CANADA'S PERIODICAL ON REFUGEES

REFUGE

Vol. 12 • No. 6 January 1993

SPECIAL ISSUE ON HUMANITARIAN AND COMPASSIONATE REVIEWS

The Review of Rejected Refugee Claims

According to federal government estimates published in December 1992, approximately 9,100 refused refugee claimants' cases were reviewed between January 1989 and October 1992. Of these cases, 8,800 were negative decisions and 300 were positive decisions. These 300 individuals represent 3.2 percent of all cases reviewed. The low acceptance rate at the postclaim review level could be a testament to the accuracy in determination at the board level, or it could indicate a reluctance to find otherwise than predecessors, or a misunderstanding of the substantive criteria of a review. It is not surprising that there was great concern about this informal postclaim review process and that its integrity was questioned. The overriding impression of refugee advocates was that the postclaim review process did not accommodate a situation in which fresh evidence surfaced after a determination was made by the board, or in which a change in country conditions occurred or in which a candid reading of humanitarian and compassionate considerations would be found meritorious.

It was in this environment that the Centre for Refugee Studies, in conjunction with refugee advocates, non-governmental organizations and government representatives, convened to examine the postclaim review process and to determine how it could be made a more transparent and meaningful procedure.

It is obvious that there is great confusion at all levels of representation about the rationale for, limits and objectives of any postclaim review for those refugee claimants who were not determined to meet the Convention refugee definition. The review process at this stage in a person's claim to remain in Canada is seemingly misunderstood by refugee advocates and government officials alike. It is simultaneously referred to as a humanitarian and compassionate review, a postclaim review and a prereview. Clearly, some definition was needed as to what review options were available to a claimant, their scope and any procedures associated with that review. It is evident that there is always a right for a refugee claimant, among others, to ask for consideration under Section 114(2) of the *Immigration Act*. This section and accompanying policy guidelines indicate that consideration will be given to the enumerated humanitarian and compassionate factors that would lead the minister of Employment and Immigration's repre-

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CANADA'S JOURNAL ON REFUGEES

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Vol. 12 • No. 4

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Refuge is dedicated to the encouragement of assistance to refugees by providing a forum for sharing information and opinion on Canadian and international issues pertaining to refugees. *Refuge* was founded in 1981.

It is published ten times a year by York Lanes Press for the Centre for Refugee Studies, York University, Canada. *Refuge* is a nonprofit, independent periodical supported by private donations and by subscriptions. It is a forum for discussion, and the views expressed do not necessarily reflect those of its funders or staff.

Current subscription rates for one year (ten issues) are:
Canada Can.$50.00
All other countries U.S. $60.00
Single issues are available at $6.50 per copy.
Please enclose your purchase order or payment, made payable to York Lanes Press, with your order.

ISSN 0229-5113

sentative to exercising discretion favourably and to grant landed immigrant status to the applicant. There is a need for this sort of mechanism in any determination process in order to address public policy situations. However, the scope of the policy is limited to those situations that are compelling for a limited set of reasons.

The review mechanisms specifically available after a refugee claim has been denied include the file review done immediately after the Convention Refugee Determination Division renders a negative decision. This review is done by Canada Immigration Centres and is based on the officer's review of the main facts in the file, recent country information and submissions from counsel. Decision-making is based on the standard of "unduly harsh or inhumane treatment if the claimant were to be returned to his or her country of origin." If the claimant is not accepted at this level, then the file will be referred to the Central Removals Unit of Immigration for a preremoval review and in order to prepare the failed refugee claimant for return to the country of origin. The refugee claimant can make representations to the government at any time during this review process. However, the removals proceedings will not be halted pending submissions by the claimant.

For refugee claimants from countries where there is civil strife and generalized oppression—countries to which the failed refugee claimant cannot yet be returned—there is still no satisfactory remedy.

There has been much confusion about the decision-making criteria for these sorts of reviews and the types of factors that the decision-maker would take into account. This was partly due to the informal nature of the proceedings and a tension as to the reading of the actual country conditions and the safety of return. However, with Bill C-86, it is now very clear that the criteria are solely that of individuated, identifiable risk if the claimant was forced to leave Canada. This is not the "humanitarian and compassionate" type of postclaim review as it was widely understood to be—it is a review based on very limited criteria (some would argue more difficult criteria to meet than for the Convention refugee definition and perhaps an inappropriate standard, given that the board is less likely to make an error regarding the relevance of individuated risk than it is to misconstrue the relevance of generalized forms of risk).

The *Immigration Regulations, 1978—Amendments in consequence of Bill C-86* will now provide the decision-making criteria for the postdetermination of refugee claimants. Indeed, the regulations are an effort to eliminate the confusion about the whole postdetermination process and to codify the informal practices that had developed since the decentralization of postclaim reviews. According to the amendments, the risk must be personal, that is, directed at the individual rather than based on generalized situations of risk faced by other individuals in the country of return. It must be compelling, consisting of a threat to life, excessive sanctions or inhumane treatment.

For refugee claimants from countries where there is civil strife and generalized oppression—countries to which the failed refugee claimant cannot yet be returned—there is still no satisfactory remedy. The only likely remedy is for the creation of a designated class or other special program. The practical effect of the postdetermination standard (under which so few claimants succeed) is that in cases that involve countries to which persons cannot be removed, the claimants must wait in Canada in a state of limbo. Since they are not in status refugee claimants, they do not accrue any rights to work or to public assistance. They are engaged in a waiting game, one where the conditions in their countries of origin must improve to a degree where they can be returned.

It should be remembered that no system of determination is free of mistakes

in the way claims are structured, represented and decided. Mistakes are possible on the part of all players in the refugee determination process, whether that has to do with how the refugee claim is framed or the current understanding regarding the conditions in a particular country. However, when honest mistakes are made, it becomes a seemingly impossible task to correct them. Whether it is the fault of the refugees, their advocates or the decision-makers, the net result is that with a severely restricted right to reopen a case before the Immigration and Refugee Board and a limited right of appeal to the Federal Court, it becomes increasingly vital to have a mechanism for approaching the government to review the compelling reasons in claimants' cases, whether those reasons be grounded on an H&C plea, the substantive merits of the refugee claim due to fresh evidence or a change in country conditions, or because of inadequacies on the part of a claimant's advocate or the decision-maker. Any such review mechanism must be holistic and not one of deference to the determinations made by previous decision-makers.

It is not in the interest of the overall integrity of the immigration and refugee determination system to create a separate postclaim review class for admission into Canada on the basis of a stricter standard than the refugee determination itself. However, it is in the interest of Canada to ensure that the criteria for finding "humanitarian" or "compassionate" circumstances that give rise to favourable consideration be expanded so that those individuals that do not fall within the strict confines of a Convention refugee definition that is universally acknowledged as inadequate in meeting contemporary migratory shifts and refugee movements do not suffer severe hardship. ■

Leanne MacMillan, Guest Editor

Leanne MacMillan, barrister and solicitor, is the Refugee Law Research Unit coordinator at CRS.

Workshop on Review of Rejected Refugee Claims

On September 18, 1992 the Refugee Law Research Unit of the Centre for Refugee Studies (CRS), Amnesty International and Vigil sponsored a workshop to review the process for the Review of Rejected Refugee Claims.

Essentially, the workshop was intended to demystify the procedures to be followed by advocates when a refugee claim had failed and to determine the criteria used by the government in determining which cases should be given relief under humanitarian and compassionate circumstances. The workshop was structured around the role of four main players involved in the postclaim review of rejected refugee claims. Representatives from the Immigration and Refugee Board, the local and national levels of Canada Employment and Immigration offices (CEIC), the office of the minister of Employment and Immigration, and the United Nations High Commissioner for Refugees (UNHCR) responded to issues introduced by representatives from advocacy groups. It was the intention of Amnesty International, Vigil and the Centre for Refugee Studies to provide the opportunity for dialogue between those involved in representing rejected refugee claimants' cases and those responsible for policy and decision making in these matters. The concerns of refugee advocates and government representatives were canvassed and a cooperative tone was set to allow for a frank exchange of information between all participants.

Participants:

Chairperson: James Hathaway, Osgoode Hall Law School and associate director of Law at CRS

Eduardo Arboleda, protection officer, UNHCR

Jean-Guy Boissonnealt, departmental assistant, Employment and Immigration

Esther Ishimura , Vigil (Toronto)

Hallam Johnston, director general, Immigration Case Management Branch (Ottawa), CEIC

Jonathan Kamin, program specialist, Hearings & Appeals (Ontario Region), CEIC

Linda Koch, Legal Services, Immigration and Refugee Board

Caroline Lindberg, Inter-Clinic Immigration Working Group

Colin McAdam, the Canadian Council for Refugees

Nancy Pocock, the Quaker Committee for Refugees

Fay Sims, refugee coordinator, Amnesty International

Ellen Turley, United Church of Canada

Lorne Waldman, vice chairperson, Canadian Bar Association

Brenda Wemp, the Refugee Lawyers Association

Staff and student members from the Centre for Refugee Studies.

The following is an account of the discussion at this workshop and reflects the efforts of concerned parties to understand the history and current state of affairs in the review of rejected refugee claims.

Postclaim Review of Rejected Refugee Claims

James C. Hathaway (JCH): This is an important day for the Refugee Law Research Unit, which has recently joined the Centre for Refugee Studies as a merged research entity. We hope that today's meeting will be the first of many opportunities at CRS to discuss the process and substance of refugee law. Part of the mandate of CRS is to disseminate information to a broad constituency across the country and internationally about how the refugee process functions. Also, we seek to act as a bridge between nongovernmental organizations (NGO), advocates and policy-makers in the refugee field.

The idea for this meeting on rejected refugee claims stems from a suggestion made two or three months ago by Peter Harder, the associate deputy minister of Immigration. He came to CRS to discuss the ongoing discussions about harmonization agreements between Canada and the European states, and to give a briefing regarding the Niagara meeting convened as part of the informal consultations. However, when he arrived, there was an extraordinary amount of concern expressed by those in attendance about the informal processes by which the petitions of rejected refugee claimants were dealt with: people simply were not keen to launch wholeheartedly into a discussion of harmonization agreements when there were immediate human concerns about rejected refugee claims. Peter Harder suggested that we hold a separate meeting specifically to address the concerns of advocates regarding the ways in which rejected refugee claims were dealt with in the system, and that brilliant procedural manoeuvre on his part allowed us to get on to a discussion of harmonization agreements.

As a means of responding to Peter Harder's suggestion, it was determined that we ought to try in a single day to assemble a diverse group of lawyers, nongovernmental organization advocates and all of the institutional actors represented.

The order of the discussion today will reflect effectively the order in which the process occurs. The first discussion will focus on catching mistakes before they occur. The role of the Legal Services Division within the Immigration and Refugee Board (IRB) is a critical role in educating members to avoid mistakes and reviewing members' reasons to ensure consistency with precedent and good sense. There is also the possibility for the IRB to play a more direct role in the larger humanitarian and compassionate review process, which we will hopefully have an opportunity to discuss.

The second component of our discussion will move beyond the IRB to the role of the Canada Employment and Immigration Commission, both at the local level, where increasing authority has been vested to engage in humanitarian and compassionate review, and at the centralized Case Management Branch at headquarters. Again, it is key that we understand the criteria, the processes, the time lines and the contact persons, so that the second level of review can be made to function effectively.

The third stage in our discussion is the role of the minister's office itself. Obviously, there are linkages between the minister's office and the work conducted within the Department of Immigration, but I think it remains true that for many advocates, the appeal of last resort is seen to be directly to the political authorities responsible for immigration and refugee law matters. It is key, then, that we understand both the interrelationship between the political and the official functions, and how the political office views its role, in regard to what cases it is prepared to intervene, and what kind of appeals it is open to receiving from advocates.

Finally, we will examine the role of the United Nations High Commissioner for Refugees (UNHCR). UNHCR, as we all know, effectively plays a role throughout the refugee determination process as the international guardian of refugee protection internationally. Its concern is to protect not only refugees, but also persons in refugee-like situations throughout the entirety of the process, whether it be formally at the level of the IRB where, for example, they have contributed in terms of education and reasons review, or more directly in terms of discussions with administrative and political officials. It is key that we have an understanding of UNHCR's role in the process, how it is prepared to intervene, when, where and on what grounds. This is the essence of the discussion: sequentially to explore each of the vehicles that exists for informal intervention with regard to rejected Convention refugee claims. By the end of today, we hope to have a clear sense of the various players' respective roles and, second, to have begun to develop an agenda to fill whatever holes may exist in that process. If we have a clear sense of what each actor is prepared to do, we can then contrast and compare the composite system with the actual predicaments faced with day to day by advocates, and ultimately to discuss either alterations to the existing arrange-

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ments or new mechanisms that might be required to coordinate humanitarian and compassionate review more efficiently.

