses that disallow a claim where the factors surrounding it have ceased to require that a claimant seek asylum. Cessation clauses were in the previous Act but, in order to invoke them, the Minister had to bring an application to the Convention Refugee Determination Division (CRDD). Under the IRPA, the RPD is automatically required to reject a claim under cessation criteria that are virtually the same as in the previous Act.²⁹⁵ Under s.108 (1)

²⁹⁴ Ibid.

²⁹⁵ Ibid., 32.

of the IRPA, a claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

(a) the person has voluntarily reavailed themselves of the protection of their country of nationality;(b) the person has voluntarily reacquired their nationality;(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or (e) the reasons for which the person sought refugee protection have ceased to exist.²⁹⁶

In general, the concept of cessation relates to a situation where the RPD would have found a person to be a refugee had there not been a change in their status. If the application was successful, the person's claim for protection would no longer be recognized. As Dolin and Young explain:

This criterion would in practice be applied only where the reasons for the need for protection ceased to exist close in time to the grant of protection (since most successful claimants will be granted permanent resident status within 6-12 months of the RPD decision). There is an exception to this criterion for people who establish compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to return home. This exception recognizes that some experiences are so horrific that forcing someone to return to the country would be cruel.²⁹⁷

4.6 Right of Appeal Under the IRPA

People who are not permitted to have their claims to protection heard by the IRB are issued conditional removal orders. According to Dolin and Young:

These orders come into effect when the claim is abandoned or withdrawn, or when it is finally refused and all further steps have been exhausted; for example, when an application for leave to apply for judicial review is denied or an application for a pre-removal risk assessment is unsuccessful. Those claimants who are found ineligible for referral to the Board and issued removal orders may apply to the Federal Court – Trial Division for leave to apply for judicial review of both the removal order and the decision of the immigration officer regarding eligibility.²⁹⁸

²⁹⁶ IRPA s. 108(a)(b)(c)(d)(e).

²⁹⁷ Dolin and Young, *Canada's Refugee Protection System*, fn. 25, 13.

²⁹⁸ *Ibid.*, 9.

Usually parties are not allowed to appear at applications for leave to apply for judicial review and applications are decided by a single judge. Appeals are not permitted on a decision on a leave application. Successful applicants in their leave applications are entitled to a hearing before the Trial Division of the Federal Court. Trial Division decisions can be appealed to the Federal Court of Appeal if the Trial Court Judge finds in their decision that a serious question of general importance is involved and the Judge sets out the question.²⁹⁹

4.6.1 The Immigration Appeal Division

The IRPA, like the previous Act, upholds the right of certain groups to have full appeal rights to the Immigration Appeal Division (IAD) against a decision or a removal order, while for others these rights are restricted or eliminated. People who have been protected as refugees would be able to appeal a removal order. The Minister can also appeal any decision of an inadmissibility hearing to the IAD. People can appeal a removal order if they believe that the officer or the Immigration Division made a legal error, or they believe they should not be removed from Canada on humanitarian or compassionate grounds. Members of the IAD hear appeals and Hearings officers represent the Minister at appeal hearings. Like the RPD hearing, rules of evidence are more flexible than a formal court of law and the IAD can consider any evidence it believes credible and trustworthy.³⁰⁰ The IAD can take one of three actions following an appeal hearing:

- Dismiss the appeal: The appeal is rejected and the removal order is confirmed.
- Allow the appeal: The appeal is successful and the removal order is cancelled.
- Stay the appeal: The IAD can ‘stay’ (postpone) the removal order for a certain period of time.³⁰¹

²⁹⁹ Ibid.

³⁰⁰ Canadian Border Service Agency, *Fact Sheet: Appeals of Removal Orders*, (March 2004), available at: <http://www.cbsa-asfc.gc.ca/media/facts-faits/052-eng.pdf>, [accessed May 17, 2007], 2.

³⁰¹ Ibid.

Bill C-11 eliminates the right of appeal to the IAD for individuals, including serious criminals (those given at least a two year sentence), members of organized crime and those who pose a security risk. This is a significant point of departure from the previous Act that allowed full appeal rights for these individuals unless they had been issued a security certificate.³⁰² Furthermore, under the old Act permanent residents who were found inadmissible because of serious criminality were only denied access to the IAD if the Minister had filed a danger opinion.

According to Sinha and Young:

The administrative process for reaching that decision [began] in local offices, and the decision [was] made centrally in Ottawa. It [involved] weighing a number of factors concerning the crime, the circumstances, and the offence. That process would be replaced by the objective fact that a person had been sentenced to prison for two years or more.³⁰³

The establishment of some standardized criteria for serious criminality and the end of the ministerial “danger opinion” requirement affected appeal rights in much the same way as they affected inadmissibility criteria. However, according to CIC, this measure:

...streamlines the removal of permanent residents who receive sentences of at least two years and eliminates the possibility of their deportation order being set aside by the IAD on humanitarian and compassionate grounds after the government decides that the circumstances of the case warrant the deportation of the person at the end of the sentence. However, permanent residents receiving sentences of less than two years of imprisonment retain the right to appeal their removal order to IAD on issues of law as well as humanitarian and compassionate considerations.³⁰⁴

Another important change under the IRPA is that a protected person who is under a stayed removal order by the IAD for reasons of criminality who is then convicted of a serious criminal offence, (section 36(1) of IRPA: a potential sentence of at least 10 years or an actual sentence of over six months) will have their stay of removal cancelled by operation of law, and

³⁰² Sinha and Young 24.

³⁰³ Ibid., 24-25.

³⁰⁴ CIC, *Criminal Justice and the Immigration and Refugee Protection Act*, (April 26, 2004), available at: <http://www.cic.gc.ca/english/pub/justice.html>, [accessed May 17, 2007], n.pag.

their appeal will be terminated.³⁰⁵ However, new in the IRPA, when the Minister files an appeal with the IAD, as the appellant, to challenge favourable decisions of members of the Immigration Division involving persons protected as refugees, according to *Sinha and Young*:

The Division could make and stay the applicable removal order or dismiss the appeal, even if satisfied the decision appealed was wrong in law or fact, or a principle of natural justice had not been observed.³⁰⁶

All decisions made at the IAD are subject to judicial review by the Federal Court. Both the Minister and the claimant may file for a judicial review of an IAD decision. Bill C-11 provides a stay of removal for 15 days following a negative refugee determination or appeal at the IAD so persons under a removal order can file their leave or stay applications to the Federal Court. Under the former Immigration Act, unsuccessful refugee claimants who were facing removal had two additional avenues of appeal beyond judicial review. They could apply to be recognized as a member of the Post Determination Refugee Claims in Canada Class (PDRCC),³⁰⁷ and they could submit a humanitarian and compassionate appeal (H&C).³⁰⁸ These two processes are considered under the IRPA as part of the new pre-removal risk assessment (PRRA).

