Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions Before the Federal Court of Canada

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This article examines judicial review practice at the Federal Court of Canada and the concerns it raises in the context of Canada's current refugee determination system. Under successive immigration statutes, the Federal Court of Canada has played a supervisory role in refugee determination; however, there is an absence of direct guidance from the Supreme Court of Canada on the application of judicial review principles in the refugee determination context. Focusing on the Trial Division's judicial review of refugee determination decisions since February 1993, the author concludes from a broad survey of the caselaw that this practice has been characterized by inconsistency both in approach and in result. The author argues that this inconsistency raises significant concerns particular to the refugee context because of the current statutory regime of refugee determination.

It is argued that the interests at stake in refugee determination set the process apart from the general sphere of administrative adjudication. Canada's statutory regime for refugee determination has evolved out of the government's attempts to respond to the 1985 Supreme Court of Canada decision in *Singh* which determined that refugee claimants are entitled to oral hearings. It is also a response to the rapid and significant increases in the number of refugee claimants. The refugee determination system has undergone a number of significant reforms which have eroded procedural protections given to refugee claimants, abolishing appeal of C.R.D.D. decisions and transferring judicial review authority over all immigration decisions to single judges of the Federal Court, Trial Division. In March 1995, the government announced that it will reduce refugee determination panels from two members to one.

The concerns raised by gaps in procedural and substantive protection under the current Canadian refugee determination system cannot be adequately addressed by the consistent application of a severe judicial review standard. Given the inherent limitations of judicial review, the author concludes that a substantive internal review mechanism is needed to redress inadequacies and to comply with Canada's commitment to the principle of *non-refoulement* stated in the United Nations *Convention Relating to the Status of Refugees*.

Cet article examine la pratique de la révision judiciaire à la Cour fédérale du Canada et les questions qu'elle soulève dans le contexte du système de détermination des réfugiés au Canada. La Cour fédérale a joué un rôle de supervision dans la détermination des réfugiés en vertu des lois habilitantes successives en matière d'immigration, malgré l'absence de directives de la Cour suprême concernant l'application des principes de révision judiciaire dans ce contexte. L'auteure concentre ses propos sur les décisions de révision judiciaire de la division de première instance portant sur la détermination des réfugiés depuis le mois de février 1993. En s'appuyant sur un vaste échantillonnage de jurisprudence, elle conclut que cette pratique de révision judiciaire est incohérente tant dans son approche que dans son résultat. L'auteure estime que cette incohérence crée des inquiétudes de taille dans le contexte de la détermination des réfugiés, étant donné le régime statutaire actuel.

L'auteure soutient que les intérêts en jeu dans la détermination des réfugiés créent un processus à l'extérieur de la sphère globale de l'adjudication administrative. Le régime statutaire pour la détermination des réfugiés a évolué suite aux tentatives du gouvernement de répliquer à la décision de la Cour suprême dans *Singh*, qui a établi que les requérants avaient le droit d'être entendus oralement. Le système de détermination des réfugiés a connu un nombre important de réformes qui ont érodé les protections procédurales accordées aux requérants, notamment en abolissant l'appel des décisions de la Commission de l'immigration et statut des réfugiés et en transférant l'autorité de la révision judiciaire de toutes les décisions en matière d'immigration à la Cour fédérale. En mars 1995, le gouvernement a annoncé qu'il réduirait les comités de détermination des réfugiés de deux à un membre.

Les inquiétudes soulevées par des lacunes dans les garanties procédurale et substantive du système actuel de détermination des réfugiés ne peuvent être écartées par l'application uniforme de normes strictes en matière de révision judiciaire. Étant donné les limites inhérentes à la révision judiciaire, l'auteure conclut qu'un mécanisme substantif de révision interne est requis afin de palier aux insuffisances et de se conformer à l'engagement du Canada au principe de non-refoulement énoncé dans la *Convention relative au statut des réfugiés* des Nations unies.

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> *[O]n présente généralement l'enjeu fondamental du droit administratif moderne comme étant l'équilibre entre les valeurs judiciaires et les valeurs administratives plutôt que l'harmonisation entre les valeurs de liberté individuelle et celles de justice sociale.*[1]
>
> R. Dussault & M. Patenaude

Introduction

Judicial review principles attempt to prescribe the interaction of administrative and judicial institutions. This paper is concerned with judicial review practice under the present refugee determination system in Canada. The discussion proceeds from the premise that the interests at issue in the refugee determination process set it apart within the general sphere of administrative adjudication. Canada's 1969 signing of the United Nations *Convention Relating to the Status of Refugees*[2] and its protocol[3] signified this country's commitment to the principle of *non-refoulement*, or non-return, which represents the *Convention*'s main obligation.[4] That principle entails determining whether individual refugee claimants are entitled to Canada's protection by reason of a well-founded fear of persecution owing to inadequate state protection in their countries of origin.[5] By its nature, refugee determination routinely raises human rights issues involving severe suffering and deprivation.

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[1] R. Dussault & M. Patenaude, "Le contrôle judiciaire de L'Administration : Vers une meilleure synthèse des valeurs de liberté individuelle et de justice sociale ?" (1983) 43 R. du B. 163 at 166-67.

[2] 28 July 1951, 189 U.N.T.S. 150, U.K.T.S. 39 (1954) (entered into force 22 April 1954) [hereinafter *Convention*].

[3] *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267, 6 I.L.M. 78 (entered into force 4 October 1967).

[4] The *Convention* states:

> No Contracting State shall expel or return ["*refouler*"] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion (*supra* note 2 at art. 33, s. 1).

[5] Canada's *Immigration Act*, R.S.C. 1985, c. I-2, as am. by R.S.C. 1985 (4th Supp.), c. 28, s. 1, provides that:

> "Convention refugee" means any person who
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> (a) by reason of a well-founded fear of persecution for reasons of raee, religion, nationality, membership in a particular social group or political opinion,
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>> (i) is outside the country of the person's nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or
>>
>> (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country, and
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> (b) has not ceased to be a Convention refugee ... (*Immigration Act*, *ibid.* at s. 2(1)).

In the 1985 decision of *Singh* v. *Canada (M.E.I.)*,[6] three members of the Supreme Court of Canada ruled that the interests at stake in refugee determination engage section 7 of the *Canadian Charter of Rights and Freedoms*.[7] This finding has since been widely accepted as stating a constitutional norm.[8] The *Singh* decision was largely instrumental in triggering legislative reform of the administrative framework for refugee determination.

Judicial review currently plays a pivotal role in the post-*Singh* system. In 1993, amendments to the *Immigration Act*[9] vested judges of the Federal Court of Canada, Trial Division, with original judicial review jurisdiction over decisions of the Convention Refugee Determination Division ("C.R.D.D." or "Board") of the Immigration and Refugee Board ("I.R.B.").[10] The following discussion focuses primarily on the exercise of this jurisdiction and implications arising from it.

Part I discusses the evolution of theoretically severe but ultimately indeterminate judicial review principles in Supreme Court of Canada caselaw and the absence of direct guidance from the Court on their application in the refugee determination context. Part II outlines the supervisory role played by the Federal Court of Canada in refugee matters under successive immigration statutes; it distinguishes the interventionism characteristic of Federal Court of Appeal decisions from the deferential posture advocated by the Supreme Court of Canada. The discussion under this heading focuses on Trial Division judicial review practice in the area of refugee determination since February 1993 and concludes from a broad survey of the caselaw that inconsistency of approach and of result has been a dominant feature of that practice.

Part III considers factors contributing to this outcome, and takes the position that inconsistency in judicial decision-making in the refugee context raises particular concerns arising from the current statutory regime's procedural and institutional weaknesses. These concerns would not, it is contended, be resolved by more consistent application of an ambiguous and inappropriately severe review standard in light of ongoing issues of expertise at the C.R.D.D. Part IV discusses remedial op-

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[6] [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 [hereinafter *Singh*].

[7] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. The remaining three members of the *Singh* Court also found the absence of oral hearings constituted a denial of fundamental justice under section 2(e) of the *quasi*-constitutional *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

[8] See *e.g.*: *Weerasinge* v. *Canada (M.E.I.)* (1993), [1994] 1 F.C. 330 at 334-35, 161 N.R. 200 (C.A.) [hereinafter *Weerasinge*]; *Huynh* v. *Canada* (1994), [1995] 1 F.C. 633 at 643 (T.D.), on appeal No. A-658-94 [hereinafter *Huynh*].

[9] *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, amending R.S.C. 1985, c. I-2, as amended [hereinafter Bill C-86].

[10] Under Bill C-86, access to judicial review as well as to subsequent appeal is restricted (*Immigration Act*, *ibid.* at ss. 82.1, 83, as am. by Bill C-86, *ibid.* at s. 73). Both aspects are reviewed at Parts II.*A* and III.*B*.1, below.

tions, concentrating primarily on internal review at the administrative level. Part V concludes that under the current refugee determination system, judicial review inadequacies underscore the need for an administrative appeal mechanism as the best review alternative consistent with Canada's commitment under the *Convention* and domestic law.

I. The Principle: The "Reasonable Bear"

A. C.U.P.E.*'s Wake*

Contemporary standards of judicial review are generally traced to 1979, when the Supreme Court of Canada articulated a new deferential Common law standard applicable to review of administrative decisions within an agency's jurisdiction. The central question in *C.U.P.E., Local 963* v. *New Brunswick Liquor Co.*,[11] once the Labour Board's jurisdiction over the subject matter of its decision had been confirmed, was whether the interpretation of its governing Statute had been so "patently unreasonable" that its construction could not be rationally supported. That is, if the Statute might reasonably bear the Board's construction, the courts should not intervene because the Board was entitled to err within its jurisdiction owing to the protection of a privative clause. This has been coined the "reasonable bear" approach to judicial review.[12] Entitlement to curial deference in *C.U.P.E.* was based on recognition that the Labour Board was a specialized tribunal administering a comprehensive statute with accumulated experience, considerable sensitivity and unique expertise.

In the immediate post-*C.U.P.E.* era, the Supreme Court extended the patently unreasonable standard for decisions within jurisdiction to a variety of labour relations contexts, whether or not the agency in question was protected by a privative clause.[13] This extension included agencies subject to the supervisory authority of the Federal Court of Canada, Appeal Division,[14] under grounds of judicial review

[11] [1979] 2 S.C.R. 227, 47 D.L.R. (3d) 417 [hereinafter *C.U.P.E.*].

[12] The reference originates with: H.W. MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 U.T.L.J. 343 [hereinafter "Formalism"]; H.W. MacLauchlan, "Developments in Administrative Law: The 1989-90 Term" (1991) 2 Supreme Court L.R. (2d) 1 [hereinafter "Developments"].

[13] See *e.g.*: *Douglas Aircraft Co. of Canada* v. *McConnell* (1979), [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385 (no privative clause); *Teamsters Union, Local 938* v. *Massicotte*, [1982] 1 S.C.R. 710, 134 D.L.R. (3d) 385 (privative clause); *A.U.P.E., Branch 63* v. *Olds College*, [1982] 1 S.C.R. 923, 136 D.L.R. (3d) 1 (no privative clause); *Bibeault* v. *McCaffrey*, [1984] 1 S.C.R. 176, 7 D.L.R. (4th) 1 (privative clause).

[14] See: *Canada (L.R.B.)* v. *I.L.A., Local 269*, [1983] 1 S.C.R. 245, 144 D.L.R. (3d) 1 [hereinafter *Halifax Longshoremen*] (partial privative clause); *Fraser* v. *Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122 [hereinafter *Fraser* cited to S.C.R.] (no mention of privative clause).

codified in the *Federal Court Act*.[15] However, the standard was applied inconsistently.[16] Conceptually, the *C.U.P.E.* deference principle remained (and remains) inextricably linked to the elastic notion of jurisdiction as redefined from case to case; as a result, the *intra*-jurisdictional, patently unreasonable standard had no relevance once an error had been characterized as jurisdictional and thereby subject to review for correctness.[17]

Even when adopting and advocating a deferential stance, the Court's language allowed for speculation as to the precise standard of review used and criteria relevant to that standard.[18] In one frequently-cited decision, the patently unreasonable test was vaguely described as "a very severe test [that] signals a strict approach to the question of judicial review", one that was equally applicable to errors of law and fact within jurisdiction and that recognized tribunals as having "the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable".[19]

B. Dogma, Dissent and Still No Definition

Over the past decade, the Supreme Court has enshrined doctrines of non-intervention within jurisdiction, on the one hand, and review of excess of jurisdiction, on the other, as the operative dogma of judicial review.[20] Deference to the ex-

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[15] R.S.C. 1970 (2nd Supp.), c. 10, s. 28. See also *infra* note 79.

[16] See: *National Bank of Canada* v. *R.C.I.U.*, [1984] 1 S.C.R. 269, 9 D.L.R. (4th) 10 [hereinafter *National Bank*] (partial privative clause); *Yellow Cab Ltd.* v. *Alberta (Board of Industrial Relations)*, [1980] 2 S.C.R. 761, 114 D.L.R. (3d) 427 (incomplete privative clause); *C.A.T.C.A.* v. *Canada (Treasury Board)*, [1982] 1 S.C.R. 696, 134 D.L.R. (3d) 577 (no mention of privative clause).

[17] See *Syndicat des employés de production du Québec et de l'Acadie* v. *Canada (L.R.B.)*, [1984] 2 S.C.R. 412, 14 D.L.R. (4th) 457 [hereinafter *L'Acadie* cited to S.C.R.] (partial privative clause; substantive interpretation upheld as within jurisdiction, remedy overturned as exceeding jurisdiction).

[18] The Court stated:

> A reviewing court, whether under s. 28(1)(*b*) of the *Federal Court Act*, or under the common law principles of judicial review, should not interfere with the decision of a statutory decision maker in a case ... unless the statutory decision maker makes a mistake of law, such as addressing his or her mind to the wrong question, applying the wrong principle, failing to apply a principle he or she would [*sic*] have applied, or incorrectly applying a legal principle (*Fraser*, *supra* note 14 at 464-65).

Compare the Court's language in *C.U.P.E.*'s precursor, *S.E.I.U., Local 333* v. *Nipawin District Staff Nurses Assoc.* (1973), [1975] 1 S.C.R. 382 at 389, 41 D.L.R. (3d) 6, cited as authority for criteria applicable to patently unreasonable errors in *U.E.S., Local 298* v. *Bibeault*, [1988] 2 S.C.R. 1048 at 1084-85, 95 N.R. 161 [hereinafter *Bibeault* cited to S.C.R.]. On this point, see J.M. Evans, "Developments in Administrative Law: The 1985-86 Term" (1987) 9 Supreme Court L.R. (1st) 1 at 61-63.

[19] *Blanchard* v. *Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 at 493-94, 14 D.L.R. (4th) 289.

[20] MacLauchlan observes: "The case for deference is familiar: decision-making expertise, political empathy and efficient use of administrative, judicial and regulated parties' resources" (H.W. MacLauchlan, "Developments in Administrative Law: The 1990-91 Term" (1992) 3 Supreme Court L.R. (2d) 29 at 32-33 [hereinafter "The 1990-91 Term"]).

pertise of administrative decision-makers, as exercised through the patently unreasonable test, has been reasserted as the governing principle in review of labour board decisions,[21] as well as those of other agencies,[22] with the former continuing to dominate the Court's judicial review agenda. Accordingly, an administrative agency protected by a privative clause and acting within its jurisdiction — as determined by pragmatic and functional analysis[23] — is, in theory, entitled to deference provided it does not err in a patently unreasonable manner.[24]

Moreover, the Court's caselaw since *C.U.P.E.* has made it clear that the privative clause "criterion" stated in that decision does not necessarily determine the applicable standard of review. In the absence of such protection, curial deference may be appropriate if the agency under review is highly specialized, and the question of law at issue falls squarely within its jurisdiction.[25] The concept of relative

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[21] See: *Bibeault, supra* note 18; *T.W.U.* v. *British Columbia Telephone Co.*, [1988] 2 S.C.R. 564, 54 D.L.R. (4th) 385 [hereinafter *T.W.U.*]; *C.A.I.M.A.W., Local 14* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437 [hereinafter *C.A.I.M.A.W.* cited to S.C.R.]; *W.W. Lester (1978) Ltd.* v. *U.A., Local 740*, [1990] 3 S.C.R. 644, 76 D.L.R. (4th) 389 [hereinafter *Lester* cited to S.C.R.]; *Canada (A.G.)* v. *P.S.A.C.*, [1993] 1 S.C.R. 941, 101 D.L.R. (4th) 673 [hereinafter *P.S.A.C. II* cited to S.C.R.]; *C.J.A., Local 579* v. *Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 [hereinafter *Bradco* cited to S.C.R.].

[22] See: *National Corn Growers Assoc.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449 [hereinafter *National Corn Growers* cited to S.C.R.]; *Domtar Inc.* v. *Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 105 D.L.R. (4th) 395 [hereinafter *Domtar*] (workmen's compensation board).

[23] The pragmatic and functional approach for determining the limits of a tribunal's jurisdiction and, by extension, the scope of deference a tribunal is owed, requires that

> the Court [examine] not only the wording of the enactment conferring jurisdiction ... but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal (*Bibeault, supra* note 18 at 1088).

This approach has been widely adopted as a basis for analysis in subsequent Supreme Court judicial review decisions (see: *C.A.I.M.A.W., supra* note 21; *P.S.A.C. II, supra* note 21; *Bradco, supra* note 21; *Domtar, ibid.*; *Canada (A.G.)* v. *Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, 80 D.L.R. (4th) 520 [hereinafter *P.S.A.C. I*]; *Université du Québec à Trois-Rivières* v. *Larocque*, [1993] 1 S.C.R. 471, 101 D.L.R. (4th) 494; *Dayco (Canada) Ltd.* v. *C.A.W.-Canada*, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609 [hereinafter *Dayco*]; *Canada (A.G.)* v. *Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 [hereinafter *Mossop* cited to S.C.R.]; *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [hereinafter *Pezim* cited to S.C.R.]).

[24] See: *Bibeault, ibid.*; *T.W.U., supra* note 21; *C.A.I.M.A.W., ibid.*; *Lester, supra* note 21; *P.S.A.C. II, ibid.*

[25] In addition to the cases cited *supra* note 13, see *e.g. Bradco, supra* note 21, in which deference was shown on the basis of expertise despite absence of a full privative clause. By way of corollary, an agency theoretically enjoying privative protection from review for correctness is not automatically entitled to curial deference where its expertise to deal with a given issue is found wanting (see: *Dayco, supra* note 23; *Chambly (Commission scolaire régionale)* v. *Bergevin*, [1994] 2 S.C.R. 525, 115 D.L.R. (4th) 609 [hereinafter *Bergevin* cited to S.C.R.], in each of which a majority of the Court applied a correctness standard to an arbitrator's decision protected by a privative clause on the basis of insufficient expertise). See also *C.P. Air Lines Ltd.* v. *C.A.L.P.A.*, [1993] 3 S.C.R. 724, 108 D.L.R.

expertise has thus become a dominant factor in the Court's evaluations as to whether deference is due.[26] Specialization of functions has also been recognized as attracting deference in appeal proceedings from decisions of at least certain administrative agencies.[27]

Notwithstanding unanimity in the framing of applicable standards of review, however, Supreme Court judges have disagreed as to the interpretation and application of these standards in relation to a broad range of issues, including: jurisdictional interpretation *per se*,[28] the appropriate standard to be applied,[29] whether or not a given administrative interpretation is in fact patently unreasonable[30] or incorrect,[31] the operation of deference *per se*[32] and the scope of review for patent unreasonableness[33] or in appeal proceedings.[34] The Court's division on related points of deference and the scope of review has been particularly problematic for lower courts in applying the patently unreasonable test. In *C.A.I.M.A.W.*, the majority concurred in finding the labour relations agency's interpretation reasonable but disagreed as to how deference works. To La Forest J.,

> [c]urial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". ... The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.[35]

By this approach, it was unnecessary to determine whether the decision under review was correct or to go beyond a finding that it was not patently unreasonable.

(4th) 1 [hereinafter *C.P. Air*], in which a correctness standard was applied in the face of a partial privative clause because the matter was not "strictly" within the Board's special fields of expertise. The *C.P. Air* approach may be contrasted with decisions in *Halifax Longshoremen*, *supra* note 14, *National Bank*, *supra* note 16, and *L'Acadie*, *supra* note 17, in all of which the patently unreasonable standard was used in the face of the same privative clause.

[26] See quote accompanying note 49, below. See also *infra* notes 59-64 and accompanying text on the question of whether the correctness standard of review applied by the Court to the decisions of human rights tribunals on the basis of absence of greater expertise on questions of law is capable of extrapolation to other "human rights" areas, such as refugee determination.

[27] See: *Bell Canada* v. *Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682 [hereinafter *Bell Canada*]; *Pezim*, *supra* note 23. See also text accompanying notes 47-49, below.

[28] See: *T.W.U.*, *supra* note 21; *P.S.A.C. I*, *supra* note 23.

[29] See: *P.S.A.C. II*, *supra* note 21; *Bradco*, *supra* note 21; *P.S.A.C. I*, *ibid.*; *Mossop*, *supra* note 23; *Dayco*, *supra* note 23; *Bergevin*, *supra* note 25.

[30] See: *C.A.I.M.A.W.*, *supra* note 21; *Lester*, *supra* note 21.

[31] See *C.P. Air*, *supra* note 25.

[32] See *C.A.I.M.A.W.*, *supra* note 21.

[33] See: *Lester*, *supra* note 21; *National Corn Growers*, *supra* note 22.

[34] See: *Zurich Insurance Co.* v. *Ontario (H.R.C.)*, [1992] 2 S.C.R. 321, 93 D.L.R. (4th) 346 [hereinafter *Zurich* cited to S.C.R.]; *Dickason* v. *University of Alberta*, [1992] 2 S.C.R. 1103, 95 D.L.R. (4th) 439 [hereinafter *Dickason*].

[35] *C.A.I.M.A.W.*, *supra* note 21 at 1003-1004.

Sopinka J., on the other hand, found:

> Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable" it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made. ... Curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness. The test is ... a "severe test". But even here an appreciation of the merits is not irrelevant. ... So long as the court is satisfied with the correctness of the tribunals' [*sic*] decision, any reference to reasonableness is superfluous.[36]

This divergence in the majority opinion, together with the separate, dissenting reasons of Wilson and L'Heureux-Dubé JJ., prompted the observation that "[t]he Supreme Court is obviously having a great deal of difficulty applying the 'reasonable bear' line of jurisprudence within its own walls."[37]

The disagreement expressed in *National Corn Growers* as to the scope of review permitted by the patently unreasonable test supports this view. There, a majority of the Court found it appropriate to scrutinize a number of aspects of the Import Tribunal's decision for patent unreasonableness.[38] The dissenting justices found this "meticulous analysis"[39] inappropriate and antithetical to the *C.U.P.E.* deference principle. For the majority, Gonthier J. observed in response that a court could not reach a conclusion as to the reasonableness of a tribunal's interpretation without considering the underlying reasoning, and that he "would be surprised if that were the effect of this Court's decision in *C.U.P.E.*".[40]

The Court split along similar lines in *Lester*, in which the breadth of the majority's analysis concluding in patent unreasonableness provoked a similar defence of the *C.U.P.E.* standard:

> It is quite unrealistic in this age of increasingly complex and highly specialized regulatory regimes to expect the courts to have the requisite knowledge and skill to adjudicate properly on some of those regimes. ... [T]here has been a tendency in the post-*C.U.P.E.* era to return to a less stringent test for judicial review than the one established in *C.U.P.E.* ... That approach to curial review in

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[36] *Ibid.* at 1018. Arguably, this analysis fails to consider that judicial agreement with an administrative decision makes it neither correct nor reasonable and appears to have little to do with the notion of comparative expertise, which is supposedly at the root of the deference principle.

[37] "Developments", *supra* note 12 at 50.

[38] See *National Corn Growers*, *supra* note 22 at 1371-83.

[39] *Ibid.* at 1349.

[40] *Ibid.* at 1383.

> the administrative context is, in my opinion, no longer appropriate given the sophisticated role that administrative tribunals play in the modern Canadian state. I think we need to return to *C.U.P.E.* and the spirit which [it] embodies.[41]

A review of post-*C.U.P.E.* cases reveals that notwithstanding frequent reiteration of the fundamental importance of curial deference to administrative expertise and despite ample opportunity, the Court has provided little guidance as to the essence of the patently unreasonable standard that mandates deference.[42] According to one view, the standard requires assessment

> in terms of the reasonable Board. This must be so if we are to allow for the fact that the Board is deemed to have special expertise. A patently unreasonable decision is accordingly one which no reasonable Board applying its expertise could possibly have arrived at.[43]

Another view, noting that "[w]hat is patently unreasonable to one judge may be eminently reasonable to another," considers that deference is called for unless the tribunal exceeds its jurisdiction by arriving at a "clearly irrational" decision.[44] Still another, acknowledging that "[a] patently unreasonable error is more easily defined by what it is not than by what it is,"[45] holds that the standard should reflect something other than the court's view of the correctness of an agency's interpretation of its governing legislation. One authority has observed that in the *Lester* decision, "novelty and incorrectness" appeared sufficient to establish patent unreasonableness.[46]

In the 1994 *Pezim* case, the Court deferred to a decision of the B.C. Securities Commission which was not protected by a privative clause and which was subject to a statutory right of appeal, based on the "concept of the specialization of duties requir[ing] that deference be shown ... on matters which fall squarely within the tribunal's expertise".[47] The unanimous Court used the narrow question before it as an

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[41] *Lester, supra* note 21 at 650-51.

[42] Holloway observes that in the years since *C.U.P.E.*, "not a year has gone by when the [Court] has not been called upon to redefine the standard of administrative judicial review" (I. Holloway, "The Transformation of Canadian Administrative Law" (1993) 6 Can. J. Admin. L. & Prac. 295 at note 110, p. 329).

[43] *C.A.I.M.A.W., supra* note 21 at 1021, Wilson J. (dissenting).

[44] *P.S.A.C. II, supra* note 21 at 963, Cory J. See also: *Bergevin, supra* note 25 at 537, Cory J., at 554, L'Heureux-Dubé J.

[45] *Bradco, supra* note 21 at 340-41, Sopinka J.

[46] J.M. Evans, "Jurisdictional Review in the Supreme Court: Realism, Romance and Recidivism" (1991) 48 Admin. L. R. 255 at 261 [hereinafter "Jurisdictional Review"].

[47] *Pezim, supra* note 23 at 591, relying on *Bell Canada, supra* note 27. Factors triggering deference in *Pezim* included: the breadth of the Commission's expertise, specialization and discretion, as reflected in its governing Statute; its role in policy development within a broad national framework for the regulation of the securities industry; a tradition of curial deference towards the decisions of securities commissions; and the nature of the problems before the Commission which lay "at the heart of [its] regulatory expertise" (*Pezim, ibid.*).

opportunity to consolidate some of its previous expressions of judicial review principles:

> There exist various standards of review with respect to the myriad of administrative agencies that exist ... The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. ... Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.[48]

The Court also asserted that in light of the many factors relevant to determining the appropriate standard of review,

> the courts have developed a spectrum that ranges from the standard of reasonableness [read: "patent unreasonableness"] to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. ... At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights.[49]

In theory, *Pezim* thus allows for a range of judicial control within the administrative law spectrum. However, the *Pezim* Court also reaffirmed the predominant role of the *C.U.P.E.* deference principle — which it found to be applicable in the narrow *Pezim* context — as a general model for virtually all appellate and judicial review proceedings where jurisdiction *per se* is not at issue, and where the legislator has placed a matter squarely within the jurisdiction of an expert administrative decision-maker.[50]

Reassertion of that principle does not, however, define criteria for identifying patently unreasonable errors within jurisdiction for purposes of situating a given tribunal along the spectrum, and it remains to be seen how the Court will develop

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[48] *Ibid.* at 589-90.