In terms of format, the associate deputy minister's intention, which I share, is to make sure that this is not a one-way discussion. This is not a lecture—it is very much a workshop. The intent is to ensure that policy-makers respond to the concerns being advanced by advocates. To that end, we have structured this meeting to ensure that at the outset of each of the four components of our discussion, one advocate will present, in a collegial and nonconfrontational way, perceptions of particular strengths and weaknesses at the level of informal review under scrutiny so as to orient the response by the official or policy-maker. The overview by the advocate will then be responded to by the institutional representative and a round-table discussion will follow.

The Role of the Immigration and Refugee Board

[Lorne Waldman, vice-chairperson of the Canadian Bar Association (Ontario), Immigration Section, opened the discussion of the role of the Legal Services Division within the Immigration and Refugee Board in terms of their role in avoiding mistakes and assisting in the review of rejected claims.]

Lorne Waldman (LW): I want to talk about why mistakes happen as I think that is really important and then, in that context, view the role of Legal Services as it is or might be. Mistakes do happen in refugee determination. There are many actors in the process and all are responsible in one way or another for mistakes.

First, some clients lie. Those clients who lie are motivated to do so for a number of different reasons. Sometimes they fabricate, and there is very little we can do about that. Clients arrive in Canada with their preconceived ideas of what they should do in order to remain. Some of them are not Convention refugees and will say whatever they have to. I have had people in my office who readily admitted, "I'm not a refugee. This is all fabrication." Other clients who are legitimate refugee claimants have been given terrible advice—essentially, they have been advised to fabricate, and by the time they get to my office, it is often too late to convince the decision-makers of the truthful account that might bring a claimant within the Convention refugee definition because their credibility is highly questionable.

Lawyers are the second reason why mistakes happen. Those of us who have been practising for awhile know that five years ago, there were approximately twenty lawyers specializing in refugee matters. Most of us were fairly experienced and competent and we knew what we were doing. This doesn't mean we never make mistakes, but we did not make them that often. Unfortunately, given the downturn in the economy, we have a lot of lawyers who are now practising immigration and refugee law and who do not have the appropriate training. I get calls from lawyers all the time asking me the kinds of questions that make me think—poor client. I spend hours on the phone with those lawyers, not because I have any sympathy for them, but because I feel bad for the client.

The solution with respect to inadequately trained counsel is not crystal clear. A lot of work has been done in an effort to educate those members of the Bar who now practise refugee law. Some of the lawyers who started off three or four years ago—not knowing very much—are now very competent, but there's a major problem that will not go away. A significant percentage of the lawyers who deal in refugee work are not sufficiently prepared for what they do. For example, I had a case where the only issue at the rehearing was internal flight. The lawyer my client initially retained had not filed one piece of documentary evidence about the situation in Sri Lanka and said, "I'm relying on the standardized country file," which had not been updated since 1989. In our office we have a stack of documents on human rights violations in Sri Lanka. Based on the lack of documentation presented at the initial hearing, the board rejected the claim, saying there was no evidence that the refugee claimant could not avail himself of internal flight. This is only one example of the kind of problem we often see, and by the time a client comes to us, it is usually too late to remedy the situation.

It is evident that the demand for refugee lawyers to do appeal work has increased. However, the lawyers who are now doing appeal work often have no experience in this area. Lawyers in the Department of Justice have told me that in their estimation, about 60 percent of the lawyers who practise appeal work don't know what they are doing and that there are only a few who do.

So, refugee claimants are sometimes victims of incompetent and overworked lawyers, but we can do something about that through education and training programs. But when the cases get beyond a certain stage in the process, there are no legal remedies left and reliance must be placed on more informal appeals to the UNHCR, the minister's office or Immigration national headquarters.

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The third set of actors responsible for mistakes are the IRB members. Obviously, there has to be a more rational selection process for board members. We are in a situation where these people make life-and-death decisions, and unless we take it out of the arena of political decisions and into a situation where the people who are making decisions are chosen on the basis of competence, we are going to have mistakes.

Some of the members are excellent, wonderful and sympathetic, and just because they reject a client doesn't mean they are bad. There is no question that some of the people they see are not genuine refugees. However, I do get very

concerned when the reasoning of a board member is terrible and the conclusions he or she draws are wrong. In my experience, this happens all too frequently. In the last two weeks, I have filed three leave-to-appeal applications simply because the reasoning of the lawyers involved and that of the members was not satisfactory.

Anyway, those are the main actors responsible for mistakes that happen. The role of Legal Services, which is what I was asked to talk about, is a limited role. A certain amount of ambivalence is felt about Legal Services to begin with and the extent to which they should get involved in correcting mistakes. It is also questionable to what extent they should get involved. My perception of the process, and perhaps the representative from Legal Services can correct me, is that a member refers a case to Legal Services in most cases after he or she has decided and written the reasons and say, "Here they are—correct them." At that point, how many times do we see a set of reasons that are bad? If the reasoning is not right, are you going to be able to convince someone who has decided negatively to change his or her mind? It might happen, but I don't think it happens that often.

There are some things that can be done with respect to that. Obviously, one of the roles of Legal Services has to be an educational one. They can educate the members to not make mistakes, and that will help avoid mistakes from happening. Legal Services can also help members see when their reasoning is flawed.

The other possible role of Legal Services might be—and I don't even know if it's within their mandate to get involved in such cases—is when the members say, "Well, this person is not a refugee, but we think that there are humanitarian reasons that should be looked at." In those cases when the members themselves have identified the humanitarian aspects of the case, there may be a mechanism whereby someone at the board, perhaps Legal Services or someone else, could deal with those cases and liaise with the minister's office.

The other more controversial possibility would be in cases when lawyers perceive that there have been serious mistakes. If representations were made to Legal Services, perhaps they might want to intervene outside the normal legal appeal process. Often the types of mistakes that are made are not the types that can be corrected through the appeal process because of the limited nature of the appeals.

JCH: Notwithstanding his initial protestations, I think Lorne has set the agenda for the discussion perfectly. Even more importantly, he has set exactly the right tone by admitting that all of us bear some responsibility for mistakes in the process, and that we are engaged collegially in a process to rectify those mistakes.

Perhaps Linda Koch from the IRB Legal Services could take us a step further in the process and offer some perceptions of how Legal Services might play a role in rectifying these problems.

Linda Koch (LK): First, I will briefly address Lorne's remarks concerning the role of Legal Services. Basically, we get involved after the members have made their decision and they have sent their reasons to us for review. However, we have tried to encourage members to come see us for informal consultation while they are making their decisions so that if they have any concerns or areas they are uncertain about, we can assist them in clarifying those issues. We are seeing a little more of this than in the past. We are trying not to limit our role just to reasons review and we don't review all reasons. It's important to keep that in mind as well. Members can send the reasons to us if they wish, but they are not obligated to do so. Therefore, we don't see each and every set of reasons that goes out. Members will send them to our office if the legal issue is complex or new to them, and we certainly encourage that. In other cases when they feel confident about the decision they made, they will not send those reasons to us.

Our main concern is that the members deal with the legal issues—with all the evidence and that they are aware of what the Federal Court has to say on certain issues. We also do some training along those lines in the form of legal opinions and memos to members, as well as members training. However, members are free to take or not take our advice on certain issues. We can point out to them that we think the Federal Court may be concerned about this particular type of reasoning, but members are free to take that advice or reject it.

Legal Services also publishes *Reflets*, which is a newsletter released every couple of months. We summarize some of the Convention Refugee Determination Division (CRDD) jurisprudence and Federal Court jurisprudence, so that members are aware of how colleagues are deciding on certain issues, as well as what the Federal Court has decided. This is another form of education designed to keep members aware of key legal issues. We try to keep it fairly simple without a lot of legal language so that it's easy for members to read, and we hope they will be inclined to pick it up and refer to it from time to time while doing their reasons.

With respect to Humanitarian and Compassionate (H&C) recommendations, the members basically have taken the view that it's an immigration matter, which it is technically. Occasionally, we have seen in reasons a reference that, even though the claimant doesn't meet the definition, the member feels that this person should be allowed to remain in Canada for humanitarian reasons. They point out in their reasons, of course, that it's not their jurisdiction and that it's an immigration matter. I think it is a rare case where a member will make a comment like that in reasons.

The position of Legal Services at this time is that we feel we cannot be more

With respect to Humanitarian and Compassionate (H&C) recommendations, the members basically have taken the view that it's an immigration matter, which it is technically.

proactive in the area of H&C recommendations. Our role is to be concerned with the legal issues and to take on an additional task would be very time consuming. As well, it may confuse the roles. We feel that our role is to make sure that reasons are legally sound. We are very interested in hearing everyone's concerns and I will certainly pass those on, but at this point, I don't think we can get involved in humanitarian and compassionate issues.

With respect to acting as a liaison between practitioners and lawyers in Legal Services, I think I can safely say that probably would not be something we would be doing in the future. Once again, our role is to make sure that members make legally sound decisions. We are not prepared to go beyond that at this point.

JCH: I think that's usefully set the terrain for discussion. It might be helpful if in our questions we pursue some of the more novel issues in terms of the role of Legal Services to see whether and how they might be made viable. In particular, ought there to be some relationship between the advocacy community and Legal Services so that those who are responsible for in-house advice can be more closely attuned to the day-to-day concerns of those who see the results? I think that is something that we ought reasonably at least to discuss. And let's see if we can come up with some creative suggestions to begin making the process of in-house counsel as efficacious as we possibly can. Would anybody like to open up the discussion?

Brenda Wemp (BW): I would like to open it up, but I don't want to discuss the topic that you wanted me to discuss. I want to raise concerns the NGO group discussed at a prior meeting about the board. Perhaps one of the reasons why the H&C review is so important is that apart from mistakes that are made at the board—because there truly are mistakes based on the evidence—there are situations when evidence arises after the hearing, in particular, changed country conditions when at the time of the hearing a certain state is in effect and the claimant is found not to be a refugee. However, a month later, the place blows up and the situation is totally different. At present, there is no mechanism to get back in front of the board for a reopening.

It's my understanding from the current practice of the board and the case-law that you cannot reopen in front of the board on the basis of changed country conditions. You can reopen at the board on an application for rehearing if you can show a violation of natural justice. In a situation when the decision might have been reasonable at the time it was made, but six weeks later the person is in danger because of the change in conditions, it is my understanding that you cannot get back in front of the board. The lack of any mechanism to do that means that it's very important for postclaim review to catch that kind of case. Otherwise, these people will be sent back to places where they are in danger.

LK: It's correct that the board would not reopen on the basis of changed country conditions. The board would only reopen if there was a breach of natural justice.

LW: I would add that I have been granted leave on this issue and I'm trying to get it heard this fall because of its importance. A board member refused to reopen on the basis of changed country circumstances, saying basically that the board didn't have jurisdiction. The argument is really a *Charter* argument—that there has to be some mechanism to bring forward changed country conditions. Interestingly enough, when we took this case on an H&C review to the Removals Unit, I sent the more recent documentation. The response from Removals *vis-à-vis* the application was that all the evidence I gave was relevant to the refugee claim and therefore was not going to be considered because the board had already determined that there was no well-founded fear of persecution. It's really a vicious circle in that, barring my being successful on this application at the Federal Court, there really is no mechanism for raising new information *ex post facto*. If you can't go to the board to raise it and Immigration says they won't consider it because it relates to the refugee claim, there is obviously no mechanism.

So apart from whatever will happen in the Federal Court on this matter, I think the people in the minister's office and in national headquarters have to see this as a really serious problem and the only other response, short of reopening at the board, is a response from Immigration on an H&C.

JCH: At a policy level, are there any reasons for situating that function either at the board or, alternatively within the Department of Immigration or in the minister' office? From a policy point of view, who ought to be looking at evidence of changed circumstances, what would your judgement be and why?

It's really a vicious circle in that, barring my being successful on this application at the Federal Court, there really is no mechanism for raising new information* ex post facto. *If you can't go to the board to raise it and immigration says they won't consider it because it relates to the refugee claim, there is obviously no mechanism.

