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CANADA'S REFUGEE PROTECTION SYSTEM

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CANADA'S REFUGEE PROTECTION SYSTEM

BACKGROUND

Although Canada signed the *Convention Relating to the Status of Refugees* (and its Protocol) in 1969, procedures for determining claims to Convention refugee status made within Canada remained informal and discretionary until the former *Immigration Act* came into force in 1978. At that time, the number of claims per year was low and the system then devised was administratively adequate for the job, although it was repeatedly criticized for its failure to give claimants an oral hearing.

In the 1980s, however, the number of claims began to mount. This was partly in response to legitimate refugee pressures around the world, but some suggest that a contributing factor was that the cumbersome system then in place offered opportunities to come to Canada – and remain here for lengthy periods – that were not available through normal immigration channels. As the number of claims grew, from 3,450 in 1981 to 6,100 in 1983, to 25,000 in 1987, it became clear that the system as originally devised was no longer adequate. In April 1985, the Supreme Court of Canada declared unconstitutional an important part of the system, compounding the structural bottlenecks.(1) The need for reform had become clear and pressing.

Reform proved controversial, and the bill took 14 months to pass Parliament, but the Immigration and Refugee Board and the entirely new refugee determination system began work on 1 January 1989. The system was modified by legislation passed in 1992 and 1995, and further modified by the new *Immigration and Refugee Protection Act* in 2002.(2)

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(1) *Singh et al.* v. *Canada* (*Minister of Employment and Immigration*), [1985] 1 S.C.R. 177, in which the Court held that the legal protection of section 7 of the *Canadian Charter of Rights and Freedoms* applies to anyone physically present in Canada. See the later section "Refugee Protection Case Law" for a summary of this important case.

(2) S.C. 2002, c. 27, largely in force 28 June 2002.

The refugee protection system within Canada must balance a number of factors.(3) 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*. As mentioned, the Supreme Court of Canada ruled in 1985 that the Charter protected refugee claimants, and since that time there have been a number of important decisions affecting both the substance and procedures of refugee and protection law.

At the same time, the law regarding the spontaneous arrival of refugee claimants must be stringent enough to counteract the perception that Canada does not have control of her borders. The government has long feared that, without control, support for all immigration and refugee programs would be endangered. Moreover, following the events of 11 September 2001, some have argued for measures to respond to American fears that the United States is more vulnerable because of perceived weaknesses in the Canadian refugee protection system.

It is the government's view that control of the number of claimants in Canada is operationally essential as well, given the great number of potential claimants worldwide.(4) Thus, deterring the arrival of new claimants in Canada by a variety of means is an important government goal.(5) The contradiction between having a refugee status determination system recognized as one of the best in the world, while at the same time making strenuous attempts to block access to it, is real and irresolvable.

The previous *Immigration Act* contained only provisions relating to claims for Convention refugee status. Other grounds for protection had developed over time in the regulations and in administrative practices of Citizenship and Immigration Canada (CIC), and were required by the case law. The new *Immigration and Refugee Protection Act* consolidated

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(3) Refugees and other humanitarian groups may also seek protection by applying from outside Canada; those who are selected come to Canada as permanent residents.

(4) The number of claims to refugee status in Canada since 1989 is found in Appendix 1.

(5) Methods includes the imposition of a visitor visa requirement on individuals from countries that produce significant numbers of claimants; fines and charges for transportation companies that bring undocumented individuals to Canada; and a network of immigration control officers overseas who work with airlines to prevent those without valid documents from boarding aircraft.

this broader focus, using the term "claim for refugee protection." Those who are successful are called "protected persons," being either a "Convention refugee" or a "person in need of protection." Jurisdiction over protection decisions is still divided between the Immigration and Refugee Board and the Department, but the Board's mandate has been widened with the new Act.

The inland refugee determination process should also be seen in the broader context within which Canada assists refugees by:

- providing Canadian groups with the opportunity to sponsor refugees abroad who are in need of resettlement;
- bringing to Canada a specified number directly as government-assisted refugees;
- contributing financially to the United Nations High Commissioner for Refugees (UNHCR);
- participating in food, medical and other emergency aid;
- delivering foreign aid to developing nations; and
- participating in peacekeeping operations.

THE IMMIGRATION AND REFUGEE BOARD

All quasi-judicial immigration matters in Canada are handled by the Immigration and Refugee Board (the "IRB," or "the Board"), the largest administrative tribunal in Canada.(6) The head office of the Board is in the National Capital Region but its operations are decentralized across the country.

The IRB consists of the Refugee Protection Division, the Immigration Division, the Immigration Appeal Division and the Refugee Appeal Division. The Refugee Protection Division decides claims made for refugee protection within Canada; the Immigration Division conducts immigration admissibility hearings for certain categories of people believed to be inadmissible to, or removable from, Canada as well as detention reviews for those being detained under the *Immigration and Refugee Protection Act*; the Immigration Appeal Division hears

(6) The Immigration and Refugee Board's web site can be found at www.irb.gc.ca.

appeals of sponsorship applications refused by CIC, appeals from certain removal orders, appeals by permanent residents outside of Canada who have been found not to have fulfilled their residency obligations, and appeals by CIC from decisions of the Immigration Division at admissibility hearings. The fourth division, the Refugee Appeal Division, has had its implementation delayed but will be responsible for hearing appeals from the Refugee Protection Division when it is established.(7)

At the head of the Board is the Chairperson, appointed by the Governor in Council, and an Executive Director. The Governor in Council appoints members of all divisions except the Immigration Division. The members in the Immigration Division are public servants. Governor in Council appointments may be for up to seven years, and members may be reappointed. There is a specific process for removing appointees in case of incapacity, misconduct or conflict of interest. This process was invoked once, in 1994, although the case was settled just as the inquiry was about to start.

The IRB reports to Parliament through the Minister of Citizenship and Immigration.

