

Pitfalls in Relying on Common Law Rules of Evidence for Administrative Tribunals

By France Houle*

SUMMARY

Most administrative tribunals are not bound by the formal common law rules of evidence. Usually, they can receive and base their decision on any credible and trustworthy evidence. Safeguards to the fair use of this free system of evidence are found in the principles of natural justice. However, when tribunals have to resolve an evidentiary issue for which they cannot find an answer in the principles of natural justice, they can turn to the formal common law rules of evidence. Indeed, courts have stated that administrative tribunals can rely on these rules, provided that the use is *justified* and that the rules are *correctly* used.

This article is based on a study of evidentiary practices of the Canadian Immigration and Refugee Board in assessing the credibility of claimants' testimonies versus that of documentary evidence. It aims at showing that when the common law rules are misused by a tribunal, the end result is the development of a mish-mash of unsound evidentiary practices that are not only incoherent with the legal context of a tribunal, but unfair to the parties in administrative proceedings. The author concludes with some proposals as to possible legislative changes to the free system of evidence

OUTLINE

INTRODUCTION

PART I: A MISH-MASH OF UNSOUND EVIDENTIARY PRACTICES

- A. Presuming Unreliability of Testimonies**
 - a) Inquiring into Credibility and Trustworthiness
 - b) Being an Interested Party in the Proceedings
- B. Presuming Reliability of Documentary Evidence**
 - a) Applying the Criterion of Disinterest of Researchers
 - b) Assessing the Objectivity of the Information

PART II: UNDERSTANDING THE DECISION-MAKING ENVIRONMENT OF A TRIBUNAL

- A. Distorting the Refugee Determination Process**
 - a) Denying the Specificity of the Refugee Determination Process
 - b) Unbalancing Fairness and Efficiency
- B. Bringing Changes to the Legislative Framework**
 - a) Assessing Reliability in a Refugee Determination
 - b) Assessing Relevancy and Probative Value

CONCLUSION

*France Houle, Associate Professor, Faculty of Law, Université de Montréal, Québec, Canada.

INTRODUCTION

In common law jurisdictions, members of administrative tribunals are usually not bound by the formal rules of evidence. In this free system of evidence, members are empowered to receive and base their decisions on any credible and trustworthy evidence, as long as they respect the safeguards provided by the principles of natural justice. In some instances, however, a tribunal may have to resolve an evidentiary issue for which they cannot find an answer in the case law pertaining to natural justice. In these situations, they can turn to the formal common law rules of evidence. Indeed, courts have stated that administrative tribunals can rely on these rules in a given case provided that the use is justified and the rules correctly used¹.

This initial intuition of courts is sound, for the idea was that the ruling of an administrative tribunal, made on the basis of a common law rule, would stand only for that particular decision. However, the legal environment of administrative tribunals, and especially those involved in mass-adjudication, has changed considerably in the last 20 years. Tribunals are now facing greater pressure to enhance coherence and consistency in their own administrative ‘case-law’. As a consequence, Board members of many tribunals routinely apply their internal ‘jurisprudence’. Some tribunals may explicitly refer to it in their decisions, others may not but the reference is implied. Indeed, in this situation, it is often possible to retrace the same line of reasoning from decision to decision and, sometimes, back to the first decision in which a particular argument was made.

Because some common law rules of evidence have a ‘jurisprudential’ effect in the daily functioning of an administrative tribunal, it is important to shed a critical look at their use by Board members. This type of analysis can make visible their positive or negative consequences on the legal system in which they operate. Indeed, it is a well-accepted view among comparative law scholarship that borrowing rules from one legal system and integrating them into another requires thinking beyond temporary solutions². Questions such as the following need to be asked: How easily can the rules in question be severed from their system of origin? To what extent are evidentiary and substantive issues interrelated in that system? How have the rules been interpreted in legal practice in these systems? How essential is that interpretation? To what extent can the rules be adapted to the context of an administrative tribunal?

In relation to the specific effect of importing common law rules of evidence into administrative law, scholars have already addressed the problem of the “judicialisation” of administrative law and its

¹ *Local Government Board v. Arlidge*, [1915] A.C. 120, 133 (H.L.); *Board of Education v. Rice*, [1911] A.C. 179, 182 (H.L.).

² J.C. Reitz, “How to Do Comparative Law”, 46 (1998) *American Journal of Comp.* 617; R.Sacco, “Legal Formants: A Dynamic Approach to Comparative Law”, (1991) 39 *American Journal of Comp. L.* 343; O. Kahn-Freund,

associated negative impact through a gradual rigidification of the free system of evidence applicable in administrative law. For this reason, I will focus on another problem which may arise from such integration: the distortion of a legal system from its original intent. Indeed, the misuse of the formal common law rules—either because of a lack of justification based on a sound comparative analysis, or because of a plain and simple incorrect use of the common law rule— may create pathologies in a legal system.

To illustrate this point, I will draw attention to the evidentiary practices of the Refugee Protection Division (RPD) of the Canadian Immigration and Refugee Board. I wish to focus, in particular, on their practices in assessing the credibility of claimants' testimonies in light of the documentary evidence which was filed at a hearing. An important number of negative decisions show that documentary evidence is used to contradict the claimant's testimony—even when no clear reason is given in the decision to explain why Board members disbelieve claimants' testimony in the first place³. Further, claimants are denied a fair opportunity to refute the documentary information used against them, violating a principle of natural justice. Over time, a practice has become widespread among RPD members: they assume that greater weight must be given to documentary evidence, as if it were authoritative evidence⁴, than to the claimant's testimonial evidence. It is not rare to encounter decisions in which RPD members give more weight to public documents because they consider the evidence contained in such documents to be more disinterested and objective than claimant's testimony, without providing any further justification⁵. As a result, they assume that claimants' testimonies are less reliable because they are an interested party to the outcome of the case. These practices, developed through time by Board members, have no basis in the

“Comparative Law as an Academic Subject”, 82 (1966) L. Q. Rev. 40. C. Valcke, “Global Law Teaching”, 54 (2004) *Journal of Legal Education* 160.

³The Board has the right to prefer documentary evidence over a claimant's testimony: *Zhou v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. (Quicklaw) No. 1087 (F.C.A.), even if this testimony is trustworthy: *Dolinovsky v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. (Quicklaw) no 1784, par. 4, 7 (F.C.). But there are also decisions in which the Federal Court controls the lawfulness of the decision when the tribunal chooses to believe the documentary evidence instead of the claimant's testimonial evidence, but without giving reasons to justify its arguments: *Okyere-Akosah v. Minister of Employment and Immigration*, (1994) 157 N.R. 387 (F.C.A.)

⁴In 1994, I concluded that the evidence was credible, but I expressed serious reservations about the fact that documentary evidence can be described as authoritative. I have not changed my mind on this issue: France HOULE, “The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience”, (1994) 6 *Int. J. Ref. Law* 6, 30.

⁵Here are a few recent decisions that illustrate this problem: *B.Z.P. (Re)*, [2000] C.R.D.D. (Quicklaw) no 6, par. 12: The RPD member concluded as follows: “In view of this documentary evidence to which the tribunal gives more weight than to the claimant's testimony because the first is objective and unbiased while the second is not....”; *B.T.K. (Re)*, [1999] C.R.D.D. (Quicklaw) no 344, par. 11 “The tribunal gives more credence to the documentary evidence than to the claimant's testimony. The documents constitute objective evidence that has no bearing on the outcome of this hearing”; *O.H.Q. (Re)*, [2001] C.R.D.D. (Quicklaw) no 493, par. 13: “The tribunal prefers objective documentary evidence, noting that the sources (sic) have no relevance to the outcome of this claim.” See also: *O.A.L. (Re)*, [2002] C.R.D.D. (Quicklaw) no 442: par. 32; *I.H.N. (Re)*, [2001] C.R.D.D. (Quicklaw) no 506, par. 45; *Y.X.F. (Re)*, [2002] C.R.D.D. (Quicklaw) no 77, par. 6.

free system of evidence in administrative law but can be traced back to formal common law rules of evidence. As I will show, the end result is the development of a mish-mash of unsound evidentiary practices that are incompatible with the legal environment of the refugee determination process.

PART I: A MISH-MASH OF UNSOUND EVIDENTIARY PRACTICES

By severing their bonds with the common law rules of evidence, administrative tribunals espoused a perspective on evidence specific to proof of material facts in civil matters, which emerged more than two hundred years ago in the civil law tradition. Indeed, partly because of the progress made by the French *notaires* in the art of crafting pre-constituted written proof, French legal scholars were able to make a first distinction between the proof of a legal act⁶ and of a material fact⁷. This fundamental classification constitutes the cornerstone of the law of evidence in civil matters in Quebec and French civil law⁸. While the proof of a legal act is governed by strict rules enacted in the *Civil Code*, the proof of material facts is governed by a free system.

In a free system of evidence, admissibility is not an issue in general; assessment is the focal point of the adjudicative process. Indeed, all the evidence presented during a hearing can be admitted as long as it provides some guarantee of credibility or trustworthiness. As a consequence, decision-makers exercise wide discretion when they weigh evidence, although their discretion is circumscribed by two broad principles: reliability and relevancy. These are the parameters governing the assessment of evidence in a free system. They are used by courts and administrative tribunals to resolve civil matters.

Jurisdictions of administrative tribunals vary tremendously. Some may perform regulatory, administrative and adjudicative duties; others may only have adjudicative powers. Presumably, it is in this last instance that the importation of common law rules of evidence would be the most effective, due to a close resemblance between courts and these purely adjudicative tribunals. This is one of the reasons for which I chose the RPD as a site for my study. However, there is a second reason to opt for this tribunal. Indeed, among purely adjudicative administrative tribunals, the context in which they operate vary greatly. In particular, the difficulty to assess the credibility of a testimony may be, by itself, a sufficient reason to seek guidance in the common law rules of evidence, for many of its rules were precisely created to set fair parameters to check the veracity of a story. In this regard, the RPD is fertile ground for examining this issue.

⁶ J.-C. Royer, *La preuve civile*, 2nd ed., Cowansville (Qc, Canada), Yvon Blais, 1995, par. 1319; G. Marty and P. Renaud, *Introduction générale à l'étude du droit*, vo. 1, 2nd ed., Paris, Sirey, 1972, no 149.

⁷ J.-C. ROYER, *op. cit.*, note 6, par. 1320; G. MARTY et P. RENAUD, *op. cit.*, note 6, no 163.

⁸See for example, the *Quebec Civil Code* sections 2813-2826 for the proof of a legal act and section 2845 for material facts.

The RPD performs a judicial function in a specialized field whose boundaries are defined by the Act. The RPD determines whether refugee claimants have demonstrated that they have a good reason to fear persecution by state authorities in the country from which they are seeking asylum for one of five reasons listed in the definition: race, nationality, religion, political opinion and membership in a social group⁹. To fulfil this mandate, members may receive any credible and trustworthy evidence and base their decisions upon it¹⁰.

The process of assessing the weight of evidence to determine refugee status is complex and difficult, mainly because of the great uncertainty about the knowledge on which refugee claims are founded. The events related by the claimant cannot be checked directly: they took place in a foreign country and over a period of time that is often very far removed from the RPD hearing. In most cases, the decision-maker is given only an incomplete story, namely the claimant's version of events, and even then, this is usually done through an interpreter. Therefore, Board members are required to make sound decisions based on scanty, ever-changing information on the refugee claimants' countries of origin and, more significantly, information about a culture that is alien to them. In fact, Board members are required to assess the credibility of testimony in a near cultural vacuum, which prevents them from forming a coherent understanding of the claimant's narrative¹¹.

