

**JUSTICE AMONG INSTITUTIONS: THE IRB AS A COMPONENT OF
CANADIAN REFUGEE STATUS DETERMINATION**

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Abstract

This paper takes an institutional approach to examine justice in Canadian refugee status determination, focusing on the Immigration and Refugee Board (IRB) as an administrative tribunal. The IRB is viewed in the historic context of post-Second World War international rights expansion and the rise of New Public Management as an administrative paradigm.

Policies implemented by the recent Harper governments are reviewed in light of the IRB's high permeability to executive influence and low judicial intervention; issues undermining the IRB's substantive independence are discussed; the interaction of the IRB with other institutions in Canadian refugee status determination, such as the IRCC and CBSA, are examined in terms of venue shopping for implementing desired policy. The possibility of integrating adversarial-style hearings into the IRB while maintaining its currently centralized research and jurisprudence is proposed.

Keywords: separation of powers, refugee status determination, Immigration and Refugee Board of Canada, administrative tribunal, rights expansion, managerialization, New Public Management, endogeneity of law, executive permeability, judicial intervention, venue shopping, inquisitorial hearing, adversarial hearing.

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Introduction

Timeliness and significance

The Liberal government elected in October 2015 has pledged to review Canada's immigration and refugee policies to be more in line with its humanitarian commitment and with international human right norms (Atak, Hudson, & Nakache, 2017). It is therefore timely to examine the functioning of the Immigration and Refugee Board of Canada (IRB) as a component of the Canadian refugee status determination system with respect to such commitments.

Research gap, research problem, and purpose

Recent literature on Canadian refugee status determination (RSD) tends to focus on criticizing the sweeping changes introduced under the Harper governments and its detriment to refugee claimants, while insufficient attention is paid to the structural and institutional characteristics of Canadian RSD that allow such sweeping changes to be implemented. Taking cue from Hamlin's (2012) observation that, in addition to international norms, the RSD process of each state is shaped by "the institutional identity created by the constitutional and administrative framework of each country, or according to their place in a larger interbranch conflict," this essay considers the structural strengths and weaknesses of Canadian RSD – specifically the dynamics among the IRB, the courts, and executive bodies (IRCC, CBSA) – in the context of its institutional history after the Second World War. As noted above, debates on how states should respond to refugees tend to be structured in the dichotomy between cosmopolitans arguing that "states should not accord primacy to the rights of

citizens over non-citizens” (Gill 2010 citing Singer 1993) versus particularists arguing that “the state’s very function is to further the interests of citizens, even at the expense of non-citizens if necessary” (Gill 2010, citing Hendrickson 1992). By taking an institutional, systemic approach (Hamlin 2012), this essay hopes to identify “influences on decision makers beyond international norms or migration politics” (Hamlin 2012), and discuss the potentials and limitations of justice in Canadian RSD. Also central throughout the essay is the idea that laws do not simply inform organizations from the outside, but are shaped by the structures and practices of organizations responsible for implementing them (Sonneck 2013, citing Edelman 2004). In other words, when notions of justice interact with stakeholder interests and with organizational goals such as efficiency, “lived law,” or “law in action” as realized through organizations produce unintended and unforeseen effects beyond the written law. Edelman (Sonneck 2013) calls this phenomenon the “endogeneity of the law.”

Thesis

This essay argues that the flexibility of Canadian RSD results from side-stepping the courts and setting up the IRB as an administrative tribunal, a framework that has historical roots in the scaling up of ministerial discretion, with the features of high permeability to executive influence and low judicial intervention.

This flexibility, which is accumulated during decades of Liberal rule when Canadian courts and the IRB are mutually sympathetic to Canada’s role as a leader in offering humanitarian refugee protection, enabled Canada to respond to expanding international human right and due process norms following the

Second World War. Through this tradition, the IRB proactively implemented protocols and built its own jurisprudence in RSD matters. Meanwhile, this very flexibility on the other hand makes Canadian RSD equally susceptible to drastic changes in migration policy, allowing the Conservative government under Stephen Harper to introduce sweeping reforms in 2012, for example the list of Designated Countries of Origin (DCO) determined solely by ministerial discretion.

At the same time, exclusionary forces in Canadian migration politics did not emerge out of nowhere. Before changes under the Harper governments highlighted the vulnerability of Canadian RSD to executive influence, the supposed independence of IRB has long masked the partisan patronage and split allegiance among decision-makers, which was exacerbated by unpredictable tenures of appointment (Crépeau & Nakache, 2008).

Discussion roadmap

A roadmap of discussion to flesh out the thesis is as follows: the components of Canadian RSD are outlined; the IRB as an administrative tribunal is described in historic context as a response to post-Second World War expansion of international human right norms, with emphasis on its characteristics of high executive permeability and low judicial intervention; policies implemented by the recent Harper governments are examined in light of the IRB's executive permeability; issues undermining the IRB's substantive independence are discussed; the IRB is viewed in greater perspective as a component among other institutions in the Canadian RSD system; and finally an alternative style of hearings at the IRB is proposed.

Research limitations

The two major limitations of this essay are: first, it is a secondary study with no first-hand interview or data; and second, by focusing on government institutions this essay necessarily reifies the state.

Canadian refugee status determination

Refugee status determination (RSD) is “the process of identifying people who are in need of protection from persecution” (Hamlin 2012) and is “one of the most complex adjudication functions conducted in industrialized societies” (Rousseau, Crépeau, Foxen & Houle, 2002). It is often a lengthy process due to the need to conduct multiple information checks fragmented globally, and to go through processes designed to safeguard procedural justice, and is further complicated by the power struggles among decisions makers who subscribe to conflicting paradigms.

RSD is often controversial because in addition to humanitarian concerns, it sits on the “faultline” between the economic demand for cheap labour and the political demand for border control (Soennecken 2013). Paradigms for RSD range from extending asylum to those in greatest need, to those most proximate geographically or culturally, to imposing arbitrary lottery caps (Gill 2010). Canada adopts a mix of these approaches.

