THE PARADOX OF REFUGEE PROTECTION IN CANADA:

LAW AND THE BUREAUCRATIC POLITICS OF EFFICIENCY

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Abstract

Over the course of the past few decades, access to refugee rights has been both expanded and restricted across the liberal democratic world. On the one hand, groups that previously had no ground for protection, such as domestically-abused women and sexual minorities, are now commonly considered legitimate refugees by liberal states. On the other hand, access to refugee systems and rights in the liberal world has become increasingly more restricted. This dissertation takes Canada as the site of its study to examine the paradoxical developments in access to refugee protection in the past thirty years. I draw on archival, interview, media and organizational data to argue that the Canadian refugee protection regime is a dynamic, complex and conflictual articulation of an expansionist and humanitarian impetus as well as a pragmatic and restrictionist compulsion. I suggest that these contradictory impulses are symptomatic of the paradoxical project of state-controlled refugee protection: the paradox of ensuring universal equality of rights through the exclusionary mechanisms of the nation-state. I further argue that the Canadian regime of refugee protection remains relatively stable despite its internal contradictions, by placing its conflictual impulses in systematic and structural arrangements. First, while expansions are primarily, although not exclusively, achieved in the field of legislation and jurisprudence, restrictions are, in large part, accomplished in administrative and bureaucratic fields. Second, while expansions in refugee rights emerge around tightly bounded categories of Convention refugees, gender-based claimants, and sexual orientation and gender identity refugees, restrictions concern ever-shifting, institutionally manufactured, and often nationally demarcated groups of excludable claimants. I suggest that these articulated arrangements maintain state-controlled refugee protection in place despite its internal paradoxes and keep refugee protection a promise that is never fully fulfilled.

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Introduction: The Paradox of Refugee Protection in Canada

During a casual dinner-table conversation, I once explained some of my research to a middle-aged American man. Almost immediately he broke into a giggle that expressed both amusement and shock at what he had just heard: that gay people can now become refugees too. Though he had the good sense not to make the point, I knew that he found me absurd for suggesting that there remained a problem with how wealthy western countries handled refugee protection.

The state of refugee protection may seem understandably confusing to any unfamiliar observer. On the one hand, refugee rights seem as expansive as one can reasonably imagine. The limiting refugee definition of the 1951 Convention Relating to the Status of Refugees has been stretched far beyond its original parameters. As a result, groups that previously had no ground for protection, such as domestically-abused women or sexual minorities, are now commonly considered legitimate refugees.

On the other hand, refugee advocates, lawyers and scholars claim in unison that access to refugee rights has become progressively more restricted in the western world (see Bohmer and Shuman 2008). As the UNHCR reports[1], only 102,800 of the world's 25.4 million refugees are resettled. The vast majority (85%) of the displaced live in the developing world, where chances of acquiring full citizenship and permanent legal residence are low. Meanwhile, wealthy liberal countries are highly unwelcoming to those who search for rights in their territories. Reports of legally questionable and inhumane treatments of refugee claimants, for instance in Australia's islands of detention (Jones 2017; Williams 2017; BBC 2016), is enough to paint a dim picture of

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[1] Report available at https://www.unhcr.org/figures-at-a-glance.html

the state of refugee protection in the developed world of liberal states. How can refugee rights have expanded and yet also have become more restrictive?

This dissertation studies the administration of in-land refugee claim processing in Canada to answer this question. "In-land" refugee protection, or the adjudication and processing of refugee claims that are made from within Canadian borders or at its official ports of entry, constitutes only one part of Canada's broader refugee protection framework. Canadian refugee protection also encompasses refugee claims that are made abroad at Canadian visa offices as well as a host of government and privately-sponsored resettled refugees. While in-land claims are decided by an independent administrative tribunal, refugee claims that are made abroad are processed by visa officers who fall under the direct mandate of the Immigration Department, currently titled Immigration, Refugees and Citizenship Canada. In distinction, claims of resettled refugees are primarily processed by international organizations such as the UNHCR. Of course, all refugee claimants, regardless of their site of claim making, are cleared through security screenings of the Canada Border Services Agency (CBSA), a federal agency under the mandate of the Minister of Public Safety and Emergency Preparedness that assumes sole responsibility for border protection and immigration enforcement. In this dissertation, I study Canada's in-land refugee protection to demonstrate that access to refugee protection in Canada has been simultaneously expanded and restricted over the course of the past thirty years. My dissertation explains how these contradictory developments have been achieved and maintained.

I argue that the Canadian refugee protection regime is a dynamic, complex and conflictual articulation of an expansionist and humanitarian impetus as well as a pragmatic and restrictionist compulsion. I suggest that these contradictory impulses are symptomatic of the paradoxical project of state-controlled refugee protection: the paradox of ensuring universal

equality of rights through the exclusionary mechanisms of the nation-state. As I will show, the neoliberal[2] iterations of this paradox maintain refugee protection as a contradictory state project. I further argue that the Canadian regime of refugee protection remains relatively stable despite its internal contradictions, by placing its conflictual impulses in systematic structural arrangements. First, while expansions are primarily, although not exclusively, achieved in the field of legislation and jurisprudence, restrictions are, in large part, accomplished in administrative and bureaucratic fields. In other words, legislative and jurisprudential expansions are continually counterbalanced by policy interventions, institutional practices, and bureaucratic procedures that maintain restrictive boundaries on refugee protection. The law and bureaucracy work in relative autonomy from each other, and yet with one another, to keep refugee protection a promise that is never fulfilled.

Second, while expansions in refugee rights emerge around tightly bounded categories of Convention refugees, gender-based claimants, and sexual orientation and gender identity (SOGI) refugees, restrictions concern ever-shifting, institutionally manufactured, and often nationally demarcated groups of excludable claimants. Against and with every instance of legislative or jurisprudential expansion, these scapegoats hold the administrative threshold of Canadian refugee protection: when the law expands rights for women and SOGI refugees, the bureaucracy finds other, supposedly distinct, groups to exclude from protection. Of course, groups who become subjects of restriction are produced in some reference to the exclusions written into the law. Indeed, with its limited terms of application, refugee law offers the basis for adaptable

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[2] In-land refugee protection in Canada predates the advent what has come to be known as neoliberalism: a fiscally conservative and austerity-promoting logic of governance that has come to roll back much of the equality-inducing measures of the Keynesian welfare states in the liberal world and across the globe (McCluskey 2003; Hartman 2005). However, as I will show in Chapter 1, systematic refugee protection in Canada coincided with the gradual rise of neoliberalism in public administration, and consequentially became increasingly framed by its economic logics in the following decades.

forms of restrictionism. Yet, the bureaucracy is a chief agent in translating abstract legal notions to actual exclusions. In fact, the various national configurations of excludable claimants are produced by the refugee claim processing bureaucracy according to its situated priorities and interests; the targeted nationalities are those whose exclusion is of most administrative value and least political liability in specific historical moments. The continuous production of targets of exclusion keeps the Canadian regime continuously restrictive.

This dissertation traces both the enduring penchant of state-controlled bureaucratic refugee protection for restrictionism[3], and the evolving formulations of this tendency over the past three decades. Restrictionism, exclusion, and inequality are inevitable features of state-controlled bureaucratic refugee protection. Over the course of the past thirty years, the impetus for bureaucratic restrictionism has become progressively entangled with neoliberal rationalities. As all functions of governance have become increasingly subsumed under tropes of economic viability, bureaucratic restrictionism has become an even more intense compulsion. Under the austere economic logics of neoliberal governance, refugee protection has barely managed to become a viable bureaucratic project by way of efficient claim processing and imposing systematic restrictions on access to rights. Yet, restrictionism and efficiency are poor threads for weaving a safety net for the unprotected and the displaced. Thus, it is only inevitable that the lofty legal promise of protection would die in the underfunded, strained, and efficiency-focused dungeon of bureaucracy.

This analysis juxtaposes the expansionist desires of the law with the restrictionist impulses of the bureaucracy to understand the contradictory developments of Canadian refugee

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[3] Restrictionism is a term widely used in refugee and immigration policy literature (for instance see Markowitz (1973), Simcox (1997), Zetter and Pearl (2000), Pedraza (2014)) to refer to a policy that favours imposing limits on immigration.

protection. Of course, neither is the law purely expansionist[4], nor is the bureaucracy exclusively

restrictive. To the contrary, as I will demonstrate throughout this dissertation, refugee law itself

provides the basis for serious forms of exclusion. Similarly, the bureaucracy is, at times,

productive of significant expansions. Nonetheless, in the past thirty years of systematic refugee

protection in Canada, the law and bureaucracy have regularly moved in seemingly incongruent

directions: legal rights have expanded for some categories, while bureaucratic access has been

hampered, particularly for specific groups of claimants. I argue that the articulation of

expansionist and restrictionist impulses *mostly* in these separate fields, and in relation to

supposedly distinct subjects, has helped the Canadian refugee protection regime advance

contradictory agendas without losing its overall coherence. In short, these articulated

arrangements sustain the Canadian regime despite, and through, its paradoxes.

In the next section, I will elaborate on the paradox of state-controlled refugee protection.

I.   The Paradox of State-Controlled Refugee Protection

The Canadian refugee protection regime is an internally contradictory system. On the one

hand, this regime is founded on the premise that all humans are equal and natural bearers of

rights. Refugee rights are based on the universality of human rights[5], particularly the right to live

free from political and religious oppression. In fact, asylum has long been associated with respect

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[4] This is particularly true for procedural law. As the body of rules and regulations that govern legal proceedings, procedural law is more closely connected with administrative considerations. In contrast, substantive law, which establishes the ideal principles of justice and equality, is less bound by practicalities of administering justice. For more on this see King G. Mcshane (2006a, 2006b).

[5] In the legal scholarship, human rights and refugee rights are separated, in part due to their differing approach to the question of state sovereignty: in human rights law, the sovereign state remains the basis and guarantors of human rights, while refugee law locates rights outside the domain of the (persecutory) state. For more on this see Goldenziel (2016).

for natural human liberty[6]. As a regime that administers refugee rights, hence, the Canadian refugee protection regime is centrally organized around the universal equality of all humans.

On the other hand, the Canadian refugee protection regime is a state agency that contributes to and participates in the exercise of exclusionist national sovereignty. With the rise of the nation-state system as the dominant form of political organization (Balibar 1991), control over borders has gradually emerged as an exclusive state prerogative (Torpey 2000, Mongia 2007). In the "national order of things" (Malkki 1992, 25), the citizen is the only proper subject of political life, and the state is the primary authority over population and territory. National citizenship, of course, is a work of social closure (Brubaker 1992): only some are included in the "imagined community" of the nation (Anderson 1991), while others are excluded. In other words, the nation-state creates the desire, the logics, and the apparatus for systematic exclusion.

Furthermore, the global system of nation-states is perhaps much more apt at creating refugees than protecting them. Historically, the coupling of the nation and the state has resulted in mass displacement and expulsion of ethnic and religious minorities in Europe and around the globe (Loescher 1993). Refugees are, in large part, the result of the monopolization of political life by the nation-state. Moreover, the nation-state system relies on producing and problematizing refugees to consolidate authority over migration regulation and border control (Soguk 1999, Haddad 2008). As Hannah Arendt (1973 [1951]) has argued, in a global system where the nation-state is the sole generator and administrator of rights, those outside of the bounds of national citizenship, such as refugees, are simply rightless. In short, protecting refugees and ensuring the universality of their human rights are largely incongruent with the operations of the nation-state.

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[6] For instance, see Alison Bashford and Jane McAdam's (2014) discussion of asylum in early twentieth century Britain.

The paradox of refugee protection in Canada is, at its core, the difficulty of administering universal equality through the exclusionary mechanisms of the nation-state. The contradictory impulses of the Canadian refugee protection regime are a reflection of this difficulty. The Canadian regime is a small part of the wider network of agencies and actors that control, restrict, and regulate access to territories, rights, and citizenship in Canada. The operations of this regime are inevitably exclusionary and both productive of and a manifestation of global inequality[7]: the Canadian regime is meant to control and restrict access to residency and citizenship rights in Canada. As a result, the Canadian refugee protection regime is charged with the contradictory task of administering universal equality, while also maintaining exclusivist and exclusionary control.

The paradox of state-controlled refugee protection creates a highly qualified notion of "universal" rights. Indeed, international refugee law imposes significant restrictions on protection. The 1951 Convention Relating to the Status of Refugees defines the refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" [8](14). The subject of rights in this definition was, and continues to be, seriously qualified. Aside from the obvious assumption of masculine subjecthood (hence the pronoun *he*), the 1951 definition was initially defined through geographical and historical parameters that made refugee protection exclusively applicable to Europeans[9]: protection was restricted to those

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[7] As Barry Hindess (2000) shows, given the existing geopolitical inequalities, those most negatively affected by the exclusionary operations of the nation-state system are the citizens of poor countries. In effect, the global nation-state system disadvantages the majority of the world population.

[8] For the full text of the 1951 Convention see https://www.unhcr.org/3b66c2aa10

[9] The international regime of refugee protection was originally created in response to the mass displacement of ethnic, religious, and political minorities in Europe in the early twentieth century (Loescher, 1993). As a result, this system has largely reflected a Euro-centric vision of protection.

who fled persecution as a result of "events occurring in Europe before 1 January 1951" (15). The original drafters of the Convention, particularly the representatives of the US government, were adamant about keeping the Convention definition limited to displaced Europeans (Glynn 2011). A more general definition, they feared, could impose considerable financial costs, and erode state control over who and how many people became entitled to protection. States were not keen to make rights universal, and refugee law reflected this political intent[10].

The limiting geographical and historical parameters of the Convention were eventually amended through the 1967 Protocol, allowing refugee protection to be extended to all regions of the world. Even though the 1967 Protocol expanded the reach of refugee protection substantially, it constituted a relatively conservative change in the context of its time. As Gil Loescher (1993) shows, Euro-American countries conceded to the Protocol in part to avoid the much more expansive conceptualization of persecution advanced by the Organization of African Unity (OAU). In the OAU's definition, those affected by generalized forms of violence (such as war, occupation, foreign domination, or other events that seriously disturb public order) were considered refugees. By recognizing generalized violence as a basis for protection, the OAU drastically diverged from the Convention's exclusive focus on limited forms of individualized, state-sanctioned persecution. Hence, by expanding the geographical reach of the Convention, the 1967 Protocol helped maintain a limited notion of protection over much more expansive proposals: protection remained only applicable in cases involving the direct violation of individual civil and political rights by states.

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[10] Convention definitions were also heavily shaped by the growing tensions between the communist bloc and liberal democratic countries after the Second World War The US, in particular, termed the Convention in ways that would encompass political refugees from Eastern Europe, and facilitate discrediting new communist countries. For more on the Cold War politics of refugee protection see Loescher (1993).

The exclusive focus of the Convention on political and civil rights is not accidental. The Convention was crafted both with an eye for the sensibilities of liberal democratic states, and based on existing liberal conceptualizations of asylum (Glynn 2011). Consequently, it reflected the uneven liberal emphasis on political and civil rights, to the marginalization of social and economic ones. Although in reality civil, political, economic and social rights[11] are interdependent and inseparable, the common attribution of their genesis to competing political localities has made for intense ideological politics. Civil and political rights are commonly associated with the French and the American bourgeois revolutions in the late eighteenth century, while economic and social rights are associated with the socialist revolutions of the early twentieth century[12] (Marks 1981). As Susan Koshy (1999) demonstrates, in the international arena of human rights, western countries championed, and somewhat successfully established, civil and political rights over economic, social and cultural rights, which were advanced by Third World and socialists states. In other words, inter-state and ideological politics strongly informed legal provisions of protection.

The exclusive focus on civil and political rights in the existing definition of the refugee is not solely a matter of ideological dispute. Rather, this uneven focus is rooted in the prioritization of the political domain in liberal law. As Capra and Mattei's (2015) thoughtful historical review suggests, with the gradual rise of liberalism as the principal mode of governance, the law was reduced to a dichotomy between the individual's right to private property, and the state's right to sovereignty. This dichotomy eradicated the previously existing rights to the commons, a realm

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[11] For a fuller discussion of these rights, see Marshall (2009 [1950]).

[12] This analytical schema can be criticized for overlooking numerous contradicting nuances. For instance, the facts that American women and racial minorities did not have the political right to vote until much later, or that Roosevelt strongly supported economic rights in the US, challenge this geographical dichotomy. For more on this see Zeleza (2007) and Whelan and Donnelly (2007).

owned and accessed by all, including the most dispossessed. As individual property and state

sovereignty became the organizing pillars of law, the poor ceased to exist as subjects of rights.

Hence, the commons were quickly transformed into capital, and the law became exclusively

consumed with defining the relations between the only two existing legal subjects: the sovereign

state and the property-owning citizen. Hence, the tendency in refugee law to prioritize violation

of citizens by states (civil and political rights) over and beyond, for instance, violation of

workers by capitalists (economic rights) or farmers by ecological devastation (ecological rights),

is a direct lineage of liberal conceptions of rights; refugee rights are limited to the relations

between the individual citizen and the state. In this conception, the emaciated, dispossessed, and

devastated migrant may become displaced, yet she does not become a rightful refugee. Similarly,

those harshly affected by generalized violence fail to fit the narrow agenda of refugee protection.

The subject of refugee rights, consequently, is plagued by serious qualifications.

The qualified nature of refugee protection is further complicated in the more recent

iteration of *neo*liberalism, a mode of governance that, to quote Wendy Brown (2015) "configures

all aspects of existence in economic terms." As Brown notes, neoliberalism converts "the

distinctly *political* character, meaning, and operation of democracy's constituent elements into

economic ones" (2015, 17). With the overwhelming '"economization" of political life' (Brown

2015, 17), refugee protection becomes centrally occupied with fast, efficient, and cost-effective

processing of refugee claims, to the marginalization of humanitarian concerns or principles of

equality and justice. As economically driven logics, rationalities, and sensibilities unabashedly

run the show, equality takes a back seat. The economic logics of neoliberalism qualify equality

via novel economic-centred mechanisms. The rightless unequal is no longer explicitly produced,

as it once was, through gendered and racialized assumptions of irrationality[13]. Rather, she is rendered unequal because of the economic unfeasibility of treating her as a true, rightful equal. Neoliberal refugee protection finds it simply not viable to protect the economically deprived or survivors of generalized violence. Those fleeing poverty and socio-political instability are too many, too eager, and too costly. Hence, migrants who fail to fit the tight legal jacket of individualized state-sanctioned persecution remain the anchor on which the door of refugee protection closes.

The failure of neo/liberal governance to deliver universal equality, however, is much more than a simple flaw. Rather, the failure[14] to deliver equality at once produces the conditions for neo/liberal continuity. In other words, inequality is both an outcome of neo/liberal governance, and a basis for the supposed need for it. As Elizabeth Povinelli (1998) has thoughtfully argued, the perpetually unfulfilled promise of liberal equality works to present justice as a project always in the making. The unfulfilled promise is one that demands our faithful anticipation. Liberalism survives off of our waiting for justice. It sustains its own futurity by promising and never fulfilling; in fact, by promising the equality that it will never fulfill.

Following this insight, I take the two contradictory impulses of the Canadian refugee protection regime as inherent to the operations as well as the continuity of this regime. The expansionist and humanitarian impetus of the Canadian refugee protection regime is an extension of the liberal claim to universal equality[15]. This claim musters our consent and mobilizes our

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[13] Uday Mehta (1990) and Carole Pateman (1988) have shown that for John Locke and other liberal thinkers the "natural" equality of individuals was conditional on possession of adequate rational capacities; these rational capacities were, rather conveniently, deemed to be deficient in people who were treated most unequally in liberal and colonial regimes: women and the colonized were considered unequal and incapable of equality.

[14] For more on the role of failure in statecraft see Scott (1998).

[15] Given the rise of neo-fascism in the liberal democratic world, one may rightly question the relevance of the liberal promise of equality in our time. There is no doubt that the promise of equality is quickly being replaced by violent and nationalist objectives of supposed self-protection. Nonetheless, two points may be made in defense of interrogating the liberal promise. First, though perhaps eroding now, the promise of equality has been a key

support for Canada's refugee policy. In turn, the nation-centred restrictionist compulsions of the

Canadian refugee protection regime provide the qualifying conditions that narrow the focus of

equality and reserve rights, ultimately, for the citizen. Together, these two impulses tell us that,

for instance, refugees deserve protection, but not at the expense of Canadians. Such cooperative

arrangements hold Canada's state-regulated regime of refugee protection in place, despite its

many failures, problems and injustices. Indeed, the Canadian refugee protection regime relies on

its contradictions to secure its continued existence. Its promises and failures, its contradictory

agendas, and its internal paradoxes, keep us hopeful and trusting, and ensure that Canada

continues to exercise its sovereign rule in relation to refugees.

II.   Theoretical Foundations: Articulation and Field

In this dissertation I argue that the Canadian refugee protection regime is a dynamic

articulation of contradictory impulses. In this, I draw on the concept of articulation, as developed

by Stuart Hall.

Hall's concept of articulation builds on the work of Gramsci, Althusser and Laclau in

developing a more nuanced theory of ideology (Hall 1980, 1985). Articulation is an attempt

against the tendency in orthodox Marxist thought to theorize the relationship between the base

(economy) and the superstructure (civil society and state) in overly reductionist and

economically deterministic ways. In Hall's view, Marxist economic determinism fails to

adequately account for complex nuances that make up social formations: the attempt to explain

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component of liberal rule. Hence, at least from a historical and genealogical point of view, this promise is worth
exploration. Second, while the promise of equality is on the retreat, it has not completely lost its weight in all
contexts. Many states, including Canada's, continue to gesture to a promise of universal equality and rights through
their refugee protection frameworks. As long as states provide refugee protection, however minimally and
nominally, the promise of equality continues to be made. This promise, and the limited forms of protection it offers,
may cease to exist in the years to come; yet, at this moment the making and remaking of the promise of equality
continues to be a part of the mechanism of political governance.

all effects via economic forces leads to overlooking diverging processes and contradictory outcomes. Thus, this mode of analysis lacks the capacity to theorize difference. Hall is also wary of post-modern and post-structural theories, which, in his view, capably theorize pluralities yet fail to explain the unity of social formations. For Hall, while the former theoretical framework neglects to theorize difference, the latter overlooks unity. Through the concept of articulation Hall proposes a third option, one that enables the necessary work of "thinking unity *and* difference; difference *in* complex unity" (Hall 1985, 93). Hence, articulation provides a way out of the impasse of economic determinism, without falling into relativist and overly pluralist modes of analysis (Hall 1980).

Hall defines articulation as the joining of distinct and disparate elements in contingent and complex unities. Articulated linkages are marked by specific characteristics. First, the linkages that produce complex articulated unities are not given *a priori*, nor are they necessary and eternal. Rather, these linkages are dynamically produced and reworked. In Hall's words, articulation involves "a linkage between that articulated discourse and the social forces with which it can, under certain historical conditions, but need not necessarily, be connected" (Grossberg 1986, 53).

Second, the joined elements of an articulated unity, "though connected, […] are not the same" (Hall 1985, 325). These elements are not reducible to one another, an expression of one another, or even in perfect harmony. Rather, articulations may involve the joining of disparate, relatively autonomous, and at times surprisingly inconsistent elements, in delicate, historically specific and even contradictory balances. Citing Althusser, Hall describes articulations as fusions "into a ruptural unity" (Hall 1985, 95). For him, articulations are as much about unities as they are about contradictions and inconsistencies.

Third, while articulations involve incoherent and ruptural joinings, they are not simply an association of random and incoherent elements. Far from it, articulations are "complex *structures*" (Hall 1980, 325, emphasis mine); they involve structured relations between their internally joined elements (Hall 1980, 325), and exhibit structured tendencies and configurations (Hall 1985, 91). Articulations are not neutrally associated things; rather, they are outcomes of power struggles and are geared towards accomplishing certain goals[16]. However, the relations, tendencies, configurations, and accomplishments of articulations are not pre-determined, and cannot be reduced to the operations of one single element (Hall 1985).

Fourth, articulations are not given, but are achieved through practice. Articulated structures are actively and practically produced and reproduced; they are outcomes of "previously structured practices" (Grossberg 1986, 95). Nonetheless, this does not make articulations outcomes of unhampered, agentic actions. Practices that produce articulations are framed by structural forces that limit and shape them. As Hall puts it, "we make history, but on the basis of anterior conditions which are not of our making" (Grossberg 1986, 95). Hence, articulations are neither produced through fully agentic practices, nor are they inescapably pre-determined. This means that articulations cannot be mapped out without rigorous empirical study. In turn, much can be gained from studying the complex and contradictory linkages that form articulated unities under specific historical circumstances. This dissertation, in many ways, undertakes such study.

Hall's concept of articulation offers a helpful theoretical lens for this project. Above all, it necessitates a structural, empirically-grounded mode of analysis that, to my mind, is the necessary basis of a sociological study. Moreover, this concept accounts for the multiplicity of

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[16] For instance, see Hall's (1980) preliminary analysis of racism in relation to capitalist development.

social forces and their at times contradictory and incoherent relations, such as the contradictory impulses of the Canadian refugee protection regime. In addition, the concept of articulation acknowledges the structured agency of actors and institutions, without losing sight of the enduring and encompassing material conditions that frame social practice. Hence, it helps explain both the dynamism and transformations within the Canadian refugee protection regime, while also explaining its enduring tendencies. All in all, the concept of articulation enables a systematic exploration of the contradictory forces that operate within a complex and multi-faceted domain.

Hall's concept of articulation considers the contingent and dynamic attachments of diverse elements that form a given social formation. In the case of this study, these attachments involve the fields of law and bureaucracy; I argue that the Canadian refugee protection regime articulates its contradictory impulses in these two fields. In this argument, I draw on Pierre Bourdieu's theory of social fields.

Like Hall's concept of articulation, Bourdieu's theory of fields is an attempt to more adequately account for the nuances and multiplicity of social formations beyond the determinacy of economic forces. Bourdieu defines fields as structured and relatively autonomous domains comprising of actors and institutions (Bourdieu 1993; Hilgers and Mangez 2014). While different and relatively autonomous, fields are marked by structural similarities; for instance, all fields are organized around internal rules, standards, hierarchies, and are sites of continuous struggle and competition for pertinent types of capital.

Bourdieu committed much of his sociological career to studying the internal mechanisms and struggles within fields, such as the field of cultural production (Bourdieu 1993b). Unlike Bourdieu, in this dissertation I am less concerned with what transpires within a specific field.

Rather, I am principally interested in exploring the relations and linkages between various fields, as well as the overarching outcome of these arrangements. Although my analysis of fields does not engage much of Bourdieu's principal focus, it is nonetheless informed by Bourdieu's theorization of the ways specific fields, such as the economic field, affect and shape other fields (Bourdieu 1996).

Using Bourdieu's concept of field together with Hall's theory of articulation allows an inroad in the analysis of the contradictory impulses of the Canadian refugee protection regime. This concept helps situate the paradoxical developments of the Canadian regime within the operation of relatively autonomous systems of institutions, actors, and logics that nonetheless produce a somewhat stable, though internally conflictual, formation. In effect, Bourdieu's concept of field provides a way of discerning the site of these paradoxical developments. As I will show, within the Canadian refugee protection regime expansions are primarily placed in the field of law, while restrictions are implemented mostly in the field of bureaucracy. The relative autonomy of these fields allows contradictory developments initiated and accomplished by different actors, institutions and logics. Hence, they concur without disturbing the initiatives undertaken in and by other fields. Together, the two articulated fields provide the mechanisms for maintaining and advancing the paradox of refugee protection.

III.   Within the Field: (Immigration) Bureaucracies and the Administration of Law

The systematic injustices of refugee protection and broader systems of migration control has been capably critiqued by a large and strong body of critical scholarship (Razack 1995, 1999; Abu-Laban 1998; Thobani 2000, 2007; Li 2001; Silverstein 2005; Razack, Thobani and Smith 2010; Bracke 2012; Jungar and Peltonen 2015; Mayblin 2017). This scholarship has been

particularly insightful in sketching the racialized violence of migration control and situating the

law and migration control systems within the ongoing projects of white settler colonialism.

While highly productive, this scholarship has left some patterns of migration injustice seriously

unexplained. For instance, the existing scholarship does not explain why some black bodies, such

as Somali refugees, have been readily accepted by the Canadian refugee regime, while other

black claimants, such as Jamaicans in the early 1990s (as discussed in Chapter 1), became prime

targets of systematic exclusion. In my view, the overwhelming preoccupation of the critical

scholarship with discursive and representational analysis has impeded serious engagement with

some of the nuances of migration regulation. I suggest that an analysis of the operations of

migration control systems at the meso-level of the bureaucracy offers much in the way of

explaining these nuances. Above all, an analysis of the bureaucracy requires grounded

engagement with actual processes of claim making and their outcomes. As I will show

throughout this dissertation, such analysis helps explain some patterns of injustice that cannot be

simply reduced to the discursive limitations of the law. In many ways, a focused study of the

bureaucracy offers a much needed material analysis to the critical literature on migration control.

The existing scholarship on immigration and refugee systems has taken two broad

approaches to conceptualizing the relationship between bureaucracies and the laws they

administer. One approach has considered the bureaucracy in a cooperative and co-productive

relation to law, while the other has formulated the bureaucracy in a relation of reaction to law

and legal change.

The first approach, largely influenced by Foucault's work on discipline, biopower and

governmentality (2008 [1978-79], 1995 [1975], 1990 [1976], 1988 [1965]), has examined the

ways bureaucracies act in tandem and coordination with law to coproduce regulation. In this

approach, bureaucracies are active partners with law in regulating migrant and refugee movements across territories; bureaucracies operationalize, enable, and even expand the regulation envisioned, initiated, or aspired to by law.

A number of insightful studies have examined bureaucratic operations as part of the wider network of laws, technologies and discourses that produce and organize migration control. Radhika Mongia (2017), for example, has outlined the making of a migration control bureaucracy in the regulation of Indian indentured migration to British colonies. Mongia has shown how the bureaucracy both operationalized ambiguous legal stipulations, and expanded and codified disciplinary regulations regarding migrant bodies. Prem Kumar Rajaram (2013) has similarly presented the bureaucracy as a crucial element in the wider network of migration control. He has demonstrated that bureaucratic practices in relation to those seeking refuge contributed to establishing the territorial rule of the state.

Other studies have highlighted the cooperative work of bureaucracies in and beyond migration regulation. For instance, Nandita Sharma's (2006) study of migrant workers, and Sherene Razack (1998), Hijin Park (2015) and David Murray's (2016, 2014a) examinations of refugee claim adjudications in Canada have exposed the contribution of immigration and refugee bureaucracies to broader projects of nationalist capitalism, neocolonial inequality, and exceptionalism and homonationalism (Puar 2007). In these works, not only does the bureaucracy cooperate with law, but it does so towards larger projects that encompass, but are not limited to, migration control.

Scholars have also suggested that bureaucracies cooperate with projects of migration control by producing subjects of regulation through their practices. Nezvat Soguk (1999), for instance, has shown that by problematizing refugee movement and the refugee category itself,

international refugee governance bureaucracies have created reasons and opportunities for state intervention and migration control. Relatedly, David Murray (2011) has shown that SOGI refugees are produced in and through the very system that is set up to regulate them. These studies have suggested that bureaucracies contribute to the work of migration control by (co-) producing subjects of regulation. All in all, the first approach has helpfully sketched the active, cooperative, and relatively conflict-free marriage between bureaucracy and law in producing subjects, opportunities, and technologies for regulating migration and inter-territorial movement[17].

The second approach to the study of law and immigration bureaucracies has placed bureaucracies in a relation of perpetual reaction to law. Most notably, although not exclusively, informed by Michael Lipsky's (1980) study of front-line public servants, this approach views bureaucratic work as a set of conflicting, challenging, and never-ending dilemmas, undertaken by actual humans in everyday or exceptional material and institutional settings. Although in this approach bureaucracies remain active and even innovative bodies, they are imagined to be in far less harmony with the law. Instead, this approach considers bureaucracies as strained, frustrated and even dysfunctional partners that, nonetheless, continuously work to appease high legal demands in the face of institutional and political pressure, technical ambiguity and ethical dilemmas.

Multiple studies have examined bureaucratic operations under exceptional or ordinary political, legal and institutional pressures. For example, in her study of the response to the 1999 boat arrivals in British Columbia, Alison Mountz (2010) has offered rare insight into how migration control bureaucracies operate on the fly, in reaction to novel and unexpected crises,

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[17] For other examples of this approach see Broeders (2010), Carver (2016), Bieh (2015) , Ong (2003), Sidhu and Taylor (2007) and Gargiullo (2017).

and under unrelenting political pressure. Conversely, Vic Satzetwich's (2015) study has revealed the strain, constraint and pressure Canadian visa officers experience in their everyday discretionary practices. These studies have shown that bureaucratic work involves ongoing and real-time negotiations in which the law is only one of the many factors to be reckoned with.

Furthermore, a growing body of scholarship has examined the troubled and troubling work of bureaucrats in applying abstract and ambiguous regulations to actual immigration and refugee cases. This scholarship has revealed the highly personalized, creative and affective strategies bureaucrats use to cope with technical and legal ambiguities and evidentiary intelligibilities. For instance, Sule Bayrak (2015) has documented the personalized styles of Canadian refugee claim adjudicators in determining refugee status[18]. David Murray (2014b), furthermore, has shown that in the absence of irrefutable proof, adjudicators rely on their intuition and affective senses to assess the credibility of SOGI claimants. Moving beyond the personalized strategies of individual bureaucrats, Jaeeun Kim (2011) has offered insights into institutional methods for handling evidentiary ambiguity. Her study on the immigration claim processing of Korean migrants from China to South Korea, explores how bureaucracies try to discern kinship and marital status in the face of uncertainty and in the absence of reliable documentation. In sum, the second approach has outlined the challenging and conflict-ridden work of bureaucracies in upholding legal requirements given prevailing institutional limitations, technical ambiguities and political pressures[19].

This dissertation takes a third approach to the study of law and bureaucracies, one that considers bureaucracies not in relations of cooperation or reaction with the law, but in a position

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[18] Other studies that have explored the personalized styles and ethos of individual bureaucrats include Jubany (2011), Feldman (2008), Fuglerud (2004).
[19] For other examples of this approach see Saltsman (2014), Cabot (2014), and Mukhtar et al. (2016).

of relative autonomy from it. I take the bureaucracy to be interdependent with and connected to the law, yet also somewhat separate and independent from it. By conceptualizing the bureaucracy as a relatively autonomous field (Bourdieu 1993), with its own internal organization, logics and systems of operation, I afford the bureaucracy an independence that is, in my view, largely absent in the literature on refugee and migration control systems[20].

Considering the bureaucracy as a *relatively* autonomous field, of course, does not mean that bureaucracies have, in any way, *absolute* autonomy in the conduct of their operations. Bureaucracies are deeply entangled in a tight web of relations with the law and political regimes. Indeed, they cannot move freely, or at all, without disturbing other fields or causing reactions from them. Moreover, this is not to suggest that bureaucracies always and necessarily resist the law or other overpowering forces. To the contrary, this dissertation will offer multiple examples of bureaucratic cooperation, reaction and subordination. To cite one example, in chapter 3, I will show the willful cooperation of the Canadian refugee claim processing bureaucracy in implementing the Designated Country of Origins policy as well as its disenchanted reaction to the imposition of extremely short adjudication timelines by the Protecting Canada's Immigration System Act (2012). Indeed, the bureaucracy is incessantly vulnerable to being overpowered by more forceful agents, and bureaucratic cooperation and reactions are regular features of the Canadian regime of refugee protection.

Nonetheless, I suggest that bureaucracies do far more than simply cooperate with or react to law. As Max Weber (1978 [1922]) argued close to a century ago, bureaucracies are not neutral

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[20] A notable exception is Landau and Amit's (2014) study. This study highlights the considerable autonomy of bureaucracies in shaping, implementing, and resisting expansive refugee policy. Landau and Amit show, for instance, that bureaucracies may resist legal and policy expansions by refusing to commit to adequate training or operating through management models that overemphasizes quantifiable output rates. Dagmar Soennecken (2013) has also outlines the growing managerialization of refugee protection bureaucracy in Canada, to the disadvantage of access to legal protection. In both of these cases, the bureaucracy operates based on logics that are distinct from and even at odds with those promoted by judicial and legal actors.

devices, but structures with specific ingrained tendencies. For Weber, the bureaucracy is rigidly organized around modern rationality[21]; rationality both regulates and is reproduced through bureaucratic work. Sociologists such as George Ritzer (2013 [1993]) have further suggested that the highly rationalized bureaucratic mindset has permeated and oriented all aspects of life to compartmentalized, joyless, streamlined and efficient conduct. As I will show in this dissertation, the rational bureaucratic penchant for efficiency has even overtaken the moral and humanitarian realm of refugee protection. Regardless of the nature of its mandate, the bureaucracy is internally structured to prioritize administrative efficiency.