4.6.2 The Pre-Removal Risk Assessment

The pre-removal risk assessment (PRRA) is available to persons who have been ordered removed, found inadmissible to make a claim before the Refugee Protection Division (RPD), or denied refugee status by the RPD. The PRRA is intended to check if these individuals face persecution or other forms of risk if they were to be returned to their country of origin. In essence it is a final appeal mechanism that could allow them to remain in the country. Under the IRPA, those found ineligible at the initial review stage or at a later point during the determination

³⁰⁵ IRPA, s. 68(4).

³⁰⁶ *Sinha and Young*, 24.

³⁰⁷ PDRCC applications were assessed in an administrative, as opposed to a tribunal process. The risk assessment was made by a CIC officer based on a review of a written application, supplemented by the record from the CRDD status determination hearing and general information about conditions in the country to which an unsuccessful claimant might be removed.

³⁰⁸ *Ibid.*

process and who are subsequently ordered removed, can apply for a pre-removal risk assessment (PRRA).³⁰⁹

The risk-related criteria under which a claimant could be granted protection under the PDRCC process or under an H&C appeal have been incorporated into the definition of "a person in need of protection" in section 97(1) of IRPA. As a result of these changes, the grounds on which the RPD can grant protection to refugee claimants have been widened. But, at the same time, the post-determination recourse available to failed refugee claimants has been narrowed considerably. Under the new legislation, failed refugee claimants may apply for a pre-removal risk assessment (PRRA), which is carried out shortly before the planned removal of the individual to another country. An appeal to the Minister on humanitarian and compassionate grounds is also still available, but this is limited to issues relating to the applicant's situation in Canada and has nothing to do with possible risks the person may face if removed to another country.

The PRRA fulfilled Canada's commitment to ensure the principle of non-refoulement. The former *Immigration Act* had prescribed in regulations that unsuccessful refugee claimants would be allowed to stay in Canada if they were determined to be at risk of death or serious harm in the country to which they were to be removed. There was no requirement that the harm feared be related to any specific ground, as is a requirement for refugee status. However, the risk of harm had to apply to the individual personally, not merely as a member of a class of persons subject to a common risk. Bill C-11 codified this administrative process that had evolved as an administrative review of risk prior to removal in the old Act, "particularly in cases in which a significant period of time had elapsed between the original protection determination and removal."³¹⁰ The *IRPA* provides that people seeking protection in Canada who are eligible for a PRRA will be notified by CIC that they have 15 days to submit a written application for

³⁰⁹ Community Legal Education Ontario, *Immigration and Refugee Fact Sheet: Pre-Removal Risk Assessment (PRRA)*, (July, 2003), available at: http://www.cleo.on.ca/english/pub/onpub/PDF/july_03/prra.pdf, [accessed July 12, 2005], 1.

³¹⁰ CIC, *Pre-Removal Risk Assessment (PRRA)*, (June, 2001), available at: <http://www.cic.gc.ca/english/irpa/c11-issues.html#10>, [accessed May 10, 2006], n.pag.

protection. This letter would be sent after claimants received a removal order. Moreover, if the PRRA application was submitted on time, it conferred an automatic stay of removal until a final decision on the application was made. Under the *IRPA* specific PRRA officers of the Immigration Division (ID) are designated to decide whether a rejected claimant qualified as a Convention refugee or a person in need of protection. The *IRPA* stipulates that almost anyone who is Canada and subject to a removal can apply for a PRRA.³¹¹

However, Bill C-11 denies the pre-removal risk assessment to individuals found inadmissible on grounds of security, violating human or international rights, serious criminality and organized criminality, persons whose claims had been rejected on the exclusion grounds stated in section F of the 1951 Convention,³¹² and persons named in a security certificate.³¹³ Individuals found inadmissible on these grounds will only be allowed to have their claims of risk assessed and judged by the Minister through the Immigration Division. The major factor considered for these individuals is the extent to which they represent a danger to the security of Canada and the nature and severity of the acts they have committed. A negative decision by the Minister or the Minister's delegate will result in the applicant's removal from Canada. In cases where the risk of return is considered overriding, risk protection will be granted, but only in the form of a stay of removal, and they will not be granted the chance to apply for permanent residence status. Furthermore, if at a later time the claimants' country of origin situation changes, they could be removed.³¹⁴

The pre-removal risk assessment is also denied to the following individuals: those being extradited; those who have already been recognized as Convention refugees in a country to which they could be returned; and those who have been rejected for refugee protection in Canada and

³¹¹ Ibid.

³¹² Ibid.

³¹³ Sinha and Young, 35.

³¹⁴ Ibid., 35.

have returned less than six months after their claim was refused, withdrawn, or abandoned.³¹⁵ The fact that repeat claimants are denied access to the IRB and have waited six months to seek another PRRA instead of 90 days as in the previous Act, has led to criticism that the PRRA is being used as a pre-screening mechanism for frequent claimants. Refugee advocates claim that this screening method denies people access to the full refugee determination process.³¹⁶ Furthermore, critics argue that this provision fails to consider that even if claimants return before six months, this does not necessarily preclude them from meeting the definition of a UN Convention refugee or person in need of protection. Bill C-11 does not address how or if protection will be determined for rejected claimants who returned less than six months after their claims were rejected.³¹⁷

Presumably, the government's rationale for denying rejected claimants access to the IRB and making them wait six months before they can reapply for Canada's protection through a PRRA was to provide a disincentive for bogus refugee claims and to stop what the government called the "revolving door."³¹⁸ The PRRA, therefore, was a mechanism that streamlined the process of evaluating repeat refugee claims. This administrative tool is related to the Minister's mandated prerogative, in both the former and new Acts, to address security considerations along with ensuring the integrity of processes conducted under the Act. According to departmental literature, "a PRRA conducted by CIC allows the Minister to take into account individual risk and public safety concerns. A PRRA by CIC also allows for protection decisions to be rendered in a timely manner in conjunction with removal priorities."³¹⁹ Ostensibly, by only allowing a PRRA to repeat claimants the Department of Citizenship and Immigration Canada (CIC) would be freeing

³¹⁵ Community Legal Education Ontario, 2.