Source and components of Canadian RSD

Canadian RSD is anchored in the 1951 *United Nations Convention Relating to the Status of Refugees*, the core tenets of which have been incorporated into Canadian law, in the current incarnation through the 2002 *Immigration and Refugee Protection Act*. The *Convention* promised asylum to

persons “with a well-founded fear of persecution for reasons of race, religion or nationality or membership in a particular social group or of a particular political opinion,” and operates under the guiding principle of *non refoulement*, i.e. not returning a claimant to potential persecution (Creal 2009). Canadian RSD is also supposed to reflect human rights obligations such as the *Canadian Charter of Rights and Freedoms* (Bates, Bond, & Wiseman, 2016).

The components of Canadian RSD can perhaps be best described from the perspective of an asylum claimant. Arriving at a port of entry, one could make an asylum claim to a Canada Border Services Agency (CBSA) officer, who answers to the Minister of Public Safety and Emergency Preparedness. From within Canada, one would make a claim to an immigration officer, who works for Immigration, Refugees and Citizenship Canada (IRCC, formerly CIC). The Refugee Protection Division (RPD) of IRB is responsible for hearing refugee protection (i.e. asylum) claims. More generally, the *Immigration and Refugee Protection Act* (IRPA, came into force 2002) provides the IRB with “sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction” (Bonisteel 2010). Under current legislation, a single adjudicator presides over each hearing, assisted by a refugee protection officer (RPO). The adjudicator “reviews files to identify issues, conducts research, holds interviews, presents evidence, calls and questions witnesses... and generally ensures a full and proper examination of a claim.” Claimants may appeal to the Refugee Appeals Division (RAD) on “a question of law, fact, or mixed law and fact.” The Minister of Public Safety and Emergency Preparedness may intervene during this process to oppose the claim (Heckman 2008).

Those applicants deemed inadmissible for a hearing with the IRB or whose claims are rejected by the IRB are subject to removal from Canada following the completion of the Pre-Removal Risk Assessment (PRRA), or the applicant may seek leave and apply for judicial review by the Federal Court, or apply to be considered for Humanitarian and Compassionate (H&C) grounds of protection. In particular, H&C applications must show that removal from Canada would subject the claimant to unusual, underserved or disproportionate hardship, or put her life in danger. H&C applications are typically adjudicated on paper, with the possibility to judicially appeal unfavourable decisions (Heckman 2008).

The general pattern described here is that administrative agencies set precedents and lay the groundwork “for the interpretation of asylum law before the courts see it in particular appeals” (Hamlin 2012). In addition to government institutions, a range of non-governmental actors are also involved in refugee outcomes, including privately contracted detention custody officers, police officers, asylum advocacy groups, charity organizations, airline and shipping employees, health and education service providers and refugee communities established the destination country, who in particular could be powerful allies for claimants and frustrate the state’s aspirations for tougher migration control (Gill 2010).

IRB as an administrative tribunal

The IRB is an administrative tribunal that conducts first-instance RSD through hearings in the inquisitorial style as opposed to the adversarial style. In the inquisitorial style, the decision-maker both researches and decides the claim, whereas in the adversarial style two disputants, mostly likely lawyers, argue their

respective cases before a judge who must decide which case is more persuasive (Hamlin 2012).

For the adjudicator, the complexity of refugee status determination requires “sufficient knowledge of the cultural, social and political environment of the country of origin, a capacity to bear the psychological weight of hearings where victims recount horror stories, and of consequent decisions which may prove fatal, and an ability to deal with legal issues” (Rousseau et al., 2002). Meanwhile an unjust decision could be the result of many factors, including: “faulty translation by an interpreter, poor legal representation, out of date information about the country [of origin], conflicting or inconsistent testimony on the part of the claimant resulting from earlier traumatic experience... or, failure of the [adjudicator] to assess the evidence fairly” (Creal 2009) – hence the importance of having recourse for claimants to appeal decisions, as will be discussed later.

The IRB is officially under the authority of the IRB Chair, who is vested by the IRPA to “supervise and direct IRB staff, assign administrative duties to members, apportion work among members, and guide members’ decision making by issuing written guidelines and identifying specific IRB decisions as jurisprudential guides” (Heckman 2008). In practice however, an alternative unofficial hierarchy and power allegiances develop within the IRB due to political differences among members (Crépeau & Nakache, 2008).

Dual forces: rights expansion and managerialization

The judicialization of Canadian RSD in the decades following the Second World War was shaped by the dual forces of human rights expansion and

managerialization. Similarly, Creal (2009) describes “two traditions,” one that seeks to “welcome the stranger, recognizing a common humanity and anticipating an enrichment of Canadian society as a result,” and the other seeing the refugee “as a threat, potentially undermining what is perceived to be an established Canadian way of life.”

Immediately following the Second World War, the Federal government was “generally disinterested in the plight of refugees” (Molloy & Madokoro 2017). Yet growing labour shortages in the resource sectors and the effort of refugee advocates pressured it to admit European refugees and reunite war-separated families. Canada’s signing of the 1951 Convention and the subsequent 1967 Protocol was motivated by the desire to play a greater part in the international community, and signified the expansion of its refugee intake as well as the codification of its refugee policies in response to recurring international crises and the growing stream of refugees escaping communist Eastern Europe (Molloy & Madokoro 2017).

As the paradigm of Canadian immigration policies shifted toward “equality and non-discrimination” in the mid-1960s, a greater role was required of the courts. Meanwhile, on a practical level the immigration ministry was “drowning in cases” awaiting discretionary decision by the minister. These ideological and practical concerns lead to the establishment of the IAB (Immigration Appeal Board), vested by the *IAB Act* of 1967 to become a court of record, with an avenue for leave to appeal to the Supreme Court of Canada on questions of law (Soennecken 2013). This development can arguably be called a scaling up of

ministerial discretion in Canadian RSD in the sense that, instead of one minister there are now multiple adjudicators deciding claims.

In 1976, the *Immigration Act* enshrined in law the hitherto informal RSD performed by the Refugee Status Advisory Committee (RASC), giving claimants legal status, rights to counsel, written transcript of proceedings, entitlement to translation services, the possibility of redetermination hearings, and access to courts. By this time the RSAC also included private citizens appointed by the minister, a precursor to the appointment of IRB members (Soennecken 2013). Moreover, Canada's refugee intake no longer consisted of *ad hoc*, piecemeal reaction to crises, but ongoing projects planned over the course of years, for example in South America, Europe, Southeast Asia and soon Africa. The need to manage these efforts is exemplified in *Immigration Act's* stipulation for the government to announce each year's intake quota in advance (Molloy & Madokoro 2017).