The bureaucratic compulsion for efficiency means that bureaucracies have, at least to some extent, a mind and logic of their own. Bureaucracies are not completely subsumed within the law or political agendas. As relatively independent actors, bureaucracies constantly work towards their own goals and interests. These goals and interests at times converge with or diverge from those of other forces in the immigration and refugee regime. Hence, bureaucracies full-heartedly cooperate with the law when it is in their self-interest, desperately react to it when overpowered, or manipulate and resist it when possible and preferable. Bureaucracies play the game of immigration control along with the law, making strategic alignments with and against it. They play tactfully and with relative autonomy. It is, in fact, due to the relative independence of the bureaucracy from the law (and other forces) that contradictions erupt quite regularly within the Canadian refugee protection regime. And it is precisely because of this relative independence and ever-present potential for conflict that I have come to theorize the Canadian refugee protection regime as an articulated formation: stable and unified through unstable and contradictory, yet systematic, linkages.

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[21] For Weber, bureaucratic rationality is deeply paradoxical as it regularly leads to meaninglessness and irrationality.

Although perhaps widely overlooked in the literature on immigration studies, the relative autonomy of bureaucracies in administering the law has been explored in other areas of sociology. The scholarship on bureaucratic implementation of employment and civil rights law (Edelman 1990, 1992, 1999; Edelman et al. 1992; Edelman et al. 1993; Dobbin et al. 1988; Dobbin et al. 1993; Sutton et al. 1994) has been particularly helpful to my conceptualization of the bureaucracy[22]. This scholarship has explored how legislation shapes organizational practices, for instance by establishing normative legal environments (Edelman 1990) as well as how bureaucracies undermine and limit the impact of potentially expansive legislation, for example by defining compliance in decidedly narrow and limited ways (Edelman 1992). Both of these analytical insights will inform my analysis. In chapter 1, for instance, I will show the weight of normative judicial rulings in the creation of the contemporary regime of refugee protection in Canada. Chapter 2 highlights the restrictive administrative packaging of jurisprudential expansions in Canada's gender-based refugee protection framework. Following this scholarship, I suggest that bureaucracies are active, strategic and consequential players in determining the actual outcomes of law. I contend, with Lauren Edelman (1992), that bureaucratic responses to law both produce the meaning of law and mediate its impact.

While indebted to this scholarship, this dissertation diverges from, and contributes to, the existing conceptualizations of bureaucratic relative autonomy in two significant ways. First, this dissertation situates bureaucratic autonomy within a much wider critical framework. While the existing literature capably explores how bureaucracies define and undermine law, they do not

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[22] This scholarship has drawn from the field of organizational theory (Meyer and Rowan 1977; DiMaggio and Powell 1983; Friedland and Alford 1991; Scott 1991), which has long noted the contradictory demands placed upon and navigated by organizations. More recent work in this field (Greenwood et al 2010; Greenwood et al. 2011) has suggested that organizations are run by multiple, competing, and contradictory logics, not dissimilar to those I will discuss in relation to the Canadian refugee protection regime.

explore what these practices of defining and undermining achieve for broader systems of governance. As a result, in this scholarship the impotence of law in delivering meaningful equality becomes a problem with bureaucracies, rather than a fundamental and systematic characteristic of neo/liberal politics.

Unlike this scholarship, this dissertation interrogates bureaucratic autonomy not just in its unfortunate and restrictive effects, but also in its broader achievements. I suggest that by restricting the impact of expansive laws, the bureaucracy sustains liberal justice as a project always in the process of delivery (Povinelli 1998). Hence, I take restrictive bureaucracies to be central to the neo/liberal organization of power; in my view, by impeding the full potential of legal justice, bureaucracies maintain liberal governance despite and through its many paradoxes and failures. As Katerina Rozakou (2017) has argued, bureaucracies are not meant to fully cooperate with and capably uphold the law. Rather, statecraft relies on some bureaucratic irregularity, mismatch and malfunction in administering the law. In other words, bureaucratic autonomy in undermining legal expansions is a significant feature of how equality-inducing law is meant to (not fully) work.

Secondly, this dissertation differs from the existing literature on bureaucratic autonomy in its genealogical design. Studies of bureaucratic autonomy often explore how bureaucracies take up specific legislations or handle legal requirements over a limited period of time. These research designs hinder a more sustained analysis of bureaucratic engagements with the law and the systematic patterns that these engagements may take. Unlike much of this scholarship, this dissertation explores the dynamic interplay between a bureaucracy and a host of laws that come to regulate its work at various points over a thirty-year period. This elongated timeframe and wider focus has allowed me to trace recurring patterns and tendencies in interactions between the

fields of law and bureaucracy. I have been able to observe, for example, moments of cooperation, reaction and autonomy, and explore how these differing moments emerge in specific political, legislative and organizational contexts. Moreover, this mode of analysis has enabled me to view the paradoxical impulses of expansionism and restrictionism as enduring features of the Canadian refugee protection regime; thus, I have come to view paradoxical developments not as curious or random phenomena, but as the consequence of the articulated arrangements that produce the Canadian refugee protection regime.

IV.   Why Canada? : The Paradoxes of Refugee Protection in Canada

Canada is a small yet productive site for exploring the paradoxes of state-controlled refugee protection. On some fronts, Canada is a bright example of refugee protection: it is the only country that has ever received the prestigious Nansen medal for sustained and remarkable commitment to refugee protection (CCR 2009). Canada is commonly applauded for its independent and non-adversarial system of refugee status determination (Hamlin 2014) and was the first country in the world to officially recognize gender-based refugee claims. Canada also has a great record with accepting SOGI claims (Swink 2008), and has recently developed its SOGI guidelines in consultation with community and LGBTQ groups and organizations. All in all, over the past thirty years, Canada has earned international respect for its refugee protection framework.

But Canada, like much of the western world, has also modelled aggressive anti-refugee restrictionism: it has been a pioneer in innovative and highly restrictive border control strategies, such as penalizing airlines for carrying unauthorized passengers and stopping travellers at airports abroad (Mountz 2010, Hamlin 2014, Satzewich 2015). Canada has at times intercepted

travellers arriving by boat in ad-hoc zones of legal exception that preclude access to the fuller range of rights stepping on Canadian soil normally confers (Mountz 2010). The Canadian government operates multiple Immigration Holding Centres and detains thousands of foreign nationals, including prospective and failed refugee claimants, every year[23]. Over the years, the Canadian government has also run multiple overseas campaigns to dissuade specific groups of refugee claimants from travelling to Canada[24].

In addition, over the past three decades, Canada's acceptance rates of in-land refugee claims have declined. Consider the graph below, presenting the acceptance rates of in-land refugee claims adjudicated by Canada's quasi-judicial, non-adversarial, politically independent tribunal, the Immigration and Refugee Board of Canada (IRB):

Figure 1- Refugee Claims Accepted by the IRB, Per Cent of Finalization, 1989-2015
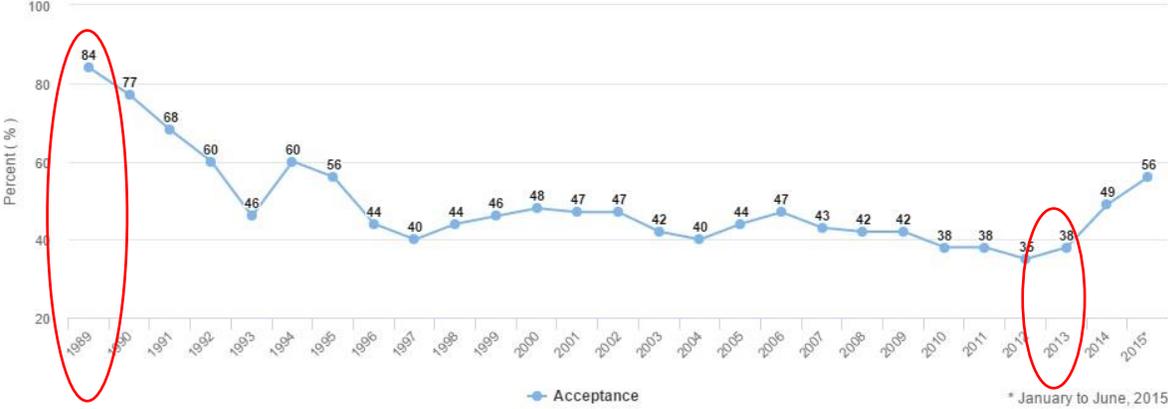
Source: Immigration and Refugee Board of Canada

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[23] In 2016-2017 6,251 persons were detained, including 162 minors, for an average of 19.5 days (13.1 days for children) (CBSA 2017). The vast majority of hundreds of refugee claimants who are detained each year are not considered security threats by the Canadian Border Services Agency: in 2015, 685 refugee claimants were held in detention, 93% of whom were not classified as security risks (CCR 2016).

[24] The targeted populations have been diverse in their origins, methods of travel, or tendency to embark on an unauthorized journey. However, they all have tended to send large numbers of poor and resource-less refugee claimants to Canada. These populations have included Roma Hungarians, Fijians, and Mexicans. These national groups have been targets of public advertisement posters and bill boards in their home towns (Keung 2013; Mountz 2010), new and shifting visa requirements (Levine-Rasky, Beaudoin, and St Clair 2014; Harris 2016), and disseminations of low approval rates of their claims (Hamlin 2014).

Since 1989, the IRB has been adjudicating refugee claims made inside Canada. It has been using the same legal definitions and standards of administrative justice and procedural fairness. Yet, not only have the yearly acceptance rates diverged highly across time (for example 84% in 1989 and 35% in 2012), all in all, acceptance rates have declined considerably since 1989, as the statistical trend-line below demonstrates[25]:

Figure 2- Refugee Claims Accepted by the IRB, Trendline
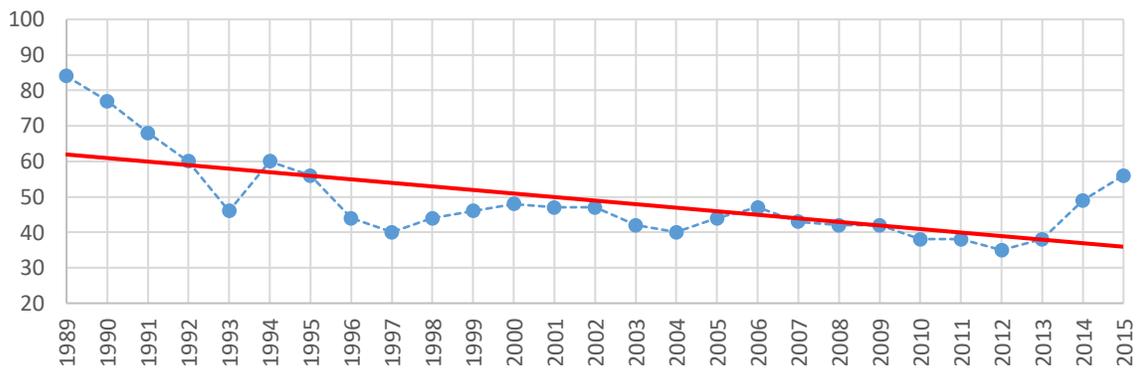
Source: Immigration and Refugee Board of Canada

This means that, notwithstanding a few periods, claimants' chances of receiving positive refugee decisions from the IRB has generally declined. Most surprisingly, acceptance rates have dropped despite the recognition of *additional* forms of persecution: while the number of legitimate grounds for refugee protection has increased, the overall likelihood of receiving protection has decreased. For instance, while persecution based on gender, gender identity and sexuality began to be acknowledged in the early 1990s, acceptance rates went through a general decline between 1993 and 2012[26]. All in all, it has become both harder to access Canada's in-land refugee protection regime and receive protection from it.

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[25] Although linear trend-lines are helpful in showcasing the long-term general tendency of data, they are poor indicators of fluctuations or cyclical and non-linear tends. As a result, this trend-line is not meant to represent the nuances of refugee acceptance rates in Canada, but simply to sketch the long-term overall tendency of the rates.
[26] As the first graph demonstrates, IRB refugee acceptance rates have been increasing since 2012. This increase corresponds with and may be attributed to some of the recent procedural changes made to the refugee status determination system. Although a detailed discussion of these changes falls beyond the scope of this dissertation,

How can Canada be both a leader in expanding refugee protection and a pioneer in restricting access to refugee rights? This dissertation provides an answer to this question.

V.   Doing Critical Sociology: Power, Methodology and Terminology

This study is a critical sociological inquiry. As a sociological study, it is committed to an empirically-grounded analysis of structural patterns and tendencies. This dissertation is based on substantial fieldwork and multiple methods of data collection.

Much of the data on the earlier years of the Canadian refugee protection regime has been derived from published and commissioned reviews of the Canadian system, annual reports of the IRB, media and newspaper coverage, and archival material. Published studies and annual reports are available in print or online. Newspaper articles were located through the *Factiva* search engine using keywords and relevant timeframes.

I acquired archival documents through Access to Information and Privacy (ATIP) requests made to the Library and Archives of Canada in Ottawa. The documents I consulted were protected government files. As such, they could not be reviewed by myself or archivists before first being vetted by ATIP specialists. In the absence of the possibility of open review, I selected the files based on their indexes. Unfortunately, many of the indexes on these documents were vague and poorly maintained. Despite the obscurity of titles and impossibility of obtaining archivists' support, I did my best to choose the most promising files. Due to the great volume of archived documents, I was only allowed access to a portion of the existing files. Through multiple requests, I acquired over 4,500 pages of documents. Some of these were heavily

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suffice it to say that this recent increase may be an unintended consequence of the conservative government's imposition of tighter adjudication timelines as well as the transition to a civil servant, rather than politically appointed, pool of decision makers.

redacted and a large portion was not of use to this project. Given that the consulted documents constitute only a fraction of the archived files on the subject, I cannot be certain that I have seen all the relevant information on this topic.

In addition, I conducted seventeen interviews with refugee lawyers, former IRB adjudicators, community support workers, advocates and language interpreters between July 2016 and January 2017. Many of these participants had multiple relationships with the Canadian refugee regimes; for instance, some lawyers had also served as former adjudicators, and many were also heavily involved in refugee advocacy. Since IRB adjudicators are not permitted to speak about their work to researchers or the media, only former adjudicators were interviewed for this project. All participants were recruited through connections that I established within the refugee advocacy as well as refugee law community. All those who chose to participate in this study held progressive views on refugee protection and were eager to share their first-hand experiences with the Canadian regime. Interviews provided valuable insights in the operations of the in-land refugee protection regime, as a workplace as well as a state bureaucracy.

In addition, I attended two orientation sessions held by the IRB and several consultation sessions organization by the Canadian Council for Refugees (CCR) in 2016 and 2017. The IRB orientation sessions, which are designed to familiarize prospective claimants with the refugee status adjudication process and are held in actual hearing rooms, provided a grounded understanding of the process of claim making in Canada. Moreover, they allowed me to observe the interactions between the IRB officials and prospective claimants and their advocates. CCR consultation sessions offered intensive education in the recent and ongoing struggles in refugee protection in Canada. Moreover, some of these sessions included presentations and speeches by Ministers, Canada Border Services Agency representatives and IRB officials. These

presentations allowed first-hand observation of the relationships between state officials and the public, refugee advocates, and officials from other departments and offices. Informal conversations with long-standing refugee advocates at consultation sessions also proved helpful in pointing me to key moments in the development of the existing regime.

Where necessary, I acquired unpublished statistical information through Access to Information requests made to the IRB's ATIP division. I used this data to complement the official accounts that featured in annual reports of the IRB. These statistics, interviews and observations informed much of my analysis of the more recent developments at the IRB.

The methodological choices in this study have been informed by a sociological commitment to de-naturalizing the seemingly ordinary and benign bureaucratic procedures that make up refugee protection administration in Canada. I aimed to place the operations and procedures of the Canadian refugee protection regime in specific material, historical, political and organizational contexts. The multiplicity of sources of data in this project required a dynamic and eclectic approach to data analysis. I studied various sources of data in and through one another to produce a fuller account of the paradoxical developments in refugee protection. For instance, I often complemented the limited and carefully crafted official accounts that featured in annual reports with the much more revealing data in the media and archival documents. In studying the media, I was minimally concerned with representational analysis (Hall 1997, 2001); rather, I used content analysis methods to track the trajectories of the IRB's many public relations crises over time. Reading the official accounts of the Canadian regime through the much more candid lens of archived documents, media reports, and interviews revealed much about the unspoken goals and priorities of refugee protection at various moments.

In this dissertation, I have called the object of my study the Canadian refugee protection *regime* to delineate the diverse and complex composition of the set of entities that administers refugee protection in Canada. My fieldwork has made me highly cognisant of the complex composition and politics of what one might offhandedly call "the government". As this dissertation will show, "the government" is far from a monolithic, unified body without internal and complex politics, and struggles. Governments are centrally organized around accumulating and administering power and control; as such, their operations are inevitable sites of tense power struggles. Additionally, governments are made up of multiple departments that are often implicitly aligned in complex hierarchical relations, are run with different managerial styles, and have distinct cultures, mandates and structures. Departments with overlapping fields of operation are likely to have developed involved histories of competition over jurisdictional authority, control and resources. Given that most government departments have to rely on other departments in their day-to-day operations, inter-departmental politics are constantly developing and being reworked. Tensions and conflicts are an everyday reality within governments. Hence, it would be a mistake to imagine governments as simple and simply unified.

In delineating my subject of study, I have intentionally avoided the commonly used term *system* because of its monolithic connotations. I have also decided against using the terms *apparatus* and *assemblage* despite their productive and nuanced use in the scholarship. These terms have often been aptly used to complicate common understandings of governments as completely self-contained and separate from the rest of the social world. In these insightful interventions, scholars have shown that government operations are accomplished also in and through bodies that are commonly classified as non-governmental (Murray 2016; Goldring and Landolt 2013; Cabot 2014). Despite my agreement with these contentions, this study is primarily

about government departments that administer refugee protection in Canada, and their practices, procedures and strategies. This, of course, does not mean that these practices, procedures and strategies are or have ever been carried out without reliance on, or interventions from, non-governmental entities. In fact, I will, at times, explore the ways non-governmental bodies and actors such as advocacy groups, lawyers and community support workers have helped shape refugee protection administration in Canada. The primary focus of this study, nonetheless, remains on the operations of Canadian government departments, particularly the Immigration and Refugee Board of Canada. For this reason, I have decided to use the term *regime* to delineate a narrower field of analysis than *apparatus* and *assemblage* commonly signify. Unlike the much broader and (deliberately) undefined connotations of these terms, *regime* directly cites the governing state as its subject. In its literal meaning "regime" is "a method of government or domination of a country or state" (Canadian Oxford Dictionary 2004). Thus, it aptly invokes the systematic, formalized and centralized constellation of forces that this dissertation studies.

I understand the Canadian refugee protection regime to primarily consist of three government departments: Immigration and Refugee Board of Canada (IRB), Immigration, Refugees and Citizenship Canada (IRCC), and Canada Border Services Agency (CBSA). These three departments are highly distinct in their size, resources, mandate, jurisdiction, relative authority, and organizational structure and culture. For example, as the department that is charged with border control and security, CBSA has a very stern culture, can operate in great obscurity, and holds great sway over when and how claimants are to be cleared to enter refugee adjudication procedures. The IRB, in contrast, is primarily charged with a humanitarian mandate that requires it to project a genial and tender image. Internally, however, the IRB has cultivated an extremely reserved and cautious culture that reflects its sense of vulnerability due to years of

constant and intense public scrutiny. Despite its struggles, the IRB is not without its own exclusive organizational advantages: since it holds the ultimate authority over refugee decisions, the IRB adjudicators can out-rule any political will, including that of the Immigration Minister, in refugee decisions. In spite of this political advantage, the IRB can be controlled by the Minister and the IRCC indirectly through legislative change and budgetary pressures. Thus, all three of these departments have particular jurisdictions and authorities that place them in complex relations of authority with one another, and shape their organizational culture, aspirations and struggles.

Lastly, as a critical study, this dissertation is concerned with questions of inequality and social justice. This study maintains an explicit position against borders and state-controlled migration. As a result, I am not concerned with how states may administer refugee protection well or as fairly as possible. As many would argue, Canada offers one of the best systems of refugee protection in the world. But perhaps there is not much competition to beat; to cite a prominent refugee law scholar, "Canada is the best player on a bad team" (Oziewicz 1993, p. A13). Instead of wishing to tweak Canada's performance, this dissertation aims to show that the game itself is one of perpetual injustice: even the seemingly humanitarian factions of state-controlled migration regimes systematically and inevitably reproduce inequality. State-controlled refugee protection offers an inherently limited vision of equality and justice.

The critical approach of this study helps situates the topic of my investigation within a much wider context of global state regimes. Although I examine the specific site of this study in great detail, the Canadian refugee protection regime must be understood beyond its distinctiveness. Hence, while this study is about refugee protection in Canada, it is also much more broadly about struggles and strategies of public administration in an age of economic

restructuring, the ongoing paradoxes of liberal humanitarianism, and the relationship between law, bureaucracies and justice. Contextualizing the challenges of refugee protection in Canada helps avoid easy conclusions; the problem is not that the Canadian refugee protection regime is "dysfunctional" or "unjust", although it can be reasonably described as both. The shortcomings and achievements of the Canadian refugee protection regime are far from simple outcomes of independent decisions made by specific officials. The ways Canada administers refugee protection is not solely about the competence, vision or political leanings of key individuals or departments. The refugee protection regime in Canada is a part of a much larger system of organized power that spans far beyond Canada and its refugees.

VI.   Dissertation Outline

In this dissertation, I argue that the Canadian refugee protection regime is a dynamic articulation of expansionist and restrictionist impulses, and that these impulses are systematically arranged in different fields and in relation to different subjects. I will advance this argument in three chapters.

Chapter 1 draws on organizational reports, review studies and archival documents to provide a contextualized account of the genesis and early years of the contemporary regime of refugee protection in Canada. In this chapter, I demonstrate that systematic refugee protection in Canada has, from the outset, been an articulation of conflicting impulses: on the one hand, the contemporary regime was the result of unprecedented legislative and jurisprudential expansions in refugee rights. On the other hand, Canadian refugee protection was conditioned on a highly restrictive vision of humanitarianism. I demonstrate that these conflicting impulses became articulated in legislative and jurisprudential expansions on the refugee category, and

administrative and bureaucratic restrictions against specific national groups. In the new regime, the bureaucracy became a relatively autonomous and influential force in shaping access to refugee rights. The claim-processing bureaucracy developed and advanced its own priorities, logics and interest, at times in contradiction to those promoted by the law. The organizational struggles of the IRB in these early years intensified the bureaucratic drive for efficiency. The need and compulsion for efficiency in turn necessitated restricting the flow of incoming claims. Bureaucratic efficiency relied heavily on administrative restrictionism. In this context, isolating and rejecting specific national groups became key to administering refugee protection. The scapegoated nationalities were bureaucratic productions: the bureaucracy shifted from one population to the next in response to changing regional, national and temporal administrative needs. Using claimants' nationality as a method of systematic exclusion, of course, undermined principles of individual and equal treatment in refugee law. The bureaucratic urge for restrictionism and efficiency produced rightlessness and inequality in the face of expansive legislative and jurisprudential change. Canadian refugee protection became centrally organized around exclusion.

With the aid of archival material, media reports, interview data, and the IRB annual reports and statistics, Chapter 2 explores the paradoxical developments in the Canadian refugee protection regime in the 1990s and early 2000s. I will show that the Canadian regime remained an articulation of conflictual impulses: this regime both desired to extend the protection of refugee rights, and restrict and control access to the in-land refugee claim processing system. These conflicting impulses were yet again arranged in separate fields and in relation to different subjects: while innovative jurisprudential interpretations expanded the reach of refugee protection to gender-based claims, bureaucratic strategies restricted the access of new national

groups to refugee rights. The IRB's Gender Guidelines expanded the established refugee definition to recognize previously unimaginable forms of violence. This jurisprudential expansion transformed the global landscape of refugee rights in significant and irreversible ways. Nonetheless, this expansion did not translate to a substantial increase in actual levels of access to refugee protection. Not only was the Canadian gender-based refugee policy delivered in a decidedly limited form, it also concurred with highly innovative and coordinated bureaucratic practices that systematically excluded large numbers of claimants from access to refugee status. Scapegoating claimants based on their nationality remained an important part of state-regulated bureaucratic refugee protection. The bureaucracy continued to operate as a relatively autonomous and influential force in curtailing the impact of jurisprudential expansions, in accordance with its distinct priorities, goals and interests.

Chapter 3 uses interview and observation data, media reports, and the IRB reports and statistics to examine the paradoxical operations of the Canadian refugee protection regime from the mid-2000s to the present. I show that the Canadian regime remains conflicted between a humanitarian impulse to expand refugee rights to new groups and an increasingly aggressive compulsion to restrict access to refugee protection. As in previous chapters, I will demonstrate that these conflicting impulses have been systematically arranged in separate fields and in relation to different subjects: while SOGI claimants have received growing, and recently formal, acknowledgement in Canadian refugee jurisprudence, new national groups of claimants have become subjects of effective and targeted strategies of bureaucratic exclusion. My intersectional analysis will expose the limits of jurisprudence in engendering meaningful material change. I show that the bureaucracy remains an active and impactful actor in determining which groups of claimants stand a chance to benefit from expanding SOGI refugee rights. I conclude that the

relative autonomy of the fields of law and bureaucracy, and the manufactured distinction between SOGI claimants and national groups of exclusion, allows the Canadian refugee protection regime to advance progressive jurisprudence without losing administrative control over who and how many claimants actually access existing and expanding rights.

Together, these three chapters sketch the paradoxical operations of the Canadian refugee protection regime over the past three decades. They map these paradoxes in their systematic arrangements, and offer an account of how state-regulated refugee protection expands rights and yet remains highly restrictive.

Chapter 1- The Battle of Numbers:

Refugee Protection and Bureaucratic Politics of Efficiency

On the eve of the Immigration Act 1976 passing into Canadian law following four years of debate, discussion and political strategizing, the liberal immigration minister J. S. G. Cullen gave a speech that aptly formulated the emerging politics of refugee protection. After highlighting the unprecedented option of private refugee sponsorship in the new Act, Minister Cullen emphasized that economic hardship did not constitute a legitimate ground for receiving refugee protection:

> "We cannot open our borders to all economic refugees, such as
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> citizens of third-world countries, and we can't do anybody a favor
>
> if we bring people to Canada who will not be able to establish
>
> themselves" (The Globe and Mail 1978, 8).

This chapter reiterates, albeit in a critical and expansive way, the basic connections that Minister Cullen formulated between the expanding regime of refugee protection in Canada and its accompanying restrictive logics. I argue that from the outset the contemporary regime of refugee protection in Canada was a complex articulation of expansionist and restrictionist impulses, and that these impulses were arranged in separate fields and in relation to supposedly distinct subjects: while expansions were articulated through the field of legislation and jurisprudence, and concerned the legal category of refugee, restrictions were imposed in the field of bureaucracy and targeted specific national groups of claimants. These articulated arrangements allowed the Canadian refugee protection regime to both expand refugee rights and restrict access to them. In effect, the Canadian refugee protection regime expanded legislatively

and jurisprudentially but was kept bounded through administrative strategies and bureaucratic practices.

This chapter provides a detailed genealogical account of the formation of the contemporary regime of refugee protection in Canada. As this account will show, the Canadian refugee protection regime was in large part the result of legislative and jurisprudential developments that extended unprecedented levels of rights to refugee claimants. These new legal entitlements made the creation of a systematic, specialized and innovative regime of refugee protection an indisputable obligation for the Canadian state. The new regime was expected to conduct the task of refugee protection with much more procedural transparency and fairness than had ever been done before in Canada.

However, the new regime of refugee protection was not exclusively expansive in its genesis. As I will show, the expansionist momentum that gave rise to the new regime emerged in tandem with an imposition of restrictive bounds on the scope of refugee protection. Indeed, the new regime was founded on clear delineation of who was *not* to be protected as a refugee; the Canadian regime was to continue the liberal legal legacy of prioritizing the political domain and defining rights only within the sphere of citizen-state relations. Hence, the supposedly universal subject of refugee rights was qualified from the outset: the legal category of refugee was reserved exclusively for those at risk of individualized political and civil persecution; the dispossessed or survivors of generalized violence had no claim to protection. As a result, claimants who were thought to file refugee claims out of economic hope or against widespread threat of violence, however devastating the impact of these on their lives, were to be excluded from the protection of Canada. The political, legal, and historical processes that culminated in

the unprecedented expansion of refugee rights in Canada also produced clear lines of exclusion. In short, the new regime was an articulation of both expansive and restrictionist impulses.

Of course, to argue that the Canadian refugee protection regime is an articulation is more than to claim simply that this regime is made up of disparate and contrasting forces. Articulations (Hall 1980, 1985) are not only complex, undetermined and historically-specific compositions, they are formations with structured tendencies, patterns and functionalities. The Canadian refugee protection regime is an articulation that places its internally conflicting impulses in specific and systematic arrangements. As I will show, these arrangements have long placed contradictory impulses in mostly different fields and in relation to seemingly different subjects. These arrangements, furthermore, emerged from political struggles over the meaning, goals and scope of refugee protection in Canada, and were geared towards achieving certain outcomes. Above all, arranging expansionist and restrictionist impulses in relatively autonomous fields (Bourdieu 1993) and in relation to supposedly distinct subjects allowed the Canadian refugee protection regime to maintain conflictual agendas without losing the overall stability of its formation. These articulated arrangements helped the Canadian refugee protection regime to persist despite its paradoxes. They provided the mechanisms for what Elizabeth Povinelli (1998) has called the continually unfulfilled liberal promise of justice. As I will show, while the promise of equality and justice was made via the law, the failure to fulfill this promise was achieved through the bureaucracy.

The failure of the bureaucracy to deliver equality and justice is not accidental, a matter of benign miscalculations, or even an intentional conspiracy; rather, the relatively autonomous structural design and sensibilities of the contemporary state bureaucracy makes for inevitable clashes with equality-inducing law. As Max Weber (1978[1922]) suggested, the bureaucracy is a

structure of specific design, tendency and outcome. For Weber, the primacy of modern rationality in the bureaucratic structure facilitates streamlined, calculated and orderly conduct, yet makes bureaucracies particularly poor at handling all that makes human existence morally and emotionally meaningful. The growing dominance of economic logics in neoliberal governance (Brown 2015) has increasingly and aggressively entangled bureaucratic rationality with a compulsion for efficiency; the bureaucracy is in a continual quest for administrative efficiency, increased productivity and high rates of quantifiable output, however irrelevant and incompatible these markers may be, in the case of this study, to meaningful, dignified and adequate refugee protection. Hence, the contemporary Canadian regime of refugee protection systematically restricts claimants' access to rights through its bureaucratic procedures not because of the cold-heartedness of its administrators, but rather due to the overwhelming, incessant and structural demands for increased efficiency. Put differently, state bureaucracies are poorly suited to administering the moral, messy and economically irrational work of refugee protection; consequently, they administer refugee protection with remarkable failure, inequality and injustice.

This chapter draws on organizational reports, review studies and archival documents to explore the articulated linkages that composed the Canadian refugee protection regime during and shortly after its genesis. The first section of this chapter provides a snapshot of the conflictual negotiations that produced Canada's first systematic regime of refugee protection. I show that the desire to offer well-structured and systematic refugee protection was simultaneously accompanied by restrictionist considerations. The remaining three sections expand on the contradictory impulses of the Canadian refugee protection regime in the early years of its operation. Section II presents the legislative and jurisprudential expansions that led to

the creation of the Immigration and Refugee Board of Canada (IRB) in 1989. This discussion outlines the normative legal environment (Edelman 1992) that produced the new regime of refugee protection in Canada. In the third section, I describe the administrative struggles of the IRB as it began work. I show that the structural compulsion and demand for increased efficiency intensified the bureaucratic impulse for restrictionism. The final section analyzes the bureaucratic procedures and practices that were put to the task of exclusion, and consider their devastating implications for groups that became their targets.

I. The Balancing Act of Refugee Protection in Canada

In Canada, systematic refugee protection was, in large part, an outcome of the Immigration Act 1976. This Act introduced the legal definition of the refugee into Canadian immigration law. In doing so, it opened a new chapter in the history of refugee protection and rights in Canada. With the refugee definition enshrined in immigration law, refugee claimants became entitled to unprecedented levels of legal protection. Although Canada had signed the 1951 Convention and its 1967 Protocol in 1969, it had not yet codified the refugee category in its immigration law. As a result, before the Immigration Act 1976 came into effect, Canada's obligations to refugees were only outlined in the Convention and remained largely unenforceable through the Canadian judicial system (Dirks 1984). However, once refugee rights were legislated, the legal status of refugees changed drastically: forms of protection that had previously been, in effect, relatively malleable matters of administrative discretion now became legal entitlements. Legal entitlements, such as those to due process, necessitated the creation of a systematic and well-structured regime of refugee status adjudication. Hence, with the ratification

of the Immigration Act 1976, the creation of the current regime of refugee protection was put into motion.

Of course, introducing the legal category of the refugee to Canadian law was not the only contribution of the Immigration Act of 1976. This Act marks a significant shift in envisioning Canada and its immigration policy. The Act is perhaps best-known for removing race, ethnicity, and country of origin as legal criteria of exclusion from immigration to Canada. Instead, prospective immigrants were to be evaluated based on their skills, education, profession and language proficiency in relation to the economic and occupational needs of Canada. The explicitly racial logics of immigration administration were now replaced with economic ones (Bauder 2008). These new logics created a way for making a racially neutral yet economically sound Canada. Canada was to be race-free, yet prosperous and invested in its own prosperity.

The rising prominence of economic logics in Canadian immigration administration was not an isolated and exceptional global or domestic phenomenon. Across the globe, governments of advanced industrial countries were beginning to be overtaken by neoliberal, economic-centred rationalities. With the full-blown rise of Thatcherism and Reaganism only a few years ahead, the global landscape was witnessing major changes in how governments were to operate and perceive their functions. The New Public Management (Lane 2000; Aucoin 1995; Ferlie 1996; Connell, Fawcett, and Meagher 2009) was on its way to soon dramatically restructure the welfare state of the preceding decades. Fiscal responsibility, cost-revenue analysis and lean management were to become buzzwords in government operations and discourses.

In this neoliberal context, legislation of the refugee category created a delicate administrative dilemma. From a legal point of view, refugee protection is a humanitarian obligation detached from economic considerations or immigration policy goals. For instance,

unlike immigrants, refugee claimants cannot be accepted or rejected based on their professional and educational skills, their compatibility with the Canadian labour market or their ability to become self-supporting residents without prolonged public support. Refugee protection, moreover, is costly. In addition to requiring specialized administrative bodies, refugees and refugee claimants need social support services above and beyond what is offered to immigrants. As a result, the addition of the refugee category to Canadian immigration law created an opening outside the normal streams of an economy-centred neoliberal immigration framework, and potentially disturbed its goals and calculations. Hence, it created a problem that needed careful management.

It is perhaps a historical irony that systematic refugee protection in Canada came into being at a time poorly suited for the task. On the one hand, the addition of the refugee category and a number of other jurisprudential transformations necessitated a specialized and independent refugee claim processing bureaucracy. On the other hand, neoliberal economic restructuring and government downsizing were not readily compatible with creation of an entire department in charge of administering refugee protection. In particular, a non-revenue generating, costly and unpredictable operation for the good of non-tax paying, non-voting, non-citizens was not an easy fit with the increasingly economic-centred logics of neoliberalism. Yet, due to the legal and jurisprudential transformations that will be discussed shortly, streamlining refugee protection become an unambiguous legal obligation for the Canadian state.

The new regime of refugee protection emerged from and in response to these paradoxical demands and obligations. Moreover, the new regime was marked by an emerging tension between legislative and jurisprudential forces, and government administrators and bureaucrats. As separate and relatively autonomous fields, law and bureaucracy were, as they continue to be,

composed of different actors and distinct priorities and logics; for instance, while jurisprudential actors prioritized abstract notions of procedural fairness above and beyond administrative convenience[1], government administrators prioritized manageability and feasibility of plans based on assessments of time, resources and finances (Dirks 1995). The relative autonomy of these fields meant that the legal obligations imposed on the Canadian government had emerged independently from, and even in contradiction to, the preferences of administrative authorities and bodies.