[49] *Ibid.* at 590.

[50] In a recent decision, the Court was again unanimous in applying *Pezim* principles to the Canadian Radio-Television and Telecommunications Commission which, like the B.C. Securities Commission, has broad policy-making and regulatory authority and, hence, is "entitled to curial deference, even in the absence of a privative clause and the presence of a statutory right of appeal" when acting within its area of expertise and jurisdiction (*British Columbia Telephone Co.* v. *Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 at 758-59, 125 D.L.R. (4th) 443).

that spectrum in future cases. According to one authority, it would be a mistake "to conclude that the *Pezim* decision is capable of putting to rest the internal tensions that have come to the surface in Canadian administrative law",[51] in part because

> the doctrine as enunciated contains too many pressure points for the re-emergence of disputes that are papered over in the adoption of a consensus on the framework of analysis of judicial review problems.
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> The most obvious of these pressure points are (1) what constitutes an issue that, on a pragmatic and functional analysis, goes to the jurisdiction of a tribunal? (2) what is meant by the degree of deference enunciated in the "patently unreasonable" standard of review? and (3) which tribunals should be considered to possess greater expertise than the courts on the issues being addressed in their decisions and which do not?[52]

In fact, the unanimity in the Supreme Court's theoretical approach articulated in *Pezim* has indeed proved elusive in practice. Despite reiteration of the *Pezim* model, the Court's next major judicial ruling, issued in January 1995,[53] was marked by the now-familiar division relating to the scope of the jurisdiction of a mature labour relations tribunal protected by a broad privative clause, the standard of review that should be applied to various aspects of its decision as well as to whether or not those features were reasonable, patently unreasonable or incorrect.

C. The Supreme Court and Refugee Determination

In 1993, the Supreme Court of Canada decided an important "pure" refugee determination case, that is, one involving the interpretation and application of the statutory definition of Convention refugee *per se*.[54] The unanimous decision in *Canada (A.G.)* v. *Ward*[55] reversed a judicial review ruling of the Federal Court of

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[51] P.L. Bryden, "Developments in Administrative Law: The 1993-94 Term" (1995) 6 Supreme Court L.R. (2d) 1 at 13 [hereinafter "Developments 1993-94"].

[52] *Ibid.* at 14.

[53] See *Canadian Broadcasting Corp.* v. *Canada (L.R.B.)*, [1995] 1 S.C.R. 157, 121 D.L.R. (4th) 385.

[54] For present purposes, "pure" refugee determination decisions are distinguished from those relating to refugee claimants but concerned more with "process", such as *Charter* decisions in the *Singh* case or, more recently, in *Dehghani* v. *Canada (M.E.I.)*, [1993] 1 S.C.R. 1053, 101 D.L.R. (4th) 654. Leave to appeal has been denied in a number of other instances involving refugee determination *per se* (see: *Canada (M.E.I.)* v. *Satiacum* (1989), 99 N.R. 171 (F.C.A.), leave refused (21 December 1989), No. 21627 (S.C.C.); *Canada (M.E.I.)* v. *Villafranca* (1992), 99 D.L.R. (4th) 334, 150 N.R. 232 (F.C.A.), leave refused (1993), 158 N.R. 400 (S.C.C.); *Saini* v. *Canada (M.E.I.)* (1993), 151 N.R. 239 (F.C.A.), leave refused (1993), 158 N.R. 300 (S.C.C.)). For a recent process case, see *Nguyen* v. *Canada (M.E.I.)*, [1993] 1 F.C. 696, 151 N.R. 69 (C.A.), leave refused (1993), 20 Imm. L.R. (2d) 245, 104 D.L.R. (4th) viii (S.C.C.).

[55] [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1 [hereinafter *Ward* cited to S.C.R.].

Appeal which had set aside an Immigration Appeal Board ("I.A.B.") decision granting the claimant, Ward, Convention refugee status.[56]

Ward was clearly a case in which the I.A.B. decision might have been evaluated against the *C.U.P.E.* doctrine. The Court's extensive reasons were, however — perhaps understandably, given the precedential value of the decision — concerned exclusively with substantive interpretation of the Convention refugee definition. Although the Court did observe that the Board's approach had been correct in respect of one aspect of its ruling, while erroneous in others,[57] the decision does not contain a single item of *C.U.P.E.* vocabulary relating to standard of review, expertise, reasonableness or deference.[58]

The dearth of direct guidance in *Ward* in respect of review standards applicable to refugee determination decisions seems to leave open the question of whether general principles articulated by the Supreme Court in the post-*C.U.P.E.* line of judicial review cases are intended to guide Federal Court judges' practice in that area.[59] To what degree, if any, does the Court's strong advocacy of deference and of the high threshold patently unreasonable test apply to decisions concerned exclusively with fundamental human rights questions such as those raised in *Ward*?

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[56] The Court remitted the matter to the C.R.D.D. for determination of an outstanding protection issue. In October 1994, the C.R.D.D. panel reconsidering Ward's claim, in light of the Court's reasons, denied him refugee status. As a fugitive from the Irish Republican Army, he had not demonstrated clear and convincing evidence that the United Kingdom would be unable to protect him from his former associates (see "Ex-terrorist Loses Bid to Stay in Canada" *The [Montreal] Gazette* (8 October 1994) A10). Ward's application for leave to seek judicial review of that decision was subsequently denied (see T. Falconer, "The Strange Saga of Paddy Ward" *The [Toronto] Globe and Mail* (26 August 1995) D2).

[57] See *Ward, supra* note 55 at 723, 751, 754.

[58] See *Kwiatkowsky* v. *Canada (M.E.I.)*, [1982] 2 S.C.R. 856, 142 D.L.R. (3d) 385, a semi-procedural, semi-interpretive post-*C.U.P.E.* decision, which involved a Federal Court of Appeal dismissal of an application for judicial review of an I.A.B. decision. In upholding the Federal Court of Appeal's ruling, the Court's analysis focused, as it would in *Ward*, on substantive and interpretive issues rather than on those of judicial review.

[59] Another recent process ruling touched upon the Federal Court's supervisory role in immigration matters. In *Reza* v. *Canada*, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61, rev'g (1992), 98 D.L.R. (4th) 88 (Ont. C.A.) [hereinafter *Reza* cited to S.C.R.], the Court found that a provincial court's refusal to exercise concurrent jurisdiction to consider a refugee claimant's *Charter* challenge was not reviewable on appeal where, as there, it had given sufficient weight to all relevant factors, notably the statutory attribution of review jurisdiction to the Federal Court: "Parliament ha[s] created a comprehensive scheme of review of immigration matters and the Federal Court [is] an effective and appropriate forum" (*Reza, ibid.* at 404-405).

Cheryl Mitchell has noted that, despite the Court's acknowledgment of the divisional court judge's discretion, its view that he had exercised it correctly "essentially ... amounts to a removal of such discretion" for the future (C. Mitchell, "Update: *Reza v. Canada*" (1994) 4 N.J.C.L. 351 at 361). *Reza* is significant to the degree that, for all practical purposes, it confirmed the exclusive nature of the review jurisdiction of the Federal Court in immigration and refugee matters, including those raising constitutional issues.

The Court's own recent human rights jurisprudence may be relevant to this question. As suggested in the above-noted excerpts from *Pezim*,[60] human rights tribunals have been situated at the "correctness" end of the spectrum. The Court has adopted a largely non-deferential stance in judicial and appellate review of human rights decisions dealing with questions of law, in respect of which it considers that human rights tribunals possess no particular expertise.[61] Arguably, human rights and refugee determination contexts are sufficiently similar to justify the application of a common "correctness" standard, particularly given the Court's endorsement, in *Ward*, of human rights principles as appropriate guides in applying the Convention refugee definition.[62] From this perspective, *Ward* might be interpreted as a case in which the Court saw the I.A.B. as entitled to little or no deference in light of factors such as the legal nature of the question at issue, the I.A.B.'s lack of particular expertise on that issue relative to that of the Federal Court[63] and the apparently broad grounds of review set out in the *Federal Court Act*.[64]

On the other hand, as *Pezim* also indicates, the principle of deference has been repeatedly and explicitly extended in the Court's caselaw to administrative agencies' findings of fact, whether in the human rights sphere or in general.[65] In the Court's recent four-to-three decision in *Chan*, however, the majority ruling turned

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[60] See quotes accompanying notes 48-49, above.

[61] For judicial review proceedings, see *Mossop*, *supra* note 23, in which a majority of the Court upheld the Federal Court of Appeal's ruling that the standard of review applicable to a human rights tribunal in such matters was one of correctness, particularly in the absence of a privative clause. This position was reaffirmed in *University of British Columbia* v. *Berg*, [1993] 2 S.C.R. 353, 102 D.L.R. (4th) 665 [hereinafter *Berg* cited to S.C.R.], in which a majority again applied a correctness standard with respect to the provincial Tribunal's treatment of a general question of law.

For appellate proceedings, see *Zurich*, *supra* note 34, in which a majority of the Court declined to defer to a tribunal's findings of law in the presence of a broad right of appeal. Standard of review and deference issues in light of tribunal expertise on questions of law prompted dissents in both *Mossop* and *Zurich*. In *Berg*, L'Heureux-Dubé J., who was in dissent in *Mossop*, adopted the majority's non-deferential posture.

[62] See *Ward*, *supra* note 55 at 733-34. La Forest J. reiterated this approach in *Chan* v. *Canada (M.E.I.)*, [1995] 3 S.C.R. 593 at 634-37, 128 D.L.R. (4th) 213 [hereinafter *Chan* cited to S.C.R.].

[63] Contrary to this position, it might be pointed out that the Court, in fact, rejected the Federal Court of Appeal's analysis of the persecution-protection nexus.

[64] Bryden seems to lean toward this view. The author comments that although the Court is not explicit that the correctness standard applies to refugee decisions, "the judgment makes no mention of deference ... and the legal issues raised by the case are addressed by the Court in the same way they would be if they arose as ordinary appeals through the court system" ("Developments 1993-94", *supra* note 51 at 36-37).

[65] See *e.g. Berg*, *supra* note 61 at 370, in which a deferential standard was applied to a tribunal's findings of fact, despite the absence of a privative clause. See also: *Mossop*, *supra* note 23 at 577-78, Lamer C.J., at 584, La Forest J., at 599, L'Heureux-Dubé J. (dissenting); *Zurich*, *supra* note 34 at 338. A notable exception to the general rule of deference to findings of fact may be found in *Dickason*, *supra* note 34, in which the majority found (and the minority denied) that in light of the provincial statute's broad right of appeal on questions of fact, the Tribunal was not entitled to deference, while the appellate court was entitled to review the evidence and make its own findings of fact. The *Immigration Act*, of course, provides no such broad appeal rights.

on its own view of factual issues.[66] The case raises the question of whether the ruling may be viewed as an attenuation of the long-standing rule of non-interference in factual matters, in the context of review of refugee determination decisions.

In *Chan*, the majority upheld a Federal Court of Appeal majority ruling dismissing an appeal from the C.R.D.D.'s denial of refugee status. As in *Ward*, the Court's focus was on substantive issues. Standard of review considerations were not addressed by the majority as grounds for upholding the Board's decision, despite *Pezim*'s extension of the deference principle to appellate review on the basis of specialization of duties and despite restricted access to appeal under provisions of the immigration Statute. Nor were standard of review grounds cited by the minority to justify interfering with the Board's decision. What then, can be inferred from the majority's rare excursion into fact-finding?

Arguably, very little of broad significance can be inferred from the unusual case. *Chan* presented the Court with a conflict between the decision under appeal and the directly contradictory decision of the Federal Court of Appeal in *Cheung* v. *Canada (M.E.I.)*,[67] which had moreover been endorsed by a unanimous Court in *Ward*. It is this context which seems to explain the majority's readiness to enter into detailed analysis of the merits of the appellant's refugee claim in order to uphold a deficient Board decision which had omitted making relevant findings of fact. The majority's approach appears, in short, to have been dictated by the circumstances of the case and its desire to settle the matter expeditiously by distinguishing the appellant's case on narrow grounds, thereby avoiding the implications of conflict with *Cheung*.[68] This close review may not be open to interpretation as indicative of a general preparedness to undertake full appellate review of Board decisions in matters of fact.[69]

The minority would have remitted the matter to the C.R.D.D. because its members "have the relevant experience and training" to make the omitted factual findings, and "as triers of fact, it is incumbent on the Board" to make refugee determination decisions.[70] These terms suggest, in principle, a conventional approach to the

[66] See *supra* note 62.

[67] [1993] 2 F.C. 314, 102 D.L.R. (4th) 214 [hereinafter *Cheung*].

[68] This view is supported by the majority's conclusion:

> In the absence of the appellant's meeting the burden of establishing a proper fact foundation ... appellate courts are handicapped in attempting to determine legal issues not grounded on the facts and should not attempt to do so. Therefore, the question of whether *Cheung* should be followed in light of the decision of this Court in *Ward* should await a case in which the necessary facts have been established in the refugee determination hearing (*Chan, supra* note 62 at 673).

[69] The Court's deferential attitude in respect of tribunal findings of fact was, perhaps ironically in light of the ambiguities of *Chan*, confirmed in a judgment issued concurrently on October 19, 1995 (see *Large* v. *Stratford (City of)*, [1995] 3 S.C.R. 733 at 742-43, Sopinka J., at 754, L'Heureux-Dubé J., 128 D.L.R. (4th) 193)).

[70] *Chan, supra* note 62 at 618.

relationship between appellate courts and first-level decision-makers. In light of the context, it remains unclear whether, and to what degree, they and similar terms may be interpreted as indicative of deference.[71]

If *Ward* offers little direct guidance as to the standard of review applicable to Board decisions on matters of law, the judicial review standard applicable to findings of fact may be even more difficult to extrapolate from *Chan*. In any event, to the extent that the distinction between questions of law and those of fact or those of mixed law and fact[72] remains important for purposes of judicial review, it is a far from a negligible factor in the largely factual context of refugee determination, where the subject matter of decisions is virtually always *within* the area of the tribunal's supposed expertise.

Under general principles set out in *Pezim*, legislated factors not directly addressed in *Ward* or *Chan* but relevant to situating the C.R.D.D. along the *Pezim* spectrum would, in theory, entitle that agency to at least moderate deference. Such factors include attribution of exclusive jurisdiction, partial insulation from review, the abolition of a statutory right of appeal and the generalist nature of the reviewing court. Nevertheless, as the ensuing discussion will argue, the weight to be attributed to these items may be largely attenuated by other valid considerations.

II. The Practice: The Reasonable Refugee

The refugee determination context encompasses, of course, not only the interests of refugee claimants, but also the statutory framework governing the decision-making process. That framework has come to be an increasingly dominant factor in determining how the process — up to and including judicial review before the Federal Court — affects the interests of those subject to it.

A. *The Federal Court of Canada and Refugee Determination*

From shortly after its creation in 1970 until 1993, the Federal Court of Appeal has been the court of review in refugee-related matters, exercising various supervisory functions under a number of statutes. From 1970 to 1978, it entertained appeals, with leave, of I.A.B. decisions,[73] including, as of 1973, those relating to de-

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[71] In fact, La Forest J. appeared deliberate in declining to use terms commonly associated with deference. The minority's reluctant, but exhaustive, review of the factual and legal merits of the claim, in response to the majority's approach, was critical of the Board's performance as trier of fact, suggesting an absence of deference to it in practice (see *Chan, ibid.* at 619-20, 637, 647-48).

[72] See *Mossop, supra* note 23 at 577, 599.

[73] See *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, s. 23, as rep. and substituted by *Federal Court Act, supra* note 15, Sch. II, Item 18.

portation orders against persons claiming to be refugees protected by the *Convention.*[74]

In 1978, the *Immigration Act, 1976*[75] came into effect, introducing into domestic Canadian law a definition of Convention refugee modelled on that of the 1951 *Convention.* At that time, Parliament also undertook to fulfil Canada's international obligations to refugees and to uphold its humanitarian tradition toward the displaced and the persecuted, a policy objective which remains in effect.[76] Under the *Immigration Act*'s cumbersome refugee determination process,[77] final determinations of refugee status by the I.A.B.[78] could not be appealed but were subject to judicial review as of right by the Federal Court of Appeal under section 28 of the *Federal Court Act.*[79] This supervisory process remained in effect until 1989.[80] The role of Trial Division judges was limited to review of immigration decisions of an administrative rather than a quasi-judicial nature, reflecting the division of labour dictated by the terms of sections 18 and 28 of the *Federal Court Act.*[81]

In January 1989, the reform package mounted to satisfy the 1985 *Singh* decision's oral hearing requirement came into effect.[82] Bill C-55 created a new adminis-

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[74] *Immigration Appeal Board Act, ibid.* at para. 11(1)(c), as rep. by S.C. 1973-74, c. 27, s. 5. This marked the introduction of the *Convention* into Canadian law.

[75] S.C. 1976-77, c. 52 [hereinafter *Immigration Act, 1976*].

[76] See *ibid.* at s. 3(g).

[77] Under the *Immigration Act, 1976*, a claim could only be made during an immigration inquiry (see *ibid.* at s. 45). This involved an examination under oath, followed by a paper determination by the Minister upon the advice of the Refugee Status Advisory Committee. Sections 70 and 71 provided that applications for redetermination might be made to the I.A.B., which would hold a redetermination hearing if it considered, based on the file, that the claim would probably succeed.

[78] The *Immigration Act, 1976*, repealed the *Immigration Appeal Board Act* (see *ibid.* at s. 128) but maintained the agency itself within the new framework it established.

[79] This section, in effect from 1970 to 1992, provided that a judicial or quasi-judicial decision of a federal board might be set aside on natural justice or jurisdictional grounds and for errors of law or for errors of fact "made in a perverse or capricious manner or without regard to the material before [the Board]" (*Federal Court Act, supra* note 15 at s. 28(1)).

[80] In March 1986, nearly a year after the *Singh* decision, Parliament amended the *Immigration Act, 1976* to provide for an oral hearing by the I.A.B. on all redetermination applications by refugee claimants and increased the number of Board members (see *An Act to amend the Immigration Act, 1976*, S.C. 1986, c. 13). On its own this modification was futile, because of the, by then, clear and pressing need for overhaul of the entire system (see Part IV.*B.*1, below).

[81] Section 18 referred to traditional prerogative remedies but was silent as to grounds on which they might be granted (*Federal Court Act, supra* note 15 at s. 18).

[82] See *An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, S.C. 1988, c. 35. For purposes of clarity, it should be noted that in the 1985 consolidation of federal statutes, which came into effect in December 1988, the *Immigration Act, 1976*, as amended by various statutes since 1978, was consolidated at c. I-2 as the *Immigration Act*. Thus, when S.C. 1988, c. 35 became R.S.C. 1985 (4th Supp.), c. 28, it was entitled *An Act to amend the Immigration Act and to amend other Acts in consequence thereof* [hereinafter Bill C-55].

The number of refugee claimants awaiting processing was daunting. In 1980, Canada handled 1,600 inland claims to Convention refugee status; in 1985, the number had risen to 8,400, and the trative agency, the I.R.B.,[83] to be composed of Governor in Council appointees named to maximum five-year terms.[84] Two-member panels of the C.R.D.D. of the I.R.B. were given sole and exclusive jurisdiction over refugee status decisions.[85] In the event of a split decision, the claimant was entitled to the "benefit of the doubt" and was recognized as a Convention refugee.[86] The Bill also created a two-person screening or "credible basis" tribunal responsible for determining a refugee claimant's access and substantive entitlement to a full hearing before the C.R.D.D.[87] It did not provide for an internal review of C.R.D.D. decisions. Under Bill C-55, the role of the Federal Court of Appeal was varied once again; access to that court became subject to a universal leave requirement[88] for appeals of C.R.D.D. decisions[89] and for judicial review of credible basis decisions.[90] Leave applications were to be decided without personal appearance;[91] appeal from denial of leave was expressly precluded.[92] The grounds for appealing decisions of the C.R.D.D. duplicated judicial review grounds set out at section 28 of the *Federal Court Act*.[93]

In February 1992 reforms to the *Federal Court Act*[94] created a new, uniform procedure for judicial review of all decisions of federal administrative tribunals, over which the Federal Court, Trial Division, was vested with original jurisdiction.[95] The Appeal Division retained judicial review authority over a prescribed list of agencies, including the C.R.D.D.[96] The reforms did not affect appellate jurisdiction over that agency but did transfer judicial review jurisdiction over the significantly fewer credible basis tribunal decisions to the Trial Division. The grounds of review

year following the *Singh* decision, that number had more than doubled (see Library of Parliament, *Canada's Immigration Policy* (Background Paper No. BP-190-E) by M. Young (Ottawa: Library of Parliament, 1994) at App. 6). By the end of 1988, a backlog of 85,000 claims had accumulated (see Office of the Auditor General, *Report of the Auditor General to the House of Commons: Fiscal Year Ended 31 March 1990* (Ottawa: Supply & Services Canada, 1990) at 347).

[83] See *Immigration Act*, *supra* note 5 at s. 57, as am. by Bill-C-55, *ibid.* at s. 18.

[84] See *Immigration Act*, *ibid.* at s. 61, as am. by Bill C-55, *ibid.*

[85] See *Immigration Act*, *ibid.* at s. 67, as am. by Bill C-55, *ibid.*

[86] See *Immigration Act*, *ibid.* at s. 69.1(10), as am. by Bill C-55, *ibid.* See also United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: U.N.H.C.R., 1979) at paras. 203-204.

[87] See *Immigration Act*, *ibid.* at s. 46.01, as am. by Bill C-55, *ibid.* at s. 14.

[88] By virtue of section 82.1(2) of the *Immigration Act*, *ibid.*, as am. by Bill C-55, *ibid.* at s. 19, only visa officer rulings, subject as administrative decisions to the review jurisdiction of the Trial Division, were exempted from the leave requirement.

[89] See *Immigration Act*, *ibid.* at s. 82.3, as am. by Bill C-55, *ibid.* at s. 19.

[90] See *Immigration Act*, *ibid.* at s. 82.1(1), as am. by Bill C-55, *ibid.*

[91] See *Immigration Act*, *ibid.* at s. 82.1(4), as am. by Bill C-55, *ibid.*

[92] See *Immigration Act*, *ibid.* at s. 82.2, as am. by Bill C-55, *ibid.*

[93] See *Immigration Act*, *ibid.* at s. 82.3, as am. by Bill C-55, *ibid.*

[94] Now R.S.C. 1985, c. F-7, as am. by *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8 [hereinafter *Federal Court Act* 1992].

[95] See *ibid.* at ss. 18, 18.1.

[96] See *ibid.* at s. 28(1)(g).

were nominally expanded,[97] and the grounds of appeal of C.R.D.D. decisions were modified accordingly by a consequential amendment to the *Immigration Act*.[98]

By early 1992, cracks in Bill C-55's refugee determination system were beyond repair, and the backlog of refugee claimants awaiting determinations by the C.R.D.D. and appellate review at the Federal Court of Appeal continued to grow.[99] In February 1993, the second round of major legislative reforms in four years came into force. Bill C-86 eliminated the credible basis panel and made the granting of access to refugee determination an administrative decision within the exclusive jurisdiction of senior immigration officers.[100] The practice of giving claimants the

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[97] The amended Act provided that relief was available if a tribunal:

> *(a)* acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
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> *(b)* failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
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> *(c)* erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> *(d)* based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> *(e)* acted, or failed to act, by reason of fraud or perjured evidence; or
>
> *(f)* acted in any other way that was contrary to law (*Federal Court Act* 1992, *ibid.* at s. 18.1(4)).

[98] See *Immigration Act*, *supra* note 5 at s. 82.3, as am. by S.C. 1990, c. 8, *supra* note 94 at s. 55.

[99] I.R.B. figures show "intakes" of 20,267 refugee claimants in 1989, 36,200 in 1990, 30,550 in 1991 and 37,720 in 1992 (see Immigration and Refugee Board, "Statistics on Refugee Claims — Jan. 1, 1989-Mar. 31, 1994" (Ottawa: I.R.B., 1994)). As a result of the Bill C-55 leave requirement, the Court of Appeal issued 594 percent more judgments and orders without personal appearance in 1990 than it had in 1988 (see *Federal Court of Canada Annual Report 1990* (Ottawa: F.C.C., 1991) at 22). From 1990 to 1992, the number of applications to the Court of Appeal for leave in immigration and refugee matters increased from just over 2,000 to over 7,000, with refugee claimants filing the vast majority of leave applications. In 1992, Court of Appeal judges disposed of over 8,000 leave applications (see *Federal Court of Canada Report 1994* (Ottawa: F.C.C., 1995) at 10 [hereinafter *F.C.C. Report 1994*]). Total Court of Appeal proceedings, other than leave applications in immigration and refugee matters, grew significantly from 1990 to 1992 owing to Bill C-55 appeals and judicial review, with approximately 2,000 proceedings pending in 1990 and nearly 3,500 pending in 1992 (*F.C.C. Report 1994*, *ibid.* at 9).

[100] See *Immigration Act*, *supra* note 5 at s. 45, as am. by Bill C-86, *supra* note 9 at s. 35. Although issues of access to the refugee determination process are beyond the scope of this paper, there is little question that suceessive legislation has, in addition to gradually restricting access to appellate and judicial review, also progressively narrowed access to that process: in 1989, Bill C-55 and its companion statute, Bill C-84, known as the Deterrants and Detention Act, S.C. 1988, c. 36; in 1993, Bill C-86; in 1995, *An Act to amend the Immigration Act and the Citizenship Act and to make a consequential amendment to the Customs Act*, S.C. 1995, c. 15 (or Bill C-44). The long-discussed "asylum-sharing" agreement between Canada and the United States, when implemented, is expected to further significantly reduce access to refugee adjudication in this country. Signing of the draft agreement, anticipated for Spring 1996 (see House of Commons, Standing Committee on Citizenship, *Minutes of Proceedings and Evidence* (19 March 1996) at 2:3), has been postponed pending the completion of

benefit of the doubt in split decisions was eliminated under certain circumstances.[101] The leave requirement enacted by Bill C-55 was maintained. Bill C-86 also virtually nullified the role of the Federal Court of Appeal in refugee determination by abolishing appeal of C.R.D.D. decisions and transferring judicial review authority over all decisions taken under the *Immigration Act*, including those of the C.R.D.D., to single judges of the Federal Court, Trial Division.[102] One effect of the move was to narrow the range of remedies available to refugee claimants.[103] Access to appeal from a Trial Division judicial review decision was, in addition, subjected to a requirement that the Trial Division judge certify, at the time of rendering judgment, that the case involved a serious question of general importance.[104] Under Bill C-86 enabling provisions,[105] the transfer of nearly 2,000 pending cases from the Appeal Division[106] meant that Trial Division judges began exercising their new judicial review jurisdiction with a significant backlog.