ACCESS TO THE SYSTEM(8)

A. Eligibility to Make a Claim to Protection

Not everyone is permitted to make a claim to protection in Canada. Eligibility criteria are applied by immigration officers (employees of Citizenship and Immigration Canada) who may exclude claimants from having their claim referred to the Board. New with the *Immigration and Refugee Protection Act* is a provision requiring officers to make a referral decision within three working days. If no decision has been made by that time, claims (with some exceptions) are deemed to be referred. Security screening is now initiated at the time a claim is made.(9)

The question of eligibility is ongoing. If claimants who have been referred to the Refugee Protection Division are later found to be ineligible to make a claim to protection,

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(7) See the later section "Current Issues" for an overview of the issues relating to the delay of the implementation of the Refugee Appeal Division.

(8) The flow chart in Appendix 2 provides an overview of the refugee protection determination process.

(9) In the past, security checks were initiated when the claimant applied for permanent residence.

proceedings before the Board are terminated, or any decisions already made are nullified. If the ineligibility decision requires an inadmissibility hearing, or a court decision, proceedings are suspended until those conclude.

Individuals under a removal order and the following categories of claimants are not eligible to have their claim referred to the Board:

- Claimants who have already received refugee protection in Canada, or in another country to which they can be returned;
- Claimants who have made claims previously that the Board has rejected, or who have made prior claims that were ineligible, withdrawn or abandoned;(10)
- Claimants who have been found to be inadmissible on grounds of security, violating human or international rights,(11) organized criminality or serious criminality. Serious criminality is defined as either: (a) a conviction in Canada that carries a maximum punishment of 10 years or more, and for which a sentence of two years or more was imposed; or (b) a conviction outside Canada that, if committed in Canada, would carry a maximum punishment of 10 years or more, and the Minister is of the opinion that the person is a danger to the public;(12)
- Those who come, directly or indirectly, from a country designated by the regulations as a "safe third country" (although those words are not in the statute). The Act establishes criteria that must be applied when drawing up agreements with other countries regarding responsibility for determining claims, and for designating countries.

As in the former Act, in prescribing the list of countries to which people may be returned without a refugee protection hearing, the law directs the Governor in Council to take into account four factors:

- whether the country is a party to the Refugee Convention and the Convention Against Torture;

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(10) Previously, a new claim could be made after the person was outside of Canada for 90 days. Withdrawn claims had no such requirement. Now, after six months outside Canada, an individual may make only an application for a pre-removal risk assessment (see below). Thus, repeat claims to the Board are no longer possible.

(11) Previously, to be ineligible on security or human rights grounds, the Minister had to be of the opinion that it would be contrary to the public interest to have the claim determined.

(12) Previously, the danger opinion also applied to convictions in Canada; now, a prison sentence of two years or more serves as the basis for serious criminality for a Canadian conviction.

- the country's policies and practices with respect to each of those Conventions;
- the country's record with respect to human rights; and
- whether the country is a party to an agreement with Canada for determining the claims to refugee protection of people who are returned under it.

With regard to the final factor, one of the difficulties that has prevented the implementation of the safe country provisions until now is the fact that there is nothing in international law to compel the countries on any such list to accept the return of most of these claimants, if they do not agree to do so.

The events of 11 September 2001 provided an impetus for Canada and the United States to reach an agreement on which country would be responsible for examining claims in cases where the claimant entered from the other country.(13) By early July 2002 a draft was ready for consultation, and a final version was initialled at the end of August, to come into force once the necessary mechanisms are in place.(14) The policy of returning to other countries people who, quite admittedly, could be genuine refugees rests on the premise that Canada need protect only those who have no other safe haven. It also assumes that Canada is not the only country that can and does protect refugees.

The Agreement embodies the general principle that claimants should have their claims examined by the first of the two countries in which they are physically present. It covers arrivals only at land border ports of entry and exceptions are contemplated for the following scenarios:(15)

- The Agreement will not apply to claimants who are citizens or residents of Canada or the United States.
- The receiving country will be responsible for hearing the refugee claim if the claimant: (a) has in the receiving country at least one family member who has had a refugee claim granted or has lawful status, other than as a visitor; (b) has in the receiving country at least one family member who is at least 18 years old and has a refugee claim pending in that country; (c) is an unaccompanied minor; or (d) arrived with a validly issued visa, other than for transit, issued by the receiving party.

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(13) A previous attempt had foundered in the mid-1990s.

(14) Some 36% of refugee claims in Canada are made by claimants who come by land from the United States.

(15) The text of the Agreement is included in Appendix 3.

- As well, Article 3 provides that claimants who have been referred back pursuant to the Agreement cannot be deported to another country without first having their claim heard. This is meant to ensure that claimants who are refused access to Canada are not precluded from making a claim in the United States. Similarly, the Parties also agree that claimants who fall under the Agreement will not be removed to another country pursuant to any other safe third country agreement.

- Either Canada or the United States can use its discretion to examine the claim of a person who might otherwise be eligible for return to the other country.

Another agreement, which the United States is reported to have insisted on as a condition of the main Agreement, will see Canada resettling up to 200 individuals at the request of the United States.(16)

The presence of the return policy in the legislation is intended to deter "asylum shopping"; that is, leaving a situation of safety and coming to Canada as a matter of personal choice. For example, employment prospects might be thought to be better in Canada or the prospects of acceptance as a refugee might be thought better in this country, and so on. The government has always insisted that these kinds of matters are an aspect of immigration, not refugee protection. The concept of asylum shopping also includes claimants coming to Canada after having been turned down by another country.

Advocates for refugees in both Canada and in the United States have always been staunchly opposed to the safe country provisions and remain so. In addition to being opposed in principle – they argue such agreements erode refugee protection and do not enhance administrative efficiency for the governments involved – they feel that in a number of respects the Canadian system is fairer to claimants. They point to the higher rates of detention in the United States, detention that is often in the same facilities as criminals; to the restricted ability to work pending hearings; to time restrictions on making a claim; and to an interpretation of the Refugee Convention that is often more restrictive than that in Canada. In addition, claimants in Canada have greater access to legal aid, and to social assistance if needed.