Given these tensions, legal requirements had to be interpreted, negotiated and implemented in ways that fit the overall goals and constraints of an increasingly neoliberal immigration policy. The need to work with unfaltering economic logics and yet deliver systematized and procedurally sound refugee protection required considerable deliberation from state bureaucrats, politicians and policy makers. Refugee protection had to be made compatible with the restrictive goals of immigration control. This meant, above all, setting boundaries on the humanitarian agenda of an economically self-preserving Canada. A tightly bounded vision of humanitarianism was widely promoted as the only practical and sustainable method of providing refugee protection. In this context, restrictionism became an understandable, and even necessary, component of refugee protection (see for instance Plaut 1985).

Thus, Canada's first systematic regime of refugee protection was created in response to both legislative and jurisprudential obligations, and bureaucratic and administrative calculations. The new regime had no choice but to articulate these two contrasting forces in arrangements that

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[1] For example, the Singh (1985) decision, to be discussed shortly, explicitly rejected administrative convenience as a legitimate factor in determining questions of administrative justice: "The principles of natural justice and procedural fairness […] implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles." (para. 70). For the full text of the decision see: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/39/index.do

allowed their mutual, if negotiated, fulfillment. In other words, the new regime was to be an articulation of expansionist desires and restrictionist impulses: it was to expand rights drastically for refugee claimants, while restricting protection to limited groups among them.

II.   More Rights: The Making of the Immigration and Refugee Board of Canada

The contemporary regime of refugee protection in Canada was not a pre-determined and necessary outcome of singular or unified forces; rather, this regime took shape through long and involved processes of debate, negotiation and struggle, and by the force of ever-shifting factors that at times concurred with some level of luck. The evolving legal and jurisprudential corpus in the late 1970s and the 1980s was one of the most influential factors in producing the existing regime.

Of course, the Canadian state had been processing refugee claims from individuals within its territories for decades before a specialized federal bureaucracy was dedicated to this task, or the term "refugee" even existed in Canadian law. Before the 1976 Act, Canada had no coherent refugee policy, and decisions about refugee protection were made on an ad-hoc basis and through cabinet orders-in-council (Dirks 1984). In 1973, Canada established a formal process for adjudicating in-land refugee claims (Plaut 1985). At the time, claims were processed by an interdepartmental administrative advisory committee comprised of officials from the Department of Manpower and Immigration, and the Department of External Affairs. Despite the fact that Canada had already signed the Convention, it did not yet have a systematic procedure for those who wished to claim refugee status. In fact, refugee claims could *only* be made during an immigration inquiry. In other words, only when non-citizens found themselves in trouble with immigration law could they make a refugee claim to avoid deportation and removal. The

Refugee Status Advisory Committee reviewed these claims and sent recommendations to the Minister[2]. The Minister held the ultimate authority over refugee decisions (Dirks 1984) and could deny refugee status based on security or related concerns (Plaut 1985). As a result, refugee decisions were easily malleable by political and foreign interests as well as immigration policy[3]. This did not leave much in the way of consistent and transparent decision-making.

Furthermore, the Refugee Status Advisory Committee made its recommendations without direct contact with claimants. In the ad-hoc system, the interviewing and adjudication stages of the process were assigned to different bodies: claimants were interviewed by senior immigration officers under oath. The officers then sent transcriptions and summaries of these interviews to the committee. The committee used these documents to adjudicate claims. Of course, this mode of claim processing was problematic as it required adjudicators to rely exclusively on pre-produced and limited accounts of the claims. The process was also criticized for lacking transparency and proper oversight (Plaut 1985).

To ameliorate some of these shortcomings, over the years multiple levels of review and oversight were added to the adjudication process. This made for an increasingly convoluted and layered process of refugee status determination. By the mid-1980s, these well-intentioned modifications had made the system extremely inefficient and slow: it took between 2 to 5 years to process refugee claims. These lengthy processing times in turn contributed to a growing and large backlog (Plaut 1985; Dirks 1995). Lengthy processing times and large backlogs reflected

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[2] Unfortunately, minimal information exists on how the advisory committee applied provisions of the Convention to refugee claims. Despite my best attempts, I was not able to locate any relevant material on this matter in the archives.

[3] For instance, Canada's slow response to Chileans refugees after the overthrow of Allende's government in 1973 has been attributed to political and ideological interests (CCR 2009).

poorly on the Canadian government and the legitimacy of its humanitarian agenda. The existing system was in dire need of overhaul.

Canadian politicians and government officials had long been aware of the need to revamp the existing refugee claim processing system as well as Canada's severely out-dated immigration policy (Hawkins 1988). Yet, Immigration Ministers had been largely hesitant to take up this complex and potentially contentious project. Robert Andras, who became Minister of Immigration and Manpower in 1972, was unlike his predecessors. Andras was particularly dedicated to liberalizing Canadian immigration and refugee policy. In the context of growing recognition of international issues in Canadian politics, and with the support of an equally dedicated deputy minister and a strong group of liberal-minded senior and mid-level officials in the Immigration Department, Andras introduced significant change in Canadian immigration and refugee law through the 1976 Act (Dirks 1984).

With the passing of the Immigration Act of 1976, the legal scene changed dramatically for refugee claimants. By defining the refugee in accordance with the 1951 Convention, the Act made the Canadian state obligated to uphold international legal standards. Above all, the new legislation required that refugee claim adjudications be shielded from the direct influence of ideological, immigration and foreign policy interests. In addition, claimants' race, ethnicity or nationality could no longer inform refugee decisions.

The legislation of the refugee category paved the way for streamlining refugee claim processing in Canada; however, the new regime was not the product of the Act alone. A host of other legal developments also helped to establish the contemporary regime and its defining features. One of the most important of these was the growing judicial concern with the failure of

the ad-hoc system of refugee claim adjudication to meet standards of procedural fairness and administrative justice (Plaut 1985).

In the 1980s, procedural fairness and administrative justice were gaining more weight than ever in Canadian jurisprudence. While the Canadian Charter of Rights and Freedom (1982) made due process a matter of constitutional right for citizens (Hamlin 2014), the *Singh vs Minister of Employment and Immigration* (1985) Supreme Court decision[4] extended this right to all persons residing inside Canada: in-land refugee claimants were now entitled to an administrative process that ensured equal, consistent and transparent treatment. Adjudicating refugee claims by an ad-hoc advisory committee was ruled out of order.

The *Singh* decision imposed another important change on the emerging regime of refugee protection as well. To the dismay of government officials who found the idea utterly impractical and inefficient (Dirks 1995), the decision outlawed paper-based refugee status determination and made claimants legally entitled to in-person hearings with their adjudicators. Access to in-person hearings became a requirement for fair refugee status determination, particularly because, as the decision argued, refugee claims can rarely be substantiated solely based on documentary evidence[5]. Making oral hearings a required feature of the new regime called for considerable administrative planning and change. The law had ruled and administrators had no choice but to comply.

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[4] The Singh decision was brought forth by seven refugee claimants whose cases had been refused between 1977 and 1981. For more on the case see Richard Foot (2006).

[5] Documents are not strong tools for refugee claims adjudications. The transnational nature of refugee claims means that documentary evidence may not exist, be exclusively in the possession of the prosecutor, or have been forged. In the absence of strong and comprehensive documentary evidence, refugee adjudicators have to heavily rely on credibility assessments. These assessments, the *Singh* decision argued, cannot be conducted fairly without direct contact between claimants and adjudicators. Of course, psychological studies suggest that credibility assessments are highly inaccurate even when adjudicators can examine subjects directly. Even professional experts are bad at making accurate credibility assessments (for a fuller discussion of this see Evans Cameron 2016). The question of procedural justice in a system that heavily relies on credibility assessments is, thus, a serious legal conundrum that the *Singh* decision mostly left untouched.

In short, the legislative and jurisprudential expansions in the late 1970s and 1980s created a normative legal environment (Edelman 1990) that made the continuation of the previous system of refugee claim processing completely untenable. The new legal environment prioritized the quest for legitimacy and fairness above and beyond investments in convenience and control. The Immigration Department had to give up its direct control over refugee matters and devote much time, resources and attention to constructing an entirely new procedure for processing refugee claims. Devising a fair, systematic, transparent and humanitarian regime of refugee protection became a matter of judicial legitimacy. In this new legal environment, a new system needed to be born.

Of course, not all of the defining features of the new regime were directly mandated by the law. The new regime was also shaped by the input of civil and non-governmental actors, and through long processes of review and consultation. The independent study by Rabbi Gunther Plaut (1985) became an influential voice in shaping the new regime. Rabbi Plaut made a convincing case for a non-adversarial model of refugee status determination. He argued that unlike criminal or civil cases, refugee adjudication does not involve a conflict of interest between two opposing parties. The Canadian government, he argued, had willingly signed the Convention and committed to protecting prosecuted individuals. Refugee protection, in other words, was not in conflict with the interests of the Canadian government. As a result, the government should not act as an adversarial party in refugee determination procedures. Instead, Plaut endorsed a non-adversarial model in which all parties cooperated to establish the merits of a claim, without any parties actively arguing against the claimant. This meant that the new system was not to function like a court, with impartial judges and active oppositional or prosecutory parties. Instead, the new system was to rely on active inquisition by independent decision makers.

Rabbi Plaut's proposal for a non-adversarial model of refugee status determination eventually became a key feature of Canada's new regime of refugee protection. To this date, refugee status adjudication remains a non-adversarial process[6]. This model of refugee claim adjudication further limited the involvement of the Immigration Department in refugee decisions. Consequently, the department received this proposal with contempt[7]. The introduction of the non-adversarial model sowed the seeds of crippling interdepartmental tensions within the new regime (Hathaway 1993). Despite these difficulties, the making of an independent non-adversarial tribunal was well on its way. The already existing Immigration Appeal Board was used as a foundation to create the new claim processing bureaucracy. Revamped and rebranded, the Immigration and Refugee Board of Canada (IRB) began its work on January 1, 1989.

III.   The Battle of Numbers: Bureaucracy and the Work of Exclusion

During the first year of the IRB's operations, senior IRB officials held a seminar with the Canadian press to share their work (Refugee Update Seminar for the Media 1989[8]). In this seminar, Gordon Fairweather, the first chairperson of the IRB, offered an answer to an anticipated question: "You are entitled, of course, and will be asking us what are the challenges [sic] in the next couple of years. They are just one word, numbers" (ibid., 1).

Fairweather's representation of the IRB as in a battle against numbers was not a frivolous remark. The early history of the IRB may accurately be described as a struggle against unfavourable odds and challenging numbers. Although the IRB was created in an expansive legal

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[6] Of course, in practice, many adjudicating Members adopt aggressive styles of interrogation that undermine the non-adversarial model of adjudications. Ironically, even the "non-adversarial" model can be highly adversarial. Some of these troubling instances of informal adversarial conduct will be discussed in Chapter 3.

[7] By this time, the government had changed hands, and the Progressive Conservatives had taken to power.

[8] Refugee update seminar for the media, 1989, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 002, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

environment, it was nonetheless an administrative bureaucracy marked by distinct logics, sensibilities and goals. The quest for legitimacy and procedural fairness had not fully displaced the weight of bureaucratic calculations in the work of refugee protection: as a government bureaucracy in the neoliberal age of public sector cutbacks and restructuring, the IRB was deeply motivated and pressed by logics of administrative efficiency. In fact, the IRB could not have survived beyond its first years had it not prioritized increasing the efficiency of its operations.

Efficient claim processing, both in terms of reducing processing times and optimizing the use of resources, was a great administrative priority for the IRB since the earliest days of its work. Much public and political hope had been invested in the ability of the young IRB to end the ongoing headache and dilemmas of refugee protection in Canada (Dirks 1995). The IRB was tasked with a daunting agenda: not only was it expected to keep up with the flow of incoming claims, it was also mandated to clear the large backlog of cases that the previous system had left behind. On the day the IRB began its operations, it inherited a backlog of 85,000 claims. Some of these had already been in the processing pipelines for several years (IRB 1990, 19). To cope with this work, the IRB had to be highly efficient.

Administrative pressures on the IRB were exacerbated by its contentious relationship with the Immigration Department. The IRB's legislated independence from political authority[9] was a source of interdepartmental tension (Hathaway 1993). Immigration officials had their reasons for detesting the IRB's newfound independence and jurisdictional authority: while the poor performance of the IRB inevitably reflected on the Immigration Department, the Department could not freely intervene in the IRB's operations and shape them to its liking. To

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[9] The IRB's independence was meant to ensure that Canadian foreign policy did not directly impact refugee decisions. However, as I will demonstrate in the next chapters, the Immigration Department and partisan and political agendas continued to taint the work of the IRB despite this independence.

Immigration officials, the IRB represented a loss of jurisdiction and control. The two departments were yet to find a common ground on which to operate side by side.

Given these organizational struggles, the young IRB had to work hard to solidify its standing as a member of the federal government of Canada[10]. For the IRB, the struggle for institutional survival involved two foci. First, it had to establish its moral contribution in advancing Canada's international standing and reputation. To do so, the IRB regularly participated in shaping other countries' and international refugee claim processing regimes[11], and boasted of UNHCR and international praise (see IRB 1991, 11; 1992, 32; 1993, 34; 1994, 6-7). Second, the IRB had much to gain from demonstrating its practical value in managing and lessening the political headache of accumulated claim backlogs. Maintaining both forms of moral and practical value was crucial: while moral contributions resonated with the public and garnered their support, politicians and government officials looked for strong indicators to decide whether the IRB's material contributions to the state were worth the resources devoted to it. Thus, the IRB had to be both laudably humanitarian as well as administratively reasonable and pragmatic. Fulfilling these conflicting demands required tough tight-roping skills.

The conflicting priorities of the IRB were weaved together by the notion of efficiency: efficiency was both a means of ensuring proper humanitarian response to refugees and a measure of restricting unreasonable access to the Canadian refugee protection regime. Even before the IRB was created, the efficiency of claim processing was associated with humane and meaningful protection of refugees. For instance, in his 1985 report, Rabbi Gunther Plaut argued that efficient

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[10] The IRB's struggles for organizational survival continue to this date. Recent threats of restructuring and dismantling the IRB's political independence has pushed the Board to find allies in its long-time critics within the refugee advocacy groups (see Braganza 2018; Zilio 2018a).

[11] The IRB continues to engage with international bodies that wish to consider the Canadian model for structuring their own refugee protection regimes. The most recent example of this is the IRB's communications with officials from Scotland in 2017 (observation at CCR consultations).

refugee status determination was integral to proper refugee protection; good refugee protection required "quick readiness to acknowledge [refugee needs]" (6). Thus, efficiency was a moral imperative: "[t]here is a human dimension to saying a ready "yes" to a refugee" (6). Efficiency was a matter of humanitarian responsiveness.

Yet, for as long as efficiency had been considered integral to proper refugee protection, it had also been understood as an effective means of protecting the refugee system against "abuse" (see Plaut 1985). In fact, quick responsiveness to "real" refugees had been directly linked with deterring "fraudulent" claimants. This logic held that lengthy processing times produced incentives for abusers to jump immigration queues and buy themselves considerable time in Canada by filing a refugee claim. Therefore, by reducing processing times, not only would Canada offer timely protection to deserving refugees, it would also deter those claimants who intended to take advantage of Canada's humanitarian agenda. In other words, efficiency was a moral imperative as well as an administrative strategy of deterrence.

Efficient refugee claim processing, of course, was also a bureaucratic necessity for the IRB. The unpredictability of the IRB's workload made efficiency a particularly important focus[12]. This was not, however, simply a matter of hypothetical concern; the compulsion for increased efficiency quickly became an indisputable priority as the IRB began its work. Within the first year of its operations, the IRB found itself confronted with an incoming caseload that almost doubled the number it had been designed to process: while the IRB had the capacity to

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[12] As a bureaucracy that largely responds to consequences of overseas political crises, the IRB's caseload fluctuates based on factors that are completely beyond its control. Although the IRB has always tried to predict the upcoming patterns of displacement and crises by monitoring international situations (see IRB 1991, 13-15; 1992, 13-17), it has never been able to fully predict or plan for the caseload that it will receive each year. This means that the IRB often discovers the volume of its caseload as claims are filed inside Canada. Therefore, the IRB has had to be prepared to handle unpredictable and, at times, overwhelming levels of workload.

process about 1,500 claims per month, the last three months of 1989 produced caseloads that averaged around 3,000 (IRB 1990, 15). The IRB, of course, was unprepared to handle this level of input. Things suddenly began to seem grim: by the end of 1989, 8,000 claims had not even entered the first stage of the then two-staged adjudication process. The second stage of adjudications was also completely overwhelmed by the large number of incoming claims. To make matters worse, the IRB officials correctly anticipated that the high rates of incoming claims would continue into the following year.

The overwhelming and unexpected increase in the volume of incoming claims was cause for serious anxiety about the future of the IRB. Officials across the immigration refugee protection regime feared the prospects of growing caseloads. Like its predecessor, the IRB was at risk of collapse. As the Immigration Deputy Minister, Nick Mulder, wrote in an inter-departmental letter in January 1990[13]: "total current volumes are such […] that, unless we make changes, the system could again be totally overloaded in about a year" (Letter from Nick Mulder to Paul Tellier 1990, 2).

The IRB administrators monitored the unexpected rise in the number of incoming claims with watchful eyes. They were keenly aware of the need to increase the efficiency of their procedures to manage the actual volume of work. Officials employed multiple and diverse strategies: they increased the number of hearing rooms in their busiest offices, enhanced hearing room booking practices, and explored more expeditious methods for reviewing and adjudicating claims (IRB 1991). Much attention, analysis and creativity was devoted to running the IRB against the threat of accumulating backlogs. Practically every stage of the claim adjudication

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[13] Letter from Nick Mulder to Paul Tellier, 8 January 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

process came under close scrutiny and surveillance. Regular statistical reports were created to closely monitor the flow and movement of claims through all stages of the adjudication process; these reports were issued weekly, monthly and quarterly, allowing analysis of IRB's performance, workload, and progress in short and long terms[14]. Efficiency had become a bureaucratic compulsion that centrally shaped administrators' perceptions of their work as well as the culture of the IRB for years to come.

To cope with the strain of the increased workloads, the IRB had no choice but to request additional funds before the end of the first year of its operation. In 1989 the IRB's $42,297,000 operating budget was increased by supplementary funds of $10,643,000 (IRB 1990, 25). The following year's $61,788,000 budget was supplemented by $18,112,000 (IRB 1991, 32). These supplementary funds were critical to increasing the IRB's output. They allowed the IRB to hire new adjudicating Members and open a new office in its busiest region, Toronto (IRB 1992, 12). However, these funds did not increase the IRB's budget in proportion to the increases in its workload. As a result, the IRB had to fundamentally revise its procedures and expectations, and devise new and innovative plans for completing its workload with the allocated funds.

The IRB officials soon turned their attention to increasing the efficiency of their routine adjudication procedures. The "expedited process" and its twin project "simplified inquiry process" were developed to work through portions of the caseload more quickly and with fewer resources. For example, simplified and expedited procedures allowed positive decisions to be issued through informal meetings rather than formal two-Member[15] hearings. Using procedural shortcuts and fewer resources for adjudications optimized productivity and allowed the IRB to

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[14] Numerous examples of these reports were available in the archived documents.
[15] At the time, refugee hearings were conducted by two adjudicating Members. Only one Member needed to accept a claim for the claimant to receive refugee status.

process a larger number of claims in a shorter period of time. These two procedures were piloted in 1989, and further developed and heavily used in the following years (IRB 1990, 15; 1991, 1992, 17-18).

The expedited and simplified procedures were applied to claims that were considered "evidently well-founded". Countries with supposedly unambiguous and well-established records of human rights violations were placed on the expedited list. In these early years, the expedited list included countries such as El Salvador, Iran, Lebanon, Somalia and Sri Lanka (IRB 1991, 19). Claimants from these countries already had extremely high acceptance rates, often ranging from 80% to over 90%.

Importantly, these early expedited procedures increased efficiency through an in-built bias towards evidently well-founded claims[16]. The acceptance-inclined bias of expedited and simplified procedures was, however, counterbalanced by restrictive logics of efficiency. For the IRB administrators, increasing efficiency was also a means of restricting access to refugee protection and deterring "abuse" (IRB 1990, 11). As the strain from overwhelming caseloads grew, the deterrence function of the IRB became more prominent. Soon the IRB began to conceive deterrence necessary for its operations. Officials even began to call on the Immigration Department to more seriously commit to timely removal and deportation of rejected claimants (IRB 1991, 11, 25; 1992, 23). These calls for tighter immigration control were indeed startling for an organization whose jurisdictional authority was primarily of a humanitarian nature.

However conflictual with the IRB's protection mandate, the interest in deterrence made great administrative sense: deterrence reduced the workload of the IRB. Without effective deterrence, the caseloads were likely to grow beyond capacity and make backlogs an inescapable

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[16] In chapter 3 I will discuss a contrasting method of fast-tracking in later years that was biased towards quick rejection of supposedly unfounded claims.

reality. The accumulation of backlogs betrayed the high hopes invested in the new system. It was imperative that the IRB moved through claims in a timely fashion. Hence, the flow of incoming claims had to be kept at a manageable level. Soon, efficient refugee claim processing and deterrence were tied to one another in a mutual bond: deterrence allowed fast and efficient refugee claim processing by reducing workloads, while fast and efficient claim processing supposedly deterred so-called fraudulent claimants. In the minds of the IRB officials, the Immigration Department's failure to conduct timely removals undermined the deterrence function of the IRB as well as the overall and long-term success of its operations[17].

The emphasis on deterrence anchored an emerging politic around refugee acceptance rates. The first year of the IRB's work produced an exceptionally high acceptance rate of 76%[18]. This rate was considerably higher than the approximately 30% acceptance rate in the previous system (IRB 1990, 15). It was widely perceived across the refugee protection regime that the IRB's acceptance rates were too high and needed to be reduced considerably. In the eyes of the Immigration Department, the high acceptance rates were a "problem area" that needed management (Letter from Nick Mulder to Paul Tellier 1990, 2[19]). High rates were considered a "pull factor" (ibid.) that attracted overwhelming numbers of fraudulent claims. Given the ever-present threat of backlogs, reducing the number of incoming claims as well as the supposedly

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[17] At the time, the IRB officials strongly suspected that the Immigration Department intentionally stalled its immigration control functions in order to sabotage the effectiveness of the IRB's work (Hathaway 1993).

[18] Acceptance rates in early years of the IRB may be reported variously. For instance, acceptance rates in 1989 may be reported as 84% or 76%. This discrepancy is due to the substantial procedural changes made to the claim adjudication processes over the years. In the earlier years, the IRB followed a two-staged adjudication process. The first stage was conducted by officials from the IRB and the Immigration Department and focused on determining refugee eligibility using a low threshold test. This stage was relatively quick and often produced very high acceptance rates (in the 90%). Claims approved at the first stage were then referred to the second stage. The second stage involved a full hearing with two IRB Members and was much more time-consuming and rigorous. In 1989, the second stage produced an acceptance of 84%, while the two stages together produced an acceptance rate of 76%.

[19] Letter from Nick Mulder to Paul Tellier, 8 January 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

attractive acceptance rates became a priority. Canada had to become less attractive in its humanitarianism.

The pressure to reduce acceptance rates was highly effective. The IRB's acceptance rates soon began to drop. In 1990, the overall acceptance rates[20] sat at 70.3% [21] (IRB 1991, 19). In 1991 and 1992, acceptance rates were 64% and 57% respectively (IRB 1992, 21; 1993, 20). Importantly, acceptance rates at the full hearing stage of adjudications were also dropping: by the middle of 1990, these rates had dropped from 88% in 1989 to 75% (Review of Convention Refugee Determination Division Activities 1990[22]). Unlike the initial stage, which was conducted by both the Immigration Department and IRB representatives, full hearings were under the exclusive authority of the IRB. Thus, the drop in these rates indicates that the IRB itself was accommodating to pressures to reject larger portions of claims.

Under immense political and administrative pressure, the IRB became attached to and began to promote a rigid dichotomy between "real" refugees and "fraudulent" claimants. This polarized conception of refugee claimants allowed the IRB to assume harsh positions against those suspected of "abusing" the system. Claimants considered to be primarily motivated by economic reasons were a particular concern. Despite occasional acknowledgement of how economic deprivation and poverty caused displacement (IRB 1990, 12; 1993, 12), the IRB

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[20] The overall acceptance rates reflect the acceptance rates of both initial and full hearing stages.

[21] These drops were owed in large parts to noticeable drops in the acceptance rates of a handful of countries (IRB 1991). For instance, overall acceptance rates of claimants from Czechoslovakia had dropped from 74% in 1989 to only 11% in 1990, and Polish claimants' rates were dropped from 51% in 1989 to 12% (IRB 1991). Acceptance rates of Chinese claimants was quickly dropping as well: nationally, their acceptance rates at the full hearing stage had dropped from 74% in 1989, to 44% in 1990 and 37% in the last quarter of that year (CRDD Statistical Report-December 1990, 30 January 1991, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.)

[22] Review of convention refugee determination division activities, July 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

officials mostly avoided sympathy with economically deprived groups of claimants. These migrants were not victims of individualized state persecution and therefore could not considered "real" refugees.

The limited provisions of refugee law offered the struggling bureaucracy a basis for operationalizing a large-scale programme of exclusion. Categorizing and excluding claimants as "fraudulent" offered the IRB new bureaucratic avenues for managing caseloads. In the IRB's difficult battle with numbers, fraudulent claimants were both an institutional production and a target. To ensure the sustainability and survival of the young agency, the IRB administrators had to reject, remove and deter large numbers of claimants. But first, the excludable claimants needed to be located.

IV.   Locating Excludable Claimants: National Groupings and Efficient Deterrence

With caseloads rising beyond expectation, deterring claimants became central to the administration of refugee protection in Canada. Officials at the IRB as well as the Immigration Department firmly believed that rejecting "fraudulent" migrants sent a clear message to those who intended to take advantage of the Canadian refugee system (Letter from Nick Mulder to Paul Tellier 1990[23]). Rejecting these claimants became equivalent to deterring abuse.

Of course, rejecting and deterring fraudulent claimants required locating them within the large pool of claims. Importantly, excludable claimants needed to be identified efficiently, systematically and quickly. This meant that adopting a strictly legal method of decision-making based on close examination of contents of each claim did not fit the reigning administrative

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[23] Letter from Nick Mulder to Paul Tellier, 8 January 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

priorities. Effective deterrence required shorthand methods that helped locate large numbers of claimants quickly and with few resources. Legal standards were simply impractical for the purposes of bureaucratic efficiency. To manage its workload with any level of success, the IRB had to develop its own methods in distinction from the exacting rigours of law.

Claimants' countries of origins provided a shorthand method for locating targets of exclusion. Firstly, claimants' country of origin was recorded in applications. As such, this information was conveniently accessible. Secondly, countries of origins provided an easy tool for differentiating between large groups of claimants. In general, absence of well-documented political and civil crises in countries of origin was used against claimants, despite the fact that refugee law only sanctioned individual assessment of claims, without regard to race, ethnicity or nationality[24].

Despite obvious legal problems, the IRB heavily relied on country conditions to process refugee claims. A UNHCR visiting consultant to the IRB's documentation centre in August 1989 reported concern about how adjudicators approached and used documentations on country conditions. The consultant suggested that adjudicating Members commonly treated country reports as clear and straightforward measures of credibility (UNHCR Consultant's Visit 1989[25]). Instead of using these reports as the broader background context for analyzing the unique circumstances of each claimant, Members looked to country documentations for directions on whether to decide for or against a claim. As a result, country conditions weighed heavily in Members' decisions and acceptance rates were highly polarized based on countries of origin. In

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[24] Individual assessment of refugee claims is critical to fair adjudication, particularly because country conditions can impact different individuals very differently based on their specific characteristics or circumstances.
[25] UNHCR consultant's visit, 22 August 1989, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 002, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

effect, the IRB adjudicators commonly perceived all or the vast majority of claimants from some countries as genuine refugees, while claimants from a number of other countries were largely rejected; refugee status was practically adjudicated based on the country of origin rather than the content of individual claims. Although highly problematic from a legal standpoint, polarized perceptions of countries perhaps helped simplify the truly difficult task of credibility assessment. These practices, nonetheless, systematically disadvantaged nationals of certain countries.

Importantly, locating excludable claimants through their countries of origin was not a neutral or objective practice. Rather, this method was intimately synced with the national, regional and temporal administrative goals of the IRB: at any given time and in any geographical jurisdiction, administrators most intensely focused on countries that featured prominently in their statistics or were acceptable targets of exclusion. In other words, the refugee claim processing bureaucracy followed its distinct interests in locating and deterring specific groups of claimants. By manufacturing "fraudulent" claimants in ways that best suited administrative and efficiency goals, the bureaucracy operated in relative autonomy from the strict legal requirements of individual and equal treatment. Using national groups to manufacture subjects of exclusion continuously supplied the IRB with institutional targets. These bureaucratic practices made large numbers of claimants easily excludable and thus helped manage the IRB's daunting caseloads.

The first countries that were coded as producers of fraudulent claimants were Jamaica, Trinidad and Portugal. The IRB administrators believed that the high number of claims from these countries, especially Trinidad and Portugal, had contributed to the collapse of the previous system of refugee protection (IRB 1990, 15; Refugee Update Seminar for the Media 1989[26]). As

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[26] Refugee update seminar for the media, 1989, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 002, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

a result, officials were keen to reject and deter these claimants; refugee protection was to begin with protecting the new bureaucracy from the tragic fate of its predecessor.

Claimants from Jamaica and Trinidad were treated particularly harshly in these early years; at the end of its first year of operation, the IRB reported an acceptance rate of 0% for these groups[27] (IRB 1990, 15). Moreover, these claimants were overwhelmingly rejected at the initial stage of adjudications: in the first half of 1990, 0% of Trinidadian and 17% of Jamaican claimants were referred from the initial stage to full hearings, in contrast to overall referral rates of 95% [28] (Review of Convention Refugee Determination Division Activities 1990[29]). Rejecting claimants at the initial stage removed them from the adjudication process without giving them a chance to present their cases fully in a hearing. In effect, Jamaican and Trinidadian claimants were excluded from full adjudicative attention and resources. They were pushed out of the system before fully entering it. This left rejected claimants with minimal recourse to legal protection; despite the expanding legal environment, Jamaican and Trinidadian claimants were kept in a state of close rightlessness. More importantly, rightlessness was produced through the multi-layered stages of bureaucratic claim processing. In short, rightlessness was achieved via the bureaucracy.

Evidently, rejecting Jamaican and Trinidadian claimants was not a contentious or complicated matter. These claimants were widely disbelieved across the refugee protection

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[27] Refugee decisions are made by independent adjudicators who cannot be directly controlled by IRB administrators. The 0% acceptance rates of claimants from Jamaica and Trinidad in 1989 perhaps points to adjudicators' strong disbelief of these claimants. Although these 0% acceptance rates cannot be directly attributed to the IRB administrators, the fact that these rates were highlighted in the annual report is illustrative of the IRB administrators' preoccupation with these two countries.

[28] The initial stage was reserved for low-threshold assessments of eligibility and credibility (IRB 1990, 13) and generally did not reject many claimants.

[29] Review of convention refugee determination division activities, July 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

regime. In fact, in the initial assessments, most Jamaican and Trinidadian claimants were rejected based on credibility of their claims rather than their ineligibility to receive refugee status[30]: in 1990, out of the 59 Jamaican claims concluded at the initial stage, only 1 was rejected based on ineligibility; conversely, 42 eligible claims were rejected for supposedly lacking a credible basis (Statistical Summary 1991[31]). Similarly, only 3 of the 51 concluded initial claims by Trinidadian claimants were found to be ineligible; 37 eligible claimants were rejected due to credibility issues (ibid.)[32].

Rejecting Jamaican and Trinidadian claimants at the initial stage made for an extreme yet quick and inexpensive method of case processing. Removing these claimants from proceedings was intentional and a cause for celebration. Indeed, high rejection rates of Jamaican and Trinidadian claimants at the initial stage were presented as proof of procedural competence. A review of the IRB refugee adjudication procedures in July 1990 reported the low referral rates and concluded: "So, the initial hearing stage is continuing to perform its basic function of culling out claims from countries that are clearly not sources of convention refugees and ensuring that claimants from countries that are known to be in upheaval get sent on for a full hearing" (Review of Convention Refugee Determination Division Activities 1990, 8[33]).

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[30] Eligibility of claimants for refugee status is determined based on factors such as claimants' history of criminality, past claims for refugee status in Canada, and access to citizenships or permanent residencies in third safe countries. These factors determine whether a claimant is eligible to be considered for refugee status. Credibility assessment requires examining the content of a claimants' case to decide whether they are in need of refugee protection. Credibility assessments at the initial stage involved basic evaluations of whether the claim has a basis that fit with the provisions of refugee law. Since comprehensive credibility assessment requires serious engagement with the content of claims, credibility decisions were largely left to the discretion of the IRB Members in full hearings, where adjudicators supposedly had more time and resources to establish credibility issues.

[31] Statistical Summary, 29 January 1991, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

[32] Unfortunately, the archived documents only provide statistical reports of acceptance rates, with no explanation for reasons of rejection.

[33] Review of convention refugee determination division activities, July 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

Exclusionary practices against countries such as Trinidad and Jamaica ran far beyond the IRB. Not only were these claimants rarely accepted at the initial stage, but the Minister was much more likely to challenge positive initial evaluations of these claims[34]. In 1990, no cases from Trinidad and only one positive initial decision from Jamaica was conceded by the Minister, while concession rates for claims from so-called legitimate source countries sat at 95% (CRDD Statistical Report- December 1990 1991[35]). Thus, odds were largely stacked against claimants from Jamaica and Trinidad; several actors across the refugee protection regime worked to reject these claimants at multiple stages of the adjudication process.

Moreover, poor acceptance rates of claims from countries such as Trinidad and Jamaica were used as an actual indicator of the IRB's performance, by and beyond the IRB. For example, in his letter to the Clerk of the Privy Council and Secretary to the Cabinet in January 1990, the Associated Deputy Minister of the Immigration Department expressed approval of the IRB's performance by directly equating successful deterrence of unfounded claims with the diminishing number of claims from specific countries: "[the IRB] reduced significantly the number of manifestly unfounded claims; that is, we have reduced to a trickle individuals (such as Turks, Portuguese, Trinidadians, etc.) who are not refugees but who used to arrive in large numbers under the old system" (Letter from Nick Mulder to Paul Tellier 1990, 1[36]).

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[34] In the non-adversarial model of refugee status adjudication in Canada, the Minister remains a party in refugee decisions. This means that the Minister has the right to contest refugee decision s/he finds problematic. By contesting decisions the Minister appeals the adjudication outcome and has a chance to provide reasoning and documentation against the decision. In the early years of the IRB, representatives of the Minister had the right to contest positive evaluations of claims' credible basis at the initial stage. However, Ministers only contested a small portion of adjudicated claims. The Minister's decision not to contest a positive initial evaluation was called a concession. Concessions allowed claims to swiftly move to the second stage of adjudications for further examination.

[35] CRDD Statistical Report- December 1990, 30 January 1991, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

[36] Letter from Nick Mulder to Paul Tellier, 8 January 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

Rejecting Jamaican and Trinidadian claimants supposedly showcased the competence, rigour and prudence of the IRB. By juxtaposing these rates against the exceptionally high acceptance rates of "real" refugees, the IRB officials suggested that they were well-prepared to reject unfounded claims and extend protection only to genuine refugees. In its struggle for institutional legitimacy, the IRB turned Jamaican and Trinidadian claimants into prime examples of excludability, undermining the equal treatment promised by refugee law.

Scapegoating specific national groups was also a regional practice. Regional offices of the IRB often produced highly disparate acceptance rates. In 1990, acceptance rates were 81% and 86% in Ontario and the Prairies respectively, and only 55% in British Columbia. The considerably lower acceptance rates of the BC office was explicitly attributed to the fact that a high proportion of claimants in this office came from China (CRDD Statistical Report-December 1990 1991, 4[37]); in BC, Chinese claimants had considerably lower rates of acceptance. For example, in 1990, decisions made at full hearings of Chinese claimants in Quebec produced 277 positive and 241 negative outcomes, a relative acceptance rate of 53%[38]. However, full hearings of Chinese claimants in B.C. produced 81 positive and 167 negative decisions, a considerably lower relative rate of 33%. Nationally, 485 Chinese claimants received a positive decision at full hearings, while 600 claimants were declined, constituting a relative acceptance rate of 45% (Statistical Summary 1991[39]). Since Chinese claimants constituted over a quarter of the caseloads in BC (ibid.), rejecting these claimants at higher rates was administratively

[37] CRDD Statistical Report- December 1990, 30 January 1991, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.
[38] The numbers reported in this discussion reflect the numbers of claims decided at full hearings, and hence exclude the number of claims rejected at the initial stage of adjudication (to be discussed later) as well as abandoned and withdrawn claims.
[39] Statistical Summary, 29 January 1991, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

consequential to the operations of the office. In other words, regional offices also participated in scapegoating specific countries of interest. They developed their own excludable subjects and complemented the national black list of countries with local scapegoats. Doing so allowed these offices to advance their regional administrative and efficiency goals in relative independence from the supposed universal applicability of refugee law across Canada.