The next watershed moment in the judicialization of Canadian RSD was the *Singh v. Canada* case of 1985, where the Supreme Court ruled the existing system of RSD "violated the constitutional right of refugee protection claimants to security of the person because claims could be denied without an in-person hearing or the disclosure of crucial country conditions information" (Heckman 2008). The Canadian government in response tabled Bill C-55, which created the IRB as an independent agency "to hear, in person and at first instance, the claims of all eligible refugee protection claimants" (Heckman 2008). The caveat, however, seems to lie in the criteria of admissibility because in subsequent

decades “inadmissibility” would be more frequently cited as the reason to reject claims, preventing them from even getting to the IRB.

Concurrent with judicialization and due process expansions in the RSD of liberal democracies is the need for managerial streamlining, as exemplified in the NPM (New Public Management) paradigm that has been guiding Anglo-American governments since the late 1970s, “championed by Thatcher in the UK, Reagan in the US, and Mulroney in Canada” (Soennecken 2013). In the decades following the “victory of procedural justice over administrative convenience” (Soennecken 2013) found in the 1985 *Singh* decision and the 1989 creation of the IRB, measures introduced to Canadian RSD signal a definite shift towards managerial streamlining and exclusion.

In 2002, the number of adjudicators presiding over an IRB hearing was reduced from typically two to only one (Rehaag 2008), prioritizing efficiency and cost-reduction over the check on individual adjudicator bias afforded by having two adjudicators jointly hearing a case. What’s more, the creation of the Refugee Appeals Division (RAD) to conduct on-paper review of negative decisions, which was meant to remedy the reduced number of adjudicators at the first-instance hearing, was not implemented until 2010 – almost a decade later – with the *Balanced Refugee Reform Act* (BRRA or Bill C-11). Even then, the BRRA was mostly “designed to make the [RSD] process more expedient and reduce the number of applications for judicial review” (Hamlin 2012).

Further evidence of prioritizing managerial efficiency in Canadian RSD is found in the truncation of claim processing timelines due to the introduction of the *Protecting Canada's Immigration System Act* (Bill C-31) in 2012, and the

resultant creation of unresolved legacy cases carried over from the previous protocol. According to IRCC and IRB evaluation reports, Bill C-31 introduces pressure to process cases within two months of the initial claim; the administration therefore prioritizes scheduling initial RPD hearings for new cases and place secondary intake of claims – those returned to RPD by the RAD or the Federal Court – on the back burner. Claims returned from judicial review at the Federal Court, in particular, are consider “the lowest of the low” in terms of priority for rescheduling (Atak, Hudson, & Nakache, 2017). As will be discussed below, this is because the Federal Court usually affirms the IRB’s negative decisions when it accepts claims for review.

The dual forces shaping the response of Canadian RSD to tenets of international refugee law can also be understood in terms of the competing theories of “international convergence” versus “exclusionary convergence” (Hamlin 2012). Scholars of the former school point to the “the proliferation of international human rights” as having shifted the locus of power away from the state in defining the boundaries of membership, giving otherwise vulnerable people a stake for their rights claims (Hamlin 2012 citing Soysal 1994, Jacobson 1996, Sassen 1996, Guiraudon 2000, Spiro 2007); on the other hand, scholars observing “exclusionary convergence” note that since the end of the Cold War, asylum policies of industrialized states have converged on a politics of deterrence and control, focusing on reducing the cost of conducting RSD and tightening border security (Hamlin 2012).

In addition to the two forces of “convergence,” the institutional features of Canadian RSD contribute to the “domestic divergence” (Hamlin 2012) of Canadian RSD outcomes from other countries.

Low judicial intervention

One salient feature of Canadian RSD is the low level of judicial intervention and deference to IRB decision-making which operates on the premises of centralized, vertical accountability and legal informality (Hamlin 2012). Judges of the Federal Court do not grant leave from RPD determinations lightly, weeding out 85% of cases through a paper-screening process to let IRB decisions stand (Hamlin 2012); they provide no written explanations in support of approved leaves, and rejections are not subject to appeal. An application is more likely accepted if it poses “a serious question of general importance” that “transcends the interests of the immediate parties, and contemplates issues of ‘broad significance and general application’” (Heckman 2008).

In addition to the low acceptance rate, the Federal Court generally quashes the disputed decision and sends it back to the IRB or other executive bodies as a confirmed negative. The judicial reviews are also limited in scope to the interpretation of laws, not issues of facts or claimant credibility unless they are patently unreasonable or irrational (Heckman 2008). Even a successful judicial review most often results not in a new decision, but a new hearing before the IRB (Dauvergne 2012). Only about 1 percent of claims that are rejected by the IRB end up being overturned by a court (Hamlin 2012).

Moreover, judicial interventions in Canadian RSD do not necessarily expand the right of refugee claimants as it did in the 1985 *Singh* decision. The

Supreme Court of Canada approved in 2002, for instance, the IRPA provisions that can lead to the indefinite detention of noncitizens without trial, “as long as the detention is regularly reviewed by the IRB” (Dauvergne 2012).

Flexibility, executive permeability, and contingency

As a centralized, first-instance administrative tribunal with low level of judicial intervention, the IRB enjoys substantial “flexibility and freedom to proactively adopt international human right norms and develop its own procedures and create its own jurisprudence,” such as specialized policies for handling women’s rights- and SOGIE-based claims (Hamlin 2012). IRB has also used “lead” or precedential cases to meet managerial goals of more efficient processing, such as “in the late 1990s when the number of Czech Roma refugee claimants began to climb rapidly” and in the 2000s as a strategy for managing caseload from Mexico (Hamlin 2012).

