

WEIGHING EVIDENCE



**Legal Services
Immigration and Refugee Board
December 31, 2003**



MEMORANDUM NOTE DE SERVICE

To/à

All members and RPOs/Tous
commissaires et les APR

From/de

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Classification
File / Dossier Evid_memo.doc
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Date 2004-04-01

Subject/Objet

Weighing Evidence Paper/Appréciation de la preuve

Attached please find the updated Weighing Evidence paper, dated December 31, 2003, prepared by Legal Services. This work is intended to assist decision-makers in the three Divisions of the IRB. The electronic version is available in Intranet and in the IRB's website.

This update replaces the previous version of the paper in its entirety. It incorporates caselaw up to December 31, 2003.

The following Legal advisors contributed to the update of the paper:

Michael Park (Chapter 1, 6.9, 6.10 and the coordinator of the paper),
Linda Koch (Chapters 2, 3 and 7),
Lori Disenhouse (Chapters 4 and 5),
Matthew Oommen (Chapters 6.1 and 6.18),
Shirley Novak (Chapters 6.2 and 6.6),

Vous trouverez ci-joint le document sur l'appréciation de la preuve, dans sa version mise à jour en date du 31 décembre 2003. Préparé par les Services juridiques, ce document vise à aider les décideurs des trois sections de la CISR. La copie électronique est disponible dans l'intranet et dans le site Web de la CISR.

Cette version mise à jour remplace la version précédente du document au complet. Elle fait état de la jurisprudence au 31 décembre 2003.

Les conseillers juridiques suivants ont contribué à la mise à jour de ce document :

Michael Park (chapitres 1, 6.9, 6.10)
(coordonnateur du document),
Linda Koch (chapitres 2, 3 et 7),
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Matthew Oommen (chapitres 6.1 et 6.18),
Shirley Novak (chapitres 6.2 et 6.6),

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Richard Tyndorf (Chapters 6.4, 6.5, 6.14 and 6.16),
Ritva Ahti (Chapters 6.7 and 6.15),
Wendy Reid (Chapter 6.8),
April Curtis (Chapters 6.11 and 6.12),
Marie-Claude Roberge (Chapter 6.13),
Gordon Hayhurst (Chapter 6.17),
David Schwartz (Chapter 8), and,
Ariane Cohen (Appendix).

The paper is reviewed annually to determine whether it requires updating. We want to be sure that it meets your needs. If you have any comments about the format or the content of this work, please forward them to Michael Park, Legal Services, Vancouver.

Marie-Claire Le Van Mao (chapitres 6.3 et 6.8),
Richard Tyndorf (chapitres 6.4, 6.5, 6.14 et 6.16),
Ritva Ahti (chapitres 6.7 et 6.15),
Wendy Reid (chapitres 6.8),
April Curtis (chapitres 6.11 et 6.12),
Marie-Claude Roberge (chapitres 6.13),
Gordon Hayhurst (chapitres 6.17),
David Schwartz (chapitres 8), et
Ariane Cohen (annexes).

Tous les ans, un examen de ce document est effectué en vue de déterminer si une mise à jour s'avère nécessaire. Nous voulons être certains qu'il répond à vos besoins. Si vous avez des commentaires au sujet de sa disposition ou de son contenu, veuillez les faire parvenir à Michael Park, Services juridiques, Vancouver.

Paul Aterman

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APPENDIX A

THE RULES OF EVIDENCE AND THE CANADA EVIDENCE ACT

WEIGHING EVIDENCE

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WEIGHING EVIDENCE

I. INTRODUCTION

This paper is designed as a reference source, for all three Divisions of the Immigration and Refugee Board, on issues related to weighing evidence. The paper is intended to be a practical tool, and thus includes some possible factors to consider in weighing the evidence, as well as relevant caselaw. The factors are not meant to be exhaustive, nor is their application to be considered mandatory. The factors are provided simply as a guide to the matters that may be relevant in weighing different types of evidence.

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CHAPTER 2

2. GENERAL PRINCIPLES

2.1. EVIDENCE

“‘Evidence’ includes all the means of proving or disproving any matter, i.e., oral testimony, written records, demonstration, etc. The term “evidence” does not include arguments on behalf of the parties (sometimes called ‘submissions’ or ‘representations’) which are made to persuade the decision-maker to take a certain view of the evidence.”¹

2.2. RELEVANT PROVISIONS OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT*

In weighing and assessing evidence, it should always be kept in mind that the Immigration and Refugee Board is not a court of law, but an administrative tribunal which is not bound by the strict rules of evidence.²

Pursuant to subsection 175(b) of the *Immigration and Refugee Protection Act* the Immigration Appeal Division is not bound by the technical rules of evidence. Subsections 175(b) and (c) of the *Immigration and Refugee Protection Act* provides:

The Immigration Appeal Division, in any proceeding before it,

(b) is not bound by any legal or technical rules of evidence; and

(c) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.

The RPD and Immigration Division have virtually identical statutory provisions which specifically exempt them from the application of the Rules of Evidence.

Subsections 170(g) and (h) of the *Immigration and Refugee Protection Act* provides:

The Refugee Protection Division, in any proceeding before it,

(g) is not bound by any legal or technical rules of evidence;

(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

Subsections 173(c) and (d) of the *Immigration and Refugee Protection Act* provides:

The Immigration Division, in any proceeding before it,

¹ *CRDD Handbook*, Chapter 11, page 2, March 31, 1999.

² See subsections 170(g) and (h), 173(c) and (d), and 175(b) and (c) of the *Immigration and Refugee Protection Act*.

(c) is not bound by any legal or technical rules of evidence ; and

(d) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.

The Rules of Evidence are derived from caselaw, and are applied by the Courts to ensure the reliability of the evidence that is relied on to reach a decision. These rules may result in the refusal to admit evidence into the court's record. The Rules of Evidence and their rationale are set out in Appendix A to this paper.

Since the Board is not bound by the rules of evidence, it may receive into evidence, evidence which would not be admissible under those rules. Nevertheless, the rationale for these rules may be used in assessing the reliability of that evidence. One or more rules may be relevant to any particular piece of evidence.

HOWEVER, the Board errs in law if it gives no weight to a document because its contents were not proved in accordance with the rules of evidence.³

Thus, the assessment of the evidence should be framed in terms of the credibility and trustworthiness of the evidence, as that is the test set out in the *Immigration and Refugee Protection Act*.

2.3. CREDIBLE OR TRUSTWORTHY EVIDENCE

The *Immigration and Refugee Protection Act* provides that the Board may receive evidence it considers credible or trustworthy. In applying the former credible basis test, the Federal Court has treated “credible” and “trustworthy” as having the same meaning: “credible.”⁴

While, the wording of the above provisions of the *Immigration and Refugee Protection Act* tend to support the position that the Board should not receive, or admit, evidence unless it is determined to be credible or trustworthy, this is rarely done in practice. There are several reasons for this. Once evidence is excluded, it is hard to later admit it. It is much simpler to admit the evidence and give it no weight, if that is warranted. Further, it is preferable to assess the credibility of the evidence based on the total evidence presented. Credibility decisions are not always easy to make, and often require careful thought and analysis. The hearing process would become very slow and tedious, if a ruling regarding credibility had to be made as each piece of evidence was tendered. Nevertheless, there may be cases where the evidence should not be admitted at all. For example, where the prejudicial value of the evidence far outweighs its probative value.

³ *Attorney General of Canada v. Jolly* [1975] F.C. 216 (C.A.)

⁴ *Sheikh v. Canada (M.E.I.)*, [1990] 3 F.C. 238; 71 D.L.R. (4th) 604; 11 Imm.L.R. (2d) 81 (C.A.).

CHAPTER 2

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CHAPTER 3

3. ASSESSING EVIDENCE

3.1. BEFORE/DURING THE HEARING:

3.1.1. Determine which party has the Burden of Proof

In every matter that comes before any of the Divisions of the Board the ultimate burden of proof lies with one of the parties to the process. The party with the burden of proof varies depending on the nature of the proceedings. For example, in a sponsorship appeal, the burden of proof lies with the sponsor; and in a claim for refugee protection the burden is on the claimant. With respect to admissibility hearings, foreign nationals who have not been authorized to enter Canada bear the burden of proving they are not inadmissible and the Minister bears the burden of proof in the case of foreign nationals who have been authorized to enter Canada or in the case of permanent residents. In the adversarial proceedings before the Immigration Division and the Immigration Appeal Division it is up to the party with the burden of proof to lead enough credible and trustworthy evidence to establish their case. Once that has been done, in adversarial proceedings, the *burden of producing evidence* shifts to the other party. However the ultimate burden of proving their case remains the same. The burden comes into play where, after all the evidence has been assessed and weighed, it is evenly balanced in terms of either proving or disproving the case. In that situation the person with the burden of proof has not established their case.

In the absence of exclusion issues or the participation of the Minister, hearings before the Refugee Protection Division are normally not adversarial. Proceedings in the Refugee Protection Division are governed by Guideline 7 issued by the Chairperson of the Board pursuant to subsection 159(1)(h) of the *Immigration and Refugee Protection Act*.¹

The Guideline points out that the role of a member of the Refugee Protection Division is different from that of a judge. A judge's primary role is to consider the evidence and arguments that the parties choose to present while a Refugee Protection Division member has an inquisitorial role, which requires that the decision maker take an active role in the hearing. Under the *Immigration and Refugee Protection Act*, Refugee Protection Division members have the same powers as commissioners who are appointed under the *Inquiries Act*.² They may inquire into anything they consider relevant to establishing whether a claim is well-founded.³ Case law⁴ has clearly established that the Refugee Protection

¹ "Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division", Immigration and Refugee Board, Ottawa, Canada, December 1, 2003.

² *Immigration and Refugee Protection Act*, s. 65.

³ *Ibid*, s. 170(a).

Division has control over its' own procedures, including who will start the questioning. The members have to be involved to make the Division's inquiry process work properly.

In a claim for refugee protection, the standard practice will be for the Refugee Protection Officer (RPO) to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way **allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.** (emphasis added).⁵

3.1.2. Define the issues

The process of assessing evidence begins before the hearing starts, in that the record⁶ before the decision-maker should be analyzed for the purpose of identifying the issues in the case. The decision-maker may also consider any evidence that is non-controversial or before them by agreement of the parties. If the admissibility of certain evidence is being, or likely to be, challenged, the decision-maker may not wish to consider that evidence, until the preliminary issue of admissibility has been determined. Of course, at this stage the determination of the issues is tentative, since the issues may change as more evidence is received during the hearing, or during the preliminary procedures leading to the hearing.

In determining the issues, the relevant provisions of the *Immigration and Refugee Protection Act* and *Regulations* should be examined and the relevant provisions identified.⁷ The evidence/record should then be examined to decide which specific issues are relevant to the particular case before the decision-maker. The issues should be defined narrowly. It is not helpful to define the issues in broad terms, such as, "is the claimant a Convention refugee or a person in need of protection?" or "is the applicant a member of the family class?" or "is the subject of the admissibility hearing admissible?" The issues should be framed in terms

⁴ *Rezaei, Iraj v. M.C.I.* (F.C.T.D. no. IMM-1367-02), Beaudry, December 5, 2002, which refers to the powers of administrative tribunals according to *Prassad v. Canada (Minister of Manpower and Immigration)*, [1989] 1 S.C.R. 560.

⁵ *Supra*, footnote 1, paragraph 19. In exceptional circumstances, for example in the case of a severely disturbed claimant or a very young child, the member may vary the order of questioning, and allow counsel for the claimant to question first. See paragraph 23 of the *Guideline*.

⁶ For example, at an admissibility hearing the record would consist of the inadmissibility report and the Minister's referral; before the IAD the record prepared pursuant to the *IAD Rules*; and before the RPD the record consists of the referral by an Officer, and the Personal Information Form.

⁷ In the case of the Refugee Protection Division, Guideline 7 emphasizes the importance of case preparation. *Supra*, footnote 1, paragraphs 1-6.

that are narrow enough to help the decision-maker to decide what evidence is relevant to the decision that is to be made.⁸

Having identified the issues, the decision-maker is then better able to focus the hearing process, by restricting the evidence to that which is relevant to the issues in the case.⁹

3.2. DURING THE HEARING:

3.2.1. Admissibility

In the courts, evidence may not be admitted into the record, if it is excluded by the Rules of Evidence. When evidence is not admitted, it is generally not physically accepted by the decision-maker for entry into the record of the proceedings, and it is not marked as an exhibit. However, parts of the evidence may be struck from the record (e.g. a passage from a document that is otherwise admitted).¹⁰ Any evidence that is struck from the record or not admitted into evidence shall not be considered by the decision-maker in reaching their decision.

Unlike a court of law, most evidence presented in Board hearings is admitted into evidence, and any deficiencies in the evidence go towards the weight the decision-maker assigns to the evidence. However, in some cases it is not appropriate to admit the evidence and give it little or no weight, instead the panel should refuse to admit the evidence at all. This may arise, for example, where the evidence is not relevant to the issues in the case; or where the prejudicial effect of the evidence outweighs its probative value; or where the evidence is protected by privilege or statutory protection of its confidentiality, or where the evidence is unduly repetitive.

In a recent case, the Immigration Appeal Division ruled that evidence of alleged criminal conduct not leading to a conviction, including KGB statements, could properly be admitted into evidence.¹¹ The IAD considered the potential prejudice to the appellant of admitting evidence suggestive of criminal activity. The panel stated that it would be unfair to augment the appellant's criminal record by attempting to show on a balance of probabilities that the appellant is guilty of more offences than those on his CPIC and thus, as in *Bertold*¹² and *Bakchiev*¹³

⁸ For example, “does the claimant have an Internal Flight Alternative (IFA) in India, outside the Punjab or “did the adoption of the applicant by the appellant create a genuine parent-child relationship?”

⁹ For example, in the examples above: evidence relating to IFA; or to parent-child relationship.

¹⁰ The passage may be physically “blacked out” or crossed out, or the presiding member may simply state for the record that the passage is being struck.

¹¹ *Thanabalasingham, Kaileshan v. M.C.I.* (IAD TA2-04078), Sangmuah, August 29, 2003.

¹² *Bertold v. M.C.I.* [1999] F.C.J. No. 1492.

¹³ *Bakchiev v. M.C.I.*, [2000] F.C.J. No. 1881.

the evidence would not be admissible for that purpose. However, the same evidence may be relevant to another issue in dispute. If the issue is peripheral to what needs to be determined, it is likely that the prejudicial effect of admitting such evidence would exceed its probative value. It would not suffice to say that the evidence goes to “all the circumstances of the case”: the particular circumstance must be identified. In this case, it was permissible for the respondent Minister to assert that the appellant was or had been a gang member.

In *Fung*¹⁴, the IAD admitted into evidence material which referred to incidents in which criminal charges had been withdrawn. The documents consisted of sworn statements and police reports. While they did not carry the same weight as documents relating to incidents leading to convictions, they were relevant to the “circumstances of the case”.

3.2.1.1 Relevance

The panel may refuse to admit into evidence, evidence which is clearly not relevant to the issues in the proceedings.¹⁵ If there is some doubt as to the relevance of the evidence, it is preferable to admit the evidence, and then determine the appropriate weight to be assigned to that evidence later.

Evidence is relevant if it tends to prove the existence or non-existence of a fact in issue. If evidence is clearly not relevant to the case, the decision-maker may refuse to admit the evidence, otherwise it may be admitted and the appropriate weight given to the evidence later. If the evidence is later found not to be relevant, it may be given no weight. When evidence is introduced, counsel should be able to explain how the evidence is relevant and to which issue.

The relevance of the evidence should be assessed in the context of the issues identified and the other evidence presented. Evidence which at first appears to be irrelevant, may turn out to be relevant in the context of the entire evidence presented. Care should be taken in rejecting evidence as not relevant.

Evidence may be credible and trustworthy, but not relevant. For example, evidence regarding the lack of police protection for women who face abuse from their spouses in Country A may come from a very reputable source, but would still have no relevance if the claimant had no status or connections to Country A, or was a male from Country A whose claim was based on his race or ethnic background.

Sometimes the relevance of evidence is not initially clear, because it depends on the decision-maker’s determination of other issues. For example, strong, credible evidence of a close parent -child relationship between the appellant and an adopted child whose adoption took place when the child was over 18 years old

¹⁴ *Fung, Ian v. M.C.I.* (IAD T99-08522), Wales, May 10, 2001.

¹⁵ *Yushchuk, Anna v. M.E.I.* (F.C.T.D., no. IMM-4773-93), Nadon, September 9, 1994.

may not be relevant if the panel decides that the adoption was not in accordance with the laws of the place of adoption. However, this issue may not be determined until after the hearing is completed, in which case, the panel should hear the evidence regarding the other issues as well, and sort it out when preparing to render the decision, whether orally or in writing.

3.2.1.2 Other

The Board should not refuse to receive in evidence an affidavit merely because it does not meet the requirements of Part III of the *Canada Evidence Act* which governs the taking of affidavits abroad.¹⁶

The Board accepted as evidence pursuant to s.65(2)(c) of the *Immigration Act*, a photocopy of a judgment of an Indian court although the photocopy would not be accepted as evidence pursuant to s.23 of the *Canada Evidence Act*.¹⁷

The Appeal Division did not err in refusing to admit the affidavit of a former colleague which raised a reasonable apprehension of bias, because he had recently left the Board.¹⁸

3.2.2. Credibility¹⁹

During the hearing, the decision-maker should note the demeanour of the witnesses, and may request explanations for inconsistencies in their testimony. Or, in adversarial proceedings,²⁰ the decision-maker may ask the parties to clarify inconsistencies, or may leave it to the parties to decide whether or not to do so. In either case, the decision-maker should make a note of inconsistencies and any explanations provided for those inconsistencies. Please note that if the witness is not allowed to explain an inconsistency, the decision-maker may not be able to rely on the inconsistency to make a negative credibility finding. Please refer to Legal Services' paper: *Assessment of Credibility in Claims for Refugee Protection* (June 28, 2002).

The *Immigration and Refugee Protection Act* allows all three Divisions of the IRB to receive evidence that is credible or trustworthy. Although in theory this would allow witness testimony to be ruled inadmissible in a hearing for lack of credibility, in practice, even judgments that testimony is entirely without credibility are normally made after the close of evidence. One reason for this is

¹⁶ *Dhesi, Bhupinder Kaur v. M.E.I.* (F.C.A., no. 84-A-342), Mahoney, Ryan, Hugessen, November 30, 1984.

¹⁷ *Sandhu, Bachhitar Singh v. M.E.I.* (I.A.B. T86-10112), Eglington, Goodspeed, Chu, February 4, 1988.

¹⁸ *Drummond, Patsy v. M.C.I.* (F.C.T.D., no. A-771-92), Rothstein, April 11, 1996.

¹⁹ Please refer to Legal Services' paper: *Assessment of Credibility in Claims for Refugee Protection* (June 28, 2002) for a comprehensive discussion of this topic.

²⁰ Hearings held in the Immigration and Immigration Appeal Divisions are adversarial in nature. Hearings before the Refugee Protection Division, in which the Minister participates, are adversarial in nature.

that the testimony can then be assessed based on the totality of the evidence, before a final determination regarding credibility is made.

3.3. AFTER THE HEARING OF EVIDENCE AND SUBMISSIONS IS COMPLETE:

3.3.1. Assess Credibility

The first matter the decision-maker must decide is what evidence is believable. This evidence will form the basis for subsequent findings. Reference may be made to the paper entitled “Assessment of Credibility in claims for Refugee Protection,” prepared by IRB Legal Services. While this latter paper was prepared for the RPD, it contains basic principles which are applicable to all three Divisions.

Where the finding of credibility makes no difference to the outcome of the case, it is possible for the decision-maker to assume that the evidence/witness is credible for the purpose of their analysis, without making a finding that the evidence/witness is credible.

For example, the decision-maker may have doubts about the credibility of a refugee protection claimant. However, the claimant has dual nationality including citizenship in the United States, and is not making a claim against the United States. In such a case, the decision-maker may state that they “assume, without so finding, that the claimant is credible” and find that the claimant is not a Convention refugee or a person in need of protection because they have not established a claim against the United States. Assuming credibility is to the advantage of the claimant, and will not give rise to judicial review. If the decision on dual nationality is overturned, then credibility is still a “live” issue. This is a legally acceptable, and expeditious way to proceed in certain areas.

3.3.2. Reliability

Next the decision-maker assesses the reliability of the evidence that was found to be believable. For example, the decision-maker may believe a witness is being truthful, however, due to other factors (lack of first-hand knowledge, lighting, intoxication, etc.) the witness’s statements may not have been very accurate, and thus could be given limited weight, depending on the other evidence presented in the case.

Special considerations arise depending on the nature of the evidence being assessed. The different types of evidence, and the caselaw and factors to consider in weighing that evidence are dealt with in detail in Chapter 6 of this paper.

3.3.3. Apply the Standard of Proof

Unless specifically stated to be otherwise, in civil matters, the standard of proof is that of a balance of probabilities (as opposed to the higher criminal standard of “beyond a reasonable doubt.”).

In weighing conflicting evidence, this standard is applied to determine what facts are established by the evidence. While this standard is applied to determine the facts of the case, a different standard of proof may apply in resolving the legal issues in the case. Please refer to Chapter 7 for a more detailed discussion of standards of proof.

3.3.4. Determine the Facts that have been established by the evidence as weighed

The decision-maker next makes their findings concerning the facts established by the evidence. It is important to make clear findings of fact, as it is these facts on which the rest of the decision will be based. There may also be some facts that have been agreed to by the parties.

A finding of fact is a determination, from the evidence, of what the facts of the case are, where there is conflicting evidence or allegations. Findings of fact may include reasonable inferences drawn from the evidence. A finding of fact does not involve the application of “legal judgment”.²¹ On the other hand, a finding or conclusion of law involves the application of rules of law to the facts as found by the decision-maker.²²

Once reliability has been assessed, it is possible to form an appreciation of the evidence with regard to a group of related facts. In such an appreciation, the testimony of two witnesses given little weight because of self-serving bias, and an expert who has founded his opinion on the facts as related by a witness found not credible on some of those facts, can be outweighed by a solid assertion in a document produced by a neutral source.

3.3.4.1. Benefit of the Doubt before the RPD

With regard to hearings before the RPD, Part Two, section B, of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*²³ should be considered. In particular, paragraphs 203 and 204 provides that the benefit of the doubt should be granted to the claimant in certain circumstances:

203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above

²¹ See the definition of “finding of fact” in *Black’s Law Dictionary*, 6 ed., (St.Paul: West Publishing Co., 1990).

²² See the definition of “conclusion of law” in *Black’s Law Dictionary*, *supra*, footnote 21.

²³ Geneva, January 1992.

(paragraph 196), it is hardly possible for a refugee to “prove” every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.

The majority of the Supreme Court of Canada in *Chan*²⁴ held that it is not appropriate to apply the benefit of the doubt where the claimant’s allegations run contrary to generally known facts, and the available evidence.

3.3.5. Identify the appropriate Standard of Proof for each legal issue

Generally, the standard of proof is that of a balance of probabilities, or whether something is more likely than not. However, for certain issues, in all three Divisions, there is a different standard.

In the RPD, the standard is particularized for several issues. For example, well-founded fear of persecution must be proved to the level of “serious possibility” or “reasonable grounds”, which is less than “more likely than not.” Inability of the state to protect must be proved by “clear and convincing” evidence; the contrary is normally presumed to exist. The requirement of “serious reasons for considering” an Article 1F exclusion in the RPD need only be proved to a level below a balance of probabilities.

Similarly, when the Immigration and Immigration Appeal Divisions determine admissibility, the standard of proof can vary from a “balance of probabilities” to “believed on reasonable grounds”, which is less than a balance of probabilities.

Please refer to Chapter 7 for a more detailed analysis of the standard of proof.

3.3.6. Apply the facts and standards of proof to the issues of the case

The facts should now be analyzed to determine the resolution of the issues of the case. Not all of the issues in the case need be considered, only those that are determinative of the matter before the decision-maker.

3.3.6.1. Presumptions

An appreciation of related facts may be affected by a rule of law that requires or allows a fact to be inferred from related facts - a presumption.

²⁴ *Chan v. M.E.I.* [1995] 3 S.C.R. 593.

For example, states are presumed to be able to protect their nationals, absent clear and convincing evidence to the contrary. Thus, in the absence of evidence regarding state protection, it may be presumed that the state is capable of protecting a claimant. In order to overcome that presumption, the claimant must present clear and convincing evidence.

As can be seen from the above example, presumptions generally act in absence of evidence contrary to the presumption. Thus credible and reliable evidence may overcome a presumption.

However, in exceptional cases, a presumption is not rebuttable. See, for example, subsection 81(a), which provides that a section 77 certificate that has been referred to a judge of the Federal Court and found to be reasonable under subsection 80 (1), is conclusive proof that the foreign national or permanent resident named in it is inadmissible.

3.3.7. Render the Decision

Has the party who bears the ultimate burden of proof, established all of the material issues of the case?

CHAPTER 3

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CHAPTER 4

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CHAPTER 4

4. WHAT IT MEANS TO "WEIGH" EVIDENCE

For the purposes of this paper, “to weigh evidence” means to assess the reliability and probative value of evidence that has already been determined to be relevant. The probative value of evidence is its value in assisting in determining the matters in issue.

Evidence is the vehicle through which facts in issue are proved or disproved. Not all evidence is equally helpful in assisting a decision-maker to make findings with respect to the matters in issue. That is why evidence must be weighed, with the more trustworthy and probative evidence given more weight in coming to a decision on the matters in issue.

The determination of the weight to be assigned to evidence involves the application of common sense.

EVIDENCE SHOULD BE WEIGHED IN LIGHT OF ALL OF THE EVIDENCE IN THE CASE AND THE ISSUES TO BE DECIDED. Evidence may be given full weight, partial weight, more or less weight than other evidence, or no weight at all. Evidence is weighed against other evidence to determine which evidence is more reliable.

Ultimately, the weight of the evidence will be used to determine whether the burden of proof has been met in relation to each element of the definitions of Convention refugee and person in need of protection or the elements of the relevant provision of the *Immigration and Refugee Protection Act* or *Regulations*. With respect to the RPD, decision-makers should keep in mind that evidence which may not be probative with respect to one protection ground, and therefore given little weight in coming to a finding on that particular ground, may be probative to a decision on one of the other protection grounds.

When weighing evidence, a decision-maker may wish to consider the following steps;

1. Identify the determinative issues.
2. Sort the evidence by its relevance to those issues.
3. Weigh the evidence for its probative value and reliability.
4. Give reasons for ascribing more or less weight to particular evidence.
5. Make clear findings of fact.
6. Apply the appropriate legal tests to the evidence found to be probative and reliable.

NOTE: Some of the factors considered in weighing the reliability of evidence, will also have been considered in determining the credibility of the evidence.

CHAPTER 5

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CHAPTER 5

5. FACTORS TO CONSIDER IN WEIGHING EVIDENCE

5.1. GENERAL PRINCIPLE

The reliability of evidence should be determined in light of all of the circumstances/ evidence of the particular case. The factors to be considered in weighing evidence are basically a matter of common sense.

The Factors Listed Here And Elsewhere In The Paper Are Not Meant To Be Exhaustive.

5.1.1. Some Factors That May be Considered

- the circumstances surrounding the making of the statement
- any information about the person who made the statement
- how many times the information was passed on before being made known to the witness
- the consistency of the statement with other reliable evidence
- the witness' opportunity to observe the events regarding which she testifies
- the circumstances surrounding the event
- whether there is better evidence available and whether a reason was provided for not producing that evidence
- whether the witness is drawing reasonable inferences or is simply speculating
- whether the evidence is consistent with reliable documentary/ other evidence
- whether the evidence is self-serving
- the circumstances under which a document was created
- the opportunity to cross-examine the author of a document
- whether some of the witness' evidence has been found not to be credible
- whether the witness is disinterested in the result
- whether the witness is biased
- the witness' qualifications and knowledge of the subject regarding which she testifies

- attitude and demeanour of a witness
- knowledge and expertise of author of a document and the date of the document.

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CHAPTER 6

6. APPLICATION TO SPECIFIC SITUATIONS

6.1. VIVA VOCE EVIDENCE

Viva voce is Latin meaning "with the living voice" and refers to evidence given by a witness orally, as opposed to evidence given in a written form, such as an affidavit. Evidence given by a witness under oath or affirmation is referred to as "testimony." Testimony may be either *viva voce* or in written form.

As the test before the I.R.B. is whether the evidence is credible or trustworthy, it does not matter whether the evidence is given under oath, under affirmation, or is unsworn testimony: it may all be given full weight.

The advantage of *viva voce* evidence over documentary evidence, is that the witness is available for cross-examination, and thus the strength of the evidence may be tested. That is why reliable, credible, *viva voce* evidence is sometimes given more weight than documentary evidence.¹ Relevant jurisprudence suggests that a panel may properly believe documentary evidence over the sworn testimony of a witness provided that the panel states clearly and unmistakably why it prefers the documents over the *viva voce* evidence of the witness.²

In assessing the credibility of *viva voce* evidence, it may be compared to the documentary evidence in order to determine whether there are discrepancies, contradictions or inconsistencies. Generally a witness should be given an opportunity to explain any inconsistencies in their evidence. Please refer to Legal Services' paper: *Assessment of Credibility in Claims for Refugee Protection* June 2002 for further discussion of this issue.

It is the practice of the I.R.B. to exclude witnesses from the hearing room before they testify, so their testimony won't be tainted by hearing the evidence of other witnesses. (see rule 41 of the *IAD Rules*; rule 42 of the *RPD Rules* and rule 36 of the *Immigration Division Rules*.) If witnesses are not excluded from the hearing room (e.g. appellants/claimants/persons concerned who are entitled to be present throughout the proceedings) the fact that they have heard the testimony of other witnesses, may affect the weight or credibility of their testimony. Counsel should be encouraged to lead the evidence of the claimant/appellant/person concerned before that of the other witnesses.

Where the *viva voce* evidence of two witnesses conflicts, the testimony of one witness may be preferred over that of another, on the basis that the preferred evidence should be given more weight.

¹ *Veres v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 124 (T.D.).

² *Hilo v. M.E.I.* [1991] F.C.J. no. 228; see also *Kwame Kyere-Akosah v. M.E.I.* [1992] F.C.J. no. 411 and *Kuomars, Aligolian v. M.C.I.* (F.C.T.D., no. IMM-3684-96), Heald, April 22, 1997.

There are some exceptions to the general rule of exclusion of witnesses. For example, where a claimant is present at the hearing **as of right**, his or her testimony cannot be discounted because he or she was present when another claimant testified (e.g. the testimony of a husband and wife at their joint hearing).³ This principle can also be extended to other witnesses (e.g. joint appellants, persons-concerned).

Similarly it would be wrong to exclude a witness from testifying simply because he or she had seen other evidence prior to testifying. The issue here is not one of admissibility but rather goes to the reliability of the evidence and how much weight is to be assigned to it.⁴

Finally the Refugee Protection Division should not refuse to hear the testimony of a potential witness purely because the witness is a refugee claimant. The witness should be allowed to testify, and then the credibility of that evidence may be assessed by the panel.⁵ This principle is essentially that the evidence of witnesses should not be prejudged, and in that sense applies to all three Divisions.

6.1.1. Factors to Consider:

- the opportunity of the witness to observe the events
- whether the witness' testimony is based on hearsay
- the witness' ability to recall events accurately
- the witness' relationship to the claimant/ appellant/ person concerned
- whether the witness has any interest in the outcome of the hearing
- whether the witness was present during the testimony of any other witness
- whether the witness had seen other evidence prior to testifying
- whether the witness' testimony was elicited through leading questions
- whether part of the witness' testimony has been found to be not credible

³ *Anand v. Canada (M.E.I.)* (1990), 12 Imm.L.R. (2d) 266 (F.C.A.).

⁴ *Regina v. Buric et. al.* (1996), 28 O.R. (3d) 737 (Ont. C.A.). An appeal from the following judgment was lodged with the Supreme Court of Canada (Sopinka, Gonthier, Cory, Iacobucci and Major J.J.) and dismissed on March 20, 1997 (See 32 O.R. (3d) 320 and [1997] S.C.J. No. 38. S.C.C. File No. 25365. S.C.C. Bulletin, 1997, p. 573). See also, *Gill, Gurpal Kaur v. M.C.I.* (F.C.T.D., no. IMM-3082-98), Evans, July 16, 1999. The IAD did not permit the applicant's wife (and sponsor) an opportunity to testify, due to the fact that she had been in the hearing room throughout the proceedings. The Court held that this was an error of law. Parties to an administrative proceeding were entitled to be present throughout the proceedings and could not be excluded because they were going to be called as a witness. The fact that she had been in the room throughout might have affected the weight given to her evidence, but was no reason to exclude it.

⁵ *Gonzalez v. Canada (M.E.I.)* (1991), 14 Imm.L.R. (2d) 51 (F.C.A.).

