Evidentiary Matters at the Immigration and Refugee Board in an Age of Diversity

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Responding to diversity in evidentiary matters is a central preoccupation of the Immigration and Refugee Board (IRB). In deciding immigration cases and refugee claims, we hear parties from all cultural backgrounds and profoundly diverse life experiences. The challenge posed by this diversity is further heightened by the emotional aspect of the issues involved. I refer in particular to the psychological trauma often suffered by refugee claimants and to the anxiety in the face of deportation or denial of family sponsorship. Sensitivity to this reality in receiving and assessing evidence is as crucial to the fairness of our process as the actual rules of evidence. Diversity in the composition of the IRB and support to the decision-makers are instrumental in fulfilling our objectives in this regard.

I. EVIDENCE BEFORE THE IRB

It has long been established that administrative tribunals are not bound by technical rules of evidence. Therefore, any relevant evidence providing certain guarantees of trustworthiness is admissible in such tribunals. The Immigration and Refugee Board (IRB) and its three divisions are no exception. The Immigration Appeal Division (IAD) hears appeals on decisions by immigration officers and adjudicators. The Convention Refugee Determination Division (CRDD) hears refugee claims. The Adjudication Division (AD) decides on admissibility and detention reviews. They may receive any evidence that they deem credible and trustworthy by any means that they consider appropriate and useful in the circumstances of a given case. For example, because witnesses are often unable to attend IAD hearings, members of this Division frequently admit evidence submitted by means of teleconferencing or video. Hearsay evidence is admitted in virtually all cases before the IRB because, without it, most parties would be unable to discharge their burden of proof. In addition, expert evidence related to medical issues or foreign law, for example, is frequently used in IRB proceedings.

It is therefore not in the area of admissibility of evidence that the IRB distinguishes itself from other administrative tribunals, but rather in the development of procedures and practices

designed to facilitate gathering relevant evidence for all those involved in the process and to help the members assess the evidence in order to make better decisions.

II. EVIDENCE BEFORE THE CONVENTION REFUGEE DETERMINATION DIVISION (CRDD)

The CRDD consists of approximately 200 independent members appointed by the Governor in Council. Members are "selected to represent the broad spectrum of Canada's cultural and ethnic composition".[1] They are appointed not only for their knowledge and interest in refugee and immigration issues, but also for their "sensitivity to circumstances affecting refugees, [...] administrative laws and procedures [...] [or] Canadian jurisprudence [...]".[2] At present, 42% of IRB members are women, 26% identify themselves as belonging to visible minorities and 40% are members of our multicultural communities. I am happy to note that the "more open" Governor in Council appointment process recently proposed by the Prime Minister will allow us to maintain the broad diversity of our membership, given that one of the stated objectives of the new process is "to produce" appointees being representative of the clientele served and providing gender, linguistic, regional and ethnic balance.

Since CRDD members represent a diversity of cultural backgrounds, they perform a significant role in engendering an increasing awareness of, and sensitivity to, linguistic and socio-cultural differences of claimants. This is reflected not only in the hearing room setting but also in the decisions rendered by the Board.

Proceedings before the CRDD are quasi-judicial and members have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act*. The decisions of the CRDD are of profound importance as they affect the very lives of the people who appear before the CRDD. Thus, to recognize the special vulnerability of refugee claimants, hearings in front of the CRDD are not adversarial, contrary to hearings before the two other divisions of the Board (the Adjudicative Division and the Immigration Appeal Division), meaning that the Minister is not

generally represented and a "contrary case" is not normally argued.[3] This difference has a significant impact on the treatment of evidence. Even though the burden of proof is on the claimant, CRDD members have the responsibility of ensuring that all the evidence required for determination of the case is on the record.

Members are assisted by Refugee Hearing Officers (RHOs) in ensuring that all the evidence relevant to a case is on the record. Before a hearing, RHOs have an important investigative role to play. They have the authority to conduct research to gather the evidence required for a particular claim. They may also hold a pre-hearing conference and subsequently recommend to CRDD members that refugee status be granted to the claimant without a formal hearing. During a hearing, RHOs can introduce evidence, call and question the claimant or any other witness, present documents and make representations.[4] It must be stressed that RHOs do not represent the Minister, that their role is to ascertain that all evidence relevant to the claim is considered and that they must remain neutral throughout the proceedings. In accordance with section 68(3),[5] the requirements of fairness impose on RHOs the duty to disclose all the information relevant to a claim. The Federal Court recently ruled in *Nrecaj* that such information must be disclosed in a timely fashion. As Gibson J. stated:

> *To adequately meet the test of fairness, disclosure must be timely. It must be sufficiently timely to allow counsel to fully and effectively fulfil his or her role and to allow the party requesting disclosure to prepare.*[6]

It is interesting to note that Gibson J. rendered his judgment on the basis of the Supreme Court decision in *Stinchcombe*, where Sopinka J. said:

> *Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice*

was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.[7]

The CRDD deals with a large number of cases each year and is committed to disposing of them fairly and expeditiously, as required by law. The equally large number of decision-makers, spread out from Vancouver to Newfoundland, poses the additional challenge of maintaining coherence in decision-making.

CRDD members determine whether an individual can be recognized a "Convention refugee" as defined by section 2 of the Act. Central to this definition is that a claimant has to prove a well-founded fear of persecution for one of the reasons mentioned in the provision: race, religion, nationality, political opinion, or membership in a particular social group. The standard is somewhat lower than that of the balance of probabilities, as stated in the *Adjei* decision:

What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50 per cent chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.[8]

A. Mechanisms to Facilitate the Gathering of Evidence

The rules of evidence for CRDD members are set out in subsections 68(2), (3), (4) and (5) of the *Immigration Act*. Subsection 68(2) states that a hearing must be conducted as informally and expeditiously as possible, while ensuring that the process remains fair toward the claimant:

68(2) The Refugee Division shall deal with all proceedings before it as informally and expeditiously as the circumstances and the considerations of fairness permit.