LW: Well, there are arguments both ways. If you look at it from a purely national point of view, obviously the board should make the determination because the evidence is related to the refugee claim. The board is the organism that makes the determination *vis-à-vis* well-founded fear. If it's to change after the determination, the board should be able to reassess that evidence and determine whether that would affect their decision.

For example, in an appeal from a deportation, the board has the power to reopen to review its equitable jurisdiction at any time, so there is not really any reason why they couldn't reopen. The argument against reopening is the board's concern that they will be flooded if they were to allow for reopening. Every person would apply to reopen

three months after his or her decision was rejected, perhaps on frivolous grounds.

So although the board is the most logical place, from a legal standpoint, to make the determination to weigh and assess the evidence, the practical concern of the board would be that they would be overwhelmed with cases. I'm trying to be as objective as I can and put it basically down on the table. I think there might be a way to overcome the problem by allowing the board to reopen, but requiring a written application that would be reviewed and, based on that, if the board was satisfied that there was some evidence, they could order a rehearing. However, there must at least be some mechanism to protect the board against being inundated with cases.

JCH: Is there any legal impediment now to stop the board from reopening?

LW: Well, the board has ruled that they don't have jurisdiction. There are some Federal Court cases under the old redetermination system that state that the board does not have jurisdiction to reopen on the basis of receiving fresh evidence in a refugee claim. However, there is a strong argument to be made that the change in the system has given the board the power to reopen at this time. Specifically, the rules have been changed and allow the board to have a rehearing and the question is whether this allows for a rehearing on fresh evidence.

In the *Grewal* case, the Federal Court said that there has to be some mechanism for a person who wants to bring forward evidence about change of circumstances to do so. Based upon a *Charter* argument, I think there is a strong argument that fundamental justice in the context of the refugee claim would allow a person to apply to reopen if he or she could satisfy the board that his or her life, liberty and security would be at stake. That's basically what's being argued and I think there's a good chance of it being successful.

Nancy Pocock (NP): Well, if a client or an advocate of a client feels that the lawyer did not do a good job in the hearing or didn't produce the documentation, is there anything that can be done? Any views on that?

JCH: I can think of an informal and a formal response—I'm not sure what the representative of the Refugee Lawyers Association will say to this. It does strike me, however, that there is some collegial responsibility within members of the Bar practising in an area to exert influence and to provide assistance to each other when one sees that an inadequate standard of practice has negatively affected a claimant's case.

There is, obviously, the possibility of a more formal sanction by the Law Society based on complaints, where it may ultimately convene to prosecute lawyers accused of having engaged in irresponsible behaviour.

... if a client or an advocate of a client feels that the lawyer did not do a good job in the hearing or didn't produce the documentation, is there anything that can be done?

LW: That's correct from the point of view of the overall system and trying to correct mistakes from happening in the future, but what about this poor person whose lawyer has made a mess of the case?

I have spoken to the Errors and Omissions Committee of the Law Society and have been told by them, for example, that if the lawyer were to admit that he or she were negligent, they would as part of their role in trying to mitigate damages, make representations to the Federal Court with respect to the person being granted leave on the basis of incompetent representation and negligence on the part of counsel. They would also attempt to do anything else that they could to get status for that person in Canada. I wonder how the minister's office or national headquarters should respond to such a representation from the Law Society. We have a professional obligation as lawyers to report lawyers who are incompetent. It's very difficult, but the Law Society has made that clear.

The other possibility is to raise it as a ground of appeal. There's one recent case in which the incompetence was so bad that Justice consented to a rehearing. However, in cases when it has been raised as an issue at appeal in the Federal Court, it has not been successful. The most obvious example of that is *Sheikh*, when there was evidence on the record that the lawyer fell asleep and was snoring, but the court felt that was still not satisfactory evidence of incompetence.

Everything that happens must be looked at from the point of view of the actors. The courts are afraid, and the Federal Court is afraid that if they admit that incompetent counsel would be a ground for appeal, they will be inundated with cases, so they have not yet opened the door, even one iota, to recognize that would be a basis for incompetence. The possibility of appeal as a mechanism is not very great.

Esther Ishimura (EI): If I could go back for a second to the reopening issue—I would be interested in asking the representative from Legal Services whether it's been discussed among the board. For example, if you look at Sri Lankan claimants in 1989, there was an acceptance rate of 95 to 96 percent. The following year, it went down to 89 percent and then the following year it went back up to 98 percent. In many of the decisions it was said, "Well, there's been a peace accord, the Indian Army has left, you don't have to worry any more." At that time 270 people were rejected, but had those people come a couple of months later, they probably would have been accepted.

We have tried for the last two years to find somewhere to go to work out a solution for those people and to date have found no solution. They may still be here, but not with any status. So I'm interested in a case like this when the board could have reopened, not as a matter of there being a mistake, but simply because circumstances had changed.

LK: Well, the members have to decide whether the person has a well-founded fear at the time of the hearing. It is a forward looking test—if the person were

to return, would he or she have a well-founded fear of persecution? That is the nature of the determination process, so that if conditions improve in the country, the person will not be found to be a Convention refugee.

EI: So in the legislation right now, there is a provision whereby the minister can say that the conditions have changed and one is no longer a refugee, but there is not the same right for a refugee for whom the conditions have changed for the worse to find a remedy. Would the board look at cases like these? Would they want to take on that sort of responsibility?

LK: Well, we have been told in Federal Court jurisprudence that if there is no breach of natural justice at the time of the hearing, then we would not reopen the hearing since the decision was made. But members do assess when they are deciding claims in situations when circumstances are changing, perhaps a recent peace accord has been reached or some other change of significance. They will assess the effect of those changes on the likelihood of persecution, so they still have to decide that issue based on the country's conditions.

LW: Perhaps I could comment on your interpretation of the Federal Court jurisprudence. I think that the case is *Longia* and I do not interpret *Longia* in that way. What the Federal Court said in *Longia* is that the board per se does not have jurisdiction to reopen on the basis of change of circumstances or to receive fresh evidence. There are two important facts about *Longia*. One is that it was a redetermination under the old system and therefore the court did not consider the new rules.

The second issue is that the court effectively said there was no *Charter* violation. It strikes me that, given that the Supreme Court of Canada has said that a refugee claim engages all of a person's rights to security, if we can show that the decision of the board in a particular case would be a violation of fundamental justice because the evidence is so clear that there has been a change of circumstances that puts that person's life at risk, then the board would have the power to reopen and that is essentially what I will be arguing on appeal.

JCH: There are a lot of other situations in which members have taken positions that may not reflect the ultimate in the quality of decision making, and Legal Services or the Hearings Branch has taken the initiative by preparing suggested position papers to encourage members to consider more well-reasoned approaches. While I appreciate that you cannot dictate, it does strike me that Legal Services could be very instrumental in promoting an interpretation of the potential for reopening that would remedy this lopsidedness (the fact that the minister can ask for cessation when circumstances warrant it). It seems that there is a role for Legal Services and the Hearings Branch to be at the very least proactive in promoting the logic of an opportunity for reopening.

... in the legislation right now, there is a provision whereby the minister can say that the conditions have changed and one is no longer a refugee, but there is not the same right for a refugee for whom the conditions have changed for the worse to find a remedy.

NP: I had a case where there was a paragraph at the end of the decision by the board stating that the claimant was not a Convention refugee, but that he should be considered positively under the H&C criteria. However, the minister's office refused him and he went back.

Ellen Turley (ET): My sense is that it is not a question of perception that there is no H&C. It is that in fact there really *is* no H&C. What can be done about the type of recommendation referred to by Nancy Pocock, which I understand is rarely put into a judgement? How can that be used as a mechanism to show that humanitarian and compassionate considerations should be acknowledged? It would seem that it then becomes a case of where that recommendation goes and what the advocate does with it. You discover that the minister's office is not even listening in those rare instances when the board makes such a recommendation and is sometimes not listening to the representations of the UNHCR, or Vigil, or Amnesty or the testimony of psychiatrists that the person may not meet that narrow definition of Convention refugee. Indeed, there are other treaties and conventions that Canada is a party to that say that someone should be looking at the circumstances to which the person will be sent back.

LW: I think that there is a very strong perception that the system is failing because the safety net that existed has ceased to exist, and I do not think there are any of us from the NGO community or lawyers who do not feel that way. There are other cases that merit H&C that are not getting positive results because there was a perception that the government was being too generous and that the system had to have integrity. In my view, the system does not have integrity and it won't until we can correct all of these problems. That means that many genuine refugees are being rejected and other nongenuine refugees are being accepted—it works both ways. Of course, the system is not infallible and we have to have the safety net. That is why we are here—to see how that system should be created and managed. People on the government side have to understand that this is the perception we all have.

There are three parts of the board that we have to look at if we assume that we want to encourage the board to have a role in this process. First, I think we should encourage members to point out to the minister that there are cases that merit H&C consideration. However, if we are going to do that, then the minister has to be willing to take those cases seriously. Second, Legal Services is saying that they don't think that is their role. Perhaps they are right, as they see a conflict and I tend to agree with that. I also do not think it is the role for the Hearings Branch because their role has to do with procedures and planning. Perhaps the

chairperson of the IRB can be relied on as the most appropriate person for the members to go to with meritorious cases and to make that recommendation to the chairperson. I am not saying that it would be a major function of the board members, but surely there are a significant number of cases in which members feel that the claimants do not squarely meet the definition, but that they should be afforded protection even though they are not refugees. I think we have to encourage the board to think about who on the board should look at these factors. I don't see why the members cannot comment on these aspects and I don't see why the chairperson can't get involved.

In terms of the second issue of the possible link between the board and the department, I would like to defer an answer to that until we have had a chance to review the whole process relating to the question of H&C because it is a terribly confusing area. What we are here to do is to try to sort out some of that as best we can. However, in order for anything like that to work, the members and the department will have to have the same understanding of what H&C is and what it is not.

I would like to clarify that there are differences in the types of cases we refer to when talking about H&C. ... There may be a case that is a legitimate H&C in terms of current criteria, but there may be cases that are legitimate Convention refugees because of fresh evidence or a change in country conditions or because of error. It is important in any determination process that these two types of cases are not lost.

JCH: I am wondering how open the Department of Immigration might be to the kind of relationship that Lorne Waldman has sketched regarding the potential role of the chairperson and/or board members.

Hallam Johnston (HJ): This has been a very useful and helpful discussion around the issues you have identified with respect to the board in its interface with us in the Case Management Branch. I also did not want to intervene without having the opportunity to lay the groundwork for a discussion, as I am next on the agenda. Perhaps I might offer two comments. It seems quite clear that the question of reopening as we have been discussing it is not something that the department can handle. If you go forward with a submission on behalf of a client and the submission addresses the arguments for reopening the claim due to a change in circumstances, departmental officials cannot handle that type of claim. They are not mandated to, they are not trained to, and they do not have the jurisdiction to do so. However, we should not assume that the substantive part of that question cannot be looked at because the mechanism in place is charged with looking at whether or not the person will be at risk if returned. So I would suggest that part of the approach in the submissions look at that and address substantively the connection between the change of circumstances and the risk that the person would be in rather than possibly the arguments for reopening. It may be a nuance, but I think from our perspective, it would be a helpful nuance.

EI: I would like to clarify that there are differences in the types of cases we refer to when talking about H&C. The reason that I think we regard reopening as a possibly good solution is because there are differences in the types of cases. There may be a case that is a legitimate H&C in terms of current criteria, but there may be cases that are legitimate Convention refugees because of fresh evidence or a change in country conditions or because of error. It is important in any determination process that these two types of cases are not lost.

LW: This whole issue of the board's capacity to reopen is in dispute and Bill C-86 is now before us. I don't know to what extent the minister's office can comment, but if you were interested in getting some free legal advice on how to craft an amendment on allowing reopening, there is still time to make such an amendment. It has not been raised by the Bar Association because it has not been directly raised within the context of Bill C-86. However, in order to create the power to reopen, it would have to be specifically delegated to the board through the legislation.

JCH: I think that we have at least identified two scenarios. One is of persons who ought reasonably to have been found to be Convention refugees. How does one deal with these cases, either by way of a mechanism within the board itself or, alternatively, by some connection between the board and an official agency willing to consider the refugee character of the claim in the context of a humanitarian and compassionate review? The second scenario, while not thus far phrased in this way, seems to me to be akin to the United Nations' "good offices" notion—that there are people who may not be, technocratically speaking, Convention refugees, but whose claims are not just compassionate in the broad sense of the word, but are indeed refugee-like. For example, persons from areas experiencing very serious forms of conflict and human rights abuse that may not, for one technical reason or another, fall squarely within the definition. As we pursue the discussion with the department and minister's office, maybe we can try to elaborate whether these concerns are somehow effectively met within existing processes, or whether we still have a gap in protection.