³¹⁶ Bossin, 58.

³¹⁷ Ibid., 59.

³¹⁸ Estibalitz Jimenez and François Crépeau, "The Immigration and Refugee Protection Act," *Horizons*, Vol.5, No.2, (2002), 19.

³¹⁹ CIC, *Pre-Removal Risk Assessment*.

its own and the IRB's resources while still providing a procedurally fair determination of risk to individuals who had previously been assessed.

PRRA officers will use Bill C-11's consolidated protection grounds of risk of persecution as defined in the *UN Convention*, danger of torture and, risk to life and cruel and unusual treatment or punishment as defined under the *CAT*.³²⁰ Thus, the PRRA and the Refugee Protection Division (RPD) will use the same definition of risk, but the PRRA will only base its decisions on evidence received after the initial protection claim was refused, such as evidence that demonstrated a change in the conditions of a claimant's country of origin.³²¹ The PRRA allows applicants to submit information that they could not reasonably have presented at their initial refugee hearing. Consideration of risk is provided to almost all refugee claimants through the PRRA, but it is to be done in an expedited manner and by independent decision-makers within the CIC.

If protection is granted to individuals at the PRRA stage, they are allowed to apply for permanent residence status. If refused, they could still make an application to the Minister to remain in Canada on humanitarian and compassionate grounds. This application, however, does not act as a stay of removal.³²² The only exception for removal after a failed PRRA is if a claimant received successful leave to appeal to the Federal Court.

4.6.3 The Refugee Appeal Division

According to Sinha and Young, "[s]ince the design of the refugee status determination system in the mid-1980s, refugee advocates have been extremely critical of its lack of an appeal mechanism."³²³ This concern on the part of advocates is addressed in part in Bill C-11 by the introduction of a new division in the IRB, the Refugee Appeal Division (RAD), whose mandate is

³²⁰ Ibid.

³²¹ Dolin and Young, *Canada's Refugee Protection Program*, 15.

³²² Ibid., 16.

³²³ Sinha and Young, 33.

to determine appeals from refused claimants and the minister over decisions made at the Refugee Protection Division. The grounds for appeal to the new division are quite wide: based on law and fact, or both mixed law and fact.³²⁴ This appeal process does not, however, consist of a hearing where claimants present the merits of their cases; instead it is based on the record of proceedings and submissions before the Refugee Protection Division. Thus, appeals to the RAD will be in writing only, and will be reviewed by decision-makers experienced in refugee matters. RAD adjudicators will have the power to either affirm RPD decisions or overturn them and substitute their own decision.

Federal Court judges can only adjudicate in matters of law or fact when they review refugee and immigrant cases. Furthermore, only about 10 percent of annual applications are accepted for review by the Federal Court.³²⁵ Thus, the vast majority of refused claimants have been denied an appeal on the merits of their case. The RAD was promoted as a way to provide claimants more opportunity to appeal their cases, and also speed up the time in which it took to have cases settled by setting up an administrative appeal body that by-passed the courts. In addition, the Minister has the right to appeal to the RAD whenever he/she is not satisfied with a positive decision made by the RPD. For example, the Minister might decide to appeal a RPD decision if an application to vacate a refugee claim before the RPD is ignored by that division. In such a circumstance the Refugee Appeal Division would have the power to:

[C]onfirm the original decision; substitute its own opinion (except if it believed a hearing was required or the appeal had been brought by the Minister and was based on the claimant's credibility); or refer the matter back to the Refugee Protection Division for a re-determination, together with any directions it considered appropriate.³²⁶

³²⁴ Ibid.,

³²⁵ Testimony provided by Peter Showler, Chairperson, Immigration and Refugee Board at the Senate hearings into Bill C-11. Canada, Parliament, Senate Standing Committee on Social Affairs, Science, and Technology, "Issue 26-Evidence," (Ottawa, Monday, October 1, 2001), available at: www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/soci-e/26ev-e.htm?Languages=E&Parl=37&Ses=1&comm_id=47, n.pag.

³²⁶ Sinha and Young, 34.

Minister of Citizenship and Immigration Canada, Elinor Caplan, testified during Senate hearings on Bill C-11 that, from the government's standpoint, the RAD would create faster procedures and more consistent decisions about refused claims which in turn would establish an enhanced body of jurisprudence for the Federal Court to follow.

To this end, submissions before the RAD can be made by the Minister, the person whose claim is at issue, a representative of the United Nations High Commissioner for Refugees (UNHCR), and any other officer or member of the IRB.³²⁷ The RAD is to be staffed by experienced refugee decision-makers, and make decisions in a quorum. The RAD, therefore, provides access to an appeal for any decision made by the Refugee Protection Division. Minister Caplan described the RAD as being part of an overall government agenda to streamline the refugee determination system. The first step would see an individual referred for a single member hearing before the RPD. Then, if he/she were refused, his/her case would be referred for a paper review before the RAD to ensure fairness and consistency in decision-making and that IRB protocols were adhered to during the course of the decision. It was expected by the Minister that judicial review would be the last step. The RAD, therefore, is seen as way to deal with mistakes made before the Board, and this, in turn, would provide greater assurance to the Federal Court when it had to decide on leave applications. As a result of this process, the Minister envisioned that fewer cases would be reviewed at the Federal Court, and this in turn would help to prevent a backlog.³²⁸

Furthermore, the Refugee Appeal Division may have been included in Bill C-11 in order to appease critics who claimed that the IRPA's streamlined determination and appeal procedures might reduce the ability of refugee claimants to receive Canada's protection. According to Dolin and Young:

³²⁷ Sinha and Young, 33.

³²⁸ Testimony by Elinor Caplan, P.C., M.P., Parliament, Senate Standing Committee on Social Affairs, Science, and Technology, "Issue 29-Evidence," (Ottawa, Thursday, October 4, 2001), available at: www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/soci-e/26ev-e.htm?Languages=E&Parl=37&Ses=1&comm_id=47, n.pag.