- the witness' demeanour
- whether the witness appears to have a bias
- the extent to which the witness' testimony is based on opinion and inference
- whether the facts which the witness relied on in forming an opinion have been established
- any other evidence which supports or contradicts the testimony of the witness

6.1.2. Adverse Inferences from the Failure to Testify or Call Evidence

In some cases where a key witness fails to testify, the decision-maker may draw an inference that the witness did not testify because the testimony would have been adverse to the interests of the party who, otherwise, would have been expected to call the witness.⁶ Care should be exercised in drawing a negative inference. The failure to testify should be weighed against all the other evidence presented; perhaps the evidence was not necessary to establish the case. If there is a reasonable explanation for the failure to testify, an adverse inference should not be made.

An adverse inference may be drawn against a party who fails to call material evidence that is particularly and uniquely available to that party.⁷

For example: an adverse inference can be drawn from the failure to file a financial statement: the adverse inference is that the party has sufficient income to meet the obligations in question (for example, child support); or it could be that the evidence would not have helped the party's case.⁸

Drawing an adverse inference is permissive, not mandatory.⁹

An adverse inference cannot be drawn from an accused's failure to testify at his/her criminal trial.¹⁰

⁶ *WCC Containers Sales Ltd. v. Haul-All Equipment Ltd.* [2003] F.C.J. No. 1266; 2003 FC 962.

⁷ *Levesque v. Comeau* [1970] S.C.R. 1010; *Apotex Inc. v. Tanabe*, QL [1994] O.J. No. 2613 (Ont. Gen. Div.). See also *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (F.C.A., nos. A-120-98, A-121-98), Isaac, Rothstein, McDonald, January 26, 2000, at para.11.

⁸ *Holtby v. Holtby*, QL [1997] O.J. No. 2237 (Ont. Gen. Div.); *Evan v. Pinkney*, QL [1994] O.J. No. 987 (Ont., Prov. Div.).

⁹ *Supra*, footnote 7. See also *M.C.I. v. Brar* (F.C.T.D., no-IMM-2761-01), Dawson, April 19, 2002, 2002 FCT 442. The IAD held that it was not mandatory for a sponsored applicant to give evidence and weighed the explanation provided for the applicant's failure to testify and did not draw an adverse inference. On judicial review, the Federal Court upheld the IAD's finding, indicating that, where there was a reasonable explanation, the IAD was not obliged to draw an adverse inference from a failure to testify.

¹⁰ *R. v. Boss* (1988) 46 C.C.C. (3d) 523 (Ont. C.A.).

Where an accused raises the issue of diminished intent and refuses to see a prosecution-retained psychiatrist, the trier of fact may draw an adverse inference respecting the defence in question without contravention of any principle of fundamental justice.¹¹

Whether an inference is drawn or not is a question of weighing evidence: a party runs the risk of an adverse inference in the absence of evidence to the contrary.¹²

In an IAD appeal based on all the circumstances of the case, an adverse inference was drawn from the appellant's failure to testify. The appellant chose not to testify as his testimony, admitting the offence he committed, would be contradictory to that which he gave at his criminal trial. Counsel claimed the appellant would be committing an offence if he testified.¹³ The panel found that the appellant could have testified regarding other matters related to his appeal.¹⁴

The Federal Court overturned an IAD decision which was based on adverse inferences drawn from the failure of the appellant's wife, mother-in-law, other relatives and friends to testify at his hearing. At the hearing of his appeal, the appellant stated that his wife had just had her tonsils out and he requested a postponement to allow his wife and mother-in-law to testify. The postponement was not granted. In reaching its decision on all the circumstances of the case, the panel concluded there was no support from his family or the community, yet there were letters on file from both. In addition, the Court found that adequate explanations had been provided for the failure to testify.¹⁵

The IAD has also drawn an adverse inference from the failure of the applicant spouse to testify where the refusal was based on subsection 4(3) of the *Immigration Regulations*. The panel found that since the onus rested with the appellant to prove the refusal was invalid in law, "... where the applicant could give evidence relevant to this issue but does not do so, it is not unreasonable to draw an adverse inference as to the applicant's lack of the relevant intention" especially in cases where there is a lack of relevant objective evidence. Pursuant to this adverse inference, together with the appellant's lack of credibility on certain aspects of his testimony, the panel found that the applicant did not have the intention to reside permanently with the appellant if she was permitted to come to Canada.¹⁶

¹¹ *R. v. Brunzlik* (1995) 103 C.C.C. (3d) 131 (Ont. Gen. Div.).

¹² *Snell v. Farrell*, [1990] 2 S.C.R. 311

¹³ Either of the offence of Giving Contradictory Evidence (s.136, Criminal Code), or Perjury (s.131, Criminal Code).

¹⁴ *Huang, Rong Ya v. M.E.I.* (I.A.D. V91-01787), Gillanders, Singh, Verma, February 16, 1993.

¹⁵ *Okwe v. Canada (M.E.I.)* (1991), 16 Imm.L.R. (2d) 126 (F.C.A.).

¹⁶ *Brar, Kuljit Singh v. M.C.I.* (I.A.D. V93-02858), Clark, March 13, 1995. See also, *Purba, Amrit Pal Kaur Sran v. M.C.I.* (I.A.D. V94-01758), Clark, April 10, 1996.

In a claim before the Refugee Division, the claimant's refusal to testify led to the panel's finding that the claimant was neither credible nor trustworthy. At the start of the hearing the panel denied the claimant's request for an adjournment to obtain new counsel and provided a number of reasons for refusing the request. The claimant thereupon declined to give oral testimony and was advised that his failure to testify might cause the panel to draw a negative inference. In proceeding with the claim, the claimant was advised that in the absence of his oral testimony, his sworn testimony through his Personal Information Form (PIF), and the documentary evidence would be the basis upon which the panel would determine his claim. The panel then found serious inconsistencies between the PIF and the port-of-entry notes. In finding itself with no ability to put these inconsistencies to the claimant, due to his refusal to testify, the panel determined the claimant not to be a Convention refugee.¹⁷

On a Minister's application to vacate a determination that a person was a Convention refugee, the Refugee Division drew an adverse inference from the failure of a Corrections worker to testify. The Minister was relying on statements made by the person to the officer, which were submitted in the form of a sworn declaration. The officer was summoned as a witness and was sworn in, however, he refused to testify due to concerns about "trust within the black community." The officer had been under the impression, at the time he swore the statement, that his identity would be protected. The adverse inference affected the weight given to the declaration.¹⁸

Drawing an adverse inference from late disclosure is an error where the late disclosure does not prevent investigation (for example, if an alibi is disclosed late (at a bail hearing), the police still has time to investigate the alibi and the judge commits an error in drawing an adverse inference based on the late disclosure.¹⁹

6.1.3. Compellability of Witnesses

The following subsections appear in Part 3 of the *Immigration and Refugee Protection Act* and provide for an offence and punishment in cases where an individual refuses to testify. These provisions are seldom relied on to prosecute a witness. Nevertheless, it is useful to be aware that such provisions exist. When a witness refuses to testify, or counsel advises them not to testify, the panel members may remind them of the existence of such provisions. If charges are laid, it would be outside of and apart from the hearing process. It is

¹⁷ CRDD U96-00894, Joakim, Sotto, April 30, 1997. Leave to the Federal Court of Canada was denied August 11, 1997 (IMM-1969-97).

¹⁸ CRDD C94-00175, Lavery, Lo, Pawa, June 2, 1994.

¹⁹ *R. v. Wheatle*, (1993) 86 C.C.C. (3d) 378 (Ont. C.A.).

normally the R.C.M.P. who would lay charges. It is recommended that decision-makers seek the advice of Legal Services in such matters.²⁰

Sections 127 and 128 of the *Immigration and Refugee Protection Act* provide:

s. 127. No person shall knowingly

(a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

(b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or

(c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

128. A person who contravenes a provision of section 126 or 127 is guilty of an offence and liable

(a) on conviction on indictment, to a fine of not more than \$100,000 or to imprisonment for a term of not more than five years, or to both; or

(b) on summary conviction, to a fine of not more than \$50,000 or to imprisonment for a term of not more than two years, or to both.

In criminal proceedings, an accused person has the right to refuse to testify in recognition of the long-standing right not to be forced to incriminate oneself. In civil proceedings, there is no such general provision against being compelled to testify. The courts have long characterized immigration and refugee proceedings as being “civil” rather than “criminal” in nature.²¹ Thus, even though a witness may be compelled to testify in civil proceedings,²² the witness may still be extended certain protections under the *Canadian Charter of Rights and Freedoms* [s.13] and under the *Canada Evidence Act* [s.5], namely, the

²⁰ For an example, see *R. v. Forrester*, 2 C.C.C. (3d) 467 Ont C.A. Dec.8, 1982. The person concerned refused to answer certain questions at inquiry on the basis that her answers might tend to incriminate her. As a result of her refusal to answer, the accused was charged with an offence contrary to s.95(g) of the former *Immigration Act*. (“every person who ... (g) refuses to be sworn or to affirm or declare, as the case may be, or to answer a question put to him at an examination or inquiry under this Act” is guilty of an offence...). The Court of Appeal upheld the conviction.

²¹ *R. v. Wooten*, [1983] B.C.J. No.2039, at para.11-14.

²² Note that in *Khalife v. M.C.I.* (F.C.T.D. no. IMM-5319-02), Kelen, November.6, 2002; 2002 FCT 1145, on a motion to stay an admissibility hearing, the Court characterized this as an “open question”, noting that the *Immigration and Refugee Protection Act* and *Immigration Division Rules* do not explicitly compel an individual to testify at an admissibility hearing. (The motion was dismissed as premature.)

witness has a right not to have the “incriminating” evidence which the witness was compelled to give used against that witness in subsequent proceedings.

Section 13 of the *Canadian Charter of Rights and Freedoms* provides:

s. 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Section 5 of the *Canada Evidence Act* provides:

s.5 (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

6.2. SELF-SERVING EVIDENCE

This term is used generally to describe evidence that appears to have been created or fabricated for the purpose of the hearing, to bolster the case. In a sense, all testimony and letters of an appellant, claimant,²³ or person concerned may be called self-serving, to the extent that it helps their case and in that it is created by or for them. The Federal Court also stated that rarely will there be any evidence to contradict this evidence. It therefore becomes practically irrefutable. However, Parliament would not have created credibility panels if credibility could not be tested. Contradictions are not the exclusive factual source on which the presumption of truth may be rebutted.

However, evidence that may be given little weight because it is self-serving, is evidence that has been found to be a pure fabrication that does not reflect reality. Often a finding that the evidence is self-serving is linked to a finding that the witness is not credible as in *Huang*.²⁴ There, the claimant's entire story was found not to be plausible. The testimony that the claimant's mother had sent the summons for use at the hearing appears to be the basis for the Refugee Division panel's description of it as self-serving. The Federal Court stated that it did not accept that the panel meant the summons was "manufactured". The conclusion as to the weight to be given to the summons arose from the panel's overall assessment of the evidence.

In *Ghazvini*,²⁵ the Refugee Division panel found the claimant to be not credible. The panel gave no weight to an arrest warrant saying that such evidence was easily concocted and the original was not available. In this case, the Federal Court held that the panel considered the document to be false.

In *Grozdev*,²⁶ a Refugee Division panel again found the claimant's testimony not credible. A letter from the claimant's father, forwarding a document purporting to be a summons, referred to recent events of which the claimant was well aware. Thus the panel found it was specifically intended to be read by the panel at his hearing and was self-serving. The Federal Court held the panel committed no error.

However, in *Cardenas*,²⁷ the Federal Court did not uphold the Refugee Division panel's finding that correspondence from the claimant's family was self-serving. The Court agreed with counsel that such correspondence was his only source of corroboration. It was natural that he would request that they write and that they responded as they did.

²³ *Sung, Wei Hao v. M.C.I.* (F.C.T.D., no. T-3070-92), Joyal, February 6, 1996.

²⁴ *Huang, Zhi Wen v. M.E.I.* (F.C.T.D., no. A-1026-92), MacKay, September 10, 1993. See also, *Hussain, Abul Kalam Iqbal v. M.E.I.* (F.C.T.D., no. IMM-3011-94), Nadon, March 28, 1995 in which the Court held the language of the panel was unclear as to whether the two newspaper articles were genuinely published and printed to support the claim or if they were fraudulent. However, the reasons given for discounting the evidence were fully supported by the evidence.

²⁵ *Ghazvini, Hojjat v. M.C.I.* (F.C.T.D., no. IMM-6521-93), Richard, October 19, 1994.

²⁶ *Grozdev, Kostadin Nikolov v. M.C.I.* (F.C.T.D., no. A-1332-91), Richard, July 16, 1996.

²⁷ *Cardenas, Harry Edward Prahl v. M.C.I.* (F.C.T.D., no. IMM-1960-97), Campbell, February 20, 1998.

Although the correspondence postdated the claimant's arrival in Canada, there was no evidence that what was written was not true. It should be borne in mind that the documents were translated from Spanish and Spanish formal writing style is different than Canadian. The Court also did not uphold the panel's adverse credibility findings.

In *Ali*,²⁸ the Refugee Division panel found that a letter from the claimant's uncle had been concocted. The Federal Court upheld this finding. The letter was undated and it was sent to forward documents needed at the hearing. It was the only indication of a ransom demand and the panel doubted that kidnappers would wait that long before making their demand. These were held to be relevant considerations that supported the panel's finding.

In *Mahmud*,²⁹ the claimant submitted letters from his uncle and his party president. The Federal Court held the Refugee Division erred in finding them to be self-serving. It stated that the letters must be considered for what they do say, not for what they do not say. They corroborated the claimant's allegations in general terms and did not contradict his evidence.

Great care should be taken in assessing evidence such as the Personal Information Form which, of necessity,³⁰ is created by the claimant for the purposes of the hearing.

Where the decision-maker is of the opinion that the evidence is a "recent concoction", the decision-maker should consider whether there is a reasonable explanation for the evidence.

It is important for the decision-maker to state why they reached the conclusion that the evidence is self-serving. In *Bakcheev*³¹, the Refugee Division panel labeled the evidence of a witness as self-serving, without any explanation. The Court concluded the panel suspected the witness embellished his evidence to support the claim. However, this suspicion should have been advanced to allow the witness to rebut it. The witness' evidence was crucial as it bridged a gap between the documentary evidence in the hearing and the claimant's evidence.

The Refugee Division panel in *Celik*³² found the claimant to be credible but in its reasons, did not make reference to a psychiatric report and another letter that contradicted its finding that the claimant had not suffered past persecution. The Court stated that the panel could have summarily dealt with the evidence as self-serving since it was based on self-reporting by the claimant, but failing to refer to it was a reviewable error.

²⁸ *Ali, Muhammad v. M.C.I.* (F.C.T.D., no. IMM-3983-97), Rothstein, August 12, 1998. Similar findings were upheld in *Rana, Usman v. M.C.I.* (F.C.T.D., no. IMM-6184-99) Teitelbaum, August 30, 2000 and *Waheed, Babar v. M.C.I.* (F.C.T.D., no. IMM-1332-02), Beaudry, March 20, 2003; 2003 FCT 329.

²⁹ *Mahmud, Sultan v. M.C.I.* (F.C.T.D., no. IMM-5070-98), Campbell, May 12, 1999.

³⁰ And is required by section 5 of the RPD Rules, formerly section 14 of the CRDD Rules.

³¹ *Bakcheev, Dmitri et al v. M.C.I.* (F.C.T.D., no. IMM-1253-02, Campbell, February 20, 2003; 2003 FCT 202.

³² *Celik, Burhan, et al v. M.C.I.* (F.C.T.D., no. IMM-4840-02, Gibson, July 4, 2004; 2003 FCT 826.

The decision-maker should also explain the consequences of the finding that the evidence is self-serving, since the Board is not bound by the rules of evidence, and this type of evidence is accepted in certain cases. In general, this would result in a finding that the evidence is given little or no weight.

Even where the CRDD specifically asks the claimant to produce evidence relating to the situation in the claimant's country since their departure, the CRDD has a duty to weigh that evidence, and may find that it is self-serving. In this case, certain letters, and information from phone calls was found to be self-serving.³³ The panel indicated in this claim that the evidence was prepared for the purpose of the claim as opposed to being derived in the ordinary course of communication between the claimants and their family.

The Federal Court held that the CRDD was wrong to discount the evidence of "patently respectable deponents as to facts within their knowledge" because they are not available for cross-examination, due to the nature of the process. The panel had given little weight to the affidavit of a nun that supported the claimant's testimony, because it was signed at the request of the claimant and the nun was not available for cross-examination.³⁴

6.2.1. Factors to Consider:

- reasons for which the evidence was prepared
- date of the evidence
- relationship of the author to the party producing the evidence
- whether the author has any interest in the outcome of the hearing
- content of the evidence
- any apparent bias or contrived appearance
- whether or not this evidence is corroborated by other reliable evidence
- whether the author is available for cross-examination
- credibility of the party producing the evidence
- consistency with other reliable evidence

³³ *Villalba, Juan Francisco Massafferro et. al. v. M.C.I.* (F.C.T.D., no. IMM-7172-93), Rothstein, October 18, 1994.

³⁴ *Fajardo, Mercedes v. M.C.I.* (F.C.A., no. A-1238-91), Mahoney, Robertson, McDonald, September 15, 1993, at page 2.

6.3. HEARSAY EVIDENCE

Courts may refuse to admit into the record evidence that is considered hearsay. That is, evidence which is not based on the first-hand observations or knowledge of the witness.³⁵ The reasons for not admitting such evidence relate to the reliability of that evidence. Since all three Divisions of the Board are not bound by the rules of evidence, hearsay evidence is routinely accepted (e.g. newspaper articles).

The Board errs in law if it rejects hearsay evidence on the basis that it is inadmissible.³⁶ However, the fact that it is hearsay evidence may be taken into consideration in determining the weight to be given to the evidence. Members and Adjudicators should normally refer to the rationale behind the rule in assessing the weight of the evidence. For example, evidence which is second or third-hand information may be given less weight or no weight because it is less likely to be accurate, given the circumstances under which it was communicated.

If evidence is rejected because it is hearsay, the panel must explain why it did not find it to be credible or trustworthy (reliable).³⁷

The Federal Court of Appeal has held that it is not improper for the Convention Refugee Determination Division (CRDD) to admit into evidence highly prejudicial hearsay evidence if there is other evidence to support the panel's findings. It is up to the panel to determine the weight to be given to such evidence.³⁸ This same principle applies to the other two Divisions of the Board, as they also are not bound by the rules of evidence.

The Immigration Appeal Division did not err in receiving and relying upon the evidence of a police officer whose evidence was based on the evidence of undisclosed informants. The officer testified as an expert in Asian gang activity in the Vancouver area and in the identification of individual gang members. Even if parts of that evidence were "double hearsay", the Board could still rely on it, as long as it found the evidence to be credible, trustworthy and relevant.³⁹

In similar circumstances, the Federal Court of Appeal determined that the CRDD had not breached natural justice by admitting evidence of an expert witness that was unsworn and had contained information from unknown sources, obtained from unidentified informants.

³⁵ For a detailed explanation of the rule against hearsay and the principles underlying that rule, refer to Appendix A.

³⁶ *Yabe, Said Girre v. M.E.I.* (F.C.A., no. A-945-90), Hugessen, Desjardins, Létourneau, March 17, 1993. While this decision related to the CRDD, the general principle applies to all three Divisions of the Board.

³⁷ *Yabe, supra*, footnote 36; *Sawan, Nafice v. M.C.I.* (F.C.T.D., IMM-2988-02), Russell, June 12, 2003; 2003 FCT 734.

³⁸ *Mahendran v. Canada (Minister of Employment and Immigration)* (1991), 14 Imm.L.R. (2d) 30 [(F.C.A., A-628-90), Heald, MacGuigan, Linden, June 21, 1991].

³⁹ *Huang, She Ang v. M.E.I.* (F.C.A., A-1052-90), Hugessen, Desjardins, Henry, May 28, 1992; see also *Papsouev, Vitali v. M.C.I.* (F.C.T.D., IMM-4350-01), O'Keefe, March 3, 2003; 2003 FCT 270.

The F.C.A. noted that pursuant to section 68(3) of the *Immigration Act*,⁴⁰ the panel was entitled to admit the statement if it was considered credible and trustworthy. As for the expert witness not having been made available for cross-examination, the Court found that this was not a case where the credibility of the witness was at issue and that consequently, an opportunity for cross-examination was not essential to the fairness of the hearing. Furthermore, it found that it was not unfair for the CRDD to admit this evidence as the claimant was given every opportunity to raise objections beforehand, to request cross-examination before the hearing, to call rebuttal evidence and to make submissions regarding weight.⁴¹

6.3.1. Factors to Consider:

- the source of the original information⁴²
- the number of times the information has changed hands
- the reliability, credibility and objectivity of the persons through whom the information has passed
- the credibility of the witness
- the availability for cross-examination of any of the persons through whom the information was passed
- the consistency of the information with other reliable evidence⁴³

⁴⁰ Now paragraph 170(e) of the *Immigration and Refugee Protection Act*.

⁴¹ *Siad v. Canada (C.A.)*, [1997] 1 F.C. 608 [(F.C.A., A-226-94), McDonald, Isaac, Gray, December 3, 1996]. Application for leave to appeal to the Supreme Court of Canada was dismissed (without reasons) on June 26, 1997. See also *Harb, Mustafa Ahmed v. M.C.I.* (F.C.T.D., IMM-3936-98), Pinard, August 12, 1999.

⁴² See, for example, *Harper, Ingrid v. M.E.I.* (F.C.T.D., 93-T-41), Rothstein, March 4, 1993, for the Court's analysis of a statutory declaration based on "hearsay upon hearsay".

⁴³ *Veres, supra*, footnote 1.

6.4. EVIDENCE OF CHILDREN⁴⁴

Section 167(2) of the Immigration and Refugee Protection Act gives each Division of the Board the power to appoint a person (designated representative) to represent a person before the Division who is under 18 years of age. The Rules of each Division contain parallel, though not identical, provisions regarding the duty of counsel to notify the Division of the need for a designated representative and the requirement for being so designated. These are set out in sections 18 and 19 of the Immigration Division Rules; section 19 of the Immigration Appeal Division Rules; and section 15 of the Refugee Protection Division Rules. The Immigration Division Rules and the Refugee Protection Division Rules both have similar but not identical Commentaries to these provisions. In addition, for the Refugee Protection Division, the Chairperson has issued a guideline (Guideline 3), which addresses procedural and evidentiary issues in claims involving child refugees.⁴⁵

Care should be taken in designating a representative to ensure that they will consider the best interests of the child in assisting the child with the presentation of their case, and that there will not be a conflict between the interests of the designated representative and those of the child.⁴⁶ Where the designated representative is not also counsel, the designated representative will instruct counsel on behalf of the person represented.

The minor may still seek to provide oral testimony. Special concerns arise regarding this testimony, depending on the age of the minor.

Two major concerns arise with regard to the evidence of children:

- (a) whether the child understands the duty of telling the truth; and
- (b) whether the child is able to communicate the evidence.

Under section 16 of the Canada Evidence Act, it is presumed that a child 14 years of age and older has the capacity to testify.

Where a child seeks to testify, the Member should first speak to the child to determine whether they understand what it means to give an oath or affirmation, or the duty to tell

⁴⁴ See also Chapters 10 and 12 of the *CRDD Handbook*, March 31, 1999.

⁴⁵ Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Immigration Act*, effective September 30, 1996, relating to *Child Refugee Claimants: Procedural and Evidentiary Issues*. The Guideline was continued in effect by the Chairperson on June 28, 2002, pursuant to section 159(1)(h) of the *Immigration and Refugee Protection Act*.

⁴⁶ In *Espinoza v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 73 (T.D.), the Court held that the CRDD erred in designating the applicant as the children's representative without regard to whether the applicant or the children understood the legal meaning of such a designation with respect to the outcome of the children's refugee claim. The lack of knowledge as to what was meant by designated representative precluded the children, by virtue of their designated representative, to fully answer the case against them and to present their claim as best they could.

the truth at the hearing. At the same time the Member will be able to determine how effectively the child is able to communicate their thoughts. Again, since all three Divisions of the Board are not bound by the rules of evidence, the Member may hear the child's testimony and weigh it appropriately depending on the child's understanding of the requirement to be truthful, and their ability to communicate.

In hearing and weighing the evidence of children, the panel needs to exercise sensitivity, always taking into consideration the limitations under which a child may be testifying.

“... A refugee claimant who is a child may have some difficulty recounting the events which have led him or her to flee their country. Often the child claimant's parents will not have shared distressing events with the claimant, with the intention of protecting their child. As a result, the child claimant, in testifying at his or her refugee hearing, may appear to be vague and uninformed about important events which have led up to acts of persecution. Before a trier of fact concludes that a child claimant is not credible, the child's sources of knowledge, his or her maturity, and intelligence must be assessed. The severity of the persecution alleged must be considered and whether past events have traumatized the child and hindered his or her ability to recount details.”⁴⁷

“Counsel for the applicants reminded the panel that we are dealing with minor children in the instant matter and that under these circumstances, close attention must be paid to the Immigration and Refugee Board's guidelines on procedural and evidentiary issues for minor children ... The panel clearly did not take into consideration the fact that the applicants were ten and twelve years of age when they travelled to Canada and that these two children clearly did not have to keep a log throughout their travels. Furthermore, it was quite possible, and perhaps even likely realistic, that both of the applicants could not precisely remember all of the circumstances of the journey, which must certainly have been very stressful under the circumstances.”⁴⁸

6.4.1 Factors to Consider:

- whether the child would be more comfortable testifying in special circumstances (e.g., with the help of a trusted friend, relative or counsellor, or through the use of a video camera or behind a screen)
- the child's age at the time of the events
- the time that has elapsed since the events
- the child's level of education
- the child's ability to understand and relate the events

⁴⁷ CRDD V92-00501, Burdett, Brisco, April 1, 1993, at 2.

⁴⁸ *Uthayakumar, Sivakumar v. M.C.I.* (F.C.T.D., no. IMM-2949-98), Blais, June 18, 1999.

- the child's understanding of the requirement to tell the truth
- the child's capacity to recall the events
- the child's capacity to communicate intelligibly or in a form capable of being rendered intelligible
- whether the child witness was intimidated by the hearing room setting.

A child should not be required to swear an oath, or to affirm, if the child does not understand the significance of doing so. It is sufficient if the child promises to tell the truth before testifying. Such evidence may be accorded the same weight as evidence given under oath or by affirmation.

6.5. EVIDENCE OF INCOMPETENTS (PERSONS SUFFERING FROM MENTAL OR EMOTIONAL DISORDERS)⁴⁹

Section 167(2) of the Immigration and Refugee Protection Act gives Members of each Division the power to appoint a person (designated representative) to represent a person before the Division who is “unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings.”⁵⁰ The Rules of each Division contain parallel, though not identical, provisions regarding the duty of counsel to notify the Division of the need for a designated representative and the requirement for being so designated. These are set out in sections 18 and 19 of the Immigration Division Rules; section 19 of the Immigration Appeal Division Rules; and section 15 of the Refugee Protection Division Rules. The Immigration Division Rules and the Refugee Protection Division Rules both have similar but not identical Commentaries to these provisions.

Care should be taken in designating a representative to ensure that they will consider the best interests of the person in assisting them with the presentation of their case, and that there will not be a conflict between the interests of the designated representative and those of the person represented. Where the designated representative is not also counsel, the designated representative will instruct counsel on behalf of the person represented.

The mere existence of a mental disorder does not necessarily mean that the person is unable to appreciate the nature of the proceedings.⁵¹ An assessment should be made in each case by questioning the person, where appropriate, and examining any medical reports produced.⁵²

While the person may not be able to appreciate the nature of the proceedings, they may still be called upon to give oral testimony. Care must be taken in assessing that testimony, as well as the testimony of individuals suffering from mental or emotional disorders which do not prevent the person from understanding the nature of the proceedings.

The claimant, who had witnessed a violent murder when he was fourteen years old, suffered from Post-Traumatic Stress Disorder. Eleven years later, he claimed the

⁴⁹ See also Chapters 10 and 12 of the *CRDD Handbook*, March 31, 1999.

⁵⁰ Based on a similarly worded provision, in *Abdousafi, Gamil Abdallah v. M.C.I.* (F.C.T.D., no. IMM-337-00), Blanchard, December 31, 2001, 2001 FCT 372, the Court determined that the *Immigration Act* does not require that the CRDD must rely on a medical assessment rather than its own assessment of the applicant’s mental ability. The Court further stated that the onus was on the applicant to bring forward medical evidence of his alleged deficiency and noted that no such evidence was before the CRDD.

⁵¹ For example, the person may be lucid for a sufficient period of time to complete the hearing, or may be stable when taking medication, or the nature of the illness may be such that it does not interfere with the person’s understanding of the nature of the hearing.

⁵² In *Ozturk, Erkan v. M.C.I.* (F.C., IMM-6343-02), Tremblay-Lamer, October 20, 2003, 2003 FC 1219, the Court found that it was apparent that on many occasions the applicant was unable to understand the questions, thus raising a doubt as to his capacity to understand the nature of the proceeding. It was therefore unreasonable to refuse an adjournment request when a medical evaluation could have cast the applicant’s testimony in a completely different light. An applicant’s mental health is of utmost importance in evaluating testimony and credibility.

murderers recognized him and he feared they would track him down anywhere in India. The CRDD found the claimant's evidence to be implausible. It was more likely that the fearfulness and extreme anxiety resulting from the disorder coloured the claimant's perception of reality.⁵³

The claimant suffered from "an undifferentiated schizophrenic process with paranoid and esoteric thematic." The Federal Court concluded that, due to this condition, there was uncertainty about the claimant's ability to recall past events. The psychiatrist indicated that the claimant would need assistance to clarify the questions put to him. In the circumstances there was a clear duty to determine what was true in the claimant's story. "Regardless of its concerns, the panel is bound by the evidence before it and cannot allow itself to engage in speculation or make assumptions. Its function is also not to engage in social work: it is only there to determine whether the claimant is a Convention refugee."⁵⁴

The CRDD found that the claimant suffered from an organic brain syndrome which impaired his memory, but that he still understood the purpose of the proceedings. The panel placed no weight on the claimant's evidence nor drew any adverse inferences from the contradictions and inconsistencies in it and, instead, relied on the evidence of his adult children.⁵⁵

6.5.1. Factors to Consider:

- any expert medical or psychological evidence⁵⁶
- the nature of the particular condition from which the witness suffers
- whether the witness would be better able to testify if given an opportunity to stabilize their condition through medication (i.e., a short adjournment would be appropriate)
- whether the witness would be more comfortable testifying in special circumstances (e.g., with the help of a trusted friend, relative, or counsellor, or through the use of a video camera, or behind a screen)
- the effect of that condition on the witness's ability to recall past events
- the effect of that condition on the witness's ability to understand the questions asked

⁵³ CRDD V94-00588, Brisson, Vanderkooy, March 27, 1996.

⁵⁴ *Chibout, Amar v. Canada (Solicitor General)* (F.C.T.D., no. IMM-5647-93), Joyal, November 30, 1994.

⁵⁵ CRDD V93-02425, Brisson, Siddiqi, October 20, 1995.

⁵⁶ *Sanghera, Bhajan Singh v. M.E.I.* (F.C.T.D., no. T-194-93), Gibson, January 26, 1994. Reported: *Sanghera v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 194 (F.C.T.D.).

- careful attention should be paid to the testimony to determine whether the witness was lucid at times, while not so at other times
- consideration should be given to whether other sources of objective evidence are available to support the witness's testimony
- any other objective evidence produced should be examined in determining the weight to give to the witness's testimony

6.6. SPECULATION

Findings of fact cannot be based on evidence that is "the sheerest conjecture or the merest speculation."⁵⁷ Nor should the decision-maker rely on its own speculation in making its findings.⁵⁸

In *Cardenas*,⁵⁹ the Refugee Division panel found some of the claimant's evidence to be implausible because his fear of "spies" was conjecture. In *obiter*, The Federal Court agreed that the claimant could have no personal knowledge of such spies himself but the documentary evidence supported that in war-torn Guatemala, their presence in a police station was highly likely. It held that the panel replaced the claimant's speculation with that of its own.

In *Matharu*⁶⁰, the panel invited the claimant to speculate why the police had arrested him and his father and had searched their home and business. The claimant indicated the police thought they were involved with militants. The Court held why the police thought this was so can only be a matter of speculation unless the police disclosed their suspicions. It was unfair to reject the incident because of speculation.

In *Mahalingam*,⁶¹ the Refugee Division panel found the claimant's fear of the police, which was supported by a letter and documentary evidence, to be "highly speculative". The panel cited no evidence in support of its "feeling". In the absence of evidence cited and weighed against the evidence to the contrary, the panel resorted to speculation.

In *Bains*,⁶² the Federal Court refused to uphold the Refugee Division panel's findings of implausibilities because it found they lacked evidentiary foundation. The panel's inferences were based on speculation.