The “progressive” or “effective” response of Canadian RSD to international human right norms, however, is contingent because the IRB is ultimately an administrative tribunal despite its quasi-judicial aspirations, and as such is very permeable to executive influence. Compared to the United States’ RSD regime, Canada’s RSD is much more centralized, making it more efficient, less expensive and less fraught with ‘turf wars’ among government branches (Hamlin 2012). But given the executive permeability of Canadian RSD, its centralization also makes changes introduced from the executive more drastic and sweeping. When political forces in Canada swing towards the state-protectionist pole, therefore, refugee protection is easily undermined. Following a 2002 peak in citing international law in response to the introduction of CAT (Convention Against

Torture) protection into the Canadian legislation, for example, the IRB's citation of international law in its decisions has been "much lower in more recent years" to an extent beyond what is accountable due to the adjudicators' "learning effect" of having assimilated the tenets of the relevant international law (Dauvergne 2012).

Restrictive reforms

The 2010 *Balanced Refugee Reform Act* (BRRA or Bill C-11) followed by the 2012 *Protecting Canada's Immigration System Act* (PCISA Or Bill C-31) – a bill introduced when the Conservative government became majority to eliminate the moderating effect of compromises made as a minority government (Bates, Bond, & Wiseman, 2016) – ushered in drastic changes to Canadian RSD, exposing its permeability to executive influence and the contingency of the protection it offers to refugees.

The changes introduced by these two bills include: "a new claim form, new qualifications and appointment standards for first-instance decision-makers, the creation of the Refugee Appeal Division (RAD), new rules governing recourse measures for failed claims, and bars on applications for Humanitarian and Compassionate (H&C) consideration and Pre-Removal Risk Assessments (PRRA). The new laws also provided for faster deportations, expanded definitions of terms relating to criminality, and swifter removal of permanent residence upon loss of protected status" (Bates, Bond, & Wiseman, 2016). In addition, these bills significantly tightened timelines throughout the RSD process. Claimants now have less time (15 days) to submit an asylum upon arrival to a Canadian port of entry (Atak, Hudson, & Nakache, 2017), and have less time (now a maximum of

60 days) to prepare for their IRB hearing from the time of lodging their claim. This new truncated timeline is “insufficient to obtain counsel, establish trust, gather, translate, and submit evidence and adequately prepare for the hearing,” thereby undermining both the procedural and substantive justice accessible to refugee claimants (Bates, Bond, & Wiseman, 2016). Moreover, the bills revoked the automatic stay of removal (ASR) for persons filing an application for judicial review to the Federal Court against a negative RPD refugee decision. This means that claimants without access to the RAD face the prospect of immediate removal from Canada (Atak, Hudson, & Nakache, 2017).

Perhaps the most telling evidence of executive power over Canadian RSD is found in the new refugee status criteria created by Bill C-11 and Bill C-31: the “Designated Country of Origin” (DCO) and “Designated Foreign Nationals” (DFNs). DCOs are countries that are “deemed to possess formal state institutions commensurate with democratic principles and the rule of law, including an independent judicial system, basic democratic rights and freedoms (e.g., the right to vote; freedom of expression, conscience and belief; right to a fair trial), as well as mechanisms for redress if those rights or freedoms are infringed” (Atak, Hudson, & Nakache, 2017; Bates, Bond, & Wiseman, 2016; Forcier & Dufour, 2016). Claimants from designated countries of origin face an accelerated timeline for the Refugee Protection Division (RPD) hearing (30 days for inland claims, 45 days for claims at a port of entry), no access to the RAD, no automatic stay of removal when awaiting leave for judicial review at the Federal Court, and no eligibility for a PRRA for three years after the initial refugee decision” (Atak, Hudson, & Nakache, 2017; Bates, Bond, & Wiseman, 2016). The Minister of IRCC

has sole discretion over the list of DCOs, with no expert committee participating in its elaboration. In effect the minister can arbitrarily choose to curb claims from certain countries, as were the cases of Mexico, Hungary (Forcier & Dufour, 2016), or any of the 42 countries currently listed.

Designated foreign nationals (DFNs), on the other hand, are individuals who arrive to Canada in groups with the help of a smuggler, and could be detained if they are of age 16 and over. According to Atak, Hudson, & Nakache (2017), “an initial detention review takes place within 48 hours, followed by a review within 7 days, and then every 30 days from the previous review.” Many DFNs are detained without trial along with criminals in segregated penitentiary institutions (Forcier & Dufour, 2016). Additionally, DFNs need to prepare for their IRB hearing within 45 days as opposed to the 60 days timeline for other claimants, receive “no access to the RAD, no automatic stay of removal when awaiting leave for judicial review at the Federal Court, and a five-year bar on any application for permanent residence, temporary residence, H&C consideration, travel document, or family sponsorship from the date of a positive RPD decision. These provisions were retroactive to 2009, allowing “potential designation of arrival on the MV Ocean Lady and MV Sun Sea” [the two ships carrying Sri Lankan asylum seekers off the coast of Vancouver] (Bates, Bond, & Wiseman, 2016).

Increased ministerial interventions

The permeability of Canadian RSD to executive influence is shown not only in the minister’s power to determine the list of DCOs and to name DFN

arrivals, but also in increased ministerial interventions into IRB hearings and the implementation of several pilot projects starting in 2012.

Subsequent to the Conservative Party gaining parliamentary majority in the 2011 Federal election, ministerial interventions to the IRB “increased between 2012 and 2015, from an average of 3% a year before 2012, to up to 20% of cases in 2012-2013,” along with “increased budget allocations for ministerial interventions.” The interventions “contribute to higher claim rejection rates,” and were increasingly initiated by the CIC whereas “previously interventions were only performed by the CBSA” (Atak, Hudson, & Nakache, 2017). Moreover, several interventional pilot projects were implemented between 2013 and 2015: “the CBSA-led Assisted Voluntary Return and Reintegration pilot aimed to increase the number of failed refugee claimants who voluntarily leave Canada... the Ministerial Reviews and Interventions pilot, which allowed IRCC to intervene in cases involving ‘program integrity and credibility’ as well as cases where exclusion pursuant to Article 1E and Article 1F of the *Refugee Convention* arise... and the RCMP’s Enhanced Security Screening pilot aimed at further strengthening the security screening of refugee claimants” (Atak, Hudson, & Nakache, 2017).

As opposed to criticizing the Conservative Party for introducing these drastic changes, I think it is worth acknowledging that the setup of the IRB as an administrative tribunal structurally enables such executive reach. The vulnerability has always been present in Canadian RSD, but becomes especially apparent when the dominant political sentiment in Parliament and the Cabinet runs counter to the established norms at the IRB.