Moreover, the nationalities that became targets of exclusion were manufactured dynamically across time and based on changing patterns of incoming claims. As international circumstances changed, so did the number of claims that entered the IRB's proceedings. The IRB administrators closely monitored changing rates and their source countries. Bureaucratic efficiency was a game of exact timing: timely responses to changes in the flow of claims was consequential to the IRB's ability to stay on top of its workload. The number of incoming claims had to be managed and controlled, even though in principle all displaced persons had the legal right to claim refugee status. Canadian officials were highly invested in preventing unexpected increases in the number of claims. They were particularly concerned with countries that suddenly began to send large numbers of claimants to Canada.

Due to the dissolution of the Soviet Union, in the early 1990s the number of refugee claimants from Eastern Europe was on a steep rise. Although the IRB positively characterized the fall of the Soviet Union as "democratization" (IRB 1991, 13), it remained somewhat sympathetic to how political and economic instability, and ethnic and nationalist tensions created displacement in Eastern Europe. However, the sympathy for the plight of Eastern Europeans did not last long. The arrival of large numbers of Eastern European refugees in Gander, Newfoundland, pushed the caseload of the IRB to unprecedented highs: the IRB received 4,200 claims in January, 3,300 claims in February, and 3,800 claims in March 1990 (CRDD Statistical

Report- First Quarter 1990 1990[40]). These numbers, informally titled "the Gander situation",

became a serious concern for the IRB and the Immigration Department. The number of Eastern

European claimants had to be controlled and restricted. As a result, the IRB and the Immigration

Department began to implement comprehensive and punishing strategies to reduce the number of

Eastern Europeans who accessed the Canadian refugee protection regime[41].

First, Eastern European claimants, particularly those from Czechoslovakia and Poland,

began to be rejected at higher rates at both stages of the adjudication process. For instance,

referral rates of Polish claimants dropped from 83% in 1989 to 64% in the first half of 1990.

Czechoslovakian claimants' referral rates went down from 98% to 58% in the same period

(Review of Convention Refugee Determination Division Activities 1990[42]). Acceptance rates of

these claimants at the full hearing also dropped sharply: Polish claimants were accepted at a rate

of 18% in the first half of 1990, starkly lower than their 1989 73% acceptance rate. In the same

period, claimants from Czechoslovakia saw a sharp drop from 75% to 12% (ibid.).

Secondly, the Immigration Department began to challenge larger numbers of Eastern

European claims that were positively evaluated by the IRB adjudicators. While positive initial

decisions on claims from countries such as Sri Lanka, Somalia and Iran were almost never

contested, in the first quarter of 1990, positive initial decisions of Czechoslovakian and Polish

claimants were contested at rates of 41% and 64% respectively (CRCC Statistical Report- First

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[40] CRDD Statistical Report- First Quarter 1990, 24 April 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.
[41] These strategies were developed in consideration of the stricter border and refugee protection protocols against these groups in Austria and the Federal Republic of Germany (IRB 1991).
[42] Review of convention refugee determination division activities, July 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

Quarter 1990 1990[43]). More importantly, contesting claims from these countries were likely to reverse the positive initial decision: in the first quarter of 1990, 75% of contested claims from Czechoslovakia and half of the contested claims of Polish claimants reversed the positive initial decision (ibid.). Hence, it soon became considerably harder for these claimants to receive refugee status in Canada. These unfavourable conditions contributed to high withdrawal rates of Eastern European claimants, particularly those from Poland.

Thirdly, the Immigration Department began to impose visa restrictions against Eastern Europeans. These visa restrictions proved to be effective in reducing the number of Eastern Europeans who made refugee claims in Canada. By the middle of 1990, the number of Eastern Europeans who filed refugee claims in Canada was considerably lower. This helped reduce the overall caseload of the IRB substantially (Review of Convention Refugee Determination Division Activities 1990[44]). With Eastern European claimants successfully kept away from the Canadian regime, by March 1991 the IRB began to see noticeable drops in the number of its incoming claims (CRCC Statistical Report- March 1991[45]).

All in all, in the first years of its operations, the Canadian refugee claim processing bureaucracy engaged in diverse, effective and targeted strategies of deterrence and exclusion. By scapegoating specific national groups, the Canadian regime placed large groups of claimants outside the bounds of refugee protection and rights. The excludable claimants were subject to comprehensive, multi-actor and systematic exclusionary treatments. Diminishing the numbers

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[43] CRDD Statistical Report- First Quarter 1990, 24 April 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.
[44] Review of convention refugee determination division activities, July 1990, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 003, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.
[45] CRDD Statistical Report- March 1991, 25 April 1991, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 004, Refugee and Displaced Persons-General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

and acceptance rates of these claimants was an intentional bureaucratic goal. Through these practices the Canadian refugee protection bureaucracy actively produced exclusion, inequality and rightlessness; despite expanding rights, the bureaucracy advanced restrictionism.

V.   Conclusion

This chapter explored the contradictory impulses of state-controlled refugee protection in the early years of systematic refuge protection in Canada. I showed that Canada's first systematic regime of refugee claim processing was the outcome of a highly expansive legal environment. Legislative and jurisprudential expansions on refugee rights and administrative justice outlawed the previous ad-hoc system, and necessitated a new and well-devised process for adjudicating refugee claims. However, the expansive effects of this normative legal environment were curtailed through administrative and bureaucratic measures: the Canadian regime soon began to produce subjects that could be readily excluded from access to refugee rights.

The dynamic interplay between the fields of law and bureaucracy allowed the new regime to be, in principle, humanitarian, and yet practical and efficient. As I showed, in managing its challenging workload, the bureaucracy was actively attuned to its distinct and relatively autonomous goals and priorities. Given the challenging circumstances of its early years, the claim processing bureaucracy was run by a compulsion for increased efficiency. The compulsion for efficiency, in turn, gave rise to a strong impetus for restrictionism and deterrence: for claims to be processed quickly and at low costs, the number of incoming claims as well as acceptance rates had to be pushed down. The desire for efficiency and deterrence led to quick, cheap and legally questionable methods of exclusion, such as using nationality to locate supposedly fraudulent claimants. This method helped the bureaucracy screen large numbers of

claimants out of adjudication procedures. The work of refugee protection quickly devolved to a bureaucratic battle against specific national groups.

Claimants' nationality became an adaptable administrative tool for managing caseloads. Bureaucratic efficiency and administrative control came at the expense of specific national groups. The targeted claimants were treated harshly and kept outside the realm of rights and protection. Despite the expanding legal environment, the new bureaucracy actively produced inequality, exclusion and rightlessness. Thus, the new regime was an articulation of expansive legal impulses in relation to Convention refugees, and restrictionist bureaucratic impulses against institutionally manufactured groups of excludable claimants.

This chapter explored the paradoxical impulses of the contemporary regime of refugee protection in Canada in the earliest years of its operation. The next chapter will examine similar paradoxes in the 1990s and early 2000s. I will show that the Canadian regime remained an articulation of expansionist and restrictionist impulses that were arranged in separate fields and in relation to supposedly distinct subjects: while refugee jurisprudence expanded on some grounds, access to refugee rights was undermined through bureaucratic strategies against a different set of national groups. Hence, the Canadian refugee protection regime continued as a paradoxical articulation of humanitarianism and restrictive control.

Chapter 2-The Politics of "Doing Exactly Nothing":

Gender Guidelines and the Bureaucratic Administration of Refugee Protection

> I remember the pride and hope I felt for our country when the Gender
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> Guidelines were made public in 1993… I thought Canada was at the cutting edge of
>
> social policy, that we were contributing to an important shift in the international
>
> refugee paradigm…
>
> Greta Hofmann Nemiroff, President of Sisterhood Is Global Institute (CCR 2003)

In March 1993, the Immigration and Refugee Board of Canada (IRB) issued its much-anticipated Gender Guidelines, and made Canada the first country in the world that formally extended refugee protection to women fleeing gendered forms of abuse and violence. The IRB's Gender Guidelines pushed the boundaries of refugee protection policy to new and unprecedented limits. Recognizing gender as a ground for refugee protection opened the door to recognizing previously unimaginable and new forms of persecution, and changed refugee jurisprudence in irreversible ways[1].

The jurisprudential expansions that underlay the IRB Gender Guidelines were indisputably significant in opening the tightly guarded legal definition of the refugee. Yet, jurisprudence is only one piece in the much larger machine that makes up refugee protection regimes. As I showed in the previous chapter, state-regulated refugee protection is not a direct and unmediated result of legislation and jurisprudence. Rather, refugee protection is the outcome of complex and

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[1] Gender-based claims were recognized through jurisprudential interpretations of the 1951 Convention that were later also used to acknowledge sexual orientation, gender expression and identity, and intersexuality claims. See the UNHCR's guidelines on sexual orientation and gender identity (UNHCR 2012). These jurisprudential interpretations will be discussed shortly.

dynamic interplays between legislative and jurisprudential forces, and bureaucratic and administrative logics and strategies.

In this chapter I argue that throughout the 1990s and early 2000s the Canadian refugee protection regime remained an articulation of expansionist and restrictionist impulses; whereas expansions were produced in the field of jurisprudence and focused on gender-based claims, restrictions were achieved through the field of bureaucracy and against specific national groups of claimants. These articulated arrangements facilitated simultaneous expansion and restriction of the Canadian regime; rights expanded in some fields and for some claimants, and yet became restrictive through other fields and for other groups of claimants. These paradoxical developments opened the refugee definition without increasing actual access to refugee rights; as I will show, gendered jurisprudential expansions did not, and were not meant to, increase access to refugee protection substantially.

This chapter provides a contextualized analysis of the development of the Gender Guidelines. This analysis will demonstrate that the Canadian Gender Guidelines were the negotiated outcome of considerable political mobilization in the face of political opposition. Yet, the desire to expand refugee protection to gender-based claims was not externally imposed on the Canadian refugee protection regime. To the contrary, senior IRB administrators were adamantly in favour of an expansive gender-based refugee policy. In fact, these administrators had taken steps toward developing this policy even before the topic of gender-based persecution had created any serious popular momentum. In other words, the impetus to expand protection to gender-based claims lay within the Canadian refugee protection regime itself.

Despite this, the Canadian refugee protection regime was not radically or uniformly expansive. The new jurisprudential expansions aimed to correct the masculinized focus of

refugee law. As feminists rightly noted, refugee law largely overlooked the forms of violence that were commonly endured by women. To make refugee protection relevant to women, the law had to account for a broader notion of persecution. Yet, gender-based expansions ultimately upheld the liberal primacy of political rights: women's rights to protection became annexed to political rights and were conceptualized within the relations between citizens and the state. Hence, even if the perpetuator of gender-based violence was a private non-state party, protection was offered based on the unwillingness or inability of the state to protect female citizens. In other words, expansions remained limited in their scope.

In addition, the growing recognition of gender-based claims was simultaneously accompanied by serious and innovative strategies of restriction and exclusion. Over the course of the period in which the IRB released and revised its Gender Guidelines, it also devoted considerable time, attention and creativity to implementing highly restrictive and effective strategies against specific national groups. In short, the Canadian refugee protection regime opened the door to gender-based claimants while closing it on large numbers of other claimants.

The contrasting drives to open and close the door of refugee protection were internal to administration of refugee protection in Canada. The IRB took up both initiatives voluntarily, with great resolve and through creative collaborations with outside forces. When necessary, the IRB administrators joined forces with a range of potential allies; from conducting strategic interviews with supportive journalists during the battle over the Gender Guidelines, to coordinating practices with the Immigration Department, the IRB did what was needed to include gender-based refugees and exclude scapegoated national groups. In short, both expansive and restrictionnist initiatives were internal, intentional and consequential to the operations of the refugee protection regime. While seemingly paradoxical in their sentiment, both initiatives

served to maintain the legitimacy of the IRB as a humanitarian agency as well as an administrative state bureaucracy. In short, the Canadian regime remained an internally conflictual, yet functional articulation.

This chapter maps the systematic arrangements that allowed the Canadian refugee protection regime to remain stable despite its internal paradoxes. I will show that the relative autonomy of the fields of law and bureaucracy, and the supposed distinction between subjects of expansion and exclusion, allowed the Canadian regime to enact paradoxical developments without losing its overarching stability. The jurisprudential gesture to and bureaucratic withdrawal of meaningful refugee protection offered a mechanism for the promise of justice and its subsequent failure (Povinelli 1998). The cycle of promising through jurisprudence and failing via the bureaucracy maintained the Canadian refugee protection regime despite and through its failures and injustices.

The role of the bureaucracy in maintaining the promise of justice in a state of perpetual failure is one of structural tendency and contextual requisite. In a neoliberal age that reduces all function of governance to economic viability (Brown 2015), it is only rational for the bureaucracy to prioritize efficiency above and beyond all else. Surviving as a bureaucracy requires compulsive investment in reaching for higher rates of quantifiable output. The Canadian refugee claim processing bureaucracy had no choice but to advance quick, cheap and efficient methods of claim processing, regardless of the incompatibility of these methods with meaningful refugee protection. Hence, the bureaucracy developed its relatively autonomous goals, priorities and strategies, at times at odds with the humanitarian mandate of refugee protection or the rigours of law. Under pressure to do more with less, the Canadian regime gained much from rejecting large groups of claimants. Scapegoating and excluding national groups that featured

prominently in administrative statistics helped manage caseloads quickly and efficiently, and screened thousands of claimants out of determination proceedings. Bureaucratic efficiency and institutional survival came at the cost of specialized procedures of exclusion. Scapegoated claimants were the human casualty.

This chapter draws on archival material, media reports, interview data, annual reports and statistics acquired from the IRB to explore the contradictory impulses of the Canadian refugee protection regime as the IRB matured beyond its early years. This chapter consists of four sections. The first section sketches the broader legislative and political context in which the Canadian refugee protection regime moved towards expanding refugee protection on account of gender. This discussion will situate the gender-based jurisprudential expansions within the increasingly restrictive context of their time. The second section describes the contentious political process through which the Gender Guidelines were established. I will show that the Guidelines were a negotiated political achievement, and one that ultimately triumphed over several other competing proposals.

The remaining two sections provide a detailed view of the bureaucratic operations of the Canadian refugee protection regime in the 1990s and early 2000s. I first examine the IRB's struggles in striking an acceptable balance between the quality and efficiency of its work. I will demonstrate that the conflictual demands of humanitarianism, border control and administrative efficiency placed the IRB in a position of unavoidable failure. The last section explores how manufacturing a new set of national groups as excludable claimants helped mitigate some of the administrative dilemmas of refugee protection. I discuss the evolving national configurations of excludables, and the controversial and exclusionary bureaucratic measures that were put to the task of rejecting them.

I.   The Restrictive Context of Gender Expansions

In the 1990s, the IRB issued its Gender Guidelines and broke ground in interpreting refugee law in exceptionally gender-sensitive and expansive ways. The IRB's Gender Guidelines formally acknowledged previously illegible forms of violence such as sexual assault and domestic abuse, and redefined the accepted bounds of refugee protection. Through the IRB's voluntary norm-setting, the course of refugee jurisprudence and protection was set on an unexpected path; soon other countries were under pressure to follow suit[2] and gender-based claims began to be recognized around the globe.

Notwithstanding its expansive effects, the IRB's Gender Guidelines emerged within an increasingly restrictionist context. In the 1990s, the Canadian border and immigration control systems were undergoing considerable transformation to more effectively control and limit access to Canada's in-land refugee protection regime. The expansions introduced by the Gender Guidelines were enveloped within an otherwise largely restrictive momentum, spearheaded by Bill C-86.

Bill C-86 came into effect in February 1993, in the last few months of the Progressive Conservative government. Nonetheless, its restrictive effects lived long passed the Conservatives and were either maintained or further intensified in the following years by the Liberals. The immigration regulation amendments introduced by this Bill changed the procedural roadmap to refugee protection significantly. First, this Bill eliminated the initial stage of the then two-staged refugee status determination procedure. In the brief period of its existence, the initial stage was

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[2] Immediately after the publication of the Canadian Guidelines, American and British press and advocates began to call on officials to follow Canada's example and formally recognize gender as a basis for refugee protection (see The Arizona Daily Star 1993; Trueheart 1993; Wheelwright 1993).

conducted by an Immigration officer and an IRB adjudicator, and assessed the eligibility and basic credibility of claims[3] (IRB 1990, 13). Given that eligibility and basic credibility criteria did not disqualify the vast majority of claimants, the initial stage consistently produced extremely high acceptance rates (see IRB 1990, 14; 1991, 18; 1992, 21). As a result, officials began to consider it superfluous to the adjudication process.

In line with this thinking, Bill C-86 eliminated the initial stage of adjudications, and placed its two functions of eligibility and credibility assessment under two different authorities. Credibility assessments were placed under the exclusive jurisdiction of the IRB. In turn, the authority to determine eligibility of claims was assigned to the Immigration Department (IRB 1994, 9; Dench n.d.). In effect, Bill C-86 separated the work of security and border control from the task of refugee adjudication. This increased the control of the Immigration Department over the incoming flow of claims; claimants' ability to enter refugee claim proceedings was now directly and exclusively controlled by the Immigration Department.

Although this change removed the IRB from the initial eligibility screenings, the IRB officials welcomed it wholeheartedly (IRB 1993, 11). Elimination of the initial stage gave the IRB more flexibility in managing its limited resources and hence was expected to improve the efficiency of claim processing. With the initial stage out of the IRB's jurisdiction, less work had to be devoted to booking and scheduling multiple rounds of hearings. More importantly, the IRB could now move all adjudicators to the second stage of full hearings and maximize its capacity to finalize claims. In the choice between control and efficiency, the IRB was quick to give up guardianship over access to refugee protection in exchange for improved rates of productivity.

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[3] Factors that made claimants ineligible included their criminal histories, access to secure residence in a safe third country, and previous rejected claims in Canada. The initial stage used a low threshold test to assess the basic credibility of claims. More rigorous credibility assessments were left to the second stage of full hearings.

In addition to eliminating the initial stage of adjudications, Bill C-86 introduced multiple restrictive measures to the Canadian refugee protection regime. Although widely protested by opposition parties and advocacy organizations (Ninette and Trebilcock 1998), these changes were squarely in line with international developments in border control and security. Across Europe and North America states were adopting increasingly more restrictive provisions that narrowed the access of refugees and displaced persons to protection and international mobility. Canadian officials noticed these trends and worried that failing to bring Canada's border control practices in line with those of other western nations would lead to an influx of claims (IRB 1991, 14; 1993, 17). The world of migration control was moving towards more restriction and Canada also joined the race to the bottom of refugee protection.

Taking the emerging geopolitical and administrative concerns to heart, Bill C-86 opened the refugee protection regime to unprecedented levels of exclusion, securitization and control[4] (Ninette and Trebilcock 1998). First, this Bill made it easier to exclude large numbers of claimants from even entering the refugee determination proceedings. For example, Bill C-86 gave immigration and medical officials more discretionary lenience in determining whether those wishing to enter Canada constituted a risk to public health and safety. By allowing more flexibility in these decisions, the Bill made it easier to declare claimants inadmissible.

Further, Bill C-86 extended criminal inadmissibility provisions. Most disturbingly, conviction was not necessary for rendering an applicant inadmissible. Rather, officials' discretionary judgement about claimants' future or past criminality was sufficient for denying them admission to Canada. Once blocked from entering Canada, prospective claimants were

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[4] The restrictive provisions introduced by Bill C-86 concerned all persons who wished to enter Canada, including but not limited to refugee claimants. In this discussion I will only focus on the implications of these provisions for refugee claimants.

automatically blocked from entering the in-land refugee protection regime. Those rendered inadmissible had very limited opportunities of appeal.

Additionally, Bill C-86 restricted prospective claimants' access to the Canadian refugee protection regime by reintroducing the safe third country provisions[5]. Intending to stop the so-called practice of asylum "shopping", the safe third country provisions restricted claimants' choice in where they filed their claims. Refugees were now required to claim refugee status in the first "safe" country in which they arrived after fleeing the country of persecution. In other words, to qualify for protection, claimants had to travel directly to Canada, without landing in a "safe" third country on their route. Of course, given the geographical location of Canada in relation to the most turbulent regions of the world, these provisions restricted access to refugee protection considerably: no travellers arriving by land and only those embarking on the most arduous sea journeys could have a claim to refugee protection[6]. Canadian rights became primarily applicable to those stepping off direct, continuous flights[7]. More importantly, the Immigration Department held the authority to decide which countries were "safe". As a result, the department had great latitude in potentially blocking large numbers of prospective claimants from even entering the Canadian refugee status determination process[8].

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[5] These provisions had been crafted in Bill C-55 and passed in 1988.

[6] The third safe country provisions had significant class implications: uninterrupted air travel is considerably more expensive than travel by land or piecemeal and mixed-transport travel. As a result, the safe third country provisions made access to refugee protection highly inaccessible to the more financially disadvantaged classes of asylum seekers.

[7] As Audrey Macklin (2003) notes, the Third Country Agreement is, in many respects, anomalous to one of Canada's racist immigration provisions in the early twentieth century. This provision denied admission to migrants who did not arrive from their countries of origin via "continuous journey". This provision was intended and designed to prevent Asian migration.

[8] Despite having the authority, the Immigration Department refrained from compiling a list of safe third countries (Ninette and Trebilcock 1998). Designating safe countries is a controversial practice that can expose the Immigration Department to criticism and legal challenge. Thus, the authority is not always worth the trouble. For a recent example, see CCR (n.d.) on the legal challenge against designating the United States a safe third country for refugees.

In addition to restricting access to the in-land refugee protection regime, Bill C-86 intensified security provisions for border control and eligibility screenings. The Bill gave Immigration officers permission to search claimants who were suspected of possessing undeclared identity documents and other evidence[9]. The documents discovered through these searches could be used against claimants in refugee proceedings. Furthermore, all refugee claimants were to be fingerprinted and photographed. Detention provisions were also intensified (Ninette and Trebilcock 1998; Dench n.d.).

Moreover, Bill C-86 made it harder for some refugee claimants to receive positive decisions. At the time, refugee decisions were made by two IRB members. Normally, positive assessment by one member was sufficient to grant refugee status. Bill C-86 created three classes of claimants who could only be accepted by a unanimous positive decision: claimants who were believed to have destroyed or disposed of their identity documents without valid reason, claimants who had visited the country of persecution after making a claim in Canada and those from supposedly safe countries. While these provisions made receiving refugee status much harder for those classified in any of these three groups, none of the outlined practices legally disqualify a claimant from refugee protection[10].

Lastly, Bill C-86 made the process of claiming refugee status less favourable, purportedly in order to deter fraudulent claimants. The Bill did not allow refugee claimants to receive work permits while they awaited finalization of their claims. This was meant to discourage claimants who, supposedly, took advantage of lengthy processing times to work and make money in

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[9] The search provisions in Bill C-86 were later further intensified in Bill C-44, passed in 1995 (Ninette and Trebilcock 1998). Bill C-44 extended immigration officers' authority by permitting them to seize any documents discovered through searches.

[10] For instance, Canadian refugee law recognizes that many refugees have no choice but to travel with fake documents (see CARL 2018). Further, many refugees are instructed or choose to destroy their travel documents upon arriving in Canada. The Federal Court of Canada has ruled that claimants' choice to destroy their travel documents should have no bearing on refugee status decisions (see CCR 1996).

Canada. Without the right to work legally, refugee claimants were pushed into poverty and reliance on social assistance. This placed great strains on provincial welfare systems. The financial costs eventually forced the government to restart issuing work permits to claimants[11]. What remained unaccounted for was the devastating human cost of this provision: from food insecurity and social isolation, to potential exposure to exploitative unauthorized employment relations.

It was in this increasingly restrictive context that the IRB issued its Gender Guidelines and made Canada the first country in the world to recognize gendered forms of persecution. While the larger immigration and border control apparatus was moving resolutely towards increasingly restrictive practices and protocols, the IRB was looking for ways to expand refugee protection to previously unacknowledged groups of claimants. Importantly, the desire for a gender-conscious refugee policy emerged organically from systematic refugee protection in Canada. Since the earliest days of their work, the IRB administrators had noticed that responding adequately to women refugees required attention to the distinct gendered patterns of displacement and persecution (IRB 1991, 30; 1992, 32; 1993, 12, 32). But since gender was not explicitly named as a ground for refugee protection in international or Canadian law[12], recognizing gender-based persecution required some jurisprudential creativity.

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[11] Although this attempt at deterring refugee claimants by making conditions of their wait time unfavourable was soon retracted, other practices were to follow. In 2012 the conservative Minister Jason Kenny reiterated similar logics of deterrence by diminishing the Interim Federal Health Program, the program that provided health care to claimants while they awaited the outcome of their claims (see Chen and Liew 2017).

[12] Following the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Canadian law defines the refugee as a person who is outside of his or her country of nationality or habitual residence, and is unable or unwilling to return to this country due to a well-founded fear of persecution. Importantly, persecution must be based on the refugee's race, religion, nationality, political opinion, or membership of a particular social group (UNHCR 2011 [1951]). Gender is not named as a ground for protection.

The IRB Gender Guidelines[13] provided a jurisprudential basis for recognizing gender-based claims. The Guidelines argued that gender may constitute a form of membership in a "particular social group", a ground that warranted protection in refugee law. According to the Guidelines, membership in the particular social group of women exposed members to specific forms of violence. Moreover, these forms of violence could amount to persecution. Thus, the Guidelines provided an expansive jurisprudential interpretation based on the existing Convention categories and without altering or amending the law.

Of course, the IRB Gender Guidelines are not law. They are neither binding nor legally enforceable. However, they are an important tool for improving the quality and consistency of decision making for women refugee claimants. The Gender Guidelines clearly indicated the preferred position of the IRB leadership on gender-based claims, and provided guidance on how to interpret and assess gender-based persecution[14]. Furthermore, the Guidelines incentivized compliance. Although Members were not obligated to follow the Guidelines[15], they were required to provide an explanation if they chose to diverge from it. Thus, the Guidelines provided a mechanism for unifying the decisions of hundreds of independent adjudicators across Canada, and enhanced the consistency, and ultimately the legitimacy, of the IRB's work; Canada's gender-based refugee policy improved refugee protection and with it the humanitarian reputation of the IRB.

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[13] Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution. Accessible at https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx

[14] For instance, absence of state protection and the possibility of internal flight within the home country are to be considered in decisions on gender-based claims.

[15] IRB Members are independent decision makers; they cannot be forced or pressured to issue a specific decision on any given case. This independence is meant to shield refugee decisions from the influence of policy and political considerations. Nonetheless, as I will show in this chapter, political and administrative interests continued to interfere with refugee adjudications.

Yet, given the increasingly restrictive developments in border and immigration control, expanding humanitarianism was not fully on the state agenda. However integral to fair and meaningful refugee protection, recognizing gender-based claims required navigating an expansive proposal through the overwhelmingly restrictive webs of border and migration control. The Canadian refugee protection regime had to once again strike a difficult balance between its desire to expand refugee rights and its impetus to limit access to refugee protection. In other words, the Canadian regime remained a conflictual articulation of humanitarian protection and restrictive border control: it hoped to both expand refugee rights and restrict access to them.

II.   The Making of Gender Guidelines: On the Politics of "Doing Exactly Nothing"

Today, the IRB Gender Guidelines, formally titled *Women Refugee Claimants Fearing Gender-Related Persecution,* are a well-established policy instrument and an important source of fame and pride for Canada. The secure and well-established position of these Guidelines, however, obscures two important points about the history of their development. First, the Gender Guidelines were the result of a long and controversial struggle against considerable political opposition. It was only because of sustained feminist and pro-refugee mobilization that the opposition to the Guidelines eventually subsided; in fact, until only one month before the Gender Guidelines were issued, the Immigration Minister continued to reject them as a viable option.

Second, the Guidelines were only one mode of addressing the question of gender-based persecution among an array of competing proposals. Other proposals, some of which were considerably more far-reaching, were ultimately cast aside in favour of the Guidelines. As I will show, the choice of Guidelines was informed by significant levels of administrative and political pragmatism. In other words, the Guidelines were not an essential or pre-determined outcome of

pro-refugee mobilization or even the most expansive imaginable method of handling gender-based claims. To the contrary, they were the result of semi-independent and conflictual social and political forces that, to borrow from Hall's discussion of articulation (Grossberg 1986, p. 53), "under certain historical conditions … [became] connected."

The Gender Guidelines were issued by the second Chairperson of the IRB, Nurejahan Mawani. Mawani brought great commitment to acknowledging gendered forms of persecution. However, she was not the only IRB chairperson to strongly support this development. The first chairperson of the IRB, Gordon Fairweather, had also championed the development of a gender-conscious refugee protection framework. Even after his retirement in 1992, Fairweather openly spoke in favour of recognizing gender as a ground for refugee protection (Broadbent 1992).

The support for recognizing gender-based claims at the IRB followed budding international conversations on the topic. As early as the mid-1980s the UNHCR had begun to consider gender as a basis for refugee protection. In 1985, the UNHCR member states, including Canada, endorsed and adopted a resolution on gender-based claims. This resolution argued that although absent from the Convention, gender can be interpreted as a ground for refugee status (Valpy 1993; Oziewicz 1993). Despite this, no state began to recognize gender-based claims in its national framework. Given that this jurisprudential interpretation expanded the reach of refugee protection, states were not inclined to accept it with open arms. Canada was not an exception in this regard.

Even though mostly side-stepped by member states, the expansive jurisprudence introduced in the UNHCR resolution was not without impact. Soon, gender-conscious interpretations of refugee law began to seep into some refugee decisions in Canada. For instance, a 1987 decision granted refugee status to a Turkish woman survivor of sexual violence

(Oziewicz 1993; Valpy 1993). This decision drew on the 1985 resolution to rule that the claimant could be considered a member of a particular persecuted group. Nonetheless, these early cases only reflected the interpretation of individual decision makers and lacked official or systematic force in shaping refugee adjudications more generally.

Systematic recognition of gender-based persecution only broke the heavy ice of resistance as a result of a few high-profile cases. These cases brought the topic of gender-based protection to the public and made it a matter of mobilization and demand. Most famous among these was the case of a highly outspoken woman known as Nada. Nada was a young Saudi Arabian woman who actively defied gender norms and socio-political sanctions against women in her country. A self-professed feminist, Nada particularly opposed compulsory veiling[16]. She also objected to gender-based discrimination in education and employment, and restrictions on women's freedom of movement and travel (Broadbent 1992). Nada's refusal to comply with gender norms, particularly in wearing a full veil in public, had exposed her to street and police harassment and violence; she had been ridiculed, threatened, spat at and beaten for appearing in public unveiled and without proper male company (Oziewicz 1993, Ulbrich 1993, Neuwirth 1992). Adamant in her feminist beliefs and fearing physical violence and arrest (The Hamilton Spectator 1993b), Nada eventually fled to Canada in 1991 (Oziewicz 1993). To her surprise, when she explained her reasons for claiming refugee status to Canadian immigration officers, they laughed.

The trouble with Nada's case was that it did not readily fit with the conventional readings of the refugee definition. To decide her claim adjudicators had to consider novel questions. For example, since Nada explicitly framed her claim as a case of persecution based on feminist

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[16] For Nada's own account of her refugee case and feminist beliefs, see Nada 1993.

beliefs, adjudicators had to decide whether feminism constituted a legitimate form of political opinion, and, thus, would warrant refugee protection. Moreover, adjudicators had to determine whether street harassment and gendered forms of regulation amounted to persecution. As the Minister's spokesperson later explained apologetically, in common adjudication practice "normal cases of persecution involve physical abuse of a horrible sort" (The Hamilton Spectator 1993a, A5). Put differently, Nada's experiences of everyday harassment and chronic restraint seemed to fall short of the level of atrocity commonly expected in persecution. Lastly, adjudicators had to decide whether Nada's punitive interactions with the police in Saudi Arabia constituted the legitimate right of a sovereign state to prosecute a citizen who defies the law, or a matter of violation of basic human rights. In sum, Nada's experiences of gendered violence diverged from the established, masculinized and state-centred notions of refugee rights.

The IRB adjudicators who heard Nada's refugee claim rejected her case. The two adjudicators ruled that Nada did not meet the standards of refugee law. They refused to recognize Nada's defiance of gendered norms as a matter of political opinion or her troubles in Saudi Arabia as persecution. Most infamously, the decision makers suggested that Nada could simply avoid trouble by complying with Saudi Arabian laws. They even advised her to "show consideration for the feelings of her father" (Broadbent 1992, A17).

Once rejected in refugee status determination proceedings, deportation was ordered. Determined not to return to Saudi Arabia, Nada disregarded the deportation order and went into hiding (Broadbent 1992). Soon, a warrant for her arrest was issued (Neuwirth 1992). Despite this, Nada remained in hiding and made important connections with refugee lawyers, human rights, women and feminist organizations, and refugee advocates. With the support of these activists, Nada's case broke in the media and became a large and sensational public spectacle.

Sympathetic media coverage of her case and speculations about the prospects of her deportation helped raise considerable support. Outraged by the negative and patronizing decision, supporters called for women's rights to be acknowledged as human rights. They insisted that Nada's troubles amounted to persecution and her defiance ought to be recognized as feminist political dissent. Large mobilizations led to strong campaigns that called on the Immigration Department to cancel Nada's deportation and grant her permanent residence in Canada (Broadbent 1992).

Nada's case became an important rallying point for several groups and organizations that believed gendered forms of violence should be recognized as persecution. But Nada was not the only case that sparked public discussion on the topic. An array of other failed refugee cases by women also soon found their way to the media. These cases, involving women from Trinidad, Bangladesh and Iran, introduced a wide range of topics to the conversation. Issues of spousal abuse, illegal abortion and sexual violence became points of debate in refugee jurisprudence (Wheelwright 1993; Trueheart 1993; York 1993b; Miller 1993b; Landsberg 1992).

The topics of domestic abuse and spousal violence ignited particularly nuanced discussions on the scope of refugee protection. These discussions considered whether seemingly private forms of violence, such as domestic abuse, could be interpreted as persecution (see Macklin 1995)[17]. Alongside ongoing jurisprudential debates, heart-wrenching details of domestic abuse cases regularly hit the media. Graphic reports of the domestic violence and abuse these women had endured mustered strong public support for recognizing gendered persecution. Feminist lawyers, refugee advocates, legal scholars, and women and human rights organizations

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[17] The issue of domestic abuse produced a particularly complex discussion, especially since domestic abuse remains an ongoing problem in Canada. Legal scholars debated whether Canada may grant refuge to women against forms of violence that also pertain to Canada (See Macklin 1995). Eventually, this question was resolved by making absence of state protection against domestic abuse a condition for granting refugee status in these cases (Trueheart 1993).

repeatedly reminded the media of these cases and called for blanket deportation relief for the rejected women (York 1993a; Ulbrich 1993; Cardozo 1993).

Of course, not all gender-based claims decided by the IRB in this period were rejected. In fact, several claims with comparable circumstances had received positive decisions from IRB adjudicators (Oziewicz 1993; Miller 1993a). In the absence of a unifying policy, it was up to the discretion of individual decision makers to determine whether gender-based claims were compatible with the provisions of refugee law. Consequently, as lawyers and advocates rightly noted, gender-based decisions were troublingly inconsistent (Scanlan 1993). Moreover, negative decisions on gender-based claims were made by independent decision makers and against the preferred positions of senior IRB administrators.

Over the course of the struggle for recognizing gendered persecution in Canada, advocates discussed and debated various forms this recognition could, or ought to, take. In these discussions, the Guidelines were only one relatively modest alternative among a range of proposals. Some advocates demanded more substantial forms of recognition than the Gender Guidelines could ever offer. For instance, women's groups, refugee advocates, lawyers, some politicians and even the retired chairperson of the IRB, repeatedly called for amending Canadian immigration law to recognize gender as a basis for refugee protection (Broadbent 1992; Thompson 1993c; York 1993b). For these advocates the Guidelines lacked sufficient legal authority to shape consistent decisions making on gender-based cases (Ulbrich 1993). In their view, gender-based protection had to be enshrined in the law and afforded full legal authority. Other advocates called on the Canadian government to take the question to the United Nations and lead international conversation on amending the 1951 Convention to include gender as a Convention ground (Wheelwright 1993; Scanlan 1993).