Subsection 68(3) embodies the common law rule that administrative tribunals are not bound by the technical rules of evidence in civil matters:

> *68(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.*

1. Teleconferencing and Videotapes

The flexibility of subsection 68(3) entitles members to use means such as teleconferences or videotapes. In one of our cases[9] the claimant, a Cuban, testified that he was a returning student from the former Soviet Union. He had made outspoken comments while in the former Soviet Union in the presence of other Cubans. These comments favoured a multi-party system, the end of Castro's cult of personality, and freedom of the press. He had returned to Cuba in the interim and had been expelled from his school for his political views. Prior to his expulsion, he claimed to have hidden out for three months with another Cuban named D. D. was located and his testimony taken by teleconference. He testified that the claimant had stayed with him for two weeks. On the basis of numerous internal inconsistencies in the claimant's testimony, namely regarding his admitted familial status, and the failure of D. to confirm his story, the panel found the claimant not credible and the evidence insufficient to meet the *Adjei* test, namely that there be a "reasonable chance" of persecution.[10]

2. Expert Evidence

As for expert evidence, the CRDD has accepted it in numerous cases. It was used to provide an opinion regarding the reform pact signed by Solidarity and the Polish government.[11] In this case, the CRDD accepted as an expert witness a member of the Canadian Labour Congress. Physicians and psychologists have been heard to testify on the medical condition of a claimant.[12] Scientific experts appeared in front of the CRDD testifying on whether documents have been

altered.[13] Expert opinions are given on the current situation prevailing in a country.[14] In *Gonzalez,*[15] the Federal Court of Appeal held that where a claim is based on membership in a particular social group, evidence of experiences of other members of that group is material to the claim and that there is a reasonable apprehension of bias if a panel refuses to hear another refugee claimant as an expert witness. Expert evidence has also been used to verify whether the claimant belongs to the particular social group to which he or she is alleging being a member.[16]

3. Extra-Record Information

CRDD members are entitled to use in the decision-making process extra-record information which was not formally introduced as evidence during the proceedings,[17] in order to support or contradict the evidence of the claimant:

> *68(4) The Refugee Division may, in any proceedings before it, take notice of any facts that may be judicially noticed and subject to `subsection (5)' of any other generally recognized facts and any information or opinion that is within its specialized knowledge.*[18]

Subsection 68(4) draws a distinction between facts which can be "judicially" noticed and other information which can be "officially" noticed. Further, among facts which can be officially noticed, some are regarded as "generally recognized facts" and others as information or opinion within the "specialized knowledge" of the CRDD.

Whereas judicial notice is associated with regular court proceedings, official notice is a concept used in the context of administrative law.[19] Only facts which are notorious may be judicially noticed.[20] The notoriety of facts is decided on the basis of their indisputability among reasonable persons or on their "being capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy".[21] In the courts, apart from notorious facts or indisputable facts known locally, judges cannot use knowledge acquired through

their own initiative or stemming from their own specialized knowledge; they must rely on expert testimony.[22] Judges may, however, take judicial notice of domestic law, but they cannot take judicial notice of the laws of foreign jurisdictions. Since CRDD members may "take notice of any facts that may be judicially noticed", as stipulated in subsection 68(4), they too are entitled to take notice of domestic law.[23]

Unlike judges in regular courts, CRDD members are specifically entitled to use their specialized knowledge.[24] As already mentioned, subsection 68(4) divides the concept of specialized knowledge into two parts: generally recognized facts and specialized knowledge. Like judicially noticed facts, "generally recognized facts" can come from indisputable sources[25] or can be general (as opposed to specific) and be well-known to the general public, as was stated in *Maslej* v. *M.E.I.:*

> *[N]o tribunal can approach a problem with its collective mind blank and devoid of any of the knowledge of a general nature which has been acquired in common with other members of the general public, through the respective lifetimes of its members, including, perhaps most importantly, that acquired from time to time in carrying out their statutory duties.*[26]

Specialized knowledge means knowledge acquired by CRDD members in the exercise of their functions. Accordingly, it does not include personal knowledge acquired by CRDD members. Personal knowledge is defined as knowledge acquired:

> *[I]ncidentally by the members of an administrative tribunal in the exercise of their functions. It is not part of the usual knowledge associated with that function, nor has it been acquired in the course of the training and experience associated with the tribunal's duties.*[27]

Specialized knowledge may come, for example, from facts established in previous cases, consultation of agency records, or information acquired through members' extensive experience in the area.[28] It may also be drawn from inquiries or group studies, references to other legal

systems, and training sessions or specialized lectures.[29] As opposed to judges, CRDD members may take notice of foreign law by taking official notice of it.

To date, CRDD members have relied on their specialized knowledge in a number of decisions. For example, members took notice of how Salvadoran death squads operated and their association with the Arena party.[30] The CRDD also relied on its specialized knowledge to determine whether there was an internal flight alternative for Armenians in the former USSR.[31]

Subsection 68(5) places a limit on the power of CRDD members to take notice of generally recognized facts or facts within their specialized knowledge in that it requires disclosure of **all** such facts, information or opinions. In this way, the dual objectives of expeditiousness and fairness are met, since the use of official notice is intended to enable CRDD members to be more expeditious, while disclosure is intended to enable claimants to know the case they have to meet. Subsection 68(5) reads as follows:

> *Before the Refugee Division takes notice of any facts, information or opinion, other than facts that may be judicially noticed, in any proceedings, the Division shall notify the Minister, if present at the proceedings, and the person who is the subject of the proceedings of its intention and afford them a reasonable opportunity to make representations with respect thereto.*

Because subsection 68(5) requires disclosure of any facts, information or opinions falling outside the ambit of judicial notice, this provision offers sufficient safeguards to ensure that extra-record information will not be used as a substitute for evidence.[32]

In addition to this safeguard, the IRB has now developed a practice to ensure that relevant background material is available for every claim. At the beginning of hearings, Refugee Hearing Officers are required to file the index to the relevant Standardized Country File (SCF) as an exhibit. CRDD members then take notice of the content of the SCF. Only the index to the SCF is filed because SCFs can be rather voluminous. The large number of cases makes it prohibitive

to photocopy the entire SCF for every hearing. It should be pointed out as well that SCFs are readily available in the Resource Centres across the country, and counsels and claimants therefore have easy access to them. However, in order to ensure a meaningful right to disclosure, RHOs are requested to draw claimants' attention to any information which contradicts their claim, and members must give claimants a reasonable opportunity to respond.