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(16) Article 9 of the Agreement states: "Both Parties shall, upon request, endeavor to assist the other in the resettlement of persons determined to require protection in appropriate circumstances." It has been speculated that these individuals will be those held in detention by the United States in areas other than its own territory.

Advocates predict potential logjams on both side of the border as officials try to sort out whether the family relationships that would permit entry can be established. They also fear that because the Agreement applies only to land ports of entry, claimants will resort to smugglers to get them into the country illegally. Once in Canada, they can make a claim without fear of being returned to the United States.

B. Judicial Review and Removals Following Screening

People found eligible to have their claims to protection heard by the IRB are issued conditional removal orders. 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. Of course, if granted protected status, the orders are of no force or effect.

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. All applications for leave to apply for judicial review are decided by a single judge, normally without personal appearance by the parties. There is no appeal from a decision on a leave application.

The grounds for judicial review are those set out in the *Federal Court Act* and are the same as the grounds for review of decisions of the Refugee Protection Division; i.e., that the body or person:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making its decision, whether or not the error appears on the face of the record;
- based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it;

- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

Applicants who succeed in their leave applications are entitled to a hearing before the Trial Division of the Federal Court. Appeals from the Trial Division decision to the Federal Court of Appeal are permitted only if the Trial Court Judge certifies at the time of judgment that a serious question of general importance is involved and the Judge sets out the question.

THE REFUGEE HEARING

A. Referral to the Refugee Protection Division of the IRB

Claimants found eligible to make a claim for protection (or who are deemed eligible after three days) are referred to the Refugee Protection Division (RPD) for a determination of their claim. The immigration officer is required to forward to the RPD certain information about the claimant and the claim. Claimants are provided with a Personal Information Form to complete and send to the RPD outlining the basis of the claim. They are also required to provide any identity and travel documents they have (or may obtain afterward). The Minister (through a representative) may request to receive all information and documents the claimant produces.

B. The Nature of the Hearing

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Under the previous Act, the Minister's participation in a refugee hearing could be limited. Now, however, the Minister has a right to receive notice of the hearing and, upon giving notice to the claimant of the nature of the intervention, may participate fully in all cases, although resources will no doubt make that impossible as a practical matter.

The Act instructs the RPD, and all Divisions, to deal with all proceedings before it as informally and quickly as the circumstances and requirements of fairness and natural justice permit. The RPD may take notice of any generally recognized facts, or opinion or information within its specialized knowledge. If it intends to use information within its specialized knowledge, it must give notice to the claimant, who then may make representations or give evidence respecting the information. The RPD is not bound by any legal or technical rules of

evidence and may base a decision on evidence that is considered credible or trustworthy in the circumstances, provided that evidence is presented in the proceedings.

Although the Division must generally hold a hearing to decide cases, it may accept a claim without a hearing if the Minister has not given notice of a wish to appear. This is called the expedited process and is based on the opinion of a Refugee Protection Officer (an employee of the Board) that:

- the case presents no issues that need to be drawn to the attention of the Minister;
- the claimant's identity is sufficiently established;
- there are no substantial issues of credibility; and
- the facts of the case are consistent with the facts as known about the country of claimed persecution and that a case for protection has been made out.

Under the former Act, refugee hearings were conducted by a two-person panel, and with a few exceptions, a split decision constituted acceptance of a claim. Under the new Act, a single member will hear a claim, except where the Chairperson is of the opinion that the panel should be composed of three members.(17) (This provision applies as well to the Refugee Appeal Division and the Immigration Appeal Division of the Board.) If three members sit on a panel, the decision of the majority is the decision of the panel.

The Refugee Protection Officer (RPO) participates in the refugee protection determination hearings by conducting the initial screening of claims and compiling relevant information for the member who will hear the matter. The RPOs are considered to be neutral, as they have no interest in the outcome of the case and their role is not to oppose, or to support, the refugee protection claim. RPOs may question claimants and their witnesses and may call evidence of their own.

Claims for protection are normally held in private, but may be open to the public unless an open hearing would result in a serious possibility of endangering the life, liberty or security of any person, or would produce a real and substantial risk either of unfairness in the

(17) In the case of the RPD, the Chairperson has delegated this decision to the Deputy Chairperson and the Assistant Deputy Chairpersons, or to a Coordinating member if there is no Assistant Deputy Chairperson in the location.

proceeding, or the disclosure of matters relating to public security.(18) Whether the proceeding is in private or open, a representative of the United Nations High Commissioner for Refugees has a right to attend and may make written representations.

Claimants and the Minister are entitled to be represented by counsel of their choice. Although the Board does not pay for counsel,(19) legal aid is available in a number of provinces. Counsel need not be a lawyer.(20) Although the Act provides that regulations may govern who may or may not represent, advise, or consult with people regarding immigration or protection matters, there are currently no regulations regarding who may appear as counsel before the Board.(21)

Claimants or the Minister are entitled to call witnesses at the hearing, including expert witnesses. Notice must be provided in advance to the Minister (if appearing) and the Board regarding proposed witnesses, including the purpose and substance of their testimony and any relationship they may have to the claimant.(22)

Claimants making claims to protection are under a duty to provide identity and other documents to the Board. The Act instructs the RPD to take into account, in assessing claimants' credibility, whether they possess acceptable documentation establishing their identity and, if they do not, whether they have provided a reasonable explanation for the lack of documents, or have taken reasonable steps to try to obtain them.

The hearings are usually conducted in an informal, non-adversarial fashion. However, they become adversarial when a representative of the Minister intervenes. The member is responsible for controlling the proceedings and may require that the evidence and submissions focus on specific issues.

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(18) A member of the public may make an application for an open hearing, or the RPD may make the decision on its own initiative.

(19) The Board does, however, provide an honorarium and pay the expenses of a person the Board designates to represent a minor or any person unable to appreciate the nature of the proceedings.

