



THE CANADIAN BAR ASSOCIATION
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April 16, 2007

Mr. Norman Doyle, M.P.
Chair, Standing Committee on Citizenship and Immigration
Room 605, 180 Wellington Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Doyle:

Re: Change to IRB Selection Committee Appointment Process

On behalf of the National Citizenship and Immigration Section of the Canadian Bar Association (CBA Section), thank you for the opportunity to voice our concerns regarding proposed changes to the appointment process for the selection committee of the Immigration and Refugee Board (IRB). The CBA Section believes that a system where the Minister names selection committee members may well be viewed as politicized and more open to patronage appointments, which would undermine its mandate to recommend qualified IRB members based on merit criteria.

To put the current issues in context, some history of the IRB is needed. The IRB was created in 1989 and very quickly thereafter became mired in controversy. The federal cabinet of the day often made blatant patronage appointments to the Board without regard to the appointees' knowledge and ability to make the life and death decisions routinely required at the tribunal. A 1993 article referred to the IRB as a "haven for wives, widows, and very good friends" of politicians, and outlined incidents of misconduct by members, including an incident where IRB members were reported joking about an Ethiopian refugee's testimony about torture.¹ Political connection routinely trumped objective evaluation of performance, resulting in the reappointment of incompetent members and talented members overlooked, and a "culture of cynicism" reigned amongst IRB members and staff.²

¹ Stevie Cameron, "A Haven for Wives, Widows, and Very Good Friends. The Immigration and Refugee Board Shows What Can Go Wrong in a Patronage System", *Globe and Mail*, (5 June 1993), at D-3.

² Peter Showler, *Refugee Sandwich: Stories of Exile and Asylum* (Montreal: McGill-Queen's University Press, 2006) at 225.

The consequence was that meritorious refugee claimants were sent back to circumstances of persecution. Bad decision-making was sheltered from scrutiny by limited recourse to judicial review and the fact that decisions were confidential. Still, evidence mounted that all was not well. Acceptance rates of refugee claims amongst IRB members fluctuated wildly between 0 and 80 per cent. A 2000 study of 40 problematic IRB cases³ found that a high proportion of cases had problems with legal findings, the most prevalent being with respect to administration of evidence (87.5 percent), and in a quarter of the cases, rules of conduct and politeness were breached:

In sum, the review of the cases...demonstrates that some Board Members fail to carry out their duties effectively. They do not always know how to treat expert evidence, or they use it in ways which are clearly inappropriate. They tend to create an atmosphere in the hearing room that is not conducive to good decision-making. They have also demonstrated difficulty in conducting a hearing correctly. Such basic rules of evidence and procedure are, however, of obvious importance for a tribunal that makes daily decisions concerning people's life, liberty and security.⁴

The study also found that in 67.5 percent of the cases studied there were expressions of prejudice, and 72.5 percent demonstrated a lack of understanding of the refugee's cultural, social and political context of origin.⁵ The precarious position claimants found themselves because of inconsistent decision-making left them vulnerable to unscrupulous officials within the system. A police investigation into bribe-taking at the IRB ultimately resulted in a criminal conviction of an IRB appeal board member.⁶ Canadians lost confidence in the administration of justice because of lives ruined through dishonesty and incompetence at the IRB.

The CBA Section welcomed the 2004 reforms to the IRB appointment process as a positive step to improve the fairness of processes at the IRB and the quality of decisions by its members. The 2004 reforms strengthened merit-based criteria, and established an external screening panel of lawyers, academics, members of organizations that assist newcomers to Canada and human resources experts, and an internal selection board, chaired by the IRB Chair, to interview candidates. The final selection of appointees by the Minister was based on the recommendations of the IRB Chair following this process. The IRB Chair appointed

³ Cécile Rousseau, François Crépeau, Patricia Foxen, France Houle, *The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*, (2002) 15:1 *Journal of Refugee Studies* 43. These cases were identified using three criteria: (1) the application for refugee status as refused; (2) there was a major disagreement amongst two of the actors in the case about the decision (IRB, lawyers, health professionals and NGO); and (3) the persons referring the case had noted major legal, psychological, or cultural problems in the case. Eighty-four cases were referred, with 44 excluded either because they did not meet the criteria or consent could not be obtained.

⁴ *Ibid*, at 57.

⁵ *Ibid*, at 64.

⁶ Ingrid Peritz, "Ex-judge Sentenced to Six Years for Taking Bribes", *Globe & Mail*, (29 June 2006). Bourbonnais had previous convictions for breach of trust, but was pardoned before being appointed to the IRB.

the external advisory committee. In short, the 2004 reforms have resulted in a more transparent and effective IRB.

One of the key concerns leading to the 2004 reforms was that patronage should not govern – or be perceived as governing – the appointment of members to the IRB. This sentiment was echoed by the CBA over a decade earlier in the *Report of the Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada*⁷:

It is apparent that 'adjudicative' or schedule A tribunals exercise functions which are similar to the courts. *No justification exists for such bodies having any interest in what 'their' ministers might be thinking.* The integrity of the adjudicative process dictates, for example, that the Immigration and Refugee Board operate entirely independently of the minister of immigration.⁸

Given the IRB's history of rampant patronage in the very recent past, it is imperative that nothing be done to permit it to gain a new toehold. If the Minister appoints any of the external members of the committee screening IRB board members, it will inevitably lead to an increased public perception that patronage, not merit, plays a role in the appointment process, thereby undoing the efforts of the 2004 reforms. The injection of political considerations by even one of the members may disturb the deliberations of the selection committee, which has operated on the basis of consensus for the past three years.

At present, the spectre of bad decisions shielded from searching review still looms. There are no appeals from the IRB from refugee decisions. A Refugee Appeal Division was included in the 2001 *Immigration and Refugee Protection Act* (IRPA), however it has never been proclaimed. The only recourse to a person who is dissatisfied with a decision by the IRB on refugee matters is judicial review. The narrow standard permitting intervention by the court is whether it was reasonably open to the decision-maker to make the decision he or she did. It is extremely difficult to get a decision overturned on review, because most cases are extremely fact-dependent. Further, where these cases were formerly heard by two IRB members, this was changed in IRPA to one member. The previous system of two members was an extra check on the reasonableness of the decisions. Split decisions were decided in favour of the claimant. The reduction of IRB hearing panels to one member was justified, ironically, on the basis that the Refugee Appeal Division was to be established. Thus, the ordinary checks and balances in the court system to militate against the effects of bad decisions simply do not exist at the IRB.

The longer the issue regarding the selection of decision-makers remains unresolved, the greater the impact of the member shortage on the work of the Board. With approximately 50 vacancies on the IRB, excessive delays in hearing sponsorship appeals, refugee claims and removal order appeals have increasingly become the norm. These delays cause hardship to many families waiting to be reunited with their loved ones in Canada.

⁷ Canadian Bar Association (Ottawa: Canadian Bar Association, 1990).

⁸ *Ibid.*, at 60, emphasis added.

The CBA shares this Committee's interest in achieving a transparent and merit-based appointment system for the IRB. We ask that you review this matter and report to Parliament on an expedited basis.

Yours truly,

(Original signed by Jean-Philippe Brunet)

Jean-Philippe Brunet
Chair, National Citizenship and Immigration Section