When concerns were expressed about the reduction of the size of the panel hearing protection claims from two members to one, the Department often pointed to the RAD as a quality control mechanism. As things currently stand, claimants are able to be heard only by single-member panels and must obtain leave from the Federal Court for an appeal of that individual member's decision. The RAD was supposed to be a "trade-off," according to some refugee organizations, that would allow Members of Parliament and the advocacy groups to swallow the harsher sections of the new law.³²⁹

Peter Fowler, Chairman of the IRB, appeared to confirm this argument when he stated during Senate hearings on Bill C-11 that, "I would not be comfortable saying to you that a system of single member decision-makers without the RAD would be a better system."³³⁰ However, as previously mentioned, the RAD was not established after the *IRPA* was enacted.

4.7 Conclusion

The IRPA contains very stringent provisions concerning people suspected of being a danger to public safety, not respecting the law or abusing the Canadian system. For example, the IRPA expands the provisions concerning detention without warrant and extends the power to arrest and detain persons who cannot establish their identity (s. 55). Refugee claimants without proof of identity can be detained if they refused to co-operate with measures to establish their identity. The IRPA also expands inadmissibility categories on the basis of security (s. 34), human or international rights violations (s. 35), serious criminality (s. 36), organized criminality (s. 37), (s. 39), misrepresentation (s. 40), and non-compliance with the Act (s. 41). In addition, the Act does not define terrorism, although it is a grounds for inadmissibility under IRPA.

The IRPA also restricts the right of immigration appeal, removing all right of appeal and power to review removal orders against any person, even a permanent resident, who is

³²⁹ Dolin and Young, *Canada' Refugee Protection System*, 16-17.

³³⁰ Testimony by Peter Showler, Parliament, Senate Standing Committee on Social Affairs, Science, and Technology, "Issue 26-Evidence," (Ottawa, Monday, October 1, 2001), available at: www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/soci-e/26ev-e.htm?Languages=E&Parl=37&Ses=1&comm_id=47, n.pag.

inadmissible on the grounds of security, violating human or international rights, serious criminality and organized criminality (s. 64). The Senate Committee on Social Affairs, Science and Technology, which tabled its final report on Bill C-11 on October 23, 2001, heard many witnesses who expressed concern about clause 64, which would remove the right of a permanent resident or protected person convicted of a “serious crime” from appealing his or her deportation before the Immigration Appeal Division.³³¹ Other witnesses criticized Bill C-11 for barring individuals, including permanent residents, found inadmissible on the grounds of security, violating human rights, serious criminality or organized crime, access to the IRB if they were found inadmissible during the course of their refugee application. Other witnesses expressed concerns about the Refugee Protection Division and the Refugee Appeal Division being able to suspend their consideration of a claim at any stage on these same grounds (s. 103). The IRPA was also heavily criticized for not allowing unsuccessful refugee claimants access to a second claim before the IRB, and for instead only allowing them a pre-removal risk assessment after they had been out of the country for six months.³³² As for multiple claims, IRPA extends the waiting period before a new claim can be submitted from 90 days to six months to discourage what the government calls the “revolving door.”³³³

Other witnesses commented positively about provisions in Bill C-11. Testimony during the hearings praised the titles in Parts 1 and Parts 2 of the IRPA which give separate status to immigrants and refugees. Other witnesses praised the government for including the reference to the *Convention Against Torture* (CAT). Still other witnesses claimed that Bill C-11’s expanded definition of protection gave the IRB additional jurisdiction to extend asylum not only to Convention refugees but also to other persons in need of protection. Other witnesses claimed that refugee protection would be enhanced by a merits-based appeal of negative refugee

³³¹ The report is available on the website of the Standing Senate Committee on the Social Affairs, Science and Technology: <http://www.parl.gc.ca/37/1/parlbus>

³³² Sinha and Young., 46-47.

³³³ Ibid.

determinations through the Refugee Appeal Division (RAD). The RAD will give failed refugee claimants the right to a paper appeal of an IRB decision, which will help reduce discrepancies in numerous decisions. This new appeal body within the IRB was also seen as a way to ensure procedural fairness as now most refugee claim hearings under the IRPA will take place before a one-member rather than two-member panel (s. 163). From a humanitarian perspective, Bill C-11 managed to maintain a determination system for asylum-seekers that upheld Canada's international obligations and was premised on a fair tribunal process, which included a new mechanism to address errors made during this process with the new Refugee Appeal Division.³³⁴

³³⁴ Ibid., 48-49.

Chapter 5:
Assessment of IRPA and Recommendations for Reform

5.0 Introduction

The central objective of this thesis has been to examine the relationship between the federal government's international obligation to protect refugees, and its responsibility to protect both the national security and the public safety of its citizens and permanent residents. In order to meet the above objective this thesis posed three major research questions: What provided the impetus for extra legal and security provisions in the IRPA related to refugees? Did amendments in the IRPA constitute a fundamental change to Canada's refugee determination system? Did the IRPA strike a right balance between safeguarding the rights of refugees and safeguarding national security? These questions represent key elements of the refugee/security nexus, a problem that the IRPA is designed to partly address. The objective in this chapter is to provide a summary and analysis of the answers to each of those questions.

5.1 Findings Regarding the Impetus for Extra Legal and Security Provisions in the IRPA Related to Refugees

Since the 1976 *Immigration Act*, Canada has had a formalized refugee determination system recognized by statute which fully accedes to the UN *Refugee Convention*. Almost from the implementation of the old Act, there was an unprecedented increase in the number of asylum-seekers who sought Canada's protection. This created huge backlogs in the determination system and a crisis of legitimacy became associated with the refugee system as a result of the backlog and examples of what were seen as disingenuous or 'bogus' refugee claims. This period also witnessed national security becoming conflated with the backlog and lack of enforcement of exclusion criteria under the law. This formed the basis of what has been described as the 'Refugee/Security Nexus': the numerical threat of a growing number of fraudulent refugee claims combined with criminals and terrorists who entered and remained in the country as a result of the backlog. A few high profile examples point to the existence of this phenomenon, e.g. Ahmed

Ressam in 1999. The 'Refugee/ Security Nexus' also had an impact on Canada-U.S. relations: the United States perceived a lack of diligence on the part of Canada in monitoring its refugee system for criminals and terrorists. Again, very few, but high profile, examples appeared to confirm some of the concerns expressed by American authorities.