In March 1995, then Minister of Citizenship and Immigration, Sergio Marchi, announced cost-saving measures that will reduce refugee determination panels from two members to one and cut the number of C.R.D.D. members.[107] Legislation to this effect, expected in 1996, will mark the third major reform of the refugee determination process in a seven-year period. An immediate result will be to abolish altogether the legislated benefit of the doubt for refugee claimants.

B. Federal Court of Appeal: What's a C.U.P.E.*?*

The Federal Court of Appeal's fifteen-year history of reviewing refugee determination decisions in judicial review and appellate proceedings roughly parallels that of judicial review developments in the Supreme Court of Canada since *C.U.P.E.* One would be hard pressed, however, to find the latter's influence reflected in the former's refugee caselaw. Overall, Appeal Division refugee decisions reveal frequent interventions in relation to errors of both law and fact, often on the

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immigration-related debates in the United States Congress (see L. Sarick, "Refugee Pact Talks on Hold" *The [Toronto] Globe and Mail* (16 April 1996) A6).

[101] See *Immigration Act, ibid.* at s. 69.1(10.1), as am. by Bill C-86, *ibid.* at s. 60.

[102] See *Immigration Act, ibid.* at s. 82.1, as am. by Bill C-86, *ibid.* at s. 73. Section 128 of Bill C-86 repealed paragraph 28(1)(*g*) of the *Federal Court Act* 1992.

[103] Under the *Federal Court Act*, the Appeal Division sitting in appeal of a Board decision during the Bill C-55 years might "give the decision that should have been given" and declare successful appellants to be Convention refugees (see: *Federal Court Act, supra* note 15; *Federal Court Act* 1992, *supra* note 94 at s. 52). In fact, this authority was rarely exercised under grounds of appeal provided by Bill C-55, and the claimant's file was generally returned to the Board, often with specific directions (see *e.g. Punniamoorthy* v. *Canada (M.E.I.)* (1994), 24 Imm. L.R. (2d) 1 (F.C.A.)). Section 18.1(3) confers no authority for a Trial Division judge sitting in judicial review to give the decision that should have been rendered (see *Federal Court Act* 1992, *ibid.* at s. 18.1(3)).

[104] See *Immigration Act, supra* note 5 at s. 83, as am. by Bill C-86, *supra* note 9 at s. 73.

[105] See Bill C-86, *ibid.* at s. 118.

[106] See *F.C.C. Report 1994, supra* note 99 at 13.

[107] See Citizenship and Immigration Canada, News Release 95/03, "Minister Marchi Announces Single Member Refugee Panels" (2 March 1995) [hereinafter News Release 95/03].

basis of meticulous analysis of I.A.B. and C.R.D.D. records and without reference to issues of deference, patent unreasonableness, tribunal expertise or to standards *per se* under section 28 of the *Federal Court Act.*[108] This interventionist practice has extended to all matters pertaining to refugee determination — the application of the Convention refugee definition,[109] adverse credibility findings,[110] the use of evidence[111] — even though refugee determination decisions are overwhelmingly concerned primarily with factual determinations and thereby, theoretically, most entitled to the deferential posture advocated by the Supreme Court of Canada.

Several factors may be suggested for this apparent departure from judicial review principles articulated by the Supreme Court. First, since the outset, the Federal Court of Appeal has been responsible for establishing the legal tests governing refugee determination and for supervising their implementation, a role that is arguably inherently interventionist. Second, the Appeal Division may have considered that the I.A.B., whose primary jurisdiction related to immigration matters, but which was also responsible for refugee determination from 1978 to 1989, did not fit the bill of "expert" tribunal in that area. By the time the C.R.D.D. began operating in January 1989, the practice of close supervision was long established. In addition,

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[108] This is not to suggest references to tribunal expertise or patent unreasonableness are entirely absent from Court of Appeal caselaw (see *e.g.*: *Gracielome* v. *Canada (M.E.I.)* (1989), 9 Imm. L.R. (2d) 237 (dissenting opinion); *Aguebor* v. *Canada (M.E.I.)* (1993), 160 N.R. 315 [hereinafter *Aguebor*]; *Yuen* v. *Canada (M.E.I.)* (7 July 1994), No. A-599-91).

[109] See *e.g.*: *Chowdhury* v. *Canada (A.G.)* (12 May 1988), No. A-468-87; *Lai* v. *Canada (M.E.I.)* (1989), 8 Imm. L.R. (2d) 245; *Madelat* v. *Canada (M.E.I.)* (28 January 1991), No. A-537-89; *Kumar* v. *Canada (M.E.I.)* (12 February 1991), No. A-576-89; *Butucariu* v. *Canada (M.E.I.)* (5 February 1992), No. A-534-91; *Veeravagu* v. *Canada (M.E.I.)* (27 May 1992), No. A-630-89; *Chichmanov* v. *Canada (M.E.I.)* (3 September 1992), No. A-243-91; *Diab* v. *Canada (M.E.I.)* (24 August 1994), No. A-688-91; *Oyarzo* v. *Canada (M.E.I.)*, [1982] 2 F.C. 779; *Rajudeen* v. *Canada (M.E.I.)* (1984), 55 N.R. 129; *Surujpal* v. *Canada (M.E.I.)* (1985), 60 N.R. 73; *Dhillon* v. *Canada (M.E.I.)* (1990), 12 Imm. L.R. (2d) 118; *Retnem* v. *Canada (M.E.I.)* (1991), 13 Imm. L.R. (2d) 317; *Wong* v. *Canada (M.E.I.)* (1992), 141 N.R. 236; *Ahmed* v. *Canada (M.E.I.)* (1993), 156 N.R. 221; *Cuadra* v. *Canada (Sol. Gen.)* (1993), 157 N.R. 390.

[110] See *e.g.*: *Siddique* v. *Canada (M.E.I.)* (23 November 1989), No. A-1137-88; *Ye* v. *Canada (M.E.I.)* (1992), 17 Imm. L.R. (2d) 77; *Vallejo* v. *Canada (M.E.I.)* (26 March 1993), No. A-799-90; *Aden* v. *Canada (M.E.I.)* (28 April 1993), No. A-813-91; *Fok* v. *Canada (M.E.I.)* (9 August 1993), No. A-881-90; *Chen* v. *Canada (M.E.I.)* (4 October 1993), No. A-30-91; *Maldonado* v. *Canada (M.E.I.)*, [1980] 2 F.C. 302, 31 N.R. 34; *Owusu-Ansah* v. *Canada (M.E.I.)* (1989), 8 Imm. L.R. (2d) 106, 98 N.R. 312; *Frimpong* v. *Canada (M.E.I.)* (1989), 8 Imm. L.R. (2d) 183; *Armson* v. *Canada (M.E.I.)* (1989), 9 Imm. L.R. (2d) 150; *Hilo* v. *Canada (M.E.I.)* (1991), 15 Imm. L.R. (2d) 199, 130 N.R. 236; *Giron* v. *Canada (M.E.I.)* (1992), 143 N.R. 238.

[111] See *e.g.*: *Mensah* v. *Canada (M.E.I.)* (23 November 1989), No. A-1173-88; *Djama* v. *Canada (M.E.I.)* (5 June 1992), No. A-738-90; *Inzunza* v. *Canada (M.E.I.)* (1979), 103 D.L.R. (3d) 105; *Galindo* v. *Canada (M.E.I.)*, [1981] 2 F.C. 781; *Perez* v. *Canada (M.E.I.)*, [1981] 1 F.C. 753; *Irarrazabal-Olmedo* v. *Canada (M.E.I.)*, [1982] 1 F.C. 125; *Ovakimoglu* v. *Canada (M.E.I.)* (1983), 52 N.R. 67; *Chaudri* v. *Canada (M.E.I.)* (1986), 69 N.R. 114; *Tung* v. *Canada (M.E.I.)* (1991), 124 N.R. 388; *Sathanandan* v. *Canada (M.E.I.)* (1991), 15 Imm. L.R. (2d) 310; *Padilla* v. *Canada (M.E.I.)* (1991), 13 Imm. L.R. (2d) 1, 160 N.R. 156; *Okyere-Akosah* v. *Canada (M.E.I.)* (1992), 157 N.R. 387; *Fajardo* v. *Canada (M.E.I.)* (1993), 21 Imm. L.R. (2d) 113, 157 N.R. 392.

the Court of Appeal's role simultaneously became that of an appellate court enjoying a theoretically broader scope of intervention.[112] Third, early Court of Appeal panels which set the tone and pattern for subsequent review of refugee determination decisions may simply have been influenced by the nature of the interests at stake, in light of factors such as the perceived absence of I.A.B. expertise and, prior to *Singh*, the real absence of procedural safeguards afforded refugee claimants. Finally, Court of Appeal judges may have viewed the patently unreasonable test — a product of jurisdictional analysis developed in the field of labour relations, which is the example of expertise *par excellence*[113] — as less applicable in the context of refugee determination, where jurisdiction, *stricto sensu*, has rarely been an issue. Furthermore, although codification of judicial review grounds in the *Federal Court Act* was not intended to supplant Common law grounds,[114] Appeal Division judges may have interpreted the grounds in section 28 relatively liberally in refugee law cases.

Whatever the reasons for its activist approach when reviewing refugee determination decisions, it seems clear that the Federal Court of Appeal was routinely concerned more with case-by-case scrutiny and evaluation of compliance with the legal tests it had set than with application or articulation of general standards of review *per se*. Closer analysis than is permitted here would be required to determine whether and to what degree the Court of Appeal's interventions in refugee cases also demonstrated consistency of approach in that review role. It is generally acknowledged, however, that during its tenure the Appeal Division did develop a relatively coherent set of principles in a number of substantive areas of refugee law, and that the effect of Bill C-86's transfer of the supervisory role to Trial Division judges has been to silence a "major judicial critic" of C.R.D.D. decision-making.[115]

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[112] It is interesting to note, however, that it was in the 1989 *Bell Canada* decision, *supra* note 27, that the Supreme Court of Canada extended the deference principle to appellate courts based on the concept of "specialization of duties".

[113] See D.J. Mullan, "The Re-emergence of Jurisdictional Error" (1985) 14 Admin. L.R. 326 at 328 [hereinafter "Jurisdictional Error"].

[114] See Law Reform Commission of Canada, *The Federal Court Act: Administrative Law Jurisdiction* by D.J. Mullan (Ottawa: Department of Supply & Services, 1977) at 69 [hereinafter *Administrative Law*].

[115] C. Rotenberg, "The Game of Jeopardy Justice: What is TWDNK and or TWDNC" (Paper presented to the Conference of Law Society of Upper Canada Department of Continuing Legal Education on *Understanding the New Immigration Act: How Bill C-86 Rewrites the Law*, January 1993) at F-1 [unpublished].

C. Federal Court, Trial Division: Find the "Whopper"[116]*?*

Judicial consistency has come into particularly sharp relief as a critical factor in refugee determination in the post-Bill C-86 era. The pivotal review role previously exercised by three-person panels subject to the levelling influence of each member has devolved to *single* Trial Division judges. A survey of Trial Division refugee decisions issued during the period from February 1993 through October 1995 indicates a lack of uniform approach to judicial review among judges and an absence of internal coherence in individual judges' rulings. This absence of uniformity also characterizes collegial and individual approaches to evidentiary and substantive issues. An examination of examples drawn from the caselaw will serve to illustrate the dimensions of the diversity.[117]

1. The February 1993 - November 1994 Period

Over the course of this twenty-two month period, a strictly non-interventionist approach is relatively rare among Trial Division judges. A consistent proponent is Joyal J., whose rulings typically adopt language of deference to Tribunal expertise, caution against substitution of judicial opinion or microscopic analysis of Board reasons and uphold the Tribunal's right to be wrong.[118] Although references to the Supreme Court of Canada's patently unreasonable test are infrequent and cursory, Joyal J.'s method is explicitly premised on the view that the Supreme Court's judicial review guidelines impose "a primary duty of deference to any tribunal".[119] Court of Appeal refugee determination guidelines are apparently less authoritative:

> [C]ertain doctrines propounded ... by the Federal Court of Appeal ... do provide adequate safeguards to an unsuccessful refugee claimant who comes before this court for review. ... There has been ... a plethora of Appeal decisions quashing credibility panel or Refugee Board decisions.

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[116] In *De Calles* v. *Canada (M.E.I.)* (1993), 19 Imm. L.R. (2d) 317, 67 F.T.R. 78 [cited to Imm. L.R.], Muldoon J. expressed the view that where factual errors are alleged, an administrative decision is not to be set aside "unless there is ... a 'whopper'" (*ibid.* at 317-18), and then proceeded to set aside a Board decision on the basis of a perceived, arguably less than "whopping", disregard for evidence.

[117] This survey does not purport to contain an exhaustive review of the caselaw. The emphasis is on the judicial review process rather than on substantive refugee issues *per se*.

[118] See: *Mahalingam* v. *Canada (Sol. Gen.)* (2 November 1993), No. A-79-93, on appeal No. A-649-93 [hereinafter *Mahalingam*] (internal flight alternative ("I.F.A.")); *Xu* v. *Canada (M.E.I.)* (21 December 1993), No. A-5-93 [hereinafter *Xu*] (persecution); *Miranda* v. *Canada (M.E.I.)* (1993), 63 F.T.R. 81 [hereinafter *Miranda*] (finding of fact); *Owusu* v. *Canada (M.E.I.)* (1993), 64 F.T.R. 13 [hereinafter *Owusu*] (credible basis); *Estrella* v. *Canada (Sol. Gen.)* (1993), 68 F.T.R. 65, aff'd (1994), 176 N.R. 56 [hereinafter *Estrella*] (credible basis); *Rajah* v. *Canada (M.E.I.)* (1993), 69 F.T.R. 71 (I.F.A.).

[119] *Owusu*, *ibid.* at 16. In both *Owusu* and *Estrella*, deference was shown to a credible-basis tribunal, half-composed of an immigration adjudicator with greater experience in enforcement matters, on the basis that it "must deal with hundreds of refugee claims and ... could be said to have developed an experience or expertise in that arduous, onerous and difficult field" (*Estrella*, *ibid.* at 66).

> For purposes of judicial review, however, it is my view that a Refugee Board's decision must be interpreted as a whole. One might approach it with a pathologist's scalpel, subject it to a microscopic examination or perform a kind of semantic autopsy on particular statements found in the decision. But mostly, in my view, the decision must be analyzed in the context of the evidence itself. I believe it is an effective way to decide if the conclusions reached were reasonable or patently unreasonable.
>
> ...
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> The Trial Division of this court is just now entering into this field of judicial review, and I believe that it will try to subscribe to and respect the guidelines which have been expressed by the Court of Appeal. This is easily said but not always easily applied when dealing with particular cases.[120]

Despite this repudiation of close scrutiny as a viable approach to judicial review, some decisions suggest that microscopic analysis of Board reasons for judgment may in fact be necessary to determine absence of patent unreasonableness.[121] One would be hard pressed to differentiate this close-scrutiny method from review for correctness or judicial agreement on the merits.

In addition, Joyal J. occasionally uses "palpable or evident error" language, omitting any reference to patent unreasonableness or to Supreme Court of Canada guidelines,[122] or states no test at all in finding an absence of error of law.[123] On at least one occasion, Court of Appeal precedents are cited to support an uncharacteristic intervention "out of abundant caution", where the basis for granting judicial review appears indistinguishable from the bases for emphatic and principled non-intervention in other cases.[124]

By way of contrast, MacKay J. frequently adopts what amounts to a deferential approach involving explicit reliance on the terms of paragraph 18.1(4)(*c*) and/or (*d*) of the *Federal Court Act*,[125] rather than on Supreme Court of Canada authority.

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[120] *Miranda*, *supra* note 118 at 81-82.

[121] See *Estrella*, *supra* note 118 at 66.

[122] See: *Siddiqui* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 108 (QL) (well-founded fear); *Gomez-Rejon* v. *Canada (M.E.I.)* (1994), 93 F.T.R. 96 [hereinafter *Gomez-Rejon*] (discrimination *vs.* persecution).

[123] See: *Adan* v. *Canada (M.E.I.)* (6 January 1994), No. A-1246-92; *Fuentes* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 206 (QL) [hereinafter *Fuentes*] (change of circumstances ("change")); *Hersi* v. *Canada (M.E.I.)* (1993), 64 F.T.R. 226 [hereinafter *Hersi*] (civil-war context).

[124] In *Abubaker* v. *Canada (Sol. Gen.)* (1994), 70 F.T.R. 74 [hereinafter *Abubaker*], a credibility decision, Joyal J. noted that the Court of Appeal,

> in a conscious effort to assure that the critical enquiry facing any refugee claimant be conducted with an imperative emphasis on the rule of law, has repeatedly intervened when legal fault was found and, without substituting its own judgment for that of the Board, has simply instructed it to try again ... (*Abubaker*, *ibid.* at 78).

[125] *Supra* note 94.

These terms are, in turn, absent from Joyal J.'s vocabulary.[126] Under this approach, MacKay J. scrutinizes Board decisions closely, concluding that intervention is not warranted in the absence of errors of law, erroneous findings of fact made perversely or capriciously or unless, in weighing evidence, the Board's "discretion can be said to be unreasonably exercised".[127] These reasons suggest a high threshold for a finding of factual error, without, however, defining it other than by circular reference to the terms of the Act; some decisions make a point of noting the Board's "recognized" or "special" expertise.[128]

Other decisions of MacKay J. upholding[129] or setting aside[130] Board reasons refer neither to the section 18.1 "test" nor to language of deference or expertise. Still others confirm the impression of considerable fluctuation in language expressing MacKay J.'s stringent review standard. In two decisions rendered the same week, in which apparently significant Board lapses are acknowledged but found not to warrant granting judicial review, the operative standard in one case is that the Board's decision "cannot be said to be unreasonable on the evidence",[131] and, in the other, a combination of the notion of unreasonableness with the criteria of paragraph 18.1(4)(*d*).[132] A third decision issued during the same period suggests the Court's ability to intervene depends on whether the Board's decision is "unreasonable ... in light of the evidence presented to it, or is otherwise contrary to law".[133]

Joyal and MacKay JJ.'s explicit adherence to what may broadly be described as analytical frameworks for judicial review, however unevenly expressed or applied, is exceptional. They are not, however, the only Trial Division judges to espouse a high threshold. Richard J.'s rulings contain no explicit reference to either Supreme Court of Canada guidelines or to the *Federal Court Act* but consistently refrain from interfering with Board findings on the basis that intervention is not warranted in the absence of patent unreasonableness,[134] absence of unreasonableness[135] or ab-

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[126] See, for example, the following decisions by MacKay J.: *Emnet* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 855 (QL) [hereinafter *Emnet*]; *Bhuiyan* v. *Canada (M.E.I.)* (1993), 66 F.T.R. 310 [hereinafter *Bhuiyan*]; *Tawfik* v. *Canada (M.E.I.)* (1993), 26 Imm. L.R. (2d) 148 [hereinafter *Tawfik*] (change).

[127] *Tawfik, ibid.* at 152.

[128] *Ibid.* See also *Emnet, supra* note 126.

[129] See *e.g. Nkrumah* v. *Canada (M.E.I.)* (1993), 20 Imm. L.R. (2d) 246 [hereinafter *Nkrumah*] (credibility, change).

[130] See *e.g.*: *Dhaliwal* v. *Canada (M.E.I.)* (1993), 68 F.T.R. 129 [hereinafter *Dhaliwal*] (I.F.A.); *Chowdhury* v. *Canada (Sol. Gen.)* (1994), 74 F.T.R. 115 [hereinafter *Chowdhury*] (change); *Chen* v. *Canada (M.E.I.)* (1994), 76 F.T.R. 235 (well-founded fear).

[131] *Fouchong* v. *Canada (Sec'y of State)* (1994), 88 F.T.R. 37 at 38 (well-founded fear).

[132] See: *Hazarat* v. *Canada (Sec'y of State)* (1994), 88 F.T.R. 128 (persecution, I.F.A.); MacKay J.'s lengthy description of the applicable test in *Tawfik, supra* note 126 at 152.

[133] *Danquah* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 1704 (QL) (credibility).

[134] See *Aguero* v. *Canada (M.C.I.)*, [1994] F.C.J. No. 1604 (QL) (well-founded fear, protection).

[135] See: *Yanahida* v. *Canada (Sol. Gen.)*, [1994] F.C.J. No. 1527 (QL) [hereinafter *Yanahida*] (discrimination *vs.* persecution, protection); *Bukhari* v. *Canada (M.C.I.)* (1994), 87 F.T.R. 134 [hereinafter *Bukhari*] (prosecution *vs.* persecution, I.F.A.).

sence of unreasonableness or other error of law.[136]

Similarly, although McKeown J.'s rulings do not refer to the Supreme Court of Canada and seldom mention subsection 18.1(4) or notions of deference or tribunal expertise, some explicitly endorse Joyal J's approach to review[137] or decline to interfere with Board findings that are not patently unreasonable,[138] sometimes despite admitted glitches in the decisions under review.[139] These decisions may be contrasted with those which make no reference to the high threshold of review,[140] which appear to apply it less rigorously[141] or which simply seem concerned with substitution of result in individual cases,[142] where findings of patent unreasonableness appear indistinguishable from disagreement on the merits in respect of conclusions that have been theoretically open to the Board.[143] In other decisions, McKeown J.'s standard is expressed in broader, more generic terms, such as whether there is "evidence to support" the Board decision, or whether it is "open to the Board" to make a given finding, with or without mention of patent unreasonableness.[144]

Leaving aside inferences arising from these cases, decisions of other Trial Division judges also suggest that omission of the term "patent unreasonableness" (or of any reference to statutory review grounds in the *Federal Court Act*) cannot be assumed to indicate that a strict standard has not been applied.[145] Similarly, mere

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[136] See *Soma* v. *Canada (M.C.I.)*, [1994] F.C.J. No. 1696 (QL) [hereinafter *Soma*] (persecution, protection).

[137] See *e.g. Osoble* v. *Canada (M.E.I.)* (1993), 69 F.T.R. 184 (civil-war context).

[138] See: *Lopez* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 753 (QL) (protection); *Ahmed* v. *Canada (Sol. Gen.)*, [1994] F.C.J. No. 1270 (QL) (well-founded fear).

[139] See: *Raheem* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 626 (QL) [hereinafter *Raheem*] (I.F.A.); *Chaar* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 626 (QL) (well-founded fear); *Murugesu* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 752 (QL) [hereinafter *Murugesu*] (I.F.A.); *Yusuf* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 903 (prosecution *vs.* persecution) (QL); *Soltan-Abadiramhormozi* v. *Canada (Sec'y of State)* (1993), 74 F.T.R. 51 (particular social group).

[140] See *Fernando* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 470 (QL) (I.F.A.).

[141] See *Ayimadu-Antwi* v. *Canada (M.E.I.)* (1993), 69 F.T.R. 157 (well-founded fear).

[142] See: *Adaros-Serrano* v. *Canada (M.E.I.)* (1993), 66 F.T.R. 300, 22 Imm. L.R. (2d) 31 [hereinafter *Adaros-Serrano*] (change); *Dykon* v. *Canada (M.E.I.)* (1994), 87 F.T.R. 98, 25 Imm. L.R. (2d) 193 [hereinafter *Dykon*] (persecution).

[143] See *Arguello-Garcia* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 1, 21 Imm. L.R. (2d) 285 [hereinafter *Arguello-Garcia*] (change).

[144] *Meedin* v. *Canada (Sec'y of State)*, [1993] F.C.J. No. 1428 (QL) [hereinafter *Meedin*] (I.F.A.); *Wong* v. *Canada (Sol. Gen.)* (1993), 70 F.T.R. 169 [hereinafter *Wong*] (well-founded fear).

[145] Other rulings suggestive of a strict review standard and deferential approach but which make no reference to patent unreasonableness include: *Kumarasamy* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 671 (QL), Rothstein J. (I.F.A.); *Siad* v. *Canada (M.E.I.)* (1993), 64 F.T.R. 271, 21 Imm. L.R. (2d) 6, Rothstein J. [hereinafter *Siad*] (civil-war context); *Oduro* v. *Canada (M.E.I.)* (1993), 66 F.T.R. 106, Noel J. [hereinafter *Oduro*] (credibility); *Antonio* v. *Canada (M.E.I.)* (1994), 85 F.T.R. 241, Nadon J. [hereinafter *Antonio*] (prosecution *vs.* persecution); *Balasubramanian* v. *Canada (M.C.I.)* (1994), 88 F.T.R. 86, Muldoon J. [hereinafter *Balasubramanian*] (persecution).

reference to the term as the operative standard warranting the setting aside of Board decisions need not denote a high review threshold.[146]

By way of further contrast, Reed J. proposes an apparently intermediate threshold for review of decisions based on findings of fact.[147] Under this approach, paragraph 18.1(4)(*d*) of the *Federal Court Act* sets out "disjunctive conditions under which a decision will be set aside, of which perversity is only one".[148] In this light, the proper test "is to ask whether [findings of fact] are unreasonable on the basis of all the evidence".[149] Nevertheless,

> the court is unlikely to be quick to interfere with decisions regarding the existence or not of primary facts or with inferences drawn by the Board which are particularly within its area of expertise and experience unless it is clear that they are not supported by the evidence.[150]

On the issue of deference to Board expertise, Reed J. also takes an "intermediate" line:

> [T]here has been a lot of criticism ... but I think at the same time Boards do deal with these kinds of cases on a regular basis. We have to give some weight to that fact. ... [The Board's knowledge about documentary identification] is the kind of experience (or expertise) to which I think a court would give some degree of deference ...[151]

Although Reed J. explicitly refers to this moderate standard in some subsequent rulings,[152] it is not immediately apparent from others in which no mention is made of a "test" that it, in fact, represents the operative norm in all of her decisions.[153] Furthermore, although Reed J.'s approach is occasionally cited by other Trial Division judges as the appropriate review threshold,[154] it generally appears that her "test"

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[146] See, for example, Cullen J.'s reasons in: *Nina* v. *Canada (M.C.I.)* (1994), 87 F.T.R. 169 (persecution); *Li* v. *Canada (M.C.I.)* (1994), 88 F.T.R. 46 (well-founded fear).

[147] See *Singh* v. *Canada (M.E.I.)* (1993), 69 F.T.R. 142, Reed J. [hereinafter *Singh and Narang* (Reed J.)] (credibility).

[148] *Ibid.* at 144.

[149] *Ibid.* at 145-46.

[150] *Ibid.* at 146.

[151] *Sambasivan* v. *Canada (Sec'y of State)* (28 April 1994), No. IMM-3541-93 at 6 [hereinafter *Sambasivan*] (credibility).

[152] See *e.g.* *Zhang* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1204 (QL) (causal link).