Increased inadmissibility decisions

Beyond ministerial intervention into IRB proceedings, claims could be kept outside of the judicialized portions of Canadian RSD and be refuted in purely administrative stages. In other words, the government could “shop” for venues (Gill 2010) among its institutions to carry out desired migrant policy outcomes – a theory that will be revisited in later discussion. According to IRB figures, the number of claims declared inadmissible due to the claimant “being a member of an organized crime organization” or being involved in “smuggling, trafficking, money laundering” has steadily increased, with an average [increase] of “10 cases per year since 2010 compared to “an average [increase] of 2 cases [per year] from 2004 to 2008. (Atak, Hudson, & Nakache, 2017). This rise in inadmissibility decisions is suggestive of either venue shopping or increased fraudulent activity.

Federal Court response to reforms

Some reforms tabled by the Harper government have been rejected by the Federal Court as being in violation of the *Charter*. In 2014, the Court ruled against the Minister of Public Safety’s authorization of preventative detention of irregular arrivals for periods up to one year, as well as against barring claimants arriving from DCO from accessing healthcare while in detention (Forcier & Dufour, 2016). In July 2015, the Federal Court ruled that refugee claimants from DCOs should have the right to appeal to the Refugee Appeal Division (RAD) of the IRB; and in November 2015, the Supreme Court issued two decisions that revised “overly broad interpretations of human smuggling [laws]” so that asylum

seekers would not be prosecutable for offering “humanitarian, mutual, or family assistance” (Atak, Hudson, & Nakache, 2017).

Reform rationale and interpretations

The governments under Prime Minister Harper justified its reforms to Canadian RSD as a response to the crisis of fraudulent claimants having rendered the system costly, inefficient, and ineffective at protecting Canadians. One seminal event prompting the government’s increased securitization and criminalization of asylum seekers was “the arrival of two ships filled with irregular [migrants] seeking asylum off the coast of Vancouver in 2009 and 2010,” the *Ocean Lady* and the *Sun Sea*. These two ships were intercepted by the Canadian Navy, followed by the detainment of the 76 and 492 Tamil migrants respectively on board (Forcier & Dufour, 2016). Minister of Security Vic Toews expressed suspicion that they were connected with “Tamil Tigers terrorism.” Prime Minister Harper said they raised a “significant security concern” (Forcier & Dufour, 2016) and called them “queue jumpers” (Atak, Hudson, & Nakache, 2017) cheating the system in contrast to refugees and immigrants who file paperwork and wait in line overseas. Minister of Immigration Jason Kenney commented that: “We have been spending precious time, as well as taxpayer money, for way too long for people that do not need our protection” (Forcier & Dufour, 2016 citing ICI Radio-Canada, 2012).

Reforms to Canadian RSD under the Harper governments can also be read as a continued intensification of managerial pressures present since the early 1980s to streamline the system and cut operation cost, as the government “never gave up on the issue of... too many refugees” (Participant 22 from Atak, Hudson,

& Nakache, 2017), i.e. the volume of refugees being too high. Yet the cumulative changes eventually constitute a rupture from Canada's welcoming, humanitarian tradition established from the 1970s onward (Forcier & Dufour, 2016). Already in October 2009, the Canadian Council for Refugees sent a letter to the Prime Minister expressing "grave concern that the Canadian Government is betraying its fundamental legal and moral obligations towards refugees" (Creal 2009). This rupture with humanitarianism came into sharper focus during the government's passive and late response to refugees from the Syrian Civil War. In December 2014, Canada refused to increase its quota for Syrian refugees and had accumulated a backlog of 7,500 Syrian claims – 2,000 of these were classified as the most vulnerable by the UNHCR – by the time public outcry over the death of young Alan Kurdi forced Western governments to respond to the Syrian crisis. "It was later revealed that the family of the young boy had made an unsuccessful attempt to come to Canada— her aunt lives in Canada and tried to resettle her kin. The crisis forced the Conservative government to react in the middle of [the 2015 Federal Election]" (Forcier & Dufour, 2016).

Reforms to Canadian RSD from 2006-2014 can moreover be read in relation to the worldwide trend of securitization and exclusion – the aforementioned phenomenon of "exclusionary convergence" (Hamlin 2012) – and as a "European turn" (Soennecken 2014) where Canada emulates restrictive policies practiced in Europe, for example the Safe Third Country Agreement with the US being modeled after the Dublin Regulation. The "European turn" in policy also has a dimension of identity politics, with Harper re-asserting Canada's colonial ties to Great Britain, privileging Christian Syrian refugees over Sunni

Muslims, prioritizing overseas military action against ISIS, distancing government policies from the *Charter*, and condemning the “government of judges” on the grounds of defending “Canadian values” (Forcier & Dufour, 2016) against Muslim threat.

A structural focus beyond partisan politics

Theoretically, this essay was inspired by Soennecken’s (2013) discussion of the “endogeneity of law” or the effects of law in action as it is institutionally implemented, as well as by Hamlin’s (2012) discussion of the “domestic divergence” of migration policies, i.e. how states naturalize international RSD norms differently based on divergent conceptions of due process, constitutional and administrative frameworks, and dynamics among domestic institutions. The choice to focus on the structural features of Canadian RSD was further warranted by the reasoning that, while reforms under Harper were especially draconian, criticizing the Conservatives does not completely address the question of justice in Canadian RSD as both Liberal and Conservative Parties have been involved in the assembly and subsequent dismantling of Canada’s humanitarian tradition. “[F]ar from being the unique work of Pierre Trudeau and the [Liberal Party],” the institutions that define post-Second World War Canadian RSD were “sometimes initiated and defended by the Conservative Party from John Diefenbaker to Joe Clark” (Forcier & Dufour, 2016). Whereas in the earlier era of the 1956 Hungarian uprising, the Liberal government of the day hesitated to accept Hungarian refugees, doubting if they could successfully adapt to Canada, fearing Soviet infiltrators to be among them, and disbaring “members of the Hebrew race” who are “non *bona fide* refugees” (Molloy & Madokoro 2017). These

exclusionary comments sound familiar in comparison to recent Conservative rhetoric towards Muslim migrants. While in terms of the dismantling of these institutions, in 2003 Immigration Minister Denis Coderre of the Liberal Party proposed to remove initial decision-making authority over refugee claims from the IRB and conferring it to CIC officials (Heckman 2008), in essence proposing to replace the quasi-judicial IRB with purely administrative procedures. Subsequently in 2006, the Conservative government allowed 45 out of 127 IRB member appointments to expire and backlogs to soar to 8000 cases while it worked on revising appointment procedures to give the CIC Minister more control over appointments and fill the board with exclusion-minded members (Bryden 2007, Heckman 2008). These instances show that the executive permeability of the IRB makes refugee protection in Canadian RSD contingent regardless of which party is in power.