In *Khan*,⁶³ the Federal Court stated that the Refugee Division panel expressed a general opinion that in Pakistan, when the government changes, the actions of all the operatives within the apparatus of the state also change. The Court held that such an opinion is speculation unless it can be proven. Here, the document used to support that opinion predated the election by four years. The Court held it is also engaging in speculation to transfer information from one period in time to another, and to rely on it to make global

⁵⁷ *M.E.I. v. Satiacum, Robert* (F.C.A., no. A-554-87), MacGuigan, Urie, Mahoney, June 16, 1989.

⁵⁸ *Hassan, Bedria Mahmoud v. M.C.I.* (F.C.T.D., no. IMM-1770-95), McKeown, February 21, 1996.

⁵⁹ *Cardenas, supra*, footnote 27.

⁶⁰ *Matharu, Manider Singh v. M.C.I.* (F.C.T.D, no. IMM-868-00), Pelletier, January 9, 2002; 2002 FCT 19.

⁶¹ *Mahalingam, Shyama Ushandhini v. M.C.I.* (F.C.T.D., no. IMM-833-97), Gibson, January 30, 1998.

⁶² *Bains, Pritnam Singh v. M.C.I.* (F.C.T.D. no., IMM-5366-97), Reed, August 10, 1998. In *Valtchev, Rousko v. M.C.I.* (F.C.T.D., no. IMM-4497-99), Muldoon, July 6, 2001, the panel made findings regarding the claimant's lack of a birth certificate while stating it had no precise information regarding birth registration requirements. The Court held this was engaging in speculation.

⁶³ *Khan, Aman v. M.C.I.* (F.C.T.D., no. IMM-5171-97), Campbell, October 30, 1998.

assertions about present conditions, without giving precise reasons. The unsupported opinion expressed was speculation.

In *Ke*⁶⁴, the Court considered the paucity of evidence available regarding the proposed bondsperson in a detention review and found the adjudicator's decision was based on speculation. The adjudicator considered the blood relationship that existed and commented that while it was tenuous, it was necessary to be sensitive to cultural differences. He speculated that to dishonor the bondsperson would create pain and disharmony to the detained person's mother and accepted the bond offer.

The difference between pure conjecture or speculation, and a reasonable inference has been described as follows:

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction, it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.⁶⁵

The evidence should be examined to determine whether there is evidence upon which the witness could draw an inference, or whether the statement is based purely on speculation. Speculation should be given no weight.

If the witness is drawing inferences from the evidence, the reliability of the evidence upon which the inference is based must also be considered. As in *Portianko*,⁶⁶ the Refugee Division held it accepted the claimant's credibility in those matters of which he had direct personal knowledge, but it did not accept his speculation or conclusion based on speculation. The Federal Court held that there is a distinction between facts of which a witness has direct knowledge, such as he had received a summons, and speculation relating thereto, such as he would be beaten or killed for responding to the summons. The acceptance of the first type of evidence and the rejection of the second is not unreasonable given that the source of the witness' knowledge of the two is different.

Ultimately, the panel must draw its own inferences from the evidence. The presumption that sworn testimony is true applies to allegations of fact, not to speculative conclusions drawn from those facts.⁶⁷

⁶⁴ *M.C.I. v. Ke, Yi Le* (F.C.T.D., no. IMM-1425-00), Reed, April 12, 2000.

⁶⁵ *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 at 45, 144 L.T. 194 at 202 (H.L.), as quoted by MacGuigan, J.A. in *Satiacum*, *supra*, footnote 57.

⁶⁶ *Portianko, Rouslan v. M.C.I.* (F.C.T.D., no. IMM-4382-94), Reed, May 15, 1995.

⁶⁷ *Hercules, Pedro Monge et al. v. S.G.C.* (F.C.T.D., no. IMM-196-93), Gibson, August 25, 1993.

6.7. EXPERT/OPINION EVIDENCE

"As a general rule, an expert is characterized as a person possessed of the special skill and knowledge acquired through study or practical observation that entitles him [or her] to give opinion evidence or speak authoritatively concerning his or her area of expertise."⁶⁸

An expert's evidence is intended to provide decision-makers with information which is outside their experience or knowledge.⁶⁹ The panel should consider whether the witness is in any better position than the panel is, to form an opinion or to draw inferences from the facts.⁷⁰

Before the courts, opinion evidence is generally not permitted. The exception to this rule is opinion evidence from an expert, who must be qualified as such before being permitted to testify. However, none of the three Divisions of the IRB is bound by the rules of evidence, and experts do not need to be formally qualified as such in order to give opinion evidence.

Each Division has a rule⁷¹ regarding witnesses, whether they are ordinary or expert witnesses. Despite some differences in the wording of the rules of the three Divisions, they all require disclosure of the qualifications of the expert witness and a signed summary of the evidence any expert witness will provide.

An expert's evidence is not, however, limited to oral testimony. It may also be in the form of a written report. Medical and psychological reports and reports concerning the authenticity of documents are common examples. In a case where the CRDD members relied on a report from Immigration Canada Intelligence Services concerning the authenticity of a claimant's party membership card and a letter, the Court held that it was reasonable for the Board to consider the person who examined the documents to be an expert.⁷²

The qualifications of the witness will have bearing on the weight to be given to the evidence. For this reason, it is still important to establish the domain of the asserted expertise, and to compare the qualifications offered with the domain asserted. In one case,

⁶⁸ Stobo, G., *Expert Evidence*, I.R.B. Legal Services, July 11, 1989, p.3.

⁶⁹ The expert's opinion is not needed unless "the expert witness possesses special knowledge and experience going beyond that of the trier of fact"; *R. v. Béland* [1987] 2 SCR. 398, at p. 415.

⁷⁰ In *Isaza, Maria Patricia Lopera v. Canada (Minister of Citizenship and Immigration)*(F.C.T.D., no. IMM-3373-99), Denault, May 19, 2000, the Court held that it was not unreasonable for the Refugee Division to refuse to recognize an Amnesty International volunteer responsible for the Andes region as an expert witness, on the basis that she had never been to Colombia and had no greater knowledge of the country than did the panel which had access to abundant documentary evidence.

⁷¹ *Refugee Protection Division Rules*, s. 38; *Immigration Division Rules*, s. 32; and *Immigration Appeal Division Rules*, s. 37.

⁷² *Mir, Abdul Rafi v. M.E.I.* (F.C.T.D., no. IMM-3721-98), Teitelbaum, August 20, 1999.

the CRDD members reviewed the testimony of a purported expert witness called by the claimants in light of the curriculum vitae she had provided. Although the panel would have been prepared to consider the witness an expert on country conditions during the time she had been living and working in the country, they concluded that she was not an expert on the country conditions during the relevant period.⁷³

Any challenge to the qualifications of an expert witness should be made immediately at the hearing before the CRDD.⁷⁴

The expert's presence in the hearing room during the testimony and the fact that the expert has interviewed the claimant before the hearing would not normally affect the credibility of an unbiased expert. The issue is whether a bias exists. Normally, the concern about whether the expert's testimony is tailored to the evidence already heard is not as great as the concern about the testimony of a lay person since experts give opinion and "do not create the facts upon which their opinions are founded."⁷⁵

The decision-maker is not bound to accept and give full weight to the expert testimony. It may be weighed in the same manner as any other evidence.⁷⁶ However, when the expertise of a witness is not in doubt, the Board should take particular care in explaining why it rejects the evidence of that expert, especially if the evidence supports a party's position.⁷⁷ The greater the expertise, the greater the weight; unless there are other reasons to give the evidence less weight.

It is an error to ignore evidence which, on its face, is relevant and emanates from a reliable source. Thus the Refugee Division erred in concluding that there was no evidence of persecution when there was before the CRDD a letter to the contrary, written by a professor with impressive credentials.⁷⁸ Nor should the Board overlook medical and psychological reports before concluding that a claim has been abandoned.⁷⁹

This does not mean, however, that expert opinions cannot be set aside after they have been given due consideration. The Court found no error in the CRDD's decision to give no weight to a psychiatric report that concluded that the claimant suffered from post-

⁷³ *Lopez Estrada, Edgar Raul et al. v. M.C.I.* (F.C.T.D., no. IMM-4089-97), Gibson, August 25, 1998.

⁷⁴ *Akingbola, Omasalape Olanake et al. v. M.C.I.* (F.C.T.D., no. IMM-3329-97), Reed, August 4, 1998.

⁷⁵ *Auto Workers' Village (St. Catherines) Ltd. v. Blaney, McMurtry, Stapells, Friedman*, 35 O.R.(3d), (Ont. Ct. Gen.Div.), June 24, 1997, at 33.

⁷⁶ *R. v. Ratti*, [1991] 1 S.C.R. 68; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374; *Bula, Ngaliema Zena v. Canada (S.S.C.)* (F.C.T.D., no. A-794-92), Noel, June 16, 1994; and *Bains, Iqbal Singh v. M.C.I.* (F.C.T.D., no. IMM-2055-94), Muldoon, August 24, 1995.

⁷⁷ *Bains, Iqbal Singh v. M.E.I.* (F.C.T.D., no. 92-A-6905), Cullen, May 26, 1993; *Zapata v. Solicitor General and M.E.I.* (F.C.T.D., no. IMM-4876-93), Gibson, June 22, 1994; *Miayuku, Lubanzadio v. M.C.I.*, (F.C.T.D., no. IMM-4813-93), Pinard, July 18, 1994; and *Sivayogathan, Maria Rajeswary v. M.C.I.* (F.C.T.D., no., IMM-4979-93), Noel, November 7, 1994.

⁷⁸ *Osman v. M.E.I.* (F.C.T.D., no. A-1245-92), Gibson, November 25, 1993.

⁷⁹ *Nievas, Lorena Cecilia Luttra v. M.C.I.* (F.C.T.D., no. IMM-828-97), Pinard, January 14, 1998.

traumatic stress syndrome, in a case where the CRDD had found the events on which the report was based not to be credible.⁸⁰ The Court has said that while it is open to the RPD to determine the weight to be given to a psychologist's assessment, the RPD does not have the expertise to reject a psychologist's diagnosis.⁸¹

In another case, the CRDD took into account a psychiatrist's report which stated that the claimant had difficulty talking about her history. The Court upheld the Board's determination that the psychiatrist's opinion could not be used to excuse the fact that there were "significant lacunae in the content of the applicant's evidence."⁸²

The Refugee Division accorded no probative value to an opinion expressed in affidavits and a letter from two directors of Central American human rights organizations and a lawyer, who were referred to as "three experts". They were of the opinion that the claimant, a deserter, would be at risk of persecution. The opinion appeared to be unsubstantiated speculation by the deponents and author of the letter who had provided no evidence or examples to support their opinion. The Court held that it was open to the Refugee Division to prefer to rely instead on the documentary evidence before it.⁸³

The fact that a medical doctor was not a specialist, had not had an opportunity to examine an applicant or review the applicant's x-rays, went to the weight of the doctor's testimony and not to the question of whether or not he was qualified to testify as an expert witness.⁸⁴

The Board was of the view that practising as an advocate in India for a number of years did not, without more, qualify a person as an expert on Hindu adoptions, although it was prepared, after cautioning the appellant on the issue of weight, to accept the affidavit of such a person as part of the appellant's case.⁸⁵

Where the expert's unsworn statement was considered important corroboration of the claimant's evidence, it should not have been accepted into evidence except through *viva voce* evidence, unless that were impossible. There was no indication of the expert's source of knowledge; he was not made available for cross-examination; and there was no evidence that he was not available.⁸⁶

⁸⁰ *Al-Kahtani, Naser Shafi Mohammad v. M.C.I.* (F.C.T.D., no. IMM-2879-94), MacKay, March 13, 1996. See also *Singh v. M.E.I.* (F.C.T.D., no. IMM-4300-96), Lutfy, October 1, 1997.

⁸¹ *Trembliuk, Yuriy v. M.C.I.* (F.C., no. IMM-5873-02), Gibson, October 30, 2003; 2003 FC 1264 at para.12

⁸² *Mbuyi, Nicole Madeleine v. M.C.I.* (F.C.T.D., no. IMM-58-97), Reed, November 5, 1997, at 2.

⁸³ *Gomez-Carillo v. M.C.I.* (F.C.T.D., no. IMM-242-96), Gibson, October 17, 1996.

⁸⁴ *Toor, Devinder Kaur v. M.E.I.* (I.A.B. V84-6167), Wlodyka, Mawani, Singh, November 14, 1986.

⁸⁵ *Aujla, Surjit Singh v. M.E.I.* (I.A.B. V87-6021), Mawani, November 10, 1987.

⁸⁶ *Siad, Ali Mohammed v. Solicitor General* (F.C.T.D., no. A-1060-92), Strayer, April 12, 1994. See however, *Fajardo, supra*, footnote 34, where the Court of Appeal held that the CRDD could not give "very little weight" to an affidavit simply because the deponent was not available for cross-examination. See also *Jones v. Canada* (I.A.D. no. V94-02269), McIsaac, June 23, 1997 where the I.A.D. accepted the unsworn expertise that corroborated a negative pre-sentencing report.

6.7.1. Factors to consider in determining the admissibility and weight of evidence from an expert witness:

- whether an expert would be of assistance regarding the issue to be decided. Counsel should be asked to clarify the purpose of the expert testimony. Before refusing to hear the testimony, the decision-maker must be certain that the evidence would be of no assistance. It may be preferable to hear the testimony and weigh it appropriately later.
- whether the testimony is within the expert's area of expertise
- the manner in which the expertise was acquired, i.e. by education and/or experience
- whether the expert's opinion was formed with full knowledge of the relevant facts
- the facts and assumptions relied on by the expert
- whether the facts relied on by the expert have been established⁸⁷
- quality of textbooks and other source material relied on by the expert
- whether the methods relied on to form the opinion were reliable. e.g. nature of tests applied, and whether they were culturally sensitive
- whether the expert has relied on hearsay in forming an opinion and how reliable that hearsay information is
- whether the hearsay information relied on by the expert is of the nature generally relied on by experts in the field⁸⁸
- whether there is evidence that other respected experts in the field hold a different opinion on the subject
- any biases or radical views held by the expert
- expert's relationship to the claimant, appellant, or person concerned
- whether a medical expert has examined the claimant personally, or simply referred to medical records

⁸⁷ *Danailoff, Vasco v. M.E.I.* (F.C.T.D., no. T-273-93), Reed, October 6, 1993; *Boateng, Nicholas v. M.C.I.* (F.C.T.D., no. A-1027-92), Wetston, March 31, 1995; and *Al-Kahtani, supra*, footnote 80.

⁸⁸ See, for example, *Huang, supra*, footnote 39, in which the Court upheld the Immigration Appeal Division's decision to admit a police officer's evidence which was based not on personal knowledge but on information from police informers.

6.8. DOCUMENTARY EVIDENCE

Documentary evidence includes a broad range of materials, including extracts from newspapers, books, and magazines; photographs; passports and other travel documents; statutory declarations and affidavits; birth, school and marriage certificates; driver licenses; warrants, judgments; records of landing; other official documents; photocopies of documents; letters; police reports; reports from probation officers; application forms; computer printouts; and computer records.

In the process of assessing the weight to be given to documentary evidence, an issue may arise as to the authenticity of the document. Unreliable documents may be genuine, but contain alterations; they may be totally fraudulent or they may be photocopies of documents that have been altered. It may also be alleged that a genuine document was issued illegally by corrupt officials. Evidence would be required to support such an allegation.

6.8.1. General Principles

The Federal Court has held that the Refugee Protection Division must explain why it finds a document which appears to be genuine, not to be genuine.⁸⁹ The principle is applicable to all three Divisions of the Board.

An applicant's lack of credibility affects the weight that will be given to the documentary evidence filed with the Refugee Protection Division.⁹⁰

⁸⁹ *Warsame, Mohamed Dirie v. M.E.I.* (F.C.T.D., no. A-758-92), Nadon, November 15, 1993; *Uddin, Nizam v. M.C.I.* (F.C.T.D., no. IMM-895-01), Gibson, April 26, 2002; 2002 FCT 451 (extensive documentary evidence disclosing that fraudulent Pakistani documentary evidence is readily available in support of refugee claims, supported the panel's conclusion that the arrest warrants were not authentic); In *Kathirkamu, Saththiyathan v. M.C.I.* (F.C.T.D., no. IMM-3430-02), Russell, April 8, 2003; 2003 FCT 409 (it was an error for the panel to require photo identification and unspecified security features in a birth certificate and postal identify card. The Board by implication presumed them to be forgeries without saying so, which is an error of law).

⁹⁰ *Songue, André Marie v. M.C.I.* (F.C.T.D., no. IMM-3391-95), Rouleau, July 26, 1996; *Syed, Najmi v. M.C.I.* (F.C.T.D., no. IMM-2785-99), Blais, May 3, 2000 (in light of the panel's finding of lack of credibility, it did not err in giving little weight to a psychologist's report); *Ahmad, Nawaz v. M.C.I.* (F.C.T.D., no. IMM-944-02), Rouleau, April 23, 2003; 2003 FCT 471 (Where the panel concludes that the claimant is clearly not credible, it is not an error on its part not to explain why it did not give probative value to documents which purport to substantiate allegations found not to be credible); However, note the finding in *Baranyi, Zsoltne v. M.C.I.* (F.C.T.D., no. IMM-3253-00), O'Keefe, June 15, 2001; 2001 FCT 664 (even in situations where the CRDD finds an applicant not to be credible it still must consider the documentary evidence). Also, in *Ahmed, Bashar v. M.C.I.* (F.C.T.D., no. IMM-2745-02), Tremblay-Lamer, April 17, 2003; 2003 FCT 456, the Court stated that a blanket statement that no probative value was assigned to a statement from the claimant's political party, a lawyer's letter and a medical report because of a negative credibility finding will not suffice.); similarly, in *Fidan, Suleyman v. M.C.I.* (F.C., no. IMM-5968-02), Von Finckenstein, October 14, 2003; 2003 FC 1190, the Court stated that the Board was obliged to do more than merely state that it had "considered" a psychological report; in *Voytik, Lyudmyla Vasylivna v. M.C.I.* (F.C., no. IMM-5023-02), O'Keefe, January 16, 2004; 2004 FC 66, the Court held that the Board erred in using its negative credibility finding as the reason to place no weight on medical records).

“...Where the [Refugee Division] is of the view...that the applicant is not credible, it will not be sufficient for the applicant to file a document and affirm that it is genuine and that the information contained therein is true. Some form of corroboration or independent proof will be required to ‘offset’ the Board’s negative conclusion on credibility.”⁹¹ This principle is also applicable to the other Divisions of the Board. While corroboration is not normally required, once the witness has been found to be not credible, their affirmation that documentary evidence is true, may not be sufficient.

Section 106 of the *Immigration and Refugee Protection Act* states that the RPD must take into account, with respect to credibility, whether the claimant possesses acceptable identity documentation and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation. Rule 7 of the Refugee Protection Division Rules states that the claimant must provide acceptable documents establishing identity and other elements of the claim.⁹²

When the documentary evidence contains excerpts that are favourable and unfavourable to an applicant, it is for the panel to weigh that evidence and the Court will not interfere except in very unusual circumstances.⁹³

There is a presumption that a tribunal has considered all the documents filed before it. The fact that some of the documentary evidence was not mentioned in the Board’s reasons is not fatal to its decision.⁹⁴

Documentary evidence may be preferred to the testimony of the claimants, on the basis that the sources were reputable and independent and had no interest in the outcome of the particular claim.⁹⁵ The panel may proceed in this manner insofar as it explains its reason in clear and specific terms.⁹⁶

⁹¹ *Hamid, Iqbal v. M.E.I.* (F.C.T.D., no. IMM-2829-94), Nadon, September 20, 1995, at 9. In *Amarapala, Priyanga Udayantha v. M.C.I.* (F.C., no. IMM-5034-03), Kelen, January 7, 2004; 2004 FC 12 the Court referred to Rule 7 of the RPD Rules and stated that evidence to corroborate the applicant’s involvement with the UNP was necessary.

⁹² *Amarapala, supra*, footnote.91

⁹³ *Owusu, Victor v. M.C.I.* (F.C.T.D., no. IMM-1541-97), Rothstein, February 27, 1998.

⁹⁴ *Hassan v. Canada (M.E.I.)* (1992) 147 N.R. 317 (FCA), *Moskvitchev, Vitalli v. M.C.I.* (F.C.T.D., no. IMM-70-95), Dubé, December 21, 1995; *Randhawa, Onkar Singh v. M.C.I.* (F.C.T.D., no. IMM-1482), Pinard, April 30, 1999; *Jaber, Ammar v. M.C.I.* (F.C., no. IMM-2099-02), Pinard, September 23, 2003; 2003 FC 1065.

⁹⁵ *Mihelcic, Nicola v. M.E.I.* (F.C.T.D., no. IMM-1010-94), Gibson, March 16, 1995. See also: *Okyere-Akosah, Kwame v. M.E.I.* (1992) 157 N.R. 387 (F.C.A.) which expresses the same principle; *Argonovski, Vladislav v. M.C.I.* (F.C.T.D., no. IMM-2709-95), Tremblay-Lamer, July 3, 1996 explaining *Okyere-Akosah*; *Sanoé, Sekou v. M.C.I.* (F.C.T.D., no. IMM-5047-98), Lemieux, September 16, 1999 distinguishing *Okyere-Akosah*; *Olschewski, Alexander Nadirovich v. M.E.I.* (F.C.T.D., no. A-1424-92), McGillis, October 20, 1993 distinguishing *Okyere-Akosah*; *Kandasamy, Thirunavukarasu v. M.C.I.* (F.C.T.D., no. IMM-4730-96), Reed, November 5, 1997. And see following cases, which support the previous conclusion from *Mihelcic*: *Ortiz, Hector Andres Gonzales v. M.C.I.* (F.C.T.D., no. IMM-2485-96), Pinard, June 4, 1997; *Fedonin, Konstantin v. M.C.I.* (F.C.T.D., no. IMM-228-97), Pinard, December 5, 1997; *Burgos, Esteban Natan Munoz v. M.C.I.* (F.C.T.D., no. IMM-2676-96), Pinard, October 17, 1997; *Orozokosse, Ange v. M.C.I.* (F.C.T.D., no. IMM -4667-97), Rouleau, September 24, 1998; *Bains, Baljit Kaur v. M.C.I.* (F.C.T.D., no. IMM-4029-97), Evans, March 8, 1999. In *Bains*, the Court considered the reliability of the

Passports and identity documents issued by a foreign government are presumed to be valid, unless evidence is presented to establish otherwise. The onus of proof lies with the party alleging that the document is not valid.⁹⁷ The Board does not have specific expertise when dealing with foreign documents.⁹⁸

6.8.2. Failure to refer to documentary evidence

Neither the Federal Court nor the RPD need catalogue every item of evidence in its reasons for decision. However, it is essential for both the RPD and the Court to have regard to the totality of the evidence on the record in reaching their respective conclusions.⁹⁹

The Court in *Gourenko*¹⁰⁰ identified three factors for consideration in determining whether a tribunal's failure to refer to documentary evidence constitutes an error of law:

source and the relevance of the evidence in considering whether the CRDD erred in law in not explaining its choice of certain documentary evidence over both *viva voce* and documentary evidence of expert witnesses on behalf of the applicant; *Khan, Amjad v. M.C.I.* (F.C.T.D., no. IMM-427-01), Blanchard, April 10, 2002; 2002 FCT 400 (the Board is entitled to give more weight to the documentary evidence, even if it finds the claimant to be trustworthy and credible); *Cekani, Najada v. M.C.I.* (F.C., no. IMM-4869-02), Heneghan, October 7, 2003; 2003 FC 1167 (the Court found that it was within the mandate of the Board to give the documentary evidence greater weight than the applicants' testimony and other evidence tendered by them); *Saif, Kafil Ud Din v. M.C.I.* (F.C., no. IMM-2443-02), Pinard, September 23, 2003; 2003 FC 1067.

⁹⁶ *Maximilok, Yuri v. M.C.I.* (F.C.T.D., no. IMM-1861-97), Joyal, August 14, 1998; *Cepeda-Gutierrez, Carlos Arturo v. M.C.I.* (F.C.T.D., no. IMM-596-98), Evans, October 6, 1998, para 16-17; *Lutete, Mgenbi v. M.C.I.* (F.C.T.D., no. IMM-2883-98), Blais, March 31, 1999; *Toor, Sukhwinder Singh v. M.C.I.* (F.C., no. IMM-5544-02), Beaudry, December 16, 2003; 2003 FC 1473.

⁹⁷ *Gur, Jorge P.* (1971), 1 I.A.C. 384 (I.A.B.); *Ramalingam, Govindasamy Sellathurai v. M.C.I.* (F.C.T.D., no. IMM-1298-97), Dubé, January 8, 1998, para 5; *Nika, Mimoza v. M.C.I.* (F.C.T.D., no. IMM-5209-00), Hansen, June 14, 2001; 2001 FCT 656; *Al-Shammari, Mossed. v. M.C.I.* (F.C.T.D., no. IMM-33-01), Blanchard, April 2, 2002; 2002 FCT 364 (the panel erred in finding that the birth certificate had no probative value since there was no indication in the evidence that the certificate could be a forgery).

⁹⁸ *Ramalingam, supra*, footnote 97, para 6. The Court held that an act of state, a passport or a certificate of identity, was prima facie valid. The Court held that the Board erred in law by challenging the validity of the birth certificate without adducing any evidence in support of its contention, considering the fact that the Board could not claim a particular knowledge regarding foreign documents; *Chidambaram, Ilango v. M.C.I.* (F.C.T.D., no. IMM-1788-01), Gibson, January 23, 2003; 2003 FCT 66.

⁹⁹ *Balachandran, Kandiah v. M.C.I.* (F.C.T.D., no. IMM-1627-96), Heald, January 9, 1997. See also for similar conclusion: *Mohammed, Hussain Ahmed v. M.C.I.* (F.C.T.D., no. IMM-262-96), Heald, November 20, 1996; *Sangarapillai, Thangammah v. M.C.I.* (F.C.T.D., no. IMM-1389-96), MacKay, March 5, 1997; *Innocent, Augusta Egbochi v. M.C.I.* (F.C.T.D., no. IMM-3697-96), McKeown, July 23, 1997.

¹⁰⁰ *Gourenko, Rouslan v. Canada (Solicitor General)* (F.C.T.D. IMM-7260-93), Simpson, May 4, 1995; in *Osman, Abdalla Abdelkarim v. M.C.I.* (F.C.T.D., no. IMM-527-00), Blanchard, March 22, 2001; 2001 FCT 229, the Court applied the criterion in *Gourenko* to determine whether a document must be mentioned in the reasons; *Patabanathi, Nalini Warnakula v. M.C.I.* (F.C.T.D., no. IMM-5843-01), Beaudry, December 13, 2002; 2002 FCT 1292 (an MP's report does not meet the test in *Gourenko* – it reflects only the commentary of a single MP who may not be in a position to be the most reliable source of information).

whether the document is timely (in the sense that it bears on the relevant time period), the reliability of the source and the relevance of the evidence to the issues in the case.¹⁰¹

The Court in *Iordanov* distinguished between claimant-specific evidence and general (documentary) evidence. The failure for the CRDD to consider the first type of evidence, and the failure to refer specifically to it, in its reasons, may vitiate its decision. However, in regard to the second type of evidence, the panel should refer to the material evidence, but not each piece of this evidence. Failure to consider the totality of this second type of evidence will result in court intervention.¹⁰²

The Board's failure to mention material evidence is reviewable. The Board is obliged to consider all of the documentary evidence before it which is directly relevant to a claim.¹⁰³

The Court must intervene when the Board has seen fit to refer to none of the documentary evidence provided by the claimant or the refugee protection officer. In *Appiah*, the Board's official record contained many pages of material describing Ghana's decidedly mixed human rights picture.¹⁰⁴

However, the "fact that some of [the]documentary evidence is not mentioned in the Board's reasons is not fatal to its decision. The passages from the documentary evidence that is relied on by the appellant is part of the total evidence that the Board is entitled to weigh as to reliability and cogency". The fact that the Board did not refer to every piece of evidence before it does not mean that it did not take it into consideration.¹⁰⁵

¹⁰¹ The documents in *Gourenko, supra*, footnote 100 referred to the panel by the applicant dealt generally with discrimination against ethnic minorities in Moldova. Those documents did not specifically address the particular situation raised by the applicant i.e. his Jewish background.

¹⁰² *Iordanov, Deian Iordanov v. M.C.I.* (F.C.T.D., no. IMM-1429-97), Muldoon, March 18, 1998; *Chowdhury, Shahala v. M.C.I.* (F.C.T.D., no. IMM-2897-02), Tremblay-Lamer, April 8, 2003; 2003 FCT 407 (as regards country reports, the Board is not required to refer to each piece of documentary evidence but must simply weigh the totality of the evidence).

¹⁰³ *Atwal, Pargat Singh v. Canada (Secretary of State)* (F.C.T.D., no. IMM-4470-93), Gibson, 20 July, 1994, para 10; *Aivazian, Gagik v. M.C.I.* (F.C.T.D., no. IMM-5616-00), Dawson, March 6, 2002; 2002 FCT 252; *Gill, Daljit Singh v. M.C.I.* (F.C.T.D., no. IMM-1388-02), Gauthier, May 27, 2003; 2003 FCT 656 (the obligation to comment on documentary evidence depended on the importance of the evidence; in this case, the documentary evidence which the panel disregarded in its reasons had to do with facts that were at the "very heart" of the claim); *Ntaganzwa, Alphonse v. M.C.I.* (F.C.T.D., no. IMM-83-02), Blanchard, January 20, 2003; 2003 FCT 47 (panel erred in not taking into account a document which was of direct relevance to determine whether the applicant was a journalist).

¹⁰⁴ *Appiah, Charles v. M.C.I.* (F.C.T.D., no. IMM-3009-96), Teitelbaum, August 19, 1997.

¹⁰⁵ *Hassan, supra*, footnote 94; *Piri, Blendi v. M.C.I.*, (F.C.T.D., no. IMM-71-97), Dubé, December 12, 1997; *Singarayer, Joseph Priya Dharshan v. M.C.I.* (F.C.T.D., no. IMM-2835-97), Richard, June 17, 1998; *Cota, Alfredo Barajas v. M.C.I.* (F.C.T.D., no. IMM-3029-98), Teitelbaum, May 6, 1999; *Piber, Attila v. M.C.I.* (F.C.T.D., no. IMM-3282-00), Gibson, July 6, 2001; 2001 FCT 769; *Pacificador, Rodolfo Guerrero v. M.C.I.* (F.C., no. IMM-4057-02), Heneghan, December 12, 2003; 2003 FC 1462.

The panel's failure to comment on the documentary evidence before it, although unfortunate, did not constitute a reviewable error, as a review of the documentation could only lead to the conclusion that the claimants did not face a serious risk of persecution.¹⁰⁶

The Board concluded that there was no nexus between the claimant's evidence and persecution. In that context, the failure to refer to any of the documentary evidence is no reason to set aside the decision.¹⁰⁷

6.8.3. No Obligation to Assess Adverse Documentary Evidence, Unless Directly Contradictory

"The Board is entitled to weigh evidence in its totality. Although it would be preferable for the Board to address adverse documentary evidence, it is under no obligation to do so unless the evidence is directly contradictory." It is necessary that the panel address the contradictory documents and explain its preference for the evidence on which it relies.¹⁰⁸

The CRDD held that there was not a serious possibility of the claimant being raped if she lived among her Habr Gedir subclan. The CRDD failed to at least mention why contradictory documentary evidence going to the core of the claim was given little weight or rejected.¹⁰⁹

The tribunal erred when it failed to assess the contradictory documentary evidence regarding the ineffectiveness of state protection, where there was considerable documentary evidence and testimony of the claimant regarding the state's ability to protect.¹¹⁰

The IAD's finding that the applicant was a citizen of Ghana ignored the father's affidavit that the applicant was born in Malawi and the documentary evidence regarding criteria for Ghanaian citizenship.¹¹¹

6.8.4. Selective reliance ("Picking and choosing")

It is not a reviewable error for the Board to rely on some documents and not others.¹¹² However, the Board cannot simply select evidence as the consequences of this attitude are clearly explained in *Penelova*¹¹³:

¹⁰⁶ *Campos, Glenda Santana v. M.C.I.* (F.C.T.D., no. IMM-1431-96), Gibson, January 30, 1997.

¹⁰⁷ *Mbuyi, supra*, footnote 82.

¹⁰⁸ *Soma, Valentin Vasile v. M.C.I.* (F.C.T.D., no. IMM-1759-94), Cullen, April 11, 1995, at 6; *Buri, Gyula v. M.C.I.* (F.C.T.D., no. IMM-243-01), Kelen, December 11, 2001; 2001 FCT 1358.

¹⁰⁹ *Dirshe, Safi Mohamud v. M.C.I.* (F.C.T.D., no. IMM-2124-96), Cullen, July 2, 1997; *Khan, Mostafa v. M.C.I.* (F.C., no. IMM-5685-02), Tremblay-Lamer, September 17, 2003; 2003 FC 1076.

¹¹⁰ *McNeil, Anthony v. M.C.I.* (F.C.T.D., no. IMM-2559-95), Wetston, October 25, 1996.