[153] See *e.g.*: *Osmani* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1022 (QL) (change); *Osei* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1252 (QL) (credibility); *Arumagam* v. *Canada (M.E.I.)* (20 January 1994), No. IMM-1406-93 [hereinafter *Arumagam*] (credibility); *Appiah* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 442 (QL) (change); *Popov* v. *Canada (M.E.I.)* (1994), 75 F.T.R. 93, 24 Imm. L.R. (2d) 242 [hereinafter *Popov*] (well-founded fear).

[154] See rulings of Tremblay-Lamer J. in: *Barabhuiyan* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1456 (QL), rev'd (11 September 1995), No. A-735-93 [hereinafter *Barabhuiyan*] (change, protection); *Romero-Minero* v. *Canada (M.E.I.)* (1994), 75 F.T.R. 156 (change).

is not given broad endorsement or consideration, at least explicitly, in most of the subsequent cases reviewed.[155]

In a subsequent decision,[156] Reed J. describes the applicable test somewhat differently, referring to the sufficiency of evidence as the appropriate standard:

> I do not think there is serious doubt that a reviewing court will not set aside a decision when the evidence supports the conclusion which the Board reached, despite the fact that there are lacunæ in the written text. If an absence of analysis in a decision leads a judge to conclude that the Board did not consider a crucial element of a legal test, or misunderstood or did not consider the evidence, then, the decision will be set aside. ... The administrative law test is whether there is sufficient evidence to support the conclusion reached by the Board.[157]

The decision does not address what constitutes sufficient evidence or whether sufficiency of evidence is to be equated with absence of unreasonableness.

Not surprisingly, the divergent approaches that Trial Division judges bring to the task of reviewing refugee determination decisions may produce quirky results. For example, in one of two Cullen J. decisions issued on the same day, Reed J.'s "intermediate" approach is adopted to set aside a finding of fact where, paradoxically, no perverseness or capriciousness has been found.[158] In the second decision, Cullen J. relies upon the stricter deferential approach advocated by Joyal and MacKay JJ. to uphold an arguably questionable decision.[159] In another instance, Muldoon J. uses Joyal J.'s high standard to uphold a Board finding because the Board has not gone "off the rails", despite intellectual and emotional concern caused by the sympathetic circumstances of an elderly, infirm Sri Lankan claimant.[160] Muldoon J. then urges that the claimant be given humanitarian and compassionate consideration on the basis of the same factors which arguably could have justified setting aside the Board decision in the first place.

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[155] The *Singh and Narang* (Reed J.) ruling, *supra* note 147, was issued October 8, 1993. In *Ajualip* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 197 (QL) (T.D.) (credibility), for example, Rouleau J. rules that he may not intervene unless the tribunal's findings are "patently unreasonable and inconsistent". In *Chowdhury*, *supra* note 130, Mackay J. concludes that a tribunal finding was perverse "in the sense that it was made without regard to the evidence" (*ibid.* at 119), suggesting a conjunctive interpretation of paragraph 18.1(4)(*d*) criteria rather than the disjunctive interpretation advocated in *Singh and Narang* (Reed J.). Although MacKay J. on occasion describes the applicable standard in terms apparently reflective of Reed J.'s "intermediate" approach, the results suggest that, in practice, for MacKay J. those terms reflect a high standard (see text accompanying notes 131-33, above).

[156] See *Valencia* v. *Canada (M.E.I.)* (1994), 85 F.T.R. 218 (I.F.A.).

[157] *Ibid.* at 225.

[158] See *Hristova* v. *Canada (M.E.I.)* (1994), 75 F.T.R. 18, 23 Imm. L.R. (2d) 278 (well-founded fear).

[159] See *Hanna* v. *Canada (M.E.I.)* (1994), 74 F.T.R. 202 (persecution).

[160] See *Naganathapillai* v. *Canada (M.E.I.)* (1994), 24 Imm. L.R. (2d) 21 at 24 [hereinafter *Naganathapillai*] (I.F.A.).

It should be re-emphasized that cases that articulate an analytical "approach" to judicial review of refugee determination decisions are vastly outnumbered by Trial Division decisions in which no such framework is discernible. Overall, factors influencing whether and when judicial intervention may be warranted appear to be attributed differing significance in various circumstances, leading to a variety of conclusions expressed in a number of different ways.

Judges differ widely, for example, in their readiness to intervene in the Board's treatment of evidence, generally, and of conflicting evidence, in particular. Apparent disparities cut across the spectrum of substantive issues. Frequently, Trial Division judges explicitly state a non-interference approach to the Board's appreciation of evidence.[161] Interference with the Board's role is, on the other hand, also commonplace.[162] The Board's selective use,[163] or cursory or inadequate analysis,[164] of

[161] See: *Fuentes*, *supra* note 123 (change; Board competent to draw conclusions); *Keerthaponrajah* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 627 (QL), Noel J. (I.F.A.; "very questionable" conclusion open to Board); *Gabuzian* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 521 (QL), Nadon J. (well-founded fear; conclusion not unreasonable); *Dolinski* v. *Canada (Sec'y of State)* (31 March 1994), No. T-228-93, McGillis J. (well-founded fear; findings reasonably open); *Mortera* v. *Canada (M.E.I.)* (1993), 71 F.T.R. 236, McKeown J., on appeal No. A-5-94 [hereinafter *Mortera*] (I.F.A.; findings open to the Board); *Megag* v. *Canada (M.E.I.)* (1993), 71 F.T.R. 64, Rothstein J., on appeal No. A-671-93 [hereinafter *Megag*] (I.F.A.; inappropriate to interfere with finding of fact); *Badesha* v. *Canada (Sec'y of State)* (1994), 72 F.T.R. 149, 23 Imm. L.R. (2d) 190, Wetston J., aff'd (1995), 180 N.R. 324 [hereinafter *Badesha*] (I.F.A.; Board considered circumstances); *Yakimov* v. *Canada (Sec'y of State)* (1994), 76 F.T.R. 172, Rouleau J. (change; findings not unsubstantiated or frivolous); *Kaler* v. *Canada (M.E.I.)* (1994), 73 F.T.R. 217, Cullen J. [hereinafter *Kaler*] (I.F.A.; evidence supports Board's finding).

[162] See: *Cortez* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 882 (QL), Noel J. (well-founded fear; unreasonable conclusion); *Soopramanien* v. *Canada (Sol. Gen.)* (5 October 1993), No. A-1572-92, Pinard J. (I.F.A.; erroneous application of law); *Choo* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 303 (QL), McGillis J. (discrimination *vs.* persecution; acted unreasonably); *Carballo* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 669 (QL), Cullen J. [hereinafter *Carballo*] (well-founded fear; error of law); *Saez* v. *Canada (M.E.I.)* (1993), 65 F.T.R. 317, 21 Imm. L.R. (2d) 15, Dubé J. (I.F.A.; several glaring errors); *Ahmed* v. *Canada (M.E.I.)* (1993), 68 F.T.R. 221, 22 Imm. L.R. (2d) 119, Nadon J. (change; findings perverse); *Cheng* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 127, Denault J. (well-founded fear; ignoring evidence); *Mahmoud* v. *Canada (M.E.I.)* (1993), 69 F.T.R. 100, Nadon J. [hereinafter *Mahmoud*] (change; error of law); *Liyanagamage* v. *Canada (Sec'y of State)* (1993), 71 F.T.R. 67, McKeown J., rev'd upon cert. (1995), 176 N.R. 4 (*sub nom Liyanagamage* v. *Canada (M.C.I.)*) [hereinafter *Liyanagamage* cited to N.R.] (I.F.A.; evidence ignored); *Kong* v. *Canada (M.E.I.)* (1994), 73 F.T.R. 204, 23 Imm. L.R. (2d) 179, Reed J. (credibility; evidence misconstrued); *Abdel-Khalik* v. *Canada (M.E.I.)* (1994), 73 F.T.R. 211, 23 Imm. L.R. (2d) 262, Reed J. (statelessness; not convinced Board understood evidence); *Moslim* v. *Canada (Sec'y of State)* (1994), 75 F.T.R. 243, McGillis J. (law of general application; patently unreasonable finding); *Tharmalingam* v. *Canada (M.E.I.)* (1994), 76 F.T.R. 190, Rouleau J. [hereinafter *Tharmalingam*] (I.F.A.; finding cannot stand); *Jean* v. *Canada (M.E.I.)* (1994), 82 F.T.R. 40, Noel J. (well-founded fear; no error *per se* identified); *Ganeshalingam* v. *Canada (M.C.I.)* (1994), 82 F.T.R. 161, Rouleau J. (well-founded fear; satisfied that Board decision cannot stand); *Hotaki* v. *Canada (M.E.I.)* (1994), 88 F.T.R. 43, Gibson J. [hereinafter *Hotaki*] (civil-war context; error of law in failing to recognize, on evidence, that claimant targeted).

conflicting or inconclusive documentary evidence warrants intervention in some instances but not in others.[165] In some decisions, the absence of reference to corroborative or other documentary evidence in Board reasons serves as a ground for overturning the Board,[166] while in others similar omissions do not produce similar results.[167]

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[163] See: *Dhaliwal*, *supra* note 130 (I.F.A.; failure to apply test); *Chowdhury*, *supra* note 130 (change; serious error of law); *Singh* v. *Canada (M.E.I.)* (1993), 65 F.T.R. 110, Dubé J. (I.F.A.; failure to satisfy test); *Hassanzadeh-Oskoi* v. *Canada (M.E.I.)* (1993), 65 F.T.R. 113, Dubé J. [hereinafter *Hassanzadeh-Oskoi*] (change; decision cannot be allowed to stand); *Kahlon* v. *Canada (Sol. Gen.)* (1993), 66 F.T.R. 219, 24 Imm. L.R. (2d) 219, Gibson J. (I.F.A.; failure to apply test); *Rosales* v. *Canada (M.E.I.)* (1993), 72 F.T.R. 1, 23 Imm. L.R. (2d) 100, Rothstein J. (well-founded fear; error of law); *Ventura* v. *Canada (M.C.I.)* (1994), 86 F.T.R. 9, Cullen J. (inability to protect, change; Board erred by failing to consider relevant evidence).

[164] See: *Elmanfoukh* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1432 (QL), Gibson J. (change; error of law); *Boateng* v. *Canada (M.E.I.)* (1993), 64 F.T.R. 197, Noel J. (change; Board erred); *Benitez* v. *Canada (Sol. Gen.)* (1993), 66 F.T.R. 224, Gibson J. (change; misstatement of evidence, ignoring of relevant considerations); *Petrescu* v. *Canada (Sol. Gen.)* (1993), 73 F.T.R. 1, Tremblay-Lamer J. (change; wrong test applied); *Magana* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 136, 22 Imm. L.R. (2d) 300, Rothstein J. (change; error of law); *Mohamed* v. *Canada (M.E.I.)* (1993), 74 F.T.R. 180, Denault J. (change; findings failing to evaluate or not based on evidence); *Costa* v. *Canada (M.E.I.)* (1994), 80 F.T.R. 12, Gibson J. (change; doubt as to whether totality of evidence taken into account); *Risak* v. *Canada (M.E.I.)* (1994), 86 F.T.R. 67, 25 Imm. L.R. (2d) 267, Dubé J. [hereinafter *Risak*] (well-founded fear; Board erred in failing to analyze uncontradicted facts); *Zetino* v. *Canada (M.C.I.)* (1994), 25 Imm. L.R. (2d) 300, Cullen J. (I.F.A.; not clear whether Board considered totality of evidence; error of law).

[165] See: *Nkrumah*, *supra* note 129 (change; decision not made without regard to the evidence); *Meedin*, *supra* note 144 (I.F.A.; finding open to the Board); *Bonilla* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 625 (QL), Noel J. [hereinafter *Bonilla*] (change; conclusion open to the Board); *Biko* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 1741 (QL), Gibson J. (well-founded fear; decision reasonably open to Board); *Boateng* v. *Canada (M.E.I.)* (1993), 65 F.T.R. 81, McKeown J. [hereinafter *Boateng*] (change; conclusions reasonably open to Board, no error of law); *Hercules* v. *Canada (Sol. Gen.)* (1993), 67 F.T.R. 131, Gibson J. [hereinafter *Hercules*] (change; conclusion reasonably open to Board); *Sekhon* v. *Canada (Sec'y of State)* (1993), 73 F.T.R. 182, McKeown J., aff'd (1994), 176 N.R. 29 (I.F.A.; finding reasonably open to Board); *Bhinder* v. *Canada (M.E.I.)* (1994), 76 F.T.R. 74, MacKay J. (I.F.A.; inference open to Board, conclusion not requiring evidentiary support); *Singh* v. *Canada (M.E.I.)* (1994), 77 F.T.R. 234, Rothstein J. (I.F.A.; no conflicting evidence, Board not erring in referring to evidence in summary fashion).

[166] See: *Barabhuiyan*, *supra* note 154 (change; conclusion not reasonable); *Carballo*, *supra* note 162 (well-founded fear; error of law); *Haddoudi* v. *Canada (M.E.I.)* (1 December 1993), No. 92-T-1750, McGillis J. (well-founded fear; conclusion sufficiently unreasonable to warrant intervention); *Thind* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 106 (QL), Rouleau J. (well-founded fear; error of law); *Garcia* v. *Canada (M.E.I.)* (11 March 1994), No. IMM-783-93, Nadon J. (change; error of law and fact); *Ioda* v. *Canada (M.E.I.)* (1993), 65 F.T.R. 166, 21 Imm. L.R. (2d) 294, Dubé J. [hereinafter *Ioda*] (discrimination *vs.* persecution; not satisfied Board applied proper principles to assessment of evidence); *Abubakar* v. *Canada (M.E.I.)* (1993), 67 F.T.R. 313, Wetston J. (I.F.A.; test not met); *Mladenov* v. *Canada (M.E.I.)* (1993), 74 F.T.R. 161, MacKay J. (discrimination *vs.* persecution; Court uncertain as to whether evidence considered); *Que* v. *Canada (M.E.I.)* (1994), 75 F.T.R. 154, Gibson J. (well-founded fear; error of law); *Raji* v. *Canada (M.E.I.)* (1994), 80 F.T.R. 17, Wetston J. (change; Board finding insufficient); *Sivayoganathan* v. *Canada (M.C.I.)* (1994), 86 F.T.R. 152, Noel J. [hereinafter *Sivayoganathan*] (credibility; not open to Board to disregard evidence without giving rea-

Judicial evaluation of identical evidence also varies. In a number of I.F.A. cases, the Board's failure to adhere to, or to give sufficient weight to United Nations High Commissioner for Refugees ("U.N.H.C.R.") advisories, warrants judicial intervention in light of a "reasonableness" test articulated by the Federal Court of Appeal.[168] Other judges decline to intervene in cases involving the very same advisories, on the grounds that there is no requirement to follow them,[169] that they represent non-exhaustive opinion evidence[170] or that they simply contain examples of factors to be taken into account.[171]

A similar fluctuation of approaches and of readiness to intervene affects approaches to review of substantive issues. For instance, in cases involving persecution, Trial Division judges seem to apply significantly disparate thresholds, both collectively and individually, in determining the sorts of factors and findings that either do or do not justify the setting aside of negative Board decisions.[172] Compa-

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sons); *Vielma* v. *Canada (M.C.I.)* (1994), 87 F.T.R. 121, Rothstein J. (discrimination *vs.* persecution; failure to make reference indicates evidence ignored); *Velauthapillai* v. *Canada (Sol. Gen.)* (1994), 88 F.T.R. 315, Gibson J. (Board erred in law by concluding absence of well-founded fear without supporting analysis of elements of claim); *Campos* v. *Canada (M.C.I.)* (1994), 89 F.T.R. 241, Muldoon J. (change; several reviewable errors).

[167] See: *Wong*, *supra* note 144 (well-founded fear; evidence to support sufficient, open to the Board); *Ibrahim* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 431 (QL) (well-founded fear; finding reasonably open); *Villacorta* v. *Canada (Sec'y of State)* (1994), 77 F.T.R. 304, Mackay J. (change; conclusion not perverse or capricious); *Vafaei* v. *Canada (M.E.I.)* (1994), 74 F.T.R. 60, Nadon J. (change; conclusion neither perverse nor capricious).

[168] See: *Thambyayah* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 307 (QL), Gibson J. [hereinafter *Thambyayah*] (failure to meet test); *Sharbdeen* v. *Canada (M.E.I.)* (1993), 66 F.T.R. 10, 22 Imm. L.R. (2d) 9, Dubé J., aff'd upon cert. (1994), 23 Imm. L.R. (2d) 300, 167 N.R. 158 [hereinafter *Sharbdeen*] (the finding cannot stand); *Pathmakanthan* v. *Canada (M.E.I.)* (1993), 71 F.T.R. 154, 23 Imm. L.R. (2d) 76, Denault J. (error); *Kulanthavelu* v. *Canada (M.E.I.)* (1993), 71 F.T.R. 129, Gibson J. [hereinafter *Kulanthavelu*] (error of law).

[169] See *Raheem*, *supra* note 139 (result not patently unreasonable).

[170] See *Eliyathamby* v. *Canada (M.E.I.)* (1994), 76 F.T.R. 156, Reed J. [hereinafter *Eliyathamby*] (test not improperly applied). In that case, Reed J. arrived at a result similar to that in *Naganathapillai*, *supra* note 160.

[171] See *Thanabalasingam* v. *Canada (Sec'y of State)* (1994), 87 F.T.R. 188, Rothstein J.

[172] Contrast the following "severe" standard decisions in: *Xu*, *supra* note 118, Joyal J.; *Mahalingam*, *supra* note 118, Joyal J.; *Soma*, *supra* note 136, Richard J.; *Murugesu*, *supra* note 139, McKeown J.; *Balasubramanian*, *supra* note 145, Muldoon J.; *Brar* v. *Canada (M.E.I.)* (1993), 68 F.T.R. 57, Rouleau J.; *Visagaperumal* v. *Canada (M.C.I.)* (1994), 87 F.T.R. 112, Mackay J. [hereinafter *Visagaperumal*], with: *Arguello-Garcia*, *supra* note 143, McKeown J.; *Adaros-Serrano*, *supra* note 142, McKeown J.; *Dykon*, *supra* note 142, McKeown J.; *Bragagnini-Ore* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 143 (QL), Pinard J.; *Castillo* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 1406 (QL), Dubé J.; *Shirwa* v. *Canada (M.E.I.)*, [1994] 2 F.C. 51, 71 F.T.R. 136, Denault J.; *Xie* v. *Canada (M.E.I.)* (1994), 75 F.T.R. 125, Rothstein J.; *He* v. *Canada (M.E.I.)* (1994), 78 F.T.R. 313, 25 Imm. L.R. (2d) 128, Simpson J. Contrast the high threshold decisions in: *Manihani* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 878 (QL), Noel J.; *Murugiah* v. *Canada (M.E.I.)* (1993), 63 F.T.R. 230, on appeal No. A-326-93, Noel J. [hereinafter *Murugiah*], with rulings in: *Suthanthirarajah* v. *Canada (M.E.I.)*

rable disparity of approach is found in decisions concerning Board treatment of the "cumulative acts" concept leading to findings of discrimination as distinct from persecution.[173] In cases with strikingly similar circumstances, Board decisions denying Convention refugee status to claimants from civil-war-torn countries elicit general, but not uniform, reluctance to intervene.[174]

The voluminous credibility caselaw suggests that these Board findings, too, are subjected to differing approaches. Trial Division judges show traditional judicial reluctance to interfere with or to substitute their opinions for adverse credibility findings by the "triers of fact,"[175] on occasion despite explicit acknowledgment that judicial discretion would have been exercised differently.[176] On the other hand, judges also interfere with credibility findings, despite the "rule" of reticence, with remarkable frequency. In general terms, this group of decisions appears to subject the Board's entitlement to draw conclusions as to a claimant's credibility to relatively closer judicial scrutiny, indicating greater preparedness to intervene. As is the case in decisions reviewed relating to evidentiary and substantive issues, the legal bases justifying intervention[177] or non-intervention[178] in credibility cases are expressed in a variety of terms.

(1993), 20 Imm. L. R. (2d) 269, Noel J.; *Castaneda* v. *Canada (M.E.I.)* (1993), 69 F.T.R. 133, Noel J.; *Sinnathamby* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 116, Noel J.

[173] Contrast decisions setting aside Board decisions in: *Risak*, *supra* note 164; *Ioda*, *supra* note 166; *Porto* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 881 (QL), Noel J.; *Freiberg* v. *Canada (Sec'y of State)* (1994), 78 F.T.R. 283, Tremblay-Lamer J.; *Khatib* v. *Canada (M.C.I.)* (1994), 83 F.T.R. 310, McKeown J., on appeal No. A-592-94, with those in which Board decisions have been upheld: *Gomez-Rejon*, *supra* note 122; *Denes* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1424 (QL), Dubé J.; *Larionov* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 196 (QL), Denault J.; *Bogdanov* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 456 (QL), MacKay J.; *Ponniah* v. *Canada (M.E.I.)* (1993), 68 F.T.R. 149, Wetston J.

[174] Contrast non-interventionist approaches in: *Hersi*, *supra* note 123; *Siad*, *supra* note 145; *Awale* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 679 (QL), Cullen J.; *Abdulle* v. *Canada (M.E.I.)* (1993), 67 F.T.R. 229, Nadon J., with those in: *Hotaki*, *supra* note 162; *Abdi* v. *Canada (M.E.I.)* (1993), 68 F.T.R. 319, Reed J.; *Ahmed* v. *Canada (M.E.I.)* (1994), 70 F.T.R. 134, Noel J.; *Abdi* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 209, Simpson J.

[175] See: *Ankrah* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 385 (QL), Noel J. (finding unassailable in absence of overriding error); *Larue* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 484 (QL), Noel J. (evidence allowing finding); *Sun* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 636 (QL), Noel J. [hereinafter *Sun*] (finding unassailable in absence of perverseness); *Bustillo* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1181 (QL), Denault J., on appeal No. A-647-93 (no interference as long as evidence to support); *Wang* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1315 (QL), McKeown J. (conclusions well-founded); *Muhammed* v. *Canada (M.E.I.)* (1993), 67 F.T.R. 152, MacKay J. (findings not unreasonable); *Asare* v. *Canada (M.E.I.)* (1993), 72 F.T.R. 318, Gibson J. (credible basis tribunal; no substitution of decision based on credibility).

[176] See *e.g.* *Oduro*, *supra* note 145 (case giving Court "substantial difficulty" but no overriding error).

[177] See: *Sivayoganathan*, *supra* note 166 (erroneous disregard of evidence leading to general finding of lack of credibility); *Pathmanathan* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 641 (QL), McKeown J. (evidence on which findings based unknown); *Odunaike* v. *Canada (Sol. Gen.)*, [1993] F.C.J. No. 1086 (QL), Dubé J. (arbitrary conclusion not based on totality of evidence); *Nizamul* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1293 (QL), McGillis J. (failure to provide clear reasons reviewable error);

2. The December 1994 - October 1995 Period

In the climate of diversity described, it is perhaps surprising that a November 30, 1994 Trial Division ruling apparently represents the first detailed survey of the Supreme Court of Canada's judicial review guidelines undertaken with a view to determining their applicability to the C.R.D.D. under paragraphs 18.1(4)(*c*) and (*d*) of the *Federal Court Act*. In *Sivasamboo* v. *Canada (M.C.I.)*,[179] Richard J. infers from those guidelines and, in particular, from criteria articulated in *Pezim*[180] that

> even though the terms of subsection 18.1(4) of [the Act] are quite broad in scope, this Court should accord specialized tribunals "considerable" or "significant" deference when they are acting squarely within their area of expertise.[181]

It is Richard J.'s conclusion that the C.R.D.D. is such a tribunal, based on the following "pragmatic and functional" analysis:

- A review of the *Immigration Act*'s jurisdiction conferring provisions suggests that despite the absence of a privative clause,

> the effect of subsection 67(1) is similar in that the decisions of the Refugee Division may be considered final and binding because of the exclusive grant of

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Su v. *Canada (M.E.I.)*, [1994] F.C.J. No. 70 (QL), Reed J. (significant misunderstanding of evidence laying foundation for negative finding); *Uddin* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 140 (QL), Pinard J. (Board not on solid ground in finding inconsistency); *Lozeva* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 215 (QL), McGillis J. (Board not entitled to make adverse credibility finding without addressing cogent evidence; error of law); *Ezi-Ashi* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 401 (QL), Wetston J. (inferences sufficiently perverse); *Asiamah* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 120, 23 Imm. L.R. (2d) 71, Rothstein J. (error in law making findings unsupported by evidence); *Sadique* v. *Canada (M.E.I.)* (1993), 71 F.T.R. 37, Nadon J. (decision based on erroneous finding of fact); *Dumitru* v. *Canada (M.E.I.)* (1994), 76 F.T.R. 116, Noel J. (conclusions based on speculation); *Callejas* v. *Canada (M.E.I.)* (1994), 73 F.T.R. 311, 23 Imm. L.R. (2d) 253, Gibson J. (in absence of general finding against credibility; error of law).

[178] See: *Sambasivan*, *supra* note 151 (conclusions reasonable); *Arumagam*, *supra* note 153 (errors not substantial enough); *Bah* v. *Canada (Sol. Gen.)*, [1993] F.C.J. No. 1037 (QL), Joyal J. (conclusion not spurious or without evidentiary base); *Wang* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1180 (QL), Noel J., on appeal No. A-656-93 (finding not unreasonable); *Campos* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1240 (QL), McGillis J. (Board entitled to weigh the evidence, conclusions not unreasonable); *Dekereza* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 62 (QL), Denault J. (within jurisdiction of Board); *Chaudhary* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 497 (QL), Joyal J. (no interference except on strong and obvious grounds); *Ahmed* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 124, McKeown J. (open to the Board); *Feng* v. *Canada (M.E.I.)* (1994), 77 F.T.R. 231, Nadon J. (absence of error justifying intervention).

[179] [1995] 1 F.C. 741, 87 F.T.R. 46, Richard J. (I.F.A.), appeal on cert. No. A-688-94, discontinued January 19, 1995 [hereinafter *Sivasamboo* cited to F.C.].

[180] See *supra* note 23.

[181] *Sivasamboo*, *supra* note 179 at 753.