Substance of IRB independence

When RSD is centralized, as in the case of the IRB, state policy outcomes become closely tied to the mundane personal politics and immediate cultural context of key powerful decision-makers (Gill 2010). The implication of Gill's observation is that the statutory independence of the IRB does not guarantee that in practice it would be impervious to political influences, or that Board members are free of political biases. Granted, the fact that IRB members are appointed with executive input does not necessarily deprive them of independence. But issues of appointments based on political patronage rather than competence, split political allegiances within the Board, and insecure tenure nevertheless put

in question the IRB's substantial independence from executive influences (Heckman 2008).

IRB appointments “provide frequent occasions” for the governing political party to reward those faithful to the party and share its outlook with patronage appointments – a practice that the Canadian Bar Association (CBA) has decried as far back the 1990s (Rehaag 2008). Reflective of partisan appointments, the asylum grant rates of IRB adjudicators vary greatly, to an extent beyond what can be attributed to specialized case assignments of a particular type of from particular regions of the world. While some adjudicators “accorded [the claimant] refugee status in virtually all cases they heard,” others “granted refugee status rarely, if at all” (Rehaag 2008). This divergence in adjudicator grant rates illustrates, in Soennecken's (2013) words, opposing forces of refugee protection and refugee exclusion operating in Canadian RSD under “a layer of fairness of justice.”

Since IRB decisions potentially “exercise power over the claimant's [*Charter* rights] to life, liberty, and security of the person,” its duty of fairness and impartiality “falls at the high end of the continuum of procedural fairness” (Bonisteel 2010). The supposed impartiality of a refugee status adjudicator, however, is at best fragile. Citing a study of 140,428 asylum applications decided in US Immigration Court from January 2000 to August 2004, Rehaag (2008) reports that “female Immigration Court judges had significantly higher grant rates (53.8%) than male judges (37.3%), and that asylum grant rates are inversely correlated with the number of years the judge has worked for Immigration and Naturalization Services (INS) or the Department of Homeland Security (DHS);

also, “grant rates varied depending on whether Immigration Court judges had prior work experience with the military (37.4%), INS or DHS (38.9%), the government (excluding INS or DHS) (39.6%), private legal practice (46.3%), academia (52.3%), and/or not-for-profit organizations (55.4%).” Two inferences can be drawn from Rehaag’s study: first, that systemic balance and checks need to be in place against individual adjudicator bias, and second, that cross-appointment of staff between adjudicative and enforcement institutions would likely erode the independence of each institution. This latter issue will be revisited in discussing the components of Canadian RSD outside of the IRB, specifically the cross-assignment of PRRA and CBSA officers.

Meanwhile in Canada, IRB members with an exclusionary mindset have dismissed reports provided by medical experts, ignored documentary evidence provided by the claimant’s counsel, laughed at the claimant or made insensitive remarks during the hearing, dealt with vicarious traumatization by trivializing claimant testimony, and interpreted the claimant’s post-traumatic behavior – such as omission to report rape – as lack of credibility (Rousseau et al., 2002). Board members have also been shown to jostle for power over the hearing at the expense of a fair decision, and have demonstrated a poor grasp of persecution in the claimant’s country of origin in terms of complex allegiances of local factions, low-intensity conflicts, corruption, and the arbitrary reign of terror by authorities (Rousseau et al., 2002). These findings of the IRB’s problematic operation – as opposed to its supposed impartiality on paper – point to the need for sound process and criteria for appointing IRB members. Otherwise accountability for

Canadian RSD would be atomized to the level of individual decisions without oversight.

Appointment of IRB members

While some adjudicators see their duty as fulfilling Canada's international human rights obligations, other see theirs as protecting the integrity of Canadian border control and shielding the RSD process from fraudulent claims (Rehaag 2008). How these personal convictions (i.e. biases) impact decisions is exacerbated by the legal informality of the IRB, its inquisitorial as opposed to adversarial style of hearing (Hamlin 2012), its history of appointments based on political patronage, and the fact that adjudicators do not need to be professionals of law. Adjudicators motivated by refugee protection prefer to err on the side of caution against sending claimants back to danger, accepting claims that do not meet the official definition of a *Convention* refugee; meanwhile adjudicators motivated by refugee exclusion make negative decisions that contradict with precedents set by the Federal Court, thereby breaching the claimant's fundamental right to security of the person (Rousseau et al., 2002). Moreover, members appointed on the basis of political patronage "do not necessarily have the qualifications or even the level of interest" (Creal 2009) to make fair and responsible decisions. Evidence of the limited effect of performance review on member reappointments is found in the 2009 Auditor General report on the IRB: "of the eighty-nine [89] members... recommended to the Minister by the Performance Review Committee, the Governor in Council reappointed thirty-seven [37].... In roughly the same period... forty-three [43] new appointments were made" (Bonisteel 2010). As Bonisteel observes, these numbers are

“surprising, given the Board’s estimate that it takes between six and twelve months and \$100,000 to fully train a new member.” The fact that the majority of appointments were new despite the high cost of training new members could suggest political motivations from the executive.