¹¹¹ *Sikilaa, Jan James v. M.C.I.* (F.C.T.D., no. IMM-1025-97), Heald, January 23, 1998.

"The CRDD here concluded, largely from a selective use of documentary evidence concerning country conditions that the Applicant's fear of persecution in Bulgaria was not objectively well-founded. In so doing, it would appear to have misconstrued the basis of the Applicant's claim and therefore to have relied upon a selection of documentary evidence that ignored the elements of that evidence that were most germane to the Applicant's fear".¹¹⁴

Overlooking or excluding relevant evidence constitutes a reviewable error of fact. Findings must not be made in a perverse or capricious manner without regard for the material before the Board.¹¹⁵

In response to the argument of counsel for the applicant that the Board ignored a significant amount of objective evidence, the Court stated that one cannot "dissect" the documentary evidence and use only specific portions in isolation to confirm one's point of view. Instead, the evidence must read as a whole and weighed accordingly.¹¹⁶

The panel cannot divide a single document so as to rely on certain paragraphs and ignore others. The panel could not refer to Ms. Dorf's affidavit and then exclude the most relevant passages. The CRDD erred in its assessment of the claimant's involvement in the

¹¹² *Zhou, Ting Yu v. M.E.I.* (F.C.A., no. A-492-91), Heald, Desjardins, Linden, July 18, 1994; *Janagill, Harmesh Lal v. M.C.I.* (F.C.T.D., no. IMM-2248-97), Pinard, May 5, 1998; *Dolinovsky, Yaroslav v. M.C.I.* (F.C.T.D., no. IMM-1559-98), Pinard, November 5, 1999. *Toor, supra*, footnote 96 (it was not an error that the Board failed to mention photographs showing that the applicant had had serious skin graft surgery).

¹¹³ *Penelova, Ventzeslava Radeva v. Canada (Solicitor General)* (F.C.T.D., no. IMM-6979-93), Gibson, November 17, 1994.

¹¹⁴ *Idem*, para. 7. See also: *D'Mello, Carol Shalini v. M.C.I.* (F.C.T.D., no. IMM-1236-97), Gibson, January 22, 1998 which follows *Penelova* decision; *Gill, Mohinder Singh v. M.C.I.*, (F.C.T.D., no. IMM-5243-97), Rothstein, August 12, 1998 which came to the same conclusion as *D'Mello*; *D'Mello* was distinguished in *Cho, Soon Ja v. M.C.I.* (F.C.T.D., no. IMM-4029-99), Gibson, August 9, 2000.

¹¹⁵ *Muzychka, Vasily v. M.C.I.* (F.C.T.D., no. IMM-1113-96), Tremblay-Lamer, March 7, 1997. See also these cases for other examples where the Court recognized the same principle: *Sikder, Sarowar Jan v. M.E.I.* (F.C.A., no. A-718-91), Hugessen, MacGuigan, Linden, October 8, 1992; *Djama, Idris Mohamed v. M.E.I.* (F.C.A., no. A-738-90), Marceau, MacGuigan, Décary, June 5, 1992; *Antonippillai, Punitharajeswar v. M.C.I.* (F.C.T.D., no. IMM-2724-28), Teitelbaum, March 22, 1999, distinguishing *Djama*; *Aujla, Kulwant Kaur v. M.E.I.* (F.C.A., no. A-520-89), Mahoney, MacGuigan, Décary, March 4, 1991; *Mensah, George Akohene v. M.E.I.* (F.C.A., no. A-1173-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Jeyachandran, Senthana v. Canada (Solicitor General)* (F.C.T.D., no. IMM-779-94), McKeown, March 30, 1985; *Srithar, Suntharalingam v. M.C.I.* (F.C.T.D., no. IMM-158-97), Tremblay-Lamer, October 10, 1997 explaining *Jeyachandran*; *Mannan, Khazeena (Fidrous) v. M.E.I.* (F.C.T.D., no. IMM-2892-93), Cullen, March 8, 1994; *Cabrera, Eulalio v. M.C.I.* (F.C.T.D., no. IMM-1991-95), Pinard, February 9, 1996; *Andemariam, Tesfu Ghirmai v. M.E.I.* (F.C.T.D., no. IMM-5815-93), McKeown, September 28, 1994; *Ayad, Larbi v. M.C.I.* (F.C.T.D., no. IMM-2820-95), Tremblay-Lamer, April 26, 1996; *Benaissa, Karim v. M.C.I.* (F.C.T.D., no. IMM-1339-96) Jerome, April 18, 1997 explaining *Ayad*; *Atwal, Sukhchain Singh v. M.C.I.* (F.C.T.D., no. IMM-3910-97) Wetston, June 5, 1998 distinguishing *Ayad*; *Vielma, Eduardo Enrique Pena v. M.C.I.* (F.C.T.D., no. IMM-786-94), Rothstein, November 10, 1994; *Neame, Nora Cathia v. M.C.I.* (F.C.T.D., no. IMM-847-99), Lemieux, March 23, 2000.

¹¹⁶ *Juarez-Yarleque, Jose Nicanor v. M.C.I.* (F.C.T.D., no. IMM-3711-96), Joyal, January 23, 1998; *Johal, Gurmail Singh v. M.C.I.* (F.C.T.D., no. IMM-4111-96), Joyal, December 12, 1997.

Part-Time Teachers Association, when it unreasonably discounted letters and selectively relied on an impugned piece of documentary evidence (the "Kamm Report").¹¹⁷

6.8.5. Obligation to consider all the evidence

“The assurance by the Tribunal that it carefully considered all of the evidence adduced at the hearing does not, I conclude, fulfil the obligation of the Tribunal to determine, against the documentary evidence that was before it, whether the applicant’s fear of persecution, on the basis of his evidence that the Tribunal determined to be credible, was objectively well founded.”¹¹⁸

6.8.6. Non-Application of the Strict Rules of Evidence

The Board errs in law if it rejects documentary evidence as not having been proven in accordance with the strict rules of evidence¹¹⁹ instead of finding that, in the circumstances of the case, the evidence was not trustworthy or credible.¹²⁰

In the Courts, if the original document is available, it must be produced, under the best evidence rule.¹²¹ Since the Board is not bound by the strict rules of evidence, it may accept copies of original documents as evidence. Nevertheless, failure to produce the original document when it is readily available may result in the copy being given little or no weight. Hence, decision-makers should request an explanation of the failure to produce the original document. In addition, when the original is readily available, it may be suggested that the party make efforts to produce the original and that otherwise, the copy may be given little weight.

It should be noted that alterations of an original document may be difficult to detect on a photocopy of the document.

¹¹⁷ *Cai, Heng Ye v. M.C.I.* (F.C.T.D., no. IMM-1088-96), Teitelbaum, May 16, 1997.

¹¹⁸ *Parvez, Mohammed v. M.C.I.* (F.C.T.D., no. A-1341-92), Gibson, October 18, 1996. For a detailed review of the case law on this matter as it relates to the Refugee Protection Division, see Chapter 2.1, “Considering All of the Evidence”, of the Legal Services document entitled *Assessment of Credibility in Claims for Refugee Protection* (June 2002).

¹¹⁹ For an overview of these rules, see Appendix A.

¹²⁰ *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.). The Court of Appeal ruled that the Board did not err in rejecting the record of the hearing held before a subcommittee of the United States government on the grounds that the document was not trustworthy in the circumstances because its contents were not proven in accordance with the rules of evidence in civil actions rather than because the Board in its judgment did not regard its contents as credible or trustworthy in the circumstances of the particular case. According to the Court of Appeal, the Board would err in rejecting this evidence. In *Legault v. Canada (Secretary of State)*, [1997] F.C.J. 1272 (C.A.), the Court of Appeal overturned the decision of the Federal Court, Trial Division, ruling that the adjudicator was entitled to base the decision on an indictment returned by a United States grand jury, even though the document would have been excluded as hearsay evidence in the context of a criminal proceeding.

¹²¹ For a fuller explanation of the rule, see Appendix A.

While the best evidence rule is generally applied to documentary evidence, it may be applied to other evidence as well. Mr. Justice Urie of the Federal Court has held, in concurring reasons for decision, that:¹²²

While it is true that the evidentiary rules applicable in trials in courts of law need not be followed in inquiries with the rigidity that is required in such courts and while an Adjudicator is, by the [*Immigration Act*], entitled to receive and base his decision on evidence which he considers to be credible and trustworthy.... However, as a first principle, it seems to me that it is incumbent upon the Adjudicator to be sure that he bases his decision on the best evidence that the nature of the case will allow. That ordinarily would require *viva voce* evidence in the proof of essential ingredients, if it is at all possible. Only when it is not possible to adduce that kind of primary evidence should secondary evidence be relied upon. The circumstances of each case will dictate what evidence the Adjudicator will accept and the weight which he will give to it.

However, the Board errs where it requires the parties to respect the best evidence rule. In particular, the Board erred in refusing to accept an expert report because the author was not called to testify and his absence was not explained.¹²³

An adjudicator's finding that a person is described in section 27(2)(d) of the *Immigration Act, 1976* was upheld by the Court of Appeal in *Singleton*¹²⁴ even though a certificate of conviction, which would have been the best evidence of the conviction, was not produced at the inquiry.

The Board accepted as evidence, pursuant to paragraph 65(2)(c) of the *Immigration Act, 1976*, a photocopy of a judgment of an Indian court although the photocopy would not be accepted as evidence pursuant to section 23 of the *Canada Evidence Act*.¹²⁵

Under subsection 6(2) of the *Immigration and Refugee Protection Act*, anything that may be done by the Minister under the Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.¹²⁶

¹²² *Cheung, Him Fook v. M.E.I.*, [1981] 2 F.C. 764 (C.A.).

¹²³ *Canada v. Dan-Ash* (1988), 5 Imm. L.R. (2d) 78 [F.C.A., no. A-655-86], Marceau, Hugessen, Lacombe, June 21, 1988]; *Cheng, Man Ying Henry v. M.C.I.* (F.C.T.D., no. IMM-4310-98), Teitelbaum, August 10, 1999.

¹²⁴ *Singleton, George Bruce v. M.E.I.* (F.C.A., no. A-813-83), Thurlow, Mahoney, Stone, November 7, 1983.

¹²⁵ *Sandhu, Bacchitar Singh v. M.E.I.* (I.A.B., T86-10112), Eglington, Goodspeed, Chu, February 4, 1988.

¹²⁶ It should be noted that in *Rana, Balbir Singh v. M.C.I.* (ID A3-00301), Tessler, September 26, 2003, the Immigration Division found that, in the absence of a legislative provision restricting all challenges regarding the authenticity of the signature or the official character of the signatory, it is the Minister's responsibility to prove that the referral for an admissibility hearing was signed by the person authorized by the Minister when the identity of the signatory is challenged.

6.8.7. Opportunity to cross-examine

The Board is entitled to admit documentary evidence, even if the author is not called to testify or is not available to testify, as long as the evidence is considered credible or trustworthy.

In *Le*,¹²⁷ the letter of a Canadian doctor was taken into evidence by the Board, despite the objection that she was not available to be cross-examined on it. The Federal Court made the same finding with regard to the responses to information requests prepared by the IRB's Research Directorate.¹²⁸

In *Fajardo*,¹²⁹ the Federal Court of Appeal held that the Convention Refugee Determination Division was wrong to discount an affidavit produced by "patently respectable deponents as to facts within their knowledge" because they are not available for cross-examination, due to the nature of the process. In this case, the Convention Refugee Determination Division had given little weight to the affidavit of a nun that supported the claimant's testimony, because it had been signed at the request of the claimant and the nun was not available for cross-examination.

However, when an affiant is available to strengthen the evidence given in an affidavit, the burden is on the claimant to call the affiant as a witness.¹³⁰

¹²⁷ *Le, Hong Ngoc v. M.E.I.* (I.A.B. 86-9204), Eglington, Bell, Durand, November 25, 1986.

¹²⁸ In *Amaya, Mariano Vasquez v. M.C.I.* (F.C.T.D., no. IMM-166-98), Teitelbaum, January 8, 1999, the Federal Court ruled that the Refugee Division did not err in admitting into evidence a response to information request containing information obtained from the personnel director of the hotel where the claimant worked. Because the information obtained included only general information on, in particular, the date of the union's formation, and not personal information about the claimant, the Court found that this evidence was admissible, even though the claimant did not have an opportunity to cross-examine the director. With regard to the weight given to responses to information requests, it should be noted that in *Veres, supra*, footnote 1, the Federal Court stated that a response to information request that is simply the response of an individual to a request for information does not have the same "circumstantial guarantee of trustworthiness" as documents prepared by independent agencies that are published and disseminated. See also *Ahmed v. M.C.I.* (F.C., no. IMM-5683-02), Campbell, May 6, 2003; 2003 FCTD 564 and *Wahab v. M.C.I.* (F.C., no. IMM-553-02), O'Keefe, August 8, 2003; 2003 FCTD 964.

¹²⁹ *Fajardo, supra*, footnote 34. See also *Siad, supra*, footnote 41, in which the Federal Court of Appeal ruled that the Refugee Division was entitled to admit an affidavit in which the author reported his interviews with the informants. The Court found that, in the circumstances of the case, the opportunity to cross-examine was not essential to the fairness of the hearing since the deponent alleged no prior statements made by the claimant. The Court also took into consideration the fact that the claimant did not raise objections to the admission of the affidavit before the hearing, did not request that the author be called for cross-examination, did not call rebuttal evidence and did not make submissions regarding the weight the panel should attach to it.

¹³⁰ *Ndombele v. M.C.I.* (F.C.T.D., no. IMM-6514-00), Gibson, November 9, 2001; 2001 FCTD 1211. In *Rani, Neelam et al. v. M.C.I.* (F.C.T.D., no. IMM-5627-01), Blais, September 25, 2002; 2002 FCTD 1002, the Federal Court found that the Refugee Division did not violate the rules of natural justice in allowing into evidence the results of the investigation done with the hotel's night manager in that the claimant did not formally ask to cross-examine the persons involved in preparing the response to the information request and did not request a postponement of the hearing in order to do so.

6.8.8. Bias of Author

In *Drummond*,¹³¹ the Court found that the Immigration Appeal Division did not err in refusing to admit the affidavit of a former Board member that raised a reasonable apprehension of bias, because he had recently left the Board.

6.8.9. "Tone" of the document

In *Corrales*, the Court cautioned the Convention Refugee Determination Division, stating that its assessment of the documentary evidence as it related to the protection of women in Costa Rica was somewhat one-sided, given that much of the documentary evidence was very general in nature and constituted a “self-congratulatory description of the progress that has been made by those attempting to combat the tolerance of violence against women.” Although the Convention Refugee Determination Division did not refer to the negative passages in the documentary evidence, the Court could not find that the conclusions it drew, overall, were not supported by that documentary evidence.¹³²

6.8.10. POE Notes and other Minister's information

For a detailed review of the case law on this matter as it relates to the Refugee Protection Division, see Chapter 2.3.3, “PIFs and Statements Made to Immigration Officials”, of the Legal Services document entitled *Assessment of Credibility in Claims for Refugee Protection* (June 2002).

In *Siete*,¹³³ the Federal Court rejected the applicant’s argument that he was entitled to request the presence of a lawyer upon his arrival at the port of entry and that such a breach violates the rules of fundamental justice. However, statements obtained in violation of the Charter must be excluded if it is established that, having regard to all the circumstances, their admission would constitute a breach of procedural fairness.¹³⁴

It is the claimant’s responsibility to call the immigration officer as a witness if the claimant believes that doing so would assist his or her claim.¹³⁵ However, it is a breach of the rules of natural justice for the Board to deny a claimant’s motion to have an

¹³¹ *Drummond, Patsy v. M.C.I.* (F.C.T.D., no. A-771-92), Rothstein, April 11, 1996.

¹³² *Corrales, Maria Cecilia Abarca v. M.C.I.* (F.C.T.D., no. IMM-4788-96), Reed, October 3, 1997.

¹³³ *Siete v. M.C.I.* (F.C.T.D., no. IMM-5369-01), Tremblay-Lamer, December 20, 2002; 2002 FCTD 1286. The Federal Court relied on the Supreme Court decision in *Dehghani v. Canada*, [1993] 1 S.C.R. 1053, in which the Court ruled that routine questioning as part of a secondary examination concerning identity, admissibility and a claim to refugee status does not constitute detention and, consequently, does not entail a right to counsel.

¹³⁴ In *Huang, Wen Zhen v. M.C.I.* (F.C.T.D., no. IMM-5816-00), MacKay, February 8, 2002; 2002 FCTD 149, the Federal Court ruled that the applicant had been detained within the meaning of paragraph 10(b) of the Charter and that her right to retain counsel without delay had been violated, as she was informed of this right only on the third day of her detention. However, the Court found that, in the circumstances of the case, the Refugee Division’s decision to admit the port-of-entry notes into evidence did not affect the fairness of the hearing because the Refugee Division did not base its finding that the applicant was not credible on these notes.

¹³⁵ *Zaloshnja, Ylldes v. M.C.I.* (F.C.T.D., no. IMM-755-02), Tremblay-Lamer, February 20, 2003; 2003 FCTD 206.

immigration officer cross-examined where the officer's testimony is essential to determining the claim for refugee protection.¹³⁶

6.8.11. News reports and newspaper articles

The documentary evidence produced before the Refugee Protection Division often includes newspaper and magazine articles. The weight attached to these documents must be based on their accuracy and on the impartiality of the author and of the publication.¹³⁷ The Refugee Protection Division errs in law if it does not admit these documents into evidence or take them into consideration for the sole reason that they are press extracts and, consequently, have no evidentiary value. In this regard, the Federal Court of Appeal held as follows in *Saddo*:¹³⁸

...It is incorrect to state that extracts from newspapers have no evidentiary value; it is also incorrect to assert that a claimant must establish, otherwise than by the production of newspaper articles, that he has a well-founded fear of persecution.¹³⁹

Where the documentary evidence consists of summaries and news reports that do not purport to provide a complete list of persons involved in a coup, it is unreasonable for the tribunal to infer that a person who is alleged to have been involved would have been named in the news reports that followed the coup.¹⁴⁰ However, the presumption of the truth of the testimony of a witness "may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention."¹⁴¹

6.8.12. Prior Inconsistent Statements or Information

A Personal Information Form (PIF) filed at a prior hearing,¹⁴² as well as the transcript of that hearing containing inconsistent testimony,¹⁴³ are admissible in Refugee Protection

¹³⁶ *Jaupi v. M.C.I.* (F.C.T.D., no. IMM-2086-01), Kelen, June 11, 2002; 2002 FCTD 658. This case involved contradictions in the port-of-entry notes.

¹³⁷ In *Veres, supra*, footnote 1, the Court ruled that a Response to Information Request that is simply the response of an individual to a request for information does not have the same "circumstantial guarantee of trustworthiness" as documents prepared by independent agencies that are published and disseminated.

¹³⁸ *Saddo v. Canada (Immigration Appeal Board)* (F.C.A., no. A-171-81), Pratte, Ryan, Lalande, September 9, 1981, paragraph 4; see also *Frimpong v. Canada (Minister of Employment and Immigration)* (F.C.A., no. A-765-87), Heald, Mahoney, Hugessen, May 19, 1989.

¹³⁹ *Saddo, supra*, footnote 138, paragraph 4.

¹⁴⁰ *Ogbomo, Perpetual Aiwanfo v. M.C.I.* (F.C.T.D., no. IMM-5217-93), MacKay, November 22, 1994.

¹⁴¹ *Adu, Peter v. M.E.I.* (F.C.A., no. A-194-92), Hugessen, Strayer, Robertson, January 24, 1995. For a detailed review of the case law in this matter as it relates to the Refugee Protection Division, see Chapter 2.4.4, "Silence of the Documentary Evidence", of the Legal Services document entitled *Assessment of Credibility in Claims for Refugee Protection* (June 2002).

¹⁴² *Anthonipillai, Jeyaratnam v. M.C.I.* (F.C.T.D., no. IMM-1709-95), Simpson, December 14, 1995. The Refugee Division did not create a reasonable apprehension of bias in adducing the first PIF in evidence of its own initiative. The Court was of the opinion that the first PIF was relevant and admissible. Further, there was no reviewable error in marking the first PIF as a "C" (counsel) exhibit, rather than as an "R" (refugee hearing officer) exhibit.

Division hearings. The Refugee Protection Division may examine this evidence and base credibility findings on it, as long as it justifies those findings.

In *Arumuganathan*,¹⁴⁴ the Court agreed with the Refugee Division's decision to admit into evidence the Minister's factum regarding the claimant's husband's leave application for judicial review. However, the Court set aside the Board's decision on the grounds that it erred in failing to indicate, in its reasons, what weight it was giving to that evidence, given that the evidence was inflammatory.

6.8.13. Relevance of Documentary Evidence in Successor State Scenarios

Documentary evidence concerning anti-Semitism in the former Soviet Union, prior to Latvian independence, was relevant evidence of the climate in the newly-independent Latvia, as much as in Russia. The application was allowed.¹⁴⁵

After considering all of the documentary evidence, the Refugee Division, referring to one particular document, found that, although the document was a valuable indicator of how homosexuals were treated in Russia, it was not convincing on the subject of their treatment in the Ukraine. The Court found that it was unreasonable for the Refugee Division to come to this conclusion. In fact, the document showed beyond any doubt that homosexual men and women were persecuted in the Ukraine and that the authorities were abusive toward these citizens.¹⁴⁶

6.8.14. Factors to Consider:

- the date of the evidence
- the author
- whether the information comes from an anonymous source
- qualifications/expertise of the author
- reputation of the publication/publisher
- any bias of the author/publisher
- information on which the document is based
- editing

¹⁴³ *Badal v. M.C.I.* (F.C.T.D., no. IMM-1105-02), March 14, 2003; 2003 FCTD 311.

¹⁴⁴ *Arumuganathan, Kalajothy v. Canada (M.E.I.)* (1994), 28 Imm. L.R. (2d) 101 [(F.C.T.D., no. IMM-1808-93), Rouleau, March 25, 1994].

¹⁴⁵ *Litevskaia, Irina v. M.C.I.* (F.C.T.D., no. A-971-92), Muldoon, August 28, 1996.

¹⁴⁶ *Muzychka, supra*, footnote 115.

- partial quotes
- consistency with other reliable evidence
- source of the author's information
- other publications by same author
- opportunity to cross-examine author
- author's knowledge of the subject matter
- "tone" of the document (is it impartial?)
- extent to which the document is based on opinion
- extent to which the document is based on observable facts
- purpose for which the document was prepared
- whether the whole document was entered into evidence or made available so that the evidence could be challenged
- whether there are any alterations apparent on the face of the document
- the results of any forensic examination of the document
- any spelling errors on official documents
- comparison of the document to a known genuine document
- whether the content of the document was sworn to be true
- consistency of the document with other credible evidence in the case
- whether the information was obtained in accordance with the rights set out in the Charter

6.9. VIDEOTAPE EVIDENCE

Videotape evidence is simply a form of documentary evidence.¹⁴⁷ The assessment of its trustworthiness raises some special concerns, given the nature of the medium. In some cases, the videotape may have been specifically created to advance a particular point of view. Also, there is always the possibility that the videotape evidence may have been intentionally made to misrepresent the truth. In any event, the videotape is likely to reflect the biases of the producer. A witness familiar with the circumstances of the production of the videotape and available for cross-examination provides the best means to test the reliability of the evidence.

If the Board chooses to view the videotape evidence outside the hearing room, the party who submitted the videotape must be given an opportunity to answer concerns of the Board arising from the viewing.¹⁴⁸

6.9.1 Factors to Consider:

- conditions under which, including when, and the purpose for which, the video was produced
- who the producer is and any biases the producer may have
- whether any part of the video was, or could have been staged
- whether the video is a recording of another tape or of a television broadcast
- whether the video was edited after filming
- nature and extent of any editing
- nature of any commentary, given that the commentator cannot be cross-examined
- credibility of witness who testifies about the manner in which the videotape was produced
- availability of any other corroborating evidence

¹⁴⁷ As is the case with any documentary evidence, once admitted into evidence, it must be given the weight it merits. See *Jordanov, supra*, footnote 102 in which the CRDD was held to have breached natural justice by not mentioning the videotape, a principal piece of evidence.

¹⁴⁸ *Muthusamy, Lingam v. M.E.I.* (F.C.T.D. no. IMM-5801-93), Cullen, September 14, 1994.

6.10. TELECONFERENCING AND VIDEOCONFERENCING

Section 164 of IRPA authorizes the three Divisions of the IRB to hold a hearing “... by a means of live telecommunication with, the person who is the subject of the proceedings.” The IRB also has inherent jurisdiction, as a quasi-judicial administrative tribunal, to control its own procedures.¹⁴⁹ The IRB thus may choose to conduct hearings and receive evidence by videoconferences or teleconferences for various reasons including operational necessity.

Various courts have held that there is no denial of natural justice or fundamental justice in the use of video testimony.¹⁵⁰ However, in exceptional situations, hearings by videoconference or teleconference may not be appropriate¹⁵¹.

6.10.1. TELECONFERENCING

Teleconferencing involves the taking of evidence of a witness by telephone. The Appeal Division has for many years taken evidence in this manner, especially in the case of applicants who are overseas, where it would be difficult or impossible for them to testify otherwise. In such cases, arrangements for the telephone call are made through the Registrar, and the person calling the witness is generally responsible for paying the long distance charges for the call. The interpreter is present and sworn in the hearing room.

The Federal Court of Appeal found that there was no breach of natural justice where the Appeal Division allowed an appellant to testify by telephone from a remote location in B.C.¹⁵² The Minister had argued that the Appeal Division could not properly judge the appellant's demeanour, and that the Minister would be prejudiced in his ability to cross-examine the appellant. The Court found that the Appeal Division had properly weighed the appropriate considerations.

The Refugee Division and the Refugee Protection Division have used teleconferencing to hear the evidence of witnesses in other countries, including expert witnesses. The Adjudication Division and the Immigration Division have used teleconferencing to conduct hearings as well, including detention review hearings where the person concerned is being held in a remote location, and there is a need to meet statutory time frames.

The trustworthiness and probative value of the evidence taken by teleconference must be assessed in the same way as any other evidence. Although the visual cues that aid in assessing credibility are absent in teleconferencing, cross-examination of witnesses is possible, and in most situations effective questioning can be used to verify matters such as the identity of a witness. Additional controls may be required in some cases. For example,

¹⁴⁹ *Prasad v. M.E.I.* [1989] 1 S.C.R. 560; *Cota, supra*, footnote 105.

¹⁵⁰ *R. v. Gibson* [2003] B.C.J. No.812 (B.C. Supreme Court), *Bradley v. Bradley* [1999] B.C.J. No.2116 (B.C. Supreme Court).

¹⁵¹ *M.C.I. v. King, David Daniel* (I.A.D. T98-07875), Aterman, May 27, 1999.

¹⁵² *M.E.I. v. Cookson, Michael Edward* (F.C.A., no. A-715-91), Marceau, Létourneau, Robertson, February 10, 1993.

arranging for the call to be made from a specific site, and/or in the presence of a government official may allay concerns such as the possibility of coaching by an unseen third party.

6.10.2. Factors to Consider

- operational necessity.
- why the evidence is being taken by teleconference.¹⁵³
- whether it would be more effective to take the evidence by other means (e.g. videoconferencing)
- relevance of the evidence to the issues of the case.
- the witness should be advised to be alone in the room from which they are testifying
- whether there are any sounds indicating that someone else is present or is coaching the witness.
- more attention needs to be paid to the tone of voice, and pauses in testifying, as other clues as to demeanour are not available.
- if there is a break in the testimony the witness and appellant/ applicant should be cautioned against discussing the evidence or the case, before testifying again.
- often there are great time differences: these should be considered in assessing the evidence, and in setting the hearing time.
- arrangements should be made to fax any relevant documents.

6.10.3 Videoconferencing

Videoconferencing involves using television screens and cameras to project images of the participants in the hearing process to different locations. Often the decision-maker is in one location and the rest of the participants, including the interpreter, are in another. Documents are exchanged in advance of the hearing, and may also be faxed on the day of the hearing or scanned in and a visual image sent to the other location. Videoconferencing offers participants in separate locales the next-best alternative to live, on-site interaction,

¹⁵³ See *Hussain, Manzoor v. Canada (M.C.I.)* (F.C.T.D., no. IMM-3579-97), Reed, August 5, 1998. A last-minute request for a judicial review to be conducted by way of telephone conference was refused to the applicant's counsel who was outside the country and, without good explanation, "had not arranged her affairs so that she could honour her responsibilities to her client and the Court."

because the participants can be seen and heard, witnesses can be cross-examined. However, the cost of using videoconferencing should always be kept in mind.

6.10.4 Factors to Consider

- operational necessity.
- whether the evidence in question is relevant to the issues necessary to be determined to dispose of the appeal/claim/inquiry, and whether it is otherwise admissible. If not, the decision-maker may decide not to hear the evidence.
- whether it is necessary or merely preferable to be able to see the witness. If credibility is not in issue, the decision-maker may not need to see the witness (e.g. in the case of an expert witness), in which case teleconferencing may be the best option. If it is merely a matter of preference, the use of videoconferencing should be subjected to a cost/ benefit analysis.
- the cost of arranging a videoconference should be compared to the cost of alternative means to obtain that same evidence, e.g. having the witness transported to the hearing site, or holding the hearing where the witness(es) is/are located.
- availability of facilities for videoconferencing
- whether a request by counsel to have the hearing held by videoconference is reasonable in all the circumstances, in that communication would be effective, and the hearing would be full, fair and expeditious.¹⁵⁴

¹⁵⁴ See *King, supra*, footnote 151 where a motion to have an appeal heard by videoconference was denied because of a concern that videoconferencing would further impede communications with a respondent suffering from a mental illness.

6.11. FOREIGN LAW AND FOREIGN JUDGMENTS WITH PARTICULAR REFERENCE TO ADOPTIONS

6.11.1. Introduction

Under the *Immigration and Refugee Protection Regulations, 2002* (“IRP Regulations”) there is a requirement that an adoption must be genuine and the adoption must not be entered into primarily for the purpose of acquiring any status or privilege under the Act¹⁵⁵. Further, in order for a child to be considered a member of the family class by virtue of that adoption it must have been obtained in the best interests of the child within the meaning of the *Hague Convention on Adoption*.¹⁵⁶ Some of those factors relating to the best interests of the child are incorporated into the *IRP Regulations*. Of importance in a discussion concerning foreign law and judgments is the requirement that the adoption be in accordance with the laws of the place where the adoption took place.¹⁵⁷ These three requirements were incorporated in the definition of “adoption” in the former *Immigration Regulations, 1978* and therefore any cases decided under the former *Regulations* continue to be of assistance.¹⁵⁸

Most adoption cases that come before the Appeal Division involve foreign adoptions. Where the refusal is based on the legal validity of the adoption, the sponsor must establish that the adoption is valid under the laws (sometimes under the customs) of the jurisdiction where the adoption took place. This involves presenting evidence of the content and effect of the foreign law or custom.¹⁵⁹ For example, in the case of Indian adoptions (by far the largest source of foreign adoption cases coming before the Appeal Division), that evidence is usually the *Hindu Adoptions and Maintenance Act, 1956* (HAMA).¹⁶⁰

¹⁵⁵ *Immigration and Refugee Protection Regulations, 2002*, s. 4.

¹⁵⁶ *Ibid.*, s. 117 (2).

¹⁵⁷ *Ibid.*, s. 117 (3) (d).

¹⁵⁸ *Singh, Bhupinder v. M.C.I.* (I.A.D. TA2-16527), MacAdam, July 24, 2003 wherein the panel held that the wording of section 4 of the IRP Regulations is not a substantive change from the meaning of “adopted” under section 2(1) of the former Regulations and see also *Asare, Vida (a.k.a. Achew Asare-Kumi) v. M.C.I.* (I.A.D. TA2-17261), MadAdam, July 31, 2003.

¹⁵⁹ For an example of a case where the adoption in question was proven by custom, see *Bilimoriya, Parviz v. M.C.I.* (I.A.D. T93-04633), Muzzi, September 18, 1996 Reported (1997) 36 Imm. L.R. (2d) 293; and *Vuong, Khan Duc v. M.C.I.* (F.C.T.D., no. IMM-3139-97), Dube, July 21, 1998. However, in *Seth, Kewal Krishan v. M.C.I.* (I.A.D. M94-05081), Angé, March 27, 1996, the sponsor failed to establish that there existed a custom in the Sikh community permitting simultaneous adoptions; and in *Kalida, Malka v. M.C.I.* (I.A.D. M96-08010), Champoux, July 3, 1997, the sponsor failed to show that Moroccan law allowed adoption.

¹⁶⁰ For a detailed examination of HAMA and its interpretation in Canadian law, see Wlodyka, A., *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*, 25 Imm. L.R. (2d) 8. Note, however, that this article was written in April 1994 and has not been updated to reflect the current state of the law. For an example of a case

In addition to the actual foreign law, sponsors may also submit other forms of evidence such as expert evidence, doctrine, foreign case-law declaratory judgments, decrees and deeds.