(20) A challenge to immigration consultants appearing before the IRB, made by the Law Society of British Columbia, was unsuccessful: see *Law Society of British Columbia* v. *Mangat*, [2001] SCC 67, discussed in the later section entitled Refugee Protection Case Law.

(21) On 3 October 2002, the Minister of Citizenship and Immigration struck an advisory committee on the immigration consulting industry to identify the various problems within the industry – both in Canada and abroad – and to make recommendations to the Minister.

(22) The provisions in the rules regarding disclosure of the substance of witnesses' testimony is new.

C. The Decision and Its Consequences

A person's claim is successful if the RPD finds that he or she is a Convention refugee or a person in need of protection. If the claim is rejected, the Act instructs the decision-maker to state if the claim contained no credible or trustworthy evidence on which a favourable decision could have been based.(23) If that finding is made, the claimant does not receive an automatic stay of removal for the purposes of court review. A stay is possible, but an application to the Federal Court is required and the decision is made on a case-by-case basis.

Reasons must be given for all final decisions. Board policy favours oral decisions delivered at the end of a hearing. However, written reasons are required for all decisions unfavourable to a claimant, at the request of any party, and in other situations specified in RPD Rules.

D. Cessation and Vacation of Refugee Protection

"Cessation" and "vacation" of status involve two different processes.

The Minister may apply to the RPD for a determination that refugee protection has ceased.(24) Cessation criteria apply in the following circumstances:

- People have voluntarily re-availed themselves of the protection of their country of nationality;
- People have voluntarily re-acquired their nationality;
- People have acquired a new nationality and enjoy the protection of that country;
- People have voluntarily re-established themselves in the country they left, or outside of which they remained, and on which their claim to refugee protection was based; and

(23) Previously, a finding of no credible basis meant that a split decision of the two-member panel went *against* claimants, instead of in their favour. With the change to single-member panels that approach was no longer possible.

(24) This provision applies whether the protection was granted by the Board or by a visa officer abroad.

- The reasons for which they sought refugee protection have ceased to exist[25].

The Minister may also make an application to the RPD to vacate refugee protection on the basis that the decision was obtained by direct or indirect misrepresentation or by withholding material and relevant facts. The RPD may reject the application if it finds that there was other sufficient evidence considered at the time of the first decision to justify granting refugee protection. Written reasons are mandatory in an application to vacate.

Decisions on the above matters may be the subject of an application for leave to apply for judicial review to the Federal Court on the same grounds as those described previously.

As a result of case law existing under the former Act, the Rules now provide that claimants or the Minister may make an application to reopen a claim for protection that has been either decided or abandoned, or in the case of a protected person, to reopen an application for cessation or vacation. There is one test applied in all applications to reopen: has there been a failure to observe a principle of natural justice?[26]

APPEALS OF REFUGEE PROTECTION DIVISION DECISIONS

The *Immigration and Refugee Protection Act* anticipates a new avenue of appeal from decisions of the RPD: the Refugee Appeal Division (RAD). However, in April 2002 it was announced that implementation of this division was being delayed due to "pressures on the system."[27] Minister Coderre did promise at the annual general meeting of the Canadian Council for Refugees in May 2002 that he would implement the RAD within one year.[28] When established, three-member RAD panels will be used for those cases determined to be of

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(25) 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.

(26) The Rules also provide procedures for a hearing to be reconvened or documents tendered when the hearing has concluded but a decision has not yet been rendered.

(27) CIC Press Release, "Refugee Appeal Division Implementation Delayed," 29 April 2002.

(28) Canadian Council for Refugees Media Release, "CCR Calls on Minister to Name Date for Refugee Appeal," 22 May 2002.

precedential value, with the decision carrying the same weight that an appellate court decision has for a trial court. A single member will hear other appeals to the RAD.

Until the RAD provisions come into force, the former procedures continue. That is, the rejected claimant may make an application to the Federal Court – Trial Division for leave to apply for judicial review.(29) The process is the same as outlined earlier in this paper in the section "Judicial Review and Removals Following Screening"; i.e., if leave is granted, the Federal Court – Trial Division will hear the case and if a question is certified as being of general importance, the Federal Court of Appeal may hear an appeal of the Trial Division's order. For those few cases that do reach the Federal Court of Appeal, a further appeal to the Supreme Court of Canada is possible, with the permission of that Court.

PERMANENT RESIDENT STATUS FOR SUCCESSFUL CLAIMANTS

A. Protected Status Granted by the IRB

People who have been found to be in need of refugee protection may make an application for permanent resident status within six months.(30) Principal applicants may include family members in Canada. As well, family members outside of Canada may be included and may be given permanent resident visas at missions abroad for up to a year after the applicant becomes a permanent resident.

Excluded from the right to make an application for permanent residence are those who are inadmissible:

- on security grounds;
- on grounds of having violated human or international rights;
- on grounds of serious or organized criminality; or
- on grounds that they are a danger to public health or public safety.

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(29) The Minister may also make an application for leave to appeal in the case of a positive decision, whether or not the Minister took part in the proceedings.

(30) Assuming all appeals and reviews have been completed, that such persons have not had their status revoked for any reason, that they have not been recognized as Convention refugees by a country to which they would be allowed to return, that they are not citizens of a non-persecuting country, and that they have not permanently resided in a country where they were not persecuted and to which they would be allowed to return.

If a protected person cannot supply the identity documents generally required for an application for permanent residence, there is an alternative route to establish identity. The applicants may produce any acceptable identity document issued outside Canada before they entered Canada or, if there are good reasons why that is impossible, they may satisfy the requirement by their own statutory declaration as to their identity accompanied by a credible statutory declaration attesting to their identity from either a person who knew them or a member of their family before they entered Canada, or from a representative of an organization in Canada that represents people of the same nationality.