The Role of the CEIC

JCH: Let's now move into a discussion of the department. I think there's been some confusion on all of our parts about which responsibilities fall to the local CEIC office and which remain with central CEIC. In the interest of painting a full picture of the CEIC roles, both regional and centralized mandates have been combined into a single panel.

We have with us Hallam Johnston, the director general for the Case Management Branch in Ottawa, and Jonathan Kamin, a program specialist in the Ontario region, so hopefully we can deal with issues arising at both levels simultaneously and make sure nothing falls between the cracks. To lead the discussion, Caroline Lindberg will set out some of the issues that are of concern to advocates.

Caroline Lindberg (CL): I'm not going to talk about the role of the minister's office. The issue has already been introduced, so I will highlight a few issues that I think should be addressed. About a year and a half ago we were told that the postclaim reviews on H&C grounds would take place at the local level, as opposed to Case Management, where they were referred to prior to that time. We were given some information about procedures and were told that negative decisions at the local level in cases of persons from certain specified countries would be subject to a further review by Case Management. It's fair to say that most of us in the NGO community feel that the process of review is virtually useless. Even in the most compelling cases, where obvious mistakes had been made, it seems impossible to make a successful H&C application on behalf of the claimant.

We want to know what is going on with these reviews at the local level and at Case Management. What are the procedures now? Who is doing the reviews? What kind of training do the people have for carrying out these reviews? Is there still a list of countries of origin from which persons coming from those countries are reviewed at Case Management? If so, what is on that list? But, most importantly, what are the criteria, what are the guidelines that are being used? How are they being interpreted? Are they the same at both levels if in fact reviews are still taking place at both levels? I think it's also fair to say that our perception is that the guidelines that are being used or the interpretation of the guidelines for applications under Section 114.2 are not the same at both levels. It seems that the H&C reviews are even more restrictive in cases of rejected refugee claimants than in other sorts of applications under Section 114.2 H&C reviews.

We would also like to know what can be done to improve the lines of communication. There's also a perception that if you send in an H&C submission, it goes into a black hole somewhere. You don't know what has happened until your client gets a letter with a date to show up for removal. You have no idea if anyone has looked at the H&C factors, what kind of consideration has been given, and if there are questions that you could have responded to with further information if you had been given a chance, so the communication aspect is also an important issue in addition to the content of the guidelines and the process that's being used.

There's also a perception that if you send in an H&C submission, it goes into a black hole somewhere. You don't know what has happened until your client gets a letter with a date to show up for removal.

HJ: In response, I would like to give the history of this whole process and its evolution and change, so that we can explore why perceptions are not clear. Also, I would like to point out that I don't see my role here today as mounting a defence of the H&C process. It's a very difficult process and I think the discussion will help us deal with it better because we want to do it properly. I think it would be very useful for us to clarify the process.

Professor Hathaway, you made a reference to the situation of people who were in refugee-like situations. This is how it started back in early 1989. I understand "refugee-like situations" is a definition that resulted from representations made by your organization and others that there are cases of people who would not meet the Convention definition of a refugee, but who nonetheless would be at severe risk and therefore in refugee-like situations. In response to concerns about that possibility, the then minister undertook to have refused cases reviewed from that perspective.

What is the appropriate definition of a refugee-like situation? That's one area where there is ongoing confusion in the interaction between people in the department who implement that review and people who make representations on behalf of persons whose cases are being reviewed. From my perspective—and I think I may speak for some of my colleagues—that's one of the areas of friction, confusion and frustration.

Headquarters assigned H&C reviews to the Case Management Branch, which deals with individual cases that may be particularly complex or contentious or ones that no one in particular is responsible for. Case Management set up a review process for cases that are refused by the board. We receive basic documentation, personal information forms (PIF), reasons for the negative decision and other material. As the process got under way and people began to know about it, we would get submissions on behalf of the people concerned. Officers in the Case Management Branch reviewed all of that material to decide if there was anything in a particular case that would put a person at risk. Just as the CRDD determination is based on the merits of an individual case, Case Management's process looked at the facts and merits of that particular case. This was a peer group process in which officers' assessments of their cases would be subject to their colleagues' scrutiny. These officers worked in Case Management's geographic bureaus, which had up-to-date information on specific countries. We also used additional resources to obtain current information. We made our own linkages with Amnesty International, various watch groups and academics who had expertise in specific countries.

That's how it was done in 1989 and part of 1990. Two things then started to happen. We started to get more cases than we could handle with the resources and the people that we had available, which led to delays. Meanwhile, our regional staff had developed some com-

petence in reviewing cases, particularly those that were refused at the first level. We felt that these people were now comfortable with the then new bill and with the new approach to refugee determination, so that we could give them that responsibility. We worked with the regions to ensure that they follow the same process. We developed some guidelines for them, set up some expectations as to what kind of resources they ought to have and then we decentralized the H&C review of failed refugee claims.

At that point, there was growing confusion around the H&C process. Part of this confusion arose after the *Yhap* decision, in which it was determined that the application of discretion should be unfettered. What we were faced with was how to deal with the process that was going on at the national level, which was quite a fettered approach on the specific question of individual risk and refugee-like situations as defined in terms of the merits of an individual case. How could we deal with that when we were not able to provide a strong, clear direction because that would be fettering the decision making? I would like to come back to this with questions because it is a very difficult area.

Before the process was decentralized, there was a two-step process. The first step was in Ottawa where the question of risk was looked at, and the second step took place in the field where, prior to any removal of a person from Canada, field officers looked at a case to determine if there were any humanitarian or compassionate reasons that came to light since that person's case was last dealt with elsewhere in the system. They looked for any circumstances that would warrant cancelling a removal of someone who was not a refugee claimant. I think this two-step process may have led to some of the initial confusion because someone in Ottawa dealt with the refugee-like situation and then someone else in the field dealt with anything and everything after the *Yhap* decision. The department was not allowed to even provide defined guidelines as to what could or could not be looked at. Anything could be looked at; it was completely at the discretion of the officer. I suspect that that's where some of the confusion came in because people would come to us in Ottawa with a representation and be told, even though the decision on the narrow criteria was negative, that there was an H&C possibility in the field, and so it started to get a bit fuzzy from our perspective. When we decentralized, we hoped to bring the two-step process together in the field and have reviews that would look at everything, including this question of risk.

In doing that, it was recognized that in a large decentralized field organization, someone faced with assessing a case may not have all the latest information about a situation to determine a person's case, so we developed an eight-country list. These were eight countries where, at the time of decentralization, it was felt that the rate of change applied. This enabled the decentralized system to analyse these cases with the same level of information that we would have had had we not decentralized. If the decisions were negative, we required those cases to be returned to Case Management in Ottawa.

At that point, the people who used to do the analysis before decentralization reassured themselves that these analysts and decision-makers in the field had the most up-to-date information available and that the process was not being driven by a rear-view mirror. The eight-country process was a monitoring function of the review process. However, I suspect that led to further confusion about where to send representations. The final straw on the camel of confusion was probably the fact that at any point in that process a case could be reviewed as a result of representations that are made. For example, if the representation was made to the Office of the Minister, the staff in that office may want to analyse that case and how it was being handled. They would ask us and we would ask the field, so that probably didn't help to keep those lines, roles and responsibilities very clear. I have tried to outline the history of the way in which these cases were handled, and I will leave it to Jonathan Kamin to explain the operations of the Hearings Section.

JCH: I think it would be useful to have the whole picture because part of the confusion is the linkage between the regional and central branches of the department. If we have the whole panorama in front of us, our questions might be better informed.

At that point, there was the growing confusion around the H&C process. Part of this confusion arose after the* Yhap *decision, in which it was determined that the application of discretion should be unfettered.

Jonathan Kamin (JK): First of all, there seems to be some confusion among counsel, clients and possibly with our field staff, as to what an H&C review actually is. Part of this confusion lies with the terminology used relating to certain procedures, such as the postclaim review (PCR), back-end review, preremoval review and A114(2) application or review. Let me detail the types of reviews that we do, as well as the criteria assessed in each. Keep in mind that Bill C-86 will change the rules concerning these reviews.

The *postclaim review* is a Commission-initiated review, conducted at the originating Hearings office of a Canada Immigation Centre (CIC). These centres include Mississauga Hearings CIC located at 6900 Airport Road, Toronto, Hearings CIC located at 136 Edward Street, and their respective suboffices located in Ottawa, Windsor, Niagara Falls and Hamilton. In the past, we conducted the review immediately after the negative decision was rendered by the CRDD. Now we perform the review when the removal order or departure notice is effective (unless it is an in-status case). This review process applies to all cases where a *negative decision* is rendered. The purpose is to assess whether the individual would likely be subjected to "unduly harsh or

inhumane treatment if returned to his or her country of origin" and decision-making discretion lies with the Hearings CIC manager. Materials considered include details on current country conditions, the CRDD reasons for the negative decision, the Personal Information Form (PIF), case file information and submissions from counsel if received on a timely basis. There is no cost recovery fee for having these cases reviewed.

Certain cases are referred to National Headquarters, Case Management office for their input. These cases include claimants from El Salvador, Sri Lanka, Ethiopia, Guatemala, Haiti, Iran, Iraq, Somalia and those cases where clients are excluded pursuant to Article 1F of the Convention.

If the decision at this level is negative, the file is forwarded to the Detention and Removals CIC. The decision and reasons for a negative decision are not normally provided.

The *preremoval review* is also a Commission-initiated review and is conducted according to the criteria set out in the *Immigration Enforcement Manual* at IE. 12. This review is conducted when removal is imminent. At this stage, we determine which country the subject will be returned to. For instance, pursuant to the reciprocal agreement with the United States, we may remove a client across the border instead of returning him or her home. The decision-making discretion lies with the Detention and Removals CIC manager and there is no cost recovery fee.

The *A114(2) application or review* is a client-initiated review and provides a mechanism for landing an applicant from within Canada. The criteria are outlined in IE.9 of the *Examination and Enforcement Manual*. The department is not obliged to recommend special relief to the governor in council if the subject is inadmissible on criminal, medical or security grounds. A section 114(2) application may be put forth at any time.

With respect to spousal cases, a reasonable doubt as to the bona fides of the marriage is sufficient grounds for refusal. Although, in every case, officers will review all the circumstances in order to determine whether a positive recommendation will be made. There is no fettering of an immigration officer's discretionary authority in deciding section 114(2) applications for humanitarian and compassionate relief. However, an immigration officer may seek *guidance* from a supervisor. It should also be noted that we will not adjourn an immigration inquiry to consider such applications, but a response should be forthcoming within a reasonable amount of time. In-person interviews need not be conducted by the officer, but in some cases it may be necessary. Cost recovery fees apply for this type of review.

Brenda Wemp (BW): You said that at the postclaim review, the manager has delegated authority to make the decision. Are you saying that review fetters the officer's discretion, whereas if the officer recommended favourably in a Section 114.2 review, the manager would not be able to overturn the officer's favourable or negative recommendation?

JK: Basically, yes, but I would not use the word "fetter."

HJ: That's obviously contradictory to what I say, which is it didn't work. We tried to put the two-step process together in the field by having postclaim reviews conducted by people who had the experience and support to look at the questions that are involved and maintain some structure to review decisions so that it was a careful analysis. Recommendations were subject to scrutiny by others. In reality, the two-step process stayed separated in the field.

JCH: How do you react to that? It seems to almost defeat the rationale for the decentralization in a sense.

HJ: It defeated one part of the rationale for decentralization. The rationale also had to do with large numbers and whether it was fair to ask the field structure to handle a whole new legislative approach in 1989.

We had hoped decentralization would also resolve the problem that had been created by unfettered decisions like the *Yhap* decision, but it did not resolve it. We still have two processes at work. We are dealing with some horrendous complexities, so we are not going to suddenly and easily resolve this. We will have to work at it.

Section 114.2 of the *Immigration Act* is a provision whereby somebody can be considered for admission into Canada upon discretionary grounds, referred to as humanitarian and compassionate grounds or H&C, so the authority to land somebody from within Canada is found in Section 114.2. A claim is considered upon its merits and individual circumstances. ...

This was done as an attempt to convey to people what their job is when we decentralize that task. To say that a case was not accepted because it didn't stand out—I would not share that categorization.