> jurisdiction, the limited opportunities for judicial review, and the specialized nature of the tribunal.[182]

° Both the *Immigration Act* and the Federal Court of Appeal have recognized the Board's specialized status. In addition to factors such as the complex context of refugee determination and the enactment of specific provisions designed to foster expertise,

> [t]he Refugee Division has an important public interest mandate and a clear policy development role with respect to the application of the Convention refugee definition [insofar] as [the *Immigration Act*] authorizes the Chairperson ... to issue guidelines to assist the members in carrying out their duties under the Act. ... The importance of such a policy development role in determining the extent of deference to be accorded to an administrative tribunal was recognized in *Pezim*.[183]

° The Supreme Court of Canada's determination that a correctness review standard applies to human rights tribunal findings of law is distinguishable. Refugee determination issues "are not broad questions involving general principles of statutory interpretation and legal reasoning", but rather, "the interpretation of a statutory definition within a specific international law and regulatory framework".[184]

° In light of these factors, the C.R.D.D. is a specialized tribunal similar to the B.C. Securities Commission considered in *Pezim*, and to other agencies granted a high review threshold by the Supreme Court of Canada. It is thus entitled to deference that applies "not only to the facts as found by the Refugee Division, but also to the legal questions before it".[185]

° Since the principle of deference extends to appeal courts, and because the standard of manifest or palpable error applies for purposes of appellate review of findings of fact, it follows that,

> with respect to the findings and conclusions of fact of a specialized tribunal, a supervisory court will intervene only when it has been shown that there is a manifest or palpable error, that is that the findings and conclusions of fact are patently unreasonable.[186]

° It can be inferred from assorted Federal Court rulings that "deference also extends to the legal questions before the tribunal in the light of its role and expertise."[187]

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[182] *Ibid.* at 755-56.
[183] *Ibid.* at 760.
[184] *Ibid.* at 761.
[185] *Ibid.*
[186] *Ibid.* at 762.
[187] *Ibid.*

° Hence, on the authority of recent rulings by the Court of Appeal and by McKeown J., the standard of review to be applied to Board findings on questions of law and of fact is that of patent unreasonableness, a "very strict" test under Supreme Court guidelines.[188]

It is noteworthy that at no point of this lengthy and problematic judicial review discussion[189] does Richard J. attempt to rationalize his conclusions in light of the Supreme Court's *Ward* decision, which related specifically to the refugee determination context.[190] *Ward* is simply not mentioned.

A review of Richard J.'s decisions since *Sivasamboo* shows that the majority do not explicitly reflect his conclusions therein. Few make any reference to patent unreasonableness.[191] On occasion, an abbreviated non-refugee Appeal Division decision, observing that no practical difference exists between the standard of review for alleged errors of fact set out in paragraph 18.1(4)(*d*) of the *Federal Court Act* and the standard of patent unreasonableness,[192] is cited by Richard J. in support of his commitment to that standard.[193]

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[188] The question certified by Richard J. for appeal purposes (see *ibid.* at 765-66), apparently on his own motion, as to whether the appropriate standard under paragraphs 18.1(4)(*c*) and (*d*) of the *Federal Court Act* is patent unreasonableness, has not gone to thė Federal Court of Appeal. As indicated, the claimants' appeal was discontinued in January 1995 (see *supra* note 179).

[189] To identify just a few troublesome aspects of the analysis: Richard J.'s equation of the "manifest error" standard used in appellate review for errors of fact to the patently unreasonable judicial review standard for errors of fact and law may extrapolate somewhat broadly from the few rulings cited to support that equation. Three of the five decisions cited with reference to the manifest error standard (see *Sivasamboo, ibid.* at 762), for example, were concerned with credibility findings, not questions of law. In addition, the three Appeal Division rulings cited (see *ibid.* at 764) as authority for Richard J.'s conclusion with respect to patent unreasonableness as the appropriate standard are cursory, issued by the same appellate panel over the same three-day period and cannot be said to represent a cross-section of Appeal Division rulings. They are, arguably, not as categorical as Richard J. seems to suggest. For the same reason, reliance on one McKeown J. ruling for authority as to the appropriate standard may not be fully warranted when, as described above, McKeown J.'s decisions are just as likely to make no reference to patent unreasonableness. Overall, it is most remarkable that Richard J.'s analysis simply fails to acknowledge the overwhelming majority of Court of Appeal and Trial Division rulings that are silent as to standard and/or not deferential to the C.R.D.D.

[190] See *supra* note 55.

[191] In *Drougov* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 709 (QL) (credibility, discrimination *vs.* persecution), Richard J. finds that questions of credibility are entirely within the Board's expertise, and no interference is warranted unless findings are perverse, capricious or patently unreasonable. In both *Flores* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 710 (QL) and *Gnanasundaram* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 707 (QL) (I.F.A.), Richard J.'s citing of *Sivasamboo* is accompanied by cursory and virtually identical statements upholding Board decisions. By way of contrast, in *Ratnam* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 516 (QL), a Board decision based on a glaring error in its I.F.A. finding is set aside because the Board erred in its conclusion, not on the basis that it was patently unreasonable.

[192] See *Stelco Inc.* v. *Canada (Canadian International Trade Tribunal)*, [1995] F.C.J. No. 832 (QL).

[193] See: *Farnaghi* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 987 (QL) (well-founded fear; factual findings not meeting paragraph 18.1(4)(*d*) criteria *and* not patently unreasonable, no other reviewable er-

If explicit references to patent unreasonableness remain infrequent, their omission does not indicate a lowered review threshold. Richard J. continues to apply the generally strict standard that was evident in his pre-*Sivasamboo* decisions.[194] Exceptional departures from that standard, in apparently no more compelling circumstances than those subjected to the "very strict" test, seem difficult to explain other than as substitution of opinion or disagreement on the merits.[195]

Contrasting results in Richard J.'s decisions support earlier impressions that the presence or absence of explicit references to patent unreasonableness may not accurately reflect the rigour of the standard applied. In one ruling,[196] for example, a rare conclusion of patent unreasonableness appears at odds with previous decisions in which Richard J. finds an identical Board finding to be a determination entirely within the Board's expertise[197] or otherwise not unreasonable.[198] This conclusion, together with his further finding of a "number of [other] errors which warrant the intervention of this Court",[199] also seems difficult to reconcile with an earlier ruling in

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ror); *Singh* v. *Canada (M.C.I.)* (1995), 97 F.T.R. 139, Richard J. [hereinafter *Singh and Narang* (Richard J.)] (persecution, I.F.A., change; Board finding patently unreasonable; failure to consider issue reviewable error).

[194] See *e.g.*: *Balendra* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 191 (QL) (persecution, I.F.A.; finding within Board's expertise to make and supported by evidence); *Chen* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 189 (QL), Richard J. [hereinafter *Chen* (Richard J.)] (well-founded fear; determination within Board's expertise, Board inferences not so unreasonable as to warrant intervention); *Ivanov* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 184 (QL) [hereinafter *Ivanov*] (change, discrimination *vs.* persecution; Board properly concluded no well-founded fear, within Board's expertise to prefer documentary evidence, conclusions reasonably open); *Valdivia* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 730 (QL) (protection, change; no reviewable error); *Zambrano* v. *Canada (M.C.I.)*, F.C.J. No. 592 (QL) [hereinafter *Zambrano*] (well-founded fear, protection; not persuaded Board committed reviewable error). Other post-*Sivasamboo* rulings by Richard J. upholding Board decisions without reference to patent unreasonableness include: *Poopalasingam* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 190 (QL) (I.F.A.); *Hussain* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 495 (QL) (change); *Morales* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 510 (QL) (credibility); *Oduro* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 515 (QL) (credibility); *Falberg* v. *Canada (M.C.I.)* (19 April 1995), No. IMM-328-94 (well-founded fear, discrimination *vs.* persecution); *Mohamud* v. *Canada (M.C.I.)*, F.C.J. No. 595 (QL) (change, I.F.A.); *Velickovic* v. *Canada (M.C.I.)* (1995), 96 F.T.R. 1 (well-founded fear, prosecution *vs.* persecution). Post-*Stelco* decisions by Richard J. not referring to patent unreasonableness include: *Brown* v. *Canada (M.C.I.)* (1995), 99 F.T.R. 271 [hereinafter *Brown*] (change); *Parameshvaran* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 996 (QL) (credibility); *Botnarenko* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1147 (QL) (discrimination *vs.* persecution, protection); *Oppong* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1903 (QL) (credibility); *Petrisoaea* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1184 (QL) (well-founded fear, prosecution *vs.* persecution); *Sakovich* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1406 (QL) (well-founded fear).

[195] See *Paul* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 187 (QL), Richard J. (well-founded fear; Board's conclusion made without regard to the material before it).

[196] See *Singh and Narang* (Richard J.), *supra* note 193.

[197] See *Chen* (Richard J.), *supra* note 194.

[198] See: *Bukhari*, *supra* note 135; *Yanahida*, *supra* note 135; *Soma*, *supra* note 136.

[199] *Singh and Narang* (Richard J.), *supra* note 193 at 142.

which, despite remarkably similar issues and similar — arguably, equally compelling — grounds for review, Richard J. finds no reviewable error without any reference to absence of patent unreasonableness.[200]

A further survey of judicial review decisions issued in the months following the *Sivasamboo* ruling indicates that, to date, Trial Division judges neither follow nor refer to it.[201] The ruling does, however, occasionally appear to feature implicitly in some of Reed J.'s subsequent decisions. In one, the standard issue is addressed in response to direct arguments that patent unreasonableness alone warrants quashing a Board decision:

> There is no doubt that deference should be paid to the decisions of specialized tribunals, particularly when those tribunals deal with complex technical or social policy matters. ... [T]he closer the decision being made by a tribunal is to the ordinary work of a court, the less deferential a reviewing court will likely be.
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> ...
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> If the use of a test of "patently unreasonable" means no more than that a reviewing court should be alert to the rules of deference ... then, it goes without saying that that verbal formulation is appropriate. ... [I]f it signifies something more, I have difficulty knowing what that is. A test of unreasonableness requires ... a more substantial type of error than mere incorrectness.
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> ...
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> ... The meaning of "patently" ... is "plain" or "obvious". I cannot envisage overturning a decision of a tribunal as unreasonable where the unreasonableness is hidden or where it is not plain or obvious. Also, I cannot envisage refusing to overturn a decision because, while I might find it to be unreasonable, I could not find it to be patently unreasonable. ... I simply do not know what the word "patently" adds to the applicable test.[202]

Reed J. further states that while this "verbal formulation" may differ from that of some colleagues, "I am not persuaded that I differ in result."[203]

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[200] See *Brown*, *supra* note 194.

[201] Muldoon J.'s ruling in *Acosta* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1291 (QL) [hereinafter *Acosta*] (well-founded fear), finding the Board's selective use of documentary evidence "neither unreasonable or capricious or perverse", is the only decision reviewed in which a Trial Division judge other than Richard J. relies on *Sivasamboo* as authority for the patently unreasonable standard and a posture of deference toward the C.R.D.D.

[202] *Efremov* v. *Canada (M.C.I.)* (1995), 90 F.T.R. 259 at 260-61 [hereinafter *Efremov*] (discrimination *vs.* persecution, credibility). It is worth noting that the explicit argument raised by counsel in this case is not chronicled in Trial Division rulings prior to *Sivasamboo* and is rarely mentioned in subsequent cases.

[203] *Ibid.* at 261. Reed J.'s concluding reference to her 1993 *Singh and Narang* decision, *supra* note 147, described as containing a review of authorities "which had led me to conclude as I have"

A later ruling[204] expresses disagreement in principle — albeit not explicitly — with Richard J.'s view of the scope of deference owed the "expert" Board. Upholding a negative Board decision based on findings of implausibility, Reed J. adds somewhat ambiguously:

> I do not accord a high degree of deference to Board decisions. I do not consider the Board to be an expert tribunal in the same way that a Securities Commission is expert in a technical area [citing *Pezim*]. In addition, the statutory provisions of the Immigration Act indicates [*sic*] that privative-clause type deference is not intended. The Board does, however, have extensive expertise as a result of dealing with a large number of cases — although sometimes this has a deadening and fatiguing effect, rather than sharpening an expertise.[205]

Reed J.'s interventions are, however, exceptional. No direct impact of the unresolved theoretical debate over the appropriate scale of deference in the refugee determination context is observable in other Trial Division decisions reviewed since *Sivasamboo*. Richard J.'s conclusions in that ruling do not seem to be influencing the various approaches that Trial Division judges continue to bring, collectively and individually, to their review of C.R.D.D. rulings.

References to patent unreasonableness,[206] deference[207] or to *Federal Court Act* provisions[208] remain sporadic, including within the rulings of those Trial Division judges observed to favour a stringent standard.[209] The cases do suggest increased use by some Trial Division judges, at least some of the time, of indeterminate "reversible" or "reviewable" error language to express the operative norm.[210] In

(*Efremov*, *ibid.* at 261) suggests that the applicable standard remains, in her view, unchanged. Her denial of certification of a question relating to the standard of review of Board decisions once again delays direct confrontation of the issue by the Appeal Division.

[204] See *Connor* v. *Canada (M.C.I.)* (1995), 95 F.T.R. 66, Reed J. (credibility, well-founded fear).

[205] *Ibid.* at 68.

[206] See *e.g.*: *Zelentsov* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 154 (QL), McGillis J. (protection); *Torres* v. *Canada (Sol. Gen.)*, [1995] F.C.J. No. 628 (QL), Simpson J. [hereinafter *Torres*] (well-founded fear, persecution); *Maya-Gomez* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 861 (QL), McKeown J. [hereinafter *Maya-Gomez*] (well-founded fear, change); *Kroon* v. *Canada (M.E.I.)* (1995), 89 F.T.R. 236, 28 Imm. L.R. (2d) 164, MacKay J. (well-founded fear, discrimination *vs.* persecution).

[207] See *e.g.*: *Acosta*, *supra* note 201; *Hristov* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 32 (QL), Cullen J. [hereinafter *Hristov*] (credibility, well-founded fear); *Vega-Solis* v. *Canada (M.C.I.)* (1995), 93 F.T.R. 211, Joyal J. (well-founded fear); *Rokni* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 182, Muldoon J. (credibility).

[208] See *e.g.*: *Okore* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 428 (QL), MacKay J. [hereinafter *Okore*] (well-founded fear, credibility); *Canada (M.C.I.)* v. *Lin*, [1995] F.C.J. No. 1317 (QL), Gibson J. (exclusion).

[209] See Part II.C.1, above.

[210] See *e.g.*: *Zambrano*, note 194; *Dhillon* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 198 (QL), Muldoon J. [hereinafter *Dhillon*] (I.F.A.); *Sethi* v. *Canada (M.E.I.)*, F.C.J. No. 1828 (QL), Joyal J. (well-founded fear); *Singh* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 183 (QL), Denault J. (well-founded fear); *Angeleveska* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 591 (QL), Wetston J. (I.F.A.); *Mohamad* v. *Can-*

broader terms, the impression persists that diversity of approach and of result suggesting a variety of review thresholds continues to characterize Trial Division decisions, whether in review of the Board's treatment of evidence,[211] credibility[212] or of substantive issues, generally.[213]

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ada (M.C.I.), [1995] F.C.J. No. 657 (QL), Cullen J. (well-founded fear, I.F.A.); *Sultana* v. *Canada (Sec'y of State)*, [1995] F.C.J. No. 663 (QL), Simpson J. [hereinafter *Sultana*] (credibility, well-founded fear); *Hossain* v. *Canada (M.C.I.)* (1995), 99 F.T.R. 241, Nadon J. (credibility); *Slavkovic* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 975 (QL), Heald D.J. (discrimination *vs.* persecution, protection); *Jiang* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 980 (QL), Gibson J. [hereinafter *Jiang*] (credibility); *Manoharan* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1111 (QL), McKeown J. [hereinafter *Manoharan*] (well-founded fear, discrimination *vs.* persecution); *Perera* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1215 (QL), Jerome A.C.J. (well-founded fear, credibility).

[211] The voluminous caselaw under this general heading continues to show contrast in Trial Division judges' general and individual approaches to evidentiary issues. Decisions taking a non-interventionist approach include: *Okore*, *supra* note 208; *Radosevic* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 74 (QL), Rouleau J.; *Oscal* v. *Canada (Sec'y of State)*, [1995] F.C.J. No. 211 (QL), Gibson J.; *De Busto* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 262 (QL), Rothstein J.; *Kioreskou* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 457 (QL), Muldoon J.; *Thavamani* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 518 (QL), Wetston J.; *Soma* v. *Canada (M.C.I.)* (1995), 94 F.T.R. 203, Cullen J.; *Liu* v. *Canada (M.C.I.)* (1995), 98 F.T.R. 88, Reed J.; *Yaguna* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 813 (QL), Simpson J.; *Tchernilevski* v. *Canada (M.C.I.)* (1995), 30 Imm. L.R. (2d) 67, Noel J. [hereinafter *Tchernilevski*]; *Singh* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 989 (QL), McKeown J. [hereinafter *Singh (H.)*]; *Hamid* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 1293 (QL), Nadon J. [hereinafter *Hamid*].

Decisions taking a more interventionist approach include: *Bacanu* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 83 (QL), Jerome A.C.J. [hereinafter *Bacanu*]; *Ivanouna* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 197 (QL), Reed J.; *Oblitas* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 280 (QL), Muldoon J. [hereinafter *Oblitas*]; *Kachine* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 214 (QL), Noel J.; *Balasingam* v. *Canada (Sec'y of State)* (17 February 1995), No. IMM-2469-94, Rothstein J.; *Jeyachandran* v. *Canada (Sol. Gen.)*, [1995] F.C.J. No. 487 (QL), McKeown J. [hereinafter *Jeyachandran*]; *Rivas* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 624 (QL), Wetston J.; *Thavanayagapathy* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 629 (QL), Simpson J. [hereinafter *Thavanayagapathy*]; *Ameyaw* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 660 (QL), Cullen J.; *Bougai* v. *Canada (M.C.I.)* (1995), 98 F.T.R. 152, Gibson J. [hereinafter *Bougai*]; *Contreras* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 798 (QL), MacKay J.; *Zrig* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1037 (QL), Pinard J.; *Zidarevic* v. *Canada (M.C.I.)* (1995), 90 F.T.R. 205, 27 Imm. L.R. (2d) 190, Dubé J.

[212] Credibility decisions also continue to indicate marked variety in approach. Rulings taking a strict non-interventionist approach apparently on the basis that credibility questions do not *allow* judicial interference, such as *Islam* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 704 (QL), Tremblay-Lamer J., may be contrasted with decisions undertaking close review of credibility findings (see, in particular: *Sultana*, *supra* note 210; *Ali* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 301 (QL), Gibson J.; *Castro-Andino* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 461 (QL), Pinard J.). Strict non-interventionism is also suggested in, for example: *Jiang*, *supra* note 210; *Amoakohene* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 267 (QL), Rothstein J.; *Dhillon* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 390 (QL), Denault J.

Other rulings declining to interfere with credibility findings include: *Zeng* v. *Canada (M.E.I.)*, F.C.J. No. 368 (QL), Cullen J.; *Ponnampalam* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 511 (QL), McKeown J.; *Boateng* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 517 (QL), Wetston J.; *Singh* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 606 (QL), Pinard J.; *Akinremi* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 808 (QL), Simpson J.; *Chen* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1318 (QL), Gibson J.

Interference with credibility findings remains relatively common (see: *Ganesalingam* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 26 (QL), Wetston J.; *Navaratnam* v. *Canada (M.C.I.)*, [1995] F.C.J. No.

Finally, the subject of tests should be mentioned. Earlier research suggested that "tests" articulated by the Appeal Division in relation to substantive issues might be viewed by Trial Division judges as "specific standard[s] that ... [preclude] the need for recourse to generally applicable ... principles" or for deference.[214] This view is tempered, however, by the further observation that the operative test, where one exists, may not be referred to at all as a basis for evaluating Board decisions.[215] It is

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142 (QL), Rouleau J.; *Opondo* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 324 (QL), McKeown J.; *Garcia-Henao* v. *Canada (Sec'y of State)* (1995), 93 F.T.R. 197, Gibson J.; *Tutu* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1035 (QL), Cullen J. [hereinafter *Tutu*]).

[213] On the issue of well-founded fear and domestic violence, contrast approaches in rulings quashing Board decisions in: *Diluna* v. *Canada (M.E.I.)* (1995), 92 F.T.R. 67, 29 Imm. L.R. (2d) 156, Gibson J.; *Narvaez* v. *Canada (M.C.I.)*, [1995] 2 F.C. 55, 28 Imm. L.R. (2d) 170, McKeown J., on appeal No. A-111-95 [hereinafter *Narvaez*], with: *Manorath* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 134 (QL), Cullen J.; *Sandy* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1012 (QL), Reed J. [hereinafter *Sandy*]. Contrast *Sandy* with Reed J.'s decision of the same day in *Williams* v. *Canada (Sec'y of State)*, [1995] F.C.J. 1025 (QL).

On the issue of discrimination *vs.* persecution, compare approaches in: *Manoharan*, *supra* note 210; *Bougai*, *supra* note 211; *Kadenko* v. *Canada (Sol. Gen.)*, [1995] F.C.J. No. 889 (QL), Tremblay-Lamer J., on appeal No. A-388-95 [hereinafter *Kadenko*], with those in: *Talman* v. *Canada (Sol. Gen.)* (1995), 93 F.T.R. 266, Joyal J.; *Gidoiu* v. *Canada (Sec'y of State)* [1995] F.C.J. No. 537 (QL), Wetston J.; *Victorov* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 900 (QL), Noel J.; *Ramirez* v. *Canada (Sol. Gen.)* (1994), 88 F.T.R. 208, Rouleau J.

On the issue of well-founded fear, contrast interventions in, for example: *Howard-Dejo* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 176 (QL), Noel J.; *Cabello* v. *Canada (M.C.I.)* (1995), 93 F.T.R. 156, Simpson J.; *Annan* v. *Canada (M.C.I.)*, [1995] 3 F.C. 25, Dubé J., with rulings declining to intervene in: *Torres*, *supra* note 206; *Tchernilevski*, *supra* note 211; *Marvin* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 38 (QL), Joyal J. [hereinafter *Marvin*]; *Cheng* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 95 (QL), Wetston J. [hereinafter *Cheng*]; *Toah* v. *Canada (Sec'y of State)*, [1995] F.C.J. No. 857 (QL), Gibson J.

On the issue of persecution, compare approaches of judges quashing Board rulings in, for example: *Vidhani* v. *Canada (M.C.I.)* (1995), 96 F.T.R. 313, McKeown J.; *Rajathurai* v. *Canada (M.C.I.)* (1995), 97 F.T.R. 134, Gibson J. [hereinafter *Rajathurai*], with those taken in: *Singh* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 232 (QL), Denault J.; *Naguleswaran* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 587 (QL), Muldoon J.; *Kandiah* v. *Canada (M.C.I.)* (1994), 87 F.T.R. 72, Cullen J. [hereinafter *Kandiah*].

[214] M.C. Hurley, *Developments in Refugee Law before the Federal Court of Canada: Internal Flight Alternative, Change of Circumstances* (Directed Research paper, Graduate Studies in Law, University of Ottawa, December 1993) at 41-42.

[215] See, for example, I.F.A. decisions issued over the first period of reference in: *Megag*, *supra* note 161; *Tharmalingam*, *supra* note 162; *Gill* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 1458 (QL), Rouleau J; *Chaudhary* v. *Canada (M.E.I.)* (1993), 71 F.T.R. 150, Joyal J. More recent decisions illustrate the same point. Although the Court of Appeal's *Aguebor* "test", *supra* note 108, is frequently relied upon as authority for declining to intervene with adverse plausibility findings (see *e.g.*: *Hristov*, *supra* note 207; *Okore*, *supra* note 208; *Hamid*, *supra* note 211; *Sinha* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 422 (QL), Rouleau J.; *Appau* v. *Canada (M.C.I.)* (1995), 91 F.T.R. 225, on appeal No. A-178-95, Gibson J.) explicit reliance on it is by no means uniform in such cases. Furthermore, rulings quashing credibility findings do not do so as a rule on the basis that intervention is justified *despite Aguebor*, but simply do not refer to it (see generally, credibility decisions cited *supra* note 212). The same observations appear applicable in respect of the "test" stated in *Sagharichi* v. *Canada (M.E.I.)*,

also true that references to appellate authority may not necessarily reflect the "test" as originally stated.[216] Both *caveats* suggest that a more focused evaluation would be required before concluding on how such references, or their absence, affect the standard of review applied under any substantive heading.

In addition, the Board's application of substantive Court of Appeal tests which require it to evaluate inherently relative factors like "reasonableness" when determining refugee status — for instance, assessment of the objective foundation of a claimant's fear or of the availability of an I.F.A. — attracts a broad range of responses from Trial Division judges.[217] Furthermore, one of the effects of a deferential stance could be the sanctioning of potentially suspect Board interpretations of higher authority, as in *Ward*,[218] at a time when judicial analysis and interpretation of the complex issues discussed in that decision and which are increasingly prominent in refugee determination seem prescribed.

Finally, the theoretical levelling influence of the "test" is not necessarily available in respect of a number of substantive areas. At the time of the transfer of review jurisdiction to the Trial Division, the Federal Court of Appeal had not formulated "tests" *per se* for several legal issues[219] or had not yet fully developed principles relevant to their application.[220]

[1993] F.C.J. No. 796 (QL) (C.A.), leave refused (1994), 170 N.R. 159 (S.C.C.), which is often cited in decisions addressing Board findings of discrimination *vs.* persecution (see decisions cited *supra* note 213).

[216] See *e.g.*: *Molina* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 615 (QL), Nadon J.; *Kazi* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 605 (QL), Pinard J. [hereinafter *Kazi*]; *Ravasinghe* v. *Canada (M.E.I.)*, (11 April 1995), No. IMM-1631-94, Nadon J. in which the Appeal Division's ruling in *Aguebor* relating to plausibility is cited as authority for non-interference in cases in which credibility does not appear to be at issue.

[217] Contrast *e.g.*: *Mortera*, *supra* note 161, McKeown J.; *Liyanagamage*, *supra* note 162, McKeown J., with: *Badesha*, *supra* note 161, Wetston J.; *Nalliah* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 403 (QL), Wetston J.; *Kaler*, *supra* note 161, Cullen J.; *Rajaratnam* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 301 (QL), Cullen J.; *Manoharan* v. *Canada (M.E.I.)* (1993), 70 F.T.R. 304, Rouleau J.; *Thambiratham* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 462 (QL), Rouleau J.; *Sahi* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 1398 (QL), Denault J.; *Jbeili* v. *Canada (M.E.I.)*, (23 December 1993), IMM-917-93, Denault J. Contrast decisions of Muldoon J. in *Naganathapillai*, *supra* note 160 and Reed J. in *Eliyathamby*, *supra* note 170, with: *Thambyayah*, *supra* note 168, Gibson J.; *Kulanthavelu*, *supra* note 168, Gibson J. Contrast interpretations of the Court of Appeal's ruling in: *Thirunavukkarasu* v. *Canada (M.E.I.)*, [1994] 1 F.C. 589; *Singh and Narang* (Richard J.), *supra* note 193; *Jeyachandran*, *supra* note 211; *Rajathurai*, *supra* note 213, with those in *Kandiah*, *supra* note 213; *Ravimohan* v. *Canda (M.C.I.)*, [1995] F.C.J. No. 1252 (QL), Muldoon J.

[218] Contrast approaches to Board interpretation of *Ward* in the matter of state protection in, for instance: *Marvin*, *supra* note 213; *Narvaez*, *supra* note 213.

[219] This seems to be the case, for example, in matters relating to application of the "exclusion" clause of the Convention refugee definition, the prosecution *vs.* persecution analysis, the "availment" of protection issue and family unity, to name just a few.

[220] "Change" decisions over the initial period following the transfer are characterized by disagreement over the nature of the analysis required of the Board as well as the interpretation of factors set out in earlier appellate decisions. Contrast: *Villalta* v. *Canada (Sol. Gen.)* (1993), 68 F.T.R. 304, Reed

III. What's Wrong With This Picture?

If any generalization may be advanced based on the foregoing selected survey, it is that no uniform standard has been applied consistently by Trial Division judges when reviewing refugee determination decisions.[221] No unifying features governing the decision-making process appear discernible by judge, by issue, by the traditional classification of administrative error or by the terms invoked in reasons for decision. The language is confusing, and the factors responsible for the shifts in approach among cases decided by the same judge are unknown.