Other limits on the CRDD's power to take official notice of facts, information or opinion have been imposed by the Federal Court of Appeal. In *Aquino*, the Court said that the Personal Information Form (PIF) filled out by the claimant cannot be judicially or officially noticed.[33] In *Lawal*, the Court decided that information obtained as a result of the panel's own post-hearing inquiries into the publishing practices of a Nigerian newspaper are not considered as facts under subsection 68(4) which may be either judicially or officially noticed.[34] In *Sivaguru*, the Court held that a reasonable apprehension of bias existed in this case because of procedural irregularities in the Refugee Division hearing, namely, the manner in which certain evidence was gathered, adduced and used. The research had been "silently initiated" after the claimant had testified on the first date of the hearing, and he was confronted with the evidence only on the second date of the hearing, after having been questioned again on the basis of this new information.[35]

B. Designing Tools to Foster Consistency and Expeditiousness at the CRDD

Every tribunal faces the challenge of maintaining consistency and expeditiousness while respecting the independence of decision-makers. At the IRB, this challenge is further enhanced by the high volume of cases and the regionalized nature of the IRB across the country. We find guidance, to reconcile our operational imperatives and our principles of independence, in the Supreme Court of Canada decisions of *Consolidated Bathurst* and *Tremblay*. Both decisions state that administrative tribunals such as ours have a certain flexibility in the measures they may take to foster consistency. In the *Tremblay* decision, the Court indicates that this is particularly true for tribunals that render a considerable number of decisions. The CRDD heard 30,000 refugee claims, and made as many decisions last year.

The IRB has undertaken a series of measures, bearing on evidentiary matters to assist CRDD members in carrying out their duties while preserving their independence. These measures particularly take the form of Preferred Position Papers, CRDD Hearing Procedures Papers and Guidelines. Additional initiatives include training, the establishment of the DIRB, and the adoption of a Code of Conduct.

1. Preferred Position Papers, CRDD Hearing Procedures Papers and Guidelines

Before the recent amendments to the *Immigration Act*, the IRB produced a series of Preferred Position Papers and Hearing Procedures Papers. The papers have a procedural, evidentiary and substantive content.

Preferred Position Papers and Hearing Procedure Papers set out the Board's preferred approach on certain issues and recommend a framework of analysis to ensure that a consistent and methodical approach is taken. This impacts on the taking and assessment of evidence by assisting members particularly in discerning relevant from non-relevant facts:

> *The papers do not provide a clear and unequivocal answer to a particular type of claim or issue; they do not lead inexorably to one result or another. Instead, they provide guidance as to the sorts of questions, evidence and considerations which should be taken into account when deciding a refugee claim. By doing so, they seek to foster and promote consistency in decision-making.*[36]

Since the recent modifications to the *Immigration Act*, the Chairperson of the IRB has authority to issue guidelines to assist members and adjudicators in carrying out their duties. In pursuing that objective, the guidelines may offer guidance in seeking relevant evidence and in assessing this evidence in its socio-cultural context.

The first, and only guidelines yet issued under this provision, regard *Women Refugee Claimants Fearing Gender Related Persecution*. They were submitted to a wide internal and external consultation. Their efficiency will also be judged on the basis of continuous consultation, in addition to our internal monitoring. I will expound on these guidelines as a concrete example of our efforts to respond to diversity in evidentiary matters.

Although the refugee definition is written in neutral terms, the reference against which it is interpreted has always been the reality of persecution as experienced by men. However, we know that the nature of persecution experienced by women is different. In particular, it is characterised by sexual violence, indirect persecution, namely persecution for the political activities of a relative, and informal persecution, namely, continuous harassment rather than say, imprisonment.

These characteristics create special evidentiary problems in the refugee determination process. For example, women are often distressed about the idea of telling stories of sexual abuse, especially if they have to testify in front of men. Claims of persecution for the activities of a relative are difficult to substantiate simply because women refugee claimants often do not know the reasons for the persecution. Indeed, in some cultures, women are not informed of the activities of men, even as the daughter, the wife, the sister or the mother. This point is illustrated in a recent CRDD decision. In finding a Somali woman claimant to be a Convention refugee, the panel stated that:

> *Part of her inability to provide detailed information on issues such as her father's involvement in the SNM may be explained by her young age. Furthermore, for cultural reasons, as a young girl in Somalia, it is not unreasonable to assume that she would have not been privy to this kind of information.*[37]

Informal persecution takes the form of insidious harassment, and, as such, poses evidentiary problems since it is constituted of a number of independently minor violations. Together, these acts amount to persecution but each act of harassment may be difficult to prove.

Consequently, to fully address the reality of persecution as experienced by women, special attention needed to be paid to the fact-finding process with respect to claims based on gender.

The guidelines on *Women Refugee Claimants Fearing Gender Related Persecution* assist the members, and ultimately the claimants, in overcoming the evidentiary hurdles specific to women refugee claims. Specifically, they remind the members that the general parameters of the refugee definition still apply and that the claimant must prove that she is persecuted not through generalized violence but on one of the grounds stated in the refugee definition, namely, race, religion, nationality, political opinion or membership to a particular group. To determine the validity of such claims, the members must consider, before all, the circumstances of the claimant, regarding general respect for human rights in her country of origin as well as the situation of other women in similar situations in that country. To assess and weigh this evidence, the members should apply the so-called "particularized evidence rule", as dealt with in *Salibian* v. *Canada (M.E.I.)*,[38] whereby a gender related claim cannot be rejected simply because the claimant comes from a country where all women face oppression; they should also take into account the fact that allegations of sexual violence by state authorities can rarely be substantiated by statistical data. Members should also consider evidence indicating a failure of state protection in the face of sexual violence or condoning such violence where the State had done nothing to prevent it.