However, government actors, including Chairperson Mawani, were in support of formulating Canada's gender refugee policy without amending the Immigration Act. These officials believed that the existing legal definitions allowed sufficient room for recognizing gender-based claims (Thompson 1993d). As they pointed out, the existing legislation was in fact used in many cases in favour of women claimants (Thompson 1993a). Hence, they argued, legislative change was not necessary. Rather, decision makers could be trained, guided and encouraged to interpret the existing definitions in more gender-sensitive ways.

For some advocates, the Guidelines were the most plausible proposal given the circumstances of the time. Expanding the Convention definition at a time when member states wished to restrict refugee protection as much as possible seemed unrealistic and even dangerous (Trueheart 1993; Oziewicz 1993). Some legal scholars rightly pointed out that gender was not the only important issue overlooked by the 1951 Convention; amending the Convention to include gender but leave out the other neglected issues, such as sexual orientation and socio-economic status, could be problematic (Oziewicz 1993).

Of course, the most serious issue facing Canada's gender-based refugee policy was not lack of consensus on its shape and format. Although the IRB leadership was largely in support of an expansive, albeit practical, refugee policy on gender, not all political actors were in favour of this change. While feminist and refugee advocates found an ally at the IRB, they lacked the same in the Immigration Department. Throughout the struggle for recognizing gender-based claims the Progressive Conservative immigration Minister Bernard Valcourt vehemently opposed expanding the interpretation of the refugee definition on account of gender.

Speaking from what soon became the wrong side of history, Minister Valcourt refused the calls to expand refugee protection to gender-based claims for two reasons. First, he argued

that altering the refugee definition to include gender-based claims would constitute an imperialist imposition of Canadian values on the world. He suggested that Canada had no right to amend the internationally recognized definition of refugees (Thompson 1993a). Second, Valcourt argued that expanding refugee rights to gender-based claims would open Canada to an overwhelmingly large number of cases (Miller 1993a; York 1993a; Ulbrich 1993). With millions of people on the move around the world, the cost of expanding the refugee definition was simply too high. Valcourt found this expansion particularly counterintuitive at a time when Canadian border control and immigration policy, like in much of the western world, was largely focused on curbing the flow of refugee claims[18] (Scanlan 1993; Thompson 1993a).

Proponents of gender-based refugee policy rejected both of these arguments. Against the first argument, advocates insisted that protection against gender-based violence was not any more imperialistic than protection against racial or religious persecution (Broadbent 1992, Neuwirth 1992). Advocates also rejected the notion that recognizing gender-based claims would open Canada to large volumes of refugees. Several advocates explained to the media why establishing a gender-based refugee policy would not lead to a surge in the number of claimants (Scanlan 1993; Broadbent 1992; York 1993b). As they correctly noted, the policy only applied to women who made in-land refugee claims. In other words, women had to flee their home countries and successfully travel to Canada before they could be recognized under the policy. Yet, women's gendered struggles, including lack of access to financial resources, largely impeded their international mobility (Scanlan 1993; York 1993b). Since the vast majority of

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[18] Those opposing the development of a gender-based refugee policy were also concerned that expanding refugee protection based on gender could potentially lead to demands for more expansions, such as on the basis of sexual orientation, poverty or famine (Scanlan 1993). Without the hindsight of history, opponents could not imagine that in a matter of years persecution based on sexual orientation and gender identity would be widely acknowledged in refugee jurisprudence.

those who could potentially benefit from the policy simply could not access it, the policy was not likely to lead to a flood of claimants. As Edward Broadbent, director of the International Centre for Human Rights and Democratic Development and a key supporter of gender-based refugee policy, remarked: "A large majority of women […] would never hear about it and others would have no opportunity of getting here" (Todd 1992, C5).

Broadbent's remark was a rightly modest estimation of the implication of recognizing gendered persecution in Canada's refugee policy. Recognizing gender was not likely to revolutionize women's access to refugee protection. Adopting a gender-conscious policy did little to change the broader circumstances that systematically undermined women's mobility, access to financial resources, and ability to secure protection against violence and abuse. The policy had a very limited reach and hence no serious bearing on the number of incoming claims.

Despite the well-placed accuracy and humility of Broadbent's remark, this reasoning was indeed striking. In effect, Broadbent and several other advocates defended gender-based refugee policy against restrictionist concerns by emphasizing its inaccessibility to the actual women who could benefit from it[19]. The policy was defensible precisely because it was politically and administratively ineffectual: the expansions were neither to disrupt the rise of restrictionism in immigration and border control, nor to greatly facilitate women's access to protection. Despite the expansive jurisprudence that lay behind it, the policy was, as Edelman (1992, 1535) has argued in relation to Civil Rights law in the US, "minimally disruptive to the status quo". In the transition from the field of jurisprudence to the field of administration, the meanings, implications, and consequences of gender-based expansions were severely tamed and modified.

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[19] Not all advocates joined this mode of reasoning in defense of the gender-based refugee policy. Groups such as the Canadian Council for Refugees and The National Action Committee on the Status of Women held more radical positions that did not appeal to the restrictionist tendencies of the time, and criticized the limitations of the Guidelines in offering real protection to actual women (for instance see Ulbrich 1993; Miller 1993b).

Tunnelled through the highly narrow administrative scope of in-land protection, the policy soon became a way to demonstrate Canada's (symbolic) commitment to gender equality to international audiences (Neuwirth 1992, Cardozo 1993). In an ironic turn of events, the gender-based refugee policy became a policy benefitting Canada rather than the persecuted women who needed refuge.

Eventually, sustained mobilization and overwhelming public demand forced Minister Valcourt to change his position on gender-based refugee claims. Suspected of wishing to appeal to the public (Cardozo 1993) and in what came to be described as a "policy flip-flop" (York 1993a, p. A4), Valcourt intervened to stop the deportation of a number of high profile rejected women, including Nada (Oziewicz 1993). He also pre-announced the IRB's creation of the Gender Guidelines (Thompson 1993d).

Minister Valcourt's announcement of the Gender Guidelines brought an end to the ongoing discussion on Canada's gender-based refugee policy. With the Minister's change of position, the Guidelines became an immediately achievable goal. Other proposals were still facing considerable political resistance; the Minister had already refused to work towards legislative change or lead international dialogue on gender-based claims (Thompson 1993a). Moreover, the IRB was well-prepared to issue its Guidelines on gender-based claims[20]. Since the Guidelines were to directly inform IRB decisions, they were likely to have quick and practical impact. In many ways, the Guidelines were the most viable middle ground between the more substantial demands of advocates, and the practical and political considerations of government and political authorities. Hence, they prevailed over other proposals; within a month,

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[20] The IRB had already announced that it was considering a draft policy paper on the topic of gender-based claims (Thompson 1993b). This paper laid the foundation for the Gender Guidelines (Miller 1993a).

Chairperson Mawani issued the world's first gender-based guidelines (The Arizona Daily Star 1993; Miller 1993a).

The IRB's Gender Guidelines were the result of the tireless work of lawyers, advocates and feminist and refugee organizations, and embodied a significant expansion in refugee jurisprudence. However, jurisprudence does not unilaterally determine how access to rights is administrated in practice. The field of administration is far from subservient to the commands of law. To the contrary, as a relatively autonomous field, the field of administration is well capable of mediating the actual impacts of law and jurisprudence. In the case of Canada's gender-based refugee policy, the administrative format of the Guidelines strongly shaped the effects of feminist and pro-refugee jurisprudential expansions: as expected, in the years following the publication of the Guidelines, the number of women who benefitted from Canada's gender-based refugee policy remained very small (IRB 1995). In 1994 only 650 claims were classified as gender-based (IRB Acceptance Rates- Response 1995[21]). By 1995, only 2% of the total number of claims that were referred to the IRB had been based on gender (ibid).

All in all, the IRB's Gender Guidelines provided more jurisprudential and symbolic value than administrative and practical change. They were a negotiated settlement that did not, and were not meant to, increase women's access to refugee protection substantially. Canada's gender-based refugee policy was limited by design: it was a well-intentioned jurisprudential expansion delivered in a narrow administrative straightjacket. Hence, beyond a small level of well-celebrated relief, the Guidelines had little to offer. In the words of noted refugee law scholar

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[21] IRB Acceptance Rates-Response, 1995, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 8, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

Professor James Hathaway, by agreeing to the Guidelines, "my understanding is that the government has done exactly nothing" (Oziewicz 1993, A13).

III.   Doing It All: Administrative Dilemmas of the IRB in the 1990s

As the IRB quickly learned, bureaucratic refugee protection is an impossible game of juggling. Over the course of the 1990s, the IRB was continuously pulled between the humanitarian desire to produce consistent and high-quality refugee decisions, and the bureaucratic demand to "work smarter" (IRB 2000, 2) and improve productivity levels. The IRB worked hard to find an acceptable balance between quality of decisions and quantity of output. Achieving these two goals, however, often proved impractical. Regardless of how the IRB conducted its operations, it managed to find itself in dire public and political trouble. Unable to do it all, the IRB was constantly and relentlessly criticized, either on account of its poor humanitarian conduct or its lack of competence as an immigration control bureaucracy. Stretched between two paradoxical demands, the Canadian refugee protection regime remained an articulation of conflictual impulses; the work of refugee protection was a never-ending and imperfect act of balancing humanitarianism against bureaucratic control.

In the early 1990s the IRB was leading the world in recognizing gendered forms of persecution. Despite this achievement, the IRB found itself at the centre of a series of serious and well-publicized crises. These crises shook public trust in the integrity of the IRB, both as a workplace and an agency in charge of processing refugee claims. The criticism was raging and relentless, and even included attacks on the character of the chairperson (for example see Nolan 1992).

In 1992, Sam Ifejika, resigned from his position as a Board Member to protest racism, favouritism, and tokenism in appointments and reappointments of Members, and bureaucratic interference with the Board's independence (Ifejika 1993; Vincent 1992a, 1992b, 1993). Most troublingly, Ifejika accused the IRB of incentivizing negative decisions[22]. He also publicized details of conversation with a federal bureaucrat who had pressured him to decide against a claimant. Although the IRB and the Immigration Department rejected Ifejika's claims (Vincent 1992b; Vincent 1992c), the charges were not without substance. At least one accused IRB official, Anna Ker, was removed from her post for pressuring Members to reject claims (Vincent 1992b).

In addition, a few disturbing reports of Member misconduct surfaced in the media. In one case, Lisa Rosenblatt, a Toronto lawyer, accused two IRB members of passing sexist notes about her during a hearing and denying her client a fair adjudication (Small and Vincent 1992; The Globe and Mail 1992). Two other Members, Naomi Goldie and Ralph Snow, were also criticized for mocking a torture victim in the notes they passed to one another during a hearing (Small and Vincent 1992; Vincent 1993); the torture method of placing boiled eggs under the armpits of the Iranian claimant had proven too amusing for the Members. The Board permanently removed Goldie and Snow, and issued an apology to Rosenblatt. Yet, refugee advocates and lawyers continued to call for an independent probe in the operations of the IRB (Vincent 1992b). The public had lost confidence in the integrity of the IRB's humanitarian agenda.

The IRB moved quickly to repair its public image. The newly appointed chairperson Mawani created a code of conduct for adjudicators (IRB 1993, 11), commissioned an independent study of the Board (IRB 1994, 4), and appointed a new Assistant Deputy

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[22] Ifejika suggested that while positive decisions had to be explained, negative decisions were not scrutinized (Vincent 1992a).

Chairperson to exclusively manage trainings (IRB 1995, 4). Training Members, particularly in cross-cultural communication and sensitivity, became a key focus (IRB 1993, 11). Moreover, the IRB began a rigorous process of "housecleaning" (Green 1993, p. A12). In addition to assessing, removing and training its existing personnel, the IRB actively recruited a number of well-respected refugee lawyers and advocates. These new appointees were given the latitude to shape training and plan educational seminars (interview with former Member, 11 November 2016). The personnel change was substantial: in 1994-1995, approximately half of the experienced adjudicators in the refugee division were replaced (IRB 1996, 9).

The IRB's efforts to restore its humanitarian reputation, however, soon backfired. The IRB had barely recovered from the earlier waves of criticism when a conservative backlash brought it under critical scrutiny. This time two former Members, Bill Bauer and Gary Carsen, attacked the IRB for accepting too many claims (Winnipeg Free Press 1995). Bauer and Carsen accused the Board of underreporting acceptance rates and suggested that Members who rejected claimants faced hostility at the IRB. Calgary Conservative MP Art Hanger stirred more controversy by alleging that the IRB's expedited processes offered easy entry to terrorists, prostitutes and homosexuals (Rinehart 1994; Cernetig 1994; Thompson 1994). In this new round of public outrage, the IRB came under fire for being biased towards refugees and neglecting its role in controlling immigration flows.

The IRB was in an impossible position. Irrespective of how it conducted its work, the Board was bound to come under attack. By succumbing to pressure to issue quick decisions and drop acceptance rates, as discussed in the previous chapter, the IRB had outraged refugee advocates and undermined principles of refugee law. Yet, the subsequent attempts to repair these problematic practices had, supposedly, made the IRB poor at border control. Satisfying the two

oppositional constituents was not a simple matter of competence or hard work; the two camps

were never to be simultaneously content. The task itself was contradictory: proper refugee

protection and stringent immigration control could not be fulfilled at once. As a result, the IRB

was set up for failure. State-centred bureaucratic refugee protection was a losing game.

In addition to these difficulties, in the 1990s the IRB was in serious administrative

trouble. The Board was struggling with its caseloads. With the elimination of the initial stage of

adjudications, 17,000 transitional cases were transferred to the IRB for processing.

Consequently, processing times almost doubled in a matter of months, from about four months in

1992 (IRB 1993) to seven and a half months in 1993 (IRB 1994).

Moreover, organizational changes, extensive trainings and high rates of turnover began to

take their toll on the IRB's rates of output (IRB 1994, 1995, 1996): productivity was low,

adjudication costs per claim had risen, and the number of claims awaiting review was mounting.

Although the number of incoming claims only modestly increased or even decreased, processing

times were growing by the year. In 1994 claims were processed in an average of nine months

(IRB 1995, 10). In 1996 average processing times had reached 13 months (1997, 15).

The IRB scrambled to deal with its unsatisfactory productivity levels. Although the

election of the Liberal government in 1993 had sparked the IRB's humanitarian revival, it had

not displaced the logics of bureaucratic efficiency in the work of refugee protection. In the mid-

1990s, the Canadian government was increasingly modelling itself after the private sector.

Neoliberal logics of economic viability were in full force. Departmental reports were soon

transported to formats that emphasized quantifiable outputs, encouraged business-sector

language and required detailed cost analyses[23] (for an example of these changes see IRB 1996,

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[23] The IRB's annual reports were deeply transformed by this new format of reporting. Even the language used in the reports shifted dramatically. Use of terms such as "dividends" and "investments" became commonplace in IRB

1997, 1998). The shift in the culture of public administration placed even more pressure on the IRB to improve its outputs and report more flattering numbers. Surviving as a state bureaucracy in the age of neoliberalism required prioritizing efficiency and productivity. The impetus for bureaucratic efficiency was strong and encompassing. Bureaucratic efficiency was a necessary compulsion.

The IRB's struggles for improved outputs were set against a budget cut as well as an understaffed adjudicator capacity (IRB 1997, 6, 14). However, low productivity rates made it much harder to secure resources, and exposed the IRB to paternalistic control and attention from the Immigration Department. For instance, the IRB's request for the appointment of two additional Members to the Immigration Appeal Division in 1995 was met with conditional and controlling responses[24]. The Immigration Department only approved a temporary addition of staff and expressed expectation that the IRB would "be able to fund the positions through savings or reallocation from other areas of the program" after the temporary period ended (Letter from Hallam Johnson to Robert Desperrier, 1995, 1[25]). The Immigration Department also took the chance to voice concerns about productivity levels and declare that it would monitor the division's performance (ibid).

The IRB engaged in multiple strategies to improve its productivity. First, it began to develop improved case management practices, particularly to deal with unexpected surges of claims from source countries (IRB 1996, 9; 1997, 12; 1998 19; 1999, 25-6). Second, it extended

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reports (for instance see IRB 1997, 6). With this shift in reporting format, for the first time the IRB began to report costs per-claim (IRB 1997, 1998, 1999, 2000).

[24] The additional resources were requested to respond to a surge of appeals that Immigration visa officers had created and download onto the IRB (see Letter from Robert Desperrier to Hallam Johnson,1995, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 8, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada)

[25] Letter from Hallam Johnson to Robert Desperrier, 1995, RG 76 B-1, Box 1993/1994, File 8620-19, Volume 8, Refugee and Displaced Persons- General-Immigration and Refugee Board, Department of Employment and Immigration fonds, Library and Archives Canada, Ottawa, Canada.

the application of expedited processes beyond the narrow limits of their original design. Soon

claims from all countries could be expedited, and 35% to 40% of cases were processed through

expedited procedures (IRB 1993, 21). Third, the IRB began to rely heavily on single-member

panels[26]: in 1996 21% of hearings were conducted by only one Member, compared to 9% in

1995 [27] (IRB 1997, 15). Fourth, the IRB began to encourage Members to issue oral decisions

from the bench. Oral decisions increased efficiency of claim processing by eclipsing the time

Members spent forming their decisions and crafting written reasons following a hearing.

However, this mode of decision making at times sacrificed rigour for efficiency: oral decisions

prioritized quick decision making over thoughtful consideration of complex sets of evidence

(interview with former Member, 6 October 2016). Despite this, the IRB strived to make oral

decisions the norm (IRB 1999, 16): by 1997 40% of the IRB decisions were rendered orally (IRB

1998, 8). Bureaucratic efficiency required compromises, even at the expense of quality of

decision making; the bureaucratic compulsion for efficiency operated in relative autonomy from,

and partial defiance of, the strict considerations of legal and adjudicative rigour.

The IRB's efforts were fruitful and productivity levels began a slow upward trend in

1996. After much hard work, the IRB was finally on its way to reduce processing times to the

target goal of 8 months (IRB 2000, 8). Yet, to the utter dismay of administrators, an unexpected

and dramatic increase in the number of incoming claims disrupted all calculations: in 1999 the

number of incoming claims suddenly rose by 23% (IRB 2000, 6). This overwhelming increase

undermined all the IRB's hard-earned achievements. Despite increased productivity, the average

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[26] Given that at this time adjudications were normally conducted by two Members, claimants had to consent to having their cases decided by a single member.
[27] The use of single-Member panels became increasingly normalized at the IRB throughout the 1990s (see IRB 2000). Eventually, *Immigration and Refugee Protection Act (2001)* transitioned all IRB hearings to single-Member panels. Today, IRB refugee hearings are conducted by one board Member.

cost per claim increased by 10% and the number of claims awaiting review rose by 3,300 (IRB 2000, 6-7). In addition, the IRB administrators had yet to adjust to the substantial legislative changes that were to be introduced by the Immigration and Refugee Protection Act (IRB 2000, 3). There was no likely relief in sight for the IRB.

The IRB closed the 1990s with considerable outstanding challenges, and in a tenuous and perpetual chase for efficiency. Nonetheless, in the impossible task of balancing humanitarian protection, and bureaucratic efficiency and control, the IRB had yet another tool at its disposal: using claimants' nationality to manufacture large groups of excludable claimants provided ready targets of bureaucratic exclusion, and an infinite source of administrative strategy.

IV.   The New Excludable Claimants: Against Chileans and the Roma

As I discussed in the previous chapter, the pressure to increase bureaucratic efficiency quickly led the young IRB to concerted efforts in order to exclude and deter specific national groups. Using claimants' nationality to manufacture and isolate excludable claimants became an easy method of handling unwanted caseloads. Although these practices diverged from legal requirements of individual and equal assessment, they were used extensively throughout the Canadian refugee protection regime. These strategies allowed the IRB to process large portions of its caseload quickly and with few resources. In sum, efficient bureaucratic claim processing relied, in large part, on scapegoating and excluding specific nationalities within the pool of claims. Bureaucratic efficiency was a work of exclusion.

Throughout the 1990s and early 2000s the Canadian refugee protection regime continued to use nationality to label, isolate and exclude large numbers of claimants. As the IRB matured beyond its early years, bureaucratic strategies of exclusion took increasingly involved,

innovative and collaborative shapes. Despite their earlier troubled relations, the IRB and the Immigration Department soon began to find a common and unifying interest in excluding and deterring claimants. As a result, the two departments began to engage in progressively coordinated projects.

Claimants' nationality offered a highly flexible tool in refugee protection administration. As I showed in the previous chapter, the Canadian refugee protection regime readily shifted from one national population to another based on temporal, regional or national administrative needs. Countries that sent large or growing volumes of claims to Canada were most susceptible to becoming targets of exclusion.

Unexpected increases in the flow of incoming claims were a particular area of administrative agony for the IRB. The IRB administrators detested unforeseen surges in the number of claims, particularly as these changes compounded the chronic struggle with caseloads. Sudden changes in the volume of incoming claims turned administrative goals into moving and evasive targets; with the number of claims shifting rapidly and unexpectedly from year to year, all achievements in adjusting to an established, albeit challenging, caseload level were undone. Bureaucratic success required some control over workloads.

Of course, controlling the factors that caused international displacement were well beyond the IRB's capacity. However, as bureaucrats across the Canadian refugee protection regime learned through trial and error, displacement abroad did not necessarily need to equate to placement in Canada: although every displaced person had the right to seek refuge, the abstract right to refuge was mediated through bureaucratic procedures and border control protocols that, to some degree, determined who and how many prospective claimants successfully accessed refugee protection in Canada. In other words, the claim processing bureaucracy was not simply a

neutral, subservient or cooperative vehicle in implementing and administering the universal right to refuge. To the contrary, the bureaucracy was an active, influential and relatively autonomous player shaping access to rights in accordance with its own restrictive administrative interests. The IRB, for instance, attempted to restrict access to its proceedings by carefully tracing changing patterns of incoming claims and developing innovative case management techniques to handle unexpected increases in caseloads.

The IRB's bureaucratic engagements with caseloads thoroughly redefined the meanings associated with a surge in the number of claims. The bureaucracy advanced and applied its own meanings, logics and sensibilities to the work of refugee protection. In the bureaucratic field, a rise in the number of claims was a matter of administrative trouble, rather than, for instance, an indication of human tragedy and need for protection. Hence, in dealing with increased volumes of claims, the IRB was minimally concerned with how to best serve a potentially disenfranchised population or to most rigorously apply principles of refugee law to a given geographical region. Rather, the most pressing question was how to effectively shield the bureaucracy from the administrative impact of increased claims. The work of bureaucratic refugee protection was, ironically, the work of protecting the bureaucracy against refugee claimants.

Chileans were the first national group to become a target of the IRB's new case management techniques. In 1995 the Canadian government lifted visa requirements for Chilean nationals as a token of good will and with hopes of improving tourism and trade between the two countries. As visa requirements were lifted the number of claims from Chile quickly multiplied: from a total of 88 claims in 1994, the number of Chileans claims increased to 1637 in 1995. In 1996, this number had reached 2625 (Da 2002).

Given the improving and friendly relations between governments of Canada and Chile, Canadian officials were not inclined to accept Chileans as victims of political persecution. Canadian Immigration officials considered Chile to have no major political or human rights crises, and did not expect Chileans to be in need of refugee protection (Sarick 1995). The fact that most of the incoming Chilean claimants originated from the economically deprived city of Valparaiso contributed to the belief that Chileans were simply in search of better economic conditions (see Reuters 1996). Given that economic rights were placed outside of the liberal realm of refugee protection, Chileans' economic deprivation worked against them: they were now excludable claimants.

The IRB quickly acted to deal with the unwelcome surge in Chilean claims. It abandoned its usual practice of adjudicating claims on a first come first serve basis and instead prioritized processing Chilean cases over older claims (IRB 1997, 15). By processing and rejecting these claimants quickly, the IRB hoped to deter Chileans from filing more refugee claims in Canada. Timely and effective deterrence was thought to help keep the total number of claims at more manageable levels and alleviate the pressure on the claim processing bureaucracy. Nonetheless, these logics of deterrence conflicted with principles of refugee law in at least two ways. First, deterring refugee claimants arguably contradicted the universal right to refuge. Second, administrative strategies of deterrence subjected claimants to specialized procedures *before* their claims were adjudicated and rejected in hearings. In effect, this mode of processing created a two-tiered adjudication system. Hence, deterrence deviated from strict principles of due process and provided for unequal treatment of claims.

Despite these problems, the IRB was committed to rejecting and deterring Chileans. The concentrated efforts against these claimants were highly effective. Soon Chilean claimants began

to be rejected in great numbers: their acceptance rates dropped from 26% in 1995, to 1.7% and

2.7% in 1996 and 1997 respectively. Over two thousands Chileans were rejected in these two

years alone. Another 1500 abandoned or withdrew their claims[28].

Furthermore, to reduce the number of Chileans who claimed refugee status in Canada, the

Immigration Department reinstated visa requirements on Chile in 1996. Following the

reinstatement of visa requirements, the number of Chilean claimants dropped dramatically (IRB

1997, 15). In 1997, only 53 Chileans claimed refugee status in Canada (Da 2002). All in all, the

unexpected rise in the number of Chilean claimants was quickly and effectively managed

through multi-departmental strategies that involved both the IRB and the Immigration

Department. The case of Chileans, however, was a relatively small example of the coordinated

strategies that were implemented against specific groups of claimants.

The most extensive instance of exclusionary strategies in the 1990s and early 2000s was

developed in relation to Romani claimants from Eastern Europe, particularly Hungary. In the

case of Roma claimants from Hungary, the Canadian refugee protection regime went to

unprecedented lengths to reject, deter and exclude these claimants. The creative and questionable

strategies deployed against Roma claimants are well-documented and critiqued (Levine-Rasky

2016; Arhin 2013; Beaudoin, Danch, and Rehaag 2015; Levine-Rasky, Beaudoin, and St Clair

2014; Macklin 2013; St. Clair 2007[29]). Here, I only highlight aspects of these strategies that

illustrate the active and relatively autonomous role of the claim processing bureaucracy in

restricting access to refugee protection.

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[28] These statistics were acquired through an Access to Information Act request (A-2018-00418/SD) to the IRB.
[29] This report was acquired through the author. Paul St. Clair is a long time refugee advocate and settlement worker at CultureLink, with specialized focus on Roma migrants and refugees. He has been intimately involved in advocacy for Roma refugees and the appeal of the Lead Case. Sections of his report have been published online by the Hungarian Free Press at http://hungarianfreepress.com/2017/08/25/hungarian-roma-refugees-in-canada-the-lead-case-its-aftermath-and-the-future-parts-2-3/

Central to the innovative strategies employed against the Roma was the inaugural use of the Lead Case. The Lead Case was an administrative device developed by the IRB[30]. Lead Cases were meant to increase the efficiency and consistency of claim adjudications by providing a vigorously researched and well-crafted "model" decision that could be used as a template in deciding other claims of comparable circumstances. The one-time investment of adjudicative attention and resources in a Lead Case was expected to pay off by increased efficiency in processing large volumes of subsequent claims.

The first and only Lead Case was developed in 1998 in relation to Roma claimants (St. Clair 2007). Before the advent of the Lead Case, claims from Roma Hungarians were processed in normal adjudication proceedings. However, following a steep hike in the number of Roma claimants from Hungary and the Czech Republic, these claimants began to be subject to focused strategies of restriction and deterrence (Levine-Rasky, Beaudoin and St. Clair 2014). The number of incoming Roma claimants from the Czech Republic was controlled through visa requirements in 1998 (St. Clair 2007; Levine-Rasky 2016). However, geopolitical considerations impeded the Canadian government from imposing visa restrictions on Hungarian nationals for several years[31]. In the absence of visa requirements, the flow of incoming claims from Roma Hungarians remained high: between 1997 and 2002, about 25,000 Hungarian Roma refugee claims were made in Canada (St. Clair 2007).

In 1998 Canadian officials received information that 15,000 Romani refugee claimants were to arrive in Canada from Hungry (St. Clair 2007, 8). Although this information was never

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[30] Like Guidelines, Persuasive Decisions, and Jurisprudential Guides, Lead Cases were meant to provide direction to and facilitate the work of adjudicating Members. Similar to these other devices, the Lead Case was hypothetically a device of general application. However, the highly controversial use of the Lead Case against Roma claimants has made this device virtually unusable in other contexts.

[31] Visa requirement were eventually imposed on Hungarians in 2001. For more on the geopolitics of visa requirements in relation to Hungary and the Czech Republic see St. Clair (2007), Levine-Rasky (2016), and Levine-Rasky, Beaudoin, and St Clair (2014).

verified, it prompted officials across the Canadian refugee protection regime to search for lasting and effective solutions for handling the rise in the number of Hungarian Roma claims (Macklin 2013). Importantly, the bureaucratic concern with Roma Hungarian claims was not that these cases were adjudicated inconsistently; in fact, Roma Hungarian claims were often accepted in proceedings. Rather, Canadian bureaucrats were concerned that the acceptance rates and the volume of these claims were too high[32]. The Roma had to be rejected and deterred.

The infamous Lead Case[33] involved refugee claims from two Roma Hungarian families. The Case used these claims as an opportunity to examine and provide a ruling on the conditions of life for the Roma in Hungary. The adjudicating panel was provided with considerable resources to study the claims and their circumstances. The panel, for instance, heard testimonies from four expert witnesses that were flown in from Hungary[34] (St. Clair 2007). After considering the evidence and examining the testimonies, the panel concluded that although the Roma faced discrimination in Hungary, their experiences did not amount to persecution. Adjudicators further suggested that conditions of Roma Hungarians were rapidly improving (St. Clair 2007). As a result, the two families' claims to refugee protection were rejected.

The Lead Case had devastating consequences for Hungarian Roma refugees. Not only did the Case signal the preferred position of the IRB on Romani Hungarian cases, it incentivized negative decisions by making rejecting cases easier, quicker and less labour-intensive. In some instances, Members were even pressured to comply with the conclusions of the Case. In one

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[32] See Geza v. Canada (Miniters of Citizenship and Immigration) [2006] 4 FCR 377; 2006 FCA 124; reversing Geza v. Canada (Minister of Citizenship and Immigration) [2005] 3 FCR 3; 2004 FC 1039 (Federal Court), paras. 7-8. Also cited in Macklin (2013).

[33] Much remains unknown about how the Lead Case was developed. According to St. Clair (2007), more than half of the communications between the IRB, the Immigration Department, and other government departments pertaining to the development of the Lead Case were not released even during the appeal proceedings due to national security concerns.

[34] Travel costs were covered by Ontario Legal Aid (St. Clair 2007).

extreme instance, a Member who refused to change his positive decision was sabotaged and eventually suspended from the IRB[35].

Immediately following the release of the Lead Case, acceptance rates of Hungarian Roma claimants dropped from 71% in 1998 to 16% in 1999 (Levine-Rasky 2016, 115). Although these rates improved in some subsequent years, they remained relatively low, ranging between 11% and 30% in the following five years. When the Lead Case was overturned in an Appeal ruling in the Federal Court in 2006, acceptance rates of Roma Hungarians improved substantially: in 2006, 62% of Hungarian claimants received refugee protection.

The Lead Case soon became highly controversial. The Case was criticized on multiple accounts. First, despite its pretense of administrative neutrality, the Lead Case was alleged to be biased against Roma claimants. As the appeal proceedings revealed, Vlad Bubrin, the IRB administrator who organized the Lead Case, had regularly rejected Roma claimants in his role as an adjudicating Member. Furthermore, Bubrin had also acted as one of the adjudicators on the panel (St. Clair 2007). Blurring the roles of administrator and adjudicator, of course, undermined the legislated independence of decision makers from administrative authorities. The Case involved a clear conflict of interest; the bureaucracy had advantaged its own administrative interests over the legal requirement for neutrality.

Additionally, the selection of experts who testified on the conditions of Hungarian Roma was cause for serious critique. In an evident breach of impartiality, all but one of the experts who testified in the Case had direct connections with the Hungarian government. As a result, witnesses were strongly partial to favouring socio-political conditions in Hungary. Furthermore,

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[35] For a detailed account of this chilling case see Mitrovica (2017).

adjudicators had refused to hear conflicting testimonies from other experts (St. Clair 2007).

Thus, the corpus of witness testimonies lacked adequate neutrality.

Some of the surrounding practices around the Lead Case also raised serious legal issues.

Appeal proceedings exposed evidence of questionable communication and collaboration between

the IRB and the Immigration Department in developing and disseminating the outcome of the

Lead Case. For instance, before the Lead Case was scheduled to be formally released, the IRB

leaked information about the outcome of the Case to the Hungarian media, with the intention of

discouraging prospective Roma claimants[36]. The IRB's participation in curbing the number of

incoming Roma Hungarian claims was in accordance with the wishes of the Immigration

Department. However, this practice violated the IRB's legislated mandate to operate at arm's

length from political authority and interest. As the appeal court ruled, the collaborative practices

of the IRB and the Immigration Department created reasonable apprehension of bias; in other

words, claimants' confidence in the political impartiality and independence of the IRB was

reasonably eroded. Hence, the Lead Case was overturned.

The successful appeal of the Lead Case was an important victory for Hungarian Roma

claimants and their advocates. However, the appeal did not do much for the thousands of

Hungarian Roma claimants who had already been rejected or deported, or had withdrawn or

abandoned their claims between 1998 and 2006 (St. Clair 2007). However legally problematic,

specialized bureaucratic measures against Chileans and the Hungarian Roma were highly

impactful in hindering these claimants' access to refugee rights in Canada. In devising and

implementing these measures, the bureaucracy actively undermined the promise of impartial,

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[36] Kozak v. Canada (Minister of Citizenship and Immigration). 2006 FCA 124, A-419-04, A-420-04, para 65.
Accessed August 30, 2018 at https://decisions.fca-caf.gc.ca/fca-
caf/decisions/en/item/34680/index.do?r=AAAAAQALaW1taWdyYXRpb24B

independent, individual and fair assessment of refugee claims. All that was promised by the law was retracted by the bureaucracy.

V.   Conclusion

This chapter examined the simultaneous expansion and restriction of access to refugee protection in the Canadian refugee protection regime in the 1990s and early 2000s. I showed that jurisprudential expansions based on gender concurred with restrictive bureaucratic measures against a new set of national groups; these restrictive measures kept the Canadian refugee protection regime firmly bounded despite, or perhaps because of, the emerging expansions. Hence, I argued that the Canadian refugee protection regime remained an articulation of conflictual impulses that produced jurisprudential expansions on account of gender and yet bureaucratic restrictions against specific national groups.

By recognizing gender-based forms of persecution as a legitimate ground for receiving refugee status, the Canadian refugee protection regime expanded the jurisprudential landscape of refugee protection. The IRB's Gender Guidelines were the outcome of considerable mobilization and a negotiated settlement between more expansive demands and strong political resistance. Although significant for its jurisprudential value, the Guidelines did not open the Canadian regime to considerably larger number of claims. In fact, the Guidelines triumphed over other proposals partly because they were not expected to dramatically increase the actual level of access to refugee protection.

Moreover, I showed that the Canadian refugee protection regime was continuously pulled by the conflictual priorities of humanitarianism, border control and bureaucratic efficiency. Unceasing demands for increased efficiency necessitated controlling the volume of incoming

claims. Given these pressures, manufacturing, rejecting and deterring new and evolving national groups of excludable claimants remained important methods of exercising control over who and how many claimants successfully accessed Canada's refugee claim determination proceedings.

Throughout the 1990s and early 2000s, the Canadian refugee protection regime deployed innovative, collaborative and restrictive bureaucratic procedures to restrict access to refugee protection. Through the use of prioritized case management techniques and the Lead Case, the Canadian refugee claim bureaucracy severely restricted the access of Chilean and Roma Hungarian claimants to refugee protection. Despite their legal problems, these practices were adaptive and effective tools in managing the IRB's workloads. Excluding large groups of claimants continued to be central to bureaucratic refugee protection.

This chapter examined the paradoxes of refugee protection in Canada in the 1990s and early 2000s. The next chapter will explore these paradoxes in the late 2000s and the 2010s. I will demonstrate that the Canadian refugee protection regime continued to be an articulation of humanitarian, and border and immigration control loyalties; as I will show, the growing and ultimately formal recognition of SOGI claims in the 2010s was balanced by highly restrictive bureaucratic practices against yet a new national group. The articulated arrangement of expansions and restrictions in the relatively autonomous fields of law and bureaucracy allowed the Canadian refugee protection regime to exist in and through its internal paradoxes.