This lack of uniformity both defies and demands further analysis. Why is a single administrative decision-maker subjected to such differing degrees of scrutiny? Does an apparently lesser degree of scrutiny signify deference to the Board or agreement with its findings? Conversely, does closer scrutiny signify mere disagreement on the merits? Which circumstances determine when the Board is entitled to deference? What makes similar Board findings patently unreasonable in some cases, not sufficiently unreasonable in others and reasonable in still others? Why is it open to the Board to weigh and select evidence in some cases but not in others? Why are some adverse credibility findings unassailable by their very nature while others are subjected to close analysis? What are the identifying features of Board errors that justify judicial intervention? What is reversible error? To date, searching for analytically satisfactory answers has been a frustrating endeavour. Nevertheless, likely factors contributing to the current unsettling state of refugee caselaw can be found.

A. *Causes*

Related historical, theoretical and pragmatic considerations may explain both Trial Division judges' varied responses to supposedly "strict" judicial review stan-

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J., on appeal No. A-677-93; *Penate* v. *Canada (M.E.I.)*, [1994] 2 F.C. 79, 71 F.T.R. 171, Reed J., with *Mahmoud, supra* note 162. In *Osei* v. *Canada (Sec'y of State)*, [1994] F.C.J. No. 1083 (QL), Reed J. refused to sign an order, and in *Manu* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 1279 (QL), Nadon J. adjourned a hearing until the Appeal Division had provided further guidance as to the applicable legal test in change cases. The "test", subsequently clarified in *Yusuf* v. *Canada (M.E.I.)* (1995), 179 N.R. 11 (F.C.A.) [hereinafter *Yusuf*], is now frequently cited by some Trial Division judges as mandating non-interference with Board findings of fact relating to change. However, contrast decisions taking this approach in: *Maya-Gomez, supra* note 206; *Singh (H.), supra* note 211; *Kazi, supra* note 216; *Ivanov, supra* note 194; *Echeverria* v. *Canada (M.C.I.)*, F.C.J. No. 1214 (QL), McGillis J, with those interpreting *Yusuf* more broadly when setting aside Board decisions in: *Tutu, supra* note 212; *Jordanov* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 483 (QL), McKeown J. In a third group of change decisions, *Yusuf* is not cited at all as authority for quashing Board decisions (see *e.g.*: *Bacanu, supra* note 211; *Antonio* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 162 (QL), Noel J.).

[221] This does not suggest that Appeal Division decisions necessarily did, either. As suggested earlier, however, the potential for inconsistency seems greater when decision-making is left to single decision-makers as opposed to three-member appellate panels.

dards articulated by the Supreme Court of Canada and their generally fluctuating approach in reviewing Board decisions. First, Trial Division judges have relatively limited experience with judicial review supervision of *quasi*-judicial bodies, in contrast to their much longer history as appellate judges under various statutes.[222] Whether or not some judges have been relying on this appellate experience some of the time, their exercise of the relatively new judicial review role, at least in refugee cases, seems to vary significantly.[223]

Second, mixed messages emanating from the higher courts have probably also contributed to the ambiguous caselaw. As previously discussed, a marked contrast exists between the non-interventionist Common law judicial review norm advocated by the Supreme Court and the interventionist practice of the Federal Court of Appeal in the context of refugee determination. The fact that Trial Division judges are now called upon to apply the same statutory grounds of review in the same context, albeit in a different capacity, may well have contributed to confusion about their role and about the operative standard that finds expression in the disposition of individual cases.

A third factor has been the absence of unanimity at the Supreme Court level regarding the legitimate scope of judicial review and the operation of the deference principle. This consideration, together with the lack of definition of the patently unreasonable test, may also have affected Trial Division judges' willingness to endorse a "very severe", but essentially indeterminate standard that, moreover, the Supreme Court has never applied in the refugee context.

Finally, judicial interference with substantive aspects of administrative decisions is generally acknowledged to be a commonplace feature of judicial review, irrespective of context or nominally applicable standard:

> [W]hile we have chosen that administrative tribunals will play a very important role in modem society, we also hold the common law model of individual consideration very dear, and that for the same reasous that we believe it would be unacceptable not to have a right of appeal in, say, a criminal case, it is equally repugnant to our notion of justice to preclude any sort of substantive reconsideration where other individually significant legal issues are being decided.[224]

[222] See *e.g.*: *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, under which they function as umpires; *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1; *Patent Act*, R.S.C. 1985, c. R-4.

[223] See A. Roman, "The Pendulum Swings Back" (1991) 48 Admin. L.R. 274 at 278-79, who observes that judges invest the term "judicial review" itself with different meanings, and that these unarticulated differences can be crucial to their decision-making processes.

[224] Holloway, *supra* note 42 at 328. See also: A. Hutchison, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 Mod. L. Rev. 293 at 320; J.M. Evans *et al.*, *Administrative Law*, 3d ed. (Toronto: Emond Montgomery, 1989) at 381.

It seems probable that, at least a good deal of the time, Trial Division judges have not confined review of refugee determination rulings to decision-making processes at the Board level but have been influenced by and responsive to merits-based, results-oriented arguments. This would account for apparently hybrid Trial Division decisions in which various judicial review terms seem to be adapted to conclusions concerning the merits of individual refugee claims.

Appeals to judicial sensibilities have long been recognized as significant to the outcome of judicial review:

> [T]he courts intervene when counsel manage to push them across their "threshold of shock." ... [E]xperienced counsel in judicial review matters don't start by trying to persuade the court as to the existence of an error of law on the face of the record or of an error going to jurisdiction, but seek rather to call attention to a *wrong* done their client. Thereafter, once they have the court "on side," the technical aspects of the law of judicial review are put forward as the legally acceptable pegs on which a court may hang its visceral initial conclusion as to the fairness of the matter.[225]

A significant feature of a threshold of shock, or merits-based, approach is that it inevitably depends on triggering a subjective judicial response to substantive circumstantial factors rather than on the objective judicial application of abstract legal tests. Given the rules of judicial review, it is hardly surprising that where the merits of a case are driven home or the threshold of shock is breached, error will be found and the language fitted to an approximate legal standard allowed by the lexicon, including patent unreasonableness. Where the appeal to judicial sensibilities fails, the strict legal test, including absence of patent unreasonableness, will be called upon to justify the opposite conclusion. Such a decision-making process seems to have little to do with standards *per se* or with deference to administrative expertise. It has been suggested, however, that "[t]o reject this realist dynamic outright might amount to a reversion to ... 'bloodless abstractions of process'."[226]

The fine line dividing process and substance may be particularly difficult to maintain in the context of review of refugee determination decisions. Arguably, the current system accentuates this difficulty. Trial Division judges are no doubt familiar with the legislative evolution of the refugee determination process which has resulted in their uniquely defined role within it. The enactment of Bills C-55 and C-86 was dogged by controversy, much of which directly involved that role. The controversy centred largely on process issues. It was argued that, in seeking to expedite the process, the reforms produced a system in which mistakes would inevitably

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[225] H.N. Janisch, "Towards a More General Theory of Judicial Review in Administrative Law" (1989) 53 Sask. L. Rev. 327 at 331-32 [hereinafter "General Theory"]. See also H.N. Janisch, Book Review of *Administrative Law: Rethinking Judicial Control of Bureaucracy* by C. Edley (1992) 37 McGill L.J. 339 at 343-44 [hereinafter "Book Review"].

[226] "Book Review", *ibid.* at 344.

result from a failure to provide internal procedural safeguards.[227] Refugee advocates also raised concerns about altered rules of access to the courts[228] to meet the dominant concern for speedy disposition of large numbers of cases.[229] These features were said to undermine and to be irreconcilable with Canada's protection obligations under both the *Convention* and domestic law.[230]

The legislated narrowing of options available to refugee claimants, combined with the nature of the interests at stake in every refugee claim, have arguably produced the ideal setting for appeals to the judicial threshold of shock and judicial interference with administrative decision-making.[231] Trial Division judges know they represent the denied claimant's first, last and only kick at the can for relief. One might expect this circumstance alone to evoke judicial reluctance to apply a strict review standard or to defer to a Board which, notwithstanding Richard J.'s assessment, differs significantly from those agencies toward which the Supreme

[227] See: *Minutes of Proceedings and Evidence of the House of Commons Legislative Committee on Bill C-55* (Ottawa: Queen's Printer, 1987) at 2:56-58 (J.B. Stern, Chair, former Refugee Status Advisory Committee), 6:32 (P. Duquette), 6:134-36 (Amnesty International), 8:66-68 (Canadian Council for Refugees), 8:178-79 (Union of Employment and Immigration Commission employees) [hereinafter *C-55 Proceedings*]. See also: Canadian Bar Association (Ontario), *Submission to House of Commons re: Bill C-55 Refugee Determination Process* (August 1987) at 58-9 [hereinafter "C.B.A.O. Submission"]; *Minutes of Proceedings and Evidence of the House of Commons Legislative Committee on Bill C-86* (Ottawa: Queen's Printer, 1992) at 4:16, 4A:10-11 (Amnesty International), 4:70 (Inter-Church Committee for Refugees), 5A:19 (Canadian Council for Refugees), 5A:36-37 (Refugee Lawyers Association), 7:9-10 (U.N.H.C.R.), 8:46 (Table de concertation des organismes de Montréal au service des réfugiés Inc.), 8:64-65 (Association québécoise des avocats et avocates en droit de l'immigration), 8:65 (P. Duquette), 8:75 (Refugee Project, Lawyers Committee for Human Rights, New York), 10:10,17 (Canadian Jewish Congress), 10:93 (Quaker Committee for Refugees), 10A:32 (Jesuit Centre for Social Faith and Justice), 11:113, 11A:22-24 (J. Frecker, former Law Reform Commission of Canada ("L.R.C.C.")), 12A:45-46 (V.I.G.I.L.) [hereinafter *C-86 Proceedings*].

[228] See: *C-55 Proceedings*, *ibid.* at 3:5-6, 11, 30 (Canadian Bar Association ("C.B.A.")), 6:9 (Rabbi G. Plaut), 7:6, 11 (Professor W. Angus, Osgoode Hall Law School), 8:69 (Canadian Council for Refugees); "C.B.A.O. Submission", *ibid.* at 60. See also *C-86 Proceedings*, *ibid.* at 4A:68 (Inter-Church Committee for Refugees), 5:25 (Canadian Council of Churches), 5A:36-37 (Refugee Lawyers Association), 7:65 (C.B.A., National Immigration Law Section), 7:117 (Professor J. Hathaway, Osgoode Hall Law School), 8:64 (Association québécoise des avocats et avocates en droit de l'immigration), 11:112 (J. Frecker), 17A:114-15 (C.B.A., National Immigration Law Section).

[229] See: *C-55 Proceedings*, *ibid.* at 9:21ff (Minister G. Weiner); *C-86 Proceedings*, *ibid.* at 2:7, 2A:13 (Minister B. Valcourt), 14:13 (P. Harder, Assistant Deputy Minister, Immigration).

[230] See *e.g.* *C-55 Proceedings*, *ibid.* at 4:6 (Inter-Church Committee for Refugees), 7:18 (Professor J. Hathaway).

[231] See *e.g.*: *Oblitas*, *supra* note 211; *Nadelasingam* v. *Canada (M.C.I.)* (13 December 1994), No. IMM-5711-93 [hereinafter *Nadelasingam*]. These were "borderline" cases in which Muldoon J. allowed judicial review, in the first instance, because "to hold that the application fails could well put [the claimants] on an aeroplane back to Peru" (*Oblitas*, *ibid.* at 6), and in the second, "for better or for worse, in the complete knowledge that there is no appeal to this decision" (*Nadelasingam*, *ibid.* at 7).

Court of Canada has advocated deference.[232] However, as has been noted, judges are certain to vary considerably in their capacity for shock.[233]

B. Cause for Concern

The availability of plausible theoretical explanations for variation in Trial Division judges' decision-making practices does little to alleviate a number of urgent practical concerns and consequences for refugee claimants arising from that variation. The concerns are both structural and normative.

1. The Random Solution

Even under the most favourable circumstances, it is clear that reliance on judicial impulse as a routine or intermittent basis for decision-making may produce disorder and promote an absence of standards. As the confused caselaw described above attests, to accept this acknowledged judicial tendency "to correct error and to respond to claims of unfairness in process and result"[234] as a *de facto* norm of contemporary judicial review would be particularly risky under the current refugee determination system, with prior review of Board decisions absent and further review virtually closed.

Judicial incoherence is not restricted to the refugee context. It has generally been attributed to judges' desire

> to do the right thing, to shield citizens against perceived injustices, to vindicate legal values. These tendencies are so strong that they lead judges to reach results by whatever means come to hand: ... most importantly, selection of a restrained or interventionist approach towards the judges' own role. What happens on the surface of the judgment is, in the cnd, determined not so much by text-book maxims as the judges' conviction that the interest of justice will or will not be served by a particular result.[235]

The refugee context, however, raises several causes for concern peculiar to it. These relate to procedural aspects previously touched upon but which now require closer attention. First, changes effected by Bills C-55 and C-86 have, as suggested, placed refugee claimants at a distinct disadvantage relative to other applicants or claimants subject to federal administrative procedures in other contexts, in terms of

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[232] See text accompanying notes 276-93, below.

[233] See: "Jurisdictional Error", *supra* note 113 at 334; P. Bryden, "Canadian Administrative Law in Transition: 1963-88" (1988) 23 U.B.C. L. Rev. 147 at 163 [hereinafter "Transition"].

[234] D. Brown, "Privative Clauses" in N. Finkelstein & B. Rogers, eds., *Recent Developments in Administrative Law* (Toronto: Carswell, 1987) 53 at 55.

[235] H.W. Arthurs, "Protection against Judicial Review" (1983) 43 R. du B. 277 at 284 [hereinafter "Protection"].

the hierarchy of statutory remedies available to them.[236] Not only have they not been granted an appellate mechanism for substantive review at the administrative level, but their only access to review by the courts has been subjected to an unprecedented leave requirement.[237]

The leave requirement is a genuine refugee's black hole. Leave applications are decided, unless otherwise specified by the judge, in the absence of claimant and counsel and, unless specifically requested, without the complete Board record.[238] According to a study of the period prior to the transfer of review jurisdiction to the Trial Division, single judges of the Federal Court of Appeal were deciding this "make-or-break" access proceeding with statistically significant variations. These results suggested to researchers that claimants did not have an equal chance of convincing the judge that leave ought to be granted.[239] Although no equivalent study has been conducted in respect of individual Trial Division judges' disposition of leave applications, there seems little reason to doubt that it would show similar diversity. Bill C-55 provided no criteria for the determination of leave applications, and the "fairly arguable case" criterion that has been applied in theory[240] is sufficiently ambiguous to support different approaches in practice. Furthermore, in the absence of an appeal from denial of leave or reasons for that denial "there are few objective standards around which a caselaw could develop which could mitigate in favour of a greater uniformity of the application of the law."[241]

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[236] Under other federal statutes, multi-tiered administrative mechanisms are not uncommon in addition to judicial review as of right or *de novo* appeals as of right to the Federal Court of Canada (see *e.g.*: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; *Unemployment Insurance Act*, *supra* note 222; *Public Service Employment Act*, R.S.C. 1985, c. P-32; *Canada Labour Code*, R.S.C. 1985, c. L-2; *Income Tax Act*, *supra* note 222; *Patent Act*, *supra* note 222; *Trade-Marks Act*, R.S.C. 1985, c. T-13).

[237] The leave requirement, while unusual, is not unique in federal law in respect of appellate review of administrative decisions. It does represent a "first" in relation to judicial review. Under section 84 of the pre-Bill C-55 *Immigration Act, 1976*, decisions of the second-level I.A.B. on appeal of first-level administrative decisions regarding sponsorship or deportation had been subject to a leave requirement governing access to further appeal to the Federal Court of Appeal. Bill C-55 did not affect this process but added a leave requirement applicable in respect of appeals of *first-level* C.R.D.D. decisions, which also applies to judicial review of those first-level decisions under Bill C-86.

[238] See Federal Court Rules, r. 10, 14. Refugee claimants face obstacles to gaining access to the leave process itself, owing to growing restrictions in the availability of legal aid for that proceeding in many provinces and the inability of impoverished claimants to retain counsel independently.

[239] See I. Greene & P. Shaffer, "Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?" (1992) 4 Int'l J. Refugee L. 70 at 82. The authors' study showed positive decisions on applications for leave to appeal C.R.D.D. rulings ranging from three percent to 57 percent, with an acceptance rate on combined categories of leave applications varying from nine pereent to 49 percent for an overall acceptance of 25 percent. This figure is higher than that inferred from the available data for the 1993-1995 period.

[240] In *Bains* v. *Canada (M.E.I.)* (1990), 109 N.R. 239, 47 Admin. L.R. 317, the Court of Appeal ruled the leave requirement did not violate section 7 of the *Charter*.

[241] Greene & Shaffer, *supra* note 239 at 81-82. In *Adjei* v. *Canada (M.E.I.)* (1994), 74 F.T.R. 57, Reed J., in dismissing a motion to reconsider a decision denying leave, acknowledged that the claimant "had no way of knowing why leave had not been granted" (*ibid.* at 59) owing to the absence of

Federal Court annual reports do not show percentages of leave applications granted at the Trial Division level. According to figures obtained from the Federal Court Immigration Registry, 13,228 applications for leave were instituted by refugee claimants from February 1, 1993 to October 31, 1995. The total number of judicial review proceedings commenced over the same period is 1,920. It cannot be assumed that these figures overlap precisely to provide an exact percentage of leaves granted overall. Leave applications filed one year may not be decided until the following year; leave applications allowed may not be reviewed until the following year. Some judicial review proceedings tallied represent files in which leave was granted under the pre-Bill C-86 regime. Nevertheless, assuming substantial overlap, the figures indicate a low acceptance rate at the leave stage. A government statistical summary covering the period up to November 1, 1993 suggested that approximately one leave application in five had been successful since 1989, with the percentage down slightly in 1993.[242] If this approximation holds to the present, only twenty percent of refugee claimants denied at the Board level are granted access to judicial review, as compared to one-hundred percent access for applicants in any other context. Thus, refugee claimants to whom leave is granted may be said to have already "survived" one lottery-like process.[243] Because judicial review is not finally determinative of refugee claims, some are subjected to the process more than once.[244]

The leave screening mechanism may be an unacknowledged factor favouring the shock approach in the ensuing judicial review, influencing at least some Trial Division judges to be susceptible to merits-based arguments at least some of the

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reasons and accepted arguments that the Board's credibility decision was substantially flawed. Nevertheless, in Reed J.'s view, the "fairly arguable test" requires the claimant to show "not only ... that there may be substantial errors in the decision under review but also that on the evidence as a whole the applicants' case is an arguable one" (*ibid.*). Because her decision denying leave "was not based on a conclusion that the Board's decision was valid but on the lack of merit to the claim on its face, the procedure followed in issuing that decision becomes irrelevant" (*ibid.* at 60). Because reasons are very seldom issued on leave applications, the result of this approach is that, in addition to leaving the claimant in the dark, the Board is left uninstructed and unimpeded with respect to significant flaws in its procedure and decision-making.

[242] See Citizenship and Immigration Canada, *Refugee Determination and Resettlement* (Ottawa: C.I.C., 1994). From inquiries to Citizenship and Immigration Canada, it would appear that no more recent version of this document has been prepared.

[243] In 1992, the former L.R.C.C. suggested it was unlikely that inconsistency in Board decision-making could be remedied by Federal Court judges because "the basis on which questions of interpretation reach the Federal Court is itself unpredictable" (L.R.C.C., *The Determination of Refugee Status in Canada: A Review of the Procedure*, Draft Final Report (Ottawa: L.R.C.C., 1992) at 82 [hereinafter *Determination*]). An example of the unpredictability of the leave process is found in *Shaju* v. *Canada (M.C.I.)* (1996) 97 F.T.R. 313, Nadon J. In that case, an application for leave was denied by Joyal J. without reasons in January 1994 and the applicant's motion to reopen the Board hearing was also denied on the basis of Joyal J.'s ruling. In January 1995, MacGuigan J. then granted the applicant leave to challenge the Board's denial on grounds similar to or the same as those rejected by Joyal J. Nadon J. applied the doctrine of issue estoppel.

[244] See *infra* note 356.

time. This, however, offers little assurance that the genuine refugee can weather a second process characterized by similar unpredictability.

A second significant procedural element involves the certification process introduced by Bill C-86, under which rulings rendered on immigration and refugee judicial review applications filed after February 1, 1993 became the only final Trial Division decisions not appealable as of right.[245] The certification requirement appears to be both unprecedented in Canadian law and more draconian in effect than rare analogous measures adopted in other Common law jurisdictions.[246]

According to government spokespersons, the changes wrought by Bill C-86 were essentially plumbing;[247] the certification process would not be left to Trial Division judges' discretion without any guidelines.[248] In practice, by its very nature the process has been, as intended, entirely restrictive.[249] The limited nature of "certified" appeals was confirmed in an Appeal Division ruling, noting that the effect of certification in a pre-Bill C-86 file — in respect of which an appeal remained available as of right — was that "the Appellant's rights of appeal have been unnecessarily restricted, in the sense that his ground of appeal is limited by the question stated."[250] Furthermore, the notion that once a question *was* certified in a post-Bill C-86 file, the Court of Appeal might, within its jurisdiction, consider all aspects of the appeal[251] has also been put to rest. The Appeal Division has ruled that not only must a certified question "be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of

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[245] See: text accompanying note 104; *Federal Court Act* 1992, *supra* note 94 at s. 27.

[246] In hearings before the House of Commons Legislative Committee on Bill C-86, the process was defended by pointing to a similar provision in the British *Criminal Appeal Act 1968* (U.K.), 1968, c. 19, s. 33(2), under which no appeal lies to the House of Lords unless the Court of Appeal has certified that a point of law of general importance is involved (see *C-86 Proceedings*, *supra* note 227 at 14:64 (E. Bowie, Assistant Deputy Minister, Litigation Section, Department of Justice). The British model differs significantly from the Bill C-86 process, in that it occurs at a "higher rung" in the judicial hierarchy, taking place only *after* an appellate court has already rendered a decision. The same distinction applies to the process referred to in *Huynh*, *supra* note 8, in which the Constitution of the State of Florida subjects appeals from district courts of appeal to the State Supreme Court to certification by the former (see Fla. Const. art. V, s. 3(*b*)(4)).

[247] See *C-86 Proceedings*, *ibid.* at 2:28 (Minister B. Valcourt).

[248] *Ibid.* at 14:59-62 (E. Bowie).

[249] In other words, its drafters intended it to be used only if a matter "really raised a question of law," or if this was a case "to which the time of three appellate court judges should be devoted" (*ibid.* at 14:62 (E. Bowie)).

[250] *Villalta* v. *Canada (Sol. Gen.)* (3 February 1994), No. A-677-93 (interlocutory ruling). Inadvertent application of the certification process occurred because in the immediate post-Bill C-86 period, Trial Division judges were dealing with three different categories of files, not all of which were subject to certification.

[251] This had been the view expressed by Rothstein J. in *Ramoutar* v. *Canada (M.E.I.)*, [1993] 3 F.C. 370 at 379-80, 65 F.T.R. 32, on appeal No. A-403-93.

broad significance or general application", but "the jurisdiction of the Court where a question is certified ... is limited to an appeal on the question certified."[252]

A subsequent Trial Division decision that found the certification process in compliance with the *Charter*'s fundamental justice norm was blunt about the implications of the limitation, stating that certification is not dependent on the facts of the case and is divorced from its disposition.[253] For the genuine refugee, whose claim may hinge largely on factual issues specific to his or her situation, divorcing the facts from the process aggravates the problem of reduced access to appeal. Given the numbers of judicial review proceedings involved, the low numbers of questions certified appear to support this conclusion.[254]

The low number of questions certified and a review of decisions in which certification has been requested also attest to the intrinsically discretionary nature of the process.[255] This is reflected in reasons given for granting or denying certification in cases raising various issues of equal significance[256] as well as in contrasting views among Trial Division judges as to what constitutes a "serious question of general im-

[252] *Liyanagamage*, *supra* note 162 at 5. Décary J. added that the Court should not "be unduly restrictive in interpreting the scope of [that] question" (*ibid.*).

[253] See *Huynh*, *supra* note 8 at 646-47, 651.

[254] According to information obtained from the Federal Court, from February 1 to December 31 1993, ten questions were certified in post-Bill C-86 files, of which two duplieated previously certified questions. In 1994, 17 appeals were filed in post-Bill C-86 files. In 1995, 44 appeals had been lodged in the Appeal Division to October 31, 1995 (telephone interview with Federal Court, Judicial Information Services (November 1995)).

[255] In *Illanko* v. *Canada (Sol. Gen.)* (1995), 93 F.T.R. 284, 27 Imm. L.R. (2d) 106 [hereinafter *Illanko*], Simpson J. explicitly affirms the discretionary nature of certification.

[256] For cases in which certification was granted, see *e.g.*: *Sharbdeen*, *supra* note 168; *Murugiah*, *supra* note 172; *Narvaez*, *supra* note 213; *Kadenko*, *supra* note 213; *Seifelmlioukova* v. *Canada (M.E.I.)* (1994), 83 F.T.R. 229, Denault J.; *Casetallanos* v. *Canada (Sec'y of State)*, [1995] 2 F.C. 211, Nadon J., on appeal No. A-73-95 [hereinafter *Casetallanos*]. For cases in which certification was denied, see *e.g.*: *Antonio*, *supra* note 145; *Hercules*, *supra* note 165; *Visagaperumal*, *supra* note 172; *Sun*, *supra* note 175; *Bouianova* v. *Canada (M.E.I.)* (1993), 67 F.T.R. 74, Rothstein J.; *Jeyakumaran* v. *Canada (M.E.I.)* (1994), 74 F.T.R. 64, Wetston J.

portance" in cases raising the same issue.[257] This, in turn, suggests that the certification process has compounded the potential for ongoing, overall inconsistency.[258]

Consistency in administrative decision-making is valued.[259] Stephen Legomsky's comprehensive article[260] on forum selection in the immigration context notes that, as a component of the adjudication process, a review system shares the goals generally associated with administrative procedure, including accuracy, efficiency, acceptability and, overlapping these three, consistency:

> One benefit of consistency is enhanced stability. Conflicts among equally authoritative bodies have ways of becoming reconciled eventually, either by gradual evolution or by pronouncements from above. The mere presence of a momentary conflict, therefore, can create at least the perception of imminent change, leaving affected sectors of the population uncertain how to plan for the future. Consistency reduces this uncertainty. ...
>
> [Another] reason for valuing consistency is one that does not fit neatly within any of the three traditional goals of administrative procedure. Consistency assures equal treatment of similarly situated litigants.[261]

It is clear that Bill C-86 has virtually eliminated access to "pronouncements from above" that would remedy inconsistency at the Trial Division level.