B. Pre-Removal Risk Assessment

In addition to the protected status accessible through the IRB, the Act now contains a process called the pre-removal risk assessment (PRRA) that permits most individuals to apply to specialized departmental officials for protection before actually being removed from Canada. For example, a refugee claimant whose claim was rejected by the RPD may make a protection application on the ground that there is new evidence, or evidence that it was not possible or reasonable to provide at the original hearing.

In many cases, the test for risk will be broad: the grounds in the Refugee Convention, the Convention on Torture, and the risk to life or the risk of cruel and unusual treatment or punishment. If protection is granted, those individuals are allowed to apply for permanent residence. In specified cases, including those inadmissible to Canada on grounds of security, organized or serious criminality, and violating human or international rights, the test is more narrow, and a successful application results only in a stay of removal. In making the decision in these kinds of cases, questions relating to any danger to the public in Canada for criminal or security reasons, as well as the nature and severity of the acts committed by the person, must be considered.

The regulations establish strict timelines for making a protection application and submissions.(31) Normally PRRA decisions will be made without oral hearings, but the regulations do set out criteria regarding when a hearing is required. The factors to be considered are:

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(31) Applicants who file their applications within the required time limits receive an automatic stay of removal. Applicants who do not file in time, or who have filed subsequent applications, do not receive an automatic stay.

- whether there is evidence relating to the person's credibility that goes directly to the essence of the risk he or she claims to fear; and
- whether that evidence is central to the protection decision.

Even if a person's PRRA application is rejected, an application to remain in Canada on humanitarian and compassionate grounds remains possible. Such applications may be made to CIC at any time, but do not have the effect of staying a removal order.

IMMIGRATION AND REFUGEE BOARD OPERATIONS

The Board has gone through numerous changes since its inception in 1989. Given that in 2001 there were over 44,000 refugee claims referred to the Refugee Division, and that it conducted almost 23,000 full hearings, it is interesting to note that the Board was originally given resources sufficient to conduct approximately 7,500 full hearings, based on 18,000 claims in total.(32) The original drafters of the legislation creating the Board had 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.(33)

The Board's acceptance rate of claims has ranged from a high of 86% in its first year of operation to a low of 53% in 1987. It is currently 58%, and has been for the last three years.

CURRENT ISSUES

A. Delay Implementing the Refugee Appeal Division

As discussed above, the implementation of an internal appeal at the IRB has been delayed. Refugee advocacy groups have reacted angrily to this news. When concerns were expressed about the reduction of the size of the panel hearing protection claims from two

(32) See Appendix 1 for a general overview of claims and their disposition since 1989.

(33) The step in the process that was originally designed to weed out claims without a credible basis was eliminated in 1992 as ineffective; as noted previously, the safe third country agreement with the United States has been approved by Cabinet and, as of October 2002, is awaiting U.S. government approval.

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. The Executive Director of the Canadian Council for Refugees has characterized the delay of the RAD by saying, "This looks like a very devious manoeuvre to do a run around Parliament."(34)

B. The Safe Third Country Agreement

The recently agreed-upon draft Agreement between Canada and the United States is, according to CIC, likely to be operational in early 2003. As indicated earlier, the arrangement has evoked some criticism. Specifically, some argue that it will erode refugee protection and increase people smuggling while creating a time-consuming and costly new administrative procedure at our land borders. Those in favour of the Agreement point to the involvement of the UNHCR and the guarantee that persons returned under the Agreement cannot be deported to their home country without their claim being heard. Thus, they suggest that those in genuine need of protection will not be adversely affected. As well, the possible decrease in claims in Canada could represent significant cost-savings.

C. Removal of Failed Claimants

There is no question that the issue of removals receives a significant amount of pubic attention. In some cases, removal orders are not executed; in others, there is what is often perceived as an inordinate delay; in still others, people are removed, but later manage to return to Canada. In some situations, the reasons for delays or non-removals are clear and usually understandable; for example, there may be a temporary moratorium on removals to a country because of dangerous conditions there. In other situations, delays or non-removal may be harder to explain. People may evade apprehension despite being included in nation-wide data banks. Travel documents may be difficult to obtain from the country to which the person will be

(34) "Coderre to delay plan for refugee appeal division," *The Globe and Mail*, 29 April 2002, page A6.

removed, a difficulty that may be increased if the person has managed to hide his or her identity or even citizenship.

In addition to the above difficulties, the Standing Committee on Citizenship and Immigration identified another serious problem in a 1998 report.(35) The Committee found that Citizenship and Immigration Canada suffered from a serious lack of data relating to enforcement. This makes it impossible to accurately track people subject to, or potentially subject to, removal. While noting that the modernization of computer systems had begun, the Committee recommended (among numerous other recommendations) that the Department make the development of modern information technology tools to support the enforcement function its highest priority.

REFUGEE PROTECTION CASE LAW

The following are summaries of some of the leading cases in this area of law. The volume of immigration litigation in Canada is quite large, and thus reference is made only to the most significant decisions.

A. *Singh et al.* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177

The Minister of Employment and Immigration, acting on the advice of the Refugee Status Advisory Committee (RSAC),(36) determined that a group of claimants were not Convention refugees. The Immigration Appeal Board denied the subsequent applications for redetermination of status without an oral hearing, as was the law at the time. At issue was whether the appellants could rely on the *Canadian Charter of Rights and Freedoms* to challenge the process and, if so, whether their right to security of the person was being infringed in a manner that did not accord with the principles of fundamental justice. The majority held:

- Section 7 of the Charter guarantees "everyone ... the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The term "everyone" includes every person physically present in Canada and by virtue of such presence amenable to Canadian law.

(35) *Immigration Detention and Removal*, June 1998.

(36) The RSAC was the body preceding the Immigration and Refugee Board that read transcripts of claimant interviews and made recommendations to the Minister.

- A Convention refugee had the right under s. 55 of the *Immigration Act, 1976* not to "… be removed from Canada to a country where his life or freedom would be threatened ..." The denial of such a right was held to amount to a deprivation of "security of the person" within the meaning of section 7.