Chapter 3- When Protection Becomes Palliative Care:

Bureaucracy, Sexual Diversity and Immigration Control

In the early 2010s, I was once told by the head of the Toronto-based Iranian Queer

Organization that the office of Immigration Minister Jason Kenny was never unresponsive when

it came to resettling gay Iranian refugees. During the ultra-conservative tenure of Kenny (2008-

2015), Sexual Orientation and Gender Identity (SOGI) refugees did surprisingly well: between

2011 and 2015, a total of 3,668 in-land SOGI refugees were accepted at remarkable rates ranging

from 56% (in 2013) to 69% (in 2015)[1]. Generally, SOGI claims that make their way to Canada

have higher chances of being accepted than those processed in other English-speaking countries

(Swink 2005). The good fate of SOGI claimants in Canada has continued: in 2017 the IRB

released its praised Sexual Orientation and Gender Identity and Expression Guidelines,

institutionalizing a nuanced approach to SOGI cases. In the broad sketch of its work, the

Canadian regime of refugee protection is laudably inclusive of SOGI claimants. The devil,

however, is perhaps only in the details.

This chapter offers a rather underexplored intersectional analysis of in-land SOGI refugee

protection in Canada. While a broad sketch of the Canadian regime tells a familiar story of

exceptionalism and inclusion, a more meticulous intersectional approach excavates the

conflictual make-up of SOGI protection. Exploring whom within the pool of SOGI claimants is

the *un*likely recipient of Canadian generosity and protection complicates the narrative of

Canadian exceptional protection. This analysis, of course, is not meant to undermine Canada's

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[1] This data was obtained by Xtra through an Access to Information and Privacy request to the IRB. The full database is accessible at https://docs.google.com/spreadsheets/d/1LDFqkYJCpOTO_B-oItLlmH3vQoYrnSF3Nl_o5q9tZ7o/edit#gid=604097886

good record with SOGI refugees; progressive jurisprudence has indeed made an unmistakable difference in the lives of many non-normative claimants in Canada. Yet, not all SOGI claimants have been equal beneficiaries of Canada's progressive jurisprudence; those systematically cast out of SOGI rights have tested the limits of refugee law in delivering meaningful, fair and equal protection.

I argue that the Canadian refugee protection regime has remained a complex and paradoxical articulation of expansive and restrictionist impulses in the new millennium; the conflictual impulses of the Canadian regime have at once expanded the reach of refugee protection and restricted access to refugee rights. The expansions have emerged through legislation and jurisprudence, and mostly for SOGI claimants, while restrictions have been applied administratively and bureaucratically against yet a new national group. The systematic arrangement of expansive and restrictionist impulses in different fields, and in relation to supposedly distinct subjects has allowed conflictual developments and contradictory agendas: the Canadian regime has conferred rights and protection, and yet restricted actual access to existing and expanding rights. Hence, despite impressive expansions in the field of refugee law, access to refugee protection has perhaps become more restricted than ever.

In this chapter, I demonstrate that the conflictual interests of state-controlled refugee protection remain internal to the work of the Canadian regime. SOGI expansions, for instance, emerged from the humanitarian impulse to push the limiting boundaries of political persecution along the seams of recent gender-based expansions. The judicial logic was simple: if gender-based violence could be considered a violation in citizen-state relations, so could the violence based on sexual orientation and gender identity. Meanwhile, the impetus to restrict access to refugee rights was not eroding. Even if expanding internally, the focus of persecution remained

squarely on the individualized relationship between the citizen and the state, and SOGI expansions were tunnelled through the narrow liberal notion of "political" rights. Hence, claimants who fled rampant and generalized violence, even if also classified as SOGI, were systematically kept out, rejected and removed. Indeed, the praiseworthy era of SOGI claimants produced some of the most restrictive, exclusionary and punitive moments in the contemporary history of Canadian refugee protection. The Canadian regime stayed unmistakably founded on exclusion.

In the new millennium, the Canadian refugee claim processing bureaucracy became increasingly strained and ever so aggressively invested in its quest for administrative efficiency. Budget cuts, shrinking human resources and inter-departmental tensions made the 2000s difficult times for the IRB. To survive, the IRB had to push some cases through the cracks of exclusion and dodge others. The bureaucracy remained a relatively autonomous agent that advanced the restrictionist impulses of state-controlled refugee protection. In doing so, it continued to retract the promise of justice and kept the Canadian refugee regime in a state of perpetual, yet functional, failure.

In this chapter I draw on interview data, organizational reports and statistics, and newspaper articles to offer a contextualized account of the Canadian refugee protection regime in the new millennium. The first section overviews the simultaneous legislative expansions and procedural restrictions occurring in the 2000s. I show that the Canadian regime continued to be an internally conflictual articulation and that the contradictory developments of this era kept rights out of the reach of large numbers of claimants.

The second section situates the Canadian jurisprudence on SOGI refugees within the recent history of expanding sexual rights in Canada. I demonstrate that the rapidly changing

landscape of sexual rights in Canada turned homosexuals from subjects of immigration exclusion to recipients of proactive protection, all within the span of a few decades. The last two sections juxtapose expanding SOGI rights with the incessant administrative drive for efficiency and restrictionism. I will first highlight the IRB's struggles with heavy workloads, attenuating resources and political neglect. I will show that efforts to mitigate these challenges came at the expense of both claimants and decision makers. The last section foregrounds the implications of bureaucratic efficiency and administrative restrictionism for a new group of excludable claimants. I will show that the administrative and political drive to lower caseloads and deter prospective claimants produced yet a new national group of scapegoats. Not only were these claimants systematically rejected and excluded, they had little to gain from the expanding rights; the administrative drive to reject and exclude overrode jurisprudential expansions.

I.   Expansive Protection, Restrictive Protocol

The new millennium changed much in the Canadian refugee protection regime without undoing its longstanding impetus to simultaneously expand and restrict access to refugee rights. At its core, the Canadian regime remained a complex articulation of expansive and restrictionist forces. This articulation is perhaps most evident in the first major immigration legislation of the era, the Immigration and Refugee Protection Act[2] (IRPA) (2001).

The IRPA made major and conflictual changes to the state of refugee protection in Canada: it both expanded the legislative reach of refugee rights and restricted access to rights through procedural provisions. The IRPA opened refugee protection beyond the terms of the 1951 Convention; in the new Act, forms of violence outlined in the Convention against Torture

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[2] Accessible at https://laws-lois.justice.gc.ca/eng/acts/i-2.5/page-1.html#h-1

and Other Cruel, Unhuman and Degrading Treatment and Punishment also warranted refugee protection[3]. The IRB's scope of work had been broadened: refugee protection was no longer exclusively reserved for those experiencing persecution based on the five Convention grounds. Anyone at the risk of cruel and degrading treatment was now legally entitled to protection. As a result, new groups of claimants could be considered legitimate refugees; those left out of the Convention grounds now had a stronger case for protection.

While expanding the reach of refugee protection, the IRPA also introduced significant restrictive procedures to the Canadian refugee protection regime. Perhaps, most importantly, the IRPA transitioned the IRB from two-Member adjudicative panels to ones operated by a single Member only[4]. The transition to single-Member panels increased the IRB's productivity substantially. But this bureaucratic advantage was not without potential costs to claimants. In the two-Member system, only one positive decision was sufficient to grant refugee status. In other words, the old system provided a modest[5] level of protection against negative decisions. In contrast, in single-Member panels each and every negative decision carried the entire weight of adjudications.

To alleviate the potential disadvantages of single-Member panels, the IRPA legislated the Refugee Appeal Division (RAD). The RAD was to provide a protective recourse against unilateral negative decisions within the IRB. Appealed cases were to be heard by a different and more experienced Member (interview with refugee advocate, 15 July 2016). The internal appeal

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[3] Before the IRPA, the cases involving these issues fell under the jurisdiction of the Immigration Department (IRB 2002). As such, they were not decided by politically independent adjudicators at the IRB.

[4] Single-Member panels were not a legislative invention; the IRB had long used single-Member panels to adjudicate straightforward cases with claimants' consent (see Chapter 2).

[5] Two-Member panels were only beneficial to claimants when the residing Members were of differing opinions; when the two Members concurred, there was no advantage to claimants. For scheduling and administrative ease, Members were commonly scheduled in the same pairings (interview with former Member, 11 November 2016). Relatively durable pairings of like-minded Members were of no benefits to claimants or the IRB.

system provided a much more accessible, transparent and affordable appeal process than the one available through the Federal Courts. The RAD was also believed to ameliorate the significant inconsistencies in decision making across the IRB's regional offices (interview with former Member, 11 November 2016) and correct errors internally before cases reached the Federal Courts[6] (IRB 2002, 10). All in all, an internal appeal division was both to protect claimants, and improve the quality and consistency of the IRB decisions.

The legislative promise of an internal appeal division was key in procuring the consent of refugee advocates to the transition to single-Member panels (interview with refugee advocate, 15 July 2016). However, soon after the IRPA passed, the Liberal government postponed the implementation of the RAD due to budgetary constraints[7] (IRB 2002, 10). While the RAD was placed on hold, the IRB was quickly transitioned to single-Member panels; in effect, procedural provisions that increased bureaucratic productivity took full force, but those that were meant to ensure comparable levels of protection were deferred. Selective implementation of the IRPA prioritized administrative interests over humanitarianism and procedural justice. Once again, the justice promised by the law was retracted by administrative calculations.

The RAD was eventually established in 2012, more than a decade after it was initially legislated. Even then, instituting the RAD took some political manoeuvering against the opposition of conservative MPs (Keung 2009). The new RAD, moreover, was far more restrictive than originally envisioned. First, not all rejected claimants were allowed an appeal to the RAD[8]. Second, unlike originally promised, the RAD did not provide a second full hearing on

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[6] For these reasons, the IRB administrators were largely in favour of an internal appeal division, and had begun conceptualizing this division since the late 1990s (interview with former Member, 11 November 2016).
[7] Although delaying the RAD lightened the IRB's work (see IRB 2002, 10), this decision was made without much conversation with the IRB officials; in fact, by the time the announcement was made the IRB had already devoted some precious resources to implementing the new division.
[8] For example, claimants from Designated Countries of Origins (to be discussed in section IV) were excluded from access to the RAD.

rejected claims. Rather, appellants were only allowed to present "new" evidence. Third, rejected

claimants had only fifteen days to submit their notice of appeal and thirty days to file their

appellant's record[9]; these short timelines made gathering and preparing new evidence extremely

difficult. Given these procedural constraints, the RAD did not provide meaningful protection

against negative decisions in single-Member panels. In practice, the legislative promise of

protection was severely restricted.

The procedural changes that narrowed access to refugee protection in Canada were not

limited to selective implementation of the IRPA. In the early 2000s, the administrative landscape

of refugee protection was rapidly becoming more securitized. The arrival of hundreds of

unauthorized travellers on boats on the west coast of Canada in 1999 and 2000 (Mountz 2010),

and the 9/11 attacks made border security and protection top national priorities. Soon, an entirely

new department was created to handle border security; the Canada Border Services Agency

(CBSA), created in 2003, further complicated the interdepartmental relationships within the

Canadian refugee protection regime[10]. As the agency guarding Canadian borders, the CBSA

concentrated considerable authority over the flow of refugee claims in Canada. Security came

first, above and beyond humanitarian considerations. The primacy of security protocols,

however, did not displace the logics of administrative efficiency. In fact, security and efficiency

were considered to be interlinked. For instance, both priorities were thought to be improved by

engaging in streamlined processes and up-front security checks (IRB 2002, 5).

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[9] For more information on the IRB appeal procedures see https://irb-cisr.gc.ca/en/filing-refugee-appeal/Pages/refugee1.aspx

[10] These relations were negotiated and clarified over the course of several years in a Memorandum of Understanding between the IRB, the CBSA and the Immigration Department (by then titled Citizenship and Immigration Canada). See IRB (2005, 5).

The rise of border security in refugee administration was a global and collaborative phenomenon. Across North America and Europe, wealthy states were sharing information, practices and technologies to achieve stricter control over borders (Mountz 2010). Increased inter-state cooperation and securitization of borders restricted unauthorized travel and access to refugee systems; in the advanced industrial world, the number of refugee claims were dropping considerably (IRB 2004, 6). Harmonization of border enforcement strategies in North America was associated with a drop in refugee acceptance rates in both Canada and the US (Hyndman and Mountz 2010). The Safe Third Country Agreement[11] (2004) between Canada and the US was particularly impactful in restricting access to refugee rights in Canada and, arguably, North America.

The Safe Third Country Agreement, which remains in place today, requires refugee claimants to make claims in the first safe country in which they arrive. Despite its seemingly bilateral nature, the Third Country Agreement was largely initiated and pursued by the Canadian government, and was geared towards curbing access to the Canadian refugee protection regime: while thousands of claimants routinely traveled from the US to make their claims in Canada, only a few hundred chose the reverse course of travel[12].

The Safe Third Country Agreement was highly effective in making the Canadian regime inaccessible to prospective claimants; following the Agreement, the number of refugee claims in Canada dropped to the second lowest rate in the IRB's history (IRB 2006, 25). The largest impact was on claims made at Canadian borders (CCR 2005): within one year from the enactment of the Agreement, the number of these claims were cut almost in half (IRB 2006, 17).

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[11] Accessible at https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html
[12] In 2001, 13,497 refugee claimants entered Canada from the US, and only a few hundred moved from Canada to the US to make claims (Mantas as cited by Hyndman and Mountz 2007)

The results were perhaps particularly detrimental to claimants whose cases involved persecution based on gender and sexuality (Hyndman and Mountz 2007; Haynes 2018): refugee jurisprudence on gender and sexual persecution is considerably stronger in Canada than in the US. As a result, forcing gender-based and SOGI claimants to make their claims in the US, rather than Canada, was likely to reduce these claims' chances of success. In other words, inter-state collaborative strategies pushed women and sexual minorities out of Canada and its progressive refugee jurisprudence.

The subsequent legislations in this era, the Balanced Refugee Reform Act[13] (2010) and Protecting Canada's Immigration System Act[14] (2012) imposed an array of other restrictive procedural changes on the Canadian refugee protection regime. These changes diminished some claimants' chances of receiving refugee status[15], and increased Ministers' power in regulating access to Canadian borders and the refugee protection regime[16]. By widening the criminal scope of human smuggling and imposing stronger sanctions against this offence, these Acts further penalized assisted unauthorized travel. Hampering and penalizing unauthorized travel ensured that prospective claimants were kept at an arm's length from the rights available in Canada. Despite the fact that Canadian refugee law had expanded to recognize potentially larger types and numbers of claims, gaining access to these expansive rights had become much more difficult. Administrative procedures were carefully designed to keep rights and claimants at a distance: rights existed inside Canada, and claimants were kept outside Canadian borders.

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[13] Accessible at https://laws-lois.justice.gc.ca/eng/annualstatutes/2012_17/page-5.html#h-3

[14] Accessible at https://laws-lois.justice.gc.ca/eng/annualstatutes/2012_17/page-1.html#h-1

[15] These changes will be discussed more fully in section IV of this chapter.

[16] For example, the Immigration Minister was afforded the authority to designate "safe" countries and the Minister of Public Safety and Emergency Preparedness was given the power to designate "irregular" arrivals. Claimants arriving "irregularly" or from "safe" countries were then subject to differential procedures that restricted their access to rights, mobility and freedom. The designation of "safe" countries will be discussed more fully in this chapter. For more on "irregular" arrivals see https://meurrensonimmigration.com/first-designation-of-irregular-arrival/

The combination of these border control and procedural restrictions drastically reduced the actual number of refugees who managed to find secure status in Canada: the number of refugees admitted to Canada dropped from 18,188 in 2003-2004, to 6,141 in 2007-2008, a reduction of over 60% (Jebwab as cited in Scott 2009). While the number of refugees declined to 8.8% of all newcomers in 2008 (from 11.8% in 2007), the number of investor immigrants and live-in caregivers increased from 55% in 2007, to 60% in 2008. In other words, the in-flow of capital and care labour was facilitated, while refugees' entry was blocked. Canadian law expanded refugee rights, but administrators limited actual protection. The Canadian refugee regime continued to be an articulation of expansive legal and jurisprudential forces, and restrictive administrative and bureaucratic impulses.

II.   SOGI Claimants and Canadian Protection: From Banned to Rescued

The IRB issued its Guidelines on Sexual Orientation and Gender Identity and Expression claims in May 2017. However, the expansive jurisprudence on SOGI claims in Canada preceded the release of these Guidelines by several years. Nonetheless, the IRB's SOGI Guidelines were a laudable attempt at refining the existing jurisprudential corpus and promoting a nuanced understanding of SOGI cases.

The growing recognition of SOGI claims in Canada has been part of the broader, albeit recent, history of expanding sexual rights. In the past few decades, Canada has emerged as one of the global leaders in legal equality for sexual minorities. For instance, Canada has been one of the first nation-states to recognize gay marriage in the world. Today, in almost all areas regulated by the law, Canadian lesbian and gay citizens stand on par with heterosexuals[17].

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[17] Canada may be gay-friendly, but it remains far from trans-inclusive. Trans people's access to rights and legal protection lags considerably behind those available to gay men and lesbians.

Including non-normative genders and sexualities under equal protection of the law, however, is a rather recent historical development in Canada. For the majority of its history, settler colonial Canada criminalized and punished non-heterosexual sex, lives and relationships. Non-heterosexuals and gender non-conforming folks were often treated harshly by the law and state agents. Homosexual sex, for instance, constituted illegal activity until 1969 (Rau 2018). Gay men and lesbians were even at times subject to systematic security surveillance due to their assumed propensity for treason (Kinsman and Gentile 2010; Robinson and Kimmel 1994). All in all, gender and sexual non-normativity was mostly placed outside the protective bounds of the law.

Animosity to sexual and gender non-normativity was also present in Canadian immigration law and systems. Until 1977, homosexuals were banned from immigration to Canada (Rau 2018). As the Canadian state assumed exclusive authority over immigration matters (see Mongia 2007) homosexuality became enshrined as a ground for exclusion in immigration law. The Immigration Act of 1927 barred homosexuals from immigration to Canada under the label of "persons of constitutional psychopathic inferiority" (Green 1987). In 1952, "homosexuality" was named as an explicit ground for denial of entry (LaViolette 2004). Homosexuals were not even allowed to enter Canada as tourists; non-citizens who were discovered to be homosexuals after having entered Canada were subject to deportation.

The expanding rights of Canadian sexual minorities slowly trickled to non-citizens and immigration matters. The Immigration Act of 1976 removed homosexuality as a basis of immigration exclusion almost a decade after same-sex sex had been decriminalized in Canada. In this new version of Canada, refugees were a legal category, race was not a criterion of exclusion, and homosexuals were valid candidates for immigration. But immigration law was yet far from

equal for sexual minorities. For instance, until 2001 spousal sponsorships were an exclusive

heterosexual privilege[18]. However, LGBT rights were quickly expanding in Canada, and the

increasing weight of principles of administrative justice in Canadian jurisprudence was soon to

include same-sex partners in mainstream channels of immigration regulation.

Jurisprudential expansions on SOGI refugees emerged within this shifting history of gay

rights in Canada. The jurisprudence on SOGI refugees also derived much from the earlier

feminist jurisprudence on gender-based claims; like gender-based claimants, SOGI refugees

were proposed as members of a "particular social group", a ground that warranted protection

under refugee law[19]. Although SOGI jurisprudence was not directly led by Canada, the Canadian

refugee protection regime was one of first in the world to accept a claim based on sexual

orientation in 1991 (Molnar 2018). The emerging SOGI refugee jurisprudence at the IRB was

soon supported by the landmark Supreme Court decision of *Ward* (1993) [20]. In *Ward,* a decision

on the seemingly unrelated refugee case of an Irish political dissident, the Supreme Court made a

point of naming sexual orientation as a form of membership in a particular persecuted social

group. The *Ward* decision was highly consequential; the eligibility of SOGI claimants for

protection was no longer a matter to be decided by individual decision makers. With Canada's

highest court firmly establishing SOGI claims within the bounds of refugee law, the question of

eligibility was taken out of adjudicators' hands. Henceforth, SOGI claimants were only to be

assessed based on their credibility.

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[18] Of course, same-sex couples continued to push the boundaries of existing laws, and bureaucrats accommodated same-sex spousal sponsorships through unconventional legal avenues, such as by recourse to the humanitarian and compassionate grounds. For a more detailed discussion of same-sex spousal sponsorships see LaViolette (2004).
[19] See the UNHCR 2012 Guideline son International Protection No. 9 pertaining to Sexual Orientation and Gender Identity (SOGI) refugees, accessible at http://www.unhcr.org/50ae466f9.pdf
[20] *Canada [Attorney General] v. Ward*, [1993] 2 S.C.R. 689. Accessible at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1023/index.do

The expanding SOGI jurisprudence and general openness to sexual diversity in Canada created a relatively positive adjudication environment for SOGI claims. In Canada, SOGI cases have often been accepted at higher rates than other claims. Between 2013 and 2015, SOGI claims were accepted at an average rate of 70.5%, compared to the overall rate of 62.5% (Molnar 2018). Despite the impossibility of providing indisputable proof for sexual orientation, SOGI claims are not necessarily considered particularly difficult to adjudicate (interviews with former Members, 11 November 2016). Adjudicators' intuition[21] or observations of hearing room dynamics, such as moments of flirtation or demonstrations of jealousy[22], routinely help Members make credibility decisions. SOGI claims, as one former Member (interviewed 11 November 2016) argued, were personal and relatable, and hence easier to decide:

I found the sexual orientation cases easier, because they were more personal …
You're not talking about the political environment, you're talking about what
happened to you … And you see the country conditions are very straight forward
… Proving sexual orientation is no more difficult in terms of evidence than
proving, um, religion. And in fact I find, for me it was easier. Because you could
talk about your own very personal circumstances…

Notwithstanding these perspectives, making credibility assessments in SOGI cases is a highly contentious area in refugee jurisprudence. Deciding whether a claimant is "truly" gay, for instance, is not a straightforward task. As a large and insightful scholarship on SOGI refugee adjudications has established (Berg and Millbank 2009; Lee and Brotman 2011; Rehaag 2008; Jordan 2009; Millbank 2003; O'Leary 2008; Fadi 2005; Murray 2011; Miller 2005), SOGI

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[21] For more on how affect and intuition enter SOGI refugee credibility assessments, see Murray (2014b).

[22] In one particularly animated story, a former Member (interviewed 6 October 2016) recounted the heavy flirtation between an openly gay interpreter and a claimant, in front of a disapproving same-sex partner during a hearing. The Member had, of course, no doubt about the credibility of homosexuality in the claimants' case.

credibility assessments often rely on stereotypical assumptions about "gay" behaviour and expression or invoke ethnocentric expectations of gay identity development, sexual experience, or community connections.

The most significant contribution of the IRB's SOGI Guidelines is perhaps their critical engagement with the recurring problems in SOGI credibility assessments. The IRB's SOGI Guidelines advise Members on appropriate use of language, and set standards for using and handling sensitive information. The Guidelines, further, prohibit relying on stereotypical assumptions in adjudicating cases. For example, adjudicators are urged not to take claimants' appearance or mannerism, their participation in religious or cultural traditions, or even past heterosexual relations as the basis of their decisions[23]. Moreover, the Guidelines acknowledge the impact of trauma on claimants' memories and their ability to report their experiences coherently. All in all, the Guidelines are a nuanced jurisprudential intervention; in the words of the IRB spokesperson, "[the SOGI Guidelines are] intended to promote a greater understanding of the diversity and complexity of the situation of sexual and gender minority individuals" (as reported in Bielski 2017).

The accomplishments of the IRB's SOGI Guidelines, of course, are not incidental: the Guidelines were produced through several consultations with community and advocacy groups, researchers, lawyers and social workers. Through these consultations, LGBT activists, community groups and advocates shaped the content of the Guidelines, and at times radically expanded bureaucrats' visions of SOGI protection. For instance, during one consultation in the fall of 2016, advocates suggested that the Guidelines should account for the notion of gender and sexual fluidity; the IRB officials took notes, exchanged glances, and thanked the audience for

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[23] Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression. Accessible at https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx#a6

giving them novel and challenging concepts to consider (observation of consultation session, 25

November 2016). Given these collaborations between the IRB and community and advocacy

groups, the SOGI Guidelines were generally received well by lawyers and advocates (Keung

2017).

Canada's commitment to SOGI refugees has gone far beyond producing nuanced

jurisprudence on SOGI cases. Canada has, at times, taken a highly active role in resettling SOGI

claimants from abroad. In some instances, the Canadian state has willingly prioritized resettling

particularly vulnerable SOGI refugees[24] (Molnar 2018). Canada has even gone above and

beyond its legal obligations to protect persecuted SOGI groups; Canada is the only country in the

world that has systematically resettled SOGI refugees from within the claimants' national

territories[25]. For example, the Canadian government flew gay Chechens to Canada under a

clandestine program conducted in complete secrecy and at the risk of disturbing diplomatic

relations with Russia[26]. In this instance, Canada committed to resettling as many gay Chechens

as qualified and were willing.

Despite these remarkable practices, much remains to be desired in the treatment of SOGI

refugees in the Canadian refugee protection regime. For instance, bisexual refugees continue to

struggle with establishing the credibility of their claims, and are often rejected at much higher

rates (Reehag 2008). More generally, SOGI claims remain an area of skepticism; bureaucrats are

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[24] For instance, after the UNHCR identified single gay, bisexual and transgender men as a particularly vulnerable group among Syrian refugees, Canada prioritized resettling gay Syrian men. These initiatives, however, were criticized for neglecting and deprioritizing other vulnerable SOGI populations, such as those from Turkey and Iran (see Molnar 2018).

[25] According to the terms of the 1951 Convention, a refugee is a person who is outside their country of nationality or habitual residence, and is unable or unwilling to return to this country due to a well-founded fear of persecution. In other words, persons who reside in their own countries are not within the Convention definition of refugee.

[26] For more on this project see Ibbitson (2017).

readily made suspicious of SOGI claims when numbers suddenly increase[27]. Perhaps most importantly, SOGI expansions have been primarily achieved through legislative and jurisprudential devices; however, SOGI refugees' access to protection is not exclusively regulated by the law. Like any other refugee claim, SOGI cases are ultimately processed by a bureaucracy that has its own logics, interests and goals; hence, bureaucrats and administrators' conceptions of their mandate inevitably informs how SOGI (and non-SOGI) claims are handled. The law is influential, but hardly the only powerful actor. It is time to turn to the bureaucracy.

III.   Running on Empty: Bureaucratic Refugee Protection in the New Millennium

Throughout the 2000s the Canadian refugee claim processing bureaucracy was in the work of implementing, adopting, lamenting, and resisting successive procedural changes that aimed to make it leaner, faster and more efficient. After almost twenty-five years of relative legislative stability, the Canadian regime of refugee protection was overhauled, revised and reformed three times in the span of twelve years. The unending flow of procedural and substantive legislative changes[28] diverted much of the IRB's administrative labour and attention to adapting to new regulations. The remaining resources were devoted to managing challenging workloads or navigating gross political neglect and severe austerity. The bureaucracy was receiving less and expected to do more.

Doing more with less required transforming financial costs into non-financial payments. If the cost was not to be billed to the budget, it had to be paid in non-monetary currency. For

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[27] For instance, the recent increase in the number of SOGI claims from Nigeria has sparked an investigation in the Canadian refugee protection regime (see Molnar 2018).

[28] Between the 2001 and 2012, the IRB was legislated to expand its protection mandate, accept the transfer of new tasks (such as Pre-Removal Risk Assessments), create an entirely new division to process appeals, radically change its scheduling practices, and define a cooperative relation with the newly created CBSA.

instance, the productivity improvements made by the transition to single-Member panels in the early 2000s proved costly to decision makers: single-member panels made the work of adjudication more challenging, particularly for new and inexperienced Members (interview with former Member, 6 October 2016). Refugee adjudication had become solitary work. New Members were now expected to hit the ground running: only after a few observation sessions, new Members were required to handle the complex and evolving dynamics of hearing rooms, counsel and interpreter problems, and the flow of the inquiry without collegial support. The new system called for greater individual skill and competence (interview with former Member, 11 November 2016) and these were to be achieved with much less institutionalized support. As one former Member (interviewed 6 October 2016) who had begun her career before the transition wondered: "When they [transitioned to single-Member panels] I thought to myself 'oh my God, I do not know how these people [new Members] do it!' … I had two-Member panels for maybe a year before I started [on my own]… I felt like I needed that time to learn from my co-Member…"

Apprehensions about erosion of institutional support for new Members were negligible compared to the critical need for greater productivity. The IRB was hit by yet another major surge: in 2000-2001, the IRB received 35,000 new claims, 40% more than the previous year (IRB 2001, 3). The number of incoming claims grew even larger the following year, reaching 45,100 (IRB 2002, 5). Despite high productivity (IRB 2003, 24), workloads drastically outsized existing capacities (IRB 2003, 22). Hence, the volume of claims awaiting review grew exponentially: by the end of the 2001-2002 fiscal year, the IRB had already accumulated a record number of 49,000 backlogged claims, an increase of 57% in just one year (IRB 2002, 5). Backlogs reached an unprecedented high of 52,600 by March 2003 (IRB 2003, 22). The age of

cases awaiting review, average processing times and costs-per-claim were also on the rise (IRB 2002, 17-18, IRB 2003, 30). The IRB was, again, in deep administrative trouble.

By 2003-2004, the IRB's foremost priority had become reducing the number of backlogged claims. New times called for new strategies. Maximizing the time-value of hearings became the new administrative obsession: hearings were made shorter and more focused (2004, 33) and new case management systems ensured claims received the minimum amount of hearing time possible[29] (see IRB 2003, 24).

Soon, even the conventional course of inquiries were tweaked to optimize the use of hearing times. Before hearings had become a site of efficiency enhancement interventions, it was customary for counsel to begin sessions with introductory remarks. By the mid-2000s, the IRB began to prohibit this practice. From the IRB's administrators' perspective, counsels' remarks lacked the brevity and focus needed for lean and efficient hearings (interview with former Member, 6 October 2016). By removing these remarks, the IRB increased Members' control over hearings. Members could now limit the inquiry only to the areas they saw fit. Increasing Members' grasp over the hearing, of course, enhanced administrative control: Members were trained, managed and evaluated by administrators based on administrative criteria. With Members in control, hearings could be made much more efficient.

The increased control of Members over hearings did not sit well with refugee lawyers, who found the new routine unnecessarily interventionist and even adversarial (ibid.). Power dynamics in hearing rooms were shifting away from counsel. Although in the legislated non-adversarial model claimants and their representatives were placed on relatively egalitarian footing with adjudicators and administrators, the bureaucracy was transitioning to a mode of

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[29] The new case management system diverted claims to four hearing streams based on their complexity. Easy and straightforward claims were directed to short hearings, while more complex cases were given longer hearing times.

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inquiry that allowed much greater concentration of power; increasing efficiency required increasing administrative control. Egalitarianism was inefficient and costly. The bureaucracy was pushing the boundaries of the law.

By the middle of the decade, stricter border and travel control strategies[30] had made gaining access to the Canadian regime much harder (IRB 2004, 6). The dropping number of incoming claims was perhaps an affront to the supposedly universal right to seek asylum and yet a blessing to the bureaucracy: with new claims held aggressively away, the IRB was finally making significant headway in tackling its piles of backlogged claims. By the end of 2004-2005, the number of pending claims was down to 24,889 (IRB 2005, 25).

While the problem of backlogs was coming under control, a more enduring issue began to cast its inauspicious shadow over the IRB's work. The electoral cycle, partisan considerations, and the transition of governments had led to persistent delays in appointments and reappointments of the IRB Members. While mandates of existing Members expired, new Members were not appointed to the Board. As a result, a significant and growing shortage of adjudicators began to debilitate the IRB. The IRB was desperate for timely appointments. Reminding the Parliament of the number of vacancies and their consequential implications became a regular theme in the IRB's annual reports (IRB 2002, 16; IRB 2003, 25; IRB 2005, 26; IRB 2006, 4).

Despite the IRB's regular requests, the new Conservative government continued to stall appointments. While a large pool of qualified candidates had been independently vetted and prepared, appointments were not forthcoming (Keung 2007). Soon, this news seeped into the

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[30] Imposition of visa requirements against countries such as Hungary and Zimbabwe, the Immigration Department's strategies for stopping unauthorized travellers abroad (IRB 2003, 23; IRB 2004, 7; IRB 2005, 24), and implementation of the Safe Third Country Agreement (IRB 2005, 24-25) significantly dropped the number of incoming claims in Canada.

media. Opposition MPs, advocates and lawyers criticized the delays. Some claimed that the Conservatives intentionally stalled the appointments to evade the pool of qualified candidates appointed or screened under the previous Liberal government (Campion-Smith 2007). Conservatives were even accused of intentionally sabotaging the IRB in order to dismantle it in favour of a system that could be much more directly controlled by political authorities (Campion-Smith 2007).

Throughout the decade, the IRB's problem with vacancies grew steadily. In 2000-2001, the IRB operated with a 3% vacancy in its adjudicator complement (IRB 2001 6). By the end of the 2000s, the staffing problem had reached alarming levels. In 2007-2008 the IRB's Refugee Protection Division operated with an average of 79 Members out of a 127-Member complement, a vacancy rate of almost 40% (IRB 2008, 29). Even the Auditor General's report noted the high rates and warned about their implications (Keung 2009). No level of administrative creativity, of course, could compensate for the damaging effects of these large shortfalls.

Delays in appointments caused much tension between the IRB and the government. The tension reached their peak in 2006 when the new Conservative Immigration Minister Diane Finley announced intentions to increase political control over the appointment process (Keung 2007). The announcement reversed years of reform that had successfully curbed political involvement in appointments[31]. The reformed system had given the IRB considerable power in the selection of its Members (IRB 2004, 33). Re-introducing direct political control in appointment processes undermined the IRB's newfound ability to select and manage its

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[31] Following years of criticism, the Liberal Minister Judy Sgro had reformed the appointment process in 2004. Under the reformed system, candidates were first screened by an independent advisory committee consisting of lawyers, academics, immigration advocates and human resources experts. A second panel of IRB officials, appointed by the chairperson, then selected from the pool of qualified candidates. The Minister's role was limited to appointing recommended candidates (Campion-Smith 2007; Keung 2007). The Conservatives planned to increase Ministerial control over appointments by condensing the process into a single round of selection, conducted by a panel half of whose members were to be directly appointed by the Minister.

adjudicators[32]. Following the announcement, the IRB's Chairperson Gordon Fleury resigned

from the Board[33](Jimenez 2007). Fleury's resignation came shortly after the departure of a

number of other senior IRB officials[34] (Mayeda 2007). The IRB was suddenly not only without a

sufficient complement of adjudicators, but also missing key administrators. To make matters

worse, a new rise in the number of incoming claims was on the way. Interdepartmental tensions

and human resource deficits had left the IRB ill-prepared to handle another colossal challenge.

The IRB's performance began to decline (IRB 2007, 27; IRB 2008, 3). With considerable

shortage of adjudicators, the volume of backlogs once again grew: by the end of 2007-2008,

42,000 refugee claims were awaiting review, 16,000 more than the previous year (IRB 2008, 29).

Public and political pressures eventually accelerated appointments. Filling the large

number of vacancies with qualified candidates, however, took time, and the number of

appointments continued to lag behind needs (IRB 2008, 5). At its 20th anniversary, the IRB was

still struggling with increasing intake and shortages of Members (IRB 2009, 1). The deficit was

so severe that even a full complement of Members could no longer stop backlogs from growing.

The IRB's intake continued to be well above its funded capacity[35]. By the end of 2008-2009, the

number of claims pending review stood at 58,000, and the average processing time was expected

to grow to 16.4 months (IRBN 2009, 2). Desperate times called for desperate measures. The IRB

even went as far as to group process simple claims that shared the same counsel (IRB 2009, 16)

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[32] Politicized appointment processes re-orient Members' accountability from the IRB administration to political parties or even single politicians, and afforded Members undue protection irrespective of their performance, responsiveness, and productivity (Interview with former Member, 11 November 2016).

[33] Fleury's frustration with appointment problems was well-known (Keung 2007). In the month before resigning, he had raised the issue with a parliamentary immigration committee, and met with the Minister eight times just to discuss appointments (Galloway 2006).

[34] Five members of the appointment advisory committee also stepped down to protest the announced changes (Campion-Smith 2007).

[35] For instance, while the IRB was funded to process 25000 claims, it received 36000 cases in 2008-2009 (IRB 2009, 16)

despite the fact that this practice obviously violated legal principles of individual assessment. No strategy, however out of the box, was to save the IRB from sinking. The IRB began to call for additional funding (IRB 2009, 2).