The *IRP Regulations* require that the adoption create a legal parent-child relationship which severs the pre-existing parent-child relationship and that the adoption be in accordance with the laws of the place where the adoption took place and as such foreign laws will often be relevant in determining the legal validity of an adoption. Therefore, it is important to keep in mind the following:

- strictly speaking, the issue of which law is relevant is not one of conflict of laws as the Appeal Division is not called upon to choose which law applies: the *IRP Regulations* make it clear that the place of adoption dictates which law applies;
- what is relevant is to understand how foreign law is proved; and
- it is also relevant to identify and understand the principles of conflict of laws which touch upon the effect of foreign laws and judgments on Canadian courts and tribunals.¹⁶¹

6.11.2. Terminology

The following terms are used in reference to foreign law:

- “declaratory judgment”: a judgment declaring the parties’ rights or expressing the court’s opinion on a question of law, without ordering that anything be done;¹⁶²
- “*in personam*”: where the purpose of the action is only to affect the rights of the parties to the action *inter se* [between them];¹⁶³
- “*in rem*”: where the purpose of the action is to determine the interests or the rights of all persons with respect to a particular *res* [thing];¹⁶⁴
- “deed of adoption”: registered document purporting to establish the fact that an adoption has taken place.

dealing with the validity of an adoption in light of the HAMA, see *Maini, Kaushalya Devi v. M.C.I.* (I.A.D. T97-00839), Hoare, March 17, 1998, where the appellant failed to prove the validity of the adoption at issue.

¹⁶¹ In this regard, see Castel, J.-G., *Introduction to Conflict of Laws* (Toronto: Butterworths, 1986), at 6, where it is stated that “when the problem involves the recognition or enforcement of a foreign judgment, the court must determine whether that judgment was properly rendered abroad.”

¹⁶² Dukelow, D.A., and Nuse, B., *The Dictionary of Canadian Law* (Scarborough: Carswell, 1991), at 259.

¹⁶³ McLeod, J.G., *The Conflict of Laws* (Calgary: Carswell, 1983), at 60.

¹⁶⁴ *Ibid.*

6.11.3. Proof of Foreign Law¹⁶⁵

The usual rule in Canada is that foreign law is a fact which must be pleaded and proved.¹⁶⁶ The Appeal Division cannot take judicial notice of it. In cases before the Appeal Division, the burden of proving the foreign law or custom lies on the party relying on it, in most cases, the sponsor.¹⁶⁷ The existence of a custom must be clearly proved and not merely on the balance of probabilities.¹⁶⁸

There are several ways in which foreign law can be proved, including statute, expert evidence, and agreement of the parties (consent). The foreign law ought to be proved in each case. The Appeal Division is not entitled to take judicial notice of the proof presented in other cases,¹⁶⁹ although it can adopt or follow the reasoning of other panels regarding their interpretation of the foreign law. The Appeal Division has also examined the text of the law itself and given it a reasonable interpretation where expert evidence respecting its meaning was lacking.¹⁷⁰ The Appeal Division has rejected arguments that it is not competent to interpret foreign law.¹⁷¹

Section 23 of the *Canada Evidence Act*¹⁷² provides that evidence of judicial proceedings or records of any court of record of any foreign country may be given by a certified copy thereof, purported to be under the seal of the court, without further proof. However, the Appeal Division does not normally require strict proof in this manner although the failure to comply with section 23 has been relied on in weighing the evidence produced.¹⁷³

¹⁶⁵ See also *Sponsorship Appeals*, Legal Services, Immigration and Refugee Board, July 1, 2002.

¹⁶⁶ Castel, *supra*, footnote 161 at 44. For a case where the Appeal Division ruled that foreign law must be strictly proved, see *Wang, Yan-Qiao v. M.C.I.* (I.A.D. T96-04690), Muzzi, October 6, 1997. See also *Okafor-Ogugba, Anthony Nwafor v. M.C.I.* (I.A.D. T94-05539), Aterman, April 14, 1997, where the panel held that the evidence failed to establish that the adoption in question had been carried out in accordance with Nigerian law and *Bajracharya v. M.C.I.* (I.A.D. VA2-01215), Mattu, February 10, 2003 where the adoption did not comply with the laws of Nepal.

¹⁶⁷ *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576; 8 Imm. L.R. (2d) 175 (C.A.), at F.C. 581-583.

¹⁶⁸ *M.C.I. v. Harjit Singh Mann* (F.C.T.D., no. IMM-1554-02), Campbell, February 18, 2003.

¹⁶⁹ *Kalair, Sohan Singh v. M.E.I.* (F.C.A., no. A-919-83), Stone, Heald, Urie, November 29, 1984.

¹⁷⁰ *Gossal, Rajinder Singh v. M.E.I.* (I.A.B. T87-9401), Sherman, Chu, Benedetti, February 15, 1988. Reported: *Gossal v. Canada (Minister of Employment and Immigration)* (1988), 5 Imm. L.R. (2d) 185 (I.A.B.).

¹⁷¹ *Gill, Ranjit Singh v. M.C.I.* (I.A.D. V96-00797), Clark, April 7, 1999.

¹⁷² R.S.C. 1985, c. C-5.

¹⁷³ *Brar, Kanwar Singh v. M.E.I.* (I.A.D. W89-00084), Goodspeed, Arpin, Vidal (concurring in part), December 29, 1989.

Under general legal principles, if the foreign law is not proven, it is said that the court will simply apply the relevant local law.¹⁷⁴ The implications of this proposition are threefold:

- when the relevant foreign law is not proven, the court ought not to dismiss the case for lack of evidence;
- given that the court will proceed in the absence of evidence, the court ought to apply its own law;
- the reason for the application of the *lex fori* [domestic law] is the presumed uniformity of law.¹⁷⁵

In *Ali*,¹⁷⁶ the Appeal Division considered the validity of an adoption performed in Fiji. At issue was whether there had been compliance with section 6(4) of the *Adoptions Act* of Fiji which required that the adopting parent (the sponsor) be a resident of Fiji at the time of the adoption. The definition of “resident” under the foreign law was not proven in the case, which led the concurring member to state:

It is trite law that if a foreign law is not adequately proved, it is proper for me to decide the issue according to Canadian law.¹⁷⁷

This, however, should not be interpreted so as to confer on the Appeal Division a jurisdiction which it otherwise does not have. The jurisdiction of the Appeal Division in an adoption case is to determine whether or not the adoption in question falls within the *IRP Regulations*, i.e., (i) has been proven under the relevant law, (ii) is genuine, and (iii) has not been entered into primarily for the purpose of acquiring any status or privilege under the Act. It is not to adjudicate the status of adoption generally.¹⁷⁸ The *IRP Regulations*, as indicated earlier,

¹⁷⁴ Schiff, S., *Evidence in the Litigation Process*, 4th ed., vol. 2 (Toronto: Carswell, 1993), at 1056.

¹⁷⁵ *McLeod*, *supra*, footnote 163 at 39.

¹⁷⁶ *Ali, Abdul Rauf v. M.E.I.* (I.A.D. V89-00266), Wlodyka (concurring), Singh, MacLeod, June 28, 1990.

¹⁷⁷ *Ibid.*, concurring reasons at 3. Another case in which Canadian law was applied on the basis of domicile in the context of a revocation of adoption is *Chu, Si Gina v. M.E.I.* (I.A.D. V90-00836), Wlodyka, MacLeod, Verma, September 4, 1992. The panel in this case did not accept a revocation of adoption done in China on the basis that neither the sponsor nor her adoptive father had any real and substantial connection with China at the time the revocation was obtained.

¹⁷⁸ In *Singh, Babu v. M.E.I.* (F.C.A., no. A-210-85), Urie, Mahoney, Marceau, January 15, 1986, the Court indicated that the Immigration Appeal Board was entitled to conclude that the adoption in question had not been proven but that it was not authorized to make a declaration that the adoption was “void as far as meeting the requirements of the Immigration Act, 1976”. In *Canada (Minister of Employment and Immigration) v. Sidhu*, [1993] 2 F.C. 483 (C.A.), at 490, the Court noted that “[the Appeal Division’s] jurisdiction is limited by the Act which, in turn, is subject to the Constitution Act, 1867. Parliament has not purported to legislate independently on the subject matter of adoption for immigration purposes. On the contrary, on that very point, it defers or it adopts by reference the foreign legislation.” The Court added in a footnote that “[t]he provision generally reflects the characterization made by English Canadian

require that the adoption be in accordance with the laws of the jurisdiction where the adoption took place. Thus, in a foreign adoption, the absence of evidence about the applicable foreign law does not authorize the Appeal Division to consider whether the adoption was done in accordance with Canadian law.¹⁷⁹

For example, in *Siddiq*,¹⁸⁰ the issue was whether the adoption in question was valid under the laws of Pakistan. The expert evidence submitted by the Minister was to the effect that in Pakistan, legal adoptions were not recognized and could not be enforced. The sponsor was unable to obtain evidence to the contrary and, therefore, failed to establish that the adoption was valid. The appeal was dismissed for lack of jurisdiction. The absence of an adoption law in the foreign jurisdiction could not have the effect of allowing the Appeal Division to adjudicate the adoption under Canadian law.

Another example is *Alkana*,¹⁸¹ where the alleged adoption was challenged on the basis that there was no provision for Christian adoptions under Pakistani laws. The sponsor attempted to prove the adoption by means of a “Declaration of Adoption”, which was essentially an affidavit made by the natural parents giving their approval or consent to the adoption. In the absence of proof of a law in Pakistan allowing for adoption, the appeal was dismissed. The panel recognized the hardship created by the ruling and recommended that the Minister facilitate the admission of the child into Canada so that he could be adopted here “[...] to alleviate the hardship created by the statutory lacuna in Pakistan regarding Christian adoptions.”¹⁸²

In a much earlier case, *Lam*,¹⁸³ the Immigration Appeal Board put it thus:

common law courts, i.e., that adoption relates to the recognition of the existence of a status and is governed by the *lex domicilii* [the law where a person is domiciled].”).

¹⁷⁹ In *Fan, Jiang v. M.C.I.* (F.C.T.D., no. IMM-1537-97), Hugessen, Sept. 3, 1998, the court noted that the definition of “adopted” in the *Regulations* is not legislation about adoption but about immigration.

¹⁸⁰ *Siddiq, Mohammad v. M.E.I.* (I.A.B. 79-9088), Weselak, Davey, Teitelbaum, June 10, 1980. See also *Addlow, Ali Hussein v. M.C.I.* (I.A.D. T96-01171), D’Ignazio, October 15, 1997, for a case involving a purported Somalian adoption; and *Zenata, Entissar v. M.C.I.* (IAD M98-09459), Bourbonnais, September 17, 1999, for a case involving a purported Moroccan adoption. For a more recent decision involving a case of guardianship in Morocco, see *Demnati, Ahmed v. M.C.I.* (I.A.D. M99-10260), di Pietro, April 3, 2001.

¹⁸¹ *Alkana, Robin John v. M.E.I.* (I.A.D. W89-00261), Goodspeed, Arpin, Rayburn, November 16, 1989. Reported (1990) 10 Imm. L.R. (2d) 232.

¹⁸² *Ibid.*, at 7. However, in *Jalal, Younas v. M.C.I.* (I.A.D. M93-06071), Blumer, August 16, 1995, reported *Jalal v. Canada* (Minister of Citizenship and Immigration) (1995), 39 Imm. L.R. (2d) 146 (I.A.D.), the Appeal Division held that in the absence of legislation in Pakistan, the Shariat applies in personal and family law, and that the prohibition against adoption does not apply to non-Muslims. The Appeal Division accepted the expert evidence that Christians in Pakistan may adopt.

¹⁸³ *Lam, Wong Do v. M.M.I.* (I.A.B.), October 2, 1972, referred to in *Lit, Jaswant Singh v. M.M.I.* (I.A.B. V76-6003), Scott, Benedetti, Legaré, August 13, 1976, at 4.

No proof was adduced that the law of China prevailing in that part of Mainland China where the appellant and his alleged adopted mother resided at the time of the alleged adoption – the province of Kwangtung – recognized the status of adoption, or that if it did, how this status was established. This is not a situation where the *lex fori* may be applied in the absence of proof of foreign law.¹⁸⁴

6.11.4. Declaratory Judgments and Deeds

Sponsors before the Appeal Division often seek to establish the status of applicants for permanent residence through the production of foreign judgments declaring the applicants' status in the foreign jurisdiction.

The issue has been expressed as one of determining whether the Appeal Division ought to look behind the judgment to determine either its validity or its effect on the issues before the Appeal Division.

As stated by Wlodyka, A. in *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*:¹⁸⁵

The starting point in any discussion of the legal effect of a declaratory judgment [...] is the decision of the Federal Court of Appeal in *Taggar*¹⁸⁶. This case stands for the proposition that a declaratory judgment is a judgment “in personam” and not “in rem”. Therefore, it is binding only on the parties to the action. Nevertheless, the declaratory judgment is evidence and the weight to be accorded to the declaratory judgment depends on the particular circumstances of the case.

In *Sandhu*,¹⁸⁷ a pre-*Taggar* decision, the Immigration Appeal Board was of the opinion that a foreign judgment, “even one in personam is final and conclusive on the merits [...] and can not be impeached for any error either of fact or of law.”¹⁸⁸ The declaratory judgment in question was issued in an action for a permanent injunction restraining interference with lawful custody of the applicant. The panel was of the view that the judgment would have to have been premised on a decision about the adoptive status of the applicant. The panel treated the judgment of the foreign court as a declaration as to status, conclusive and binding on the whole world (including Canadian authorities) and thus found the adoption was valid under Indian law. The panel did not feel

¹⁸⁴ *Lit, ibid.*, at 4.

¹⁸⁵ *Wlodyka, supra*, footnote 160 at 46.

¹⁸⁶ *Taggar, supra*, footnote 167.

¹⁸⁷ *Sandhu, supra*, footnote 125.

¹⁸⁸ *Sandhu, ibid.*

required itself to examine whether the adoption was in accordance with Indian law.¹⁸⁹

Sandhu was distinguished in *Brar*¹⁹⁰ as follows:

[...] the decision in *Sandhu* was not intended to have universal application in cases where foreign judgments are presented as proof of the validity of adoptions and can be distinguished in this case.

In *Sandhu* the judgment was accepted as part of the record and at no time was the authenticity of the document challenged by the respondent. The authenticity of the judgment referred to in *Sandhu* was not an issue. However, in the present case the Board has been presented with a document which contains discrepancies, has not been presented in accordance with section 23 of the Canada Evidence Act and purports to validate an adoption which clearly does not comply with the requirements of the foreign statute.¹⁹¹

The majority of the panel determined that the declaratory judgment had no weight.¹⁹² The member who concurred in part was of the view that the reasoning in *Sandhu* applied and that the declaratory judgment was a declaration as to status and was binding on the Appeal Division.

In *Atwal*,¹⁹³ the majority accepted the declaratory judgment but noted that:

It is the opinion of the Board that a foreign judgment is not to be disturbed unless there is proof of collusion, fraud, lack of jurisdiction of the court and the like. No such evidence was presented to the Board.¹⁹⁴

¹⁸⁹ *Sandhu*, supra, footnote 125 was followed in *Patel, Ramesh Chandra v. M.E.I.* (I.A.B. T85-9738), Jew, Arkin, Tisshaw, April 15, 1988.

¹⁹⁰ *Brar*, supra, footnote 173.

¹⁹¹ *Brar*, *ibid.*, at 10.

¹⁹² For other cases in which it has been held that declaratory judgments are not determinative, see *Singh, Ajaib v. M.E.I.* (I.A.B. W87-4063), Mawani, Wright, Petryshyn, April 26, 1988 (declaratory judgment disregarded where internally inconsistent, collusive, and did not result from fully argued case); *Burmi, Joginder Singh v. M.E.I.* (I.A.B. T88-35651), Sherman, Arkin, Weisdorf, February 14, 1989 (regarding a marriage); *Badwal, Jasbir Singh v. M.E.I.* (I.A.D. T87-10977), Sherman, Bell, Ahara, May 29, 1989 and *Atwal, Manjit Singh v. M.E.I.* (I.A.B. W86-4205), Petryshyn, Wright, Arpin (concurring), May 8, 1989, where the concurring member gave no weight to the declaratory judgment. In *Pawar, Onkar Singh v. M.C.I.* (I.A.D. T98-04518), D'Ignazio, October 1, 1999, the panel held that notwithstanding the existence of a declaratory judgment, the evidence established that there was no mutual intention of either the birth parents or the adoptive parents to transfer the child and therefore, the adoption did not meet the requirements in HAMA.

¹⁹³ *Atwal*, *ibid.*

¹⁹⁴ *Ibid.*, at 4.

In *Sran*,¹⁹⁵ the Appeal Division expressed it thus:

[...] a declaratory judgment [...] is merely evidence which must be considered along with other evidence in determining the validity of the adoption. By itself, it does not dispose of the issue.

This decision appears to reflect the current decision-making of the Appeal Division in light of *Taggar*.¹⁹⁶ An adoption deed may be presented as proof of the validity of an adoption. In *Aujla*,¹⁹⁷ the panel ruled that:

The Board accepts the Adoption Deed as prima facie evidence of an adoption having taken place. However, as to whether the adoption was in compliance with the requirements of the [Indian] Adoptions Act is a question of fact to be determined by the evidence in each case. In this connection, the Board also drew counsel's attention to a recent Federal Court of Appeal¹⁹⁸ decision where the Court expressed the view that it was proper for the Board to determine whether the adoption had been made in accordance with the laws of India, and that the registered Deed of Adoption was not conclusive of a valid adoption.¹⁹⁹

6.11.5. Presumption of Validity under Foreign Law

The Appeal Division has dealt with the issue of adoption deeds in the context of section 16 of HAMA, which creates a presumption of validity.²⁰⁰ In *Dhillon*,²⁰¹ the sponsor presented as evidence a registered deed of adoption and argued that section 16 of HAMA was substantive, and therefore the adoption in question had to be considered valid unless disproved by an Indian court. The Federal Court of Appeal rejected the argument:

There is, in our view, no merit in that submission. Under subsection 2(1) of the *Immigration Regulations*, the Board had to determine

¹⁹⁵ *Sran, Pritam Kaur v. M.C.I.* (I.A.D. T93-10409), Townshend, May 10, 1995, at 6.

¹⁹⁶ *Taggar, supra*, footnote 167.

¹⁹⁷ *Aujla, supra*, footnote 85.

¹⁹⁸ *Dhillon, Harnam Singh v. M.E.I.* (F.C.A., no. A-387-85), Pratte, Marceau, Lacombe, May 27, 1987.

¹⁹⁹ *Aujla, supra*, footnote 85. See also *Chiu, Jacintha Chen v. M.E.I.* (I.A.B. V86-6123), Mawani, Gillanders, Singh, July 13, 1987, and *Jaswal, Kaushaliya Devi v. M.E.I.* (I.A.D. W89-0087), Goodspeed, Wlodyka, Rayburn, September 27, 1990.

²⁰⁰ Section 16 of HAMA provides that:

16. Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

²⁰¹ *Dhillon, supra*, footnote 198. The facts of the case are set out in *Dhillon, Harnam Singh v. M.E.I.* (I.A.B. V83-6551), Petryshyn, Glogowski, Voorhees, January 3, 1985.

whether the adoption had been made in accordance with the laws of India. If, as contended, the Board was required to apply section 16 of the *Hindu Adoptions and Maintenance Act, 1956* in making that determination, it was bound to apply it as it read, namely, as creating merely a rebuttable presumption regarding the validity of registered adoptions. As there was no doubt that the adoption here in question had not been made in accordance with Indian laws, it necessarily followed that the presumption was rebutted.²⁰²

In *Singh*,²⁰³ the Federal Court of Appeal went further when it stated:

Presumptions imposed by Indian law on Indian courts, which might be relevant if the issue were simply to know, in private international law terms, the status of the sponsorees in India, are of no assistance in determining whether either of them qualifies as an “adopted son” for the very special purposes of the *Immigration Act* [...] the presumption in section 16 is directed specifically to “the court”, it is difficult, in any event, to conceive of it as being other than procedural since it is unlikely to have been the intention of the Indian Parliament to bind a court over which it had no authority or jurisdiction.²⁰⁴

In *Seth*,²⁰⁵ the Appeal Division followed *Singh* and added that it is not up to the Canadian High Commission in New Delhi to seek standing before an Indian court to have the adoption declared invalid. Instead, the visa officer is entitled to conclude that an alleged adoption has not been proven for immigration purposes.

The Appeal Division has applied the reasoning of the Federal Court of Appeal in *Singh* to cases of adoptions in countries other than India. For example, in *Persaud*²⁰⁶ the Appeal Division considered a final order of the Supreme Court of Guyana and held that the order is one piece of evidence but is not determinative of whether the adoption is in compliance with the *Immigration Act*.

In *Sinniah*²⁰⁷, the Court held that it was patently unreasonable for the visa officer to ignore the effect at law of a final Court order and to decide, in the absence of cogent evidence, that an order pronounced by a court in Sri Lanka

²⁰² *Dhillon*, *supra*, footnote 198, at 2.

²⁰³ *Singh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 37; 11 Imm. L.R. (2d) 1 (C.A.); leave to appeal to Supreme Court of Canada (Doc. 22136, Sopinka, McLachlin, Iacobucci) refused on February 28, 1991, *Singh v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 46 [Appeal Note].

²⁰⁴ *Ibid.*, at F.C. 44. See also *Chahal v. M.C.I.* (I.A.D. VA1-04237), Workun, August 14, 2002.

²⁰⁵ *Seth*, *supra*, footnote 159.

²⁰⁶ *Persaud, Kowsilla v. M.C.I.* (I.A.D. T96-00912), Kalvin, Jul7 13, 1998.

²⁰⁷ *Sinniah, Sinnathamby v. M.C.I.* (F.C.T.D., no. IMM-5954-00), Dawson, July 25, 2002; 2002 FCT 822.

was insufficient to establish that an adoption was made in accordance with the laws of Sri Lanka.

6.11.6. Parent and Child Relationship Created by Operation of Foreign Law

This issue has arisen in the context of section 12 of HAMA,²⁰⁸ which many Immigration Appeal Board decisions have interpreted as having the effect of creating a parent and child relationship by operation of law.²⁰⁹

In light of more recent jurisprudence, it is highly questionable that section 12 of HAMA, or any other similar provision in foreign law, can be seen as determinative of the question of whether a parent and child relationship exists to satisfy the requirements of the Regulations. In *Sharma*,²¹⁰ the Federal Court – Trial Division indicated that:

A parent and child relationship is not automatically established once the requirements of a foreign adoption have been demonstrated. In other words, even if the adoption was within the provisions of HAMA, whether the adoption created a relationship of parent and child, thereby satisfying the requirements of the definition of “adoption” contained in subsection 2(1) of the *Immigration Regulations, 1978*, must still be examined.²¹¹

The framework of the *IRP Regulations* has further eroded the notion that a provision in foreign law could be seen as determinative of whether a parent-child relationship exists. Prior to even determining whether an adoption conforms with the laws of the jurisdiction where

²⁰⁸ Section 12 provides, in part, as follows:

12. An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family [...]

²⁰⁹ See, for example, *Banga, Harjit Ram v. M.E.I.* (I.A.B. V86-6175), Arpin, Gillanders, MacLeod, September 10, 1987. Reported: *Banga v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 1 (I.A.B.); *Sandhu, Gurcharan Singh v. M.E.I.* (I.A.B. T87-9066), Eglington, Teitelbaum, Sherman, November 13, 1987;; and *Shergill, Kundan Singh v. M.E.I.* (I.A.B. V86-6108), Mawani, Gillanders, Singh, April 8, 1987. Reported: *Shergill v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 126 (I.A.B.). For a contrary view, see *Kalair, Sohan Singh v. M.E.I.* (I.A.B. V82-6104), Chambers, Howard, P. Davey, January 9, 1987.

²¹⁰ *M.C.I. v. Sharma, Chaman Jit* (F.C.T.D., no. IMM-453-95), Wetston, August 28, 1995.

²¹¹ *Ibid.*, at 4. This two-stage process has been followed in *M.C.I. v. Edrada, Leonardo Lagmacy* (F.C.T.D., no. IMM-5199-94), MacKay, February 29, 1996, and *Gill, Banta Singh v. M.C.I.* (F.C.T.D., no. IMM-760-96), Gibson, October 22, 1996 (upheld by the Federal Court of Appeal in *Gill, Banta Singh v. M.C.I.* (F.C.A., no. A-859-96), Marceau, Linden, Robertson, July 14, 1998). These cases indicate that the issue had already been determined by the Federal Court in *Singh (C.A.)*, *supra*, footnote 203. In *Cheema v. M.C.I.* (F.C.T.D., no. IMM-2187-01), Gibson, June 4, 2002 the court held that the laws of a province are not determinative for immigration purposes of the adoptive relationship between the adopted child and adopting parents, however, it is a relevant factor to be considered.

it took place, a determination must be made pursuant to s. 4 of the *IRP Regulations* in order to determine whether a foreign national is even to be considered an adopted child. In addition, it was held in *Hurd*²¹² that the assessment of a genuine relationship is not solely to be governed by the future state of the relationship nor is it necessarily governed by the current state of affairs between the adopting parents and child.

Given the case law and the *IRP Regulations*, it is now highly unlikely that a provision in foreign law could ever be determinative of the existence of a parent-child relationship.

6.11.7. Power of Attorney

In cases where the sponsor, for one reason or another, does not travel to the country where the applicant is in order to complete the adoption, the sponsor may give a power of attorney²¹³ to someone to act in his or her stead. The power of attorney gives the person named in it the authority to do whatever is necessary in order to complete the adoption in accordance with the laws of the jurisdiction where the adoption is to take place.

An issue that has arisen in this area with respect to Indian law is whether HAMA requires that the power of attorney be in writing and registered for the adoption to be valid. In a number of decisions, panels have ruled that neither is required.²¹⁴

Another issue is whether the sponsor can give a power of attorney to the biological parent of the person to be adopted. In *Poonia*,²¹⁵ in dealing with the requirements of a giving and taking ceremony under Indian law, and after reviewing a number of Indian authorities, the Appeal Division held that the power of attorney must be given to a third party who cannot be the biological parent as that person is a party to the adoption.

²¹² *Hurd v. M.C.I.* (F.C.T.D., no. IMM-2279-02), Lemieux, June 9, 2003.

²¹³ *Black's Law Dictionary* defines "Power of Attorney" as "[...] an instrument authorizing another to act as one's agent or attorney. The agent is attorney in fact and his power is revoked on the death of the principal by operation of law [...]." *The Canadian Law Dictionary* gives the following definition: "An instrument in writing authorizing another to act as one's agent or attorney. It confers upon the agent the authority to perform certain specified acts or kinds of acts on behalf of his principal. Its primary purpose is to evidence the authority of the agent to third parties with whom the agent deals."

²¹⁴ See, for example, *Gill, Balwinder Singh v. M.E.I.* (I.A.D. W89-00433), Goodspeed, Arpin, Rayburn, September 13, 1990; *Paul, Satnam Singh v. M.E.I.* (I.A.B. V87-6049), Howard, Anderson (dissenting), Gillanders, February 13, 1989; and *Kler, Sukhdev Singh v. M.E.I.* (I.A.B. V82-6350), Goodspeed, Vidal, Arpin, May 25, 1987.

²¹⁵ *Poonia, Jagraj v. M.E.I.* (I.A.D. T91-02478), Arpin, Townshend, Fatsis, October 5, 1993.

In *Rai*,²¹⁶ the applicant had been adopted under the *Alberta Child Welfare Act*. The Appeal Division rejected the argument that the granting of an adoption order under that Act was clear and incontrovertible proof that a genuine parent and child relationship was created.

6.11.8.Revocation of Adoption

Under s. 133(5) of the *IRP Regulations*²¹⁷, similar to the provision in the former *Immigration Regulations, 1978*, an immigration officer (and the Appeal Division) may consider whether the revocation of an adoption by a foreign authority was obtained for the purpose of sponsoring an application for a permanent resident visa made by a member of the family class (of the biological family) and if it was, to rule that the intended sponsorship is not permissible.

In *Sharma*,²¹⁸ the Appeal Division was presented with a declaratory judgment from an Indian court nullifying the adoption of the sponsor. The judgment was obtained by the sponsor's biological father in an uncontested proceeding. After considering the expert evidence presented by the parties, the Appeal Division concluded that the judgment was *in personam* and that the weight to be given to it would depend on the particular circumstances of the case. The Appeal Division inferred from the evidence that the Indian court had not been informed of the immigration purpose for the action and gave the judgment little weight. It also found that the only possible reason for nullifying an adoption under Indian law, misrepresentation, was not present in the case.²¹⁹

In *Chu*,²²⁰ the panel acknowledged that an adoption can be terminated in China with the agreement of the parties. However, because neither the sponsor nor her adoptive father had any real and substantial connection with China at the time the revocation was obtained, the panel ruled that the applicable law was not Chinese law but British Columbia law. Under this law, termination of adoption was not possible.

In *Sausa*,²²¹ the panel identified the issues as follows: (1) “[...] whether the legal relationship of ‘father’ and ‘daughter’ survived the adoption [...]” and (2)

²¹⁶ *Rai, Suritam Singh v. M.C.I.* (IAD V95-02710), Major, Wiebe, Dossa, November 30, 1999.

²¹⁷ Section 133(5) of the *Regulations* reads:

133 (5) A person who is adopted outside Canada and whose adoption is subsequently revoked by a foreign authority or by a court in Canada of competent jurisdiction may sponsor an application for a permanent resident visa that is made by a member of the family class only if the revocation of the adoption was not obtained for the purpose of sponsoring that application.

²¹⁸ *Sharma, Sudhir Kumar v. M.E.I.* (I.A.D. V92-01628), Wlodyka, Singh, Verma, August 18, 1993.

²¹⁹ See also *Heir, Surjit Singh v. M.E.I.* (I.A.B. V80-6116), Howard, Campbell, Hlady, January 16, 1981.

²²⁰ *Chu, supra*, footnote 177.

²²¹ *Sausa, Eleonor Rabelas v. M.C.I.* (I.A.D. W94-00009), Wiebe, June 3, 1996.

“[...] whether the subsequent revocation of the adoption under the laws of the Philippines reinstates the legal status of [the applicant] to that of ‘father’ within the context of Canadian immigration law.”²²²

With respect to the first issue, and relying on the definitions of “father” and “daughter” in the Regulations, the panel ruled that the relationship of father and daughter had been severed by the adoption.²²³

With respect to the second issue, the panel first ruled, relying on *Lidder*²²⁴ that the regulation with respect to revocation was not applicable to the case because the provision post-dated the date of the application for permanent residence. The panel then went on to distinguish *Sharma*²²⁵ noting that in that case, the expert evidence had put into question the validity of the Indian declaratory judgment, whereas here, the expert evidence supported a conclusion that the revocation was valid under Philippine law. However, the panel refused to recognize the revocation on the basis of *Chu*.²²⁶ As in that case, the sponsor and the adoptive parent had no real and substantial connection with the Philippines at the time of the revocation and, in the view of the Appeal Division, “[...] the domicile of both the adoptive parent and adopted child at the time of the revocation is determinative of the governing law [in this case, Manitoba].”²²⁷ There was no evidence to show that revocation of adoption was recognized or available in Manitoba.

In the alternative, the Appeal Division had the regulations applied, the sponsor would not have to prove that the revocation was valid under the law of Manitoba but would have to establish that the revocation was not obtained for the purpose of immigration. This she failed to do. The panel looked at a number of factors, including the timing of the revocation, the reasons given for it and the conduct of the parties after the revocation.

²²² *Ibid.*, at 6. See also *Quindipan, Aurello Jr. v. M.C.I.* (I.A.D. T95-03321), Townshend, November 6, 1997.

²²³ In *Borno, Marie Yvette v. M.C.I.* (F.C.T.D., no. IMM-1369-95), Nadon, February 22, 1996, the applicant, who had come to Canada as the adoptive daughter of her sponsor, tried to sponsor her biological mother. There was no revocation of the adoption in this case, instead, counsel argued that because the Quebec authorities had not approved the adoption done in Haiti, the adoption was not valid. Both the Appeal Division ((I.A.D. M93-06069), Blumer, April 7, 1995) and the Court rejected the argument. The Court noted at 3:

I fully agree with the Appeal Division. The definition of “adopted” in subsection 2(1) of the Regulations is unambiguous. A person adopted “in accordance with the laws of a country other than Canada” is “adopted” for the purposes of the Regulations. The applicant does not challenge the lawfulness of her adoption under the laws of Haiti. And there is no question that the applicant’s natural mother, given her adoption by Ms. Tunis, is not her “mother” for the purposes of the Regulations.

²²⁴ *Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.).

²²⁵ *Sharma, Sudhir Kumar, supra*, footnote 218.

²²⁶ *Chu, supra*, footnote 177.

²²⁷ *Sausa, supra*, footnote 221, at 11.