Before the process was decentralized, there was a two-step process. The first step was in Ottawa where the question of risk was looked at, and the second step took place in the field ... prior to any removal of a person from Canada ...

Ellen Turley (ET): I would like a clarification. Do you mean that the worse the conditions are in a country, the more likely a person's case will not stand out and the less likely he or she will get landed or be allowed to stay on that basis? That's how I interpret it.

HJ: No, I don't think that necessarily follows.

Eduardo Arboleda (EA): I think everyone is interested in Bill C-86 because the proposed new legislation has an amended version of Section 114.2 and a new 6(5) section dealing with H&C. Is this an attempt to clarify and create guidelines for this whole issue of postclaim review?

HJ: The changes being proposed to Section 114.2 are essentially taken off the table of the Cabinet Committee and left to the minister to decide. Both sections under 6(5) create a possibility of classes and offer the opportunity to develop a

more transparent process in getting out of this bind about unfettered decision making and articulating exactly what we are looking for and trying to develop that.

JCH: At the risk of misquoting, I'm going to try to synthesize where we are so that we don't forget these strands. I have tried to note the major themes in the discussion. The first strand of criticism that I hear is that there is an arbitrariness in applying IE.9 criteria based on whether the review is CEIC-initiated or client-initiated. Logically, the same circumstances should be considered irrespective of the manner in which the review was commenced.

The second criticism is that affording a review based *only* on unique circumstances that put the person at risk is, in a real sense, not as important as one might think. The board is less likely to make an error regarding the relevance of individuated risk than it is to misconstrue the relevance of generalized forms of risk. The latter, however, is outside the scope of CEIC review.

The second criticism is that affording a review based only on unique circumstances that put the person at risk is, in a real sense, not as important as one might think.

The third and perhaps the most important criticism that I have heard is that the two procedures, even if joined, are insufficient. Persons can be at risk of extraordinarily serious harm by reason of factors that are not uniquely identifiable to them as individuals. And, indeed, that's absolutely consistent with the Federal Court's jurisprudence, which has rejected, absolutely and unequivocally, the notion of a hierarchy of harm, saying that whether experienced alone or with 10,000 persons, the gravity of harm *per se* is the issue, not the individuality of the harm.

The fourth criticism derives from the fuzziness of the criteria and the communications among regional offices with the resultant potential for different interpretations. There may well have been some advantages in the old model of centralized review contrasted with the current process of decentralized review. With the old model, at least we knew the criteria were the same and being applied in the same way for all, and there was a clear linkage to NGO and academic experts during the review process. So we may want to consider whether there is some way of drawing on the strong points of that old model to improve the model currently in place.

The Role of the Minister's Office

JCH: The discussion now turns more explicitly to the role of the minister's office. We had a consensus at the end of the last session that there were a number of humanitarian or refugee-like concerns that, for whatever reason, may not be adequately addressed within the existing legislation or institutional structures. The department is constrained by what it perceives to be its jurisdiction and its mandate. The question then is how are these broader concerns to be addressed? To introduce this issue, let me turn the discussion to Fay Sims, the refugee coordinator for Amnesty in Toronto, and then Jean-Guy Boissoneault for an initial response, followed by discussion.

FS: I would like to start by talking about the differences that we as an organization feel, and I'm sure it's felt by other people in the community as well when dealing with the minister's office and with this minister. We used to feel that there was a dialogue or communication with the minister's office and the possibility of getting a response to some of our concerns. However, with this minister, we no longer feel that degree of openness at all. We have been dealing with ministers in Immigration since 1979 and this is the most difficult minister we have ever dealt with.

We don't know what the minister wants to do or is prepared to do. He has the power and we also feel that he has a responsibility to intervene in cases that have not been caught and stopped in the reviews, but we have no idea what criteria the minister has for deciding about what he's going to do about these cases. We know that he will intervene. The most recent case that I heard about was for a couple who were already on the plane on their way back to their country of origin. They left from Alberta and he ordered them off the plane in Toronto and returned to Alberta.

I understand that he has intervened in a few other cases, most of which are high-profile. I would like to talk about how we can improve communication. I would like to hear what the differences are between the two sides in the minister's office and how they liaise with each other, with people from the Case Management Branch and with the local offices. How all of those lines of communication work? I would also like to know if the minister is aware that there are cases that can fall through the cracks in the system, and whether there is discussion in the minister's office about how to deal with them.

The lines of communication are open. The minister gets anywhere from 7,000 to 8,000 pieces of correspondence per month.

The representative from the UNHCR has just raised the suggestion that the amendment to Section 114.2 is to allow changes to be made in the review system and I would like to hear from you if that is true. Is that what it is designed to do and what kind of guidelines do you want to follow?

I would also like to talk to you about a couple of other fears that have come to everyone's attention. The first one is the Somali situation. There was a change in policy that Canada would begin to remove Somalis and I believe that it was only stopped because of the huge outcry when it became public. There were eight Somalis in detention in Montreal and only one of them possibly had some kind of criminal charges against him. That was never made clear to the public. The other seven, as far as I was able to find out,

didn't have criminal charges, but they and a family in Montreal were to be removed as well. On the day that Amnesty learned of this, we were able to speak with someone in Removals who bragged to us that they had found a way of taking Somalis back. He told us that there were two ways to send them back. One way was to fly them to Djibouti, where people who owned boats would take them down the coast to Somalia, probably Somaliland, and let them off. The other way was to fly them to Nairobi, put them on small planes, take them inside the border of Somalia somewhere and let them off. The closest border area to Nairobi that would probably be accessible by Cesnas is one of the war regions where there has been constant fighting. We were very upset to hear this. I don't understand how this kind of decision could have been made and approved by a minister in Canada.

There also seems to be a policy of nonremovals of Tamils of a certain age—young men between the ages of about 18 and 40. Other people from Sri Lanka will eventually be removed, but they don't seem to be removed. They are left here in a strange situation of limbo where they don't have access to work permits. Many of them have had trouble being allowed to stay on welfare. I would like to hear about this nonremoval policy. We recognize that it's not really a program, but how is the decision made, is anyone consulted, and how does the minister's office decide on these things?

Jean-Guy Boissoneault (JGB): First, I'd like to address the situation on Somalia. The minister has directed his officials to meet with Somali community associations. So far, we have met with the community in Toronto, Ottawa and Montreal. I was a participant at two of these meetings and they were very productive in finding out what their concerns were and their problems with the Department of Immigration in getting their families to Canada and so on. We have recently sent a new program manager to Nairobi to be responsible for the immigration program. His task is to assess the situation and report back to headquarters. When all of this information has been gathered and evaluated, options will be assessed and recommendations will be made to the minister. We are expecting the report from Nairobi by the end of the month. I'm hoping that during the following weeks the department will be presenting something to the minister on what we can do to alleviate that situation.

I think the Removals officer who was threatening to remove Somalis by Cesna might have been talking out of his hat because I don't believe it for a minute. In fact, I think I'm only aware of one or perhaps two Somalis who have been removed to Somalia in the last year and a half, and I think in both cases they had serious criminal convictions. The minister will not tolerate anything of that nature and those people will be removed.

The lines of communication are open. The minister gets anywhere from 7,000 to 8,000 pieces of correspondence per month. My phone rings off the hook all day, as do the phones of all the other assistants. We are there and we will speak to you. We may not always be able to give you what you are asking for, but we are certainly prepared to listen to any information you have. We are being pulled at from all sides. There are only two departmental assistants at the minister's office, Randy Gordon and myself, and we handle anything and everything concerned with immigration.

As for Tamil Sri Lankans, there is no moratorium on removals to Sri Lanka. Each case is looked at individually. We are looking at the circumstances of each person. Refused refugee claimants will be put through the system. I believe we'll

The role of the departmental assistant is to counsel, to advise the minister and the political staff on the workings of Immigration on the department itself. I bring cases that have fallen through the cracks for one reason or another to the minister's attention.

get postclaim reviews but if they are not found to be at great risk, they will be removed.

FS: There are a number of Somali claimants just sitting and waiting for a postclaim review. They do not have work permits and some of them have difficulty in obtaining welfare.

HJ: From my perspective in terms of the postclaim process and the role of Case Management, I am aware that there are a number of cases, mostly of young Tamil males who don't come from Colombo and don't have family ties there. Those cases are being looked at very, very carefully and they are difficult cases. What you are talking about is probably the consequence of that review taking some time.

FS: So are you telling me that they are still under review and they are still in your department?

... we look at country conditions among other factors. We will not retry a case, but we'll look at any and all circumstances that have changed since the board made its determination.

HJ: Generally, yes. The cases that are giving people a lot of concern are subject to careful analysis.

FS: Just to explain where I'm coming from, I was told by someone in the minister's office that if any of those types of cases come up for removal, I should let him know that because it was understood that they were not going anywhere.

JGB: The role of the departmental assistant is to counsel, to advise the minister and the political staff on the workings of Immigration on the department itself. I bring cases that have fallen through the cracks for one reason or another to the minister's attention. I'm not always successful with those cases. I can recall one case where I thought national interest was involved; the minister agreed. Another case was based in a humanitarian and compassionate plea and the minister agreed. Another case raised humanitarian and compassionate issues and the minister did not agree. Political considerations do not enter into it for me. I am an extension of the department in the minister's office. I look at the same reasons, the same criteria, the same considerations that are looked at by the department. We review the correspondence every morning and most of it is sent down to the department for response. Most have to do with cases that have gone through the entire system and are being sent to the minister as a last resort. In the majority of those cases, I am satisfied that the system has worked and I will simply refer to the department. I may see one that I think we should look at. The minister may be interested for one reason or another. As I said, I will bring those to his attention, but they may not always be successful.

JCH: It would be helpful for me if you could outline what the process is in the minister's office and what the substantive criteria are. You say that they are the same as the department's. Does that mean both the process and the substantive criteria? Or do you consider also generalized circumstances of risk? What do you look at when you are considering these kinds of cases and how does the process flow?

JGB: All kinds of cases come up to the minister's office. We will consider IE.9 criteria. Some of the cases that have been refused at the postclaim review come to the minister's office at the request of perhaps a political assistant or perhaps the minister or perhaps because there are new considerations brought to our attention and we feel that perhaps we should take a further look. There are no set rules.

JCH: Let's take the scenario we had this morning where there's been a radical change of circumstance in the country of origin, where the board made the right decision initially, where the review process was fair based on the IE.9 criteria when it was conducted.

But suddenly there's been a horrible shift in the political circumstances in the country, so that it's no longer safe. Is that the kind of case the minister is responsive to and, if so, how does one frame that case?

JGB: I would suggest that rather than coming to the minister, you go back to the local immigration centre to present these new facts.

JCH: But they have told us they can't look at refugee-specific facts.

JGB: I'm not talking about refugees. I'm talking about evolving circumstances. The immigration centres are able to and prepared to consider any new submissions at all times. There is no reason why you cannot go back to the immigration centre and present those new facts.

JCH: I may have misunderstood Jonathan Kamin, but I thought CEIC would not review the merits of refugee claims.

HJ: I think it relates back to the point that I made earlier that the officials at the regional level can't handle an argument as to why this claim should be reheard and why the person should be found to be a Convention refugee. That's not their role, but they can and should entertain submissions because the circumstances have changed and people are now at risk for certain reasons.

JCH: Even if they have become at risk as part of a group?

HJ: Yes. The immigration centre has the mandate to look at these cases and that's my sense of how the minister prefers to see things operate. The process ought to work and the minister's initial reaction on any cases we have brought forward is to ask if they have been through the process. Have people had a chance to do what they are supposed to do? So from that point of view, I think there isn't really an inconsistency—it's a question of framing the inconsistency.

JK: As I stated earlier, we look at country conditions among other factors. We will not retry a case, but we'll look at any and all circumstances that have changed since the board made its determination. I was thinking of a scenario different from the one where removal is imminent. We have done all the reviews and there's been a drastic change. Perhaps a political decision will be made and maybe removals will be stayed for a little while until things calm down.

JGB: I want to address another point that Fay Sims raised on what criteria are used,

how the minister is interpreting cases and why. There are no simple answers. The minister will intervene for political reasons. Why and for whom I can't tell you; I couldn't possibly answer that, but the minister will intervene if we present a strong case to him, and in many instances the minister will ask us about the case. A comprehensive memo is requested from the department for the minister's review, and sometimes one of the assistants will prepare something for the minister to review, but there are no clear-cut criteria. I am working with the same considerations used by the department in a humanitarian and compassionate review.