Therefore, from the decision-makers' standpoint, the problem is as follows: How can they analyse something that is not part of their everyday lives when the information that originates from this unfamiliar context is uncertain, fragmented and constantly changing? How can they assess the relevance and probative force of a claimant's testimony without falling into the trap of naïveté? In order to overcome this difficulty, and especially when they are about to make negative determinations, Board members apply a presumption of unreliability of testimonies, on one hand, and a presumption of reliability of documentary information on the other, thereby putting them in contradiction to one another.

A. Presuming Unreliability of Testimonies

⁹ *Immigration and Refugee Protection Act*, S.C. 2001, ch. 27, art. 96. The new Act also takes into account reasons of torture and mistreatment and gives the RPD jurisdiction over persons described as "in need of protection", section 97.

¹⁰ *Immigration and Refugee Protection Act*, cited note 9, subsection 170(h).

¹¹ If its detractors are to be believed, it does not succeed very well in doing this. The RPD has been widely criticized because it was created by professionals who work in this field (doctors, psychiatrists, lawyers, social workers). To explore these issues, a research team conducted preliminary analyses, from 1997 to 1999, of files of refugee claimants whose applications were rejected. This exploratory study made it possible to define a number of general problems associated with the decision-making process which to a certain extent explain professionals' dissatisfaction. François CRÉPEAU, Patricia FOXEN, France HOULE, Cécile ROUSSEAU, "Analyse multidisciplinaire du processus décisionnel de la CISR," (2001) 19:4 *Refuge* 62-75. Cécile ROUSSEAU, François

Board members' reasons for decisions which reject claims based on a lack of credibility are often unsatisfactory. Indeed, it is not rare to find reasons that are either vague and inconclusive (3-4 paragraphs) or, conversely, painstakingly detailed (60 paragraphs and more). One of the reasons why Board members' decisions are unsatisfactory from a legal perspective is because testimonies are examined only from the standpoint of their reliability. When the reasons are vague it is usually because the decision-maker found the testimony confused and evasive, concluding that the claimant was insincere or not credible. When the reasons are very detailed, it is usually because the decision-maker is of the opinion that the testimony is not trustworthy. The main causes are the incapacity of the claimant to remember the details of an event or that the delivery of the testimony reveals inconsistencies or contradictions.

Therefore, credibility and trustworthiness are the two criteria used to assess the testimony. The question here is whether it is sufficient to rely only on these two criteria. Two reasons can be advanced to suggest they are not. First, it is important to point out that although the RPD can, of course, conclude that a testimony is not reliable, the Federal Court has often ruled that even if a testimony contains a few implausible or exaggerated accounts, these alone are not always sufficient to conclude that the claimant does not have a well-founded fear of persecution.¹² The RPD must therefore have strong reasons to doubt the truthfulness of the testimony. Second, even if the Board can rely on unjustified memory failures or contradictions in a claimant's testimony to reach a conclusion that it is not trustworthy, the Federal Court has on several occasions cautioned IRB members not to conduct a painstaking analysis of the evidence to find such contradictions¹³. When the Court is of the opinion that the tribunal looked for contradictions too meticulously, this would be a ground for quashing the decision¹⁴.

These rulings of the Court are sound for they are in tune with the two characteristics of the refugee determination process, namely the scarcity, fragmentation and constant change of the information pertaining to the countries of origin of claimants and the fact that claimants and Board members do not share the same cultural backgrounds. This type of environment, more than any other, requires a much more nuanced analysis of the evidence: one that will also assess relevancy. Indeed, Board members should not reject a claim when the purported confusion, evasiveness or contradictions uttered by the

CRÉPEAU, Patricia FOXEN, France HOULE, "The Complexity of Determining Refugeehood," (2002) 15:1 *Journal of Refugee Studies* 43-70.

¹²Abundant jurisprudence on this point asserts that the contradictions or divergences must be real, major or serious: *Lai v. Canada (Department of Employment and Immigration)*, (1989), 8 Imm. L.R. (2d) 245, 246 (C.F.A.); *Ahmed v. Canada (Department of Employment and Immigration)*, (1990) 12 Imm. L.R. (2d) 212, 216 (C.F.A.); *Rajaratnam v. Canada (Department of Employment and Immigration)*, (1991) 135 N.R. 300, 307 (C.F.A.); *Giron v. Minister of Employment and Immigration*, (1992) 143 N.R. 238, 240 (F.C.A.).

¹³*Graciélome v. Canada (Minister of Employment and Immigration)*, (1990) 9 Imm. L.R. (2d) 237, 239 (F.C.A.).

¹⁴*Owusu-Ansah v. Canada (Department of Employment and Immigration)*, (1989) 8 Imm. L.R. (2d) 106, 113 (C.F.A.)

claimants have no or peripheral relevance to the fundamental elements of their claims¹⁵. When the case turns around an assessment of the testimony, Board members mostly base their findings on the sole evaluation of its reliability, namely its credibility and/or trustworthiness. In their reasons for decisions, their assessment of the reliability of the testimony often resembles a shopping list. Board members simply enumerate the flaws, without assessing their relevancy and probative value, and draw a conclusion that the testimony is unreliable. In the first section, I will show how this practice translates into the Board's analysis. Also, from these decisions, one cannot help but notice that the arguments used by RPD members to refuse refugee status to the claimant reflect a distrust of claimants' testimony which, I contend, amounts to the application of a *de facto* presumption of unreliability of testimonies. This often manifests itself by a qualification of the claimants' testimonies as *interested*, thus implying that they are less reliable than other types of evidence such as documentary evidence. In the second section, I will criticize this practice.

a) Inquiring into Credibility and Trustworthiness

In principle, Board members have to presume that testimonies are given in good faith unless they have good reasons to believe otherwise. This basic statement was reiterated by the Federal Court in numerous cases¹⁶. Therefore, before Board Members can examine a testimony to check its reliability in light of the documentary evidence, for example, they should state first the reasons for which they believe the testimony is not, in itself, reliable. They can do so by making a demonstration that it is incoherent, evasive or contradictory and, thereafter, completing their reasoning if needed by a comparison between the testimony and the documentary evidence. But their reasoning often follows another path: even when no fault can be found in the testimony, the claim will nonetheless be rejected on the basis that it is not in whole or in part compatible with documentary evidence. This practice received the blessings of the Federal Court: "The Board is entitled to give more weight to documentary evidence, even if it finds the applicant trustworthy and credible."¹⁷ The Court even went as far as saying that the "presumption that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be

¹⁵The Federal Court cautioned the RPD against reviewing testimony in minute detail: *Rawal v. Canada (Minister of Employment and Immigration)*, [2002] F.C.J. (Quicklaw) no 116, par. 25 (F.C.); *Attakora v. Minister of Employment and Immigration*, (1989) 99 N.R. 168, 169.

¹⁶*Sidhu v. Canada (Minister of Employment and Immigration)*, 23 Imm. L.R. (2d) 107; *Okyere-Akosah v. Minister of Employment and Immigration*, (1994) 157 N.R. 387 (F.C.A.); *Chaudhry v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. (Quicklaw) no 708.

¹⁷*Bustamante v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 643 (T.D.) (QL) at paragraph 9; *Dolinovsky v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1784 (T.D.) (QL); *Gomez-Carrillo v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1396, (T.D.) (QL); *Oppong v.*

rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention.”¹⁸

Of course, this case-law would deserve a more nuanced analysis. However, it shows that the Federal Court is reluctant (as expected) to interfere with the issue of assessing and weighing the evidence by administrative tribunals. In a sense, Board Members have *carte blanche* to assign weight to evidence and unless the Board makes a patently unreasonable error, the Court will defer to the Board’s judgment. As I will explain in the first section, the Court should examine more cautiously Board members’ reasoning for in many cases they simply omit to state their ‘good reasons’ for which they believe the testimony not to be reliable. Second, I will give a few examples to illustrate that this reasoning can lead to a serious unfair treatment of the case.

i) Omitting to state ‘good reasons’

The testimony should be deemed to have been given in good faith, unless there are good reasons to doubt its truthfulness. Of course, the RPD may rely on contradictions in the evidence to justify a conclusion that a testimony is not reliable. However, the Court has on several occasions cautioned IRB members not to conduct a painstaking analysis of the evidence to find such contradictions¹⁹. When the Court is of the opinion that the tribunal looked for contradictions too meticulously, this would be a ground for quashing the decision²⁰. Moreover, even if the testimony contains a few implausibilities and exaggerations, the Court will rule that these alone are not always sufficient to conclude that the testimony is not credible or trustworthy²¹.

In sum, these reasons cannot be based on mere speculation or on a minute examination of every fact, however insignificant they are in comparison to the overall claim, stated in the testimony (or the Personal Information Form or the declarations made at the port of entry). However, decisions of Board members show that such is the case. For example, it is very frequent to find statements in decisions that the story

Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 1187 (F.C.T.D.) (QL); *Noori v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 938 (T.D.) (QL).

¹⁸ *Adu c. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. no 114 (F.A.C.) (QL), Hugessen, Strayer and Robertson JJ., Jan. 24, 1995, par. 1: “In our view it was no error for the Board to infer that the absence of any documentary evidence as to the existence of the law under which the appellant claimed to have been persecuted indicated that there was no such law. The fact that the appellant had sworn that there was such a law was not necessarily sufficient evidence of the law’s existence. A law is a very public fact and where, as here, there is comprehensive documentary evidence of country conditions, it is entirely reasonable to expect that such a law, if it exists, will be mentioned. Accordingly, the Board was well within its rights when it found that “the absence of documentary evidence ... suggests that no such law exists”.

¹⁹ *Gracielome v. Canada (Minister of Employment and Immigration)*, cited in note 13.

²⁰ *Owusu-Ansah v. Canada (Department of Employment and Immigration)*, cited in note 14

²¹ See cases cited in note 12.

‘does not ring true’²² because of the demeanour of the claimant. The fact that the claimant is too relaxed or too nervous or smiling during testimony when crying or being upset is the expected response to the eye of the Board member—all these demeanours are perceived as sufficient for Board members to justify their doubt in the truthfulness of the claimant. Further, these doubts find objective basis through their analysis of contradictions and inconsistencies in the claimant’s testimony. As a result, the Board members feel confident that they have good reasons to doubt that the testimony was given in good faith. However, as the three examples below will show, the reasons are not always as good as they should be and that this type of analysis lacks nuance for it does not assess the relevancy and probative value of inconsistencies and contradictions.

In a case from Sudan, the decision-maker made a list of the claimant’s statements that he found implausible. Among them was that the claimant was able to give the name of the governor, but unable to explain how the governor is appointed. It is not said in the decision why the claimant should have known that and how it affects the core of the claim. This Sudanese claimant also testified that the army from the north set fire to his house and in relation to this fact, the Board member asked where the Sudan People’s Liberation Army were the day his house burned. The claimant answered that “they were not defending that day and that they cannot protect everybody”. This answer was listed as a good cause to find it implausible that the claimant’s house was burnt, but again we are left with no explanations as to why and how these findings are detrimental to the core of a claim for refugee status²³.