The shortage of adjudicators made for difficult working conditions at the IRB in the late 2000s. The necessity of increasing the productivity of existing Members put great pressure on adjudicators to finalize larger numbers of claims. As one former Member (interviewed on 6 October 2016) who served from the early 2000s to the end of the decade reflected: "At the beginning it wouldn't be unusual for members to do like 2, 2.5 hearings, like cases a week. And over the years that was increased to like 4… so almost doubling it…"

While Members' workloads were doubling, the level of support they received for conducting their work was declining substantially. The elimination of the position of Refugee Hearing Officers (RHO)[36] was particularly consequential for Members. RHOs were tasked to assist Members in conducting both background research and the hearing inquiry. With this position eliminated, much more of the work fell on the shoulders of Members. In the absence of the RHOs, thorough research and rigorous gathering of documentation was no longer practical for strained adjudicators (ibid.). The eroding support for pre-hearing investigation was compensated through emphasis on the conduct of the inquiry during hearings: "And now people don't even have the time to do [the thorough research]… so, you had to do the questioning yourself, so there was much bigger emphasis on questioning techniques and questioning methods" (Interview with former Member, 6 October 2016).

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[36] The role of RHOs (also titled Refugee Protection Officers) had long been a topic of discussion at the IRB. As early as the early 1990s, RHOs were criticized for undermining the non-adversarial nature of the adjudication process by their aggressive cross-examinations and problematic dissemination of information (see Hathaway 1993). Hence, the elimination of their role was not purely motivated by cost and efficiency concerns.

In addition to losing the dedicated support of the RHOs, Members were receiving much less general administrative assistance (ibid.): "Initially you would have one administrative assistant who would be assigned for the members to help them […] that soon changed and their job became more like an editor […] but they would have many more people to do that for, so you didn't really have as much support… so you had to do a lot more of your own admin-type work."

In the absence of capacity for thorough pre-hearing investigation and post-hearing support, real-time inquiry during hearings gained more weight: adjudications now happened largely in hearing rooms, and arguably to the detriment of traumatized claimants who had difficulty performing as competent and coherent narrators of their experiences[37].

The pressure to do more with less transformed the culture of adjudications at the IRB. The quest for adjudicative rigor and administrative justice became secondary to the need to finalize more claims. In the increasingly cost and efficiency-conscious administrative culture of the IRB, Members' work became much more narrowly about hearing and finalizing claims. For instance, Members' latitude in adjourning and postponing hearings to ensure fuller presentation of evidence became much more restricted (ibid.). Instead, the bureaucracy took the authority over determining hearing readiness in its own hands[38]. Even though the law had provided Members with the discretionary prerogative to err on the side of rigour and administrative justice, the bureaucracy actively shaped the normative bounds for the exercise of these rights.

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[37] Experiences of trauma can impede some claimants' ability to retrieve, recall, and narrate details of their cases with consistency (interview with refugee lawyer (30 November 2016) and refugee support worker (15 September 2016)). In these case, submission of supplementary documentation, such as psychiatrics reports, are key to establishing credibility for incoherent claimants. While good lawyers are savvy at recognizing and gathering supplementary documentations on behalf of their clients, claimants without capable legal representation are bound to do much worse in a system that places great emphasis on the real-time course of the hearing.
[38] For instance, the IRB began to introduce streamlined pre-hearing readiness protocols (see IRB 2003, 18, 24).

The bureaucratic compulsion for efficiency pushed the IRB to unprecedented levels of micro-managing its Members. Members were encouraged to hold shorter hearings, issue more oral decisions and produce shorter written reasons[39] (ibid.). Statistical reports of their performance and comparative data on productivity levels ensured Members' were aware of administrators' expectations (ibid.). Quantifiable output rates were set and discussed openly. Bureaucratic refugee protection was becoming increasingly managerialized[40], and consequently, removed from its humanitarian or judicial roots.

By the end of the decade, the IRB was finally operating with near a full complement of adjudicators (IRB 2010, 1) and a controlled workload[41] (IRB 2010, 1, 8). The IRB was recuperating from years of starved operation. However, the successive introduction of legislation in 2010 and 2012 supplied the IRB with new challenges. The Protecting Canada's Refugee System Act (PCRSA) (2012) produced particularly significant and long-lasting administrative troubles for the IRB.

The PCRSA dramatically reduced the timelines for making and processing refugee claims[42]. The new timelines made both access to refugee rights and administration of refugee protection much more difficult. The IRB was now obliged to schedule hearings within 3 or 6 months after receiving a new claim. Meeting these timelines was a constant struggle[43] (IRB

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[39] Shorter written reasons were thought to help Members produce decisions more quickly, and minimize the chances of error and grounds for objection and appeal by claimants (interview with former Member, 6 October 2016).

[40] For more on the managerialization of refugee protection in Canada see Soennecken (2013).

[41] The workloads were controlled through imposition of visa requirements, to be discussed in the next section.

[42] For example, those making refugee claims at Canadian ports of entries had only 15 days to complete and submit their Basis of Claim forms (from 28 days under the previous legislation). The truncated timelines hindered claimants' access to the Canadian refugee protection regime as well as their chances of success. The shorter timelines gave claimants considerably less time to seek and procure proper legal representation, gather evidence and documentation, and complete their forms in detail. For more on this see the report by the Canadian Bar Association (2012).

[43] The IRB officials regularly lamented that the legislated timelines were out of touch with realities of the work of refugee protection (IRB 2014, 15, IRB 2015, 2). The timelines did not, for instance, account for the learning curve

2014, 7). Not only did these timelines undermine the IRB's control over its scheduling practices, they even sidelined some of the IRB's well-honed strategies for improving the efficiency and quality of decisions. For instance, the obligation to schedule new claims within the legislated timelines meant that the IRB could not optimize the use of its geographically specialized adjudication teams (see IRB 2014, 15). New claims had to be assigned to adjudicators quickly, regardless of whether they fit with the regional expertise of the decision maker. Of course, sidestepping the wealth of specialized knowledge accumulated by geographical teams was both detrimental to the quality of decisions and the efficiency by which adjudicators could process new claims. Quick hearings were neither efficient nor of utmost quality.

The biggest problem with the PCISA was its complete neglect of the 30,300 "legacy" claims that already existed when the Act came into force (IRB 2013, 8). The new timelines only applied to new claims. In fact, no formal capacity or resources were allotted to resolving older cases[44]. Processing these claims required creative use of all and any available capacity (IRB 2013, 8, IRB 2014, 15; IRB 2016, 19). The precarious and temporary nature of resources devoted to older claims made their processing difficult and slow (IRB 2014, 15; IRB 2016, 19-20). The older claims were continually pushed to the back of the scheduling line to accommodate quick resolution of new cases. Scheduling practices became highly uneven and increasingly unfair.

Unfortunately, resolving older claims was not the only major budgetary hassle faced by the IRB. In general, funding was becoming scarcer. A cut of 13 million dollars (or 10%) from the IRB's budget (IRB 2014, 1-2) made the work of refugee protection the skill of resource patchwork. Under this new austerity, even routine processing of claims required creative

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of new Members, the delays in front-end security screenings conducted by other departments, or basic human resource issues such as increases in vacation allocations (IRB 2014, 15).

[44] These included legacy claims, but also claims that were sent back from Federal Courts for re-assessment (IRB 2016, 19).

budgetary work. The bureaucracy was on its own to deal with fluctuating workloads. For instance, to handle a rise in intake levels, the IRB reallocated more than 3 million dollars internally to hire additional Members[45] (IRB 2016, 1). Legacy and older claims continued to be largely funded internally and without additional resources (IRB 2015, 2).

The election of the Liberals in 2016 changed the political discourse about refugees. However, discursive change did little to alleviate the IRB's troubles with insufficient funding and growing intake (IRB 2017, 1, 2). Under the new government, the IRB began to defy legislated timelines and prioritize the resolution of legacy claims (IRB 2017, 1). The IRB now had more elbowroom, but also a heavier workload. The trouble of fitting a large portfolio into a skinny budget continues to haunt the IRB to this date. The necessity and compulsion to do more with less has been costly to the humanitarian reputation of the IRB, and the working conditions of its administrators and decision makers; however, the biggest cost has been imposed on the claimants.

IV.   The Era of "Palliative Care": Mexicans Claimants and the Politics of Exclusion

By the time the IRB had entered the new millennium, the Canadian refugee protection regime had developed a well-established practice of managing caseloads through tracking and controlling the number of incoming claims. The 2000s' daunting challenge of balancing high caseloads with attenuated resources continued to make restricting access to the Canadian regime a bureaucratic necessity. The IRB officials remained continuously preoccupied with populations of concern; national groups that showed a sudden and marked increase in their numbers were particular subjects of anxiety for administrators and bureaucrats.

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[45] Despite this, the volume of incoming claims exceeded processing capacity and the number of claims waiting review grew (IRB 2016, 19).

In the early 2000s, Mexican claimants were emerging as the top focus of bureaucratic anxieties. Mexico was rapidly rising as a major source country (IRB 2003, 23). For several consecutive years since 2005, Mexico ranked as the top country of origin for refugee claims in Canada (IRB 2008, 28). The number of Mexican claims were high and rising steadily: in 2005, 3,400 Mexicans filed refugee claims in Canada; these numbers peaked in 2008 at 9,400 claims (O'Neil 2009). In the 2007-2008 fiscal year, Mexicans accounted for nearly 25% of all new claims (IRB 2008, 14-5).

The high and rising number of Mexican claims presented delicate geopolitical and administrative challenges. Mexico was Canada's NAFTA trade partner, a close ally, a democratic country, and, in former Prime Minister Jean Chrétien's words, Canada's "amigo" (Simpson 2009). Geopolitical relations with Mexico were improved further after conservative governments were elected to power in both countries in 2006. Inter-state relations were strong and neither of the countries required entry visas from each other's citizens. Canadian officials, by all indications, were not inclined to see Mexico as a legitimate source of refugees (Jimenez 2008; Ivanyi 2009). Moreover, Canadian political authorities had no interest in souring their good relations with Mexico by accepting too many Mexican refugees (The Globe and Mail 2008). Yet, provisions of refugee law obliged the Canadian state to consider Mexican claims without any consideration to geopolitical relations. Political interest was sharply at odds with the principles of refugee law. The law had to be circumvented.

The trouble with Mexican refugee claims, however, was not merely a political hassle. The large volume of these claims also caused significant administrative strain. The IRB was already struggling with a shortfall of adjudicators, attenuated resources and reduced capacities. The overwhelming and unexpected increase in the number of Mexican claims only exacerbated

already existing troubles. The IRB was keen to be rid of the large number of Mexican claims that continuously piled up in its inventories. Thus, administrators were well aligned with political authorities in their desire to drive Mexican claimants away from Canada.

As much as Canadian administrative and political authorities despised them, Mexican claimants were indeed fleeing harsh and threatening circumstances. In the 2000s, conditions of life had quickly deteriorated in Mexico: an open war between drug cartels and the state, police corruption, and human rights abuses by the national army had threatened and taken thousands of lives[46]. In 2008 alone, more than 1,300 people had been killed in drug wars in Ciudad Juarez, a city of 1.3 million (Valpy 2009). Across Mexico, the numbers of dead citizens tallied well over 3,000 in just one year (Jimenez 2008). Since police forces proved unable to control the eruption of mass violence, Mexican President Felipe Calderon had brought the army to the front; the Mexican state was in an open war with the cartels. The army itself was soon accused of several instances of serious human rights abuse. Violence was pervasive, and easily caught innocent bystanders and civilians in its wake. Extortion, kidnapping, rape (Taylor 2008), decapitation, asphyxiation and shootouts had become every day occurrences (Jimenez 2008). The Mexican state seemed at the cusp of losing control over the country (Valpy 2009).

Despite these alarming conditions, Canadian officials were highly invested in rejecting Mexicans as legitimate candidates for refugee protection. The accumulated weight of geopolitical and administrative interests turned Mexican claimants into targets of well-coordinated, multi-departmental and highly aggressive strategies of exclusion. At the IRB, Mexican claimants rarely received a positive decision; in 2008, their acceptance rates were 11%, well below the overall average of 34% (Jimenez 2008). The low acceptance rates of Mexican

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[46] For fuller accounts of these conditions see Valpy (2009) and Jimenez (2008).

claims were particularly striking as these cases often involved issues that, from lawyers' point of view, normally produced high rates of acceptance in other national groups (Day 2009).

In addition to their misfortunes at the IRB, Mexican claimants were also becoming prey for the Immigration Department. Unlike most other scapegoated national groups, Mexicans were explicit political targets; the Conservative Immigration Minister Jason Kenny openly orchestrated negative media coverage against Mexicans. Kenny's hands-on approach did not leave much about his disdain for Mexican claimants to the imagination; he spoke publicly and frequently about Mexican refugees, calling them bogus (Keung 2009), queue-jumpers (Fekete 2009) and systematic abusers of the Canadian system (Edwards 2009). Mexicans were, supposedly, opportunist migrants and not real refugees. In this new era of scapegoating, the claimants who dropped to the rank of excludables were not only rejected and excluded, but also publically demonized.

Kenney's active campaign against Mexican claimants, and these claimants' dismal rates of acceptance at the IRB were not unrelated phenomena. From a judicial standpoint, these concurring developments could well constitute institutional bias within the Canadian regime. The Minister's vocal attack on Mexican claimants clashed with the legislated independence of refugee status determinations (Showler 2009). Although refugee decisions continued to be made by independent adjudicators, Members' appointments and reappointments were ultimately controlled by the Minister. Hence, the Minister's outspoken position against Mexican claimants could lead to apprehension of bias: Mexican claimants could no longer be confident that adjudicators were acting with full independence and were not swayed by the prospects of damage to their careers if they did not comply with the position of the Minister. Kenny's campaigns against Mexican claimants, in other words, undermined principles of administrative

justice and legislated provisions of refugee protection. With Kenny's active hand in refugee

matters, refugee decisions did not seem fully shielded from political influence.

To cut the number of Mexican claimants who could access the Canadian regime, Kenny's

Department began to impose visas on Mexicans in 2008[47]. The visa requirement was announced

on very short notice, allowing a grace period of only 48 hours for those already in transit (O'Neil

2009); any longer notice, Kenny explained, would have created the conditions for a "rush for the

border" (Clark 2009, A1). Visa restrictions were meant to stop the vast majority of prospective

Mexican claimants from entering Canada and accessing its protection regime. The universal right

to seek asylum was to live quietly on the books and not be exercised in practice.

Although Kenny outdid any Minister in explicitly targeting a national group for

exclusion, scapegoating Mexican claimants was not a solitary political initiative. In his attempts

to cut the number of Mexican claimants, Kenny had a strong ally in the refugee claim processing

bureaucracy; the IRB had also much to gain from rejecting and deterring Mexican claims.

Although not nearly as explicit as the Minister in their intentions, the IRB officials did what they

could to reduce the number of Mexican claims. From facilitating negative decisions to making

processing conditions more unfavourable, the IRB had an active role in curbing access to refugee

rights and protection.

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[47] Imposing visas on hundreds of thousands of Mexicans who travelled to Canada as students, tourists, and businesspeople was, of course, a huge political and administrative headache. The Mexican government received the news with contempt; unwilling to risk the loss of Canadian tourism, Mexican officials reciprocated by imposing visas on Canadian diplomats only (Barrio-Terrazas 2009). The visa requirement caused confusion and an assortment of administrative problems for international students (Willick 2009; Cryderman 2009), and damaged the image of Canada in Mexico (Simpson 2009). Administering these visas was also troublesome: the Canadian embassy in Mexico City was hardly prepared to accommodate the large volumes of applications; while existing officers worked overtime, fourteen additional visa officers were flown from Ottawa and a number of Mexicans locals were hired and put to the task of processing visa applications (Cryderman 2009). Kenny's decision, furthermore, turned out costly: the costs of processing visas and loss of tourism revenues in Canada easily overshadowed any gains from cutting the number of refugee claims (Simpson 2010). The messy work of visa application processing at times also produced absurd outcomes; in one controversial case, a prominent Mexican Supreme Court justice was refused entry to Canada (The Toronto Star 2009).

The IRB used its own distinct devices and resources to turn the tides of adjudication against Mexican claimants. In May 2008, the Board adopted a Persuasive Decision[48] on Mexicans that largely invalidated their claim to refuge (Jimenez 2008). The Decision provided a "model" reasoning on the nuanced and unconventional, although by no means exceptional, conditions of persecution in Mexico. Unlike conventional claims, most Mexican claimants did not claim persecution at the hands of state agents. Mexico was a democratic country with no serious records of state-sanctioned human rights abuse. Persecution, however, was commonly perpetuated by non-state actors. Hence, to secure protection in Canada, claimants had to demonstrate that the Mexican state was unable or unwilling to protect claimants from persecutors; eligibility for protection had to be framed in terms of a failure in citizen-state relations.

The IRB's Persuasive Decision raised the bar for demonstrating lack of protection in Mexico. Although the Decision recognized the pervasive violence, it argued that the Mexican government was combating existing problems. Further, the Decision suggested that to establish absence of protection, claimants could not simply claim that they had sought help from "some member of the police force and that his or her efforts were unsuccessful" (as reported by Jimenez 2008). Rather, claimants were required to demonstrate substantial, yet futile, efforts in securing safety. The extent of efforts claimants had exhibited in seeking protection in Mexico was now a key area of scrutiny. Moreover, adjudications hinged on subjective estimations of the Mexican state's protective capacities (Keung 2010).

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[48] A close relative of the infamous Lead Case (discussed in the previous chapter), Persuasive Decisions are administrative devices that are meant to lighten the work of refugee status determination by providing replicable guiding reasoning on cases of similar circumstances.

Ironically, the increased preoccupation with claimants' efforts in securing safety in Mexico sidelined the more central question of persecution. In fact, Mexican claimants were more likely to be rejected based on perceived capabilities of the Mexican state than lack of credibility of their own cases (Zabjek 2009). Adjudicators regularly rejected claimants that, even in their own estimations, had endured serious violence, brutality and risk to life and safety. The adjudicative work of refugee protection had become centered on protecting the reputation of the Mexican state, above and beyond an examination of claimants' experiences of persecution.

In addition, not all adjudicators found the level of violence in Mexico worthy of refugee protection. In fact, many Mexican women's experiences of gender-based violence were considered insufficiently grave. In one troubling instance, an adjudicator described the case of a seventeen-year-old woman who had been kidnapped and raped by a drug gang "horrific" but not "atrocious and appalling" enough to warrant refugee protection (Taylor 2008, A01). Despite the fact that the IRB's much-celebrated Gender Guidelines had long established sexual violence as a form of gender-based persecution, the expansive definition of persecution was not applied to the Mexican claimant. The thresholds of violence that admitted Mexicans to protection were raised higher than those applied to others in similar circumstances.

The insensitive and troubling decisions on this and a number of other similar Mexican claims were challenged in the courts. In 2008, six negative decisions on claims involving issues of rape, kidnapping, beatings and threat were successfully appealed in the Federal Court of Canada (Taylor 2008). Federal judges out-ruled the negative decisions and reproached the IRB for demonstrating gross insensitivity in recognizing Mexican women's claims. The IRB had lost touch with the provisions of refugee law. The bureaucratic impetus to reject and deter Mexicans, including women, had undermined humanitarian and legal standards of protection.

The fact that Mexican claimants were regularly rejected despite their strong cases was not an accidental outcome of insensitive decision making by independent adjudicators. To the contrary, the IRB administration had a hand in diminishing Mexican claimants' chances of receiving a positive decision: the IRB had reshuffled its adjudicative personnel and concentrated Members with anti-refugee attitudes and lower approval rates in the regional team that heard Mexican claims (interview with refugee lawyer, 30 November 2016). Mexicans were being heard by Members who were not inclined to accept refugees.

These changes made the IRB an increasingly hostile environment for Mexican claimants. Refugee lawyers who represented Mexican claimants in this period painted a disturbingly grim picture. Refugee adjudications had become a brutal battle. Relations between counsel and Members were filled with tension. One lawyer (interviewed 30 November 2016) described her changing perceptions of the nature of her work in the aggressively antagonistic hearings in this period:

> Going into these hearings… it was, it was palliative care, right? The only way that we could, I think many of us [refugee lawyers], could get through…was to think okay, you know, I have to radically readjust my expectations of this process. I'm not going in to try to get someone refugee status. I'm going in to try to make this the most dignified process it can be. I'm going to provide moral support, you know, I'm going to provide emotional support. I'm essentially gonna try to defend this person, I'm gonna try to protect her from having this person [the Member] brutalize her for three hours, before giving her the negative decision, right? So let's just, give the goddamn negative decision. But don't kick my client in the face for three hours before you do it, right? Like that's now my role.

The work of representing Mexican claimants had been radically redefined. "Successful" legal representation was now reduced to shielding clients from degrading comments, disrespect and verbal abuse. Negative decisions were almost guaranteed; the aim was to receive them with a minimal amount of harm to the dignity of claimants. The counsel's work had become about providing emotional support in the face of grave hostility, above and beyond legal representation. Counsel knew claimants had virtually no chance of receiving refugee status. The promise of refugee protection was none but nominal; palliative care was the theme of the new era. The goal was to nurse clients through a painful process that was to end in rejection. Legal representation was a very sombre joke.

As grim as these circumstances were, the Canadian refugee protection regime had not yet exhausted all its strategies for excluding and deterring Mexican claimants. Only a few years after the imposition of visas, the conservative government introduced a new and highly unconventional fast-tracking system. Unlike earlier expedited processes, the Designated Countries of Origin (DCO) was externally imposed and controlled by the Minister, and sharply skewed towards quick rejection of claims[49]. The DCO was an explicit strategy of deterrence: it was intended to cut the supposedly large number of unfounded claims that clogged Canada's refugee protection system (see CIC (2013 and 2017)).

The DCO gave the Minister the authority to create a list of countries that, in his estimation, were unlikely producers of refugees. Claims from these "safe" countries were then diverted to bureaucratic procedures that ensured claimants had minimal chances of success. The DCO established several disadvantageous procedural provisions. First, DCO claims were

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[49] As discussed in Chapter 1, fast-tracking systems had long been used by the IRB to increase efficiency of claim processing. These systems were created internally by the IRB and were applied to claims that were largely believed to be well-founded.

decided on considerably shorter timelines: compared to 60 days in other cases, DCO claims were heard within only 30 or 45 days after the receipt of applications[50] (CIC 2013). These shorter timelines gave claimants little time to secure legal representation, prepare for hearings, and gather necessary supporting documents and evidence. Making strong and well-supported claims, hence, had become almost impossible.

Second, DCO claims were excluded from the right to appeal negative decisions to the IRB's new Refugee Appeal Division (RAD). As a result, appeals to the Federal Courts were the only possible avenue for challenging negative outcomes. Federal appeals, however, were costly, lengthy and rarely granted[51]. Lack of access to the RAD, thus, made reversing negative decisions much more difficult.

Third, to ensure "fraudulent" claimants were quickly sent home (CIC 2013), the Immigration Department committed to removing rejected claimants within one year (CIC 2013). Deportation and fast removal of rejected claimants, of course, made access to the federal appeal system virtually impossible (Levine-Rasky, Beaudoin, and St Clair 2014). All in all, the DCO restricted access to the full range of rights offered by refuge law. Negative decisions were more likely to be made and less likely to be successfully overturned. Mexico was placed on the DCO list despite its well-documented records of serious human rights problems (CARL website 2012).

Unsurprisingly, the DCO violated many of the key premises of refugee law. The authority of the Minister in designating "safe" countries, the consequential use of group-based

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[50] DCO claims that were made at ports of entry were to be heard within 30 days. Other DCOs had 45 days before their hearing.

[51] Federal appeals of refugee decisions have a number of limitations. First, Federal Courts can only hear appeals based on judicial grounds; only when claimants have evidence of judicial error may they apply for these appeals. Second, Federal Courts cannot rule on the substance of cases. Deciding on the content of refugee claims remains the exclusive authority of the IRB adjudicators. Third, federal appeals require a leave to appeal. These leaves are granted very infrequently. Thus, the vast majority of prospective appellants will never be given a chance to appeal their decisions in Courts.

processing and the differential levels of access to appeal rights undermined the legal promise of

politically independent, individual-based and fair and equal assessment of refugee claims.

Although externally imposed on the IRB, the DCO was ultimately a method for increasing

bureaucratic efficiency. Even if originated by non-IRB actors, the DCO helped the IRB process

masses of unwanted claims out of its caseloads (CIC 2017). The DCO was a tool for making the

bureaucracy more efficient and bureaucratic efficiency was yet again in conflict with the legal

promise of refugee protection[52].

The effective alliance between political and bureaucratic forces slashed Mexicans'

chances for receiving refugee protection. Not only were Mexicans held away from the Canadian

regime, their acceptance rates were also considerably lower than overall averages: in 2010,

Mexicans were accepted at a rate of 11% compared to the overall acceptance rate of 38%[53].

Mexicans' acceptance rates only improved when their actual numbers were minuscule. For

instance, although in 2014 Mexicans' acceptance rates improved to 29% (compared to the

overall average of 50%), Mexicans numbered only 328 of 19,954 total adjudicated claims (ibid).

The combined effects of political and administrative strategies had made positive decisions for

Mexicans a rarity. Very few Mexicans were able to enter the Canadian claim adjudication

processes and very few exited it with refugee status.

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[52] The DCO generated mass protest and objection. Kenny's power in designating "safe" countries and his active campaign against Mexican claimants soon led to allegations of institutional racism in the Canadian regime (Levine-Rasky, Beaudoin, and St Clair 2014). Refugee advocates passionately fought the DCO and challenged it in the Federal Courts. The Court found the DCO in conflict with the Canadian Charter of Rights and Freedoms (CCR 2015). Displeased with this ruling, the conservative government initiated an appeal on this ruling. However, the 2015 elections brought an end to the long reign of Conservatives; the new Liberal government had no intention to proceed with challenging the outcome of the appeal (CBC 2016).

[53] This data was obtained through an Access to Information and Privacy request made by Xtra. The full database is accessible at https://docs.google.com/spreadsheets/d/1LDFqkYJCpOTO_B-oItLlmH3vQoYrnSF3Nl_o5q9tZ7o/edit#gid=604097886

Being Mexican reduced claimants' chances of receiving protection from Canada, even for those whose claims normally produced high rates of success. Over the course of the period in which Mexicans had become explicit targets of exclusionary strategies, the Canadian refugee protection regime was moving to codify an expansive protective vision for SOGI claims. In general, SOGI claims did well in Canada; for instance, in 2011 and 2012, 64% and 60% of SOGI claims received positive decisions, while overall acceptance rates sat at 38% and 35% respectively. Of course, SOGI claims constituted only a fraction of the IRB's caseloads: in 2011, only 1,144 of 34,234 finalized cases were SOGI claims (3.3%). In 2012, out of 29,500 finalized claims only 1,208 were SOGI (4%).

But not all SOGI claims were treated with generosity; Mexican SOGI claimants were regularly rejected at much higher rates than other SOGI refugees: in 2011, only 18% (20 out of a total of 112) of Mexican SOGI claims were accepted. In the years directly preceding the IRB's SOGI Guidelines, Mexican SOGI claimants faired considerably worse; their actual numbers as well as their acceptance rates dropped substantially: in 2014, only 1 out of 9 Mexican SOGI claimants received a positive decision (11%); in 2015, no Mexican cases were among the 1,286 SOGI claims the IRB adjudicated. Acceptance rates of Mexican SOGI claims were even at times lower than the rates of other Mexican cases: in 2014, Mexican SOGI claims' 11% acceptance rate was much lower than the 29% rate for all Mexicans.

Hence, the general openness to SOGI claims in Canada was mediated through the intersectional filter of national origin. Jurisprudential expansions on SOGI claims were not equally beneficiary to all SOGI claimants. Mexican SOGI claims continued to be disadvantaged through political and bureaucratic measures well before they were in any position to benefit from expanding SOGI rights: Mexican SOGI claimants were Mexican first and SOGI second. In fact,

acceptance rates of Mexican SOGI claims were more closely aligned with those of other

Mexicans than other SOGI cases (see figure below[54]).

Figure 3- Acceptance Rates of SOGI, Mexican, and Mexican SOGI Claims
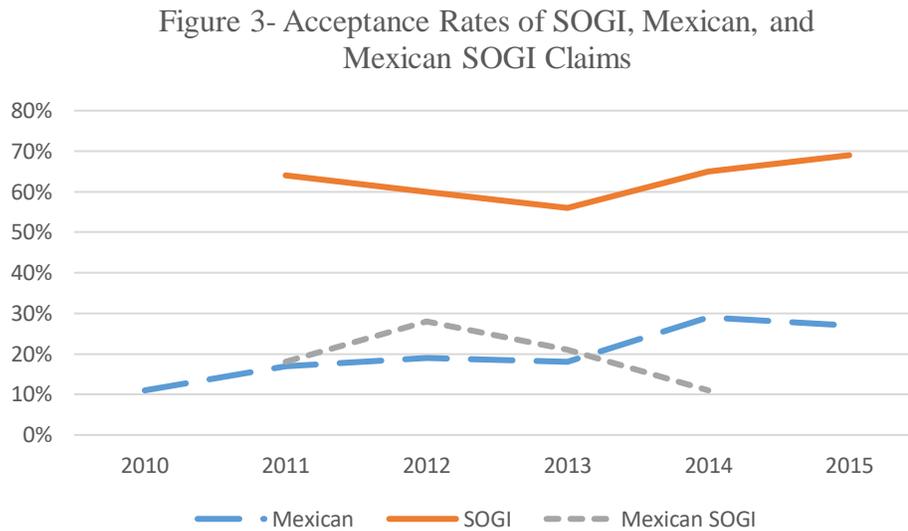
In sum, the aggressive and restrictionist forces of political and bureaucratic authorities

overpowered the expansive effects of SOGI jurisprudence. When jurisprudential and

bureaucratic forces clashed, the bureaucracy won. Mexican SOGI claimants derived the

propensity for being systematically rejected due to their nationality, and little privilege from the

SOGI nature of their claims. Patterns of bureaucratic disadvantage easily trumped those of

jurisprudential advantage.

The systematic scapegoating of Mexican claimants was highly effective and at times

extremely tragic. In one publicized case, a twenty-four-year old pregnant woman was abducted

and murdered after she was deported to Mexico by the Canadian government (Keung 2009;

Greenaway 2009). Her body was discovered with clear marks of drug trafficking-related

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[54] Ibid.

violence. The young woman, Grise, along with her mother and sister, had attempted twice to secure refuge in Canada. She had been rejected both times. The adjudicator had decided that the family had not made enough attempts to secure protection from Mexican authorities, who were, supposedly, capable of protecting them. Even the customary pre-removal risk assessment[55] had failed to properly recognize the risks of returning the family to Mexico. Grise was killed within a few months of her forced return. She had given birth while abducted and the whereabouts of her newborn baby remained unknown.

Grise's tragic death caused outrage. Refugee advocates chastised Canada for systematically rejecting persecuted Mexicans, and called on the government to return Grise's mother and teenage sister to safety in Canada. The family eventually received temporary visas and flew to Canada; however, they were only issued visas after a payment of $3,400 was made to the federal government in lieu of the deportation costs that had sent their daughter to her death. Upon her return to Canada, Gise's grieving mother, Neumi, said to the media: "My daughter had to be killed in order for Canada to believe in our story. The price is just too high" (Keung 2009, GT01).

Grise was perhaps only one of the numerous casualties of the systematic scapegoating of Mexican claimants in the Canadian refugee protection regime. The multi-faceted strategies of exclusion against Mexicans controlled the number of incoming claims, increased efficiency of claim processing and strengthened control over migration; these bureaucratic and political achievements, however, were drenched in blood. The price, indeed, was too high.

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[55] Before any person is deported from Canada, risk assessments are made to ensure the deported person is not sent to dangerous conditions. These assessments are particularly important for claims that originate from highly volatile national contexts. These assessments do not provide secure status in Canada, but only protect prospective deportees from likely danger after deportation.

V.   Conclusion

This chapter examined the conflictual impulses of the Canadian refugee protection regime in the new millennium. As I showed, the Canadian regime of refugee protection remained a complex and conflictual articulation that expanded refugee rights through legislation and jurisprudence, and yet restricted access to protection through administrative, bureaucratic and procedural provisions. As a result, despite expanding legal rights, the Canadian regime became highly restrictive, exclusionary and punitive.

My genealogical account of SOGI refugee rights situated these developments in the rapidly changing legal scene of sexual rights in Canada. I showed that the changing legal status of homosexuality soon turned homosexuals from subjects of exclusion to deserving recipients of protection. However significant, these legal and jurisprudential changes did not impede the restrictionist impulses of the Canadian regime. Struggling to the point of possible collapse, the Canadian refugee protection bureaucracy worked against the odds of heavy workloads, political neglect and shrinking resources. In this institutional context, restricting the number of those who knocked on the IRB's door became integral to organizational survival. The bureaucracy remained highly invested in restriction and deterrence.

The alliance between conservative political power and bureaucratic impetus for efficiency produced devastating strategies of exclusion. Inter-departmental collaborations, bureaucratic rearrangement of internal resources and the outright demonization of Mexican claimants ensured these migrants had very little chance of receiving protection. Even Mexican women and SOGI claimants were routinely pushed out of protection. Expanding SOGI rights did not apply evenly across the SOGI population. Political and bureaucratic exclusion came first, undoing possibilities of protection despite jurisprudential expansions. Mexican SOGI claimants,

hence, tell the untold story of Canadian exceptional SOGI protection: SOGI rights are

exceptional for some but not for others.

Conclusion: For Whose Protection?

Between May and October of 1847, otherwise known as "Black '47", 38,560 famished Irish migrants arrived at Toronto's waterfront, then a city of only 20,000 residents. The migrants were penniless, sick and dying. They were at times received with sympathy, and other times with racist contempt. There was disorder, loss and confusion, but no major calamity or long-term damage ensued to life in Toronto[1]. The city absorbed or gradually passed along a refugee population of almost double its size. Migrants came, died, settled or moved to other parts of Canada. And Toronto remained more or less the same.

One hundred and seventy years after the Black '47, it is thoroughly inconceivable for Toronto to receive, let alone play host to, a comparably large population of hungry and ill refugees. The cost and inconvenience of receiving that large of a volume of refugees in a span of a few months is enough to rule the entire event out of the realm of plausibility. It was, of course, also hugely costly and inconvenient to receive the famished Irish refugees. However, in 1847 agitations about cost and inconvenience were not as readily and capably accommodated by the logics and technologies of governance. The famished migrants arrived, and the only possible response was to, however reluctantly, receive them.

Ironically, as refugee protection has become more formalized, it has become harder for refugees such as the Irish of the Black '47 to find safety in relatively stable and prosperous regions of the world. There is no shortage of refugees, of course. Million upon millions continue to be displaced because of famine, war and other tragedies comparable in scale to the Great

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[1] For a fuller account of the Irish migration to Toronto due to The Great Hunger see http://irelandparkfoundation.com/famine-memorial/great-famine-history/

Hunger in Ireland. But the displaced no longer reach Canada nor are the famished considered legitimate refugees.

The events of the Black '47 are perhaps no longer plausible precisely because of the advent of formalized, state-controlled, economically-conscious regimes of refugee protection in the liberal democratic world. Contemporary refugee protection bureaucracies are far more advanced, and much more capable of achieving their goal of minimizing disorder, cost and chaos. The Black '47 is an unimaginable mishap of the distant past because it would be completely irrational, economically unfeasible and socio-politically disorderly for such an event to take place again.

Despite the fact that liberal democratic countries led the development of refugee protection regimes, refugee protection has now, primarily, fallen into the laps of less wealthy and less liberal countries. Countries with fewer resources to spare, less codified and systematic regimes of refugee protection and less robust liberal legal systems now host the overwhelming majority of refugees in the world. Turkey, for instance, is housing 3.5 million refugees, while Uganda and Pakistan each host 1.4 million. Lebanon, a country of only 6 million, has 1 million refugee residents[2]. None of these top refugee receiving countries were among the initial signatories of the 1951 Convention[3]. In fact, Lebanon and Pakistan have never signed the 1951 Convention and its 1976 Protocol[4].

Lebanon, a country that has hosted Palestinian refugees since 1948, has neither signed the Convention, nor does it have a national legislation on refugees (Janmyr 2016). When the 1951 Convention was drafted, Palestinian refugees were already under the mandate of the United

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[2] UNHCR, "Figures at a Glance", accessible at https://www.unhcr.org/figures-at-a-glance.html
[3] This is not surprising, given that the 1951 Convention was originally only concerned with European refugees.
[4] For the list signatories see https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf

Nations Relief and Works Agency for Palestine Refugees in the Near East; hence, they were excluded from the protection of the Convention. Arab states supported this exclusion out of a desire not to erode the special legal status of Palestinian refugees or become responsible for their care (Knudsen 2009). Thus, Lebanon, and much of the Arab world, never became party to the Convention. Today, Palestinian refugees are not within the jurisdiction of any singular international body[5] and thus remain subject to major gaps in protection (Suleiman 2006). Further, the absence of codified legal obligations towards refugees in Lebanon has had serious implications for Palestinians and other refugees in this country[6].