- The procedure for determining refugee status claims established in the *Immigration Act, 1976* was found to be inconsistent with the requirements of fundamental justice. At a minimum, the procedural scheme set up by the Act should have provided the refugee claimant with an adequate opportunity to state his case and to know the case he had to meet. However, the process did not envisage an opportunity for the refugee claimant to be heard other than through the transcript of his examination under oath by an immigration officer, and the claimant was not given an opportunity to comment on the advice the Refugee Status Advisory Committee had given the Minister. Under the Act, the Immigration Appeal Board was required to reject an application for redetermination unless it was of the opinion that it was more likely than not that the applicant would be able to succeed. An application, therefore, would usually be rejected before the refugee claimant even had an opportunity to discover the Minister's case against him in the context of a hearing.

- The government did not demonstrate that these procedures were a reasonable limit on claimants' rights within the meaning of s. 1 of the Charter.

It was the *Singh* decision that led to the creation of the Immigration and Refugee Board.

B. *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689

Mr. Ward was a former member of a Northern Ireland terrorist organization who had been sentenced to death by that organization for assisting hostages to escape. He made a claim to refugee status in Canada, arguing that the United Kingdom and Ireland could not protect him. The Supreme Court looked at various legal issues relating to the definition of a Convention refugee in this landmark case and held as follows:

- "Persecution" includes situations where the state is not an accomplice to the persecution but is simply unable to protect its citizens. The claimant must provide clear and convincing confirmation of a state's inability to protect, absent an admission by the national's state of its inability to protect that national. Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant.

- In determining that Mr. Ward did not belong to a "particular social group" (one of the enumerated grounds in the definition of a Convention refugee), this basis of persecution was determined to consist of three categories: (1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

- Mr. Ward, who believed that the killing of innocent people to achieve political change was unacceptable, set the hostages free in accordance with his conscience. The persecution he feared thus stemmed from his political opinion as manifested by this act.

Ultimately, the case was returned to the Board for rehearing in accordance with the Court's guidance.

C. *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982

Mr. Pushpanathan entered Canada and claimed refugee status, but his claim was never adjudicated as he was granted permanent residence status under an administrative program. He was subsequently convicted of conspiracy to traffic in a narcotic, having been a member of a group in possession of heroin with a street value of some $10 million. He was sentenced to eight years in prison. In 1991, when on parole and facing deportation, Mr. Pushpanathan renewed his claim for Convention refugee status. The Board decided that he was not a refugee by virtue of the exclusion clause in Article 1F(c) of the Convention, which provides that the Convention does not apply to a person who "has been guilty of acts contrary to the purposes and principles of the United Nations."

The majority of the Supreme Court of Canada found that the Board's decision was incorrect and allowed Mr. Pushpanathan's appeal. Article 1F(c), the Court determined, will be applicable where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the UN purposes and principles. Conspiring to traffic in a narcotic is thus not a violation of Article 1F(c).

The matter was remitted to the IRB for reconsideration, where a new argument was advanced against the claimant. It was suggested that Mr. Pushpanathan was ineligible to

have his claim heard under Article 1F(c) because his drug trafficking was intended to profit a terrorist group, the Tamil Tigers.(37) Although he denied any knowledge that funds from the drug ring were being sent to the Tigers, the Board held that he was ineligible to have his claim heard. The Federal Court upheld that decision in October 2002, stating that the test for determining whether there is "a serious reason for considering" (the term used in the Refugee Convention) that a person has been guilty of acts that the Supreme Court would consider sufficient to meet the Article 1F(c) exclusion requires a low standard of proof. Formal membership in the terrorist organization or direct involvement is not required. This case may yet be appealed to the Federal Court of Appeal.

D. *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1

Suresh, and its companion case *Ahani* (see below), dealt with deportation orders against individuals who argued that they would face torture if returned to their home countries. Canada has ratified the *Convention Against Torture* (CAT), which explicitly prohibits state parties from returning people to torture. Article 3(1) states: "No State 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 subjected to torture." States are not supposed to be able to deviate from this absolute prohibition. Article 2(2) of the CAT reads: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Furthermore, the Supreme Court of Canada unanimously held when examining the issue that the prohibition on returning a person to face a risk of torture is also the prevailing international norm; that is, it is customary international law.

In direct contradiction, however, was a section of the former *Immigration Act* that permitted deportation to a country where the person's life would be threatened if the person was inadmissible for any specified reason and was designated to be a danger to the security of Canada. (This continues to be the case under the new *Immigration and Refugee Protection Act*, which came into force on 28 June 2002.) In essence, Canadian law provides that in certain situations, people may be deported to face torture.

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(37) The Liberation Tigers of Tamil Eelam is an organization involved in terrorist activity in the course of its war for an independent Tamil state in Sri Lanka.

Mr. Suresh was allegedly a member of and fundraiser for the Tamil Tigers. Although the Court allowed Suresh's appeal and ordered that he was entitled to a new deportation hearing, the legislation was upheld as valid. The principles of fundamental justice in section 7 of the Charter would guide the new hearing and the Court suggested that the Minister should "generally decline to deport refugees where on the evidence there is a substantial risk of torture." The Court set out its restrictive view of when deportation under these circumstances could take place as follows:

> 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.

E. *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2

In the companion case to *Suresh* (see above), the appellant was allegedly an assassin, trained by Iranian intelligence. In his case, the Court determined that he had not established that he faced a substantial risk of torture if returned to Iran. His appeal was therefore dismissed.

Following the judgment, Mr. Ahani began new proceedings, requesting that his deportation be stayed until the United Nations Human Rights Committee reviewed his case. He was unsuccessful in the lower courts and the Supreme Court of Canada refused to hear his appeal.