To further facilitate the submission of evidence by women refugee claimants, the IRB attempts to provide "user-friendly" hearing rooms, as much as possible, for women refugee claimants. This often means that the panel, RHOs and interpreters will be women, if the claim involves sexual violence. This is particularly important where there is evidence of trauma. Also in order to provide support to the overall goal of consistent, sensitive and well-informed decision-making, our Documentation Information and Research Branch has been mandated to produce

research papers on the conditions faced by women in their countries of origin including the incidence of violence, both sexual and domestic violence, and on the adequacy of state protection. These will be available to decision-makers and to the public through the IRB's regional Documentation Centres.

2. Training

Effective refugee determination requires trained decision-makers. CRDD members need initial and continuing training to learn skills to conduct effective interview and examination, to be able to elicit and understand the narrative of the individual before them, to take fair decisions and write sound reasons.

Continuing education consists of training sessions on country conditions, jurisprudence updates, reasons writing, hearing room techniques, and gender and cross-cultural sensitivity. Judges, lawyers, academics, representatives from the United Nations High Commission for Refugees and other governmental and non-governmental organizations are involved in the delivery of the training. In addition to formal training, CRDD members are encouraged to specialize in refugee claims involving particular countries of origin.

In the context of refugee determination, the need for cross-cultural training becomes of critical importance in the assessment of the credibility of refugee claimants. Cross-cultural misunderstandings between CRDD members and claimants "can seriously hinder the accurate assessment of credibility during the hearing."[39]

Misunderstandings can arise when "common sense" from a Canadian perspective is used as a guide in making credibility determinations.[40] For example, while it might appear as an affront to common sense that a refugee woman claimant may not have told her husband about her sexual assault at the hands of the police, it makes far more sense when one has an understanding of the

condition of women in her country of origin and what sexual assault means for her within her society.

Questions can arise over the content of what is said by a refugee claimant. Members must be aware that certain words, ideas or concepts have different meanings in different cultures. In Somalia, for example, ethnic Somalis are not given family names; rather, they are given many names arrived at through consensus on the part of their families or family friends. This allows for the tracing back of names through previous generations. In addition, Somalis may use different names at school than those used at home.[41] In questioning Somali claimants, then, regarding family members, claimants may appear confused over names when in fact, it is just because they have a series of names or because they might refer to the same person by other names.

Demeanour is also an important factor that is taken into consideration when determining the credibility of a refugee claimant.[42] The claimant may appear to be evasive upon questioning or may refuse to make eye contact with the members hearing the claim. This is not necessarily a sign of deceitfulness; in some cultures, it is a sign of respect for authority while in others, it is a reflection of a cultural norm according to which one does not go to the heart of the matter. Refugee claimants may also be distrustful of authority based on their experiences in their country of origin.

Problems in assessing credibility can be aggravated by the need to communicate through interpreters. In an effort to minimize the problems created by the intervention of interpreters, the Board provides for training, monitoring and evaluation of interpreters on a continuing basis. Further, the Board has an accreditation programme to provide an objective and uniform means of ensuring that interpreters meet an established standard as a prerequisite to providing interpretation service.[43]

Recognition of the special circumstances pertaining to women refugee claimants has led to the creation of a CRDD Working Group on Refugee Women Claimants. The Working Group

has held a series of workshops on refugee women's issues. These have included workshops focusing on the socio-cultural background to refugee claims made by women and on refugee protection and determination. In addition, the Board has just finished a series of training sessions for CRDD members and staff on the Guidelines on Gender related Claims to ensure that the Guidelines are used effectively in hearing claims of women refugee claimants.

3. The IRB Documentation, Information and Research Branch

The IRB Documentation, Information and Research Branch, commonly referred to as DIRB, was created mainly to meet the needs of the Refugee Division for trustworthy and current information.[44] The DIRB provides information on the human rights situations, including human rights law and practices, in the countries of origin of persons making refugee claims. The most important documents produced by the DIRB are Country Profiles, Question and Answer Series, Responses to Information Requests and the Media Weekly Review. DIRB researchers follow an established method of research to ensure the reliability of all its documents. This is a vital evidentiary tool in the determination of claims.

4. Code of Conduct

The Code of Conduct gives guidance to members on matters touching on their professionalism and conduct and at the same time enhances public confidence in the integrity and competence of members and in the fairness and efficiency of hearings. The manner in which members receive evidence is particularly governed by the following rules of conduct:

- the importance of giving refugee claimants a reasonable opportunity to present their case, and,

- the requirement of guarding against the making of intemperate, racial, sexist or ethnocentric comments.

III. EVIDENCE BEFORE THE IMMIGRATION APPEAL DIVISION

The Immigration Appeal Division has 12 members[45] at the present time. Its proceedings are adversarial in nature, with appeals officers representing the Minister as respondent in sponsorship appeals and appeals from removals orders and as appellant in appeals initiated by the Minister.

In receiving evidence, the Appeal Division is guided by section 69.4(3)(c) of the *Immigration Act.* This broadly-cast provision enables the Appeal Division to receive any evidence it considers to be credible or trustworthy and necessary for dealing with the subject-matter before it. It has been described as having the purpose and effect of freeing hearings from all technical rules of evidence and particularly the "best evidence" and "hearsay" rules.[46]

The Appeal Division is entitled to found its decision on material introduced in evidence if it considers it to be credible or trustworthy in the circumstances. It would constitute an error for the Appeal Division to conclude, as a matter of law, that certain material could not be relied upon because its contents were not proven in accordance with the rules of evidence in civil actions.[47] The Appeal Division cannot, for example, refuse to consider newspaper articles introduced into evidence on the ground that newspaper articles are not evidence on which it can base a decision. Newspaper articles may or may not have probative value according to the circumstances of each case and as such, should be considered and weighed.[48]

The exercise of evaluating the credibility and trustworthiness of evidence is a question of fact for the Appeal Division to determine.[49] The Appeal Division may refuse to accept evidence although credible or trustworthy if its prejudicial effect outweighs its probative value or if it is clearly irrelevant or unnecessary.[50] However, the approach taken almost universally and sanctioned by the Federal Court,[51] is to admit all evidence and then accord it whatever weight it deserves. And although the Appeal Division is not bound by the legal rules of evidence which

prevail in ordinary courts, it may nevertheless take those rules into account in assessing the relative credibility, trustworthiness and weight of the evidence adduced.