In *Purba*²²⁸, the sponsor had been adopted by her grandparents but when she was granted an immigrant visa, it was on the basis that she was their dependent daughter. The fact of the adoption was not disclosed to the visa officer. A few years later, she attempted to sponsor her biological mother but that application was refused. The evidence presented at the Appeal Division hearing showed that the adoption was void *ab initio*,²²⁹ however, the appeal was dismissed on the basis of estoppel. As the panel put it:

[The sponsor] was granted status in Canada as a landed immigrant and subsequently as a Canadian citizen based on a misrepresented status which was acted upon by Canadian immigration officials. In my view, she is estopped from claiming a change in status to enable her to sponsor her biological mother [...].²³⁰

6.11.9. Severing the Pre-Existing Legal Parent-Child Relationship

Under s. 3(2) of the *IRP Regulations* an adoption is defined as one that creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship. In some foreign jurisdictions, an adoption may be granted, however, the pre-existing legal parent-child relationship is not severed and, therefore, for the purposes of the *IRP Regulations*, there has been an incomplete adoption.

In *Sertovic*²³¹ under the adoption laws of Bosnia-Herzegovina when a child is adopted over the age of five years, the adoptive parents gain the full rights of natural parents, however, the natural parents' rights are not affected. Further, the incomplete adoption could be cancelled if the legitimate interest of the child so demanded. The panel held that, while the relationship may be genuine, there was no severance due to the nature of the adoption law in Bosnia and therefore the appeal could not be allowed in law.

6.11.10. Public Policy

At times, sponsors have argued that certain provisions in the foreign adoption legislation are discriminatory and should not be recognized by Canadian authorities on the basis of public policy. *Sidhu*²³² dealt with a situation where the purported adoption was not recognized by the visa officer because it was in contravention of HAMA. The sponsor argued before the Appeal Division that the relevant provision in HAMA was discriminatory and should not be given

²²⁸ *Purba, Surinder Kaur v. M.C.I.* (I.A.D. T95-02315), Teitelbaum, September 10, 1996.

²²⁹ The evidence included a judgment of a court in India declaring the adoption null and void. The grandfather already had three daughters and therefore did not have the legal capacity to adopt another daughter under HAMA.

²³⁰ *Purba, supra*, footnote 228 at 8.

²³¹ *Sertovic v. M.C.I.* (I.A.D. TA2-1698), Collins, September 10, 2003.

²³² *Sidhu, Jagdish Singh v. M.E.I.* (I.A.D. M90-02200), Blumer, Durand, Angé, February 4, 1991.

effect because to do so would be contrary to public policy. The Appeal Division accepted the argument and held that the adoption was valid. The Federal Court of Appeal set aside the decision noting that:

Paragraph 4(1)(b) [of the Regulations] represents the conflict of laws rule of the *Immigration Act*. There is here no “material” rule of conflict in the sense of a substantive rule of law applicable since there is no federal adoption legislation. Nor are we in a situation where there is a law of “immediate application” in the sense of a law which must unilaterally and immediately apply so as to protect the political, social and economic organization of Canada to the exclusion of the foreign law that would normally be applicable by virtue of the conflict of laws rule of Canada. Such a situation, when it occurs, can only have the effect of excluding *in toto* the relevant foreign legislation. For instance, if the present adoption were valid under the HAMA, but contrary to Canadian public policy, a rule of immediate application could stipulate that the adoption will not be recognized in Canada. The Canadian authorities would then be obligated to refuse to recognize an adoption performed abroad for reasons of public policy. This is not what the Board did [...]

What the Board did [...] was to purge clause 11(ii) of the HAMA as being contrary to Canadian public policy and then to validate what would be an otherwise invalid adoption according to the Indian legislation [...]

In my view, the Board erred.

[...] the Board had no jurisdiction under the *Immigration Act* to grant a foreign adoptive status which was not valid under foreign law on the grounds that the cause of the invalidity is contrary to Canadian public policy. [Footnotes omitted]²³³

Even if an adoption meets the requirements of the foreign law, it appears that the Appeal Division may refuse to recognize it on grounds of public policy.²³⁴ In *Chahal*,²³⁵ the appellant, a Canadian citizen living in Canada, had been adopted in India. She then tried to sponsor her adoptive family. The panel found that the adoption did not comply with the requirements of HAMA. In obiter, it went on to say that in circumstances where the adopted child is ordinarily resident and domiciled in Canada, to recognize a foreign adoption would be contrary to public policy because the protective jurisdiction of the British Columbia Supreme Court would be denied to that child.

²³³ See *Canada (Minister of Employment and Immigration) v. Sidhu , Sidhu* (C.A.), *supra*, footnote 178, at 489-490. See also *Seth, supra*, footnote 159.

²³⁴ *Chahal, Gobinder Kaur v. M.E.I.* (I.A.D. V89-00287), Mawani, Gillanders, Verma, October 6, 1989.

²³⁵ *Ibid.*

6.12. FOREIGN JUDGMENTS

In order to establish the status of applicants for permanent residence appellants will often produce foreign judgments as evidence of their status in the foreign jurisdiction. While there is a presumption that a foreign judgment made by a court of competent jurisdiction is valid, there are circumstances in which the decision-maker is entitled to go behind the judgment. In any event, the Appeal Division is not bound by the foreign judgment and must make its decision based on the whole of the evidence before it. The foreign judgment forms part of the evidence in the case, and as such must be weighed by the decision-maker.

Some of the factors weighed when assessing foreign judgments include whether the foreign court had before it the full evidence that is before the Appeal Division, and whether the foreign judgment was obtained by consent of the interested parties.

6.12.1. Adoption

In *Sandhu*,²³⁶ the panel held that a decision as to the adoptive status of the applicant was essential to the decision of the foreign court respecting an action for a permanent injunction restraining interference with lawful custody. The panel treated the judgment of the foreign court as a declaration as to status, conclusive and binding on the whole world, and thus found the adoption was valid under Indian law.

However, in *Brar*²³⁷, the panel distinguished *Sandhu*, on the basis that the authenticity of the foreign judgment had not been in dispute. The majority of the panel gave no weight to a declaratory judgment of adoption from an Indian court which contained discrepancies and had not been presented in accordance with section 23 of the *Canada Evidence Act*.

In *Atwal*²³⁸ the majority of the panel accepted the declaratory judgment and noted that "...a foreign judgment is not to be disturbed unless there is proof of collusion, fraud, lack of jurisdiction of the court and the like."²³⁹

The Appeal Division, in *Badwal*,²⁴⁰ found that the foreign declaratory judgment pertaining to the adoption of the applicant was not determinative of the issue of the validity of the adoption. The foreign declaratory judgment was issued on consent, devoid of material particulars and made in apparent violation of the relevant foreign law. Indeed, the adoption was made in violation of clause 11(i)

²³⁶ *Sandhu*, *supra*, footnote 125. See also, *Patel*, *supra*, footnote 189.

²³⁷ *Brar*, *supra*, footnote 173.

²³⁸ *Atwal*, *supra*, footnote 192.

²³⁹ *Ibid*, at 4.

²⁴⁰ *Badwal*, *supra*, footnote 192.

of the *Hindu Adoptions and Maintenance Act, 1956* and was void by operation of clause 5 of that Act.

At issue, in *Gill*,²⁴¹ was whether there was a mutual intent to transfer the applicant from her natural family to her adoptive family. Three years after the adoption ceremony, a declaratory judgment was obtained in an Indian court stating that the applicant's mother was the only natural and legal guardian of the applicant as the father was presumed dead. The Appeal Division held that this evidence did not contradict the other evidence that the requisite mutual intent to transfer existed, as the declaratory judgment was only sought to facilitate the sponsorship application. The panel held that the *viva voce* evidence of the appellant and his witnesses outweighed that of the declaratory judgment in the particular circumstances of this case.

The IAD, in *Sharma*,²⁴² rejected a declaratory judgment from a Indian court which declared an adoption null and void. The judgment had been obtained in an uncontested application by the natural father of the appellant, who then applied for permanent residence. The IAD held that a declaratory judgment is not binding on third parties. Further, an Indian adoption cannot be annulled on the basis that the adoptive father changed his mind after the adoption. In addition, the panel found that the annulment was obtained for immigration purposes. There was evidence that the annulment would not have been granted if the judge had known this.

In *Sran*,²⁴³ the appellant admitted that she had three Hindu sons living at the time of the applicant's adoption, but sought to rely on a declaratory judgment of an Indian court upholding the validity of the adoption deed. The Appeal Division dismissed the appeal, holding that it was bound by the *Taggar* decision,²⁴⁴ in which the Federal Court of Appeal held that the declaratory judgment in that case was a judgment *in personam* which bound only the parties to the action. The Appeal Division stated that the declaratory judgment was merely evidence which must be considered along with other evidence in determining the validity of the adoption, and did not dispose of the issue by itself. The Appeal Division noted that the issue of the existence of "Hindu sons" at the time of the adoption was apparently never raised before the Indian court and stated that the declaratory judgment could not cure the defect in the adoption, which clearly contravened the *Hindu Adoptions and Maintenance Act*.

²⁴¹ *Gill, Sukhminder Singh v. M.E.I.* (I.A.D. V89-00308), Wlodyka, Chambers, Verma, April 30, 1991.

²⁴² *Sharma, supra*, footnote 218.

²⁴³ *Sran, supra*, footnote 195.

²⁴⁴ *Taggar, supra*, footnote 167; 8 Imm.L.R. (2d) 175 (F.C.A.).

In *Sinniah*²⁴⁵ the court held that it was patently unreasonable for the visa officer to ignore the effect at law of a final Court order and to decide in the absence of cogent evidence that an order pronounced by a court in Sri Lanka was insufficient to establish the fact of an adoption made in accordance with the laws of Sri Lanka. Caution must be exercised in concluding that an adoption is not valid in the face of what appears to be a valid court order.

6.12.2.Divorce

The Federal Court of Appeal has held that a domestic court may not refuse recognition of a foreign divorce on the ground that there was fraud or collusion in obtaining that divorce unless the fraud was such that it led the foreign court to wrongly assume jurisdiction over the subject matter.²⁴⁶ For a foreign divorce decree to be recognized in the province of Quebec, the Quebec Courts must be satisfied that it was rendered by a court of competent jurisdiction. The panel could have found the decree invalid solely on the basis of its finding that the appellant and the first wife were never domiciled in Haiti. However, the Board also considered that the ground on which the divorce was obtained in Haiti (incompatibility of character), did not exist in the Canadian *Divorce Act* and that the first wife was not represented in Haiti when the divorce proceedings took place.²⁴⁷

6.12.3.Marriage

In order to prove that he was not married, the applicant obtained an *ex parte* order from an Indian court stating that two marriage certificates were false and that he was not married. When his application for permanent residence was again refused on the same grounds, he sought a declaration from the Federal Court that he was never married and had answered the visa officer's questions truthfully. A motion to strike out the action was granted because the Court does not have jurisdiction to make declarations of fact. In *obiter*, the Court commented on the officer's failure to accept the judgment of the Indian court because it was obtained *ex parte*. The Court indicated that the fact that it was obtained *ex parte* does not, alone, make the judgment valueless or invalid. The judgment was issued by a court with proper jurisdiction to render such a decision.²⁴⁸

²⁴⁵ *Sinniah, supra*, footnote 207.

²⁴⁶ *Sandhu, Kirpal Singh v. M.E.I.* (F.C.A., no. A-221-81), Pratte, Urie, Verchere, October 8, 1981. See also *Johal, Tarsem Singh v. M.E.I.* (I.A.B. 83-6737), Glogowski, Howard, P. Davey, February 19, 1986, in respect of a foreign judgment declaring the parties to be married. See also, *Powell v. Cockburn*, [1977] 2 S.C.R. 218 re: fraud going to jurisdiction.

²⁴⁷ *Goyette, Michel André v. M.E.I.* (I.A.B. 78-1073), Houle, Glogowski, Tremblay, March 23, 1979.

²⁴⁸ *Gill, Jhanda Singh v. Canada (M.E.I.)* (F.C.T.D., no. T-484-91), Teitelbaum, September 19, 1991.

Where a declaratory judgment by an Indian court respecting the marriage of the appellant and applicant did not refer to the date and place of the marriage and was obtained some four months after the applicant received her refusal letter, the panel gave it little weight.²⁴⁹

The Appeal Division did not give great weight to a declaratory judgment obtained *ex parte* purporting to establish the marriage of appellant and sponsoree, as the record showed that evidence placed before the Indian court was incomplete. From the evidence before the Appeal Division, it appeared that the appellant was married to another person and thus lacked the capacity to marry his purported wife (the applicant).²⁵⁰

²⁴⁹ *Burmi, supra*, footnote 192.

²⁵⁰ *Gill, Sakinder Singh v. M.E.I.* (I.A.D. V89-01124), Gillanders, Verma, Wlodyka, July 16, 1990. An appeal to the Federal Court of Appeal was dismissed without reasons: *Gill, Sakinder Singh v. M.E.I.* (F.C.A., no. A-860-90), Pratte, Heald, Desjardins, April 24, 1991.

6.13. FOREIGN LAW

Decision-makers cannot take judicial notice of foreign law, it must be proved as a fact.

Section 23 of the *Canada Evidence Act* provides that evidence of judicial proceedings or records of any court of record of any foreign country, may be given by a certified copy thereof, purported to be under the seal of the court without further proof. However, the Board does not normally require strict proof in this manner. Nevertheless, the failure to comply with section 23 has been relied on in weighing the evidence produced.²⁵¹

"Absent pleading or proof, the court will simply apply the relevant local law. Judges sometimes translate this proposition into the formula that, without a showing of difference between the foreign law and local law, the court will presume they are identical."²⁵²

The Board was not entitled to rely upon evidence given in other cases as to the existence and effect of certain aspects of the law of India bearing on adoptions as a basis for its decision that the applicant had not been so adopted.²⁵³

It is completely within the Appeal Division's jurisdiction to weigh conflicting evidence relating to foreign law. In *Shergill*,²⁵⁴ the Appeal Division had given little weight to legal opinions of three lawyers from India which interpreted a provision of the *Hindu Adoptions and Maintenance Act*. The Federal Court - Trial Division noted:

In view of the conflicting evidence relating to Indian law, the IAD was required to weigh that evidence. While the evidence here was as to the interpretation of Indian law, the weighing of such evidence is no different than the weighing of any other evidence by a tribunal. Here, it is the function of the IAD and, barring legal error, the Court will not re-weigh the evidence. The matter is not beyond doubt and indeed the applicant produced relatively persuasive evidence. However, it was still open to the IAD to prefer the respondent's evidence.²⁵⁵

6.13.1. Factors to Consider:

- date of the law²⁵⁶
- whether there have been changes to the law since publication

²⁵¹ *Brar, supra*, footnote 173.

²⁵² Stanley Schiff, *Evidence in the Litigation Process* (Toronto: Carswell, 1993), 4th ed., Vol.2, page 1056. See, for example, *Gill, supra*, footnote 241.

²⁵³ *Kalair, supra*, footnote 169.

²⁵⁴ *Shergill, supra*, footnote 204.

²⁵⁵ *Ibid.*, at 3.

²⁵⁶ See *Chen, Bo v. M.C.I.* (I.A.D. V95-02261), Nee, March 12, 1998 where the panel found that the Adoption Law of the People's Republic of China was not applicable to the adoption in issue as that legislation was not in effect at the time the appellant adopted the applicant.

- whether the law is statutory and the possible effect of foreign case-law
- whether presented through an expert²⁵⁷
- qualifications of any expert witnesses & all other concerns regarding expert evidence

6.13.2. Date of the foreign legislation

The appellant argued before the Federal Court of Appeal, that the Board had erred in relying on a version of the *Hindu Adoptions and Maintenance Act (HAMA)* which antedated the adoption by 4 years. The Court held that before the IAD, the appellant had the burden of proof. If the appellant had wished to challenge the version of *HAMA* relied on, it should have been raised at the hearing, and evidence should have been lead to support the challenge. The Appeal Division would not err in rejecting antedated legislation as not being trustworthy, however, under section 69.4(3)(c), [now sections 174(2) and 175(1) of *IRPA*] the IAD has a broad discretion in determining what evidence is trustworthy. The appeal was dismissed.²⁵⁸

In a case that came before the Appeal Division²⁵⁹ where the appellant's putative adopted son was 18 years of age at the time of the adoption, the sponsored application for permanent residence was refused on the basis that the adoption did not comply with the *Hindu Adoptions and Maintenance Act, 1956* which requires that a child be under the age of 15 years at the time of adoption. The appellant presented evidence to establish that custom in the Sikh community permits the adoption of children over 15 years old. Apart from a letter from the head priest of the temple where the adoption took place testifying to the validity of such adoptions, the appellant presented a legal opinion from an Indian lawyer whose expertise appeared to be in commercial rather than family law and whose case law in support of the opinion largely predated the *Hindu Adoptions and Maintenance Act, 1956*. The Appeal Division found that the appellant's evidence was insufficient to overcome the clear requirements of the foreign legislation.

²⁵⁷ See, for example, *Quindipan, supra*, footnote 222 where the appellant presented no legal opinion or expert evidence and the Appeal Division found that the mere recitation by the appellant of the relevant provisions of the *Family Code of the Philippines* together with the decision of the court revoking the adoption were insufficient to persuade the panel that the revocation revived the relationship between the appellant and his natural father so that the appellant became legally the son of his natural father by operation of law.

²⁵⁸ *Singh, Ranjit v. M.E.I.* (F.C.A., no. A-859-88), Mahoney, Stone, Robertson, September 22, 1992. See also, *Chaudhari, Keshubhai Laxmanbhai v. M.E.I.* (F.C.A., no. A-285-89), Mahoney, Stone, Robertson, September 22, 1992.

²⁵⁹ *Grewal, Sarbjeet v. M.C.I.* (I.A.D. T96-04958), Hoare, September 9, 1997.

6.13.3. Presumptions under foreign law

In *Singh*, the Federal Court of Appeal held that the presumption in section 16 of the *Hindu Adoptions and Maintenance Act* is not applicable in determining whether a person is "adopted" for the purposes of the *Immigration Act* and Regulations.²⁶⁰

The Court ruled in *Dhillon*²⁶¹ that under section 2(1) of the *Immigration Regulations, 1978*, [now sections 3(2) and 117 of the *IRP Regulations*] the Board had to determine whether the adoption had been made in accordance with the laws of India. Section 16 of the *Hindu Adoptions and Maintenance Act, 1956* creates merely a rebuttable presumption regarding the validity of registered adoptions. As there was no doubt that the adoption here in question had not been made in accordance with Indian laws, it necessarily followed that the presumption was rebutted. In *Dhudwa*,²⁶² also ruling on whether the adoption was in accordance with HAMA, the Appeal Division ruled that "an Adoption Deed gives rise to a rebuttable presumption that a valid adoption took place in accordance with the HAMA and is therefore persuasive, but not conclusive evidence.

Relying on *Dhillon*,²⁶³ the Board accepted an adoption deed as *prima facie* evidence of an adoption having taken place, although whether or not the adoption was in compliance with the *Hindu Adoptions and Maintenance Act, 1956* was a question of fact to be determined by the evidence in each case.²⁶⁴

The applicant's mother obtained a declaratory judgment from the Indian courts which indicated that the natural father of the applicant was presumed dead. The IAD held that the rebuttable presumption of Indian law that the father was dead must be categorized as procedural, and therefore not binding on the panel. Canadian law was applied, which turned out to be similar to Indian law on this point; the evidence showed that, on a balance of probabilities, the natural father was to be presumed dead at the time of the adoption.²⁶⁵

6.13.4. Expert Evidence

In *Fuad*,²⁶⁶ the panel looked at the validity of marriage celebrated under Sharia law or Islamic law in Ethiopia in relation with the refusal of a sponsored

²⁶⁰ *Singh, supra*, footnote 203. Leave to appeal to the S.C.C. refused February 28, 1991: *Singh, supra*, footnote 203

²⁶¹ *Dhillon, supra*, footnote 198.

²⁶² *Dhudwarr, Didar Singh v. M.C.I.* (I.A.D. TA2-02097), D'Ignazio, April 22, 2003.

²⁶³ *Dhillon, supra*, footnote 198.

²⁶⁴ *Aujla, supra*, footnote 85.

²⁶⁵ See *Gill, supra* footnote 241.

²⁶⁶ *Fuad, Omar Goala v. M.C.I.* (I.A.D. MA2-08443), Fortin, October 1, 2003.

application. Three legal opinions were presented to the tribunal on the interpretation of Ethiopian law regarding marriages by proxy. In view of conflicting opinions, the panel expressed the view that in order to evaluate an expert opinion it was always useful to know the degree of expertise of the person who prepared a legal study. The panel preferred the detailed opinion from the expert in the field, whom also went one step further and talked about practical aspect of the application of the Ethiopian Civil Code.

In *Bajracharya*,²⁶⁷ the appellant before the Appeal Division provided a written legal opinion of a lawyer who also testified at the hearing on a number of provisions of the adoption laws of Nepal. Since the expert was unable to provide any credible explanation on apparent contradiction between his opinion and the wording of the Sections of the law, the Panel concluded with its own interpretation to what it considered otherwise clear provisions of the Nepalese law.

In *Lee*,²⁶⁸ neither the Minister's counsel nor the appellant was able to provide a copy of the applicable adoption statutes of Myanmar, both arguing that such documentary evidence was difficult to obtain. The panel decided to accept the legal opinion of the Minister's legal counsel from Myanmar "as evidence that sets out the relevant and applicable adoption laws in Myanmar. There was no objective evidence that the legal counsel has any interest in the outcome of this case and appears to have provided objective, credible and trustworthy evidence."

²⁶⁷ *Bajracharya, Laxmi v. M.C.I.* (I.A.D. VA2-01215), Mattu, February 10, 2003.

²⁶⁸ *Lee, Shwe Chin v. M.C.I.* (I.A.D. VA2-02286), Mattu, May 2, 2003.

6.14. JUDICIAL NOTICE

When “judicial notice” is taken of a fact, no formal evidence of that fact has to be introduced at the trial or hearing.

The term “judicial notice” has been defined as follows:

The court’s recognition of certain facts that can be confirmed by consulting sources of indisputable accuracy, thereby relieving one party of the burden of producing evidence to prove these facts. A court can use this doctrine to admit as ‘proved’ such facts that are common knowledge to a judicial professional or to an average, well-informed citizen – e.g., that the mail is not delivered New Year’s Day.²⁶⁹

The courts take cognisance or notice of matters which are so notorious or clearly established that formal evidence of their existence is unnecessary: and matters of common knowledge and everyday life; e.g., that there is a period of gestation of approximately nine months before the birth of a child.²⁷⁰

The purpose of “taking judicial notice” is to shorten the proceedings. Every trial or hearing could go on for an interminable length if courts and tribunals were required to receive formal proof of every assertion being made and were not allowed to make use of their ordinary experience to reach a decision. No one is required to provide evidence that Monday follows Sunday, that the sun rises in the east, or any of the innumerable facts which are “generally known”.

The essential basis for taking judicial notice is that the fact involved is of a class that is so “generally known” as to give rise to the presumption that all reasonably intelligent persons are aware of it. This analysis excludes from judicial notice what are not general, but are “particular” facts – facts known to people who have some special knowledge gained through their work or travel, for example, but which are not known by the general public.

No universal line can be drawn distinguishing between the “generally known” and “particular” facts. As a guideline, it can be stated that usually the more central to the question in dispute a matter is, the greater the need is for proof to be made at the trial or hearing.

A court or tribunal may take judicial notice, that is, accept a statement as true without formal proof where the statement (a) would be considered as common knowledge without dispute among reasonable people, or (b) is capable of being shown to be true by reference to a readily accessible source of indisputable accuracy.

Some examples of situations in which courts have taken judicial notice are:

²⁶⁹ John A. Yogis, *Canadian Law Dictionary*, 2nd ed. (New York, 1990), page 121.

²⁷⁰ Osborn’s *Concise Law Dictionary*, Ninth ed. (London: Sweet & Maxwell, 2001), page 219.

- *local conditions*: a judge may apply his or her knowledge of matters which are generally accepted in the community, such as the fact real estate values have increased over the years or the approximate time of the sunset in the summer;
- *geographic facts*: it is proper for Canadian courts to recognize where the boundaries are of the United States or other foreign states without formal proof;
- *human behaviour*: for example, that children are playful or that television is a common feature of Canadian life;
- *business and trade practices*: ordinary methods of doing business may be judicially noticed;
- *Canadian laws*: courts take notice of all federal and provincial statutes and regulations without requiring evidence of their proper enactment (see *Canada Evidence Act*, sections 17 and 18). It must be noted, however, that courts do not take judicial notice of the laws of a foreign country (see Chapter 6.13 of this paper). The validity or existence of any foreign laws must be established in evidence like any other fact to be proved. Often this is done by calling an expert witness to testify as to the state of the foreign law; and
- *international instruments and law*, though this is not entirely free from doubt.²⁷¹

With respect to proceedings before the RPD, the Immigration and Refugee Protection Act specifically provides in section 170(i) that the Division “may take notice of any facts that may be judicially noticed ...”. Nevertheless, even absent such a provision, the Immigration Appeal Division and the Immigration Division may also rely on judicial notice to establish obvious matters.

However, judicial notice should be distinguished from the use of “specialized knowledge” by the RPD. Unlike specialized knowledge, notice need not be given to the parties before the Member may rely on judicial notice. This is because of the very nature of the matters of which judicial notice may be taken.

Judicial notice should only be used for facts that are commonly known and are not in dispute.²⁷² Thus in one case where there was no evidence to support the CRDD’s finding

²⁷¹ See *R. v. The Ship North* (1906), 36 S.C.R. 385; *Reference Re. Exemption of U.S. Forces from Canadian Criminal Law*, [1943] S.C.R. 483, as discussed in *International Law, Chiefly As Interpreted in Canada*, 4th edition (Edmond Montgomery Publications Limited, 1987), page 236. In view of paragraph 3(3)(f) of the *Immigration and Refugee Protection Act*, which states that the Act “is to be construed and applied in a manner that ... complies with international human rights instruments to which Canada is signatory,” it would appear that a Member may properly have recourse to international instruments and law in his or her analysis of matters such as international crimes, the Convention refugee definition, etc. However, in *Quao, Daniel Essel v. M.C.I.* (F.C.T.D., no. IMM-5240-999), Blais, August 15, 2000, the Court stated: “International, national or even customary law are not within the general knowledge of the Board. It is not the sort of information that the Board can be expected to know or take judicial notice of.”

²⁷² *Maslej v. Canada (Minister of Manpower and Immigration)*, [1977] 1 F.C. 194 (C.A.) (not all members of a minority group were in danger of being persecuted); *Amiri, Hashmat v. M.C.I.* (F.C.T.D., no. IMM-1458-00), Lutfy, February 13, 2001 (Dari was not spoken solely in Afghanistan). See also *Galindo v. Canada (Minister of Employment and Immigration)*, [1982] 2 F.C. 781 (C.A.), where the Immigration Appeal Board was overturned for

that “Hong Kong newspapers and magazines are readily available in Guangzhou,” the Federal Court–Trial Division concluded that the panel had taken judicial notice of the facts. In the opinion of the Court, however, they were not facts which were the proper subject of judicial notice as they were not “generally known, reasonably unquestionable or easily verifiable.”²⁷³

In another case, the Federal Court found that the RPD erred in taking judicial notice of how a person’s background was investigated before a passport was issued in Turkey.²⁷⁴

6.14.1. Judicial Notice and Specialized Knowledge in the RPD

The RPD has a special power not given to the other two Divisions. Section 170(i) of the *Immigration and Refugee Protection Act* provides that in addition to having authority to take judicial notice of facts, the RPD may take notice of “any other generally recognized facts and any information or opinion that is within its specialized knowledge.”

Section 18 of the Refugee Protection Division Rules provides as follows:

18. Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to

(a) make representations on the reliability and use of the information or opinion; and

(b) give evidence in support of their representations.

(The equivalent provisions under the Immigration Act were subsections 68(4) and (5), respectively.)

Thus, the RPD is given authority to go beyond the area of judicial notice to make use of “generally recognized facts” and “information or opinion that is within its specialized knowledge”. Unlike facts of which judicial notice may be taken, specialized knowledge involves information which would not necessarily be known to the parties in a particular claim. The Refugee Protection Division Rules therefore require that the parties be advised and be given a chance to respond before the RPD is entitled to rely on its specialized knowledge.²⁷⁵

improperly taking notice of information it had obtained in other hearings relating to Chile. Section 170(i) of the *Immigration and Refugee Protection Act* now allows the RPD to use its specialized knowledge in such cases, provided that notice is given to the parties.

²⁷³ *Cheng, Kuo Ta v. M.E.I.* (F.C.T.D., no. A-1389-92), Denault, October 12, 1993.

²⁷⁴ *Oymak, Abdullah v. M.C.I.* (F.C., no. IMM-5345-02), Lemieux, October 23, 2003; 2003 FC 1243.

²⁷⁵ In *Bula, Ngaliema Zena v. S.S.C.* (F.C.A., no. A-329-94), Marceau, Hugessen, MacGuigan, June 19, 1996, the Court noted: “it is of the very essence of the role of the tribunal that hears the witnesses to rule on their credibility, and we

The “specialized knowledge” possessed by the RPD comes from its studies in the Board’s Documentation Centre and other sources, and from evidence presented in other cases before it.

The term “generally recognized facts” could include facts which are usually accepted without question by scholars, by government and United Nations officials, and by people who resided in an area and others, but which are not necessarily commonly known by the general public.

The RPD’s power to take notice of facts, information and opinion within its specialized knowledge must be exercised fairly,²⁷⁶ in accordance with the legislative parameters.²⁷⁷ The Federal Court appears to be more likely to uphold the use of specialized knowledge where the documentary evidence supports the panel’s statement regarding the existence of certain facts or information.²⁷⁸

Where the panel takes notice of matters within its specialized knowledge, the panel should still consider the weight to be given to that information, in relation to the other evidence, and in light of the representations made by counsel, or the Minister’s representative.

Where the panel takes “notice” of the contents of the Standard Country File or any other evidence in the Documentation Centre, the panel is essentially accepting those documents into evidence, as “information or opinion” that falls within the “specialized knowledge” of the Board, without requiring copies to be produced.²⁷⁹ Thus the contents of those documents should be weighed in the same manner as any other documentary evidence.

think it is not only normal but inevitable that in doing so the members will be influenced by the experience they may have acquired in the exercise of their duties. As long as it involves only experience they have acquired and not specific information, subsections (4) and (5) of section 68 of the Act [*Immigration Act*] are not at all involved.”

²⁷⁶ In *Pamuk, Sunay v. M.C.I.* (F.C., no. IMM-4617-02), Heneghan, October 10, 2003; 2003 FC 1187, the RPD referred to an “on-going” case between the Alevi organization and the Turkish State, but it did not identify which case or conflict it was referring to when it put this question to the claimant. It then relied on the claimant’s lack of knowledge about this “case” as a reason to doubt her membership in the Alevi organization. The Court held that the RPD did not comply with RPD Rule 18 before using its specialized knowledge, in that it did not give the claimant sufficient notice.

²⁷⁷ *Sivaguru, Jegathas v. M.E.I.* (F.C.A., no. A-66-91), Heald, Hugessen, Stone, January 27, 1992. In *Hussain, Saeed Atif v. M.C.I.* (F.C.T.D., no. IM-1940-99), Dawson, August 11, 2000, the Court held that there is no requirement that notice under section 68(5) of the *Immigration Act* must be given at the outset of the hearing; compliance with that provision during the hearing is sufficient. (The CRDD advised the claimant of its concerns about his statements about Shi’ite principles and rituals.)

²⁷⁸ *Ahamadon, Tuan Ramaiyan v. M.C.I.* (F.C.T.D., no. IMM-1257-99), Pinard, May 17, 2000; *Nadarajalingam, Rajah v. M.C.I.* (F.C.T.D., no. IMM-3238-00), Gibson, May 8, 2001. In *Afzal, Amer v. M.C.I.* (F.C.T.D., no. IMM-6423-98), Lemieux, June 19, 2000, the Court held that the circumstances in which FIRs are available in Pakistan is not a matter of the CRDD’s specialized knowledge: that is why evidence was sought on the point by the tribunal itself.