Debates over the appointment mechanism for IRB members illustrate how the executive power of the state has a “fuzzy boundary” (Gill 2010) and that as an administrative tribunal the IRB is always permeable to executive influence. For instance, in response to an Auditor General’s Report on the IRB, the Minister of Citizenship and Immigration announced in 2004 a new appointment procedure that involved two separate advisory bodies:

... one internal and one external to the IRB. The Chair of the IRB and the Minister jointly named the members of the external body, which was meant to be “independent and representative of Canadians.” This body, known as the Advisory Panel, was responsible for initial screening of [IRB member candidates]. Once the Advisory Panel vetted candidates, their qualifications were [further scrutinized] by the internal body, known as the Selection Board. The Chair of the IRB named the members of the Selection Board, who were to be ‘experts with an in-depth understanding of the IRB and its decision making processes.’ The role of the Selection Board was to provide the Minister with a list of ‘highly qualified candidates’ for IRB appointments. The Minister then exercised discretion over who, among those candidates, would receive appointments. (Rehaag 2008)

In 2007 however, more executive influence was reintroduced into the selection process, with the merger of the two advisory bodies into one whose members are selected jointly by the Minister and the IRB Chair. Refugee advocates and the Canadian Bar Association decried the merger as a “repoliticization” of the selection process that cancels out the 2004 reform (Rehaag 2008). Next in 2009, former immigration minister Jason Kenney’s exclusionary stance towards claimants from Mexico and the Czech Republic, combined with his power over reappointments, constituted an institutional bias (Bonisteel 2010) in the IRB. By commenting that claimants from these countries were “economic migrants” who “systematically violated” the refugee regime, and by imposing visa restrictions on these countries, Minister Kenney predisposed IRB members to reject Mexican and Czech claimants “in order to secure ministerial favour and avoid potential reprisal in the form of non-reappointment.” Regardless of whether individual IRB members are *in fact* biased in their decision, the appearance of potential bias is sufficient to undermine the legitimacy of the IRB (Bonisteel 2010). In light of these instances of executive influence over the IRB I would argue that the fairness of Canadian RSD depends the reservoir of expertise and due process developed gradually over time, and that any excessive and sudden introduction of executive influence into the process would jar its operation.

IRB as a component of Canadian RSD

To comprehensively understand its role in Canadian RSD, the IRB needs to be considered in ensemble with other government bodies handling immigration and border control, such as the IRCC (formerly CIC) and the CBSA.

As a refugee claim is shuffled among these bodies, the claimant's access to human rights protection as promised by the *Charter* and international law could be lost. The *Charter* may not be evoked during the initial stage of determining claimant admissibility, during IRB hearing and decision (implemented, ironically, to meet *Charter* obligations), or even during PRRA after the claim is rejected from first-instance determinations because the claimant still has access to Federal Court appeal. The *Charter* may not be engaged in the refugee protection process until the claimant has "one foot on the plane" (Atak, Hudson, & Nakache, 2017) to be deported, at which point refugee protection becomes contingent on a "discretionary administrative request."

In addition to delayed or absent engagement with the *Charter* in the RSD process, international law is seldom engaged in Supreme Court rulings or in IRB decisions, further undermining Canada's protection toward refugee claimants. In Dauvergne's (2012) study of approximately 10,000 publically available IRB decisions, only 966 made any reference to international law: "Of these, a full 691 decisions were found to have no engagement with the international law cited, and a further eighty-five [85] decisions made only a passing reference to some international instrument.... [Cases] where international law had no explicit influence on the decision, [account] for an additional 131 of the cases. This leaves only forty-three [43] cases with a robust discussion of international law, and a mere sixteen [16] decisions where international law influenced the outcome."

The lack of engagement with the *Charter* and with international law in Canadian RSD raises suspicion that the state's purported absence in Canadian RSD – in designating IRB as an independent administrative tribunal in a

supposedly centralized decision-making regime – is amenable to refugee policy outcomes that are concordant with executive goals of refugee exclusion (whether Liberal or Conservative). This illustrates the strategy of “venue shopping” (Gill 2010), where the “strategic ‘non-presence’ of the state allows states to simultaneously commit to a range of progressive international agreements concerning the rights of migrants and then to avoid the responsibilities that inhere in these agreements through the maintenance of zones of uncertainty and legal ambiguity.”

In Canadian RSD these zones of ambiguity can be found in the stages before and after IRB determinations, i.e. in the admissibility stage and the PRRA stage. At the front end of the determination process, immigration officers employed by CBSA at ports of entry and by CIC within Canada determine whether a claimant is admissible for a hearing with the RPD (of the IRB). CBSA officers for instance, screen arrivals according to CIC guidelines under the Safe Third Country Agreement (STCA); those deemed as inadmissible for refugee claim would face PRRA and eventual removal (Heckman 2008).

In the PRRA stage, officers are often cross-appointed with the CIC and CBSA, thereby blurring the separation of adjudicative and executive functions. Several court decisions have dealt with this shifting relationship between PRRA and CIC/CBSA. In the 1989 *Mohammad v. Canada (Minister of Employment)* case, the Federal Court ruled that cross assignment of pre-deportation adjudicators to enforcement positions was acceptable because their decisions could be appealed at the more independent Immigration Appeals Tribunal, and from there to the Federal Court of Appeal. The Court also noted that the cross-

assignments concerned separate divisions and did not report to a common superior (Heckman 2008).

In the 2001 case of *Ahumada v. Canada (M.C.I.)* the Federal Court of Appeal ruled differently, deciding that cross-appointing an enforcement officer to adjudication role in IRB “raised a reasonable apprehension of bias” because the officer might be “mindful” of how her colleagues in CIC’s enforcement branch would view her decisions and their effect on her career at CIC” (Heckman 2008).

In a third instance, the 2005-2006 case of *Say v. Canada*, the Federal Court rejected the claim that PRRA officers working within the CBSA were supervised by officials interested in removing refugee claimants under review, arguing that CIC entrusts “PRRA coordinators” to act as an administrative “firewall” between PRRA officers and the enforcement unit, provides separate physical space and administrative support for the two groups, and gives PRRA secure tenure and proper training (Heckman 2008). The inconsistency among these three court decisions show that institutional arrangements are malleable, and that it is far from evident what degree of institutional insulation constitutes sufficient separation between adjudication and enforcement functions.

Moreover, just as IRB adjudicators have individual biases as previously discussed, so do the judges of the Federal Court of Canada (FCC). Examining more than 600 immigration and refugee claims, Gould, Sheppard, & Wheeldon (2010) showed quantitatively that variation in FCC decisions correlated with the litigant’s representation [by lawyers], litigant demographics and national region, as well as the judge’s own background and ideological reputation. Representation by an experienced attorney is “the most influential factor” in FCC’s decision to

grant leave, while judges are more likely to grant petitions if they are reputedly Liberal (obviously), have previously worked in government service, or are Anglophone.