Therefore, throughout the 1980s and 1990s there were calls for better administrative efficiency and management of the refugee determination system by enforcing stricter exclusion provisions for those seeking Canada's protection and who were deemed a threat to public safety. But during this same period, calls for more restrictions were balanced with the imperatives of Canadian jurisprudence which after the *1985 Singh Decision* required that access to the determination system for person physically present in Canada be limited as little as possible, that an oral hearing be provided to claimants, and review of their cases be conducted by an independent body. In 1989, Bill C-55 created the independent *Immigration and Refugee Board* (IRB), a quasi-judicial tribunal which presided over a multi-tiered refugee determination process and provided unprecedented procedural rights to refugee claimants.

Prior to the IRPA, the *Immigration Act* and its amendments established circumstances that made a refugee claim ineligible; this meant that the claim could not be heard before the Convention Refugee Determination Division of the IRB. The purpose of this exclusion order was to facilitate as quickly as possible the removal from Canada of an individual not deemed eligible to receive Canada's protection. The inadmissibility clause applied to those considered dangerous criminals, persons who had already been granted refugee status in another country, terrorists and war criminals, and those who had been denied refugee status in Canada within a period of 90 days. Problems related to enforcing these provisions of the *Immigration Act* as they relate to refugees were the subject of the 2000 Standing Committee on Citizenship and Immigration Report, *Refugee Protection and Border Security: Striking a Balance* which advocated for a tightening up of the screening, detention, and removal procedures in the Canadian refugee system. The Report highlighted the problem of the 'refugee security nexus' but advocated for an

open refugee system with tightened security provisions.³³⁵ The Report's findings elaborated upon the dual nature of the meaning of 'protection' in Canadian law and influenced the federal government's agenda for a newly revised Immigration Act.

5.2 Findings Regarding Whether Amendments to the IRPA Constitute a Fundamental Change to Canada's Refugee Determination System

The IRPA includes justifiably tougher legal measures, not radically different from the amended 1976 *Immigration Act*, against claimants who commit serious crimes, are considered security threats, or who are found not to be genuine refugees. However, the IRPA does not alter the fact that most refugee claimants in Canada will continue to have their cases heard before the quasi-judicial and independent IRB. Furthermore, Bill C-11 does not alter IRB proceedings from what, according to the Auditor General, have become institutionalized so that asylum-seekers are given the benefit of the doubt.³³⁶ It is difficult to argue that the IRB's institutional mandate to provide procedurally fair refugee determination procedures that meet Canada's international obligations, has been significantly altered through new security measures and streamlined determination and appeal procedures. Importantly, two central facets of the IRB's mandate remained in place: the IRB maintained its ability to make decisions independent from the

³³⁵ The Report emphasized the need to streamline the system and reduce the length of time it took to process claims while still welcoming those that required our help. The need to detain people whose identities were suspect and refused to cooperate in establishing their identities was also a priority. Other changes recommended included the following: one-member IRB panels to hear refugee claims; that refugee claimants appear in person to receive the final decision on their case and if denied, they should be removed if a deportation order has been ordered against them; and a pre-removal risk assessment (PRRA) for failed and repeat claimants in order to expedite the claims and appeal processes. However, in tandem with the PRRA, the report also called for an internal appeal body within the IRB which would provide a paper review of the claimant's case and thus ensure consistent and procedurally fair decision-making before the IRB. See Chapter 3, *Section 3.4 Recommendations of the House of Commons Standing Committee on Citizenship and Immigration* of this thesis, p. 63-70.

³³⁶ The Auditor General stated in his report on the processing of claims that, "non-adversarial hearings take place in a context where the very nature of the claim poses major challenges of availability and quality information..." and, "while in theory the burden of proof is on the claimant, Canada has decided to give claimants the benefit of the doubt." Auditor General of Canada, "Chapter 25: Citizenship and Immigration Canada and the Immigration and Refugee Board—The Processing of Refugee Claims," *Report of the Auditor General of Canada*, (December 1997), 25.59.

government, and IRB proceedings continued to provide rejected claimants administrative and court appeals through an in-country post-determination process. Furthermore, Bill C-11 codifies in the law that all claimants are entitled to a pre-removal risk assessment (PRRA) in order to ensure that if they are removed, they do not face risk of torture or persecution, as defined by both Canadian and international legal interpretation.³³⁷ Moreover, according to Stephen Gallagher, Bill C-11 “[did] not significantly limit judicial review of IRB and Citizenship and Immigration Canada (CIC) decision-making. When the US, UK, and Australia (among others) reformed their refugee systems during the 1990s, significant limitations on judicial appeals were core elements of reform.”³³⁸ Furthermore, Canada uses an expanded definition of “protection” under the IRPA which makes explicit reference for the first time in Canadian Immigration law to Canada’s international obligation under the Convention Against Torture (CAT).

However, the IRPA does contain new provisions that impact on the procedural rights of refugee claimants. Bill C-11 expands the powers of arrest and detention and creates new grounds of inadmissibility to Canada. Appeals have been restricted and the security certificate procedure has been condensed. The Immigration and Refugee Board will also be altered by the new legislation. Refugee hearings will be conducted by a single member and all relevant risks to the claimant will be considered at one hearing. Repeat refugee claims will no longer be permitted and a new Refugee Appeal Division will be created to ensure consistent jurisprudence and a reduced reliance on lengthy Federal Court proceedings. The IRPA expands the grounds for which refugee claims are ineligible³³⁹. Applicants who have received removal orders for reasons of security, human or international rights violations, serious criminality or organized criminality will be ineligible for an IRB hearing and will be unable to appeal to the Refugee Appeal Division. The Refugee Protection Division and the Refugee Appeal Division

³³⁷ Stephen Gallagher, “Canada’s Dysfunctional Refugee Policy: A Realist Case for Reform,” *Behind the Headlines*, vol.58, no.4, (summer, 2001), 2.

³³⁸ For example, Australia detains all in-land refugee claimants until their identities’ are established. See, Stephen Gallagher, “The Open Door Beyond the Moat,” 101.