²² After a research on QL with ‘does not ring true’ as key-words, 17 English CRDD decisions were found in the bank; with ‘ring of truth’, 133 English CRDD decisions. Here are three examples. *Gebreyes v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 632, No. TA2-04212, August 10, 2004 (QL), at par. 6: “The claimant was examined on the key incident in July 1999 that caused him to flee Ethiopia. He claims he was in his locked car when three masked men tried to force their way into his car. (...) The claimant’s relation of this incident *does not ring true*. Security officials in Ethiopia are armed, act with impunity and to suggest that they would wear masks is to suggest also that they fear prosecution from the very Government that has given them free range on certain targeted groups and individuals.”; *S.E.Y. (Re)*, [1996] C.R.D.D. No. 137, Sept. 12, 1996, par. 49: “The Respondents’ testimony regarding what happened to M1, M2 and M3 with which they travelled to the United States is not believable. The Respondents indicated that the male Respondent told the female Respondent to destroy the passports one day in the United States when he went out to get food for the children. She tried to do so by burning them in the oven. Instead she was convinced by the owner of the house, xxx xxxx, that if she burnt them, the fire alarm would go off which might lead to them being exposed as being illegally in the United States. She was thus convinced to give the passports to xxx xxxxx and to lie to the male Respondent and say that she had destroyed the passports. It was for this reason that the male Respondent said he was so shocked when Gina Champagne, an Immigration Officer, confronted him with these same passports some time later in Canada. This story simply does not have the *ring of truth*. Why would the male Respondent leave it to the female Respondent to destroy the documents when he clearly was the person who had made all of the arrangements for their travel and had been the one to deal with all the documents, both genuine and fraudulent?”; *G. (J.B.) (Re)*, [1995] C.R.D.D. No. 97, Oct. 2nd, 1995: “The testimony about his training is not credible either. At first he stated that his training consisted in him telling his employers about his experience and how he would behave to identify drug smugglers. Then he stated that he was given some individual training on ways to dress and behave in various circumstances. His information, however, was vague and, in the panel’s opinion, lacked the *ring of truth*.”

²³ A claim from Sudan: *A.U.A. (Re)*, [2000] C.R.D.D. No. 133, July 28, 2000, paras 5-7: “(5) The claimant’s testimony was extremely general and vague; his demeanour showed no emotion when recalling the deaths of the

In another case from China, the questioning of the Board member turned around the number of pictures that were taken for her passports. The Board member does not state the reasons why this specific fact is important and the reader is left with the impression that he is picking on trivial details²⁴. Finally, in a case from Angola, the Board member starts his analysis by stating the following point: “The claimant made the following key allegations, which if credible would have resulted in a positive decision for both claimants on at least one of the consolidated grounds.” Thereafter, he proceeds to explain why he found her testimony reliable, but his reasons are confused. It is difficult to say precisely whether the Board member had a problem with the fact that the claimant omitted to state some information in her PIF or because he was not too sure whether it was the father or the daughter that was under threat. The claimant stated that it was the father, but from a letter written by a Canadian doctor and filed as evidence, the Board found that it “reflect[ed] the fact that the adult claimant told him that Angolan soldiers came into her house in January 2001 and tried to take her daughter away” and appeared to believe the version of the doctor (hearsay) over the one stated in the claimant’s testimony. In the decision, there is no indication that the claimant was given an opportunity to clarify her statement and there is also no explanation as to why it is important to know whether the father or the daughter was targeted²⁵.

members of his family. He even had a smile when speaking about this tragedy and his physical posture seemed very detached. The evidence contained improbabilities which the claimant did not satisfactorily explain. (6) The implausibilities are summarized as follows: (7) The claimant testified that the war came to their city, xxxxx, only in early 1999. The civil war is in its seventeenth year in Sudan and the documentary evidence shows that the war is all over the southern part of the country. He gave us the name of the governor but was unable to explain how the governor was appointed, if it was by the south, the north or by the Sudan People's Liberation Army (SPLA). He did not know where they were the following day as he left xxxxx. He testified having no political involvement, and that he and his brothers were never approached to join the SPLA.”;

²⁴ A case from China: Y.Z.P. (Re), [2002] C.R.D.D. No. 216, Jan. 25, 2002, par. 13: The claimant presented a genuine Chinese passport, with a valid Canadian Visitor's Visa, [See Note 3 below] which she used to travel to Canada. She alleged that the passport was obtained by the snakehead. It has her name, her picture, and her date of birth, however the month and day are different from the National Identity Card presented. [See Note 4 below] She was asked when she made the arrangements. First, she stated at the end of March 2000, that she was given the passport to sign. She was again asked the same question, and then she replied at the end of February. She was asked what arrangements she made with respect to the passport. She stated that her cousin made the arrangements; she provided the money and photos. When asked how much money and how many photos she gave, she stated that she gave eighty thousand RMB, but her husband provided the photos. When asked when the pictures were taken, she stated they were taken in 1999; she needed two photos for getting a work identity card. When asked how many photos she got, she stated eight photos. When asked why she needed eight passport size photos, she stated that there is a negative that can be developed. The Refugee Claim Officer (RCO) asked again why she needed eight photos. Then she stated that the photo situation is such that you have to take eight photos. The panel finds that the claimant never answered the questions directly and was giving contrived answers as the questions were asked;

²⁵ A case from Angola: M.U.L. (Re), [2002] C.R.D.D. No. 448, le 16 juillet 2002, par. 6: The claimant made the following key allegations, which if credible would have resulted in a positive decision for both claimants on at least one of the consolidated grounds. Firstly, in oral testimony, the adult claimant claimed that in early 2001, unknown men entered her house, looking for her husband. He answered the door and the minor claimant was thrown to the floor and sustained a cut to her head. The claimant took her to the hospital and the men left. Her husband told her he was having problems at work but gave her no details. This entire episode is omitted from the claimant's PIF. In Canada, the claimant took her daughter to see Dr. Les Richmond to have her daughter examined. Dr. Richmond, in a letter dated June 24, 2002, [See Note 2 below] notes that the minor claimant had a scar and suture marks on her

Good reasons mean substantial reasons, i.e. reasons related to the core of the claim. Therefore, clear contradictions in the testimony itself or the comparison to out-of-court declarations made by the claimant on the alleged persecutions, constitute good reasons. However, most importantly Board members should explain why and how contradictions are relevant with respect to the core of the claim. This is precisely at this stage of the analysis that assessing relevancy is crucial in the refugee determination process as shown in the few examples provided above, but also when documentary evidence is used to contradict a claimant's testimony. Clear contradictions between the testimony and documentary evidence can also constitute relevant reasons to doubt the reliability of a claimant's narrative, but the probative value of such findings should be assessed with great caution, especially when the documentary evidence consists of country reports. Indeed, they contain general information on the conditions in the country of origin of claimants from which deductions on the reliability of the specific facts told by the claimant in her testimony can hardly be made. In fact, as per MacGuigan J. of the Federal Court of Appeal, nothing can be directly deduced from country reports²⁶.

ii) *Some examples of serious situations of unfairness*

Assessing the sincerity of a witness is a subjective exercise which can be quite speculative when a decision-maker and a party do not share the same cultural background. This cultural difference can be reflected in claimants' testimony in several ways. Telling a story is one example of this. Refugee claimants may not answer questions directly, and they may make long digressions about events or even myths and legends in order to provide a context they think is important. For RPD members, this way of telling a story can be exasperating, because they will not understand its relevance and may interpret it as an attempt to be evasive, in which case, they may be tempted to put a stop to it through vigorous questioning. Claimants whose stories are interrupted several times this way may become completely disorganized, even incoherent in their thinking, and decision-makers will then interpret these difficulties as a sign of bad faith. The tribunal interview can also make a strong impression on claimants from a culture in which it is customary to show deference marked by great respect for authority. Such claimants may have problems with the language or difficulties in expressing themselves in complete sentences. Quite often, RPD members perceive these

forehead. However, Dr. Richmond's letter reflects the fact that the adult claimant told him that Angolan soldiers came into her house in January 2001 and tried to take her daughter away. In summary, the claimant's written evidence does not mention any such incident; her oral testimony is about persons she did not know looking for her husband, and her story to Dr. Richmond was that soldiers came looking for her daughter. In January 2001, her daughter would have been five years old. There would have been nothing to prevent soldiers from taking her. There was no explanation from the claimant for not referring to her daughter's injuries in her PIF. Because of the omission from the PIF and the different versions of the same event, I find on a balance of probabilities that this incident did not occur;

difficulties as a deliberate reluctance to tell the truth, whereas they may simply be a reflection of the claimants' anxiety, fear or embarrassment.²⁷ Finally, in their questions, decision-makers may make references to concepts (especially legal) that claimants do not understand or that may not even exist in their cultures.²⁸

When claimants or their counsel suspect Board members of conducting an interview on the basis of false knowledge or prejudice, it is difficult for them to protest because considerable risks are involved in alienating the decision-maker. Furthermore, Board members do not always make the effort they should to correct their ignorance of the events related by claimants. The nature of the problem remains obscure and re-emerges when the reasons are being written. When a claimant's story does not coincide with the decision-maker's viewpoint, the testimony is deemed not credible²⁹.

All these situations give rise to a profound lack of understanding of the context of the claim, leading to decisions that do not provide 'good reasons' to justify that claimants' testimonies were not truthful. In fact, in some decisions, major flaws are evident because of misunderstandings arising from the decision-maker's stated prejudices, which may be based on ethnicity, religion, sexual orientation or sex³⁰. The tribunal members will not always try to understand the claimants' overall situation. In the grounds for the decision, they will limit themselves to making a negative decision based on how claimants acted, as opposed to how they should have acted, in a particular situation.³¹ In other cases, tribunal members will adopt an

²⁶ *Sheik v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.).

²⁷ Z. Kunda and P. Thagard, "Forming impressions from stereotypes, traits, and behaviors: A parallel-constraint-satisfaction theory," (1996) 103 *Psychological Rev.* 103, 284-308.

²⁸ M. Paradelle, "Du déterminisme du milieu: la notion de culpabilité dans la tradition juridique inuit," 6 *C.I.A.J. (La culpabilité)* 83.

²⁹ For example, in a case involving a Rwandan national, RPD members told a claimant of Tutsi origin that the differences between Hutus and Tutsis are difficult to establish and that the two groups are therefore equally in danger. As a result, the RPD members thought that the claimant had not established that his fear of persecution because of his ethnic origin was well-founded. Nevertheless, at the hearing, the claimant explained that, even though there are no distinguishing features between these two groups, every member of the communities knows who is of Tutsi and who is of Hutu origin, and the persecution is based on this knowledge. This example is taken from F. Crépeau, P. Foxen, F. Houle, C. Rousseau, *loc. cit.*, note 11, 70 (in *Refuge*). The Federal Court checked the validity of some of the RPD's decisions because the members had based their conclusion about claimants' ethnic origin by simply relying on their common sense: *Pluhar v. Canada (Minister of Citizenship and Immigration)*, (1999) 174 F.T.R. 153 and in *Mitac v. Canada (Minister of Citizenship and Immigration)*, (1999) 175 F.T.R. 155 (F.C.) The Court was of the opinion that it was dangerous for an RPD member to rely solely on a claimant's physical appearance. On the other hand, judgments based on such characteristics as appearance, language, cultural practices and friends may be reasonable, depending on the circumstances. See: *Bartonik and al. v. Canada (Minister of Citizenship and Immigration)*, (2000) 191 F.T.R. 162 (F.C.); *Tugambayev v. Canada (Minister of Citizenship and Immigration)*, (2000) 188 F.T.R. 127, 129 (F.C.); *Mikhailov v. Canada (Minister of Citizenship and Immigration)*, (2000) 9 Imm L.R. (3d) 293, 295 (F.C.). On the other hand, in *Szostak v. Canada (Minister of Citizenship and Immigration)*, (2001) 16 Imm L.R. (3d) 273, 279, it was decided that these criteria constituted a stereotype that had no basis in reality.

³⁰ See C. Rousseau, F. Crépeau, P. Foxen, F. Houle, , *loc. cit.*, note 11, 70 (in *JRS*).