The *Immigration Appeal Division Rules* contain disclosure rules for documentary evidence and expert witnesses.[52] Extensive use is made of prehearing conferences[53] as a means of ensuring the exchange of documentary evidence which the parties intend to produce at the hearing, the agreement as to facts and issues and any particular procedural logistics, such as arrangements for receiving teleconference evidence from abroad. The Appeal Division has also ordered the production of documents in the possession of third parties.[54]

Key to an appreciation of the Appeal Division's mandate in relation to evidence is an understanding of the nature of Appeal Division hearings. An appeal before the Appeal Division is not restricted to an administrative type of review of the decision below. Hearings before the Appeal Division are *de novo* hearings in a broad sense.[55] This means the Appeal Division decides appeals on the facts as they exist at the time of its hearing and decision and not as of the time of the visa officer's or adjudicator's decision.[56] The starting point in a removal order appeal is the record of the inquiry proceedings before the adjudicator and in a sponsorship appeal, the material before the visa officer on which the officer based the decision to refuse the application for landing.[57] The parties build on this foundation by introducing additional evidence that was not before the adjudicator or visa officer, either newly arisen evidence or evidence that was in existence at the time of the adjudicator's or officer's decision.

The Appeal Division's unique jurisdiction is its so-called "equitable jurisdiction", its authority to consider evidence of humanitarian and compassionate considerations and evidence going to all the circumstances of the case. In the exercise of this jurisdiction, the Appeal Division needs evidence of current circumstances and conditions.

As a court of record with the powers of a superior court, the Appeal Division may take notice of facts that may be judicially noticed. It has also taken official notice of generally

recognized facts, or of information or opinions within its specialized knowledge. In one instance, a panel took official notice of the considerable waiting list for health care services for patients with heart conditions in the Lower Mainland of British Columbia.[58]

The Appeal Division follows the usual rule that foreign law is a fact which must be proven and therefore cannot be judicially noticed. However, if the foreign law is familiar to the Appeal Division and the parties, there is often agreement as to the application of the foreign law (formal proof being dispensed with as a result) and occasionally as to its interpretation. If the Appeal Division is not presented with expert evidence of the foreign law, it is bound to examine the text of the law itself and give it a reasonable interpretation.[59] In the absence of evidence of the foreign law, the Appeal Division may apply Canadian law.[60]

As for the methods of receiving evidence, they are many and varied. The Federal Court has held that the Appeal Division has broad authority as regards matters necessary or proper for the due exercise of its jurisdiction and the provision of suitable means to receive evidence is among those matters.[61] In the same case, which involved an appellant sponsor's proposal to receive the evidence of an applicant residing in Guyana by telephone conference call, the Federal Court commented that where the principles of natural justice must be observed, it is no answer to say that the tribunal is not organized or set up in a way that permits their observation and particular cases may require special treatment.

Many of the cases before the Appeal Division involve witnesses distanced from the hearing location by time zone, continent and culture. The Appeal Division has responded with an openness to new methods, such as receiving evidence by telephone conference or by video.

A. Evidence by Telephone Conference and Video

Apart from the conventional method of testifying in person in the presence of the Appeal Division, witnesses frequently testify by telephone conference. The practice was upheld by the Federal Court in *Cookson*.[62] Cookson had appealed from a deportation order. He asked to present

his evidence in writing rather than in person because he lived far from the place of the hearing and it would be very expensive for him to get there. The Appeal Division agreed to have him present written evidence but also asked him to be available for a telephone conference. The appeals officer acting for the Minister registered her objection to the panel's ruling allowing the appellant to testify by telephone. During the hearing, the appellant's written evidence was entered and he swore to the truth of the information. The appeals officer was given an opportunity to cross-examine by telephone. The Federal Court concluded that the Appeal Division had properly weighed the relevant considerations before deciding to proceed by way of a conference call and that such a procedure did not prejudice the right of the Minister to effectively cross-examine.

The use of video evidence is popular especially in sponsorship cases involving medical inadmissibility or alleged marriages of convenience. One such case was *Jiwanpuri*.[63] It was a sponsorship of the appellant's family. Her father and sister were refused permanent residence after medical officers diagnosed them as suffering from mental retardation - moderate severity. The appellant introduced evidence in the form of a video showing her father and sister doing their daily chores, her father driving his tractor and operating a thresher, her sister, watering plants and milking the cows. Having regard to this and other evidence, the Appeal Division concluded the medical officers' opinion regarding their conditions was unreasonable. The videotape was used to show that the facts relied on by the medical officers were insufficient to lead to their opinion.

B. Expert Evidence

Expert evidence may be decisive in cases involving medical inadmissibility, foreign law, the political or economic situation of a foreign country or rehabilitation of an appellant or applicant.

Assuming that the Appeal Division accepts the subject-matter as a field of admissible expertise, it must decide whether the particular witness qualifies as an expert in his or her field. The qualifications of an expert witness are proved before the Appeal Division as before an

ordinary court. If the witness is found not to be an expert in the subject-matter, the witness can still give opinion evidence, because the Appeal Division is not bound by the rules of evidence. However, the weight given to the opinion will be less. By qualifying a witness as an expert, the credibility of the testimony and its reliability are enhanced.

Concerning expert evidence on medical questions, the fact that a physician is not a specialist or did not have an opportunity to examine the applicant goes to the weight of the physician's testimony and not to the question of qualifications to testify as an expert.[64]

In *Gill*,[65] appellant's counsel had a physician practising in Manitoba (where the applicant wished to settle) testify as to the following facts: that the waiting list for the surgery needed by the applicant numbered approximately 100 people and that approximately nine people were treated per week. Thus, since the physician felt the applicant would need surgery in only five years' time and the cost of the surgery was merely $3,800, the Appeal Division concluded that the demand on health services was not excessive.