BW: I'd like to ask Jean-Guy to clarify some things. What screening process do our submissions go through? Who ensures that a submission will or will not get the minister's attention? What is the liaison with Case Management? For example, I recently sent a submission to the minister and a copy to Case Management, which may or may not have been politically correct. However, I don't know how decisions are made. Obviously the minister doesn't read all our submissions, so someone decides whether he needs to know about a case or not. Who are the gate controllers and what is your liaison with Case Management?

JGB: All the correspondence eventually ends up in Case Management for response, unless it's a policy issue or a procedural question. We screen much of the incoming correspondence. There are political assistants responsible for geographic areas who will look at correspondence and then refer them to the department for response.

As a departmental assistant, I screen the correspondence and the vast majority go down to the department for response. If a case is presented and convincing arguments are made about a certain case, I may do some research on it, and I may make a case to the minister. However, the vast majority of cases go to the Case Management Branch, which is responsible for reviewing submissions received from the field.

HJ: It is our job to provide analysis for special requests and to set the issues out in a memorandum. So if I may, in my own self-interest pick up on your point, please continue to send us copies of submissions because it gives us a head start.

JGB: The correspondence eventually makes its way back up to the minister's office for signature, either by the minister or one of the assistants. You will get a response, but not always a timely one, I'm sorry to say.

Edward Opoku-Dapaah (EOD): How many cases does the minister see?

JGB: The minister does not see that many cases personally because that's what the assistants are for. The minister cannot possibly be expected to review every single case brought to his attention. He sees a very small percentage of the cases. His assistants act as intermediaries.

... The convergence of those two events, the decentralization and the changing of the minister, left a distinct impression within the NGO community that the rationale behind the decentralization was to push the postclaim review as far away from the minister as possible.

EOD: Are you saying that there are gatekeepers who actually prevent the case from reaching the minister?

JGB: We prefer to see ourselves as intermediaries, as opposed to gatekeepers. You can't realistically expect the minister to review every single case, and Immigration is the smaller side of the Commission. He has Employment on the other side. He also has his House duties.

Colin McAdam (CM): I'd like to link the discussion of the minister's office with some topics that came up before. I believe the decision to decentralize came when Barbara McDougall was still the minister, just as she was going out. Was this the decentralization of the postclaim review?

HJ: That's correct.

CM: The kind of response that we used to get from Barbara McDougall was radically different from the kind of response we are getting from the current minister, Mr. Valcourt. The convergence of those two events, the decentralization and the changing of the minister, left a distinct impression within the NGO community that the rationale behind the decentralization was to push the postclaim review as far away from the minister as possible. That seems to be confirmed by the minister, who is making it quite clear that he just doesn't want to see the submissions. Could you respond to that, given Hallam Johnston's conclusion that decentralizing the postclaim review created a lot of confusion. I wonder if it would serve our interest to rethink the rationale for having decentralized in the first place and reconsider bringing things back together again. Do you think that decentralization would be something that the minister might reconsider if, as we have heard, it's not really a solution?

I think you are short-changing the minister's office if you go away with the impression that this sort of process goes on. ... You are judging by outcomes and you can't argue from the outcome back to the existence or nonexistence of the process.

HJ: I'm not sure that that's necessarily the way to go. I think the key issue is how to get the best features of the older centralized system into the decentralized approach. We are very open to that and we look for help and advice on it, but I don't think that bringing it back into one place is necessarily the way to do it. We concluded that we ought to move it out because we thought that was a more appropriate way to do it and link it with all the other parts of the process. We are still wrestling through all of that in an administrative sense, but I think that's probably the way we would prefer to go rather than centralizing it.

Ellen Turley (ET): Mr. McAdam's perception or explanation of a perception of the timing of decentralization with the arrival of the new minister, plus increasing frustration since that time with humanitarian and compassionate reviews has indeed created an extremely frustrating experience for NGOs. I have always been concerned when the only way that we seem to be able to get the minister's attention or the attention of Canada Immigration is when we go to the papers or ask members of Parliament to raise points in the House of Commons. That's not how the system is supposed to work because only the people who have access to the papers or to the MPs get heard. Many of us are, of course, concerned about the hundreds of others who never get heard, but who deserve humanitarian and compassionate consideration. How can we somehow ensure that the appeals to the minister or appeals to Case Review actually get heard? We hear of gatekeepers. What do we need to do to get your attention when many of us who work with NGOs carefully screen cases too before submitting them and find them to be credible and honestly deserving of protection? It's an honest question. Can you give me a response?

JGB: I can honestly say the cases are looked at. We don't simply give pat answers. We will get reports from the field and find out what's going on. Sometimes we have information that you don't, but the cases are looked at and, as I said, some cases are brought to the minister's attention. Case Management is very much involved in looking at the cases brought to their attention.

ET: Why is it then that recent public awareness of a specific case often has such wonderful results? I'm concerned because I don't like doing that, I really want the system to work. Yet I also know that when push comes to shove, I have to go to the press or I have to go and ask an immigration critic to raise it in the House. I'm just saying the system doesn't seem to be working yet.

JGB: If the case is brought to the minister's attention through the media or the House, he will immediately ask for a report on the case. He will look objectively at the case and he will make his decision, but it may not always be what we want to hear. A case may get media attention, but it may not always end up with the result that you are looking for.

ET: No, but the ones that get the attention certainly seem to have a better chance of getting the result that we are asking for. I just find that type of action, when it becomes necessary, really distasteful because all of those cases have already been brought to your attention and to the minister's attention. It's been through the system.

HJ: May I again offer a bureaucrat's gratuitous comment on this? Case Management is uniquely situated because we not only have to deal with the substance of the case and the representations made, we also have to deal with the media aspects of it when it takes on a high profile because of approaches to members of Parliament or to the press. From that perspective, I don't think it's an open-and-shut case. I don't think that taking the more high-profile route will necessarily change the decision. It doesn't always do that. Sometimes it makes it much more difficult.

There have been four cases where reviews of changed country circumstances resulted in positive decisions that were originally negative because we identified factors that were not part of that decision making, so that process works. I'm also aware of cases where a representation or an intervention at the Case Management Branch in Ottawa triggered a review of the process that led to a positive decision that might have been negative. And I'm aware of cases where the minister has intervened as a result of the analysis done for him on particular situations. It does happen, but the numbers are not large.

Arul Aruliah (AA): The reason for having this meeting is partly because the NGO community thinks that this review process deserves due care and attention on the part of the minister for a large

number of cases who are affected by change in country circumstances since the [IRB] decision. As was pointed out earlier, there was negative determination for some Sri Lankans claims (between July-October 1987) due to positive change in that country's circumstance. However, that condition in that country did not last long. Had those claims been determined a little earlier or a little later, (as the statistics indicate) they would have had a different result. How can one make a humanitarian case for those claimants when there seems to be an aversion on the part of the minister's office in intervening on cases of changed country circumstances? The Canadian government looks at the problem in Yugoslavia quite rightly on a country basis—possibly due to some political pressure, but the minister does not want to consider the situation on Somalia on a similar basis and will only look at individual reassessments.

JGB: That would be a government decision as opposed to a departmental decision.

JCH: Do you have any insight on the thinking that led to a preference for purely individuated reassessments, as opposed to country-specific or situation-specific reassessments?

JGB: Generally speaking, the minister is satisfied with the work being done by officers in the field. He's reluctant to intervene because he is satisfied that the system works. You are talking about cases of individuals whose circumstances change and the only thing that I can suggest again is that they should go back to the immigration centre to have a second look at their case. As you said, the situation has changed for them. Approvals are not guaranteed, but reconsideration is.

HJ: I wonder if I could very briefly speak to the other aspect of what you have put on the table and that's the sense that cases are not given careful review. If we leave no other impression, let it be that they are given careful review. The decision ultimately reached is a different question, but they are given careful review. That is what my branch exists for and I'm aware of what happens in the minister's office in terms of looking at the file and sometimes asking very awkward and penetrating questions of departmental officials. I think you are short-changing the minister's office if you go away with the impression that this sort of process goes on. It is a very difficult environment with a massive volume of cases but the process happens in a conscientious way. You are judging by outcomes and you can't argue from the outcome back to the existence or nonexistence of the process.

JCH: It seems to me in this segment of our discussion, as in the first two, the bottom line concern is again the substantive criteria for review. Who really are we talking about and on what grounds? There still seems to be a lack of commonality around the table in terms of this fundamental issue.

The Role of UNHCR

JCH: The last segment is devoted to the role of the UN High Commissioner for Refugees, which embraces quite a comprehensive and broadly-based notion of persons deserving protection, including a good office's mandate and a generic humanitarian human rights concern for persons in refugee-like situations. I think it would be useful in this last segment to have a sense of the extent to which UNHCR might play a role in sensitizing the behind-the-scenes review process to a more liberal interpretation of humanitarian and compassionate grounds in keeping with its own good offices mandate. I will turn the discussion over to Ellen Turley from the United Church of Canada who will set the stage, and Eduardo Arboleda will then respond.

ET: Many of us see the UNHCR as potentially intervening in cases and indeed recommending to the government needed changes to proposed and present legislation. On what basis will the UNHCR intervene? I recognize that you have the Convention definition of a refugee. However, what about some of the other cases that you have heard mentioned around the table? Many of us have talked about the danger of generic violence when people return or are returned. Is the UNHCR willing to make recommendations on refugee-like situations or in situations where broader humanitarian and compassionate grounds exist for allowing a person to remain in Canada? Is UNHCR prepared to talk about nonremoval rather than simply arguing that perhaps the person should be receiving the protection of the Convention? Of course, it is recognized that the UNHCR in Canada is one of the representatives of a larger international governmental body. However, there are conventions other than the Convention on refugees that Canada has signed, and I would like to know if the UNHCR is prepared to assist the Canadian government in interpreting its duties under the other United Nations and international instruments to which it is a party.

Much of our discussion today has been part of the discovery of the different levels of the CEIC and where certain reviews are done, who has final say, who delegates, who delegates the discretion to decide. Does that mean, then, that the local UNHCR officer will contact directly the local CEIC official? I would like to know whom we should approach in asking to make representations and at what level, and then what procedure should be followed to solicit UNHCR intervention. Many of us, of course, are familiar with the protocol to follow in the larger cities. However, I would like to know what happens in the smaller cities where there are smaller CEIC offices and lower level officials, given that the review process has been decentralized to those offices and there is no UNHCR representative in the vicinity.

... I see myself as a potentially important but rather peripheral player in this whole issue, given that we don't make the refugee determination procedures, nor do we define the policies of Canada on humanitarian and compassionate grounds.

Eduardo Arboleda (EA): First of all, I see myself as a potentially important but

rather peripheral player in this whole issue, given that we don't make the refugee determination procedures, nor do we define the policies of Canada on humanitarian and compassionate grounds. We are specifically told not to define humanitarian and compassionate grounds for anybody because each country has its own version of such. We are nevertheless in the process of doing so in certain situations.

Most people around the table know the role of the UNHCR. However, I think it's important to address the basis for UNHCR intervention. Our functions in the developed and nondeveloped countries are totally different. In a nondeveloped country, we have a much more hands-on approach in terms of the systems of protection, and governments allow us to exercise the right of creating broader humanitarian good offices interventions. We do not necessarily do that in developed countries because they would not listen to us and because if we continue to do that, they would stop listening to us totally.

That then leads us to a developed country, which tries to be the expert or alleged expert on the interpretation of the Convention refugee definition as it should be interpreted internationally. That creates a problem in Canada because it seems to be totally out of whack with the Canadian standard and interpretation. When I first came to Canada, I thought that I would find an interpretation of the Convention in keeping with the way that I knew it to be understood in Geneva, but I found that was not the case as everybody had different ideas. However, our basis for formal interventions is determined by what the UNHCR considers to be a Convention refugee. That is the only basis of formal intervention that we would use in determining which case to take forward to the minister's office. I want to emphasize that I am referring to *formal* intervention. Our work in the area of refugee-like situations, humanitarian issues and the like is accomplished by our ongoing continuing education on every level and the updated information on certain issues that we provide.

I make representations to both government and NGOs, informing them about the most current information that we have on specific conditions in countries and what our positions are. In that sense, we try to help the government in particular by keeping them informed of tangible and intangible situations, like countries that may have refugee-like situations for individuals.

In Canada, we base our decisions on the utmost updated information possible. If an argument is not backed by current specific facts about the country of origin, we won't intervene if we don't see any particular danger.