³¹ For example, in a case involving a Mexican applicant, an RPD member, questioning the claimant on the events that led up to his escape, blames him during the hearing both for trying to help his companion (by asking the soldiers to do something) and for not helping the young man (by leaving after the soldiers uttered threats). In his reasons, the

attitude of denial that will be expressed in a variety of ways. For example, RPD members may trivialize a serious situation³², refuse to hear the violent events of a story³³ or question claimants on matters that have no bearing on the evidence as a whole. They may also ask claimants to describe the physical layout of certain places (number of places or chairs, how they are arranged), the exact geographic locations of places, population statistics or the agent's exact role in passport renewal or explain why they failed to request a permit for a street demonstration. In other cases, Board members will frequently return to questions the claimants already answered (often in a direct, coherent way). This makes them disoriented and sometimes causes them to hesitate in silence, which is interpreted as bad faith and detrimental to the credibility of their testimony. Finally, in the worst cases, the tribunal's examination of the claimant's testimony is really an exercise in intimidation whose ultimate purpose is to find flaws in the testimony. Indeed, in some cases, the tone of the interviews can reflect anger, exasperation, aggressiveness, irony and, in a more general way, lack of empathy.³⁴ Occasionally claimants are asked questions that are clearly unfair³⁵ or questions that are veiled criticisms about what the claimants actually did and what they should have done.³⁶

In sum, when one examines these cases, the general impression that emerges is that Board members view the task of weighing the evidence as something mechanical or mathematical. After Board members believe that they have accumulated sufficient implausibilities, exaggerations, inconsistencies or contradictions they feel confident they can find the testimony not credible or trustworthy and reject the

RPD member suggested that in both cases, the claimant lacked courage, thereby reinforcing the stereotype by which homosexuality is linked to an individual's moral and physical weakness. It reflects the macho ideology that homosexuals are responsible for their own victimization, and "deserve" the abuse they are subjected to because of their weaknesses. See file CAG02-JPC-Mex for which the account appears in the research report cited in note 9. This report can be obtained through one of the researchers upon request.

³²See C. Rousseau, F. Crépeau, P. Foxen, F. Houle, *loc. cit.*, note 11, 60 (in *JRS*).

³³See F. Crépeau, P. Foxen, F. Houle, C. Rousseau, *loc. cit.*, note 11, 68 (in *Refuge*).

³⁴For example, in one case, a RPD member asked the claimant whether she was accustomed to disobeying her parents. See file SAR02-JP-Mya. In another case, the overall tone of the hearing was very aggressive and the claimant, who had been tortured, was visibly terrorized because one of the RPD members said to him "I'm sure that you're not afraid of us, I hope that you're not afraid of us." The claimant replied "a little." The member retorts in a condescending tone: "A little bit? He should relax, we're here to listen to his story." See file AS101-JCP-Mex. These files are reproduced in the report produced by the researchers cited in note 11. This report is available upon request.

³⁵For example, RPD members and agents ask for a logical, rational explanation of the irregularities and absurdities that occur in countries in crisis or ruled by dictators. See file SAR02-JP-Mya reproduced in the report cited in note 34.

³⁶In a case involving a Congolese national, the caseworker is surprised that after Kabila asked the population to denounce the abuses of the Mobutu regime, the claimant's family waited so long to denounce her persecutor's alleged offences. Later, a member is surprised that the claimant's father was so naïve as to believe he could seek justice by denouncing his daughter's assailant, whereas in 1998 it was known that the Kabila regime did not respect the rule of law at all. In the decision, this point was reiterated to justify the conclusion that the story was not credible. See file NGCR03-J-RDC which is reproduced in the report cited in note 34.

claim³⁷. These types of examinations aim more at finding a flaw in the testimony than to genuinely understand the relevancy (or lack of) of the information provided by the claimant.

b) Being an Interested Party in the Proceedings

The qualification of claimants as interested parties in the proceedings finds a basis not only in the RPD ‘case law’³⁸, but also in the Federal Court³⁹ and in the material distributed to Board Members and prepared by the Legal Services of the Board⁴⁰. Although other statements contrary to these can also be found in these decisions and materials, the lack of clarity of these sources may be one the causes to bring Board members, especially those with no legal expertise, to rely on what they view as orthodox practices, that is to say, practices based on a common law presumption concerning the lack of reliability of witnesses, especially when they are interested parties to the proceedings. This presumption emerged in a particular context of the development of the common law system of evidence. For this reason, it is useful to trace a brief historical account of the development of this presumption in the common law rules of evidence to form a better understanding as to why it may still have such a profound effect on the thinking of Board members, judges and Board Legal Counsels. Next, I will state the reasons for which it is irrelevant to qualify claimants’ testimonies as *interested*.

³⁷The Federal Court cautioned the RPD against reviewing testimony in minute detail: *Rawal v. Canada (Minister of Employment and Immigration)*, [2002] F.C.J. (Quicklaw) no 116, par. 25 (F.C.); *Attakora v. Minister of Employment and Immigration*, (1989) 99 N.R. 168, 169.

³⁸ *Makau v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 642, No. MA3-08941, July 13, 2004; *H. (X.K.) (Re)*, [1991] D.S.S.R. no 699, No T90-03316, Feb. 13, 1991; *R. (B.P.) (Re)*, [1991] D.S.S.R. no 864, no M90-07480, August 21, 1991; *T. (V.H.) (Re)*, [1990] D.S.S.R. No 57, No T89-02654, Feb. 15, 1990; *E. (O.H.) (Re)*, [1990] D.S.S.R. No 601, No T90-01627, November 13, 1990; *E. (J.F.) (Re)* [1990] D.S.S.R. No 50, No T89-02962, Feb. 13, 1990; *E. (L.K.) (Re)*, [1990] D.S.S.R. no 1008, No T89-04557, July 24, 1990.

³⁹ See for example: *Mihelcic, Nicola v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. no 416 (Quick Law), F.C.T.D., no. IMM-1010-94, March 16, 1995, Gibson J. quote this paragraph from the Board’s decision: “In this decision greater weight has been given to the documentary evidence where it is at variance with the testimony of the claimants. The documentary evidence is from several external reputable and independent sources which have no interest in the outcome of this matter. To that extent they are free of bias which is naturally not true of the claimants.” and did not find any fault with it. See also: *Zvonov, Sergei v. Canada (Minister of Employment and Immigration)*, (1994), 28 Imm.L.R. (2d) 23 (F.C.T.D.); *Varga, Sava v. Canada (Minister of Employment and Immigration)*, F.C.T.D., no. IMM-790-94, June 8, 1995, Heald J.

⁴⁰ For example, in the IRB Guide, *Assessment of Credibility in Claims for Refugee Protection*, section 2.4.7, entitled “Preferring Documentary Evidence to the Claimant’s Testimony”, reads as follows: “The Federal Court has upheld, in a number of decisions, the Board’s reliance on documentary evidence originating from a variety of reputable independent sources, none of which can be said to have any vested interest in the claim at hand (and are to that extent free of bias), in preference to the claimant’s testimony.” In the IRB Guide *Weighing Evidence* in the very first paragraph of section 6.2, pertaining to self-serving evidence, it is stated that the Federal Court issued a decision in which it asserted that all refugee claimants’ testimony “may be called self-serving to the extent that it helps their

i) *A brief historical account*

During the Middle Ages, only instrumental witnesses, as opposed to accidental witnesses, were able to testify to present evidence regarding the proof of a legal act⁴¹. Accidental witnesses, those who had knowledge of material facts pertaining to a litigation were generally excluded from civil and criminal trials⁴². Indeed, Middle Ages juries rarely heard witnesses; it was deemed unnecessary because members of the jury were chosen because of their particular abilities and knowledge. Indeed, until the 16th century, a jury was composed of a group of men who combined the roles of judge, prosecutor and witness. As the judge on the facts, the jury made the verdict which bound the judge on law. But they were also prosecutor since they could gather all the information they thought useful to arrive at a verdict on their own motion. Finally, they also acted as witnesses since they had the powers to take into account any facts, information, opinion and indicia coming from their own experience and personal knowledge⁴³. It must also be noted that it was not possible to force English subjects to testify⁴⁴. Indeed, few persons consented to testify since a judge was empowered to punish any witness which he deemed to be a troublemaker⁴⁵. At this time, the risks of such an accusation were particularly high because very little credibility was granted to the accidental witness in common law⁴⁶.

In the 16th century, as soon as the jury was declared incompetent to act as a witness, there were profound transformations in the common law rules of evidence⁴⁷. Without the appearance of witnesses during a trial, it became very complex, if not impossible in some cases and notably in criminal law, to prove material facts during the proceedings. Therefore, admitting testimonies of witnesses became a necessity. But now that they had to deliver their testimony publicly in the presence of judges, counsels and members of the jury, the danger that evidence would be fabricated become very real⁴⁸. It is how a

case and in that it is created by or for them”, thus implying again that a testimony is less reliable because the claimant’s testimony is interested.

⁴¹ Sir William HOLDSWORTH, *A History of English Law*, vol. IX, 3rd ed., London, Methuen and Co. Ltd., 1966 (reprint), at page 180.

⁴²R. C. Van Caenegem, "La preuve dans le droit du Moyen Âge occidental", in *Recueils de la Société Jean Bodin pour l’histoire comparative des institutions*, vol. XVII, *La preuve, 2e partie, Moyen Âge et Temps modernes*, Bruxelles, Ed. Librairie Encyclopédique, 1965, p. 691 at pages 705-706.

⁴³ In common law, members of the jury are the only witnesses who qualified. It is only later that the functions of judges of the facts and witnesses will be distinguished in English law and will give birth to the concept of jury as we know it in contemporary common law. Sir W. HOLDSWORTH, *op. cit.*, note 41, vol. 1, at p. 317.

⁴⁴ F. J. Des Longrais, "La preuve en Angleterre depuis 1066", in *Recueils de la Société Jean Bodin pour l’histoire comparative des institutions*, *op. cit.*, note 42, p. 193 at p. 253.

⁴⁵*Id.*, p. 265.

⁴⁶ J. Gillissen, "La preuve en Europe du XVIe au début du XIXe siècle (rapport de synthèse) ", in *Recueils de la Société Jean Bodin pour l’histoire comparative des institutions*, *op. cit.*, note 42, p. 755 at page 806.

⁴⁷ F. J. Des Longrais, *loc. cit.*, note 44, p. 271-272.

⁴⁸ R.J. DELISLE, « Hearsay Evidence », [1984] L.S.U.C. Special Lectures 59, 59-64; contra E. M. MORGAN « Hearsay Dangers and the Application of the Hearsay Concept », (1948) 62 *Harvard L. Rev.* 177, 177-185. See

presumption of unreliability of testimonies started to find its way into common law rules of evidence. Indeed, in the face of this problem, the *law of evidence* oriented its development toward a unique goal, that is, of preventing as much as possible false verdicts by the jury. Consequently, numerous principles and rules aimed at excluding evidence were created in common law to guarantee, as much as possible, that members of the jury would only hear the facts which offered some guarantee of reliability. It was for this reason, for example, that an accused was forbidden to testify in a criminal trial; it is only later that the right to remain silent together with the presumption of innocence were recognised to the accused. It is also for this reason that even today, common rules pertaining to reliability of testimonies are organized in a hierarchical order. At the top are in-court testimonies given under oath, followed by in-court testimonies not given under oath. At the bottom, one finds out-of-court statements not given under oath and which were inadmissible in the Canadian *law of evidence* until the 80's, notably in criminal proceedings.