C. Testimony by the Victim

The Appeal Division may consider receiving victim impact evidence as to the repercussions of an appellant's criminal act on affected victims, including the victim's family members.[66] The evidence may be received in furtherance of the objective in section 3(i) of the *Immigration Act*, to maintain and protect the health, safety and good order of Canadian society. Such evidence is found in pre-sentence reports or in the court's sentencing remarks but the Minister's representative may also seek to call a victim to testify.

The question of whether or not to receive victim impact evidence is within the Appeal Division's discretion, having regard to the probative value of the evidence as compared with its prejudicial effect. In *Williams*,[67] the appellant had been convicted of aggravated assault against his wife after he broke into her house and stabbed her while she slept. He objected to his wife

being called as a witness, maintaining her evidence would be inflammatory and prejudicial. The Minister's representative submitted that the wife's evidence would show how she and her two sons had been affected as a result of the appellant's assault on her. The Appeal Division allowed the wife to testify. However, in *Pepin*,[68] the Minister's representative moved to permit the mother of the victim to testify as to how the death of her baby daughter had affected her. The Appeal Division refused to accept such evidence. The Minister's intention in producing the witness was purely for her to give evidence as to the emotional trauma suffered by virtue of the actions of the appellant, a matter, in the panel's view, more properly an issue to be considered by the Court in sentencing.

IV. EVIDENCE BEFORE THE ADJUDICATION DIVISION

A. Introduction

The Adjudication Division became a part of the Immigration and Refugee Board with the recent amendments to the *Immigration Act*. The Adjudication Division consists of 43 adjudicators appointed pursuant to the *Public Service Employment Act*.

The *Immigration Act* gives adjudicators the power to preside at inquiries to determine whether a person will be allowed to come into or remain in Canada, or will be removed from Canada. In addition, the detention of any person detained pursuant to the *Immigration Act* must be reviewed regularly by an adjudicator.

In deciding any such question, the adjudicator has sole and exclusive jurisdiction to determine all questions of fact, of law and of jurisdiction.[69] Given that important interests are at stake, both the inquiry to determine whether the person concerned has contravened the *Immigration Act* and the detention review hearing are conducted in accordance with procedures of a quasi-judicial and adversarial nature. Inquiries and detention review hearings are conducted in public[70] and in the presence of the person concerned.[71] The person concerned may be

represented by a barrister or solicitor or other counsel of his choosing both at an inquiry and at a detention review.[72] The Minister is represented by a case presenting officer (CPO) during the inquiry procedure; at detention reviews, he is represented by a senior immigration officer. Adjudicators decide informally and expeditiously.[73]

In any inquiry or detention review proceeding, the adjudicator is not bound by any legal or technical rules of evidence and may receive any evidence adduced in the proceedings that he considers to be credible or trustworthy.[74] The adjudicator has all the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may, *inter alia*, do anything necessary to provide for the full and proper conduct of any proceedings before him.[75] The adjudicator may use any methods he considers appropriate to be in a position to make a just and informed decision in accordance with the *Immigration Act and Regulations,* the *Adjudication Rules* and the principles of natural justice.

Although adjudicators are specialists in any immigration matters included in their jurisdiction, the Act does not authorize them to take official notice of the facts, opinions or information within the scope of their specialization, as is the case with the CRDD. In fact, the Act specifies that every decision must be based on evidence adduced at the inquiry or detention review hearing. Thus, foreign law must be proven,[76] but the adjudicator may take judicial notice of Canadian law.

At a detention review hearing, the adjudicator reviews the reasons for continued detention. At these hearings, the senior immigration officer must communicate the reasons for the person's detention to the adjudicator together with the reasons for his continued detention. The detainee will benefit from a reasonable doubt because freedom is the rule.[77] The reasons are generally presented *viva voce,* since an assessment of the detainee's credibility is often decisive.

Detention reviews do not require the use of special evidentiary methods. However, should it be necessary to resort to a telephone conference or to a video, the rules for the admissibility of

evidence before the Adjudication Division are unquestionably flexible enough to permit those methods.

CONCLUSION

The IRB is governed by very flexible rules of evidence that permit sufficient latitude to ensure that any evidence needed to resolve a case may be introduced without objection. Thus, testimonial, hearsay, documentary, video and telephone conference evidence are all admissible as long as they are relevant.

In spite of the flexibility of the statutory provisions, it has quickly become apparent that the IRB faces challenges requiring additional, and original, solutions. Such factors as the number of cases per year, regional decentralization of decision-making power and the number of members have militated in favour of more energetic measures to ensure that evidence is handled consistently.

The IRB is taking a number of actions in response to the challenge of diversity. It is ensuring that its members are as representative as possible of the socio-cultural diversity of those who appear before it. In addition, when they are appointed, members receive training that touches on evidentiary issues in a varied socio-cultural context, and that training is continued throughout their terms.

Generally speaking, we listen to interested organizations, to counsel and to the parties in order constantly to improve how we handle evidence in the face of the challenge of cultural and language differences and in the face of the diversity of experiences of life. This attitude is imperative as a reflection of our contemporary world, which is varied and in motion, like an inescapable challenge, at the legal and human levels.

FOOTNOTES

1. Immigration and Refugee Board, *Annual Report* (Ottawa: Immigration and Refugee Board, 1992) at 31.

2. *Ibid.*

3. Except when paragraphs E or F of Section 1 of the Convention Relating to Refugee Status are at issue. See *Immigration Act*, R.S.C. 1985 (4th Supp.), c. 28, s. 69.1(5)(b).

4. S. 68.1 of the *Immigration Act*, as modified by S.C. 1992, c. 49.

5. S. 68(3) of the *Immigration Act.*

6. *Nrecaj* v. *Canada (M.E.I.)*, [1993] 3 F.C. 630 at 638, Gibson J.

7. *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326 at 332.

8. *Adjei* v. *Canada (M.E.I.)* (1989), 7 Imm. L. Rev. 169 at 173 (F.C.A.).