³³⁹ *IRPA*, s.101(f).

can suspend their consideration of a claim at any stage on these same grounds.³⁴⁰ All of these procedures, along with the restriction of appeal rights for serious criminals and those who pose a security risk, are intended to expedite decisions and removals.

The IRPA has specific preventative security measures related to refugees. It expands the provisions concerning detention without warrant and extends the power to arrest and detain refugee claimants who cannot establish their identity anytime during the refugee determination process. Refugee claimants can be detained if they refuse to co-operate with measures to establish their identity.³⁴¹ They may also be detained upon entry if the officer believes it necessary to complete an examination or if the officer has reasonable grounds to suspect that they are inadmissible on grounds of security. Refugee Detention may be continued if the Immigration Division member is satisfied that: they are a danger to the public; they are unlikely to appear for further proceedings; the Minister is taking steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security; or the Minister is of the opinion that identity has not been established and is making reasonable efforts to do so. If the officers are not satisfied as to a claimant's identity or have concerns that the individual may pose a security risk, they have the discretion to detain the person. The exercise of such discretion is probably preferable to automatic detention, which can result in innocent people being deprived of their liberty. Thus, the IRPA provides the Immigration Division member discretion to provide alternatives to detention.³⁴² The IRPA also provides a specific statutory definition for a serious crime committed in Canada. Serious criminality for the purpose of inadmissibility is now defined a crime that was punishable in Canada by a term of imprisonment of at least two years.³⁴³ This procedural change was accompanied by the

³⁴⁰ *IRPA*, s. 103.

³⁴¹ *IRPA*, s.55.

³⁴² *IRPA*, s. 58(3).

³⁴³ *IRPA*, s.64(2).

elimination of the requirement that the Minister issue a ‘danger opinion’ before deportation proceedings are initiated for refugee claimants convicted of a serious crime in Canada.

These examples demonstrate how due process measures for refugee claimants have been changed in order to facilitate expedited and clarified processing requirements. The tightening of inadmissibility provisions in Bill C-11 clearly demonstrates that the government sees increasing processing efficiency as a crucial way to enhance security elements in the refugee system.

Furthermore, changes to the ineligibility criteria and the fact that under Bill C-11 a refugee claim rejected on criminal or security grounds produces an automatic removal order, made it appear as though the IRPA establishes more stringent access to Canada’s refugee determination system.

However, as Gallagher states, “[a]lthough technically available to the Canadian refugee system, practices such as safe third countries, safe country of origin, or internal flight option, routinely applied by other industrialized countries to allow for expedited removal, are rarely applied in Canada.”³⁴⁴ Furthermore, historically, 95 percent of all initial refugee claims have been forwarded to the IRB for a full hearing, and now with the *IRPA*, all failed claimants will be assessed under the consolidated protection grounds of the *PRRA* for the risk they would face if removed.³⁴⁵ Even failed claimants who are denied refugee status due to security and serious criminality reasons will have the Minister’s delegate for a *PRRA* balance the risks he/she faces against the nature and severity of the acts he/she committed and the potential danger to Canada. A positive decision will result in a stay of removal but not protected status. A negative decision will result in deportation. The inclusion of the *PRRA* in the *IRPA* ensures that Canada cannot limit access to its borders to genuine refugees nor can it exclude and deport non-citizens who face the risk of refoulement, the return of people to a place where they would

³⁴⁴ Stephen Gallagher, “Canada’s Dysfunctional Refugee Policy: A Realist Case for Reform,” *Behind the Headlines*, 10.

³⁴⁵ *Ibid.*,

face persecution under the *UN Refugee Convention*, and helps to ensure that the IRPA does not constitute a fundamental change to Canada's refugee determination system.

5.3 Findings Regarding Whether the IRPA Strikes a Right Balance Between Safeguarding the Rights of Refugees and Protecting Canada

Importantly, the *IRPA* framed the meaning of 'protection' in modern Canadian immigration law and regulations as supporting the idea that Canada is a nation that will protect persons in genuine need of protection. On the other hand, the *IRPA* also explored the, at the time, less topical issue of what measures the Canadian state should enact to protect its own citizens from the threat that refugees might pose. Importantly, the *IRPA* did not demonize refugees as a threat to the nation. In fact, the government went out of its way to emphasize Canada's commitment to refugee rights by linking the concept of 'protection' in the title of the new Act to part two of the legislation entitled 'Refugee Protection'.

However, the *IRPA* fails to clarify the grey area of procedural rights associated with 'security certificates'. This measure in particular has disturbed refugee advocates and others who believe that the Canadian government has been too restrictive in the way that it has exercised this procedure. Refugee advocates charge that it is more important to guard against the infringement of the individual's right to protection than to let the state exercise its right to defend state security with extra-legal procedures that only apply to non-citizens. The contradictory nature of the refugee/security nexus has been evident in the example of security certificates because non-citizens are detained without being brought to trial or even charged, ostensibly in order to protect the security of citizens. Moreover, under a security certificate, the government can limit access to the evidence on which the allegations are made to both the accused and his or her lawyer. The *IRPA* does not address the procedural validity of detaining individuals indefinitely in the absence of the legal principles of "beyond reasonable doubt" and "full disclosure of evidence". Because the 'security certificate' process only applies to non-citizens, it has become a litmus test under the

IRPA of how the government has reconciled the protection rights of individuals against the security of the state.

However, court rulings, common practice, and Canada's adherence to the *Convention Against Torture* make it very difficult for the government to deport anyone found inadmissible on a 'security certificate' if they face the risk of torture. Furthermore, almost all security certificate cases have been appealed to the Supreme Court. In adjudicating the cases it has weighed the protection rights of non-citizens versus the right of the state to protect citizens and uphold national security using a lesser burden of proof. The 'security certificate' process, like other security measures in the *IRPA* that affect refugees, for the most part maintains the due process and procedural rules already established in previous legislation.

5.3.1 The Ethics of Striking a Balance Between Refugee Protection and National Security in the IRPA

Critics of security provisions in Canadian immigration law point to the fact that refugees as non-citizens are subject to differential treatment under the law in Canada. Chapter two of this thesis examines the meaning of 'protection' in regard to the refugee/security nexus and the principles that have governed its interpretation in Canadian and international law. On the one hand, Canadian immigration law and policy has supported the idea that Canada is a nation that must protect persons in genuine need of protection. On the other hand, Canadian policy and law have demarcated certain asylum seekers as not eligible for Canada's protection, either because they are not considered 'genuine' refugees or because they are considered a threat to Canadian security. This dichotomy reveals that Canadian law has affirmed the idea of sovereignty along with a commitment to protect refugees.