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[257] Questions denied or granted certification by different judges may relate to issues that have been controversial among Trial Division judges, such as the "test" for "change" prior to the *Yusuf* ruling of the Court of Appeal, *supra* note 220. Contrast: *Bhuiyan, supra* note 126; *Boateng, supra* note 165; *Bonilla, supra* note 165, with *Hassanzadeh-Oskoi, supra* note 163.

In declining to reconsider his denial of certification in *Bhuiyan* in the interests of consistency in the certification process, MacKay J. commented that such consistency was only significant if the underlying facts of different cases were clearly similar. Otherwise, the role of the Trial Division in "finally disposing" of cases would be hampered. This, in his view, "would ignore the evident intention of Parliament ... to provide an expeditious process for final determination of refugee claims by the Trial Division except where the underlying facts of the claim and its disposition ... give rise to a serious question of general importance" (*Bhuiyan* v. *Canada (M.E.I.)* (1994), 77 F.T.R. 286 at 289).

[258] In addition to differing views on substantive aspects, Trial Division judges have also taken different approaches to the question of the timing of certification itself. Contrast approaches in: *Illanko, supra* note 255, Simpson J.; *Cruz* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 185 (QL), Simpson J., with those in: *Popov, supra* note 153, Reed J.; *Isa* v. *Canada (Sec'y of State)* (1995), 91 F.T.R. 71, 28 Imm. L.R. (2d) 68, Reed J.; *Paukovac* v. *Canada (M.C.I.)* (1994), 89 F.T.R. 227, Gibson J.; *Sheikh* v. *Canada (Sec'y of State)* (6 February 1995), No. IMM 2814-94, Gibson J.; *Casetallanos, supra* note 256, Nadon J.

It is also worth noting, however, that on occasion the certification process has been resorted to for the specific purpose of resolving Trial Division inconsistencies on substantive questions (see *e.g. Kadenko, supra* note 213).

[259] See: *Domtar, supra* note 22 at 784ff; H.W. MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984) 8 Dalhousie L.J. 435 at 446; Y.-M. Morissette, "Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse" (1986) 16 R.D.U.S. 591 at 632ff.

[260] See S.H. Legomsky, "Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process" (1986) 71 Iowa L. Rev. 1297.

[261] *Ibid.* at 1313-14.

Absence of consistency is potentially more harmful, in Legomsky's view, when the outcome of a case is particularly critical for the litigant, as it is in such "high stakes" cases that "[t]wo of the interests that uniformity serves — predictability and equality — assume greater importance".[262] The refugee caselaw reviewed suggests that at present neither a sensitivity to the high stakes issues nor an understanding of the need to resort to substantive precepts to protect individual interests[263] has been able to deliver uniform practice. In fact, process features of the present system militate against uniformity. The system seems unsuited to, or incapable of, remedying the potential for actual harm arising from unpredictable and unequal results in the disposition of individual applications.

The most obvious harm is to genuine refugees who are mistakenly denied status at the Board level, denied relief from that mistake because of an elusive, individually variable judicial norm and for whom no other form of relief is available. The coherent development and application of legal principles relevant to refugee determination also suffer. Uncertainty in the law, for all concerned — including Board members denied adequate guidance in their decision-making processes — becomes an altogether foreseeable consequence.

2. The Very Severe Solution

That Trial Division judges reviewing Board decisions currently invoke a patently unreasonable test at all, or indeed any deferential, high threshold standard, however erratically, is a legitimate area of concern. Under the present refugee determination process, negative repercussions for genuine refugees seem equally inevitable with the application of an unduly severe standard. A second concern is that a high threshold standard risks becoming increasingly entrenched as the operative standard, not because it is appropriate, but because of considerations antithetical to the purpose and promise of refugee determination under the *Convention* and domestic law.

One such consideration involves the workload of Trial Division judges, which has undoubtedly increased significantly as a direct result of Bill C-86.[264] Although six "C-86 judges" were named to the Trial Division specifically to deal with the backlog of cases transferred from the Appeal Division,[265] the suggestion that this

[262] *Ibid.* at 1321.

[263] See Hutchison, *supra* note 224 at 320.

[264] The total number of proceedings commenced in the Trial Division jumped from just over 5,000 in 1992 to around 11,500 in 1993, with a decrease to approximately 8,500 in 1994:

> Immigration has proved to be the most significant source of new proceedings in both 1993 and 1994, with 8,454 new proceedings commenced in 1993 (including [those] transferred from the Court of Appeal) and 5,224 commenced in 1994 (*F.C.C. Report 1994*, *supra* note 99 at 13).

[265] See *C-86 Proceedings*, *supra* note 227 at 14:12-13 (P. Harder).

measure could effectively reduce the impact of such a sudden jump in the Trial Division's inventory was questioned from the outset.[266] Parliament's failure to transfer any of the existing Trial Division caseload, such as the high volume of appeals under the *Unemployment Insurance Act*,[267] to other judicial fora has meant that the thousands of leave and hundreds of judicial review applications in refugee matters have placed enormous additional demands on stretched judicial resources.[268] The resulting time pressures affecting all Trial Division judges on a continuous basis might, over time and however inadvertently, influence the degree of scrutiny they are prepared to bring to bear on C.R.D.D. decisions.[269] Judicial workload appears to be considered an increasingly relevant factor in establishing the threshold of judicial review generally[270] and may assume a particularly prominent, if unspoken, role in high-volume areas, such as refugee determination.[271] However unpalatable, given the interests at stake in the refugee context and the procedural weaknesses implemented by Bill C-86, the prospect of such an eventuality should not be underestimated.

A second factor that might propel Trial Division judges into a more uniform high threshold approach involves the generally negative public attitude toward immigrants and queue-jumping "bogus" refugees. As Legomsky has noted, sharp increases in the volume of immigrants to the United Kingdom and the United States have been accompanied historically by corresponding increases in anti-immigrant sentiment.[272] The Canadian reaction to higher refugee claimant numbers since the late 1980's, fanned by anti-immigration predictions of growing unemployment and recession, has been no different. In Legomsky's view, judicial decisions may be influenced by contemporary political forces in society, either because judges are susceptible to or share prevailing public opinion, or because they are hesitant to defy that opinion.[273] In theory at least, this factor, conflicting as it does with the presumptive judicial impulse to protect individual interests, may also influence the inconsistency of approaches discussed earlier.

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[266] See *ibid.* at 7:64, 7:67 (L. Waldman), 11:113, 11A:24 (J. Frecker).

[267] *Supra* note 222. According to the Office of the Umpire, Trial Division judges sitting as umpires heard 3,352 unemployment insurance appeals in 1992-1993. In 1993-1994, the figure was 3,811, with a backlog of 7,435 pending appeals. The former L.R.C.C. had recommended since 1980 that this workload be transferred to some other jurisdiction (see: L.R.C.C., *Judicial Review and the Federal Court*, Report 14 (Ottawa: Department of Supply & Services, 1980) at 21 [hereinafter *Judicial Review*]; L.R.C.C., *Independent Administrative Agencies* (Working Paper No. 25) (Ottawa: Department of Supply & Services, 1980) at 156).

[268] In their capacity as *ex officio* judges of the Trial Division, Appeal Division judges did decide over a thousand leave applications in both 1993 and 1994 (see *F.C.C. Report 1994*, *supra* note 99 at 10).

[269] See *C-86 Proceedings*, *supra* note 227 at 4A:68 (Inter-Church Committee for Refugees).

[270] See "The 1990-91 Term", *supra* note 20 at 31.

[271] The high-volume factor may also, of course, be relevant at the leave application stage.

[272] See S.H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1987).

[273] See *ibid.* at 241-42.

Leaving aside these considerations — and even assuming that a consistently applied severe standard might be preferable to none at all — Supreme Court of Canada rulings and administrative law scholarship suggest persuasively that the inherently indeterminate and subjective patently unreasonable standard is incapable of consistent implementation. Like Reed J., critics have noted that the distinction drawn between "patently unreasonable" and "reasonable" or "clearly wrong" is largely semantic. The lack of practical criteria of rationality against which to measure when a threshold level of acceptability has been crossed renders the test unworkable as a basis for judicial assessment;[274] it also reduces the test to a threshold of shock exercise in which "patently unreasonable" serves as new jargon for *post hoc* rationalization once a court has decided, for whatever reason, to intervene or to defer. Without the type of structure that might make patent unreasonableness a helpful concept, courts are left with considerable discretion to embark on expansive review. The other side of the coin, of course, is that egregious errors may elude judicial control on the basis that they are not sufficiently unreasonable.[275] Much of the refugee caselaw testifies to the validity of these criticisms and to the validity of concerns related to the absence of prior or subsequent procedural safeguards in the present refugee determination system.

Limited potential for consistent application is not unique to the patently unreasonable test, and it is not the only objection to its application in review of C.R.D.D. decisions. A fundamental question concerns whether that Board qualifies as an "expert" agency entitled to curial deference irrespective of errors committed within its jurisdiction. A review of the literature highlights a number of relevant points. Rules of deference developed largely in a labour relations context may be less compelling where, as in most areas of administrative law (including refugee law), the relationship between the parties is not ongoing. Judicial review issues do not lend themselves to monolithic standards; generalizations based on labour relations experience fail to account for the distinctiveness of administrative regimes. Most judicial review decisions from the Supreme Court of Canada have been concerned with mature administrative tribunals having a claim to judicial respect; not all tri-

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[274] See Roman, *supra* note 223, who suggests that judges appear to have at least three different views as to what it is that is reviewed for patent unreasonableness: "Debate is likely to be protracted, if not endless, if we have three significantly different ways of describing the same thing" (*ibid.* at 280).

[275] For further discussion of these and related points, see: "Formalism", *supra* note 12 at 372-73; "Jurisdictional Review", *supra* note 46 at 261; "Jurisdictional Error", *supra* note 113 at 327; Roman, *ibid.* at 282; "General Theory", *supra* note 225 at 331; "Transition", *supra* note 233 at 153; Morissette, *supra* note 259 at 613-14, 641; D.J. Mullan, "Judicial Deference to Administrative Decision-Making in the Age of the Charter" (1986) 50 Sask. L. Rev. 203 at 208 [hereinafter "Age of the Charter"]; B.A. Langille, "Judicial Review, Judicial Revisionism and Judicial Responsibility" (1986) 17 R.G.D. 169 at 207; R. Yalden, "Deference and Coherence In Administrative Law: Rethinking Statutory Interpretation" (1988) 46 U.T. Fac. L. Rev. 136 at 153-54; B. Etherington, "Arbitration, Labour Boards and the Courts in the 1980s: Romance Meets Realism" (1989) 68 Can. Bar Rev. 405 at 408; D. Dyzenhaus, "Dicey's Shadow" (1993) 43 U.T.L.J. 127 at 140.

bunals can make this claim. Furthermore, notwithstanding legislative choice of the statutory body as decision-maker, deference should be earned, and "an undifferentiating or universal application of the patently unreasonable standard is simply not appropriate."[276] A need exists for "differentiated deference or a sliding scale of entitlement to court respect".[277]

Generally acknowledged *indicia* of expertise include qualifications required for appointment, length of term of office and security of tenure.[278] Although agency expertise is an important factor in determining when curial deference is appropriate, the term "expert" is not synonymous with "infallibility"[279] nor necessarily indicative of equivalent competence for all boards or panels within boards.[280] Unless administrative decision-makers engage in a process "which is consistent with [a] purposive, field-sensitive approach"[281] and have the capacity and the expertise to do so, "hand-waving references to judicial restraint will only ensure that the entire legal system co-operates in a collective denial of responsibility."[282]

Turning this critical perspective on the Board, there is no doubt that the semi-privative leave requirement in place since Bill C-55's enactment reflects Parliament's intention to limit high-volume review of Board decisions as a means of ensuring expedited finality of decision-making. On the other hand, refugee claimants who satisfy that statutory screening requirement are also statutorily entitled — since the Bill C-86 "plumbing" exercise — to judicial review. In this ambiguous circumstance, the Board's mandate, structure and history are most relevant to determining whether it is owed deference as an expert agency.

With respect to Richard J.'s opposing view, at a theoretical level, the Board's mandate does not entail the administration of a complex statutory scheme or broad policy-making or regulatory functions of the sort considered by the Supreme Court in *Pezim* to warrant a deferential posture. Some might argue the C.R.D.D.'s more confined role in interpreting and applying the *Immigration Act*'s definition of Convention refugee confers "expert" status in practice. However, this factor, while relevant,

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[276] D.J. Mullan, "The Supreme Court of Canada and Jurisdictional Error: Compromising New Brunswick Liquor?" (1988) 1 Can. J. Admin. L. & Pract. 71 at 97 [hereinafter "Compromising"]. See also D.J. Mullan, "The Future of Canadian Administrative Law" (1991) 16 Queen's L.J. 77 at 78 [hereinafter "Future"].

[277] "Compromising", *ibid.* at 100-101. See also: "Formalism", *supra* note 12 at 372-73; "Jurisdictional Review", *supra* note 46 at 261; "Jurisdictional Error", *supra* note 113 at 323; Roman, *supra* note 223 at 289; "Book Review", *supra* note 225 at 342ff; "Age of the Charter", *supra* note 275 at 208; A. Harvison Young & R.A. Macdonald, "Canadian Administrative Law on the Threshold of the 1990's" (1991) 16 Queen's L.J. 31 at 42-43.

[278] See: "Compromising", *ibid.* at 99-100; "Future", *supra* note 276 at 78ff.

[279] See T.D. Schiller, "Paccar of Canada Ltd.: Curial Deference for the 1990s?" (1990) 40 Admin. L.R. 290 at 299.

[280] See: Roman, *supra* note 223 at 289; "Formalism", *supra* note 12 at 378-79.

[281] "Formalism", *ibid.* at 376-77.

[282] *Ibid.* at 373.

should be assessed in context. For the Board, the context includes its structure as a regional, first-level decision-maker in matters of fundamental human rights that is not subject to substantive review by a superior administrative body prior to judicial review proceedings.

Equally importantly, the Board is a relatively immature agency whose credibility as an expert board has been continuously called into question since its 1989 creation. Criticism has focused largely on the appointment process and its consequences for decision-making. Well before the introduction of Bill C-55, reports to the federal government on reforming the refugee determination system stressed that the "care with which individual decision-makers and panellists of the [proposed Refugee Board] are selected will reflect the commitment of government to the true nature of the determination process".[283] Prior to the Bill's enactment, the need for quality appointments to the C.R.D.D. was again emphasized as essential to the agency's ability to function credibly and with consistency.[284] Nevertheless, the appointment process under Bills C-55 and C-86 remained non merit-based and open to charges of patronage. The I.R.B. is not exceptional in this regard. The implications flowing from a flawed appointment process related to refugee determination, however, are exceptional.

From 1989 to 1992, repeated highly publicized and embarrassing incidents of non-expert behaviour by ill-equipped or ill-disposed appointees were followed by the introduction, *via* Bill C-86, of a mechanism for judicial inquiry into the conduct of C.R.D.D. members.[285] Both the 1993 I.R.B.-commissioned report on deficiencies in the conduct of refugee hearings[286] and the 1992 Draft Final Report of the former L.R.C.C.[287] on refugee determination procedures underscored the appointment process' compromising effects on the integrity of the refugee determination system and the urgent need for introducing merit-based recruitment to the Board.[288] More "field-sensitive" (but shorter term) appointments by Minister of Citizenship and Immigration Sergio Marchi from 1993 to 1995 did not alter the inherently political

[283] Report to the Minister of Employment and Immigration, *Refugee Determination in Canada* by G.W. Plaut (Ottawa: M.E.I., 1985) at 133-34 [hereinafter Plaut Report]. See also Report to the Minister of Employment and Immigration, *A new refugee status determination process for Canada* by E. Ratushny (Ottawa: M.E.I., 1984) [hereinafter Ratushny Report], observing that "the fairness of the process will depend not only upon procedural requirements, but also upon the quality of the decision-maker" (Ratushny Report, *ibid.* at xii).

[284] See *e.g. C-55 Proceedings, supra* note 227 at 2:51-52 (M. Falardeau-Ramsay, former Chair, I.A.B.), 5:26 (L. Waldman).

[285] See *Immigration Act, supra* note 83 at ss. 63.1, 63.2, as am. by Bill C-86, *supra* note 9 at s. 53. The inquiry process, initiated by the Minister on the I.R.B. Chair's recommendation, provides for a member's removal from office for misconduct or incompatibility with the execution of office.

[286] See Report to the Chairperson of the Immigration and Refugee Board, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* by J.C. Hathaway (Ottawa, 1993) [hereinafter Hathaway Report].

[287] See *Determination, supra* note 243.

[288] See: Hathaway Report, *supra* note 286 at 19-26, 37-42; *Determination, ibid.* at 141-46.

and discretionary nature of the process. In fact, the Board's vulnerability to politically-charged dissent among members became particularly apparent in the wake of these appointments, paralleled as they were by the non-renewal of many former appointees.

In the fall of 1994, the Liberal-appointed I.R.B. Vice-Chair resigned following his suspension by the Conservative-appointed Chair on the basis of C.R.D.D. members' allegations that they were "bullied" for higher refugee acceptance rates. This event accentuated the agency's political volatility and deepened divisions within it.[289] Related charges and counter-charges by polarized present and former members, refugee advocates and refugee policy critics over the C.R.D.D.'s role and practice multiplied over this period in a highly open forum,[290] further compromising the agency's ability to function effectively.[291] Since this low-water mark, charges of incompetence have continued to be levelled against the agency.[292]

In short, the Board's claim to expertise over its brief but controversial history has not been that of a stable, mature agency. These factors, combined with weaknesses in procedural protection afforded refugee claimants, seem to argue strongly that a high threshold, deferential standard is simply unsuitable under present circumstances.[293]

In March 1995, the Minister of Citizenship and Immigration and the I.R.B. Chair simultaneously announced initiatives to revise the refugee determination hearing to a special board of inquiry model,[294] introduce single-member Board pan-

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[289] The resignation pre-empted the first Federal Court inquiry initiated under the Bill C-86 mechanism (see *supra* note 285).

[290] See: "Choosing the Refugee Board" *The [Toronto] Globe and Mail* (15 November 1994) A22; S. Delacourt, "Marchi Accused of Impropriety in Refugee Board Squabble" *The [Toronto] Globe and Mail* (15 November 1994) A4; L. Sarick, "Power Struggle at IRB Could Be Fatal, Observers Say" *The [Toronto] Globe and Mail* (18 November 1994) A5; R. Platiel & E. Greenspon, "Schelew Resigns; Inquiry Cancelled" *The [Toronto] Globe and Mail* (10 December 1994) A1; S. Fine, "IRB Furor Reflects on Lawyers" *The [Toronto] Globe and Mail* (10 December 1994) A10-11; "But What About the IRB?" *The [Toronto] Globe and Mail* (13 December 1994) A22.

[291] In January 1995, the I.R.B. was reported to have instituted a formal mechanism for dealing with public complaints about Board members in an attempt to restore public confidence (see A. Thompson, "Refugee Panel Gets System for Complaints" *The Toronto Star* (4 January 1995) A9).

[292] See: "Refugee Board Called Incompetent" *The [Toronto] Globe and Mail* (15 March 1995) A4; D. Stoffman, "Canada's Farcical Refugee System" *The [Saint John] Telegraph Journal* (6 September 1995) A9; A. Norris, "Refugee Board Not Rife With Incompetence — Official" *The [Montreal] Gazette* (2 October 1995) A4.

[293] It has been suggested that "the case for deferring to an agency's interpretation is less compelling when the decision under review has apparently jeopardized the very interests that the agency was created to protect" ("Jurisdictional Review", *supra* note 46 at 259). See also text accompanying notes 344ff, below.

[294] See Immigration and Refugee Board, News Release, "Refugee Status Determination Process to be Strengthened" (3 March 1995) [hereinafter I.R.B. Release].

els[295] and reform the appointment process. The first two reforms were criticized by many on the basis that they would aggravate rather than remedy existing Board problems, with serious implications for the safety of refugee claimants.[296] The projected "highly unusual" move to single-member Boards[297] was seen as one which, owing to its potentially negative impact, ought at least to have been accompanied by an internal review mechanism.[298] Furthermore, although the proposed board of inquiry model purported to be along the lines of recommendations in the Hathaway Report, the author was quoted as stating that the model would not solve existing problems and would, in fact, change little.[299]

Ironically, I.R.B. documents outlining the "improved" refugee hearing process cited Richard J.'s conclusions in *Sivasamboo* as to the Board's entitlement to significant curial deference in support of a claim of increasing acknowledgment of Board expertise in Federal Court decisions.[300] In fact, no such broad conclusion can be drawn from the cases reviewed. As discussed previously, Trial Division judges continue to show highly variable attitudes toward the Board generally and, on occasion, more or less openly question Board members' grasps of procedural and substantive issues.[301]

The third March 1995 reform involved the creation of a five-member Advisory Committee, mandated to subject all applications for appointment to the I.R.B. to a selection process based on objective standards provided by the Minister and to form

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[295] See News Release 95/03, *supra* note 107.

[296] See: "Marchi Moves 'Weakening' Board" *The [Victoria] Times-Colonist* (3 March 1995) A14; D. Rinehart, "Refugee-Board Changes Will Make System Worse, Critics Say" *The [Montreal] Gazette* (7 March 1995) A8; M. Farrow, "Tougher Refugee Hearings Feared" *The [Vancouver] Sun* (4 March 1995) A22.

[297] D. Rinehart, "Marchi to Revamp Refugee Boards, Appeal Process" *The [Montreal] Gazette* (2 March 1995) A10 [hereinafter "Revamp Refugee Boards"].

[298] See: M. Cornellier, "Les aspirants réfugiés seront entendus par un seul commissaire" *La Presse* (3 March 1995) B5; L. Sarick, "Refugee Board to Assign Single Person Panels" *The [Toronto] Globe and Mail* (3 March 1995) A4 [hereinafter "Single Person Panels"].

[299] See: L. Sarick, "Refugee Hearing Process Reformed" *The [Toronto] Globe and Mail* (4 March 1995) A5. See also M. Valpy, "The Suspicion of a Gelded Refugee Process" *The [Toronto] Globe and Mail* (7 March 1995) A2.

[300] See "Backgrounder" in I.R.B. Release, *supra* note 294. The I.R.B. Chair reiterated this assertion in testimony before the House of Commons Standing Committee on Citizenship and Immigration (see *Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Citizenship and Immigration* (Ottawa: Queen's Printer, 1995) at 41:7).

[301] See *e.g.*: *Thavanayagapathy*, *supra* note 211; *Njoko* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 119 (QL), Jerome A.C.J.; *Canada (M.C.I.)* v. *Salazar*, [1995] F.C.J. No. 562 (QL), Nadon J.; *Diallo* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 893 (QL), Noel J., as well as Appeal Division rulings such as *Nizamov* v. *Canada (M.E.I.)*, [1995] F.C.J. No. 805 (QL). It is worth noting that the Hathaway Report excerpt cited in *Sivasamboo*, *supra* note 179 at 757-58, in support of Richard J.'s view of the Board as "expert" is an introductory description of the purported purpose for which the C.R.D.D. was established, not a conclusion. As noted earlier, the report was in fact critical of the Board.

an inventory of suitable candidates.[302] In announcing this important policy shift, Minister Marchi stated his commitment "to recommend to the Governor in Council, only those candidates for appointment or re-appointment who have been recommended by the Advisory Committee".[303] At the same time, negative reaction to proposed single-member Board panels was anticipated by the suggestion that the proposed Advisory Committee could or would resolve the thorny competence issue.[304]

Although some critics greeted this initiative more positively,[305] others expressed reservations on grounds that the selection process would not affect present appointments and that the Advisory Committee might not be sufficiently isolated from political pressures.[306] While the Advisory Committee model is less than ideal in that it reflects ultimately discretionary ministerial policy rather than a legislated norm,[307] it seems to offer the best hope to date for developing the Board's expert potential. However, even assuming the Advisory Committee can, as is hoped, positively influence the overall competence of decision-making at the Board level, it is not at all apparent that this factor alone could resolve other enduring concerns about the present system. These continue to centre around the question of whether, in light of consequences of mistakes in refugee determination, first-level panels composed of single decision-makers named to short terms and whose decisions are not subject to internal review can, or should, be considered expert bodies entitled to broad immunity from the sole avenue of review available to refugee claimants. Institutional factors such as these arguably outweigh the benefits of greater competence from the outset.

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[302] See Citizenship and Immigration Canada, News Release, "Minister Marchi Announces Advisory Committee for Selecting Board Members" (2 March 1995) [hereinafter C.I.C. Release].

[303] "Backgrounder", reproduced in C.I.C. Release, *ibid.*

[304] Another Minister's statement discussing the proposed committee declared:

> We want the best people for the job [of Board member]. It is mandatory that the best people are named to the board because the reduction in panel size requires unquestioned and unflinching competence from every member (Speaking notes of Minister S. Marchi for the House of Commons (2 March 1995), reproduced in C.I.C. Release, *ibid.*).

[305] Hathaway described the move as "philosophically a really important change" that would "[work] very well, and ... [avoid] a whole lot of political flak" (J. Miller, "Merit System Promised for Refugee Board" *The Ottawa Citizen* (3 March 1995) A3).

[306] See: R. Boulakia, "Board 'Reform': Plus ça change ...". *Refugee Update* (Spring 1995) at 9; "Single Person Panels", *supra* note 298. As has been observed, only two members "will clearly and necessarily be 'advocates for refugees' in the sense used by both Board supporters and detractors. These are the representatives from the bar and from non-governmental organizations involved in refugee matters" (Library of Parliament, *The Immigration and Refugee Board: Proposed Changes* (Background Paper No. BP-399-E) by M. Young (Ottawa: Library of Parliament, 1995) at 15). Of the remaining members, one is chosen by the government from the general public; both the Committee Chair and the I.R.B. Chair are order-in-council appointees, as are the *ex-officio* I.R.B. Vice-Chairs.

[307] This feature is highlighted by the February 1996 federal Cabinet shuffle, in which former Minister of Citizenship and Immigration Marchi, who had given his personal undertaking to respect the Committee's recommendations, was moved to another portfolio.

IV. The Promise: Dusting Off a Modest Proposal

A consideration of the problems associated with judicial review principles and practice in the context of refugee determination leads to the issue of remedial options. If, as contended, judicial review of refugee determination decisions has not yet provided an effective route for addressing the current system's potential for harm to genuine refugees, the question becomes how best to reduce that potential.