F. *Law Society of British Columbia* v. *Mangat*, 2001 SCC 67

Mr. Mangat was an immigration consultant in Vancouver. Although he was not a member of the British Columbia bar, he and other employees of his firm acted as counsel in various immigration proceedings. The Law Society of British Columbia brought an application seeking a permanent injunction against Mr. Mangat and his associates to prevent them from engaging in the practice of law in contravention of the B.C. *Legal Profession Act*. The

consultants conceded that they were engaged in the practice of law within the meaning of the provincial *Legal Profession Act*, but contended that they were permitted to do so under the former *Immigration Act,* which allowed (as does the new Act) non-lawyers to appear on behalf of clients before the IRB.

The Supreme Court of Canada determined that since the subject matter of the representation of people by counsel before the IRB has federal and provincial aspects, the federal and provincial statutes and rules or regulations will coexist insofar as there is no conflict. Where there is a conflict, the federal legislation will prevail according to the paramountcy doctrine, thus safeguarding the control by Parliament over the administrative tribunals it creates.

Non-lawyers may therefore appear before the IRB (although by the time the case reached the Supreme Court of Canada, Mr. Mangat had completed law school and become a member of the Bar).

APPENDIX 1

REFUGEE CLAIMS IN CANADA, 1989-2001

Year	Number of Claims	Number of Claims decided by IRB after a hearing	Withdrawn/Abandoned and Others	Positive Decisions by IRB (as % of all claims not abandoned or withdrawn)
1989	12,092	5,599	133	4,840 (86%)
1990	21,046	13,177	394	10,429 (79%)
1991	29,008	27,520	1,394	19,913 (72%)
1992	31,345	27,600	1,866	17,610 (64%)
1993	35,702	25,868	4,920	14,203 (55%)
1994	22,375	21,928	3,694	15,298 (70%)
1995	26,409	13,755	3,388	9,704 (71%)
1996	26,009	16,715	5,277	9,619 (58%)
1997	22,721	19,086	5,751	10,038 (53%)
1998	23,897	23,183	6,211	12,929 (56%)
1999	29,450	22,373	5,609	12,984 (58%)
2000	34,289	24,204	4,710	14,003 (58%)
2001	44,075	22,951	5,467	13,383 (58%)

Sources: Compiled from: Immigration and Refugee Board, *CRDD Refugee Status Determinations, Calendar Year*, supplied to author.

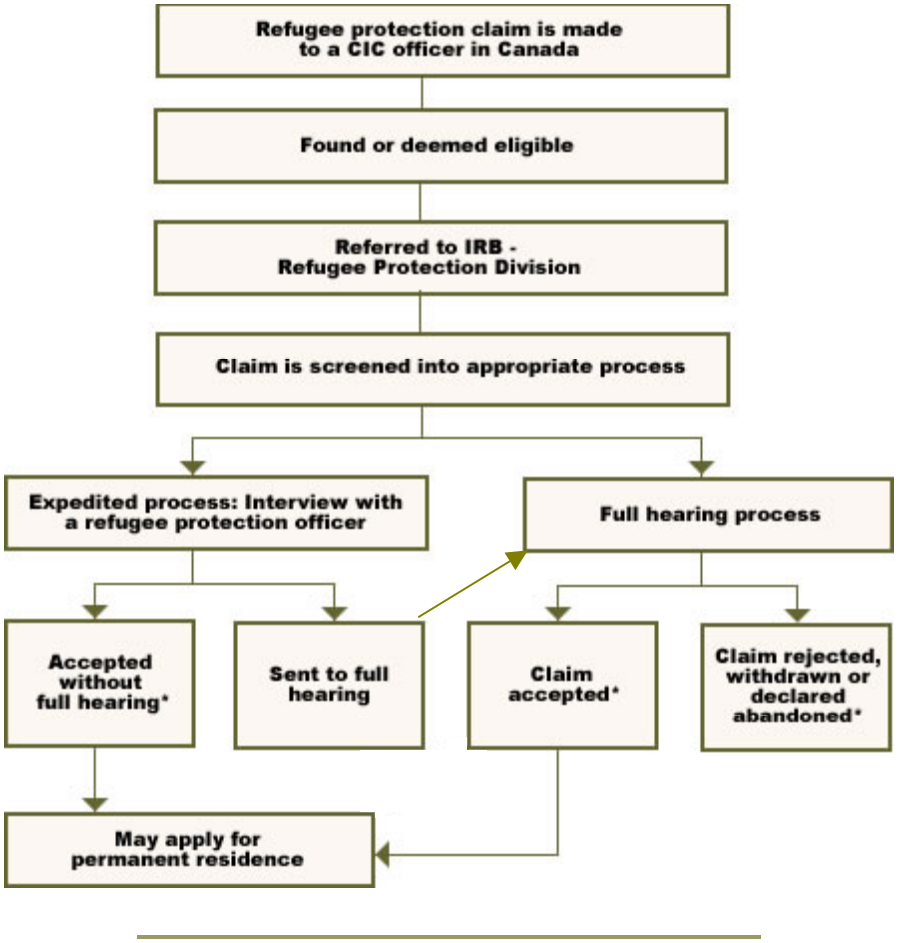
NOTE: There are two different methods of calculating the recognition rate of Convention refugees, and they produce distinctly different results. The above calculation subtracts the number of withdrawn, abandoned, or other claims in calculating the recognition rate. This is thought to provide a more accurate picture of the recognition rate of serious claims, that is, those that actually went to a hearing. Many claimants file a claim and then disappear. It may be thought misleading to treat those claims as negative decisions.

In contrast, the Board includes withdrawn, abandoned and other claims in computing its recognition rate. The Board's recognition rates, using this method, are as follows:

1989 – 84%
1990 – 77%
1991 – 69%
1992 – 60%
1993 – 46%
1994 – 60%
1995 – 57%
1996 – 44%
1997 – 40%
1998 – 44%
1999 – 46%
2000 – 48%
2001 – 47%

APPENDIX 2[1]

REFUGEE PROTECTION DETERMINATION PROCESS



* The claimant or CIC may ask the Federal Court of Canada for leave (permission) to apply for judicial review of any decision of the Refugee Protection Division.