In the case of Pakistan, the limited Euro-centric vision of the emerging "international" refugee regime impeded the ratification of the Convention. The terms of the Convention made the refugee definition completely irrelevant to the 14 million South Asians who were forced to cross newly established national borders as the result of the 1947 Partition. The displaced South Asians were considered not to have lost the protection of their nationality; hence, they were not considered Convention refugees (Robinson 2012). The Indian and Pakistani states strongly objected to this exclusion and refused to become parties to the Convention. Meanwhile, mass displacement in South Asia was addressed through a regional refugee regime that developed alongside the international system (see Robinson 2012). In the subsequent decades, refugee protection remained a makeshift project in Pakistan and refugees' access to services were, at times, limited to bare necessities. For instance, in the early 1980s the Pakistani state hampered

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[5] The terms of the United Nations Relief and Works Agency for Palestine Refugees in the Near East only apply to Palestinians who reside in one of the specified areas of operation (Jordan, Syria, Lebanon, the West Bank and the Gaza Strip). Hence, Palestinians who are outside this geographical region are not protected by the agency (Knudsen 2009).
[6] For a discussion of how this has affected Syrian refugees in Lebanon see Janmyr (2016).

Afghan refugees' access to education and employment in order to de-incentivize their stay in the country (Gallagher 1989).

In short, the limited, Euro-centric and state-focused underpinnings of international refugee law has led to a situation in which the majority of the world's refugees live in countries whose refugee systems are less rigorously organized around international provisions or liberal notions of justice. By any honest estimation, refugee law has failed to protect refugees or successfully establish their universal human rights. The failure of human rights law is a noteworthy, if not an astonishing reality: over the course of the human rights-focused twentieth century, arguably more human rights violations occurred than ever before (Douzinas 2000). Moreover, the ideal of universal equality of rights has been continuously challenged in practical encounters between legal and governing authorities, and outsiders (Kapur 2006) such as refugees. As Denise Ferreira da Silva (2001) notes, (racist) inequality is not external to liberal justice; rather, exclusion "circumscribe[s] the zone of operation of [liberal] universality" (424). Hence, today, the vast majority of the world's refugee population are actively and systematically excluded from the territorial realm of liberal rule. Refugees literally remain on different continents than the liberal regimes of refugee protection. Refugee protection and refugees are worlds apart.

Whom, then, do liberal regimes of refugee protection protect?

In this dissertation, I proposed that refugee protection has been a highly paradoxical state project in Canada. I suggested that the Canadian paradox is only a reflection of the much larger problem of state-controlled refugee protection: the difficulty of instituting universal human rights through the exclusionary mechanisms of the nation-state. Indeed, the paradox of refugee protection spans far beyond Canada and its refugee claim processing system. The Canadian state

is only a small part of a much larger system of power that exerts exclusionary control over mobility and access to rights across the globe. In the global regime of nation-states, exclusion and inequality are not accidental; nation-states are meant to discriminate against and exclude non-citizens. In this system, refugees have a highly tenuous claim to rights and equality. And yet, nation-states remain in charge of administering refugee rights.

I argue that the Canadian regime of refugee protection is a complex and dynamic articulation of an expansionist impetus for humanitarianism and a restrictionist compulsion for control. Further, I argue that the paradoxical impulses of refugee protection are articulated in specific and systematic arrangements. As I showed, the humanitarian impulse to expand the reach of rights has been primarily achieved in the field of law and in relation to tightly guarded legal categories. Chapter 1 explored the expansion of refugee rights through the legislation of the refugee category in the Immigration Act of 1976. This legislative change along with emerging jurisprudential rulings dramatically increased refugee claimants' scope of rights. Chapters 2 and 3 followed the subsequent expansions of refugee rights through progressive jurisprudence. Feminist re-interpretations of the 1951 Convention, the changing legal status of sexual minorities in Canada, and a Supreme Court ruling made gender-based and SOGI claimants unquestionable subjects of rights and protection. In all these instances, humanitarian expansions were led, accomplished or heavily aided by forces within the field of law.

In contrast, the impulse to restrict access to protection has been largely applied in the field of bureaucracy and imposed against specific national groups of excludable claimants. Chapter 1 traced the administrative desire for restrictionism within the contemporary regime of refugee protection in Canada. I showed that keeping specific national groups away from refugee rights became a bureaucratic strategy and a priority. Chapters 2 and 3 provided several examples

of how the bureaucracy manufactured, isolated and excluded strategic groups of claimants in the subsequent years. Coordinating practices with political forces, accelerating processing of claims from unwanted groups, and advancing model decisions to the disadvantage of specific claimants were some of these bureaucratic and administrative strategies. Strategies of exclusion and restriction were regularly implemented, advanced and originated in the field of bureaucracy.

Of course, neither the bureaucracy is exclusively restrictionist nor is the law purely expansive. To the contrary, this dissertation has noted the fundamental restrictions in refugee law and the occasional desire of the bureaucracy to expand the reach of protection. Indeed, refugee law itself offers a highly qualified notion of protection. The existing legal provisions largely reflect the interests of powerful, liberal states. Above all, refugee law has reproduced the liberal tendency to prioritize the political domain, and define rights exclusively within the relations between the individual citizen and the sovereign state. As a result, refugee law fails to recognize violations that concern other, supposedly distinct, domains; those violated by economic dispossession, generalized violence or ecological devastation remain unprotected. This has left the majority of the displaced population of the world without access to systematic protection: 40.3 million displaced persons do not even fit within the UNHCR's protection mandate[7].

Nonetheless, I suggest that in the past thirty years, the Canadian regime has *mostly* articulated its expansionist impulses in the field of law and much of its restrictionist desires in the field of bureaucracy. Through these arrangements, the Canadian regime has managed to advance contradictory agendas and sustain itself despite its internal paradoxes.

Much of this dissertation has been a testimony to the relative autonomy and independence of the bureaucracy in effectuating the laws that it supposedly "only" administers. I

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[7] UNHCR, "Figures at a Glance", accessible at https://www.unhcr.org/figures-at-a-glance.html

argue that the Canadian refugee claim bureaucracy is an impactful, calculating and relatively agentic actor in shaping the broader regime of refugee protection and regulating access to refugee rights. Despite its seemingly neutral demeanour, the bureaucracy is highly biased towards specific interests. Above all, the bureaucracy is structurally disposed to rational, controlled and efficient conduct (Weber 1978 [1922]; Ritzer 2013 [1993]). This disposition, at times, places the bureaucracy on a track different from that of the law. For instance, while refugee law is principally concerned with equal, fair and individual assessment of claims, the bureaucracy is interested in quick and cheap procedures. While the law prioritizes principles of administrative justice over convenience, the bureaucracy pursues control and feasibility. While refugee law establishes the universal right to seek asylum, the bureaucracy is hard at work controlling and restricting the actual number of claimants who may file refugee claims. The law and bureaucracy are organized and motivated by different logics and objectives; they are fields (Bourdieu 1993) that operate in relative autonomy from one another.

Of course, the law is a powerful actor; yet, the bureaucracy is not without its own distinct devices. When the bureaucracy sees fit and is able, it actively manipulates, disregards or violates the law to pursue its own interests. For example, in repeatedly promoting group-based processing of refugee claims, the Canadian refugee claim processing bureaucracy has quietly undermined legal standards of individual and merit-based claim assessment. In its collaborations with political forces to curb the flow of incoming cases, the bureaucracy has violated principles of political independence and impartiality. In sum, the bureaucracy is an active and influential player that works with and, at times, against the law. Thus, the IRB's pronounced mandate of "making well-reasoned decisions on immigration and refugee matters, efficiently, fairly and *in accordance with the law*" (IRB 2019, emphasis mine) should be taken with a grain of salt.

Of course, the bureaucratic agenda is not always and necessarily in opposition to that of the law. Nor are bureaucracies' unhampered agents who may autonomously advance their interests without regard for other powerful fields and forces. As an actor encapsulated by a tight network of laws and politics, the bureaucracy only has limited, circumstantial and relative autonomy in advancing its own interests. In fact, and as I showed throughout this dissertation, in numerous instances the Canadian refugee claim processing bureaucracy willingly cooperates with the objectives of the law or is otherwise forced to comply with legal requirements. For instance, the development of Gender Guidelines, discussed in Chapter 2, was in part the result of the bureaucracy's willful cooperation with emerging feminist jurisprudence. In contrast, the imposition of unrealistically short processing timelines by the Protecting Canada's Immigration System Act (2012), discussed in Chapter 3, offered a moment of disgruntled compliance by the bureaucracy.

Moreover, when legal and bureaucratic agendas clash, the outcome is only determined by the circumstantial alignment of other forces. For instance, if a strong advocacy community supports the law, bureaucratic practices can be challenged and even overturned. The successful repeal of the Lead Case, discussed in Chapter 2, is a case in point. Conversely, if political forces are well aligned with the objectives of the bureaucracy, the battle may turn in favour of the bureaucracy. For instance, the Designated Countries of Origins policy, discussed in Chapter 3, was an outcome of such alignment: with the support of political forces, the bureaucracy operationalized legally questionable and unequal procedures. In short, the law and bureaucracy compete in a real-time and strategic game of alliance; they lose, win, and continue playing. Thus, rather than proposing an inflexible dichotomy between the law and the bureaucracy, I suggest

that the complex and dynamic attachments between the two constitute an articulation: a durable and complex formation that persists despite internal contradictions and inconsistencies.

This dissertation provided a detailed and relatively compassionate account of the restrictive force of the refugee claim processing bureaucracy in Canada. Although the bureaucracy is a serious repeat offender of restrictionism, its penchant for restricting access to refugee rights is not a simple matter of ill will. As Akhil Gupta (2012) has argued in relation to the postcolonial state's failure to eradicate mass poverty in India, the goal of establishing equality is somewhat incongruent with the bureaucratic structure. The structural design and circumstantial needs of the bureaucracy necessitate imposing weighty restrictions on access to rights. A substantial portion of this dissertation was devoted to enumerating the serious pressures that constrained and overwhelmed the Canadian refugee claim processing bureaucracy over the course of its existence. As I showed, unexpectedly large workloads, insufficient funds and human resources, and political threat and interdepartmental sabotage placed the bureaucracy in a continuously tenuous position. Institutional survival was never guaranteed, but achieved through pragmatism, strategizing and proactive plans.

The bureaucratic work of refugee protection in Canada has been further troubled by the growing weight of neoliberal logics over the past thirty years. Even the moral work of humanitarianism has not managed to escape the austere forces of economic calculations. As a result, over the course of the past three decades, the Canadian claim processing bureaucracy has become increasingly strained. Hence, the bureaucracy has had no choice but to prioritize efficiency over justice. Efficient claim processing, in turn, has required advancing restrictionism and administrative control. Economically viable refugee protection was necessarily a work of deterrence and exclusion. The strained, neoliberalized bureaucracy was ill-fitted to the moral and

humanitarian task of refugee protection; hence, refugee protection was carried out with remarkable failure.

Ever since refugee rights became codified in Canadian law in 1976, the Canadian regime has persisted in administering refugee protection through systematic and strategic exclusion. As I showed, scapegoating claimants based on their nationality has become a routine and adaptable method of controlling workloads, inflow of cases and rates of acceptance. I traced the various national groups that became subjects of exclusion over the thirty-year lifespan of the contemporary regime of refugee protection in Canada. I showed that every era of refugee protection produced its specific targets: claimants from poor Caribbean countries, particularly Jamaica and Trinidad, were the first targets for the young bureaucracy. Eastern Europeans soon became new topics for administrative strategizing. Chileans and the Roma featured in the exclusionary projects of the 1990s. Mexicans were the main scapegoats in the late 2000s. Importantly, the fall of all these groups to the rank of excludable was linked with administrative needs of the bureaucracy and political sensibilities of the time: only groups whose numbers disturbed the timely processing of claims and whose exclusion was politically unproblematic, became foci of restrictionist procedures. These scapegoats were strategic administrative and political productions.

My analysis ended in the later part of the 2010s. Yet, strategic exclusion remains a key component of refugee protection in Canada. As I write these pages, new configurations of excludable claimants are emerging into public and administrative discourses of refugee protection. Irregular Haitian claimants, for instance, are among the newest groups of excludables. As in the case of previous scapegoats, the circumstances of Haitians fleeing to Canada is troubling from a humanitarian perspective and troublesome from an administrative one.

The administrative panic with the irregular arrival of Haitians is somewhat understandable. Since Donald Trump was elected, more than 30,000 people have "irregularly" crossed into Canada to seek protection (Zilio 2018b). In comparison, in 2016 only 2,000 asylum seekers crossed into Canada without going through an official port of entry (Samuel 2018). "Irregular" crossings have significant legal implications: given that the Safe Third Country Agreement between Canada and the US only applies to entries at official ports of entry, irregular crossings make it possible for asylum seekers to enter refugee claim proceedings in Canada without being turned back to the US.

The irregular border crossers include large numbers of Haitians who had been living under temporary protected status in the US since the 2010 earthquake in Haiti. When the Trump administration threatened the temporary status of Haitians in May 2017 (Campbell 2017) thousands began to head north to Canada in hopes of evading deportation or undocumented life (Zilio 2018b).

The dramatic increase in the number of irregular arrivals has been highly cumbersome for the Canadian refugee protection regime. The IRB is struggling with the large inflow of irregular claims. Between February and October 2017, 6,304 Haitian refugee claims were referred to the IRB, yet only 298 cases were concluded (Campbell 2017). By June 2018, the IRB had managed to process only 15% of the irregular arrivals (Zilio 2018b). Processing times have risen beyond control, reaching 20 months (Zilio 2018b). The bloating backlogs are making the IRB's work a vain effort; if the growth of backlogs is not controlled, IRB officials have predicted, by 2021 new claims could face a wait time of 11 years (Campbell 2017).

The strained bureaucracy is once again at the work of rejection. Acceptance rates at the Quebec regional office, where the bulk if irregular claims are processed, dropped considerably

lower than other offices (Zilio 2018b). In general, a smaller portion of irregular border crossers are now accepted as refugees: in 2017, 53% of irregular border crossers received refugee status. In the first three months of 2018, their acceptance rates dropped to 40% (Samuel 2018). Haitians are doing particularly poorly: while 84% of Syrian and 34% Nigerian irregular claims made between Feb 2017 and March 2018 were granted, only 9% of the Haitians have secured refugee status in Canada (Samuel 2018).

Moreover, rejected Haitian claimants have been targets of concerted deportation efforts (Zilio 2018b). Despite the fact that Canada closed its embassy in Haiti and began to advise Canadians against travel to this country, many Haitian refugee claimants, including children, have been sent back to unsafe and unstable conditions[8] (CBC 2019). Furthermore, new provisions have been introduced by the Liberal government to curb the access of irregular border crossers to refugee rights in Canada (see Wright 2019). In short, many claimants who are in serious need of safety continue to be turned away from Canada. Exclusion remains a systematic and strategic part of how Canada administers refugee protection.

My account of the numerous contradictions in the Canadian refugee protection regime suggests that the failure to protect refugees is an inevitable consequence of administering the moral work of humanitarianism through the administrative devices of the bureaucracy. Of course, this failure is not exclusive to Canada. The Canadian refugee protection regime is perhaps one of the better models of state-controlled refugee protection in the world. Not only do claimants often have higher rates of acceptance in Canada compared to other Euro-American

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[8] Deportations have recently stopped as a result of increasingly unsafe conditions and growing mobilization for deportation relief (Oslon 2018; CBC 2019)

countries[9], Canadian refugee policy has been historically much less politicized than those of

countries such as the US[10]. Canada's specialized, politically independent and non-adversarial

regime of refugee protection is unique, and arguably more conducive to the impartial protection

of refugee (Hamlin 2014). Most other post-industrial, English-speaking countries process refugee

claims directly through their Immigration Departments or sub-departments. As a result, their

refugee status determination systems are not structurally independent from political authority.

For instance, in the US, refugee claimants are interviewed by asylum officers at Citizenship and

Immigration Services[11], while in Australia, the Department of Immigration and Border

Protection is tasked with initial assessment of claims[12]. In the UK, the Home Office remains

responsible for administering asylum cases. Initial assessments by the Home Office appear to be

poorly made and are appealed at high rates (Refugee Council n.d.). Further, appeal proceedings

in the Australian system have come under great scrutiny after disturbing evidence of impetuous

decision-making[13]. Across the liberal world, refugee protection regimes fail to protect refugees.

In this dissertation, I used Stuart Hall's (1980, 1985) concept of articulation to suggest

that contradiction and failure are structural and functional to in-land refugee protection in

Canada. The articulated regime of refugee protection is not accidentally paradoxical; rather, it is

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[9] For instance, as Susan Kneebone (2009) reports, in 2002, Canada accepted 55%, of the refugee claims it processed, a rate considerably higher than those of the US and the UK (approximately 30%), Australia, Belgium and Sweden (20-25%) and Greece (2%.)

[10] For several decades, American law defined refugees clearly in relation to ideological and political interests of the US: refugee were defined as people who fled "from a Communist-dominated country or area, or from any country within the general area of the middle East." It was not until 1980 that the US began to adopt a more neutral definition in line with the international law. Yet, as Michael Tietelbaum (1984) noted, refugee admissions in the US continued to reflect political interests even after 1980.

[11] For more information on the asylum process in the US see https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process

[12] For more information on the Australian system, see https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/asylum-seekers-and-refugees-guide#process

[13] In 2017, the appeal case of an Afghan Hazara asylum seeker in the Federal Court reveled that parts of the negative decision issued by the Refugee Review Tribunal was cut-and-pasted from other refugee applications. For more on this case see Robinson (2017).

fundamentally made up of conflictual forces, logics, discourses and operations. Hence, failure is not a "mistake", but part of how the regime is meant to (partially not) work. The failure to protect has perhaps helped sustain the Canadian regime by creating the conditions for its futurity; the unfulfilled promise of protection has necessitated further promising, and the cycle of promising and failing has upheld the Canadian regime of refugee protection.

This dissertation was dedicated to uncovering the systematic failure of state-controlled bureaucratic refugee regime in protecting refugees. Yet, this analysis also inadvertently points to the many failures of bureaucratic refugee protection as a state project. State-controlled refugee protection, as it appears, is not much more apt at controlling migratory movements than it is at protecting refugees. Controlling migration through the refugee protection regime has proven to be extremely cumbersome and inconvenient for state officials.

Ever since Canada signed the 1951 Convention in 1969, refugee protection became a "problem" that no level of creativity, dedication or consultative work has been able to fix. When the refugee category was legislated in the Immigration Act of 1976, the practical implication of protection became a far more complex matter. Canadian political scientist Gerald Dirks (1995) has noted that no other aspect of the Immigration Act of 1976 produced as much headache, embarrassment and ordeal for Canadian state officials than in-land refugee status determination. My account of the Canadian regime of refugee protection corroborates the colossal trouble of in-land refugee protection: administering a regime of refugee protection that upholds constitutional rights to due process and administrative justice, and yet remains compatible with other state operations and economic and foreign interests, has been an unrelenting source of trouble.

The struggles and tribulations of the Canadian regime of refugee protection is perhaps not surprising. After all, the Canadian regime is only a makeshift solution to the weighty problem of

global inequality, and the displacement and dispossession that it causes. Inevitably, refugee protection has been the ongoing work of supplying temporary and surface-level solutions to systematic problems. As a result, the rather minuscule mandate of in-land refugee protection has required disproportionately large amounts of attention, labour and resources. Refugee protection has truly been a frustrating and frustrated state project.

Of course, Canada's in-land refugee protection regime protects some refugees and benefits the Canadian state in some respects. For instance, the Canadian refugee protection regime has helped promote an image of liberal humanitarianism for Canada and provided some regulatory control over migration flows. Yet, the Canadian regime has contributed to both functions of humanitarianism and migration control without excelling at either.

The systematic failure of the Canadian regime to be adequately humanitarian or fully amenable to the state's control over migration has perhaps been key to negotiating the paradoxical demands of refugee protection. As I showed in Chapter 2, for instance, a strong dedication to humanitarianism in the early 1990s caused political outrage. Conversely, facilitating migration control through highly effective strategies, such as the Lead Case, led to public outcry and judicial reproach. Keeping the paradoxical demands of refugee protection in relative equilibrium has called for achieving exacting levels of mediocrity on all fronts. The Canadian regime has managed to stay afloat by holding all the stakeholders in a constant state of tolerable dissatisfaction: the Canadian regime has done just enough refugee protection to maintain a tenuous claim to humanitarianism, enough abidance to the law to be considered lawful, enough cost-cutting to be barely economically viable, and enough migration control to be a part of the Canadian regime of migration control. By conducting all these paradoxical tasks with minimum competence, the Canadian regime has survived thirty years of constant trouble.

The biggest achievement of the Canadian regime of refugee protection may well be its continued existence as a highly paradoxical project. Of course, the systematic failure and mediocrity of the Canadian regime has interesting and important implications for who becomes the subject of protection. I conclude this dissertation with a series of anecdotes from my fieldwork that perhaps best convey the irony of "protection" in the Canadian regime.

In the early months of my fieldwork in the summer of 2016, I attempted to interview a number of IRB officials. Through public events and information sessions, I met and made connections with three IRB employees. Upon meeting each employee, I introduced myself and explained the purpose of my research. They all received me with great politeness; while some seemed more forthcoming and interested than others, none of them refused to give me their work email addresses.

I then emailed these employees to invite them for an interview. In all emails, I explained the academic nature of my research, and the ethical standards of anonymity and confidentiality. One employee responded relatively quickly, and in a highly formalized tone informed me that he did not have the authority to speak on behalf of the IRB. He then forwarded my email to his supervisor. His supervisor indicated some openness to speaking with me and asked for my phone number. I provided my phone number, explained that my research process required a signed consent form and asked to meet in person. The supervisor did not respond.

A second IRB employee expressed unexpected openness to my research when we first met. He even offered help before I asked. After a very friendly chat, he volunteered his work email, and told me that I should feel free to email him my questions. He indicated that he might decide to answer my questions on the phone; communicating on the phone rather than in writing, it seemed, gave him fewer reservations about speaking freely. I agreed and followed up with an

email. He responded with warmth, but appeared considerably more hesitant about speaking to me. He asked me to further clarify my areas of interest and suggested that I may be better served by the IRB's official Communications department in Ottawa. In a later email, he told me that he would consult his manager about my request and that he did not have the authority to speak on behalf of the Board. He again suggested that I direct my inquiries to the IRB's Communications team. In response to my subsequent inquiries, he replied that he would get back to me shortly. My follow-up emails remained unanswered. I suspected that the supervisor had not agreed to our interview. Soon, the senior Communication officer from Ottawa contacted me to see how she could answer my questions. She then assigned another officer to the task. As expected, the responses I received from the Communications department were general and mostly unhelpful (see Appendix A).

The third IRB employee did not appear to have any reservations about speaking with me at our initial meeting and responded with openness to my email invitation. But once I attempted to plan a meeting, he stopped responding to my email. I later ran into him at an information session. He told me that he had indeed received my email and had decided to ask for permission from his supervisor before speaking with me. The supervisor, apparently, had not yet responded to his request. The employee, who clearly felt uncomfortable about not having responded to my email, suggested that he might be able to appease his supervisor by submitting his answers to her before releasing them to me. From our conversation I gathered that the employee and his supervisor had been discussing my request, and remained undecided about how to proceed. His careful probes about my research revealed untold anxiety about the potential risks that my inquiries posed. I found myself emphasizing again that I was not a journalist, that I was not in search of scandalous details about the Board, or in any way intended to violate the ethical

requirements of academic research. Despite my best efforts, I was unsure that I had convinced the employee of my intentions.

Eventually this employee's supervisor contacted me and asked that I send my questions in advance of an interview. I did so and again reassured her that I was not intending to scandalize any employee or the Board. We eventually decided to have a phone interview a few days later. She agreed to sign the consent from but did not agree to be audio-recorded. On the day of the scheduled phone interview, the supervisor emailed to ask if she may relay the information in text, rather than on the phone. Sensing her great reservation about speaking to me and having no other options, I agreed. She emailed me her written responses. Her answers were astonishing. They were either literally copied-and-pasted from the IRB's website or were thoroughly formalistic and empty (see Appendix B). For example, to my inquiry about the training process for new Members, the supervisor responded that: "IRB members are highly qualified and well-trained." She answered four questions on the outcome of adjudications by stating that: "each [case] is decided by an independent decision maker on its own merits. Each case is unique." Upon receiving these responses, I finally realized that I had been completely misguided in assuming that I could gain any meaningful access to the world of IRB bureaucrats[14].

Over the course of five months of communication with IRB personnel, I was told numerous times that a manager will be consulted, that employees did not have the authority to speak on behalf of the IRB, that I should contact Communications officers, and that my inquiries would be returned "shortly". The IRB bureaucrats were well-versed in the art of avoiding talk without indicating outright refusals. Lower level bureaucrats quickly referred my inquiries to their supervisors or the formal Communications team, diverting any unwanted responsibility and

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[14] For more on the evasive nature of state departments see Abrams (1988).

signifying institutional loyalty to their superiors. Supervisors controlled their employees'

behaviour behind closed doors and responded with formalistic statements. My requests for

interviews were repeatedly evaded while I was continuously assured of the IRB's commitment to

reasonable transparency. No real information ever crossed the lips of bureaucrats. The silence on

the surface masked a host of internal conversations about my request. Lower and higher levels

bureaucrats, and possibly actors I never met, discussed my requests and strategized a course of

action for minimizing the "risk" that I posed. In the world of bureaucrats who handled literal

matters of life and death for refugees on a daily basis, the meanings of "risk", "harm" and

"protection" were reformulated in astonishingly self-serving and self-centric ways. The Canadian

regime of refugee protection seemed most capable of, and most dedicated to, simply protecting

itself.

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1-   How are RDP Members hired? How are RAD Members hired?

The information regarding the hiring process for Governor in Council Appointed Members for the RAD can be found on the IRB external website. http://www.irb-cisr.gc.ca/Eng/NewsNouv/NewNou/Pages/CampRecrut072016.aspx

RPD members public servants and are hired through the same competitive hiring process as all public servants.

2-   In what ways are the RAD and RPD Members independent of one another?

On the IRB website, see the Chairperson's Instructions Governing Communications Between Related Divisions at the Immigration and Refugee Board of Canada (the Instructions): http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/instructions/Pages/InstructDivisions.aspx.

The purpose of the Instructions is set out in s. 1.1 as follows:

They reaffirm the fundamental principles of institutional independence, whereby members are free from improper influence. The Instructions also set out a framework for the level of separation expected between first-level and appeal-level Divisions of the IRB; that is, between the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD); and between the Immigration Division (ID) and the Immigration Appeal Division (IAD).

3-   What are the most common grounds based on which claims are denied? What are the most common grounds based on which claims are approved?

For the RPD, see the attached document Top 10 RPD.

When the RAD finds that there is an error fact, error of law or mixed fact and law in the RPD decision, the appeal is allowed.

4-   What are the most common grounds based on which appeals are allowed? What are the most common grounds based on which appeals are dismissed?

When the RAD finds that there are no errors in the decision of the RPD, the appeal is dismissed.

5- How are RAD and RPD Members trained? What materials do these trainings cover? How long are the trainings? Who provides the training? Do RAD and RPD Members go through different trainings? If yes, in what ways are these trainings different?

RAD members are trained by the Legal Services of the IRB over a period of close to one month on legal principles and jurisprudence as it concerns the RPD and the RAD. Six months or so after the initial training, there is a Continued Education programme of approximately one week where the knowledge is consolidated. There are monthly Professional Development Sessions thereafter. Members attend various legal conferences during the course of their appointment.

RPD members undergo an initial training program of several weeks. This program covers all aspects of in-Canada refugee status determination, including the refugee definition and associated jurisprudence. It also covers procedural issues, including the principles of natural justice. Finally, the program also covers practice based aspects, such as presiding over a hearing and drafting reasons. Various materials are used, including PowerPoint presentations, practice exercises, and mock files. IRB Legal Services provides the training on the legal elements, while the Division leads the training on practice elements.

The initial program finishes with new members sitting on three-member panels with experienced members for the purpose of enhancing their hearing presiding skills. This aspect of the training program is set out in the RPD's policy on the Designation of three-member panels - Refugee Protection Division available on the IRB's website: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolRpdSpr3MemCom.aspx

RPD members receive ongoing professional development. One aspect is regular jurisprudence updates on important Court decisions, provided by IRB Legal Services. In addition, professional development sessions on specific topics are routinely organized by the Division.

6- How are training priorities for Members decided? Who is responsible for deciding these? How do they make these decisions?

The materials are prepared by the IRB Legal Services. They are very extensive. They cover the following:
The Legal Framework: Law, Regulations, Rules
Conduct and Ethics
Grounds of Protection : Section 96
Grounds of Protection: Section97
Exclusion Clauses Sections E and F of Article 1 of the Convention
Natural Justice
Chairperson's Guidelines
RPD grounds for decisions
3 days of reading RPD decisions and attending RPD hearings
RAD's Legal Framework
Study of a simulated RAD file

Scope of RAD appeal
RAD rules
Charter of Rights issues
Assessing evidence and credibility
Weighing evidence
Specialized knowledge
New Evidence at the RAD
Hearing at the RAD
Recourses at the RAD
Official Languages and language of the appeal
3 days Writing reasons
2 days shadowing a RAD member

7- How long are training sessions?

The RAD training is 20 days. In the middle, between the RPD and the RAD training, there is a pause of 3 to 5 days to do reading. Approximately 6 months after their initial training, RAD members attend a one-week Continued Education Programme. Thereafter, there is a Professional Development day each month. In addition, members meet nationally (2 or 3 days) at least once a year to discuss broad RAD legal issues.

For the RPD, the initial new member training lasts several weeks. Ongoing professional development sessions are typically scheduled for half a day, but vary depending on the topic.

8- Do RAD and RPD members go through different trainings? If yes, in what ways are the trainings different?

RPD and RAD members are not trained together, in order to maintain the institutional independence of the two Divisions.

9- How are training priorities for members decided? Who is responsible for deciding these? How do they make these decisions?

Training priorities for the RAD, at PD days for example, are decided jointly by the Deputy Chairperson of the RAD in consultation with the PD committee and the Legal Services (for example, a decision of a higher court may require immediate training to make sure RAD members apply the higher court decision).

RPD Professional development priorities are determined by the RPD Divisional management. Typically, management consults RPD members and IRB Legal Services in determining professional development priorities.

10 -   How does the IRB deal with inconsistent adjudications?

There are a number of different tools that are available to the IRB to promote consistency, coherence and fairness in the treatment of cases at the Board.

On the IRB website, there are several IRB policies which discuss adjudication strategy:

·   section 1.2 of the Policy on the Use of Jurisprudential Guides: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolJurisGuide.aspx;
·   section 1.2 of the Policy on the Use of Chairperson's Guidelines: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolGuideDir.aspx; and
·   section 1.1 of the Policy on Higher Court Interventions: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolIntervention.aspx.

Note that the Refugee Appeal Division (RAD) is not referred to in these policies as it was launched on December 15, 2012, after these policies were issued.

With respect to the use of three-member panels as an adjudication strategy tool, see the following policy instrument on the IRB website: Designation of Three-Member Panels – Refugee Appeal Division: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolRadSar3MemCom.aspx. A decision of a three-member RAD panel is binding on the Refugee Protection Division (RPD) and on a single-member panel of the RAD. The criteria for designation are set out in section 3.1, which include: "The appeal raises an issue in an area in which there is significant divergence or inconsistency in decision-making at either the RAD or the RPD".

Also, a principal way that the RPD promotes consistency is by having standard disclosure packages. See the following policy on the IRB website: Policy on Country-of-Origin Information Packages in Refugee Protection Claims: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolOrigin.aspx.

11-   Has creation of the RAD impacted the work of RPD in any significant way?

A decision of a RAD three-member panel is binding on the RPD and on a single-member panel of the RAD. Therefore, any decision issued by a RAD three-member panel would have a significant impact on the work of the RPD. Although there have not been any decisions issued by a RAD three-member panel to date, there is currently a pending appeal that is being conducted by a RAD three-member panel. See the following notice on the IRB website: http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/notice3mempan.aspx.

12-   Is the IRB concerned with (some) lawyer practices, for example whether they heavily coach their clients/the claimants?

Unless the counsel conduct amounts to a possible breach of professional or ethical obligations, the IRB does not have a position on counsel practices. With respect to IRB procedures for dealing with possible breaches of professional or ethical obligations, see the following policy on the IRB website: Policy on Disclosing Information Regarding the Conduct of Authorized Representatives to Regulatory Bodies (http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolCondRep.aspx).

13-   How are interpreters hired? Are they trained? Do the same interpreters work across RAD and RPD?

Please see the attached information sheet on interpreters.

Written Interview with an IRB Manager[1]

About Your Job:

1-   What does your job at the IRB [unit] entail?

[…] I manage [the unit's] intake, resources and outreach for [the region]. […].
My primary duties are to manage the [the unit's] decision-makers, as well as [the unit's]
analysts, and to report to the [unit's] Deputy Chairperson in IRB headquarters.

2-   How long have you been working at the IRB?

I became a [unit's] member in [late 1990s] and have been [a manager at this unit] since [early
2010s].

About the [unit]

3-   Why was the [unit] created?
[…]

4-   What do you see as the main goal, aim or mission of the [unit]?

[…]. The [unit] renders quality decisions and resolves cases in a timely manner.

5-   […]

6-   Is there a noticeable difference in the [outcome of claims processed by the unit]?

These statistics are not available.

7-   Why are some groups, such as [group], excluded from [your unit]?

I cannot provide any comment as this specific question relates to a policy decision. Such
questions however can be addressed to the department of Immigration, Refugees and
Citizenship.

8-   In what ways does [your unit] improve the Canadian refugee system?

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[1] Portions of this text has been removed and other parts have been anonymized to protect the interviewee's identity.

I cannot provide any comment on this specific question.

9-   Do think that [your unit] benefits refugee claimants? In what ways?

Although I cannot give an opinion on whether [this unit] benefits refugee claimants, I will say that the [unit] provides an opportunity for [fair and expeditious decisions].

About the Relationship between [the unit] and [other unit]

10-   In what ways is [this unit] separate and independent from the [other unit]?

I refer you to the [Instructions Governing Communications Between Related Divisions at the Immigration and Refugee Board of Canada](#) which is available on the IRB's website. These Instructions reaffirm the fundamental principles of institutional independence, whereby members are free from improper influence. The Instructions also set out a framework for the level of separation expected between first-level and appeal-level Divisions of the IRB […].

11-   What is the working relationship between [this unit] and [other unit]?

See answer above.

12-   Has creation of [your unit] impacted the work of [the other unit] in any significant way?

I decline to comment on behalf of the [other unit].

About the [unit's] Members

13-   In what ways are the [unit's] Members independent from the [other unit's] Members?
14-   How are the [unit's] Members chosen? Do Members themselves decide which [unit] they would like to work in?
15-   How are the [unit's] Members trained? Do they receive the same training as [other unit's] Members?

My answer to question 13 – 15 is that IRB members are highly qualified and well-trained. They go through a rigorous selection process.

About Outcomes of the [unit's] Decisions

16-   What are the general rates of successful [cases at this unit]?
17-   What are the most common grounds on which [claims are accepted]?

18-   What are the most common grounds on which [claims are denied]?
19-   How likely is it for [this unit] to grant refugee status [without involving other units]?

My answer to questions 16– 21 is that each [case] is decided by an independent decision maker on its own merits. Each case is unique.

20-   Are some [unit's] Members more/less likely than others to [accepted or reject cases]?

Statistics on acceptance rates provide an insufficient basis on which to draw conclusions concerning the quality and consistency of decision-making at the IRB.

21-   How does the [unit] deal with such individual differences between Members?

[no response provided]

About Interpretation

22-   Do the [various units] use the same interpreters […]?
23-   Are interpretation problems a common or relatively common reason for wrongfully denied [claims]?
24-   What are the most common interpretation mistakes/problems that lead to negative […] decisions (if any)?
25-   How does [the unit] deal with interpretation problems in […] decisions?
26-   How does the [unit]/IRB ensure that interpreters are translating accurately?

Members are reminded of the importance of ensuring that interpreters understand the requirement to provide consecutive interpretation, meaning that everything said in one language should be interpreted faithfully and accurately into the other language using the exact equivalent meaning and structure.

Should communication issues arise during a hearing (either due to lack of an interpreter or issues with the interpretation), members have the discretion to adjourn the hearing so that appropriate measures can be taken.
Just as a side note, interpretation refers to oral communication while translating refers to written communication

Conclusion
27-   Do you have any concluding remarks?

Thank you for your interest in the [unit].