In the contemporary law of evidence, the presumption of unreliability still informs judges. Indeed, one can read in the most prominent Canadian treatise, *The Law of Evidence* written by Lederman, Sopinka and Bryant, that the point of departure in the common law tradition is to presume that testimonies are not reliable⁴⁹. Of course, this presumption can be reversed but it has nonetheless a significant bearing in a decision-making process and it is even more so when ordinary witnesses are deemed to be interested parties in the outcome of the case. Indeed, when a witness is characterized as interested the direct consequence is that a judge will assign less weight to his testimony. Therefore, the question whether a witness is an interested party in the proceedings is a very important one to ask. However, this qualification cannot be lightly made for its effect can be devastating for a particular witness. In the refugee determination process, some Board Members are often explicitly stating or implying that claimants' testimonies can be qualified as *interested*. The problem with this reasoning is that it is not a relevant criterion to start the process of assessing claimants' testimonies.

ii) *Irrelevance of the criterion*

In some legal fields, such as criminal law, the issue of the interest of a witness in the proceedings is very often central, especially to assess the testimonies of the witnesses that are called in support of the prosecution's case and against the accused. The examination would then focus on trying to find out if this witness has a hidden motive (such as revenge) to testify against the accused and which may shed some

also Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed., Toronto, Butterworths, 1999, § 6.4; 6.5; 6.6.

⁴⁹J. Sopinka, S.N. Lederman, A.W. Bryant, *op.cit.*, *supra*, note 49, § 6.7.

doubts as to the veracity of the story told by this witness. In some circumstances, presuming unreliability because the witness is an interested party to civil or criminal proceedings can help greatly the inquiry progress toward a better understanding of the issues at stake.

However, in cases where the motives are known and that there is no reason to believe that a witness has a hidden agenda, the application of this presumption is simply irrelevant. Such is the case in civil matters (including administrative matters) when a decision-maker assesses the weight of testimonies of applicants or defendants and, for our purpose, refugee claimants. Obviously, these individuals *are* interested parties to the proceedings but they have no hidden agenda: they want to win their case and, of course, they will testify in their favour. Therefore, when Board members state that refugee claimants' testimonies are less reliable than other proofs, such as documentary evidence, because they are an interested party to the outcome of the case, they achieve nothing of significance. It does not make the inquiry progress in any direction.

* * * * *

Because of the tenuousness of conclusions that are based on assessment of testimony alone, Federal Court judges have required that RPD members justify their negative conclusions concerning credibility of testimony in clear, unmistakable terms⁵⁰. To comply with this directive, RPD members use information found in public documents to refute a claimant's testimony. Over time, a practice has become widespread among RPD members: they assume that greater weight must be given to this type of documentary evidence, as if it were authoritative evidence⁵¹, than to the claimant's testimonial evidence.

B. Presuming Reliability of Documentary Evidence

In refugee cases, the documentary information that is used consists of reports produced by the IRB Documentation Centre.⁵² This Centre has two mandates⁵³: to help Board Members find the information they need to bring all the facts to light in a given case and to make available to the public (first and foremost refugee claimants) timely information on human rights, including the laws and practices of

⁵⁰*Armson v. Canada (Minister of Employment and Immigration)*, (1990) 9 Imm. L.R. (2d) 150 (C.F.A.).

⁵¹In 1994, I concluded that the evidence was credible, but I expressed serious reservations about the fact that documentary evidence can be described as authoritative. I have not changed my mind on this issue: France HOULE, "The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience", (1994) 6 *Int. J. Ref. Law* 6, 30.

⁵²On the development of the centre, see Sharon RUSU, "The Development of Canada's Immigration and Refugee Board Documentation Centre," (1989) 1 *Int. J. Refugee L.* 319-330.

⁵³This organization is part of the tribunal, but is somewhat independent of the RPD: See F. HOULE, *loc. cit.*, note 4, 25.

refugee claimants' countries of origin.⁵⁴ All this information can be received as evidence and used to check the credibility and trustworthiness of the facts disclosed by claimants concerning the particular events that led them to claim refugee status.

Researchers at the Documentation Centre produce these reports and they are available electronically in three databases available to the public. The first database is REFQUEST. Reports from this database are a compilation of information from public sources. Their purpose is to make available a vast collection of general information on the situation in the main countries of origin of claimants for refugee status. They contain, *inter alia*, chronologies of important events in the history of each country, information on its geography, political life, economy, respect for human rights and other social issues. These reports are produced by researchers at the Centre, who examine and assess the information in their possession compiled by the Centre. In order to produce these in-house reports, the researchers base their analyses on enquiries, studies and commentaries made by observers from Canada and elsewhere, such as national and international organizations (Amnesty International, Human Rights Watch, U.S. State Department, Press Agencies, etc.). The other two, REFINFO and REFEXTEN⁵⁵, contain answers to requests for information by Board members on the country of origin of a given claimant and on migration and human rights issues⁵⁶. The information on country reports is the primary focus of this article not only because this information is systematically filed with every claim, but also because Board members use any information in this material to contradict claimants' testimony, without giving them prior notices of their intention or providing them with an opportunity to respond.

As mentioned above, using this information is problematic because RPD members tend to give greater *de facto* weight to these public documents than to the claimant's testimony. From a legal standpoint, this way of proceeding presents at least two difficulties. First, RPD members lose sight of the fact that documentary evidence is only hearsay and should normally be examined carefully before it is given weight in a particular case, especially when it is used to refute the direct sworn testimony of refugee

⁵⁴ See the IRB Web site—Country of Origin Research; Research Directorate: <http://www.IRB.gc.ca/en/research>, updated on April 17, 2003.

⁵⁵ *Id.*

⁵⁶ The REFINFO database contains short answers to requests for information by Board members; and in the REFEXTEN database can be found longer, more detailed answers to certain questions asked by Board members. Board members can ask questions dealing with very specific material facts alleged by claimants on a multitude of subjects, such as the situation of Wahdat Party supporters in Afghanistan (Claim no AFG38771.E dated April 16, 2002, which is available at the IRB Web site: http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?cid=0), the existence of Talibans as a politico-military group from 1991 to 1994, (at the same site, see Claim no AFG32557.F dated August 25, 1999). the situation of gays and lesbians in Russia (Claim no RUS31357.EX dated May 14, 1999) or the history of the Falun Dafa (Falun Gong) religion in China, its history and religious practices and the treatment of its followers by the Chinese government (Claim no CHN33180.EX dated November 1999).

claimants⁵⁷. In this matter, elementary prudence dictates that these public documents should be subjected to some form of critical examination. But not only do members not take part in any form of critical examination, but what is more, they give more weight to public documents because they consider them to constitute *a priori* reliable evidence. Indeed, they are of the opinion that they constitute disinterested and objective evidence. In saying this, they refer to the researchers' disinterest in the proceedings and the objectivity of the information reported in documentary evidence.

These two criteria depart in some measure from the normal inquiry that is made in administrative law to assess reliability of hearsay evidence such as documentary evidence. Indeed, the rules of natural justice require that the inquiry focuses first on an examination of the reliability of the information, and second, on giving a fair opportunity to the claimant to make submissions with respect to this information, including challenging its reliability.

In the refugee determination process, these two steps are generally skipped. Indeed, there is no examination of the documentary evidence —Board members simply presume their reliability on the basis of the two criteria mentioned above— and claimants are not provided with an opportunity to respond.

In common law, public documents are admissible as an exception to the hearsay rule as long as certain criteria are met. Depending on the type of document being examined, judges may look at the quality of the author of the declarations in the public document (disinterest) and/or the manner in which the document was prepared (objectivity). Although both criteria are not always relevant in every case, Board Members treat them as equally relevant in all cases. This is an incorrect application of the common law rules. Indeed, the disinterested character of the makers of the documentary information — the researchers of the Documentation Centre or other organisations— is, in nearly all cases, an irrelevant factor to take into consideration. As to the objectivity of the information contained in the document, this criterion is relevant, but, as I stated above, this information is only very rarely examined seriously by the Board and claimants are seldom given a genuine opportunity to address its timeliness, accuracy or completeness.

a) Applying the Criterion of Disinterest of Researchers

In common law, the disinterested character of the author of the declarations found in public documents is acknowledged by judges when three conditions are met. Thus, under the common law rules of evidence, public documents must have been prepared by public servants in the course of their

⁵⁷ I have encountered only two Federal Court decisions, both handed down by Judge Teitlebaum, in which the judge reiterated the principle that not all documentary evidence has the same degree of reliability. *Cai v. Canada (Minister of Citizenship and Immigration)*, (1997) 131 F.T.R. 66, 74 (F.C.); *Vaithilingam v. Canada (Minister of Citizenship & Immigration)*, (2001) 13 Imm. L.R. (3d) 120, par. 27, 29, 30 (F.C.).

duties⁵⁸, the public nature of the document must be acknowledged⁵⁹ and the declarations must have been signed by public servants *who have personal knowledge of the facts*. Only when these conditions are fulfilled may judges conclude that the authors of the declarations are disinterested. Judges will assume that public servants have nothing to gain from carrying out their duties taking their personal interests into account since this may lead to disciplinary action⁶⁰.

In the case of the documentary evidence used by RPD, when the Board members refer to the disinterested character of the documents, they speak of the researchers who work at the IRB Documentation Centre or at other national or international organizations or NGOs. In their case, although the first criterion (public documents prepared in the course of their duties) and the second criteria (acknowledgment of the public nature of the document) are met, the third one, which is the most important, is not. Indeed, the researchers of the Documentary Centre generally do not make declarations about events of which they have personal knowledge.⁶¹ They only report other people's statements or observe events of which other people have personal knowledge. The same problem may occur with declarations found in documents collected by the Documentation Centre that are prepared by other national and international organizations as well as NGO's. Indeed, very often, these organizations' researchers report only facts and opinions provided by other people. These researchers are therefore not the primary source of information. So whether these reports are produced by the Centre or by other bodies, they are based on secondary sources. It is therefore simply not possible to reach a decision on the disinterested character of the true authors of the declarations.

Furthermore, even if the criteria of disinterest of the researchers were used simply to refer to the fact that they have no interest in the outcome of the case, it has to be noted that this usage is just as useless as saying that claimants are interested parties. Again, this is an obvious statement: researchers do not and cannot (unless they know the claimant personally which is highly improbable) have a personal interest in the outcome of a particular refugee claim. There cannot be any dispute on this issue and, therefore, it does not help the inquiry progress in one way or another to state that researchers are disinterested. In fact, the use of this criterion would only be relevant in cases where the author of the declaration is cited to

⁵⁸*Thrasylvoulos Ioannou v. Papa Christoforos Demetriou*, [1952] A.C. 84, 95 (P.C.); *R. v. Kaipainen*, [1954] O.R. 43, 53 (C.A.); *R. v. Zundel*, (1987) 31 C.C.C. 97, 166-168.

⁵⁹When a document prepared by a public servant is necessarily subject to public examination, the ease and certainty with which the errors can be identified and corrected provide additional guarantees of accuracy: *Sturla v. Freccia*, (1880) 5 App. Case. 623, 643-644 (H.L.); *Mercer v. Denne*, [1904] 2 Ch. D. 534, 541-542; conf. [1905] 2 Ch. D. 538 (C.A.)

⁶⁰*Finestone v. R.*, [1953] 2 S.C.R. 107, 109; *Re Puczka, Voitko v. Sabados*, (1973) 38 D.L.R. (3d) 234, 241 (Q.B. Sask).