9. CRDD M91-04966, Gilad, Sparks, October 23, 1991.

10. *Supra* note 8.

11. CRDD T89-00417, Kapasi, Dutchin, June 23, 1989.

12. *Molina, Mario Angel Riquelme* v. *Canada (M.E.I.)* (IAB 79-9363) Scott, Benedetti, Teitelbaum, July 9, 1980; CRDD M92-01445, Ven der Buhs, Brown, January 4, 1993.

13. CRDD V91-01681, Corley, Paetkau, November 16, 1992.

14. CRDD T89-01831, Shatzky, Menkir, February 5, 1990; CRDD M91-01910, La Salle, Fleury, October 28, 1992; CRDD U90-00398, U90-00399, Jackson, Goldie, June 18, 1991.

15. *Gonzalez, Maria Ines Arrechea* v. *Canada (M.E.I.)* (F.C.A., No. A-899-90) Desjardins, Heald, Hugessen, May 8, 1991. However, in this case, the decision appealed was from the former inquiry level which has now been dismantled. Before February 1st, 1993, the Refugee Determination process was a two-step process: the inquiry and the full hearing.

16. CRDD U91-01006, Harnett, Hanson, April 26, 1991 expert opinion by the Ahmadiyya Movement in Canada was used to verify the Ahmadi status of the claimant.

17. *Junkin* v. *Davis*, (1855-1856) 6 U.C.C.P. 408 (C.A.), Draper C.J. in a dissenting judgment.

18. On taking official notice of information by the CRDD, see F. Houle, "The Use of Official Notice in a Refugee Determination Process" (1993) 34 C. de D. 573; for a general analysis, see D. Lemieux & E. Clocchiatti, "Official Notice and Specialized Knowledge" (1991) 46 Admin. L. Rev. 126.

19. W. Gellhorn, "Official Notice in Administrative Adjudication" (1941-1942) 20 Texas L. Rev. 131.

20. *Lumley* v. *Gye* (1853), 118 E.R. 749 at para 267 (Q.B.); *Graham* v. *Grand Trunk Railway* (1912), 1 D.L.R. 554 (Ont. C.A.); *R.* v. *Lew* (1912), 1 D.L.R. 99 (B.C.C.A.).

21. *R.* v. *Potts* (1982), 134 D.L.R. (3d) 227 (Ont. C.A.); leave to appeal refused (1982), 134 D.L.R. (3d) 227 (S.C.C.). J. Sopinka & S.N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 357 and in Quebec, C. Fabien, "L'utilisation par le juge de ses connaissances personnelles, dans le procès civil" (1987) 66 Can. Bar Rev. 433 at 453.

22. See Laskin J. in a dissenting judgment: *R.* v. *Cameron*, [1966] 2 O.R. 777 at 811 (Ont. C.A.).

23. In *Asamoah, John Kofi* v. *Canada (M.E.I.)* (IAB 86-10286) Arkin, Eglinton, Tisshaw, April 25, 1988, the Immigration Appeal Board noted in its determination of whether prosecution for military desertion in Ghana could, under the circumstances, amount to persecution. No evidence was brought forward as to the normal punishment for desertion prescribed by Ghanaian military law. The panel therefore applied Canadian military law and took judicial notice of British military law in assessing whether the punishment likely to be meted out by Ghanaian authorities would be so disproportionate to the offence as to amount to persecution.

24. The right of members of tribunals to use specialized knowledge was recognized by the Supreme Court of Canada in a unanimous decision: *Cité de Ste-Foy* v. *Société Immobilière Enic Inc.*, [1967] S.C.R. 121.

25. See Lemieux & Clocchiatti, *supra* note 18 at 135.

26. *Maslej* v. *M.E.I.*, [1977] 1 F.C. 194 at 198 (C.A.).

27. Lemieux and Clocchiatti, *supra* note 18 at 144-145.

28. *Ibid.* at 150.

29. *Ibid*. at 149-152.

30. CRDD V90-00701, Siddiqi, Holloway, November 26, 1990; see also CRDD M90-04745, Gilad, MacPherson, February 6, 1991; *Verman, Surinder Kumar* v. *Canada (IAB)* (F.C.A., No. A-481-83) Le Dain, Marceau, Hugessen, October 27, 1983; *Permaul, Christolene* v. *Canada (M.E.I.)* (F.C.A., No. A-576-83) Heald, Thurlow, McQuaid, November 24, 1983; *Singh, Swaran* v. *Canada (M.E.I.)* (F.C.A., No. A-1346-83) Heald, Pratte, Thurlow, March 12, 1984.

31. CRDD M90-06112, M90-06113, Gilad, Murphy, December 5, 1990.

32. *Weatherall* v. *Harrison*, [1976] Q.B. 773; *Re Department of Labour and University of Regina* (1975), 62 D.L.R. (3d) 717 (Sask. Q.B.); *Boucher* v. *Canada (M.E.I.)* (1990), 105 N.R. 66 (F.C.A.).

33. *Aquino, Jose Felix Paniagua* v. *Canada (M.E.I.)* (F.C.A., No. A-344-89) Mahoney, MacGuigan, Linden, June 4, 1992.

34. *Lawal* v. *Canada (M.E.I.)* (1991), 13 Imm. L. Rev. (2d) 163 (F.C.A.).

35. *Sivaguru* v. *Canada (M.E.I.)* (1992), 16 Imm. L. Rev. (2d) 85 (F.C.A.).

36. IRB, "Preferred Position and CRDD Hearings Procedures Papers, What they Are and How they Should Be Used" in *Convention Refugee Determination Division, Preferred Position Papers and CRDD Hearings Procedures Papers* (Ottawa: IRB, tab 1).

37. CRDD T90-01590, Liebich, Clarke, March 7, 1991.

38. *Salibian* v. *Canada (M.E.I.)*, [1990] 3 F.C. 250 (C.A.).

39. W. Kalin, "Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing", (1986) 20 International Migration Rev. 230.

40. See CRDD V90-00182, Angus, Paetkau, January 9, 1991; where the IRB members suggest that common sense and a knowledge of human nature are also valuable tools when examining the credibility of the claimant. See also *Bains* v. *Canada (M.E.I.)* (F.C.T.D., No. 92-A-6905) Cullen, May 26, 1993 where the Court corrects the CRDD in that "Canadian paradigms do not apply in India".