²⁷⁹ In *Hassan, Jamila Mahdi v. M.E.I.* (F.C.A., no. A-757-91), Isaac, Pratte, Hugessen, February 8, 1993, Justice Hugessen stated with reference to the information contained in the Standard Country File: “By making published

The Federal Court–Trial Division held that the CRDD may take notice of an expert opinion in a “lead case” and consider it in a subsequent case, as an exercise of its authority to take notice of fact, information and opinions within its specialized knowledge, provided it gives proper notice.²⁸⁰

The RPD may not take judicial notice of its knowledge of similar claims. Such knowledge comes within their specialized knowledge, thus the notice requirements set out in section 18 of the Refugee Protection Division Rules (formerly section 68(5) of the Immigration Act) must be followed.²⁸¹

In another case, the Federal Court–Trial Division held that the CRDD erred in concluding, under its specialized knowledge, that the claimant, a citizen of Algeria, was not credible because, among other things, he had mentioned that none of his Islamic aggressors had beards. In addition, the Court found that the CRDD erred by failing to give notice under section 68(5) of the Immigration Act of its intention to consider this fact.²⁸²

Details of a Nigerian newspaper’s publishing schedule, which were obtained by the CRDD in one case, on its own initiative, after the hearing, were held not to be facts that come within any of the categories of section 68(4) of the Immigration Act. All inquiries by the Division must be for the purposes of a hearing, and the Division may only take evidence at an oral hearing in the presence of the claimant, unless that right is waived.²⁸³

Where there was no evidence that any of the countries the claimant passed through had ratified the Refugee Convention and Protocol, the Federal Court of Appeal held in its decision in *Tung* that, despite the CRDD’s power to take judicial notice of facts, the Division should not have speculated that these countries provided refugee protection.²⁸⁴ However, this decision was distinguished in the *Ilie* case by the Federal Court–Trial Division on two grounds. First, that in *Tung* the transit time was 5 weeks, whereas in *Ilie*, it was

information publicly available and by referring to the then current index thereto at the outset of the hearing, the Board has, in my opinion, adequately complied with the notice requirements of subsection 68(5) [of the *Immigration Act*].”

²⁸⁰ *Horvath, Ferenc v. M.C.I.* (F.C.T.D., no. MM-2203-00), Blanchard, June 4, 2001.

²⁸¹ *Thillaiyampalam, Sangarasivam v. M.C.I.* (F.C.T.D., no. IMM-429-94), Gibson, November 24, 1994. See also *Cadet, Marie v. M.E.I.* (F.C.T.D., no. A-939-92), Dubé, October 18, 1993; and *Comes, Norman v. M.C.I.* (F.C.T.D., no. IMM-3575-98) Rouleau, May 28, 1999. In *Comes* the CRDD took into account the testimony that an expert had given in another case without informing the claimants of its intention to admit the expert’s testimony in the case. The application for judicial review was not granted, however, as the CRDD’s error did not vitiate its decision: the decision was founded on many other pieces of evidence.

²⁸² F.C.T.D., no IMM-6813-98, Denault, September 14, 1999.

²⁸³ *Lawal v. Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 404 (C.A.).

²⁸⁴ *Tung, Zhang Shu v. M.E.I.* (F.C.A., no. A-220-90), Stone, Heald, Linden, March 15, 1991; Reported: *Tung, v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.)

6 months; second, that in *Ilie*, there was evidence (by way of notice) of the status of the countries through which the claimant passed. The Court held that it would have been preferable for the CRDD to have raised its concerns at the hearing regarding the failure to make a claim en route to Canada. Nevertheless, it held that the Division could take note of which countries were signatories to the Refugee Convention and Protocol. The Division was also entitled to assume, absent evidence to the contrary, that the signatories would implement the Convention.²⁸⁵

In one case, a CRDD panel was found to have erred in relying on its many years of personal experience in travelling through Europe, in determining the claimant's credibility in relation to the ease with which he claimed to have travelled through Europe. The Court found that the Members' personal experiences, the full extent of which was unclear, did not qualify as specialized knowledge.²⁸⁶

A CRDD panel, referring to subsections 68(4) and (5) of the Immigration Act, advised the parties to a claim that he had lived in Mexico and that it was common to see large cars. In this case, the claimant had alleged that three men in a dark blue car which had stopped her were judicial police because, amongst other things, they "drove a big dark blue car." The Federal Court–Trial Division doubted that this was "specialized knowledge" under section 68(4) of the Immigration Act, but thought that the Member must have thought it was at least a "generally recognized fact". The Court held that section 68(5) of the Immigration Act had been complied with as the Division had given the claimant an opportunity to submit evidence. The Court further found that there was no reasonable apprehension of bias.²⁸⁷

In another case, the Federal Court–Trial Division doubted that the CRDD's "alleged knowledge of procedures at Swiss border points and procedures of Swissair ... could be described as 'generally recognized facts' or 'information or opinion that is within its specialized knowledge.'" Even if it were, the Court found that the Division had erred in not giving notice of its intention to rely on those facts, and by not giving the claimant an opportunity to make submissions.²⁸⁸

²⁸⁵ *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994.

²⁸⁶ *Mama, Salissou v. M.E.I.* (F.C.T.D., no. A-1454-92), Teitelbaum, October 17, 1994; this decision was upheld by *Mama, Salissou v. M.E.I.* (F.C.A., no. A-596-94), Stone, Décary, McDonald, May 26, 1997.

²⁸⁷ *Portilla, Carla Karina Aguirre v. M.C.I.* (F.C.T.D., no. IMM-4110-97), Rothstein, May 29, 1998.

²⁸⁸ *Appau, Samuel v. M.E.I.* (F.C.T.D., no. A-623-92), Gibson, February 24, 1995. This case was distinguished in *Kanvathipillai, Yogaratnam v. M.C.I.* (F.C.T.D., no. IMM-4509-00), Pelletier, August 16, 2002, where the Court upheld the CRDD's use of specialized knowledge about U.S. immigration procedures (i.e., whether rejected claimants returning to the U.S. are given a hearing there).

In one case, the CRDD took judicial notice that in order to successfully complete medical school in Russia, one needs to understand Russian. In this case the decision was upheld by the Federal Court–Trial Division, and the following matters were held to come within the Division’s specialized knowledge: (a) medicine is a post-graduate field of study; (b) all universities send students a copy of their course grades at the end of their courses; and (c) student identity cards do not establish the eligibility of students to be admitted or readmitted to university.²⁸⁹

In respect of a claim against Russia, the Federal Court–Trial Division stated that “some of the matters of which the [CRDD] panel might well have had knowledge, notorious matters of which this Court has knowledge is that President Boris Yeltsin does not control the Duma, much less a honeycomb of corrupt offices and officers, who resent an idealist or just a garden-variety honest person attempting to operate honestly.”²⁹⁰

In reviewing the decision of the CRDD in another case, the Federal Court–Trial Division found that the Division had not erred in making use, without notifying the claimant, of its specialized knowledge that false documents indicating Jewish identity were commonly available in the former Soviet Union. The Division had put the claimant on notice at the outset that the hearing would focus on the claimant’s ethnicity and her credibility. The adverse finding on credibility was based on all of the evidence, not just on the Division’s specialized knowledge. In the view of the Court, the Division “is not required to bring to a claimant’s attention every reservation held or implausibility found in reflecting upon the [claimant’s] testimony as a whole, before its decision is made.”²⁹¹

Where the CRDD stated in a case that it had specialized knowledge from hearing Sri Lankan claims that there was a well-established community of approximately 250,000 Tamils in Colombo, the Federal Court–Trial Division was not satisfied that the Division should not have given the claimant notice under section 68(5) so that the claimant could have made submissions with respect to that knowledge.²⁹²

In reviewing another CRDD decision, the Federal Court–Trial Division found that, while the Board’s expertise in the “cultural norms of China” and the dynamics on board a ship is not apparent and not deserving of much, if any,

²⁸⁹ *Hassan, supra*, footnote 58.

²⁹⁰ *Vassiliev, Anatoli Fedorov v. M.C.I.* (F.C.T.D., no. IMM-3443-96), Muldoon, July 4, 1997.

²⁹¹ *Tchaynikova, Olga v. M.C.I.* (F.C.T.D., no. IMM-4497-96), Richard, May 8, 1997.

²⁹² *Balasundaram, Velummylum v. M.C.I.* (F.C.T.D., no. IMM-4487-96), Wetston, September 15, 1997.

deference, the panel was entitled to draw from its specialized knowledge of the important dates in Tian Dao from having heard scores of Tian Dao claims.²⁹³

In another case, where a document from the Board's Documentation Centre was available at the time of hearing, but was not submitted in evidence, counsel for the claimant argued before the Federal Court–Trial Division that the document formed part of the ex officio knowledge of the Division. The Court did not agree. In its view, since the document was available at the time of the hearing, the claimant could have submitted it. A specialized tribunal such as the CRDD (now the RPD) does not have “a duty to be familiar with all the documents originating in its documentation centre.”²⁹⁴ In *Omar*, the Court imposed a duty on the CRDD to be aware of all pertinent information in the possession of the Documentation Centre, as well as claim-specific information, despite the fact that the evidence had not even been presented to the panel.²⁹⁵

However, in *Tambwe-Lubemba*, the Court of Appeal subsequently distinguished *Omar* and held that the CRDD Member did not have a continuing obligation, after the conclusion of the hearing and before she signed her written reasons, to consider documents that were not filed at the hearing but which had come into the possession of the CRDD in the meantime. There was no evidence in that case that the Member ever saw the document at issue prior to signing her written reasons.²⁹⁶ The Court endorsed the reasons for judgment of the Trial Division, which held that where the documents are readily available, the claimant, having the onus of proof, can submit them for the consideration of the panel.²⁹⁷

Therefore, normally, a panel is not under a continuing obligation to consider documents (nor is it presumed to have knowledge of information in the possession of the Documentation Centre) unless presented in evidence at the hearing.²⁹⁸

²⁹³ *Chen, Tian Wang v. M.C.I.* (F.C.T.D., no. IMM-768-02), O'Reilly, June 27, 2003.

²⁹⁴ *Kadenko, Ninal v. S.G.C* (F.C.T.D., no. IMM-809-94), Tremblay-Lamer, June 9, 1995; set aside on another ground in *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996; leave to Supreme Court of Canada denied, [1996] S.C.R. 612.

²⁹⁵ *Omar, Mustafa Abdulwahab v. M.C.I.* (F.C.T.D., no. IMM-1497-97), Teitelbaum, April 14, 1998 also *Bouguettaya, Nabil v. M.C.I.* (F.C.T.D., no. IMM-546-99), Lemieux, June 22, 2000.

²⁹⁶ *Tambwe-Lubemba, Mike v. M.C.I.* (F.C.A., no. A-279-99), Richard, Décary, Noël, November 14, 2000.

²⁹⁷ *Tambwe-Lubemba, Mike v. M.C.I.* (F.C.T.D., no. IMM-1929-98), McKeown, April 15, 1999.

²⁹⁸ For applications of this principle by the Federal Court–Trial Division see: *Guan, Xiu Lan v. M.C.I.* (F.C.T.D., no. IMM-2642-00), Lutfy, March 27, 2001 (the Board's failure to make an updated report available was not a reviewable error); *Chen, Juanmei v. M.C.I.* (F.C.T.D., no. IMM-2501-00), MacKay, November 29, 2001; 2001 FCT 1312 (the Court found exceptional circumstances).

6.15. VICTIM IMPACT EVIDENCE

Victim Impact Evidence is evidence regarding the harm done to, or the loss suffered by the victim of a crime or by that victim's family.²⁹⁹ At the stage of admission of the evidence, it is often argued that the prejudicial value of such evidence outweighs its probative value.³⁰⁰

Under the *Immigration Act*, the question of the admissibility of such evidence generally arose in appeals from removal orders where the Minister sought to lead victim impact evidence with regard to the issue of whether the appellant ought to be removed from Canada “having regard to all the circumstances of the case.”³⁰¹ The *Immigration and Refugee Protection Act (IRPA)* has added a qualifier to the parameters of discretionary relief.³⁰² However, there is no obvious reason that this change would prevent considering victim impact evidence as one of the circumstances of the case.

In the Federal Court of Appeal decision of *Chieu v. Canada*, Mr. Justice Linden, in *obiter*, specifically referred to victim impact as one of the circumstances of a case:

“...IRB(AD) may, indeed must, consider broadly all the circumstances of the case in order to determine whether the deportation order was properly and equitably made. These considerations may include but would not be limited to such matters as: [...]

- the impact of the crime (if a crime is involved) on the victim;”³⁰³

The Supreme Court of Canada³⁰⁴ has since overturned the *Chieu* decision, but did so on the issue of whether the Appeal Division could consider the country conditions in the potential destination to which a non-refugee might be deported. The decision of the Supreme Court does not affect the relevance of victim impact evidence as consideration in the Appeal Division’s exercise of its equitable jurisdiction.

²⁹⁹ In the criminal courts, this type of evidence is often heard after the accused has been convicted, and before the judge determines the sentence to be imposed. Victim impact evidence is considered relevant to determining the length of sentence to be imposed.

³⁰⁰ In criminal trials, “the trial judge may exclude admissible evidence if its prejudicial effect substantially outweighs its probative value.” *R. v. Potvin*, [1989] 1 S.C.R. 525, at 529. See also, *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Tretter* (1974), 18 C.C.C. (2d) 82; and *R. v. Wray*, [1971] S.C.R. 272.

³⁰¹ This ground of appeal against a removal order was set out in paragraph 70(1)(b) of the *Immigration Act*.

³⁰² Under paragraph 67(1)(c) of the *Immigration and Refugee Protection Act (IRPA)*, one ground for allowing an appeal depends on the IAD being satisfied that “sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case”.

³⁰³ *Chieu v. Canada (M.C.I.)* [1999] 1 F.C. 605 at p. 614.

³⁰⁴ *Chieu v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 84.; 2002 SCC 3.

Victim impact evidence may be sought to be introduced in many forms. Victims or their family members may be called as witnesses to testify at the hearing.³⁰⁵ In some instances, letters from victims have been received into evidence.³⁰⁶ Victim impact statements from the criminal trial have been used by the Appeal Division.³⁰⁷ Even a report from an expert concerning impact on a victim has been considered admissible evidence although it was rendered through a third party.³⁰⁸

In determining whether to admit such evidence, the Appeal Division has often distinguished victim *impact* evidence from other kinds of evidence that a victim can provide. Evidence regarding the circumstances of the offence, or of threats that followed, or a continuation of the offence are examples of victim evidence which may be relevant to the assessment of factors such as the seriousness of the offence and the possibility of rehabilitation or likelihood of re-offending.

In some cases the Appeal Division has refused to admit evidence of the impact of the crime on the immediate victim or his/her family member, but has permitted testimony on matters which the decision-makers considered relevant to the issue before them. In one such instance, the Appeal Division refused to allow the mother of the infant murder victim to testify about the impact of the murder on the mother's life. The Appeal Division held that such evidence might properly be before the sentencing judge, but not before the Appeal Division, as deportation was not a form of punishment. The victim's mother would have been allowed, however, to testify about the appellant's circumstances before the murder; to show acts of a continuing nature; or about past events.³⁰⁹ The Minister was precluded from calling the witness solely to testify about how the murder had affected her.

One Federal Court case has specifically considered the Appeal Division's jurisdiction with respect to victim impact evidence. In *Jhatu*,³¹⁰ the Appeal Division declined to hear the testimony of the children of the murder victim, holding that such evidence was

³⁰⁵ Oral testimony was heard or sought to be admitted in: *Muehlfellner v. M.E.I.* (IAB 86-6401); *Pépin, supra*, footnote 309; *Fetter v. M.E.I.* (I.A.D. V89-01100), Wlodyka, Gillanders, Verma, March 10, 1993, *Williams, Gary David v. M.E.I.* (I.A.D. W91-00014, V92-01459), Singh, Wlodyka, Gillanders, July 27, 1992; *Jhatu v. M.C.I.* (I.A.D. V89-00784), Lam, Clark, Verma, June 21, 1995.

³⁰⁶ Letters from the victims were filed as evidence in *Milovanovic v. M.E.I.* (I.A.D. T91-00239), Chu, Fatsis, Bell (dissenting), April 2, 1992 and *Inthavong, Bounjan Aai v. M.E.I.* (I.A.D. V93-01880), Clark, Singh, Verma, March 1, 1995.

³⁰⁷ Victim impact statements used at sentencing were submitted as evidence in *Sannes v. M.E.I.* (I.A.D. V91-00063), Wlodyka, Robles, Verma, June 30, 1993 and *Probst v. M.E.I.* (I.A.D. V92-01852), Wlodyka, Singh, Gillanders, February 23, 1994.

³⁰⁸ A written report by a clinical counsellor concerning the effect of the crime on the victim was considered in *Liedtke: M.E.I. v. Liedtke* (I.A.D. V89-00429), Wlodyka, Gillanders, Verma, November 26, 1992.

³⁰⁹ *Pépin, Laura Ann v. M.E.I.* (I.A.D. W89-0119), Rayburn, Goodspeed, Arpin (dissenting), May 29, 1991, appeal dismissed; *Pépin: M.E.I. v. Pépin, Laura Ann* (F.C.A., no. A-740-91), Heald, Stone, Robertson, May 19, 1993.

³¹⁰ *Jhatu, supra*, footnote 305.

inadmissible for lack of probative value. This decision was upheld by the Federal Court Trial Division, which certified the following question:

In considering "all the circumstances of the case", does the [Appeal Division] exceed its jurisdiction when it determines victim impact evidence inadmissible on the basis that such evidence will have no probative value, without first hearing and weighing that evidence?³¹¹

On appeal, the Federal Court of Appeal confirmed that in the circumstances of the *Jhatu* case, the Appeal Division had not exceeded its jurisdiction nor erred in law. The Court opined that the real reason the Board refused to hear the victim impact evidence was that it would not have helped the Board in any way. In other circumstances, the Court said, the certified question might have been answered differently.³¹² It may be that in some circumstances, such as the ones in the *Jhatu* case where the crime was murder and the evidence would have consisted of the testimony of the victim's children, the seriousness of the crime and its impact are self-evident and can be taken into consideration without hearing evidence from the victims.

The Appeal Division has had to deal with proffered victim impact evidence on several occasions, sometimes accepting it apparently without question,³¹³ sometimes admitting it over the objections of the appellant,³¹⁴ and at other times, refusing to hear it at all.³¹⁵ Some panels have admitted it and addressed any concerns raised in terms of the weight assigned to the evidence.

An appeal to the Appeal Division from a removal order involved an appellant who had been convicted of aggravated assault against his wife after he broke into her house and stabbed her while she slept. The Minister sought to have the wife testify about the impact of the assault on her life and that of her two sons. The Minister argued that the wife and her sons were part of "Canadian society" referred to in the objectives of the Act, at paragraph 3(i). The Appeal Division allowed the wife to testify.³¹⁶

In another case, the family members of a victim of aggravated assault tendered letters into evidence as "victim impact statements". One letter focused on the impact of the victim's death, although the appellant had not caused his death. The other letter gave a synopsis of the events which led up to the victim's death. Its purpose was to oppose the appellant's release on full parole by showing the impact on the family of the events leading to the

³¹¹ *M.C.I. v. Jhatu, Satpal Singh*, (F.C.T.D., no. IMM-2734-95), Jerome, August 2, 1996.

³¹² *Jhatu: M.C.I. v. Jhatu, Satpal Singh* (F.C.A., no. A-32-97), Pratte, Décary, Linden, March 24, 1998.

³¹³ *Fetter, supra*, footnote 305; *Sannes, supra*, footnote 307 and *Probst v. M.E.I., supra*, footnote 307.

³¹⁴ *Inthavong, supra*, footnote 306.

³¹⁵ *Pépin, supra*, footnote 309 and *Jhatu, supra*, footnote 305.

³¹⁶ *Williams, supra*, footnote 305; application for leave to appeal dismissed: *Williams, Gary David v. M.E.I.* (F.C.A., no. 92-A-4894), Mahoney, December 21, 1992.

victim's death. The Appeal Division accepted both letters into evidence, but gave them little weight.³¹⁷

³¹⁷ *Inthavong, supra*, footnote 306.

6.16. ACCEPTABLE DOCUMENTATION (IDENTITY)³¹⁸

There are both general and specific legal principles relating to the assessment of identity documents. In addition, the *Immigration and Refugee Protection Act* and *Refugee Protection Division Rules* contain specific provisions governing identity documents at the RPD.

Claimants for refugee protection bear the fundamental obligation to establish their identity on a balance of probabilities.³¹⁹ Thus, they must come to a hearing with all of the evidence they are able to offer and believe is necessary to prove the claim.³²⁰

Section 106 of *IRPA* requires the RPD to consider a claimant's lack of documents establishing identity in assessing a claim for refugee protection. The language of this provision is mandatory, though it does not state how this factor is to be weighed in a particular case.

106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

Section 7 of the *Refugee Protection Division Rules* indicates that, in addition to identity, this requirement extends equally to documents that establish "other elements of the claim."

7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

The Commentary to Rule 7 contains guidance as to the RPD's practice and interpretation of these provisions. In particular,

Claimants duty to provide documents establishing identity

... Documents that are not genuine, that have been altered, or that are otherwise improper are generally not acceptable proof of identity.

³¹⁸ This topic is treated in depth in the *Assessment of Credibility in Claims for Refugee Protection* paper, dated June 28, 2002, in sections 2.4.5. Lack of Identity and Other Personal Documents and 2.4.8. Assessing Documents of, where the relevant case law is set out. Only case law dealing specifically with the interpretation of section 106 of *IRPA* and Rule 7 is cited here extensively.

³¹⁹ *Yip, Fu On v. M.E.I.* (F.C.T.D., no. A-921-92), Nadon, October 27, 1993.

³²⁰ *Kante, Abdoulaye v. M.E.I.* (F.C.T.D., no. IMM-2585-93), Nadon, March 23, 1994.

Meaning of “identity”

“Identity” most commonly refers to the name or names that a claimant uses or has used to identify himself or herself. “Identity” also includes indications of personal status such as country of nationality or former habitual residence, citizenship, race, ethnicity, linguistic background, and political, religious or social affiliation.

In 1997, the Board issued a *Commentary on Undocumented and Improperly Documented Claimants* (IRB Legal Services, March 11, 1997) and an accompanying Practice Notice to provide guidance regarding the treatment of claimants who lack proper documentation. These documents were not reissued with the implementation of *IRPA* and are superseded by the provisions of section 106 of *IRPA* and Rule 7, which adopt a similar approach.

In the case of *Nardeep Singh*,³²¹ the Federal Court–Trial Division upheld the CRDD’s reliance on the *Practice Notice on Undocumented and Improperly Documented Claimants* in support of its decision that the claimant presented insufficient evidence to establish his identity or residency in the Punjab. Despite requests, the claimant provided no identity documents, which he said he had left at home in India. The Court stated that the CRDD drew an adverse inference as to credibility. The Court noted that the CRDD did not reject the claim solely because of an absence of documentation, but rather because the claimant had ample opportunity to seek documentation in support of his claim and the CRDD did not accept his explanations for failing to produce that evidence.

In *Ignacio*,³²² the Federal Court held, in the circumstances of that case, that the RPD did not impose an unreasonable onus on the claimants to produce documentary evidence to support their claim pursuant to Rule 7.

In *Matanga*,³²³ the Federal Court held that it is essential for a claimant to be able to submit acceptable documentation to establish their identity and journey to Canada. Under section 106 of *IRPA*, the RPD could take account of the lack of acceptable proof of identity in assessing the claimant’s credibility. In some cases, if a claimant gives serious explanations, the panel may excuse the loss or absence of acceptable documents. In this case, the claimant did not provide any serious explanation of the loss of her false French passport and the lack of official documentation establishing her identity.

Relying on Rule 7 and the Commentary to the Rule, in the case of *Amarapala*,³²⁴ the RPD rejected the claim because the claimant provided no documentation to corroborate his involvement with the United National Party (UNP), on which his claim was based. The Federal Court held that Rule 7 makes documentation a requirement not only for

³²¹ *Singh, Nardeep v. M.C.I.* (F.C.T.D., no. IMM-2217), O’Reilly, May 6, 2003; 2003 FCT 556.

³²² *Ignacio, Jaime dela Cruz v. M.C.I.* (F.C., no. IMM-5765-02), Simpson, September 24, 2003. The Court Order erroneously refers to Rule 7 as Rule 9.

³²³ *Matanga, Alice Baygwaka v. M.C.I.* (F.C., no. IMM-6271-02), Pinard, December 4, 2003; 2003 FC 1410.

³²⁴ *Amarapala, supra*, footnote 91.

establishing identity, but also for other elements of the claim. However, a reasonable explanation for the failure to provide documents under section 7 means that corroborating documents are not always necessary. The Court went on to hold:

[10] It is well established that a panel cannot make negative inferences solely from the fact that a refugee claimant failed to produce any extrinsic documents to corroborate a claim. But where there are valid reasons to doubt a claimant's credibility, a failure to provide corroborating documentation is a proper consideration for a panel if the Board does not accept the applicant's explanation for failing to produce that evidence. See *Singh v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 755 per O'Reilly J. at paragraph 9.

[11] In this case, the applicant provided documents about his father's and brother's involvement in the UNP, and the Board reasonably expected documents would be produced about the applicant's involvement with the UNP. The failure to produce documents one would normally expect is a relevant consideration in assessing and rejecting the credibility of the applicant.

[12] The onus is on the applicant to establish a credible claim. The applicant failed to do so, and the Board provided clear reasons for its credibility finding.

Some cases have suggested that documents whose authenticity has not been undermined cannot be rejected; other cases indicate that such documents may, in appropriate circumstances, be assigned little (or no) weight, provided the Board explains in its reasons why it did so.

A claimant's overall lack of credibility may affect the weight given to documentary evidence, and in appropriate circumstances may allow the Board to discount that evidence. Not every discrepancy in a document, however, will necessarily be material to the success of a case.

The RPD is not necessarily required to have expert evidence in order to examine identity and other documents. It may discount a document if there is a sufficient evidentiary basis for doubting its authenticity.

6.17. MISREPRESENTATION

6.17.1. Introduction

The misrepresentation provisions under the old *Immigration Act* provide that a permanent resident, where granted landing by reason of a false or improperly obtained passport, visa or other document pertaining to the person's admission, or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by that person or any other person, may be subject to the initiation of removal proceedings under s.27(1)(e) of the *Immigration Act*.

The materiality of misrepresentations under the *Immigration Act* has been the subject of numerous court decisions including the decision of the Supreme Court of Canada in *Canada (Minister of Manpower and Immigration) v. Brooks*, [1974] S.C.R. 850. *Brooks* held, among other things, that *mens rea*, or design to mislead, was not an essential element for the misrepresentation. Chapter 5 of the Removal Order Appeals paper discusses the impact of the *Brooks* decision and misrepresentations in general.

The misrepresentation provisions under the *IRPA* can lead to a finding of **inadmissibility** (s.40) whether the person is inside Canada or abroad. An inadmissibility report prepared with respect to a permanent resident, may lead to an inadmissibility hearing before the Immigration Division where a removal order may be made. (s.44(1) & s.44(2)).

6.17.2. Possible Legal and Evidentiary Issues

Specific wording contained in section 40 of the *IRPA* will likely give rise to legal and evidentiary issues. For example, what is the meaning in s. 40(1)(a) of the *IRPA* of the phrase "... *directly or indirectly misrepresenting or withholding material facts...*"? Does it matter whether the person made the misrepresentation as opposed to someone else making the misrepresentation? Does this include giving untruthful answers, giving partial answers, or omitting reference to material facts (even if the person does not know what is material or were not asked)?

Similarly, what is the meaning in s. 40(1)(a) of the *IRPA* of the phrase "... *material facts relating to a relevant matter that induces or could induce an error in the administration of this Act*"? How might we interpret "*an error in the administration of this Act*"? [Note: There is a difference in the wording in the French version which could influence interpretation – rather than saying *that induces* it says, *as this induces*.] Is there a timing element in this provision – does it catch persons who misrepresent any immigration related circumstances at any time? What might be included in this provision? For example, does this include an applicant or sponsor making misrepresentations,

partial answers, omissions, etc.; applicants on humanitarian and compassionate considerations who became permanent residents; or applicants withholding information from the examining designated physician?

Finally, what is the meaning in s. 40(1)(b) of the *IRPA* of the phrase “...for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation.”? Does this put the sponsor at risk of an inquiry for making misrepresentations? If yes, how far back may it go? For example, suppose a mother, now landed, sponsors her son to Canada. The son then sponsors his fiancé. Mom had been sponsored by dad, who lied on his application as an independent 20 years earlier, as did mom when she applied under the *IRPA*. Who is at risk? Will the Minister “justify” the inadmissibility under s.40(2)(b)?

6.17.3. Nature of the Misrepresentation

In *Singh*³²⁵ the appellant married her nephew to facilitate her admission to Canada as his spouse. She then divorced, remarried and sponsored her present husband to Canada in 2000 and their child was born in 1999. She was ordered removed from Canada on the basis of misrepresentations made and failures to disclose material facts in immigration applications respecting her marriages. The appellant claims the Appeal Division erred in concluding there were deliberate misrepresentations made by her respecting her second husband’s application in the absence of evidence. The Court found that although there was no direct evidence of the appellant’s knowledge of her husband’s misrepresentations, there was some evidence on which those inferences could be made. The Appeal Division did not make a finding she colluded with her second husband in his misrepresentations.

No specific reference was made to section 40 of *IRPA*.

6.17.4. Humanitarian and Compassionate Considerations

In *Mohammad*³²⁶ the appellant was being sponsored by his “wife” and failed to indicate that he had been married before. He had taken no steps either to obtain an annulment of that marriage or to obtain a divorce. The legal validity of the removal order was not challenged. The Appeal Division found that there were sufficient humanitarian and compassionate considerations to warrant granting special relief taking into account the best interests of the appellant’s children. A stay was granted on terms and conditions, including a condition that he have his first marriage annulled or obtain a divorce.

³²⁵ *Singh, Rajni v. M.C.I.* (F.C., no. IMM-2038-03), O’Reilly, December 19, 2003; 2003 FC 1502.

³²⁶ *Mohammad, Sami-Ud-Din v. M.C.I.* (IAD VA3-01399), Kang, December 2, 2003.

6.18. CONCLUSIVE FINDINGS OF FACT

Pursuant to s.162 of the *Immigration and Refugee Protection Act*, each Division of the Immigration and Refugee Board has sole and exclusive jurisdiction to hear and determine all questions of law and fact in respect of proceedings brought before it. Generally, this is effected through the presentation of evidence by the parties, the member weighing that evidence and making findings of fact on that basis. New provisions brought in under the *Immigration and Refugee Protection Act* and *Regulations* constitute an exception to this norm. These new sections render the “weighing of evidence”, in prescribed circumstances, unnecessary.

Sections 14 and 15 of the Immigration and Refugee Protection Regulations provide:

14. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 34(1)(c) of the Act, if either the following determination or decision has been rendered, the findings of fact set out in that determination or decision shall be considered as conclusive findings of fact:

(a) a determination by the Board, based on findings that the foreign national or permanent resident has engaged in terrorism, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or

(b) a decision by a Canadian court under the *Criminal Code* concerning the foreign national or permanent resident and the commission of a terrorism offence.

15. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 35(1)(a) of the Act, if any of the following decisions or the following determination has been rendered, the findings of fact set out in that decision or determination shall be considered as conclusive findings of fact:

(a) a decision concerning the foreign national or permanent resident that is made by any international criminal tribunal that is established by resolution of the Security Council of the United Nations, or the International Criminal Court as defined in the *Crimes Against Humanity and War Crimes Act*;

(b) a determination by the Board, based on findings that the foreign national or permanent resident has committed a war crime or a crime against humanity, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention; or

(c) a decision by a Canadian court under the *Criminal Code* or the *Crimes Against Humanity and War Crimes Act* concerning the foreign national or permanent resident and a war crime or crime against humanity committed outside Canada.

Sections 34(1)(c) and 35(1)(a) of the *Immigration and Refugee Protection Act* provide:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

...

(c) engaging in terrorism;

...

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

Sections 14 and 15 of the *Immigration and Refugee Protection Regulations* provide for the recognition of previously determined findings of fact as conclusive evidence of events in cases of security and human or international rights violators. Thus, prior findings of the Board or a Canadian court in relation to a permanent resident or foreign national having engaged in terrorism are binding in relation to subsequent determinations with respect to the admissibility of that person under s.34(1)(c) of the Act. Prior findings by the Board, international tribunal/court or Canadian court that the foreign national or permanent resident has committed a war crime or a crime against humanity are binding for purposes of subsequent determinations with respect to the admissibility of that person under s. 35(1)(a) of the Act.

The practical effect of these provisions is that in these instances, there will be no need to re-establish the specifics of such an allegation at an admissibility hearing. Rather, the decision-maker need only determine whether there has, in fact, been a prior finding by the Board, Canadian court or international tribunal that a permanent resident or foreign national has engaged in terrorism or committed a war crime or crime against humanity. If so, and notwithstanding any other evidence a party may present, the prior finding will constitute an established finding of fact for purposes of the admissibility proceeding.³²⁷

The recognition of prior findings of fact is intended to simplify procedures and avoid the need for a lengthy admissibility hearing when the facts relevant to the admissibility have already been previously established. This will serve to limit the time and cost of re-hearing matters that have already been ruled on.³²⁸ Under the former *Immigration Act*, such prior findings were not binding at a subsequent admissibility hearing. In *Varela*,³²⁹ for example, the Court indicated that an adjudicator had been correct in concluding that

³²⁷ This is to be contrasted with the treatment of foreign judgments generally, where the decision-maker is not bound by the foreign judgment i.e. the judgment will simply form part of the totality of the evidence and, as such, must be weighed by the decision-maker. See Chapter 6.12 Foreign Judgments.