⁶¹Occasionally researchers at the centre make field trips to investigate whether human rights are being respected, but rarely. Canada, Immigration and Refugee Board, *Security and Human Rights Situation, Entry and Exit Procedures and Personal Documentation - Report on joint fact-finding mission to Sri Lanka*, May 2002: http://www.IRB.gc.ca/cgi-bin/foliocgi.exe/request_f/query. (updated on April 19, 2003).

support or to refute an allegation made by the claimant. For example, if a Board member were to use the statement made by the ambassador of the country of origin of the claimant, it would be relevant to discuss whether the declaration is or is not of a disinterested character.

b) Assessing the Objectivity of the Information

The second condition governing the admissibility of public documents as an exception to the rule prohibiting hearsay in common law deals with preparation of a document. In the 1950s, Canadian courts determined that public documents, i.e., those prepared by public servants, were admissible when two conditions were met. First, it had to be shown that the reports in question were accessible to the public. This is the case with documents that are used for determining a claimant's refugee status. Second, all the components used to prepare them had to be made public.⁶² It was, and still is, a matter of knowing "who" produces the documents and "how" they produce them. In other words, the reliability of a public document may be inferred when two conditions are met: the researchers' competence is established, and the researchers use tried and tested research methods.

On the first point, the competence of researchers at the IRB Documentation Centre has already been examined and the conclusions are favourable for recognizing their overall competence in conducting research.⁶³ However, the competence of researchers at other organizations should be reviewed, especially in cases where they are largely unknown or not known at all. In fact, it sometimes occurs that the Documentation Centre researchers will carry out this review and will comment on the objectivity of the source in the documents they produce⁶⁴. This is a good practice, because Board members then have assurances about the objectivity of the sources on which their decisions are based, especially when they are unfavourable. This information also helps provide better justification for their reasons and makes them more acceptable in the eyes of refugee claimants. The obligation to provide good justifications is part of both the lawfulness and the legitimacy of the decision-making process.

When the Board member is satisfied that the public document was prepared by an organization with a competent staff, he may proceed to the second step in the review of its reliability: Are the researchers using valid research methods?

⁶² *R. v. Northern Electric Co.*, [1955] O. R. 431, 468 (H.C.).

⁶³ F. HOULE, *loc. cit.* note 4, 13-14.

⁶⁴ See, Canada, Immigration and Refugee Board, *Security and Human Rights Situation, Entry and Exit Procedures and Personal Documentation - Report on joint fact-finding mission to Sri Lanka*, May 2002: http://www.IRB.gc.ca/cgi-bin/foliocgi.exe/request_f/query. (updated on April 19, 2003). This report is available in the IRB REFQUEST database.

Before answering this question, it should be pointed out that the indicators of validity are those based on journalistic methods, not scientific methods⁶⁵. In order to be valid from a journalistic standpoint, three conditions must be met. First, the information must be collected and processed by someone who is independent of any government or political influence and the sources used must be public and accessible so that they can be cross-checked. Second, there must also be certain guarantees that the information is timely, accurate and complete⁶⁶. However, this last criterion should be applied with caution⁶⁷. Indeed, it is not because a document is incomplete that the information it contains is not reliable. Conversely, just because a fact is not reported in a document does not mean that this event did not occur⁶⁸. Third, all the information must have been subjected to an external check. According to the journalistic method, it is normally by corroborating information from other sources that a fact can be established as correct. The number of corroborations needed to credibly establish the existence of a fact may vary according to the source of information⁶⁹. In case of doubt, the rule of three corroborations is generally followed where

⁶⁵Researchers generally do valid journalistic but not scientific research. This standard of validity is satisfactory, and this paper is not concerned with challenging its adequacy. On this issue, see F. HOULE, *loc. cit.*, note 4, 21-25.

⁶⁶In the case of *L.Q.J. (Re)*, [2001] C.R.D.D. (Quicklaw) no 151, par. 12, the tribunal doubted the credibility of the testimony of a citizen from Southern Lebanon, mainly because his description of the checkpoint did not mesh with that given in the documentary evidence, documents filed from 1993 to 1995, whereas the events that led to the claim date from 1999-2000.

⁶⁷With respect to completeness of information, the far-ranging mandates of the centre and other organizations that produce reports on the predominant conditions in refugees' countries of origin make it difficult if not impossible to achieve this objective. It should also be pointed out that the assignments that RPD members give to Documentation Centre researchers often have poorly defined parameters, and the researchers are given a limited time for carrying them out.

⁶⁸The Court of Appeal ruled as follows in *Adu v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. no 114, par. 1 (F.C.A.), Judge Hugessen stated, erroneously in my opinion, that 'The 'presumption' that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention.' However, in section 2.4.4. ("Silence of the documentary evidence") of the IRB guide *Assessment of Credibility in Claims for Refugee Protection* (Canada, Immigration And Refugee Board, Refugee Protection Division Ottawa, Legal Services, June 28, 2002, 89 p., available at the IRB Web site at <http://www.irb-cisr.gc.ca/>), the legal advisers state: "Therefore, the fact that the documentary evidence does not confirm the claimant's testimony or refer to an event reported by the claimant may be grounds for rejecting the claimant's testimony. Caution should be exercised, however, especially when the documentary evidence before the panel is silent about a particular matter, or less than comprehensive. Moreover, a document containing general information may not be always sufficient to refute testimony dealing with a specific, individualized event."

⁶⁹For example, the short Responses to Information Requests are often based on sources whose credibility is generally accepted, such as the large Western press agencies (AFP, WNC), large watchdog agencies (Human Rights Watch, Amnesty International) or the United States Department of State's Country Reports, cited in note 111. Interestingly, these Country Reports make no mention of the sources of information that are used to make the assertions found in them. Moreover, in reports containing in-depth answers to RDP members' questions, researchers also frequently cite sources whose credibility is not self-evident: Latinamerica Press, Belize First Magazine, North Africa Journal. But they cite sources that report events written in a language other than French or English, such as Spanish (Correo Del Sur, la Prensa, La Razon) or Arabic (Al-Sharq al-Awsat), Russian (Moskovsky Komsomolets), etc.

possible. Otherwise, researchers must use their own judgment to decide whether to report facts in their documents, and if necessary, should mention this *caveat*⁷⁰.

Rarely in the Board Members' arguments does one encounter indications that they checked the objectivity of the document. Usually, they simply describe the fact or the opinion reported in it. They will cite the source of information in a footnote to their decisions, with no further comment. On this last point, it is also worth noting that, quite often, the source is cited in such a general way that it is impossible to know exactly where the information comes from⁷¹. By proceeding this way, Board members give the impression that they take for granted that these documents are reliable. They do not ask themselves questions such as: Who is the original author of the declaration? Should the events reported be confirmed by other sources? Is this information timely, accurate and complete? In sum, the central issue to be resolved while assessing documentary evidence is to be able to check the 'credit worthiness' of this information. If claimants do not have the opportunity to make submissions in this regard, the tribunal has the duty to do so⁷². This duty is not only one of fairness, but also of strict legality. Indeed, it is important to recall that these preliminary controls are important for determining whether decision-makers have based their decisions on credible and trustworthy evidence as prescribed by paragraph 170(h) of the *Immigration and Refugee Protection Act*.⁷³

* * * * *

The application of the common law presumptions of unreliability of testimonies and reliability of documentary evidence in the refugee determination process is not justified and not correctly applied. Therefore, the validity of their use is not established in positive law. Many internal and external constraints may explain the success or the failure to import common law rules of evidence into administrative tribunals' legal system. However, prior to importing any common law rules in administrative law, there should be time devoted to thinking of the big picture: Will this incorporation be compatible or

⁷⁰Some documents occasionally mention this: see, for example, Response to Information Request no BHS38015.E on the Bahamas, dated November 14, 2001, available at the IRB Web site, *supra*, note 64.

⁷¹This finding is easy to make. It is enough to simply consult the Quicklaw database of IRB decisions to conclude that is a regular practice. Here is an example of a recent decision: *O.Y.X. (Re)*, [2002] C.R.D.D. (Quicklaw) no 68, par. 18: "Even though the documentary evidence shows that experienced activists who are more prominent in the RPG had been targeted, the claimant's profile does not match that of people currently at risk in Guinea." Nowhere in the decision is it mentioned what the documentary evidence in question is.

⁷² Here again, it is not a matter of asking RPD members to check information themselves. The time constraints imposed on them do not militate in favour of this additional work. Documentation Centre researchers are in a better position to check the validity of the research. As for the other documents, those that the Centre does not produce but simply collects, the Refugee Protection Officer can perform this task.

incompatible with the free system of evidence applicable in a given administrative tribunal, given the decision-making environment of the tribunal?

PART II: UNDERSTANDING THE DECISION-MAKING ENVIRONMENT OF A TRIBUNAL

Legal scholars in comparative law are telling us to focus on the substantive effect of importing rules from one legal system to another. On the one hand, the question is how easy it would be to sever the formal common law rules of evidence from the system in which they were elaborated, that is to say, to understand the interrelation between evidentiary and substantive issues in the common law system of evidence. Therefore, before importing the common law rules of evidence into an administrative tribunal, one must have a good understanding of the context of origin in which common law rules operate. On the other hand, it is equally important to understand the decision-making environment of a tribunal in which the rules will be received.

With respect to the first issue, it is trite to say that many common law rules of evidence were developed in the context of criminal proceedings and to meet the needs of this system. Presuming the unreliability of testimonies until proof to the contrary is made is sound in that system, because its goal is to ensure beyond reasonable doubt that the accused is the person who committed the crime for which she is tried. The threshold of proof is very high and stringent checks are imposed on the prosecution's evidence, because we accord great value to the presumption of innocence. From this perspective, one can understand the reasons for which testimonies are presumed to be unreliable until the proof of the contrary is made: it is a question of elementary prudence in order to avoid wrongful convictions. Checking the credibility and trustworthiness of witnesses matters first. They can be cross-examined in very minute detail and the longer the list of inconsistencies and contradictions is, the better the chances are that a particular witness will not pass the test of reliability. In this case, issues of relevancy will not need to be addressed. The testimony can simply be put aside.

However, in a civil matter tried by a Court, the threshold of proof is lower. The factual situation at the origin of the claim must be proved on the balance of probabilities. Here, it does not matter as much as in a criminal setting to get as close as possible to the truth; what matters is to be able to determine which side of the story is the most probable. For this reason, a judge is justified to start an analysis by presuming the reliability of testimonies. In fact, both sides may have delivered credible and trustworthy testimonies and both sides of the story may be plausible. In this situation, it is an analysis of the

⁷³ I found an IRB decision in the Quicklaw database that refers to this very problem of sources of information that are "vague or unknown, with very few or no references to how the information was checked, if it was checked at all ... "E.F.B. (Re), [2000] C.R.D.D. (Quicklaw) no 445, par. 32.

relevancy and the probative value of the evidence adduced at the hearing which will cause the balance to tip over to one side or the other.

As a civil matter, a refugee determination is somewhat similar. Unlike a court-case, however, the threshold of proof is lower than that of the balance of probabilities. Refugee claimants must prove that they fled their country of origin because of persecutory actions in the hands of their government and that they are still facing serious risks of persecution if they were to be returned to their country of origin. Therefore, a refugee claimant must prove that she faced, and is still facing, serious risks of persecution. This proof must show that persecution is more than possible, but it does not have to be probable. It just has to be plausible. Given the particular characteristics of the refugee determination process, namely that it is not a *lis inter partes*⁷⁴, the scarcity and uncertainty of information available and the multicultural context, this threshold makes sense. But most importantly, searching for the truth is almost meaningless owing to the fact that the testimony of a refugee claimant is the central piece of evidence: in a great number of cases it is the only oral proof that the tribunal will hear. In these circumstances, it is very difficult, if not impossible, to verify *directly* the existence of facts alleged in support of a well-founded fear of persecution. The IRB underscores this point in its guide *Weighing Evidence* by referring to the case law of the Federal Court: “The Federal Court also stated that rarely will there be any evidence to contradict [the testimony of the claimant]. It therefore becomes practically irrefutable.”⁷⁵

This is one important reason for which the importation of the presumption of unreliability of testimonies, which likely comes from common law rules applicable in criminal than civil matters, creates significant distortions in the refugee determination process as it was established by Parliament. As I will explain further in the first section, it is simply incoherent with this system. This does not mean, however, that one should take for granted that all claimants are telling the truth. What this situation shows is that the Board is facing a real difficulty for which the free system of evidence does not give adequate answer. Nevertheless, the way to solve the problem of assessing the reliability of claimants’ testimonies does not lie in relying on common law rules and presumptions that were designed to operate in an adversarial system.