In answer to your other question as to whether we assist in interpreting duties with regard to other instruments that Canada adheres to, the answer is categorically no. We have more than our hands full just doing what we do—we are swamped just looking at intervention cases based on the Convention. We are trying to make people understand what a Convention refugee is, as illustrated in the Supreme Court case of *Ward*, in which we officially intervened and tried to outline our arguments and how the case should be interpreted.

As to how one solicits intervention from the UNHCR at either the local or national level, reference should be made to the UNHCR guidelines. It is part of our responsibility to respond candidly on any case that you may put forward to us, to respond regardless of whether or not the country is a signatory, and to intervene on Convention refugee grounds in any particular case. The problem is that we have all kinds of people seeking UNHCR intervention with different levels of interventions—some are serious, some are not and some are totally frivolous. We have a very small office, so we have to prioritize and, as such, I ask for an intervention request form to be completed. We always ask for the facts of the case, the reasoning of the IRB's decision and the reasoning behind the intervention request. In other words, why do you think it was wrong and on what basis are you asking for intervention, the credibility of the claimant and other observations. The intervention request form, along with the PIF, the IRB decision and any additional evidence that you have is the minimum requirement for us to look at a case.

Last year, we looked at 201 cases officially. The office is comprised of myself, my assistant and one regional legal officer. In addition, I have a lot of other responsibilities, so we do the best we can, but when you want to solicit our assistance, it is advisable for you to meet the minimum requirements in order for us to look at a case.

We do not normally or officially intervene at the local level. We go directly to the minister's office because we believe that the case warrants intervention based on Convention grounds. There are other unofficial types of interventions that we can make at local offices and the regional legal offices have the right to do that. For example, we might advise that a local immigration office look at a particular case, perhaps with observations that were not made clear in the decision or whenever we have updated information.

The biggest problems that we have had were not with clients but with lawyers. The NGOs usually do their analysis well, they look at facts objectively and the like.

In Canada, we base our decisions on the utmost updated information possible. If an argument is not backed by current specific facts about the country of origin, we won't intervene if we don't see any particular danger.

We have a country information unit in Geneva that provides continuously updated pragmatic information on specific regions throughout the world and

that's what we work with. Sometimes the information other people have of a situation in a particular country is totally different from the information we have, and our people in that particular country are saying differently, so I have to take our advice. That's where we differ with a lot of people because some people don't have updated information and that's at all levels. We find sometimes even in government that information is lacking. We try to fill those voids by giving as much information as possible and have become somewhat unpopular because of that. Often people don't agree with that information, but if you have some information we don't, please let us know so we can verify it.

It's also important to understand that we also have a very strong commitment to postclaims review, although there are errors in the system. We think the system overall is quite good, but like everyone, we are all human beings and there are errors. I think the postclaims review process is an important one and, in fact, we have included it in the statement to Parliament about the new Bill C-86. We thought we would say that we think a significant and functional postclaim review process should be established.

JCH: At the end of your presentation, you suggested that you would like to see a more comprehensive postdecision case review process in Canada. The UNHCR has worked at the board level, the departmental level, the minister's office—you have seen it all. Can you give us any sense of some touchstones that would be helpful in a more comprehensive postclaim review process? What would one look for?

EA: One of the critiques that we might have about postclaim review is that every individual who makes a postclaim review is not sufficiently expert in the region that they are looking at and that, to a degree, weakens the analysis of the case. And that's why we are proposing within our brief that be carried out and that if anything, the decision-maker should be very well-informed to give the fairest decision and perspective. Essentially that is what we do. If I need to know what's going on in Sri Lanka, I look at the latest available information and develop a position based on that. There is a lot of controversy as to how much information we would give based on a monitoring of twenty-five different areas within Sri Lanka. However, that type of information is essential to make the most valid and significant analysis of the case.

JCH: In some sense, these comments link with Hallam Johnston's earlier comment that the good aspects of the former centralized model within CEIC—up-to-date sources of information from NGOs, academics in the field and individuals — would improve the process. The knowledge level would be enhanced.

EA: I agree. Let me give you a case in point. During my stay here, the UNHCR has intervened in cases from every region. It is part of our responsibility to monitor, and we intervene in cases we read about ourselves. If we do not agree with the outcome, we follow it up once we get all the evidence that there is a potential problem.

It does not necessarily have to come from a lawyer. In a recent case, we tried to give all the information to a local person in a smaller region, but they basically didn't listen. Unfortunately, we had to refer the matter to the federal office of the government where it was analysed, evaluated and it worked.

ET: Can you tell us your success rate?

EA: Very low. The majority of cases are MUCS to begin with—that is, manifestly unfounded claims. For example, a guy from Trinidad says that he really lied throughout the whole thing and now has a different story. And their different story doesn't make sense. The biggest problems that we have had were not with clients but with lawyers. The NGOs usually do their analysis well, they look at facts objectively and the like. But most of the time in the MUCS, for example, lawyers tell their clients to lie, to make up a story because it will sell better. After they have gone to the second level and been denied, immigration denied, H&C denied, they come to us right before deportation and suddenly have a new story with no evidence whatsoever.

We have intervened even in those cases when we interview the individual very, very carefully and ask for as much information as possible on the case, but usually the lawyer tells them to say certain things and/or the lawyer doesn't provide any evidence whatsoever and we have no evidence until two days before deportation. I will not go to the minister's office with nothing. We have to look at experience elsewhere throughout Europe, and at what kind of cases are being made of Somalis or Sri Lankans or the like, and I will check with Geneva to verify if there's any situation. If worse comes to worse and we don't have any information, we will ask extraordinarily for some more time to evaluate the case even though we don't like to do that.

I do not think it came as any surprise that mistakes were being made at the board in three basic areas. First, there are simply poor, bad decisions by board members. Second, when there has been a change in country situations, there is no mechanism for further review before the board, and third, there are poor legal representation of clients at the board for whatever reasons.

Leanne MacMillan (LM): Do you report to the Law Society the lawyers who have, in your estimation, failed their clients?

EA: When there is a lawyer error, we have an ethical problem. As a representative of a foreign organization, I question whether it's our role to report these lawyers, but we have the authority to report to whomever we can report.

What I have seen in my stay here is an incredible sophistication of many lawyers who have specialized in the field, of many NGOs that are generally much better than lawyers in presenting their cases.

Unfortunately, the NGOs only get cases after they have been rejected. But

we do get many real estate lawyers and other types of lawyers who have absolutely no concept about the case and who make all kinds of mistakes that we can't possibly correct. It is a very serious problem because this is a very complicated system that necessitates that people understand what international rights are all about, and some lawyers have no background or training in the area.

ET: I would encourage your regional legal offices to report unethical lawyers. Not only do those of us in the profession want those bad apples out, I also think that any regional legal officer who is a member of the Law Society of Upper Canada has a duty to report, which is independent of whether or not he or she represents an international organization. That duty is clear, and it's even more clear from some of the directives that are coming out at this time.

You referred to the 201 formal cases that you have opened. You said some of them are MUCs. Of the ones that you have asked the minister to review and accept, how many have been successful?

EA: I would like to make a distinction between formal and informal intervention. Formal intervention is when I can write it on paper and have Geneva agree that I am right about a specific case. In those cases, there has been a 100 percent acceptance rate by the minister. Informal interventions are humanitarian—when I think that this person should be protected and assume that Geneva will back me up but am not 100 percent that I am right. In those sorts of case I have received an acceptance rate of at least 75 percent.

Ian Hoy (IH): I would like to comment about the matter of reporting lawyers. It is difficult because often the evidence is not clear-cut that the lawyer has made a mistake. It is inferential from reading the board's decision. Therefore, it is not an easy thing to say that this lawyer has behaved in an unethical or irresponsible manner, even though there might be anecdotal evidence that infers this.

Summary

JCH: We seem to have come full circle. Lorne Waldman began today by encouraging a shared sense of responsibility for the predicament faced in the postclaim review process. No player in the process is completely without blame, and I think we have had a helpful discussion in the sense that, at the very least, we have begun to map out where each of those actors might reasonably begin to improve its performance.

We understand that there are two sides to this. I hope that you would appreciate that when we come to you with concerns, we are coming only with cases that we believe have a great deal of merit and that we would like you to carefully consider them. We act as a kind of filtering process and in the end we take only the few cases that we think have merit.

Fay Sims will now attempt to sketch the path forward from here, based on our discussions in the hope that this is truly the beginning of a dialogue among us rather than the end of a one-day meeting.

FS: I would like to go a step further than Professor Hathaway and propose that we meet again in perhaps a few months or with a different agenda but to go on from this. When listening to Hallam Johnston and Jonathan Kamin talk, I felt that we really should have had somebody from Removals to hear what their procedure is as I did not realize that it was completely separate from the rest of the department. I think it would be very helpful for us to continue this and we hope that other people who are here think so too.

In terms of providing a summary, I would like to begin with the issue of mistakes. I do not think it came as any surprise that mistakes were being made at the board in three basic areas. First, there are simply poor, bad decisions by board members. Second, when there has been a change in country situations, there is no mechanism for further review before the board, and third, there are poor legal representation of clients at the board for whatever reasons. What I heard from the representative from Legal Services is that the board is really not interested in reopening cases unless they can find a breach of natural justice. I personally feel, as do others here today, that is too narrow and limited a basis for reopening cases. In particular, I like Lorne Waldman's suggestions about having a discussion in the near future about broadening those areas.

In particular, I'd like to address the representative of the minister's office and suggest that there is still time to change Bill C-86.

JGB: Well, I will be making a report on my return and that will be included, I can assure you.

FS: I was also very interested in a couple of other suggestions today regarding humanitarian and compassionate grounds that become known to board members during the hearing of cases. If they find that people do not meet the clear definition, is it not possible to have a mechanism that enables the board to deal directly with the minister's office again on cases that they think merit a particular analysis? If they could not be taken directly to the minister's office, perhaps the chairman of the board could set up a professional area within his office from where the cases that have been recommended would be referred directly to the minister. Perhaps a second way would be to have the same kind of department, but these cases could be taken directly to CEIC, to that postclaim review with a very brief submission from the board members to go directly into their review consideration.

We went from there to talking about Hallam Johnston's department, the Case Management Branch. What I am still not clear about is this eight-country list—whether or not that list has remained static since it was first initiated. I am wondering if that country list might be made available to us. I would like to suggest that any changes for circumstances of countries on that list be publicly announced.

HJ: The list has not changed. There has been consideration from time to time with particular countries coming off or going on; however, there has been no change. I offered to consider the input and representations of the countries that should be subject to that kind of careful review. We have not had any input to date, but that offer remains.

FS: I have a proposal for Mr. Kamin of CEIC relating to the discussion earlier regarding the lack of country specialization of those looking at the cases postclaim. Instead of having people who are expected to know about all the country situations, could there not be a section that would receive training and become specialists in particular country areas whose job it will be to keep up with what is going on? We regularly give all our documents to the board and I am sure there could be arrangements made to assist with this kind of set-up with the postclaim reviews.

You [UNHCR] could have been much more cautious and I appreciate that you spoke very honestly to us.

Clearly, there is still a problem when I consider that a Somali could have been refused at postclaim review in light of what's happened since January 1992 and the widespread human rights violations that have happened in Somalia. It still has not been made clear to me how they could not have been considered under the criteria of harsh, inhumane conditions upon return and have been granted landing under those terms. I would also ask that if we have another meeting that we have the numbers from both of your departments for the levels of acceptance rates of postclaim reviews or at Case Management.

Is it not possible to have some kind of receipt procedure at a local CEIC office? When a submission is made on behalf of a client, could a very simple receipt form be sent back to the person who sent in the submission, so that the person sending the submission feels confident that it's been received, that it has made it into the file, and that it will be considered? At this point, none of us have any idea that this is happening at all. Things just seem to disappear and we don't know what happens to what we have spent a considerable amount of time preparing. I very much appreciated having this meeting today and I am glad to have had this opportunity to hear about things from your side. I think that we on the advocacy side are all very aware that we see perhaps the most meritorious cases, and that the people who come to us or the people whose cases that lawyers refer to us are people who have a great deal of merit in their cases and whom we feel a responsibility to assist. We understand that you see a great deal of other cases that are not credible, that are clearly fabricated. We understand that there are two sides to this. I hope that you would appreciate that when we come to you with concerns, we are coming only with cases that we believe have a great deal of merit and that we would like you to carefully consider them. We act as a kind of filtering process and in the end we take only the few cases that we think have merit.