³²⁸ *Regulatory Impact Analysis Statement*, Canada Gazette Part II, Vol.136, June 14, 2002.

³²⁹ *M.C.I. v. Varela, Jaime Carrasco* (F.C.T.D., no. IMM-2807-00), Gibson, February 14, 2002; 2002 FCT 167.

he was not bound by the earlier determination of the Convention Refugee Determination Division in relation to exclusion under Article 1F(a) of the Refugee Convention:

I am satisfied that is beyond doubt that neither the former paragraph 19(1)(j) of the Act, nor the re-enactment of that paragraph, provides any direction to an Adjudicator that an earlier decision of the Convention Refugee Determination Division to exclude an individual from Convention refugee status, by reason of a conclusion that there are serious reasons for considering that the individual has committed a war crime or a crime against humanity, is determinative of an issue before the Adjudicator ... If Parliament had intended that an earlier decision of the CRDD be binding on the Adjudicator, it could easily have said so. The Immigration Act provides a number of instances where Parliament has achieved a parallel outcome.³³⁰

Regulations 14 and 15 were the legislative response to this line of caselaw from the Federal Court.³³¹

Members should be cognizant of the fact that findings in relation to exclusion under Articles 1F(a) and 1 F(c) of the Refugee Convention are now of even greater significance given that these findings will be binding in any subsequent admissibility proceedings where sections 34(1)(c) and/or 35(1)(a) of the Act are engaged. All findings in relation to an individual having engaged in terrorism or committed war crimes or crimes against humanity should therefore be clear and unequivocal.

³³⁰ *Varela, supra*, footnote 329, at para.23. An appeal by the Minister was dismissed; the Federal Court – Appeal Division indicating that this was a decision that the adjudicator was entitled to make: *Varela: M.C.I. v. Varela, Jamie Carrasco* (F.C.A., no. A-141-02), Strayer, Sexton, Pelletier, January 28, 2003; 2003 FCA 42.

³³¹ See also, *Zazai, Nasrullah v. M.C.I.* (F.C.T.D., no. IMM-377-02), Campbell, May 21, 2003; 2003 FCT 639. The Court found that the adjudicator had determined that she was bound by the C.R.D.D.’s prior findings with respect to complicity in crimes against humanity and that this constituted an error of law.

CHAPTER 6

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CHAPTER 7

7. STANDARDS AND BURDEN OF PROOF

After the evidence has been assessed and weight assigned to it, and it has been determined which evidence is more reliable, the panel determines what facts have been established on the balance of probabilities (more likely than not). The decision-maker then applies the relevant rules of law to facts as found to draw conclusions in law. In doing so, the decision-maker must apply the appropriate standard of proof for the legal issue to be decided,¹ and any applicable legal presumptions.² Finally, in reaching a final decision in the matter, the decision-maker must consider which party carries the ultimate burden of proving their case.³

The standards of proof for the legal issues and the ultimate burdens of proof differ in the three Divisions. However, in all three Divisions, on an application made by way of motion, the burden of proof lies with the party bringing the application. For example in an application for confidentiality of the proceedings⁴ the ultimate burden of proof lies with the applicant, and the standard of proof, for meeting the legal test for closing a hearing, is identical for all three Divisions.

7.1. REFUGEE PROTECTION DIVISION (RPD)

In the RPD, the facts are applied to the definitions of Convention refugee and person in need of protection to determine whether the elements of the definitions have been established.

It must be determined that the evidence shows that it is more likely than not that each element exists, other than the element of the risk of the harm feared. With respect to the objective basis of the fear of persecution in the Convention refugee definition, a lower test is applied: "a reasonable chance" or a "serious possibility" of persecution. . .⁵

With respect to the standard of proof for the danger of torture ground in subsection 97(1)(a) of the *Immigration and Refugee Protection Act* and the risk to life or cruel and unusual treatment or punishment ground in subsection 97(1)(b) of the Act, the preferred position of Legal Services is that the *Adjei* test is the appropriate standard.⁶

¹ See section 3.3.3. regarding the standard of proof.

² See discussion of presumptions at section 3.3.6.1.

³ See section 3.1.1. regarding the burden of proof.

⁴ Pursuant to subsection 166(b) of the *Immigration and Refugee Protection Act*.

⁵ *Adjei v. M.E.I.* [1989] 2 F.C. 680, 57 D.L.R. (4th) 153, 7 Imm. L.R. (2d) 169 (C.A.).

⁶ For the rationale supporting this position, please see the papers "Danger of Torture" and "Risk to Life or Risk of Cruel and Unusual Treatment or Punishment", IRB Legal Services, May 15, 2002, at p. 19-22 and p. 38 respectively.

The standard of proof of a “serious possibility” was applied to the danger of torture ground in subsection 97(1)(a) of the *Immigration and Refugee Protection Act* by the Refugee Protection Division in a case involving a Guinean claimant.⁷

There is conflicting jurisprudence in the Federal Court as to the correct standard of proof to be applied to subsections 97(1)(a) and 97(1)(b) of the *Immigration and Refugee Protection Act*.

In *Thangasivam*⁸ the Court opined that the standard of proof in both subsections 97(1)(a) and 97(1)(b) of the Act equates to a “balance of probabilities”.

In *Tameh*⁹, the Court found that the Refugee Protection Division had applied the correct standard of proof, that is “serious possibility” as set out in *Adjei*, to the question of whether the claimant feared persecution at the hands of the Iranian regime or faced a risk to his life. At issue was the correct standard of proof as regards to whether the applicant was a person in need of protection.

In *Li*¹⁰ the Court held that “pursuant to subsection 97(1) of the Act, there must be persuasive evidence (ie balance of probabilities) establishing the facts on which a claimant relies to say that he or she faces a substantial danger of being tortured upon his or her return. Second, the danger or risk must be such that is more likely than not that he or she would be tortured or subjected to other cruel and other degrading treatments”. The Court went on to certify three questions.

Given the conflicting case law on this issue, Legal Services recommends , until the matter is resolved in a higher court, that members apply the lower “serious possibility” standard to all protection grounds.

Where Exclusion clause F is applied, the standard is “serious reasons for considering,” which is less than the balance of probabilities.

In a refugee protection claim, the ultimate burden of proof rests with the claimant, that is, it is their responsibility to establish their claim. However, where the Minister is alleging that the claimant is excluded from the definitions of Convention refugee and person in need of protection through application of the Exclusion clauses,¹¹ the burden of proof lies with the Minister to establish exclusion. Further, where the Minister applies to have a refugee protection determination vacated,¹² or to have it determined that the person has ceased to be

⁷ MA2-00869, Tshisungu, August 7, 2002.

⁸ *Thangasivam, Kantheepan v. M.C.I.* (F.C. no. IMM-8986-03), Snider, November 25, 2003. Note that the Court’s remarks can be considered to be *obiter* in that the judge was expressing an opinion on a question other than the one directly before him.

⁹ *Tameh, Ali Farrokhi v. M.C.I.* (F.C., no. IMM-6266-02), Blanchard, December 15, 2003, 2003 FC 1488.

¹⁰ *Li, Yi Mei v. M.C.I.* (F.C., no. IMM-5838-02), Gauthier, December 22, 2003; 2003 FC 1514.

¹¹ The exclusion clauses are referred to in section 98 of the *Immigration and Refugee Protection Act*, and sections E and F of Article 1 are set out in a schedule to the *Act*.

¹² Pursuant to subsection 109 of the *Immigration And Refugee Protection Act*.

a Convention refugee or a person in need of protection,¹³ the burden of proof lies with the Minister.

7.2. IMMIGRATION APPEAL DIVISION (IAD)

In the IAD, the panel must determine whether the necessary elements of the issues in the appellant's case have been established by the facts as found. The standard of proof varies according to the legal issue before the panel. Some provisions of the *Immigration and Refugee Protection Act* specify the applicable standard of proof. For example, subsection 36(3)(d) specifies that the standard is the balance of probabilities. On the other hand, in subsection 37(1)(a) the standard is "believed on reasonable grounds," which is less than a balance of probabilities. Where the standard of proof is not specified, it is the civil standard of a balance of probabilities.¹⁴

On an appeal the ultimate burden of proof rests with the appellant.

7.3. IMMIGRATION DIVISION (ID)

In the Immigration Division, the Member will determine whether the elements of the allegation have been established based on the Member's findings of fact. As in the Immigration Appeal Division, the standard of proof varies with the legal issue to be determined.

Pursuant to section 45(d) of the *Immigration and Refugee Protection Act*, the burden of proof will vary. Where the permanent resident or foreign national seeks to come into Canada, the burden of proving that the person has the right to come into Canada is on the person seeking to enter. With respect to persons who are in Canada, the Minister has the burden of proving that the person should be ordered to leave Canada.

¹³ Pursuant to subsection 108 of the *Immigration And Refugee Protection Act*.

¹⁴ As opposed to the higher standard applied in criminal matters, of beyond a reasonable doubt.

CHAPTER 7

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CHAPTER 8

8. SECURITY EVIDENCE IN APPEALS

8.1. INTRODUCTION

The Minister has been provided with a mechanism in the *Immigration and Refugee Protection Act* (IRPA) to bring an application in both the Immigration Division (ID) and the Immigration Appeal Division (IAD) for Non-Disclosure of Information.

This means that if the Minister's application is granted, the subject of the proceedings, i.e. the person concerned at the ID or the appellant at the IAD, and their respective counsel, are not permitted to view specific evidence provided to the member in support of the Minister's case. This chapter will very briefly touch on the procedures for determining the non-disclosure application¹ as they impact on Immigration Appeal Division appeal. We will examine selected commentary provided by the courts respecting evidence that is subject to a non-disclosure order. Lastly we will provide a list of factors that may impact the weight to be given such evidence and the manner in which such evidence is to be dealt with in reasons for any ultimate decision based on this special kind of evidence.

8.2. INITIATING THE PROCEDURE

When one examines the matters set out in s. 78 of IRPA it is clear that this section is a relatively complete code for conducting an application for non-disclosure. It mandates that an *ex parte* procedure take place. This means the hearing is conducted **in private** and in the **absence of the subject of the proceedings and his counsel**. The member must however provide a summary of the evidence (omitting anything that in the opinion of the member would be injurious to national security or the safety of any person if disclosed) to the subject of the proceedings and his counsel and allow that person and counsel to be heard as to the potential impact of the information contained in a summary of the evidence. It is important to note that this *ex parte* hearing is only a portion of the full admissibility hearing, detention review or appeal hearing. In some cases the actual summary is prepared by the Minister and CSIS.

The IAD Rules contain no specific provisions as to the manner in which the IAD is to treat these applications. It is worth noting that the Immigration Division Rule 41 requires the application must be in writing. This would make sense in an appeal as well to preserve a record of the process. The non-disclosure application is to be made in writing to the IAD registry by the Minister.

¹ These procedures are treated in more depth in Chapter 5 of the Guide to Proceedings Before the ID by Marina Manganelli, Legal Services.

If the application is made during a hearing, the IAD member **must exclude the appellant and the appellant’s counsel from the hearing room** in the same manner as the ID Rule 41(2) mandates for the ID. The application may be made at a place **outside the hearing room** as well. This allows the Minister an opportunity to control access to the documents that contain the security information. In the case of security intelligence that is in the control of CSIS the application is **always made on their premises**.

Due to the low number of cases from which to draw conclusions there is no consensus as to a number of basic procedural matters including exactly how the application is to be conducted, whether the hearing is to be recorded, whether notes may be taken and locked away, and numerous other questions of a procedural nature. To date only one case in the IAD has dealt with evidence presented *ex parte*². That case proceeded under the prior legislation.

In *Sogi*³ the Court outlines in detail the procedure it adopted in applying s. 78 to a judicial review hearing.

8.3. TYPES OF INFORMATION SUBJECT TO NON-DISCLOSURE

Section 76 of IRPA states:

“**information**” means **security or criminal intelligence information** and information that is **obtained in confidence** from a source in Canada, from the government of the foreign state, from an international organization of states or from the institution of either of them.

There is no definition of either security or criminal intelligence information but such terms should be read together with s. 78 which section directs a judge to ensure the confidentiality of the information on the basis that “its disclosure would be injurious to national security or to the safety of any person”.

The context in which these terms appear may also inform a panel as to their meaning. These terms are used in the procedure set out in s. 77 where the Minister (of Citizenship and Immigration) and the Solicitor General sign a certificate stating a person is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

It follows that intelligence regarding persons or groups that are described in these inadmissibility provisions may be considered “security intelligence information”.

Examples of criminal intelligence may include the identity of police informers, methods of investigation of organized crime, surveillance techniques or targets, etc. Security

² *Denton-James, Lucy Eastwood v. M.C.I.* (IAD V98-04493), Workun, April 3, 2002.

³ *Sogi, Bachan Singh v. M.C.I.* (F.C., no. IMM-5125-02), MacKay, December 8, 2003; 2003 FC 1429.

intelligence may be drawn from highly sensitive sources and whether such information is properly the subject of a non-disclosure application is determined by CSIS and CIC together.

8.4. THE RATIONALE FOR PROTECTING INFORMATION

The Federal Court has had occasion to comment on these types of information:

In considering whether the release of any particular information might prove injurious to national security, and in estimating the possible extent of any such injury, one must bear in mind that the fundamental purpose of and indeed, the *raison d'être* of a national security intelligence investigation is quite different and distinct from one pertaining to criminal law enforcement, where there generally exists a completed offense, providing a framework within the parameters of which investigations must take place and can readily be confined. Their purpose is the obtaining of legally admissible evidence for criminal prosecutions. Security investigations on the other hand, are carried out in order to gather information and intelligence and are generally directed towards predicting future events by identifying patterns in both past and present events.⁴

Information on national security is therefore more sensitive and the Canadian Security Intelligence Service (CSIS) has very specific requirements concerning the protection of the information it holds in security matters and intervenes directly when an application under s. 86 of the Act is heard. A Security Intelligence Report is a detailed summary of information in the possession of CSIS and must never be disclosed to anyone including the appellant or the appellant's counsel. It is usually designated either "Secret" or "Top Secret".

8.5. THE MEMBER'S DECISION

On an application for non-disclosure of information the *ex parte* hearing may result in certain permissible outcomes under the IRPA. If the member determines the evidence is not relevant to the appeal or that it should be included in the summary that is to be disclosed over the objections of the Minister, or if the Minister withdraws their application, section 78 (f) dictates that **no evidence submitted in the context of a non-disclosure application may be disclosed without the approval of the Minister's counsel.**

In all cases where the member reviews the information that is the subject of the application the member must determine if the evidence is relevant and its disclosure would be injurious to national security or to the safety of any person.

If relevant and injurious – it may **not** be included in the summary. That summary is to be part of the record of the appeal proceedings and is to be provided to the appellant and counsel.

⁴ *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229, affirmed by the Federal Court of Appeal (A-1107-88), Hugessen, Stone, Linden, February 4, 1992.

If the member determines the evidence is **not injurious** but **relevant** and should be disclosed as part of the summary, the Minister's counsel may withdraw the application and that information may not be adduced in the appeal hearing. **A member may not refer to or disclose that information at any subsequent time for any purpose.**

8.6. DUTY OF DISCLOSURE

The case law has clearly established that the principles for the disclosure of evidence in the context of a criminal prosecution do not apply in immigration matters. The Federal Court in *Henrie* warned against the disclosure of information that was peripheral to the protected information:

In criminal matters, the proper functioning of the investigative efficiency of the administration of justice only requires that, wherever the situation demands it, the identity of certain human sources of information remained concealed. By contrast, in security matters, there is a requirement to not only protect the identity of human sources of information, but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice, and more particularly to the openness of its proceedings: information pertaining to the identity of targets of the surveillance, whether they be individuals or groups, the technical means and sources of surveillance, the methods of operation of the service, the identity of certain members of the service itself, the telecommunications and cypher systems and, at times, the very fact that a surveillance is being or is not being carried out. This means, for instance, that evidence, which of itself may not be of any particular use in actually identifying the threat, but nevertheless require to be protected if the mere divulging of the fact that CSIS is in possession of it would alert the targeted organization to the fact that it is in fact, subject to or electronic surveillance or to wiretap or to a leak from some human source within the organization.

It is of some importance to realize that an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group, which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture with which he has before him, be in a position to arrive at some damaging deductions regarding investigation of a particular threat or if they many other threats to national security. He might, for instance, be in a position to determine one or more of the following: (1) the duration, scope intensity and degree of success or lack of success of an investigation (2) the investigative techniques of the service; (3) the typographic and teleprinter systems employed by CSIS; (4), internal security procedures; (5) the nature and content of other classified documents; (6), the identities of service personnel or of other persons involved in an investigation.

In *Yao*⁵, the Minister had refused to issue a visa, alleging that Mr. Yao was inadmissible on grounds of security. In the context of a judicial review of the visa officer's decision, the

⁵ *Yao, Haiquan v. M.C.I.* (F.C., no. IMM-1571-00), Dawson, June 12, 2003, 2003 FCT 741.

Minister applied for non-disclosure of information under s. 87(1) of IRPA. The Federal Court cited *Henrie* and added the following:

In arguing that the confidential information should remain confidential in the case at bar, the Minister argued in its public motion record that if the confidential information was released it could result in a reader being a into a position to determine or learn one or more of the following:

- a) the duration, scope, intensity, and degree or success or lack of success of an investigation;
- b) the investigative techniques of the foreign state;
- c) the nature and content of the investigation;
- d) the identities of the individuals working for the foreign states or of other persons involved in an investigation;
- e) it could identify the techniques and methodology of the investigation;
- f) it could identify the degree of success or lack of success of the investigation;
- g) it could jeopardize the lives of the people involved;
- h) it could identify the relationships between Canadian government institutions and foreign governmental institutions which could be jeopardized by the disclosure of this information since foreign governments would not be prepared to enter into those kinds of arrangements in the future;
- i) it could also identify individuals who are the subject or targets of the investigation by Canadian and foreign governments.

Having reviewed the confidential information, and the confidential affidavit filed in support of this motion, I am satisfied that the disclosure of the confidential information would be injurious to Canada's national security or the safety of any person because, if released, it could result in an informed reader learned one or more of the matters set out above.

In conclusion, one may summarize by saying that the duty of disclosure of criminal intelligence information will most often be directed at protecting intelligence sources, and, sometimes, investigative methods in order to ensure the safety of the persons involved and public in general. The prohibition against disclosure of security information will be aimed at protecting the activities of CSIS and those who are involved in or affected by its activities.

8.7. ASSESSING THE EVIDENCE

Once a decision is made on the application for non-disclosure and a summary of the evidence is disclosed to the appellant and counsel there are some challenges for a member to both assess that information as to its relevance, matters of onus, reliability and probative value when compared to traditional evidence in an appeal hearing. As the relevance of the evidence must have been assessed in the application for non-disclosure itself, it needn't be repeated here.

8.8. ONUS OF PROOF ON MINISTER

The onus of proving that the information must be protected falls on the Minister. It is up to the Minister to establish to the satisfaction of the member that the information the Minister wants to protect is information within the meaning of section 76 of the Act, that the evidence that is the subject of the application is relevant and that disclosure would be injurious to national security or the safety of any other person. Neither the act or the case law specifically defines the standard of proof that applies in deciding whether disclosure would be injurious to national security or to the security of a person. It would seem, therefore, that a “balance of probabilities” is the standard that applies in this regard.

8.9. RELIABILITY OF THE EVIDENCE

At a hearing of the nondisclosure application, because only one party is present, the responsibility for assessing the reliability of the evidence falls on the member. The Court has commented on how such evidence is to be assessed. For instance, in *Singh*⁶ the Court said:

However, I can say that the security intelligence report includes six large volumes of documents. Having regard to the respondents concerns, I have paid particular attention to detail of the information, at specific questions and received answers about the reliability of the various sources and considered whether information was corroborated by more than one independent source. [please check for accuracy]

In *Sogi* the Immigration Division member said:

In addition, having considered the security intelligence report, and having asked specific questions and received answers about the reliability of the various sources, and having considered whether information was corroborated by more than one independent source, I conclude...⁷

The reliability of the evidence is evaluated in terms of its source. More often than not, the source of the information is one of the main factors behind the application for nondisclosure. The member must always question the source of the evidence when

⁶ *M.C.I. v. Singh, Iqbal* (F.C.T.D., DES-1-98), Rothstein, August 11, 1998.

⁷ *M.C.I. v. Sogi, Bachan Singh* (ID 0018-A2-01098), Ladouceur, October 8, 2002 and affirmed on judicial review – see next page

evaluating its reliability, but in the context of an application for nondisclosure a member must assume a greater measure of responsibility in this respect, as the opposing party is unable to examine and test this aspect of the evidence.

8.10. REASONS FOR DECISION

Where the member grants an application for nondisclosure of information, the evidence presented in private in the absence of the person who is the subject of the preceding and his counsel may serve as a basis for the case. The reasons in support of the decision must be written in order to avoid inadvertently revealing information that has been the subject of the prohibition against disclosure. Members should be very careful when referring to the evidence that's the subject of the ban on disclosure to refer to that evidence in very general terms.

The court has expressed itself in *Henrie* as follows:

It would in these reasons be improper for me to comment directly on any particular document or piece of evidence if there would be a serious risk that such comments might serve to identify the evidence and its source to any knowledgeable person who might be or whose organization might be a target of the investigation⁸.

In *Singh*, the court said:

By reason of paragraph 40, I am not permitted to disclose the security intelligence report or other evidence which have heard in the absence of the respondent or his counsel, because disclosure would be injurious to national security or to the safety of persons.⁹

8.11. CONSTITUTIONALITY OF THE PROCESS

To date there has been only one decision of the Court on the constitutionality of the non-disclosure process under IRPA and the FC Note of that decision is set out below:

Sogi, Bachan Singh v. M.C.I. (F.C., no. IMM-5125-02), MacKay, December 8, 2003; 2003 FC 1429. [JUDICIAL REVIEW OF Montreal ID 0018-A2-01098, Ladouceur, October 8, 2002.] By decision dated October 8, 2002, the Immigration Division determined that the applicant is inadmissible on security grounds, IRPA, s. 34(1)(f): being a member of an organization, Babbar Khalsa International ("BKI"), a Sikh extremist organization that there are reasonable grounds to believe engaged in terrorism (IRPA, s. 34(1)(c)). The Immigration Division granted the Minister's application, pursuant to IRPA, s. 86, for non-disclosure of protected information. (1) The Court granted the Minister's application, pursuant to IRPA, s. 87, for non-disclosure of protected information during the hearing of this application for judicial review. (2) The standard of review: (i) issues of mixed and law, "reasonableness

⁸ *Henri, supra*, footnote 4.

⁹ *Singh, supra*, footnote 6.

simpliciter”; issues of fact, “patent unreasonableness”; issues relating to assessment of security intelligence, “correctness”. (3) The Court determined that the information not disclosed to the applicant is relevant to the issues before the Court concerning the identity and the activities of the applicant, and that its disclosure would be injurious to national security. The Immigration Division member did not err in so concluding, nor is there error in his failing to set out detailed reasons for those conclusions, particularly in light of his responsibility to ensure that the information in question is not disclosed (IRPA, s. 78(b)). (4) The decision would have been clearer had the Immigration Division member given explicit reasons for not accepting the documentary evidence with respect to identity introduced by Mr. Sogi, but the member did so implicitly, and his finding of fact was not patently unreasonable. (5) It was not patently unreasonable for the member to find that the applicant was not credible when he denied that he had used certain aliases. (6) The continuing detention of the applicant and the labelling of him as a terrorist, engages s. 7 of the Charter. However, the process introduced under IRPA, ss. 44(2), 86, and 87, does not contravene the principles of fundamental justice, for the same reasons given by Justice McGillis in *Ahani* in upholding the security certificate process under s. 40.1 of the former Immigration Act. Question certified. Application dismissed.

A more thorough treatment of the constitutionality of the process for nondisclosure is beyond the scope of this chapter. Members can seek guidance in 5.7 of Guide to Proceedings before the ID that contains a detailed examination of this question.

CHAPTER 8

TABLE OF CASES: SECURITY EVIDENCE IN APPEALS

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APPENDIX A

A. THE RULES OF EVIDENCE AND THE *CANADA EVIDENCE ACT*

A.1. The Rules of Evidence

The Rules of Evidence set out rules to ensure the reliability of evidence. The Rules of Evidence are derived from caselaw. The relevant rules are the hearsay rule, the best evidence rule, the opinion evidence rule and the self-serving evidence rule. The *Canada Evidence Act* provides, among other things, for exceptions to those rules in particular cases, and specifies methods of proof in certain cases.

A.2. The Hearsay Rule

A.2.1. The Rule

“Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.”¹

A.2.1.1. Rationale

Hearsay evidence is thought to be generally untrustworthy. Some of the reasons that have been given for finding hearsay to be a poor type of evidence are:

The author of the statement is not under oath and is not subject to cross-examination;

There is no opportunity to observe the demeanour of the declarant;

Accuracy tends to deteriorate with each repetition of the statement;

The admission of such evidence lends itself to the perpetration of fraud;

Hearsay evidence results in a decision based upon secondary and therefore, weaker evidence rather than the best evidence available;

The introduction of such evidence will lengthen trials.²

¹ Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, at 156.

² Sopinka and Lederman, *The Law of Evidence in Civil Cases*, Butterworths, 1974, at 41; and Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, at 157.

A.2.1.2. Exceptions to the Rule:

Hearsay evidence may be admitted where its admission is necessary to prove a fact in issue and the evidence is reliable.³

“The criterion of "reliability" -- or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness -- is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established.”⁴

A.3. The Best Evidence Rule

A.3.1. The Rule

“The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach, which he does not produce.”⁵

A.3.2. Application of the Rule

While this rule originally applied to all evidence, it has been restricted in its application to documentary evidence: if the original document is available, it must be produced. Otherwise, all relevant evidence is admitted into evidence, and whether it is the best evidence available, simply goes to weight.

A.3.2.1. Secondary evidence is admissible where

- the original document has been lost or destroyed;
- the original document is in the possession of another party who refuses to produce it; or
- the original document is of an official or public nature, and great inconvenience or risk would result from its removal from its place of storage.

³ *R. v. Smith*, [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590.

⁴ *R. v. Smith*, *supra*, footnote 3, at 933.

⁵ *Doe d. Gilbert v. Ross* (1840), 7 M. & W. 102, 151 E.R. 696 (Exch.).

A.4. Opinion Evidence

A.4.1. The Original Rule

A witness may only testify as to what she has actually observed, and not to the inferences she draws from those observations.

A.4.2. Rationale

It is the jurisdiction of the trier of fact to draw inferences from the facts that are established.

However, this rule was found to be unworkable because the distinction between facts and inferences is not always clear.

A.4.3. Exceptions to the Rule

Exceptions allowed lay witnesses to testify as to the identity of persons and places; the identification of handwriting; and mental capacity and state of mind.

A.4.4. The Current Rule

Now a witness may give testimony about the inferences to be drawn from observed facts, where it would be helpful to the court.⁶

The issue then becomes the weight to be given to such evidence once it is admitted.

Expert evidence is a form of opinion evidence. “The general rule is that expert evidence is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge and jury...”⁷

A.5. Self-Serving Evidence

A.5.1. The Rule

Self-serving evidence was originally not admissible to support the credibility of a witness unless her/his credibility has first been put in issue. However, the Supreme Court of Canada amended the rule. Now such evidence is admissible as substantive evidence of its contents, if it is evidence of a witness other than the accused, and the evidence is reliable and necessary.⁸

⁶ *R. v. Graat*, [1982] 2 S.C.R. 819, 144 D.L.R. (3d) 267.

⁷ *R. v. Burns*, [1994] 1 S.C.R. 656, at 666. See also, *R. v. Abbey*, [1982] 2 S.C.R. 24, at 42.

⁸ *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740.

The rule is generally used to exclude prior consistent statements made by the witness, but also extends to any out-of-court evidence which is entirely self-serving.

A.5.2. Rationale

Reasons for this rule include the risk of fabrication of evidence, repetitions do not make the evidence more reliable, and court time would be wasted in dealing with such evidence if credibility is not in issue.

A.5.3. Application of the Rule

Self-serving evidence may be introduced, when credibility is in issue, only to bolster credibility, and not as evidence of the truth of the statement.

Prior consistent statements may only be admitted⁹:

1. to rebut allegations of recent fabrication;
2. to establish eye-witness prior identification of the accused;
3. to prove recent complaint by a sexual assault victim;
4. to establish that a statement was made that forms part of the *res gestae*¹⁰ or to prove the physical, mental or emotional state of the accused;
5. to prove that a statement was made on arrest;
6. to prove that a statement was made on the recovery of incriminating articles.”

A.5.4. Exceptions to the Rule

Such evidence is admissible as substantive evidence of its contents:¹¹

- if it is evidence of a witness other than the accused; and
- the evidence is reliable and necessary.¹²

⁹ Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, at 309.

¹⁰ That is, a statement made during the course of the transaction, and so closely related in time as to form part of the transaction.

¹¹ *Supra*, footnote 8.

¹² For the meaning of "reliable and necessary", also refer to *R. v. Smith*, [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590. (see Exceptions to the Hearsay Rule).

A.6. The Canada Evidence Act

The *Canada Evidence Act* deals with a number of evidentiary matters that may come up before the IRB.

A.6.1. Business Records

Section 30 of the *Canada Evidence Act* provides that "records made during the usual and ordinary course of business" may be admitted into evidence. Subsection 30(6) indicates some of the factors that may be taken into consideration in determining the weight of such evidence: "...the circumstances in which the information contained in the record was written, recorded, stored or reproduced...."

A.6.2. Affidavits and Oaths Taken Abroad

Sections 52 and 53 of the *Canada Evidence Act* indicate who may take oaths and affidavits abroad.

Oaths taken abroad by persons other than those named in sections 52 and 53, may be given less weight. In addition the circumstances of the taking of the oath should be examined to determine the weight.

However, the Board should not refuse to receive in evidence an affidavit merely because it does not meet the requirements of Part III of the *Canada Evidence Act* which governs the taking of affidavits abroad.¹³

A.6.3. Evidence of Foreign Law

Section 23 of the *Canada Evidence Act* states the method of providing proof of court records or judicial proceedings from a foreign country.

The Board accepted as evidence pursuant to s.65(2)(c) of the *Immigration Act*, a photocopy of a judgment of an Indian court although the photocopy would not be accepted as evidence pursuant to s.23 of the *Canada Evidence Act*.¹⁴ Nevertheless, section 23 has been applied in determining the weight to be afforded to evidence. The majority of the Appeal Division panel gave no weight to a declaratory judgment of adoption from an Indian court which contained discrepancies and had not been presented in accordance with s.23 of the *Canada Evidence Act*.¹⁵

¹³ *Dhesi, Bhupinder Kaur v. M.E.I.* (F.C.A., no. 84-A-342), Mahoney, Ryan, Hugessen, November 30, 1984.

¹⁴ *Sandhu, Bachhitar Singh v. M.E.I.* (I.A.B. V86-10112), Eglinton, Goodspeed, Chu, February 4, 1988.

¹⁵ *Brar, Kanwar Singh v. M.E.I.* (IAB 89-00084), Goodspeed, Arpin, Vidal (concurring in part), December 29, 1989.

A.6.4. Evidence of Minors and Incompetents

Section 16 of the *Canada Evidence Act* provides a procedure for determining whether a witness should be permitted to testify.

A.6.5. Judicial Notice

Sections 17 and 18 of the *Canada Evidence Act* provide that judicial notice may be taken of legislation.

A.6.6. Authentication of Electronic Documents

Section 31.1 of the *Canada Evidence Act* allows electronic evidence to be admitted into evidence as long as the person seeking to admit such evidence prove its authenticity. Under section 31.2 (a) of the *Canada Evidence Act* the best evidence rule is satisfied upon proof of the integrity of the electronic documents system by or in which the document was stored or (b) if an evidentiary presumption is established regarding secure electronic signatures (s.31.4 of the *Canada Evidence Act*).

A.6.7. Non Disclosure of Specified Public Interest Information

The *Canada Evidence Act* (sections 37-38.16) was recently amended pursuant to the enactment of the *Anti-Terrorism Act*.¹⁶ This recent amendment addresses the judicial balancing when disclosing specified public interest or injurious information to international relations, national defence or national security in judicial or other proceedings. Such information may be deemed protected. A notice to the Attorney General of Canada may be made by a participant or an official (other than a participant) who believes that sensitive information or potentially injurious information is about to be disclosed during a proceeding.

Similarly, *IRPA* (the *Act*) contains specific provisions relating to the non-disclosure of protected information at section 86 of the *Act* which apply to the Immigration Division and the Immigration Appeal Division of the IRB.¹⁷

Please refer also to section 6.14 of this paper for further discussion on Judicial Notice.

¹⁶ *Anti-Terrorism Act*, (2001, c.41), part 3

¹⁷ See section 38.01 of the *Canada Evidence Act*, there are exceptions to this rule. The Refugee Division may refer to the *Canada Evidence Act* (s.38.01) for guidance on the procedures to follow in the event sensitive information is about to be disclosed in a proceeding.

APPENDIX A

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