My argument is that it is not sufficient anymore for Parliament to simply prescribe that a tribunal “is not bound by the legal or technical rules of evidence” in contemporary administrative law. Indeed, tribunals and courts are designed to fix problems as quickly as possible. They focus on the tree, not the forest. As a consequence, when Parliament let tribunals and courts set the legal boundaries to the

⁷⁴Technically, there is no opposing party contesting the claimant’s claim, but the RPD member (or the Refugee Protection Officer, who acts as a sort of assistant to the RPD member) is still responsible for carrying out a full investigation of the claim. The tribunal therefore plays the roles of investigator and decision-maker. Therefore, the inquiry model chosen by Parliament is not adversarial, but inquisitorial. See the *Immigration and Refugee Protection Act*, cited in note 9, paragraphs 170g) and h).

exercise of discretion in a free system of evidence, it is not surprising to note that the primary source from which solutions are drawn from the legal and technical rules of common law, when none is provided by the principles of natural justice. In addition, judicial and quasi-judicial settings do not provide adequate environments to think through the consequences of importing common law rules into another system. Parliament does. It is Parliament which should design specific provisions adapted to the decision-making environment of a tribunal. In section two, I will propose changes to the legislative framework governing evidence in front of the Refugee Protection Division.

A. Distorting the Refugee Determination Process

The presumption of good faith is especially important in a refugee determination process because of the two characteristics of the process (scarce information and multicultural context). These difficulties were meant to be overcome, at least in part, by an inquisitorial procedure and a free system of evidence. The inquisitorial procedure provided Board members with all the flexibility to find all the information useful to resolve the claim. They could look for information—in favour or against the claimant—before, during or after the hearing. The free system of evidence provided Board members with the flexibility to receive and base their decision of any credible and trustworthy evidence, whatever its source. Therefore, it is suggested that to start from the opposition point of view, by presuming that the testimony is unreliable, is to deny the importance of these factors, and hence, to endanger the fairness of the whole process. This is particularly when one examines how Board members assess testimonies. Qualifying testimonies of interested or by providing weak reasons to doubt their truthfulness are two unfair ways to assess them.

Real, practically insurmountable constraints are posed by the prospect of directly checking specific facts on which the refugee claims are based. As a consequence, it is mostly through indirect proof that the implausible character of the story told by the claimant can be uncovered. Therefore, the ability to draw reasonable inferences is at the core of the determination process and this task can only be achieved after an assessment of the relevancy and the probative value of the evidence is done. Moreover, the omission to assess relevancy is contrary to positive law as it will be explained first.

Therefore, the question becomes: why Board members nonetheless assess only the reliability (credibility and trustworthiness) of the information? Indeed, this reasoning method cannot logically lead decision-makers to draw inferences, but only to the creation of a list of inconsistencies and contradictions. One of the reasons may be linked to the external constraints of the refugee determination process.

⁷⁵ Canada, IRB, *Weighing Evidence*, chapter 6, at p. 8.

Indeed, Board Members have very little control on the parameters within which they can exercise their decision-making judgment. Internal and external constraints are not favourable to the establishment of a balanced decision-making environment, one in which testimonies will be examined from two standpoints: reliability and relevancy. For example, internal constraints relates to the mass-adjudication environment of the tribunal. The workload is extremely heavy for the 200 Board members who have to decide over 25 000 cases per year. The Board is constantly working on solutions to increase the speed at which decisions are made (such as making as many decisions as possible on the bench), thus creating a tremendous amount of pressure on Board members. The turnover of Board members is very high and mandates are very short, thus not favouring the retention of institutional knowledge. In addition, only 10% of Board members must be appointed, by law, for their legal expertise. Moreover, annual work appraisals take into consideration the quantity and the quality of Board member decisions, which are used to determine renewal of terms.

In this environment, Board members have virtually no time to step back after the hearing, reflect on the evidence and think it over if needed. In fact, the safest route for them to take is to follow their peers in how they approach evidence and to abide as best they can to the many guidelines issued by the Board and of the Federal Court. In sum, there is very little room for critical thinking. In fact, assessing testimonies from the only standpoint of their reliability is a quick way of making decisions and since the President of the Board is committed to speedy determinations, Board members have no incentive to change their practices. However, I will argue in the second section that the procedures established to increase expediency are going too far. Indeed, efficiency trumps fairness despite the clear prescription to the contrary in the *Immigration and Refugee Protection Act*⁷⁶. They may, moreover, be in violation of section 7 of the *Canadian Charter of Rights and Freedoms*.

a) The Importance of Assessing Relevancy

Being unable to check the reliability of facts directly means that it has to be done indirectly. Therefore, much of the findings upon which a decision will be based must be made through inductions drawn from the evidence filed at the hearing.

Inferences are not objective facts. They do not exist by themselves: a decision-maker cannot state that an inference “is” or “is not”. Inferences are subjective facts for they can only be formed in the mind of individuals. As a consequence, it can be properly speak of a reasonable or an unreasonable inference. To complete successfully an inferential reasoning, the probative value of the evidence must be

⁷⁶ 162(2) “Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.”

assessed. This allocation of weight of the evidence is done through an evaluation of the relevancy of facts stated to support or contradict a claim. Because Board members do not engage in this process of assessing the relevance of the evidence and, as a consequence, its probative value, they are skipping a crucial step in the reasoning they are asked to conduct in a refugee determination process and in positive law⁷⁷.

Indeed, although the *Immigration Act* does not mention the criteria of relevance⁷⁸, it is nonetheless an implicit obligation to any judicial or quasi-judicial body⁷⁹. In order to determine if a proof is relevant, two conditions must be met. First, it has to be linked directly or indirectly to a litigious fact and whether this evidence makes the inquiry progress⁸⁰. Second, the element of proof must be such that it can establish or make plausible (in a refugee determination process) the existence or the non-existence of a litigious fact⁸¹. To determine if the evidence is relevant, Board members must take into consideration questions of law under their jurisdictions, since it is the legal text which prescribes what has to be proved.

Assessing relevancy leads to a assigning a probative value of the evidence⁸². Board members must ask themselves if each contradiction is fundamental, secondary or minor in relation to the proof of a well-founded fear of persecution past or present. For example, when reasons are solely based on minor inconsistencies, it does not matter what Board members find in the evidence. The degree of relevancy of minor inconsistencies is so weak that they should be deemed irrelevant. Therefore, in a free system of evidence, the decision-maker must assign a degree of relevancy to the evidence; not assign a pre-determined weight to each type of evidence according to a preconceived notion about its trustworthiness. On this point, it is worth noting that not all Federal Court judges accept the validity of *a priori* organization of testimonial and documentary evidence. For example, in *Munkoh, Frank v. M.E.I.*,⁸³ the Court rejected it. They were of the opinion that to state that documentary evidence is more reliable than

⁷⁷ In a free system of evidence, especially applied in an inquisitorial process, relevancy is usually not assessed during the hearing, but during the deliberations. It is so because it is not a normal practice in front of administrative tribunals to object to evidence during the hearing. Generally, all the evidence which appear to be reliable and relevant will be admitted, mainly because the knowledge of the file prior to the hearing is limited. However, it does not mean that this assessment should not be done.

⁷⁸ Par exemple, les dispositions législatives applicables dans le cadre d'un processus décisionnel devant le Tribunal administratif du Québec prévoient expressément ce critère. Voir la *Loi sur la justice administrative*, précitée, note 32, articles 137. «Toute partie peut présenter tout moyen pertinent de droit ou de fait pour la détermination de ses droits et obligations.» and 139. «Le Tribunal peut refuser toute preuve qui n'est pas pertinente ou qui n'est pas de nature à servir les intérêts de la justice.»

⁷⁹ *Hollington c. Hewthorn and Co. and Ministry of Housing*, [1943] 1 K.B. 587, 594 (C.A.); *Re Bortolotti and Ministry of Housing*, (1977) 15 O.R. (2d) 617, 628 (C.A.).

⁸⁰ *R. c. Cloutier*, [1979] R.C.S. 709, 731. «...there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.»

⁸¹ *Clark v. Stevenson* (1865), 24 U.C.Q.B. 200 (C.A.); *R. c. Perry*, [1945] 4 D.L.R. 762, 765 (C.A. I.-P.-E.).

⁸² Gérard CORNU, *Vocabulaire juridique*, 7e ed., Paris, PUF, 1998, p. 29.

⁸³ (F.C.T.D., no. IMM-4056-93), Gibson, June 3, 1994,

the claimant's testimony because it was unbiased and objective was without merit. In other decisions, certain judges have stressed the importance of taking all the evidence into account: "it must be assessed *together*,⁸⁴ not parts of it in isolation from the rest of the evidence."⁸⁵

As stated above, however, external constraints imposed on Board members may explain, without justifying, some of the reasons why a meaningful assessment of issues related to relevancy is rarely done in the Canadian refugee determination process.

ii) *External constraints causing imbalance between efficiency and fairness*

Because of the very large amount of decisions that the Refugee Protection Division has to make each year and the backlog that has been accumulated since the creation of the Board in 1989, several measures have been put in place to drastically augment the speed of the decision-making process. The end result of these evidentiary practices and these new procedures is a severe imbalance in the refugee determination between fairness and efficiency. Since its inception, three main procedural changes were brought to the refugee determination process in order to increase expediency: the Fast-track procedure, the delivery of oral decisions from the Bench and Guideline no 7. Now, the 'mot d'ordre' at the Refugee Protection Division is 'efficiency'.

From the Board's perspective, the first step of the procedure is to determine whether or not a case can be determined through the fast-track procedure. This procedure is a filtering mechanism through which cases are classified into two categories: unproblematic and problematic. Unproblematic claims are those which are deemed well-founded on the record. Cases falling into the first category represent more or less 25 per cent of all claims which are determined in a year. These cases are treated through an expedited process. The main characteristic of this process is that claims are cursorily examined by a civil servant during an interview that lasts between 30 minutes to one hour. When the civil servant is satisfied that the claim is indeed well-founded, a draft decision is sent to a Board member who signs it.

⁸⁴ *Owusu, Kweku v. M.E.I.* (F.C.A., no. A-1146-87), Heald, Hugessen, Desjardins, January 31, 1989; *Mensah, George Akohene v. M.E.I.* (F.C.A., no. A-1173-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.); *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.). This would include a consideration of the conditions in the claimant's country or origin and the experiences of people in a similar situation. See, respectively, *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm.L.R. (2d) 296 (F.C.T.D.); and *Chaudri v. Canada (Minister of Employment and Immigration)* (1986), 69 N.R. 114 (F.C.A.).