Finally, I would like to thank the representative from the UNHCR for his candour regarding what he thinks are the possibilities of his role here in Canada. You could have been much more cautious and I appreciate that you spoke very honestly to us. I knew that you made formal interventions directly to the minister; however, I learned today that you also make informal interventions to the minister's office. I also didn't know that your local representatives make calls to the local offices to call attention to particular cases and problems, and that was very helpful for us to hear that. I just hope that your people will receive a good consideration from those offices.

JCH: This brings to an end a day of genuine collegial concern to resolve a problem. I must tell you that when we first undertook this project, we did so with some trepidation, wondering whether we might in fact end up with nothing more than a confrontation and two very diverse groups walking away without having spoken forthrightly. That was not the case and I genuinely thank everyone who is here today for having been so very open to the ideas of others. ■

Extract from New Immigration Regulations, re Bill C-86

Immigration Regulations, 1978 —Amendments in Consequence of Bill C–86: Phase I

[The following extract is from the *Canada Gazette*, Part 1 (Extra No. 4, Vol. 126), December 23, 1992.]

(b) Post-Determination Refugee Claimants in Canada Class (PDRCC)

Previously, under the refugee determination system, persons who were refused refugee status by the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board had their cases automatically reviewed by immigration officials to determine if they would be subject to unduly harsh or inhumane treatment in the country to which they were to be removed. If the assessment was positive, steps were taken to grant landing to the persons under the authority of the old subsection 114(2) of the *Immigration Act*.

This review was introduced by the Minister of Employment and Immigration of the day, to complement the coming into force in 1989 of legislative provisions creating a new refugee determination system (Bill C-55). The measure responded to concerns about persons who might fail to meet the Convention refugee definition, but who nonetheless should not be removed because they would be facing a personal risk of serious harm.

These amendments are designed to clarify the existing review process. Elaboration of the decision criteria in regulations will benefit both the refused refugee claimant and the decision maker. Specific immigration officers have been assigned to apply these criteria. Also, they have received the required training.

Eligibility criteria for the class are set out in the definition section of these amendments. All refused refugee claimants are included, with the exception of those whose claims have been determined to lack credible basis by the Convention Refugee Determination Division pursuant to subsection 69.1(9.1) of the Act (as amended by Bill C-86), those who have withdrawn or abandoned their claims, or those who voluntarily leave after their claim has been refused.

The claimant must be subject to an identifiable risk if forced to leave Canada. The risk must be compelling, consisting of a threat to life, excessive sanctions or inhumane treatment. It must be personal, that is, directed at the individual rather than being based on generalized situations of risk faced by other individuals in the country of return. However, this risk cannot be caused by the inability of the country of return to provide adequate health care. It should be noted that claimants in this class will not be refused landing if they fail to meet medical requirements, if they are otherwise eligible for the class. Humanitarian and compassionate review is still available to such persons pursuant to section 114(2) of the *Immigration Act*.

It should be stressed that these requirements are not strictly speaking admissions criteria. The refugee determination system itself contains the eligibility criteria for the admission of in-Canada claimants. The criteria are intended to be narrowly drawn to avoid creating an admissions system on top of the refugee determination system.

Pursuant to landing requirements in the new section 11.4 of the *Immigration Regulations, 1978*, the review process is automatic: the refused claimant is deemed to have applied. The review is available only once. There is no provision for a claimant to apply again. Refused claimants are give 15 days after notification of the Convention Refugee Determination Division negative decision to make submissions. A decision may be made even if no submissions are received within the required time.

The provisions which govern health, security and criminality requirements for members of this class are similar to those for successful refugee claimants contained in the *Immigration Act* (as amended by Bill C-86). Refused refugee claimants may be landed even if they do not meet medical requirements, since they cannot be removed from Canada. However, refused claimants who have been convicted of serious crimes, or who do not meet security requirements cannot be landed. Nor will landing be granted until the applicant provides a satisfactory identity document.

Applicants may apply on behalf of dependants in Canada. If any dependant, whether in Canada or outside the country, fails to meet criminality and security requirements, neither the applicant nor the dependants may be landed.

Section 7 of the Act (as amended by Bill C-86) requires the annual Immigration Plan to set out management numbers for each class. For some classes, these numbers are projections or estimates, for others, they are maximum numbers. The new section 11.5 of the Regulations provides that the Plan be tabled before Parliament not later than June 15 of each calendar year. By definition, members of the in-Canada classes are already in the country; there is no point in setting landing limits on them. A single number is assigned for both classes, representing estimates of all class members to be landed in the year—live-in caregivers, and refused refugee claimants.

Alternatives Considered

Amendments were necessary to give effect to the legislative provisions enabling admission on humanitarian and compassionate or public policy grounds (new section 6[5] of the Act). As indicated above, the definitions and landing requirements which make up these amendments are codifications and clarifications of existing practices.

Anticipated Impact

These amendments codify practices developed under the predecessor of section 114(2) of the *Immigration Act*. This provision allowed the Governor in Council to facilitate the admission of persons on public policy or humanitarian and compassionate grounds. The creation of classes and landing requirements in the *Immigration Regulation, 1978*, will provide more transparent criteria which should result in more consistent decision-making. It will also reduce resources required to prepare and review applications, and as a result, processing times will decrease by up to three months.

The amendments are expected to have no significant impact on the numbers of affected persons landed in Canada, since the provisions do not represent a significant change in the existing approach to live-in caregivers, or to the review of the situation of refused refugee claimants. In 1991, about 3,200 persons were landed in Canada as live-in caregivers. Preliminary data on case reviews of refused refugee claimants indicate that between January 1, 1989, when the review was introduced, and October 1, 1992, about 9,100 cases were reviewed, with 8,800 negative decisions, and 300 positive decisions (3.2%).

There was a great deal of confusion and misunderstanding surrounding the review of refused refugee claimant cases. Clarifying the decision criteria in the Regulations will reduce confusion and enhance the consistency of decision-making.

Explanatory Notes

Post-Determination Refugee Claimants in Canada Class

"Member of the post-determination refugee claimants in Canada class" means an immigrant in Canada in respect of whom

(a) the Refugee Division has made a determination that the immigrant is not a Convention refugee and who is not the subject of an application for leave to commence an application for judicial review or an application for judicial review following the determination, other than an immigrant

(i) who has withdrawn the immigrant's claim to be a Convention refugee,

(ii) whom the Refugee Division has declared to have abandoned a claim to be a Convention refugee, pursuant to subsection 69.1(6) of the Act,

(iii) whom the Refugee Division has determined does not have a credible basis for the claim, pursuant to subsection 69.1(9.1) of the Act, or

(iv) who has left Canada at any time after it was determined that the immigrant is not a Convention refugee,

(b) an immigration officer has not previously refused landing pursuant to section 11.4,

(c) removal to a country to which the immigrant can be removed would subject that immigrant to an objectively identifiable risk, where the risk is not a risk that is faced generally by other individuals in or from that country,

(i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of the country to which the immigrant can be removed to provide adequate health or medical care,

(ii) of extreme sanctions against the immigrant, or

(iii) of inhumane treatment of the immigrant, and

(d) the objectively identifiable risk referred to in paragraph (c) would apply in every part of the country referred to in that paragraph.

Ministerial Exemptions

R.2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

PDRCC Regulations

R.11.4 (1) A member of the post-determination refugee claimants in Canada class and the member's dependants, if any, are subject to the following landing requirements:

(a) the member and the member's dependants must not be persons described in paragraph 19(1)(c), (c.1), (c.2), (d), (e), (f), (g), (1), (k) or (1) or (2)(a) or subparagraph 19(2)(a.1)(i) of the Act;

(b) the member and the member's dependants must not have been convicted of an offence referred to in paragraph 27(2)(d) of the Act for which a term of imprisonment of more than six months has been imposed or a maximum term of imprisonment of five years or more may be imposed;

(c) the member and the member's dependants must have been in Canada on the day on which they became members of the post-determination refugee claimants in Canada class and must have remained in Canada since that day; and

(d) the member and the member's dependants must be in possession of valid and subsisting passports or travel documents or satisfactory identity documents.

(2) For the purposes of subsection 6(5) of the Act, a member of the class referred to in subsection (I) shall be deemed to have submitted an application for landing to an immigration officer on the day on which the member became a member of that class.

(3) The landing requirements referred to in subsection (1) shall not be applied before the expiration of the 15-day period immediately following notification by the Refugee Division to a member of the post-determination refugee claimants in Canada class that the member is not a Convention refugee, so that the member may make submissions to an immigration officer respecting the matters referred to in paragraphs (b) and (c) of the definition "member of the post-determination refugee claimants in Canada class" in subsection 2(1). ■

RESEARCH FELLOWSHIP AND AWARDS

Centre for Refugee Studies
York University

A. KATHLEEN PTOLEMY RESEARCH FELLOWSHIP

An annual Can. $15,000 Kathleen Ptolemy Research Fellowship has been set up to permit a visiting scholar from a developing country to undertake research on refugees. Scholars interested in the study of refugee women who are in need of protection, and demonstrate commitment to refugee rights advocacy or service to the disfranchised will be given priority.

B. ANNUAL RESEARCH AWARDS

The goal of these research awards is to provide funding to a number of graduate students while they undertake research projects under the auspices of the Centre for Refugee Studies. Eligible students are/will be registered full time in a graduate program at York University and whose intended research area is refugee and migration studies. International students are eligible to apply.

VALUE OF AWARDS

i. Naomi Harder Refugee Award - Can. $15,000
The Naomi Harder Award may not be held in conjunction with an external scholarship or any other teaching or research assistantship.

ii. General Refugee Awards - 5 awards of Can. $9,000
The General Refugee Awards may be held in conjunction with an external scholarship, but may not be held in conjunction with any other teaching or research assistantship.

Candidates should submit a curriculum vitae (resumé), academic records, two letters of reference and a sample of research or publications to the Centre for Refugee Studies, together with a statement of intent by March 15, 1993.

VISITING SCHOLARS

Visiting scholars may use the facilities at the Centre for Refugee Studies for short-term or long-term projects. Short-term projects are those that can be completed within a few weeks or months. We will provide visiting scholars with office space and a computer. Long-term research projects are for the duration of the academic year, which extends from September to April and are also eligible for funding support.

Please submit your applications to:

Helen Gross, Student/Faculty Liaison
Centre for Refugee Studies
Suite 322, York Lanes, York University
4700 Keele Street
North York, ON
Canada M3J 1P3

Tel: (416) 736-5663 • Fax: (416) 736-5837
E-mail via BITNET, address: REFUGE@YORKVM1

CENTRE FOR REFUGEE STUDIES
ANNUAL DINNER AND MEETING

Jade Garden Restaurant, 222 Spadina Avenue, Toronto

February 4, 1993

DONOR INFORMATION

Corporate Patron	A table for ten to the dinner *plus* a subscription to ***Refuge*** and notification of events sponsored by CRS	**$600**
Patron	One ticket for the dinner *plus* a subscription to ***Refuge*** and notification of events sponsored by CRS	**$125**
Friend	One ticket to the dinner	**$60**
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I would like to reserve ____ table(s). Total number of dinner tickets required: ____

I wish to renew my support. Enclosed is my cheque in the amount of:

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❒ I will attend the dinner on February 4, 1993.

Menu preference: ❒ Regular ❒ Vegetarian

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CRS ANNUAL DINNER AND MEETING

FEBRUARY 4, 1993

Yes, it's that time of year again! The Centre for Refugee Studies (CRS) cordially invites you and your friends to join us at our Annual Chinese Dinner and Meeting. The dinner is being held on February 4, 1993 at the Jade Garden Restaurant, 222 Spadina Avenue, Toronto.

VINCENT KELLY AWARD

We are pleased to announce that we have invited the Honourable Kim Campbell, Minister of Justice and Attorney General of Canada, to present the Vincent Kelly Award.

This year's award will be presented to **Barbara Jackman** and **Pierre Duquette,** two lawyers who have performed outstanding work on behalf of refugees. The dinner will focus on the legal profession and its contribution in the area of refugee studies.

CRS ENDOWMENT FUND

Our annual dinner is an opportunity for CRS to bring together those interested and involved in refugee studies. This year the dinner will assist in funding two graduate legal students with their research through the CRS Endowment Fund.

We look forward to you joining us or your financial support through a donation, which will then enable people from the refugee community to attend our dinner on your behalf.

Please copy the registration form and send it to us at your earliest convenience. The CRS greatly appreciates your interest in and support of our endeavours.

Join Us!

Refuge • Vol. 12, No.6 • January 1993

CANADA'S PERIODICAL ON REFUGEES
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