41. Immigration and Refugee Board Documentation Centre, "Somalia: Information on the Naming of Children", Response to Information Request, April 9, 1991.

42. *Supra* note 40.

43. Immigration and Refugee Board, *Annual Report* (Ottawa: Immigration and Refugee Board, 1991) at 32.

44. S. Rusu, "The Development of Canada's Immigration and Refugee Board Documentation Centre" (1989) 1 Int. J. Refugee L. 319 at 323. In addition to the head office in Ottawa, there are five Documentation Centres across the country: Montreal, Calgary and Vancouver and two offices in Toronto.

45. It should be noted that some members of the CRDD hear IAD appeals from time to time. Section 59(4) of the *Immigration Act* allows members appointed to either Division to hear and determine cases of the other Division.

46. *Dan-Ash, Taysir* v. *Canada (M.E.I.)* (F.C.A., No. A-655-86) Hugessen, Marceau, Lacombe, June 21, 1988.

47. *Canada (A.G.)* v. *Jolly,* [1975] F.C. 216 (C.A.).

48. *Saddo* v. *Canada (M.E.I.),* [1981] 2 F.C. 703 (C.A.).

49. See *supra* note 47.

50. See, for example, *Rao, Lamber Dass* v. *Canada (M.E.I.)* (IAB 87-6165) Wlodyka, November 30, 1988 allowing the appellant's motion to remove a letter from the record.

51. See *supra* note 46.

52. *Immigration Appeal Division Rules,* SOR/93-46, r. 18 and 19.

53. *Ibid.* r. 17.

54. *Toth, Janos* v. *Canada (M.E.I.)* (IAD V91-00419) Wlodyka, Tisshaw, Chu, June 6, 1991.

55. *Kahlon* v. *Canada (M.E.I.)* (1989), 7 Imm. L. Rev. (2d) 91 (F.C.A.).

56. The exception being sponsorship refusals on grounds of medical inadmissibility. These refusals are founded on a medical officer's opinion, and the question in medical refusal appeals is whether the person concerned was suffering from the diagnosed condition and whether the medical officer's opinion was reasonable at the time it was given and relied upon by the visa officer: see *Mohamed* v. *Canada (M.E.I.),* [1986] 3 F.C. 90 (C.A.). Evidence of improvement in the condition is considered under the Appeal Division's "humanitarian and compassionate" jurisdiction.

57. See *supra* note 52, r. 7 and 11(3).

58. *Sidhu, Mohinder Singh* v. *Canada (M.E.I.)* (IAD V91-00647) Wlodyka, December 10, 1991. Before taking official notice, the Appeal Division drew the appellant's attention to two other cases in which it had taken notice of similar facts.

59. *Gossal* v. *Canada (M.E.I.)* (1988), 5 Imm. L. Rev. (2d) 185 (IAB).

60. *Dhillon, Amarjit Singh* v. *Canada (M.E.I.)* (IAB 80-6325) Davey, Benedetti, Hlady, April 8, 1981.

61. *Rajpaul* v. *Canada (M.E.I.)*, [1988] 3 F.C. 157 (C.A.).

62. *Cookson, Michael Edward* v. *Canada (M.E.I.)* (F.C.A., No. A-715-91) Marceau, Létourneau, Robertson, February 10, 1993.

63. *Jiwanpuri* v. *Canada (M.E.I.)* (1990), 8 Imm. L. Rev. (2d) 201 (IAD); aff'd (1990), 10 Imm. L. Rev. (2d) 241 (F.C.A.) without comment on the IAD's use of videotape evidence.

64. *Toor, Devinder Kaur* v. *Canada (M.E.I.)* (IAB 84-6167) Wlodyka, Mawani, Singh, November 14, 1986.

65. *Gill* v. *Canada (M.E.I.)* (1990), 10 Imm. L. Rev. (2d) 300 (IAD).

66. *Muehlfellner, Wolfgang Joachim* v. *Canada (M.E.I.)* (IAB 86-6401) Wlodyka, Chambers, Singh, October 26, 1988. The panel took the testimony of the victim's mother and sister into account. The decision was set aside for other reasons: (F.C.A., No. A-72-89) Desjardins, Urie, Marceau, September 7, 1990.

67. *Williams, Gary David* v. *Canada (M.E.I.)* (IAD W91-00014) Singh, Wlodyka, Gillanders, July 27, 1992; application for leave to appeal dismissed: (F.C.A., No. 92-A-4894) Mahoney, December 21, 1992.

68. *Pepin, Laura Ann* v. *Canada (M.E.I.)* (IAD W89-00119) Rayburn, Goodspeed, Arpin (dissenting), May 29, 1991. An appeal to the Federal Court was dismissed without comment on this particular ruling: (F.C.A., No. A-740-91) Heald, Stone, Robertson, May 19, 1993.

69. *Immigration Act, supra* note 4, at s. 80.1(1).

70. *Ibid*. s. 29(1) and 103(9). Unless the person concerned satisfies the adjudicator that public proceedings pose a serious risk to his life, liberty or security. In such cases, the adjudicator may take such measures and make such order as he considers necessary to ensure the confidentiality of the inquiry or review (s. 103(10) and (11), and 29(2) and (3)).

71. *Ibid*. s. 29(1). In respect of reviews, see the *Adjudication Division Rules*, SOR/93 - 47, s. 28(1) and 29.

72. This right is expressly provided for in section 30 in respect of inquiries, but not in respect of detention reviews. However, considering that a person's release is at issue, there is no question that a person has the right to counsel at such hearings as provided for at common law.

73. *Supra* note 4, s. 80.1(4).

74. *Ibid.* s. 80.1(5).

75. *Ibid.* s. 80.1(2)(*d*).

76. *Ibid.* s. 80.1(5). This restriction also existed under the old s. 46(4).

77. *Ibid.* s. 103(3)(*a*).