(1) Source: IRB web site, http://www.irb.gc.ca/en/about/processes/rdp_e.htm.

APPENDIX 3

Final Draft Text

SAFE THIRD COUNTRY AGREEMENT

The Government of Canada and the Government of the United States of America
(reverse order in U.S. original) (hereinafter referred to as the Parties)

CONSIDERING that Canada is a party to the 1951 Convention relating to the Status of Refugees, done at Geneva, July 28, 1951 (the "Convention"), and the Protocol Relating to the Status of Refugees, done at New York, January 31, 1967 (the "Protocol"), that the United States is a party to the Protocol, and reaffirming their obligation to provide protection for refugees on their territory in accordance with these instruments;

ACKNOWLEDGING in particular the international legal obligations of the Parties under the principle of non-refoulement set forth in the Convention and Protocol, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984 (the "Torture Convention") and reaffirming their mutual obligations to promote and protect human rights and fundamental freedoms.

RECOGNIZING and respecting the obligations of each Party under its immigration laws and policies;

EMPHASIZING that the United States and Canada offer generous systems of refugee protection, recalling both countries' traditions of assistance to refugees and displaced persons abroad, consistent with the principles of international solidarity that underpin the international refugee protection system, and committed to the notion that cooperation and burden-sharing with respect to refugee status claimants can be enhanced;

DESIRING to uphold asylum as an indispensable instrument of the international protection of refugees, and resolved to strengthen the integrity of that institution and the public support on which it depends;

NOTING that refugee status claimants may arrive at the Canadian or United States land border directly from the other Party's territory where they could have found effective protection;

CONVINCED, in keeping with advice from the United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee, that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing;

AWARE that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded;

Have agreed as follows:

Article 1

1. In this Agreement,

   A. **"Country of Last Presence"** means that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry.

   B. **"Family Member"** means the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews.

   C. **"Refugee Status Claim"** means a request from a person to the government of either Party for protection consistent with the Convention or the Protocol, the Torture Convention, or other protection grounds in accordance with the respective laws of each Party.

   D. **"Refugee Status Claimant"** means any person who makes a refugee status claim in the territory of one of the Parties.

   E. **"Refugee Status Determination System"** means the sum of laws and administrative and judicial practices employed by each Party's national government for the purpose of adjudicating refugees status claims.

   F. **"Unaccompanied Minor"** means an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States.

2. Each Party shall apply this Agreement in respect of family members and unaccompanied minors consistent with its national law.

Article 2

This Agreement does not apply to refugee status claimants who are citizens of Canada or the United States or who, not having a country of nationality, are habitual residents of Canada or the United States.

Article 3

1. In order to ensure that refugee status claimants have access to a refugee status determination system, the Parties shall not return or remove a refugee status claimant referred by either Party under the terms of Article 4 to another country until an adjudication of the person's refugee status claim has been made.

2. The Parties shall not remove a refugee status claimant returned to the country of last presence under the terms of this Agreement to another country pursuant to any other safe third country agreement or regulatory designation.

Article 4

1. Subject to paragraphs 2 and 3, the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.

2. Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party of the receiving country, and not the Party of the country of last presence, where the receiving Party determines that the person:

    a. Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory; or

    b. Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending; or

    c. Is an unaccompanied minor; or

    d. Arrived in the territory of the receiving Party:

        i. With a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or

        ii. Not being required to obtain a visa by only the receiving Party.

3. The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.

4. Neither Party shall reconsider any decision that an individual qualifies for an exception under this Agreement.

Article 5

In cases involving the removal of a person by one Party in transit through the territory of the other Party, the Parties agree as follows:

a. Any person being removed from Canada in transit through the United States, who makes a refugee status claim in the United States, shall be returned to Canada to have the refugee status claim examined by and in accordance with the refugee status determination system of Canada.

b. Any person being removed from the United States in transit through Canada, who makes a refugee status claim in Canada, and:

   i. whose refugee status claim has been rejected by the United States, shall be permitted onward movement to the country to which the person is being removed; or

   ii. who has not had a refugee status claim determined by the United States, shall be returned to the United States to have the refugee status claim examined by and in accordance with the refugee status determination system of the United States.

Article 6

Notwithstanding any provision of this Agreement, either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so.

Article 7

The Parties may:

a. Exchange such information as may be necessary for the effective implementation of this Agreement subject to national laws and regulations. This information shall not be disclosed by the Party of the receiving country except in accordance with its national laws and regulations. The Parties shall seek to ensure that information is not exchanged or disclosed in such a way as to place refugee status claimants or their families at risk in their countries of origin.

b. Exchange on a regular basis information on the laws, regulations and practices relating to their respective refugee status determination system.

Article 8

1. The Parties shall develop standard operating procedures to assist with the implementation of this Agreement. These procedures shall include provisions for notification, to the country of last presence, in advance of the return of any refugee status claimant pursuant to this Agreement.

2. These procedures shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of this Agreement. Issues which cannot be resolved through these mechanisms shall be settled through diplomatic channels.

3. The Parties agree to review this Agreement and its implementation. The first review shall take place not later than 12 months from the date of entry into force and shall be jointly conducted by representatives of each Party. The Parties shall invite the UNHCR to participate in this review. The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations.

Article 9

Both Parties shall, upon request, endeavor to assist the other in the resettlement of persons determined to require protection in appropriate circumstances.

Article 10

1. This Agreement shall enter into force upon an exchange of notes between the Parties indicating that each has completed the necessary domestic legal procedures for bringing the Agreement into force.

2. Either Party may terminate this Agreement upon six months written notice to the other Party.

3. Either Party may, upon written notice to the other Party, suspend for a period of up to three months application of this Agreement. Such suspension may be renewed for additional periods of up to three months. Either Party may, with the agreement of the other Party, suspend any part of this Agreement.

4. The Parties may agree on any modification of or addition to this Agreement. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.