Moreover, both the enforcement of state sovereignty and the demands asylum seekers place on that sovereignty are inescapable elements of the refugee/security nexus. One side of this issue is often associated with the proponents of refugee rights who are concerned with civil

liberties, human rights, and the concept of individual sovereignty represented by the doctrine of liberal cosmopolitanism. The other side of this issue is associated with supporters of communitarian principles who are concerned with ensuring community and group rights of a society to determine whom to accept as new members. Both communitarians and liberal cosmopolitans agree that individuals who lack a state that protects their rights consequently have the right to receive protection from another state; this is the definition of a Convention refugee and is recognized in international law. Furthermore, Howard Adelman explains that both theoretical positions acknowledge that when it comes to refugees:

Unlike immigrants, the state does not make a choice in deciding to admit the individual. Rather the state is obliged to admit such individuals into its protection provided that he or she has a well-founded fear of persecution in his or her home state from organs of the state, or that the state is incapable or unwilling to provide such protection.³⁴⁶

However, the exclusion clauses of section E and F of the *UN Convention on the Rights of Refugees* provide an exception to the above principle for both of liberal and communitarian philosophical theories. These clauses allow individuals to be excluded from states if they pose a threat to that state's security and are meant to be applied against individuals who are a threat to democratic and social institutions that underpin the very conditions of liberty in a host-country. However, the commitment to the rule of law in liberal democracies demands that before an asylum seeker is denied entry on security grounds, it must be proven that they pose a genuine threat. A hypothetical possibility is not a good enough reason to bar entry; furthermore, the reasons for barring entry must be supported by evidence and ways of reasoning acceptable to all. Although a serious threat to national security justifies excluding individuals, both political theories discussed above call in one way or another for exclusionary grounds to be balanced against fundamentally important societal values within a receiving-state. As Gibney explained, the responsibility of states to protect their own citizens' interests, their personal safety and

³⁴⁶ Ibid., 18.

security being one of the most important, constrains how states will approach the refugee/security nexus.

For example, under the IRPA, the Canadian state did not reverse the Singh decision, which stated that the right of refugee claimants in Canada to have an oral hearing was required as a basic principle of fundamental justice. Therefore, in Canada, a refugee hearing must include, “a hearing notice to the subject of the case to be met and the opportunity of the subject to respond.”³⁴⁷ The sole exception to this principle is for refugee claimants identified as security risks, and this is most evident in Bill C-11’s exclusion clauses and the ‘security certificate’ process. Yet, these security clauses themselves demonstrate that the refugee/security nexus also involves deeply held Canadian values related to the idea of sovereignty. These concepts remain incorporated in the definition of “protection” in the *IRPA* and point to the fact that the *IRPA* upholds the balance between safeguarding the rights of refugees and protecting the state which has been established and accepted by Canadians through their immigration law.

5.4 Findings Regarding the Need to Reform the Security Certificate Process in the IRPA and to Review Security Provisions in the Refugee System

On balance, the IRPA strikes a reasonable balance in protecting refugees and the security of Canadians. And it is difficult to argue that the IRPA tipped the balance between maintaining an open and procedurally fair refugee system and a refugee system that excludes and removes dangerous individuals who try to gain entry into Canada through it. However, neither the IRPA nor the *Immigration Act* represents an example of perfect legislation when it comes to addressing the problems associated with the refugee/security nexus. On the one hand, the IRPA could do a better job of dealing with the issue of security certificates; this is an issue that in my estimation is undermining the legitimacy of the IRPA. This is also related to the issue of the government using the concept of “sensitive evidence” to file for the “non-disclosure” of security related evidence in

³⁴⁷ Campbell, 75.

order to bar entry or remove dangerous and risky people. On the other hand, the matter of improving security provisions in the refugee system was not fully addressed by the IRPA and may in fact not have a legislative solution.

5.4.1 The Need to Reform Security Certificates

This process used by Federal judges to determine the reasonableness of a security certificates needs to be improved. Upon referral, the designated judge has seven days to review the information and any other evidence, and must determine whether it is relevant to the issue of the person's inadmissibility and whether it can be released without damaging national security. The judge then prepares a summary of the information or evidence so the appellants are able "to be reasonably informed of the circumstances giving rise to the certificate," but must ensure that information that would be "injurious to national security or to the safety of any person if disclosed," remains confidential (IRPA s 78h). According to section 78(e) of the IRPA, the judge may be required to hear all or part of the information or evidence in secret (without the presence of person named in the certificate or their counsel), if they believe that its disclosure would threaten national security.

This kind of policy also applies to applications for non-disclosure of information made by the Minister of Public Safety and Emergency Preparedness under section 86(1) of the *Immigration and Refugee Protection Act* (IRPA). It applies to both the Immigration Division (ID) and the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada (IRB). Among the cases heard by the ID and IAD are cases dealing with criminal activity and threats to national security. The Minister's evidence in these cases may consist of confidential criminal and security intelligence information and other information obtained from a source in Canada or from a foreign government or international body. When the Minister makes an application for non-disclosure of information in a detention review or an

admissibility hearing before the ID or an appeal before the IAD, these Divisions apply the procedure followed by the Federal Court in security certificate cases and may adapt it as required by the circumstances. Information and other evidence that are relevant to decide the person's release, admissibility or appeal cannot be disclosed to the person if, in the member's opinion, doing so would be injurious to national security or to the safety of any person.³⁴⁸

In both of these circumstances, the right of the person to know the case he or she has to meet is denied, a violation of a fundamental tenet of natural justice. Moreover, these procedures lack an effective mechanism to challenge the credibility of secret evidence since neither judges nor immigration adjudicators are necessarily specialists in security matters. In *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, the Supreme Court of Canada has explained the importance of providing these elements of due process to non-citizens:

The right to a fair hearing comprises the right to a hearing before an independent and impartial magistrate who must decide on the facts and the law, the right to know the case put against one, and the right to answer that case. While the *IRPA* procedures properly reflect the exigencies of the security context, security concerns cannot be used, at the s. 7 stage of the analysis, to excuse procedures that do not conform to fundamental justice. Here, the *IRPA* scheme includes a hearing and meets the requirement of independence and impartiality, but the secrecy required by the scheme denies the person named in a certificate the opportunity to know the case put against him or her, and hence to challenge the government's case. This, in turn, undermines the judge's ability to come to a decision based on all the relevant facts and law. The judges of the Federal Court, who are required under the *IRPA* to conduct a searching examination of the reasonableness of the certificate, in an independent and judicial fashion and on the material placed before them, do not possess the full and independent powers to gather evidence that exist in an inquisitorial process. At the same time, the person named in a certificate is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the judge, despite his or her best efforts to get all the relevant evidence, may be obliged, perhaps unknowingly, to make the required decision based on only part of the relevant evidence. Similar concerns arise with respect to the requirement that the decision be based on the law. Without knowledge of the information put against him or her, the person named in a certificate may not be in a position to raise legal objections relating to the evidence, or to develop legal

³⁴⁸ Immigration and Refugee Board, *Policy on the Treatment of Applications for Non-Disclosure of Information*, available at: http://www.irb-cisr.gc.ca/en/references/policy/policies/nondisclos_e.htm. (last visited September 2, 2007).

arguments based on the evidence. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. The *IRPA* provides neither.³⁴⁹

In the same ruling, the Supreme Court declared that while protecting Canada's national security and related intelligence sources is a substantial objective, and the non-disclosure of evidence at certificate hearings is rationally connected to this objective, less intrusive alternatives, notably the use of special counsel to act on behalf of the named persons could be used to better protect individuals while keeping critical information confidential. Chief Justice Beverley MacLachlan stated:

Why the drafters of the legislation did not provide for special counsel to objectively review the material with a view to protecting the named person's interest, as was formerly done for the review of security certificates by SIRC and is presently done in the United Kingdom, has not been explained. The special counsel system may not be perfect from the named person's perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person's s. 7 interests.³⁵⁰ Special counsels should be a part of the security certificate process and for each case under the *IRPA* where the Minister makes an application for non-disclosure of information. This would help to shore up a glaring perception among many that the government has bought additional security for Canadians by infringing on fundamental rights of non-citizens.

5.4.2 The Need to Review Security Provisions in the Refugee System

From a security standpoint it is hard to argue that the *IRPA* dramatically improved Canada's security, even with enhanced screening measures and expanded grounds for detention. Realistically, refugee claimants who could pose a threat to national security may not be on

³⁴⁹ Judgments of the Supreme Court of Canada, available at: <http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html> (last visited May 8, 2007).

³⁵⁰ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, available at: <http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html>, (last visited September 5, 2007).

security watch lists and, therefore, could still be released into Canadian society until their claim is heard, which could take months. As Martin Collacott explains:

It may be sometime before it is known if they have terrorist connections and by then it may be difficult even to locate them, quite apart from determining what kind of activities they have been involved in. A significant proportion of refugee claimants do not, in fact, bother to show up for their refugee hearing and their whereabouts usually remain unknown.³⁵¹

Moreover, effective security measures are dependent on sufficient resource allocation and efficient administrative practices working in tandem to prevent backlogs. The Standing Senate Committee on National Security and Defence addressed this point in its *2005 Security Guide Book* which stated that in 2003-2004, there were 22,681 applicants screened at an initial refugee application stage. Still, with added resources, and front-end screening, the median turn around time for complete inadmissible briefs was 224 days.³⁵²

The resulting backlogs continue to pose a security risk because they delay screening time, which in turn permits individuals to live and work in Canada with virtually no surveillance. However, this problem begins with delays in making final determination on asylum applications and then is compounded by the problem of delays in removing failed claimants. These delays encourage abuse of the asylum determination process as a means to bypass regular immigration channels. Currently, the average refugee application is expected to take between 16-18 months.³⁵³ But delays between the referral of claims and RPD decisions are only part of the picture. To this must be added all of the post-determination delays. Failed claimants have 45 days after receipt of notice after a RPD decision to complete an application for judicial review. The Federal Court, moreover, on average takes four months to make a decision on leave applications and an additional 12 months to deliver a decision in cases where leave for review is granted.³⁵⁴ The time

³⁵¹ Martin Collacott, *Canada's Inadequate Response to Terrorism: The Need for Policy Reform*, 45.

³⁵² Standing Senate Committee on National Security and Defence, *Canadian Security Guidebook*, (2005), Digital Document available at: <http://www.parl.gc.ca/38/1/parlbus/commbus/senate/com-e/defe-e/rep-e/rep03nov04-e.htm>.

³⁵³ Ibid.

³⁵⁴ Josh Frecker, "Chapter 3.3.3, Removal Proceedings," in *Immigration and Refugee Legal Cost Drivers*.

required for pre-removal risk assessment, which has been estimated at 7 months on average, and to complete the arrangements that must be made before the person concerned can be returned to his or her country of origin, causes further delays in the removal of failed refugee claimants.³⁵⁵

The most logical solutions to the problem of inland refugee backlogs, which leads to delays and strains resources and therefore slows the ability of security services to quickly screen inland claimants, would be to reduce access to the system to people who should not be entitled to make claims or to require reforms that would ensure much faster settlement of cases so that final decisions could be reached within weeks or months, not years. Also, there would probably have to be greater use made by the government of detention for failed claimants whose identity or risk to national security is in doubt as well as for those ordered removed. All of these measures could be addressed in the regulations that govern the act and by increasing resource allocations to the inland refugee determination system. A more in depth analysis about these measures than what has been presented in this thesis thus far is warranted because they would represent a significant shift in relation to Canada's response to the refugee/security nexus. With few exceptions, Canada has been successful in finding the right balance to the refugee/security nexus. However, the nature of this problem will require Canadians and their federal government to remain vigilant so that the balance that has been struck between individual rights and national security remains in place under the IRPA.

³⁵⁵ Under the *IRPA*, these delays may increase with the automatic right of a pre-removal risk assessment, which take on average seven months to complete. Furthermore, all rulings can be appealed to the Federal Court. See, Allison Hanes, "Ottawa slow to deport Rwandan war criminal," *National Post*, (April 6, 2006), A-1

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