The fact that the individual biases of decision-makers seem inevitable prompted me to consider incorporating adversarial-style hearing into first instance refugee status determination at the IRB. Below I will discuss limitations in the Canadian government's perspective of RSD, and how that given these limitations, explicitly arguing opposing perspectives in an adversarial-style hearing – at the first instance – may be more conducive to fair decisions rather than trying to ambivalently represent multiple perspectives in one adjudicator.

Limitations of Canadian RSD

As stated in the IRPA, the goal of Canadian RSD are multiple: to protect the health and safety of Canadians, to protect Canada's and international security, to reunify families, to respect Canada's humanitarian commitments, and to comply with international human right laws. This is to be achieved by striving for fair and rapid adjudication of asylum claims while preventing the system from abuse by claimants who do not meet the 1951 *Refugee Convention* definition for purposes such as work, access to healthcare and social services (Atak, Hudson, & Nakache, 2017). In other words, the IRB by definition needs to separate more legitimate claims from less legitimate ones to balance between protecting refugees and protecting Canadian sovereignty and security. If refugee claimants are all genuine and deserving of protection, there is no need for taxpayers' money to be spent on an expensive determination system and there is little justification for subjecting asylum-seekers to delay and uncertainty (Gill 2010); on the other

hand, if the majority of refugees are fraudulent, NGOs and refugee support organizations would be jeopardized (Gill 2010).

While the government can be said to be in the “business” of distinguishing deserving refugees from economic migrants, two additional discourses jostle with the government for dominance in the arena of refugee determination: refugee advocates are in the “business” of aid, viewing refugees as clients needing professional service; whereas refugee community organizations are in the “business” of self-help, considering refugees as fully functioning and equal members of society (Hardy & Phillips, 1999). The competition among the three discourses constitutes a robust ecology. While it is unreasonable to expect the government to entirely relinquish its responsibility of protecting the state and its citizens, its natural exclusionary tendency needs to be checked by judicial reviews and by institutional designs that shield RSD from drastic executive interventions. Otherwise the statutory independence of Canadian RSD becomes merely a facade.

Canada has been able to respond progressively to the post-Second World War expansion of international human rights law and due process norms by centralizing refugee status determination in the IRB as an administrative, inquisitorial style tribunal. This centralized model, where RSD is apparently conducted with statutory independence at arms length from the executive, has allowed the Canadian government to maintain an “above the fray” stance in refugee discourses. When political sentiments in the Parliament and the Cabinet are pro-refugee, IRB adjudicators bent on refugee-exclusion do not draw much public attention. When sentiments of securitization and managerial efficiency

dominate the executive, however, the pendulum drastically swings the other way; ministerial intervention and discretion are legislated despite the IRB's apparent independence and quasi-judicial features. What's more, outside of the IRB there are multiple stages in Canadian RSD to which engagement with human right norms can be delayed, and eventually at a junction controlled by administrative, discretionary decision-making, side-stepped all together.

Incorporating adversarial style hearing into the IRB

The government's ambivalent stance toward refugees in Canadian RSD is reflected within IRB hearings, where the premise of inquisitorial, supposedly non-adversary hearing creates confusions for both adjudicators and claimants because dual expectations of protection and exclusion are being vested in the same adjudicator. As Rousseau et al (2002) describe:

As there is no 'official adversary,' the [claimant's] lawyer often does not know what attitude to take toward the Board Members, who often present themselves as protective of refugees while simultaneously adopting aggressive attitudes towards the claimants. If the lawyer tries a conciliatory approach, he runs the risk of appearing unconvincing or of approving unacceptable demands.... If he tries an aggressive approach, he risks antagonizing the Board Members. [Meanwhile, depending] on the Board Members' attitude in the case, the RCOs are often cautious, asking general questions, drawing unhelpful conclusions....

To address this confusion, it might be worthwhile to consider adopting an adversarial style of hearings at the IRB while retaining its centralized management and its reservoir of research and jurisprudence. In other words,

drawing from facts gathered by an independent research division, perspectives of two opposing counsels would be argued explicitly in the hearing before an adjudicator. This reformed model of IRB operation would combine the strength of inquisitorial style adjudication in terms of its consistent research as well as the strength of the adversarial style in checking against individual bias and error.

Conclusion

The IRB's statutory independence does not by itself guarantee justice in Canadian refugee status determination. Tracing its historic contexts of post-Second World War international rights expansion and the rise of New Public Management as an administrative paradigm, this essay identifies the IRB's structural features of high permeability to executive influence and low judicial intervention into its proceedings. These features account for the IRB's flexibility in adopting to the post-war expansion of rights and due processes, as well its susceptibility to drastic changes such as the state-protectionist, exclusionary policies implemented under the Harper governments. While criticism has been directed mostly toward political parties, the structural features of low judicial intervention and high executive permeability have remained mostly uncontroversial as part of the IRB's institutional identity.

Moreover, in order to deliver just decisions, the IRB must constantly strive to balance the biases of individual IRB members, the politically partisan forces at play within the organization, and the inevitable executive influence over member appointments. Outside of the IRB, exclusionary refugee policies can be pursued through other institutions in Canadian RSD – the IRCC, CBSA, and RCMP for

example – where obligations to protect refugee claimants according to the *Charter* and international law can be delayed or even sidestepped altogether.

Taking cue from Hamlin's (2012) institutional approach and Soennecken's (2013) focus on the endogeneity of law, this essay looked for insights beyond partisan politics, focusing on how institutions in Canadian RSD interact with one another, and on how written law interacts with managerial ideas to influence policy outcomes. One proposal to emerge from this discussion is that, in order to check against adjudicator bias, moderate policy swings, and discourage the avoidance of refugee protection obligations by means of policy venue shopping, the adversarial style of hearing should perhaps be integrated into the IRB's centralized research and jurisprudence so that opposing paradigms in Canadian RSD are more explicitly represented by opposing counsels, thereby combining the strengths of both the adversarial and inquisitorial styles of refugee status determination.

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