A. *The Tinkering Approach*

The tinkering approach contemplates defining a standard of review in light of the refugee context and the Board's characteristics that would prove capable of consistent implementation by Trial Division judges. A number of factors militate against such an approach. First, it probably amounts to a largely academic exercise in circumstances calling for more immediate remedial potential. Numerous reforms of considerable theoretical interest have been proposed over the years but have had little noticeable effect on judicial practice.[308]

Second, although the notion of tailoring the scope of permissible judicial intervention to specific agencies has been thought to have considerable merit,[309] such scaling is also viewed as an "excruciatingly difficult task".[310] Even if an appropriate "scale" could be articulated, the "standard" approach presumes that uniformity and consistency of application are attainable objectives in judicial review[311] — a presumption which has yet to prove justified. Standards are by their nature conceived in value-laden terms such as "rational", "fair", "reasonable", "substantial" and "relevant", all susceptible to myriad subjective interpretations or usages and "threshold of shock" inconsistency: "Law tends to be particularly uncertain when judges apply semantic formulae which convert subtle or highly subjective differences in degree to the language of qualitative distinction."[312] Although the present refugee determination system certainly calls for a low-threshold, non-deferential standard to redress the absence of procedural safeguards available to refugee claim-

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[308] See *e.g.*: "General Theory", *supra* note 225; N. Lyon, "Continuing Search for a General Theory of Judicial Review of Administrative Action for Legality" (1980) 58 Can. Bar Rev. 646; N. Lyon, "Reforming Administrative Law" (1989) 2 Can. J. Admin. L. & Pract. 315; D.J. Mullan, "Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill L.J. 250; J.M. Evans, "Developments in Administrative Law: The 1988-89 Term" (1990) 1 Supreme Court L. R. (2d) 1 [hereinafter "The 1988-89 Term"].

[309] See: "Book Review", *supra* note 225 at 341, 349-50; D.J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform" (1973) 23 U.T.L.J. 14 at 43, 51.

[310] "Book Review", *ibid.* at 343.

[311] See "The 1990-91 Term", *supra* note 20: "There must be standards" (*ibid.* at 37).

[312] Roman, *supra* note 223 at 280. See also: "General Theory", *supra* note 225 at 336; "Protection", *supra* note 235 at 284.

ants, it seems doubtful that such a standard, if capable of articulation,[313] would effect that redress or reduce apparent — albeit good faith — arbitrariness in judicial decision-making.

The problem of defining just standards for judicial review is not exclusive to the refugee context. The refugee context, however, is exceptional in the nature of consequences flowing from the problem and in the scope of statutory procedural restrictions imposed upon refugee claimants, making the problem particularly acute. The harmful results of inconsistency at the judicial level do not, however, appear to have their roots at that level, nor do they seem capable of meaningful redress through tinkering with standards. Administrative law scholars have argued that, in general, judicial review is unlikely to compensate for inadequacies of administrative decision-making.[314]

B. The Body-Work Approach

Substantive reconsideration of negative decisions has been accepted as an integral feature of a fair refugee determination system since long before the *Singh* decision. At the international level, the U.N.H.C.R. Executive Committee, of which Canada is a member, recommended in 1977:

> If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or a different authority, whether administrative or judicial, according to the prevailing system.[315]

Although not binding, this recommendation has been viewed as "a minimum standard to which the Canadian system should conform,"[316] and one which is not satisfied by providing only for recourse to the Federal Court by way of leave. At the domestic level, refugee advocates have sought without success, since before the *Immigration Act, 1976* was proclaimed in 1978, to warn successive governments

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[313] See *e.g.* "The 1988-89 Term", *supra* note 308 at 57-58, where a "rights-based approach" is discussed.

[314] See H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1:

> Judicial review, seen as general deterrence, is a less promising method of securing proper administrative decisions at first instance than a host of other methods ...
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> ...
>
> Constructive measures to enhance the original quality of decisions will not result in perfection, but they will, in the aggregate, ensure greater justice for more people than could possibly benefit from any system of judicial review. Such measures would include ... more careful training of administrative decision-makers, systems of internal appeal ... (Arthurs, *ibid.* at 41-44).

[315] *Report of the Executive Committee of the Program of the U.N. High Commissioner for Refugees*, UN GAOR Doc. A/AC.96/549 (1977) para. 53.6.

[316] *Determination*, *supra* note 243 at 101-102.

that the absence of adequate mechanisms for review on the merits of negative decisions in successive refugee determination systems would result in predictable inefficiencies and inevitable injustices to genuine refugees.[317]

The following discussion concentrates on internal review. It opens with a brief review of the feasibility and theoretical advantages of judicial appeal on the merits before the Federal Court. The discussion assumes the Board's continued jurisdiction over first-instance decisions.[318]

1. Judicial Appeal on the Merits

Refugee claimants have never had an appeal on the merits to the Federal Court; appeal under Bill C-55 was a narrower recourse, given both the leave requirement and the merging of judicial review and appeal grounds in immigration and Federal Court statutes.[319] Although a number of factors might seem to favour this form of appeal, it has not been widely advocated as a mechanism of formal reconsideration.[320] These include judicial impartiality, judicial independence from administrative and political institutions and influence, broad authority to reverse erroneous first instance decisions and, in theory, avoidance of ambiguities of process, result and posture associated with judicial review.

These benefits, while undoubtedly significant, seem on balance largely outweighed by other considerations. In the current political climate, a minimally viable review mechanism would have to satisfy not only *Convention* obligations to protect genuine refugees, but also political obsession with fiscal constraints, expeditious process and real or perceived abuse of the refugee system. One might certainly argue these latter factors ought not to exert a determining influence in light of the interests at stake; it would be difficult, however, to maintain that they do not. Realistically, then, not only would cost and delay factors associated with judicial appellate review[321] prove politically unacceptable, but equally importantly, the option would require legislative backpedalling to a more liberal version of an already discarded appellate option. The political choice of narrow judicial review, with its surrounding procedural impediments, as the sole judicial recourse available under the *Immigration Act*, does not appear likely to be countermanded.

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[317] See *e.g.*: *C-55 Proceedings*, *supra* note 227 at 2:58 (J.B. Stern), 5:6-7, 13, 34 (L. Waldman), 6:41 (K. Zaifman), 6:159 (Nanaimo Immigrant Settlement Society and Refugee Committee). See also "C.B.A.O. Submission", *supra* note 227 at 1.

[318] Recent upheavals at the Board prompted some observers to call for the replacement of lay Board members as first instance decision-makers by immigration judges or the transfer of Board jurisdiction to a refugee division of the Federal Court (see: F.C. Leclerc, "Faulty Justice: Immigration Tribunals Have Been a Disaster" *The [Montreal] Gazette* (14 November 1994) B3; Stoffman, *supra* note 292).

[319] See text accompanying notes 88-98, above. See also: *C-55 Proceedings*, *supra* note 227 at 8:69 (Canadian Council of Churches); "C.B.A.O. Submission", *supra* note 227 at 57-59.

[320] In 1992, the Refugee Lawyers Association did recommend that Federal Court review of Board decisions be on the merits (see *C-86 Proceedings*, *supra* note 227 at 5:64).

[321] See T.G. Ison, "Appeals on the Merits" (1992) 30 Osgoode Hall L.J. 139 at 146.

On the assumption that appeals on the merits to the Federal Court were either politically palatable or feasible, it is open to question whether they would, in theory, provide the most appropriate avenue for formal reconsideration of negative Board decisions. The 1985 Plaut Report suggested that a fair refugee determination model might consist of an initial hearing by a three-member panel followed by an appeal as of right to the Federal Court of Appeal for purposes of compliance with the 1977 recommendation of the U.N.H.C.R. Executive Committee.[322] In this structure, Rabbi Plaut considered an appeal on the merits of "questionable value" owing to the relative inexpertise of the Federal Court in areas affecting refugee determination.[323]

Ten years later, the Federal Court remains a general court of law, not a specialist court. As such, arguably, it is still not the appropriate body to conduct an appeal on the merits in the absence of the expert first instance Board panel envisaged by Rabbi Plaut.[324] Federal Court judges have undoubtedly acquired experience in dealing with issues relevant to refugee determination. On the other hand, the breadth of the Federal Court's adjudication jurisdiction and the ensuing diversity and volume of workload militate against its ability to develop special expertise in refugee law issues, such as applicable international norms and country conditions.[325]

In theory, the review and remedial scope of judicial appeal on the merits before the Federal Court would present advantages over the present judicial review process. It has been argued, however, that an "overriding difficulty" with statutory provision for appeals on the merits to courts of general jurisdiction is that it might not work. Ison suggests: "[W]hen legislatures have provided for an unrestricted appeal from a tribunal to a court, the judges have tended to shrink the scope of that appellate jurisdiction to a point at which it is indistinguishable from judicial review."[326] The explicit merging of appellate and judicial review values and roles in the post-*Pezim* era seem to argue against introducing a potentially "shrunken" judicial appeal on the merits as the sole

[322] See Plaut Report, *supra* note 283 at 108-10.

[323] *Ibid.* at 170-71.

[324] See: "C.B.A.O. Submission", *supra* note 227 at 59; *C-86 Proceedings, supra* note 227 at 10:17 (Rabbi Plaut). But see also *C-86 Proceedings, ibid.* at 8:75 (Refugee Project, Lawyers Committee for Human Rights, New York), describing the "evidentiary merits element" to refugee appeals to federal courts in the United States.

[325] Nor does the creation of a specialized Immigration Division equipped with the human, research or documentation resources, arguably necessary to provide a meaningful appeal on the merits, seem a realistic prospect. The idea of a special administrative law division within the Federal Court was raised as long ago as 1977, on the basis of workload considerations that would seem equally germane in 1995 (see *Administrative Law, supra* note 114 at 66. See also *Judicial Review, supra* note 267 at 24). Although Ison has noted that appellate courts of specialized jurisdiction have advantages over generalist courts, he also points to a strong tradition against creating such courts (see Ison, *supra* note 321 at 152-53). Presumably, a specialized appellate Immigration Division within the Federal Court is just as unlikely.

[326] Ison, *ibid.* at 151.

remedial avenue for formal reconsideration open to refugee claimants.[327] Such a mechanism might differ little in practice from the present process and might fail to address concerns outlined under previous headings, including judicial preoccupation with rationing of resources in a high-volume area like refugee determination.

Finally, creation of an appeal structure within the Federal Court might hinder necessary reforms at the Board. Arguably, judicial appeal would not address problems of primary adjudication or enhance Board efficiency and might divert the focus away from improvements in the Board's expertise and structures.[328] Under present circumstances, the I.R.B. would appear better suited institutionally to build on existing resources in order to deliver the expertise required for quality decision-making at first instance, and to develop expert structures for formal reconsideration that would satisfy concerns for cost effectiveness and expeditiousness.

2. Internal Appeal

Internal appeal is the review option consistently favoured by refugee advocates and frustrated at the political level since the beginning of contemporary refugee determination in Canada.

Three expert reports prepared for the Liberal government during the early 1980's addressed already existing systemic problems of the process introduced in 1978. The authors called for comprehensive change to that inaugural system to reduce delays that promoted abuse and imposed hardship for those with legitimate claims[329] and warned against reliance on the courts' "blunt solution" to address inadequacies in the refugee determination process.[330] A full hearing for initial determination as well as a clearly-defined administrative appeal to assess the factual and legal correctness of that initial decision were judged essential.[331] It was seen as imperative, in light of the consequences of mistakes, that refugee claimants benefit from standards of procedural protection equivalent to those afforded through the criminal system.[332] The government was urged to take action and cautioned against complacency that would erode Canada's "fortunate position" of being able to prevent potential problems from materializing.[333]

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[327] An appeal on the merits in refugee cases would have to extend to examination of factual issues, a task judges have traditionally been unwilling to undertake (see Ison, *ibid.* at 152).

[328] See *ibid.* at 143.

[329] See Report to the Minister of Employment and Immigration, *Illegal Migrants in Canada* by W.G. Robinson (Ottawa: M.E.I., 1983) at 107-108.

[330] Task Force on Immigration Practices and Procedures, *The Refugee Status Determination Process* (Ottawa: M.E.I., 1981) at xix, 76. Previously, the L.R.C.C. had recommended that "immigration appeals" should be transferred from the Federal Court to a specialized administrative tribunal (see *Judicial Review*, *supra* note 267 at 21, 24).

[331] See Ratushny Report, *supra* note 283 at 45, 53.

[332] See *ibid.* at 33.

[333] *Ibid.* at 21.

In April 1985, the Plaut Report commissioned by the Progressive Conservative government expanded upon these concerns. It cautioned that tension between government strategies relating to immigration enforcement and refugee determination "must not ... shade the ensuing process to the detriment of the [refugee] claimant".[334] Of three possible models proposed for the refugee determination process,[335] two incorporated internal appeal procedures, with subsequent appeal by way of leave to the Federal Court of Appeal seen as adequate, provided the grounds of appeal were sufficiently broad. The third provided, as described in the previous section, for initial determination by a three-person panel of experts, with appeal as of right to the Federal Court of Appeal in the absence of an internal mechanism for formal reconsideration.

Government rejection of an internal appeal mechanism for substantive review of the merits of Board decisions prior to limited-access court proceedings prompted heated repudiation of the system introduced by Bills C-55 and C-86. Apologists defended the chosen system on the basis that "front-loading" it with quality Board hearings ensured adequate procedural protection.[336] In response, it was argued that the absence of safeguards for non-criminal refugee claimants would fail to remedy inconsistent decision-making by a regionally-based Board and, given the nature of decisions being made, increase the chances of mistakes going unchecked under narrow grounds of appellate or judicial review.[337]

Not surprisingly, the Bill C-55 system led Rabbi Plaut to conclude that it "is not a bill to determine refugee status primarily; it [is] a bill on how to deport people primarily".[338] With the advent of Bill C-86, while abolition of the credible basis tribunal freed resources that might have been allocated to an internal appeal structure,[339] proposals along those lines were again rejected in favour of increasingly restrictive procedures.

Governmental recognition of weaknesses in the refugee determination system owing to the absence of such a mechanism has continued to surface. In January 1994, then Minister of Citizenship and Immigration Marchi, a strong supporter of internal appeal while in opposition and during the first days of the Liberal government,[340] commissioned yet another study into the possibility of creating an appeal

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[334] Plaut Report, *supra* note 283 at 18-19. The need for maintaining a clear distinction between immigration and refugee processes has been a source of ongoing concern (see *e.g. Determination, supra* note 243 at 53ff.).

[335] See Plaut Report, *ibid.* at 107-19.

[336] See: *C-55 Proceedings, supra* note 227 at 9:21-22 (Minister Weiner); *C-86 Proceedings, supra* note 227 at 2:35 (Minister B. Valcourt).

[337] See *supra* notes 227, 228.

[338] *C-55 Proceedings, supra* note 227 at 6:7.

[339] See: *Determination, supra* note 243 at note 136, p. 107; *C-86 Proceedings, supra* note 227 at 5A:19 (Canadian Council For Refugees).

[340] See A. Thompson, "Minister Wants a More Hospitable Refugee Policy: Proposals Would Make Appeals System Easier for Failed Claimants" *The Toronto Star* (28 November 1993) B4.

process for refugee claimants within the I.R.B. The March 1994 Davis-Waldman Report proposed a centralized, written appeal of all negative C.R.D.D. decisions as the "best compromise to satisfy the competing concerns of cost-effectiveness, efficiency and fairness".[341] Despite expectations that the shift to single-member Board panels would be tempered by the introduction of such a process,[342] internal review was once again "conspicuously absent"[343] from the Minister's March 1995 announcement.

In fact, research into the actual operation of Bill C-55 confirmed predictions that inconsistent decision-making by the regionally-based Board would be an inevitable repercussion of failing to provide for internal review.[344] In addition, Trial Division caselaw also appears to bear out the concern that, in practical terms, judicial review has not addressed inconsistencies in decision-making at the Board level.[345]

The I.R.B. has made various attempts internally to address problems of inconsistency; these have themselves proved controversial and have given rise to judicial review.[346] Moreover, they do not represent or replace substantive review. The March

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[341] Report to the Minister of Citizenship and Immigration, *The Quality of Mercy: A study of the processes available to persons who are determined not to be refugees and who seek humanitarian and compassionate treatment* by S. Davis & L. Waldman (Ottawa: March 1994) at 46 [hereinafter Davis-Waldman Report].

[342] Up to days before the March 2 announcement, press reports suggested a system of review of negative decisions *would* be introduced (see: L. Sarick, "Immigration Board Calculates a Way to Save $3-Million" *The [Toronto] Globe and Mail* (24 February 1995) A2 [hereinafter "Calculates"]; "Revamp Refugee Boards", *supra* note 297).

[343] "Single Person Panels", *supra* note 298.

[344] According to the L.R.C.C. report:

> One of the major problems observed ... is great inconsistency in the way in which cases essentially indistinguishable on their facts are decided [by the C.R.D.D.]. We also observed wide variation from region to region in the rate of acceptance of refugee claimants from particular countries. Regional disparities in refugee acceptance rates confirm, not the supposed value of independence of individual decision-makers, but a failure of fairness within the system. If the refugee determination process in Canada is to be anything more than a lottery, it is imperative that measures be taken to promote greater consistency (*Determination, supra* note 243 at 82).

Board inconsistency has been acknowledged by government (see *e.g. C-86 Proceedings, supra* note 227 at 2:35, for then Minister Valcourt's justification of Bill C-86 amendments on the basis that they would ensure greater consistency).

[345] See *Determination, ibid.* at 82. Trial Division judges before whom the issue is raised are placed in an at best awkward position (see: *Tawfik, supra* note 126; *Cader* v. *Canada (M.E.I.)* (1 June 1993), No. A-181-93, Reed J.; *Shahzanian* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 724 (QL), MacKay J.; *Shivatharshini* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 1213 (QL), McGillis J.; *Ponnampalam* v. *Canada (M.C.I.)* (1995), 30 Imm. L.R. (2d) 178, Muldoon J. (application to stay removal order).

[346] See Trial Division decisions discussing a "consistency project" initiated by Board officials in: *Gyimah* v. *Canada (M.E.I.)* (1994), 83 F.T.R. 34, 25 Imm. L.R. (2d) 132, Simpson J.; *Asare* v. *Canada (M.C.I.)* (1995), 94 F.T.R. 283, Rothstein J.; *Oduro* v. *Canada (M.E.I.)* (1993), 73 F.T.R. 191, MeKeown J. For Appeal Division decisions upholding the Board's "reasons review policy", see: *Weerasinge, supra* note 8 at 337; *Bovbel* v. *Canada (M.E.I.)*, [1994] 2 F.C. 563, 18 Admin. L.R. (2d)

1995 "Operational Framework" for the new board of inquiry refugee hearing model might be interpreted by some as a small step toward review. Perhaps seeking to deflect adverse reaction to the government's introduction of down-sized Board panels and its failure to provide for an internal review structure, the document indicated, under the heading "Other Initiatives", that the I.R.B. would "supervise more closely the [Board's] exercise of its jurisdiction to reopen cases where there may have been a breach of the principles of natural justice so as to ensure that a coherent and systematic approach is adopted".[347] However, this statement of intention merely reflects already existing authority to reconsider "natural justice" cases. Even on a generous reading, the exercise of that authority does not qualify as internal review, as that term is generally understood, and would benefit relatively few claimants.

The prospect of lone decision-makers does indeed heighten the need for a review mechanism capable of correcting erroneous Board decisions and promoting institutional coherence. Expert reports have recommended means to achieve those goals while reducing the need for recourse to the Federal Court. The Davis-Waldman Report and the Draft Final Report of the former L.R.C.C., for example, proposed mechanisms having a number of common elements, which echoed aspects of options considered by Rabbi Plaut a decade ago. In all three proposals, the effectiveness of internal review was premised on the expertise of those recruited to conduct it.[348] Most importantly, the internal processes proposed would apply as of right. While all three reports have either assumed or sanctioned limited access to subsequent *judicial* proceedings, under certain circumstances, they have viewed internal substantive review as of right — because it has the greatest potential to correct mistakes made at first instance — as necessary to offset this otherwise-unacceptable restriction.

The two most recent reports underscore other important distinctions between the level of protection afforded by internal appeal or review and by judicial review by way of leave. First, because a principal and explicit function of internal appeal or review would be to correct mistakes, neither report suggested that first-instance decision-makers should be entitled to deference for reasonable or any other errors.[349] Both reports also considered it essential that the reviewing body not be limited to the record of the original proceeding — as is the case in judicial review proceedings — but be able to consider new evidence relevant to the claim. Furthermore, internal review or appeal

169, rev'g [1994] 1 F.C. 330. For decisions relating to the use of "boiler plate" reasons in Board decisions, see: *Fainshtein* v. *Canada (M.C.I.)*, [1995] F.C.J. No. 941 (QL), Simpson J.; *Singh* v. *Canada (M.C.I.)* (27 January 1995), No. A-988-92, Noel J.

[347] Immigration and Refugee Board, *Refugee Status Determination Process: Specialized Board of Inquiry Model* (Ottawa: I.R.B., 1995) at 12.

[348] This stands to reason, since the creation of such a mechanism would, in and of itself, be of limited value in the absence of greater attention to development of the Board's potential as an expert agency through merit-based appointments and adequate training.

[349] This makes sense. A deference requirement would complicate the process, undermine the purpose of review at the administrative level and arguably amount to a mini judicial review exercise indistinguishable for all practical purposes from the real thing.

would involve the entire record rather than the partial record upon which leave applications determining access to judicial review are generally decided.[350]

The L.R.C.C. report characterized internal review as "a complement to, rather than a replacement for judicial oversight".[351] In fact, both reports saw internal review as a means of avoiding or of simplifying subsequent court proceedings:[352]

> Since there would now be a two stage process involving examination of credibility issues and legal issues, it is anticipated that the role of the Federal Court would be significantly diminished. The number of cases in which successful applications for judicial review would be launched would be far fewer than at present.[353]

This consideration highlights a further fundamental distinction between internal and judicial review. Under both proposals, the reviewing body's broad authority to remedy mistakes might be expected to achieve the much desired expedited finality of decision-making in a significant number of refugee claims.[354] The remedial limitations of judicial review,[355] on the other hand, produce prolonged, costly and potentially repetitive[356] shuttling of refugee claimants between the Board and the Trial Division of the Federal Court because of errors, omissions or misidentified or unresolved issues at first instance. In this light, the rejection of internal review seems doubly unfortunate as well as short-sighted. Reduced operating costs for the I.R.B. and the Federal Court might be expected to more than compensate for those associated with an internal review mechanism.[357]

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[350] See Davis-Waldman Report, *supra* note 341, which foresaw that, as a result, the task of Federal Court judges at the application for leave stage would be eased by ensured access to an adequate record of prior proceedings (see *ibid.* at 48).

[351] *Determination*, *supra* note 243 at 124.

[352] See *ibid.* at 106, 107-108, 113, 126, 136-37.

[353] Davis-Waldman Report, *supra* note 341 at 48.

[354] Testifying before the Legislative Committee on Bill C-86, John Frecker reiterated the position of the L.R.C.C. report, stating: "[T]he planners of the system seem to have a pathological fear of introducing effective review of appeal rights, because they see that as an opportunity for people to use due process to obstruct quick disposition of claims." Frecker predicted that the failure to provide for internal review might "have the perverse effect of causing more delay" (*C-86 Proceedings*, *supra* note 227 at 11:109, 113, 11A:22-4).

[355] See the *Federal Court Act* 1992, *supra* note 94 at s. 18.1(3).

[356] For the applicants in *Singh and Narang* (Richard J.), *supra* note 193, Richard J.'s decision referring the matter back to the Board for redetermination was the second to grant judicial review following two negative Board decisions reached on different grounds. Reed J.'s 1993 ruling *Singh and Narang* (Reed J.), *supra* note 147. This sort of situation may be said to attest not only to absence of expertise but also to the inadequacy of present Board processes to catch mistakes. The claimants in *Dhillon*, *supra* note 210, and *Cheng*, *supra* note 213, were denied judicial review on their second "round", despite judicial recognition of evidence indicating the claimants faced difficulties upon return to their countries of origin.

[357] According to one report, in 1995 the Federal Court required a budget increase of 11.6 million dollars for refugee cases, while the cost of "C-86" judicial appointments is approximately 1 million dollars annually (see "Revamp Refugee Boards", *supra* note 297). It was also reported that the inter-

A final point involves the dilemma of judicial inconsistency previously identified in Trial Division caselaw. Although a two-level administrative process would not directly eliminate all factors contributing to judicial inconsistency, arguably the potential for harm arising from it would be largely diminished as a result of systematic screening for factual and legal errors by a specialist reviewing authority prior to judicial proceedings. Furthermore, a two-stage process conducted by qualified decision-makers would result not only in a reduced workload for Trial Division judges, but also in the elevation of the notion of comparative expertise into a relatively more reliable factor when, as admitted non-experts, they decide judicial review applications of refugee claimants.

Conclusion

The Canadian refugee determination system has evolved as a product of three related factors: the 1985 *Singh* decision of the Supreme Court of Canada mandating oral hearings for refugee claimants; significant, rapid increases in numbers of refugee claimants; and the inability or unwillingness of government to respond to either in a timely or appropriate fashion. Successive wholesale legislative changes culminating in the present system lead one to conclude that "[i]t is easier to accept the principle of protection and deny it in practice than to deny the principle."[358] The result is that genuine refugees pay the price:

> The refugee crisis was certainly not caused by *Singh*. ... *Singh* dictated the *form* of our response. *There shall be hearings*. But this form could in no way contradict the substance: not more but rather less generosity in granting refugees admission to the country. The right to a hearing turned out to be no more than a consolation prize for our stinginess ...[359]

For genuine refugees, neither front-loading the system with a flawed Board nor "plumbing" it through the transfer of supervisory jurisdiction to single judges of the Federal Court has worked to their benefit with consistency. Trial Division judges have, understandably, been unable to avoid varied responses to the clash of theory and practice produced by the junction of an ill-defined judicial role, a particular legislative evolution and the *Convention*'s promise of protection to genuine refugees. A growing body of caselaw attests to the inadequacy of judicial review as a first-line review mechanism under the current system.

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nal review structure anticipated in March 1995 would cost 2.5 million dollars, resulting in a significant net savings to the streamlined Board (see "Calculates", *supra* note 342).

[358] D. Matas, "Fairness in Refugee Determination" (1989) 18 Man. L.J. 71 at 76.

[359] M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994) at 250. See also D.J. Mullan, "Natural Justice — The Challenges of *Nicholson*, Deference Theory and the *Charter*" in N.R. Finkelstein & B.M. Rogers, eds., *Recent Developments in Administrative Law* (Toronto: Carswell, 1987) 1 at 48-49.

If anything, inherent limitations of judicial review signal the ongoing need for a substantive internal review mechanism under qualified decision-makers to redress present gaps in procedural and substantive protection prior to compelling refugee claimants to seek the courts' "blunt solution". While repeated government rejections of this formal reconsideration model are said to arise out of a "deep-seated fear that the system will be open to serious abuse if liberal appeal rights are extended to refugee claimants",[360] it might also be argued, from the perspective of the genuine refugee, that the denial of such a mechanism represents a failure to provide the promised measure of reasonable protection.

In 1985, Rabbi Plaut commented that Canada's "adherence to the U.N. *Convention* and the incorporation of its principles into Canadian law are flags we have run up on our pole of moral purpose, and there they must continue to wave".[361] Internal review continues to offer, as refugee advocates have argued all along, the best option for ensuring that contradictions between Canada's commitment and its practice are resolved and the promise of non-*refoulement* fully honoured. Until the necessary reform is realized, the flags on Canada's pole of moral purpose fly at half mast.

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[360] J.P. Frecker, "Reform of the Refugee Determination Process" (Paper presented to the Conference on Canadian Immigration Law and Policy II, 10-11 May 1991) at 29 [unpublished].

[361] Plaut Report, *supra* note 283 at 179.