⁸⁵ In *Polgari, Imre v. M.C.I.* (F.C.T.D., no. IMM-502-00), Hansen, June 8, 2001, 2001 FCT 626, the Court faulted the CRDD for "the absence of any analysis of the extensive documentation...coupled with the failure to adequately address the contradictory documents and explain its preference for the evidence on which it relied." In *Orgona, Eva v. M.C.I.* (F.C.T.D., no. IMM-4517-99), MacKay, April 18, 2001, 2001 FCT 346, the Court faulted the CRDD because "it made no reference to the significant documentary evidence which was supportive of the...claims.

Problematic cases are the following. Cases falling in the second category, representing more or less 75 per cent of all cases, will be directed to a full hearing and examined by a Board member. Because of this *a priori* classification between ‘good’ cases and ‘less good’ cases, Board members likely start the inquiry with a preconceived negative opinion which also likely be reinforced with the application of *Guideline no 7 - Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*⁸⁶.

The main thrust of Guideline no 7 is to empower Board Members to use hearing time only on issues which they consider central to the case. Since the issuing of this guideline, refugee claimants no longer have the opportunity to tell their whole story during the hearing. As a result, they have to recount all the relevant events in *writing* in their Personal Information Form (PIF) before the hearing. This narrative will be compared to the declarations they made at the port of entry and compiled in a report *written* by the immigration officer who interviewed the claimant and, finally, the narrative will be compared to the *documentary information* available at the time of the claim.

This comparative analysis is conducted by Refugee Protection Officers (the right arm of Board members). From it, the Refugee Protection Officer in charge of a file will indicate in *writing* to a Board member what he “considers to be central to the claim”. Then a “copy of the RPD File Screening Form identifying those issues will be provided to the parties together with the Notice to Appear.” Thereafter, the claimant is “expected to notify the RPD as soon as possible of any issue it wants to add or delete, and explain why.” The claimant and the RPD must disclose the documents they want to use 20 days before the hearing, but this does not include documentary evidence on country conditions. Those are provided by the Board and “every case will have some basic documentary evidence”.

During the hearing, Board members will direct their inquiry in light of the File Screening Form:

“18. Using the File Screening Form as a starting point, the member will consult with the RPO and counsel about the issues and how long the hearing is expected to last. Once the issues have been confirmed by the member, questioning must be limited to those issues. However, if it becomes necessary, the member can add or delete issues during the course of the hearing.”

With this guideline, the Board also changed “the order of questioning by having the Refugee Protection Division (of the IRB) leading the inquiry in the hearing room.”⁸⁷ When credibility issues are at stake, the

...when evidence which supports the [claimants’] position is not referred to, and when other documentary evidence is selectively relied upon, the tribunal, in my opinion, errs in law by ignoring relevant evidence.

⁸⁶ A copy of the *Instructions for the Acquisition and Disclosure of Information for Proceedings in the Refugee Division* (CRDD – Instructions 96-01), is found in the *CRDD Handbook*, chapter 1, *Conduct of Refugee Division Proceedings*, at Appendix 1D: <http://www.cisr-irb.gc.ca/en/about/tribunals/rpd/handbook>.

⁸⁷In the “Hearing” section of the Guidelines, *supra* note 86 at paras. 19-23. In *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C. 16 Guideline 7 was challenged as a breach of procedural fairness and on the grounds that it “fettered” the discretion of board members to decide the order of questioning appropriate to a

inquiry will focus on questioning claimants on specific issues related to their well-founded fear of persecution. Because very few decisions of the Board are published on the use of Guideline no 7, it is not yet possible to examine how it is precisely used in the refugee determination process.

The last procedure pertains to the delivery of decisions. As a norm, Board members are not required to make oral decisions from the Bench⁸⁸. From this account, it is clear that the Board aims at speedy decisions. What is not clear, however, is how in practice they are committed to also ensure fairness of the process. For example, it is possible that Guideline no 7 may have positive impact in ensuring that claimants are systematically given an opportunity to respond to any facts and opinions contrary to their claims. At this point in time, however, it is not possible to make a valid evaluation of the process from this perspective.⁸⁹ In any case, knowing that Board members are already assessing testimonies from the standpoint of their reliability, leaving aside issues of relevancy and probative value, there is little hope that the situation will improve considering the constraints imposed to them.

There is one more issue which I would like to raise concerning these procedures for processing claims and it is in relation to the *Singh* decision of the Supreme Court of Canada⁹⁰. The question I am asking myself as whether these new procedures, in conjunction with the means to gather and assess evidence, are not sharing close resemblance with the first refugee process. Three judges of the Supreme Court declared this process incompatible with the fundamental principles of justice, entrenched in section 7 of the *Canadian Charter of Rights and Freedoms*. Three judges declared it incompatible with the right to fairness of section 2 of the *Canadian Declaration of Rights and Freedoms*. Although there was no majority decision, judges nonetheless agreed that the procedure was deficient. The Supreme Court delivered this decision in 1985 and, as a consequence, the Immigration and Refugee Board was created in 1989.

This process that the Court examined was established in 1978. Under this process, claimants filled in a form, including a written narrative establishing the facts upon which their claim was based, and filed it with the Consultative Committee on Refugees. This Committee examined the files in light of

particular claim. The Court concluded that the language of the Guideline and the pressure board members might experience to apply it whether it was appropriate to a particular case or not amounted to invalid fettering of the discretion of the IRB. Until an appeal is heard on the issue, the status of this Guideline is now uncertain.

⁸⁸ Canada, Immigration and Refugee Board, *Policy on Oral Decisions and Oral Reasons*, September 2003: 4. Policy Statement: "It is the norm in the IRB that an oral decision and supporting reasons are delivered at the conclusion of a hearing, and that the decision concludes the matter at issue. All decision-makers are expected to deliver oral decisions and reasons in all appropriate cases." See Policy at http://www.irb-cisr.gc.ca/en/references/policy/policies/oral_e.htm

⁸⁹ However, it is still too soon to provide an answer, even a preliminary one, since the Guidelines have been effective for two years only. Access to decisions of the Board (beyond the Quick Law databank which contain a small amount of decisions selected by the Board) in which the Guidelines have been used in addition to observations of hearings will be needed to draw definitive conclusions on this matter.

⁹⁰ *Singh c. Canada (Ministère de l'emploi et de l'immigration)*, [1985] 1 S.C.R. 177.

documentary information which was not divulged to claimants. Therefore, they were not able to refute any fact contradicting their claim. When the facts revealed in claimants' files did not correspond to documentary information, the Committee likely made negative recommendations to the Immigration Minister arguing that that claimants' allegations were not reliable (it is not possible to say with certainty because the Committee was sitting *in camera*). Following this examination, the Committee sent the file and its recommendation to the Minister, who then took the decision to grant or refuse the claim. In sum, this procedure did not allow claimants to be heard when their claims were contested. It is for this reason that the Supreme Court decided that this procedure was not compatible with either the Charter or the Declarations. The Court further stated that when issues of credibility are at stake, they need to be resolved through an oral hearing. Paper hearings do not suffice in this regard. As a consequence of this decision, the new refugee determination process was created and it entitles refugee claimants to be heard.

The process that is actually followed by the Board is compatible with the letter of the law laid down by the Supreme Court, but is it compatible with its spirit? Given all the arguments put forward in this article regarding the treatment of testimonial and documentary evidence, the Federal Court's imprimatur to the Board's practices in this regard, including the fairness of not allowing claimants to refute facts used against them, especially those found in documentary evidence, the question surely warrants being asked.

B. Bringing Changes to the Legislative Framework

Although several institutional constraints can explain Board members' lack of critical distance when they assess claimants' testimonies, and in particular, the evidentiary practices they developed⁹¹, they do not constitute good justifications from a legal standpoint. Indeed, the bottom line is that these practices are not only illegal in a free system of evidence from a positive law point of view, but they also lead to unfair results from the principles of natural justice point of view. For these reasons, reforms to the free system of evidence should be seriously considered for at least two reasons.

⁹¹With respect to the heavy workload, the problem is that Board members have little time to spend on each file (no more than one day). Therefore, they have no choice that to devote a minimal amount of time to each claim, which is not enough to make the effort to arrive at the understanding needed to resolve the factual and legal issues. The Board hopes to solve this problem by counting on different international and governmental measures to reduce the flow of claimants coming to our borders (visa restrictions, third safe country agreements, etc.) So far, however, these measures have lead to some reductions of the number of claimants coming to our borders, but they are not drastic (for year 2005-2006, the plan receiving around 30 000 claims). Of course, this problem of time could be solved with a significant increase of new appointments to the Board. I am conscious, however, that were living in an age where economic issues matters more than any other moral considerations to govern the State, and that this kind of proposal would not be embraced with enthusiasms. In fact, Board members are fewer *Performance Report, 2004-2005* and *Reports on Plan and Priorities 2005-2006*. These documents can be found on the IRB site: www.ird-cisr.gc.ca/en/about/publications/index_e.html.

First, the analytical deficiencies among RPD members may be attributed, at least in part, to the fact that they are not experts in refugee affairs and foreign cultures, whereas in order to work properly, a free system of evidence presupposes the existence of a context in which decision-makers and parties share a common cultural background and also in which the information is reasonable certain. When these conditions are not present, it is difficult for the free system of evidence to produce fair results. The second reason is that administrative tribunals are not what they were anymore. The scope and complexity of the legal issues that they determine have nothing in common with those of the past (especially in Canada where many tribunals have the competence to settle constitutional disputes). Therefore, examining how each tribunal assess the evidence provides empirical data to support the view that it is not sufficient anymore to prescribe that Board members are “not bound by any legal or technical rules of evidence” (such as stated in s. 170g) of the IRPA) in contemporary administrative law.

My opinion is that this type of provision is too general. It does not provide meaningful guidance to Board members to exercise their jurisdiction fairly, especially when the working conditions are such as those of the Refugee Protection Division: heavy workload, limited possibility to directly check the facts stated in claimants’ testimonies and the multicultural context. I have two changes to propose to the *Immigration and Refugee Protection Act*. The first one is on the issue of reliability of testimonies and documentary evidence, paying special attention on the need to provide meaningful guidance to Board members with respect to a fair assessment of these two types of evidence. The second one is on the assessment of relevancy, especially taking note of the multicultural context in which the tribunal operates.

a) Assessing Reliability in the Specific Context of a Refugee Determination

With respect to testimonies, two principles stated in the Federal Court refugee determination case law would gain to be incorporated in statute law. The third one makes the link between what a refugee claimant must prove under the statutory definition of refugees.

1. Testimonies shall be presumed to be given in good faith when they are credible and trustworthy.
 - a) Credible means sincere
 - b) Trustworthy means coherent, consistent and overall plausible
2. The presumption of good faith can be rebutted when:
 - a) Board members have good reasons to believe that the witness is not credible.
 - b) Board members have good reasons to believe that the witness is not trustworthy.

3. Good reasons mean reasons that are linked to the subjective and/or the objective fear of persecution.

With respect to documentary evidence, that is to say the use of country reports, three principles should be enacted.

1. Country reports form part of the record.
2. They shall be deemed trustworthy, unless
 - a) The timeliness, accuracy or completeness of their content can be challenged;
 - or
 - b) The credit worthiness of the sources can be reasonably inferred.
3. When information contained in a country report is intended to be used against the claimant:
 - a) Attention of the claimant shall be drawn to the specific information in the document;
 - b) An opportunity to make oral or written submissions to respond to it shall be given to the claimant.

b. Ensuring Assessment of Relevancy and Probative Value

The presumption that a claimant's testimony was given in good faith applies to the events related by claimants, not to the deductions they make. Indeed, RPD members are not required to subscribe to a claimant's interpretations of events. After Board members determined what information is reliable, they have to determine the degree of relevancy of those and assign a probative value. This last part of the reasoning serves the purpose of making final determinations, that is to say, whether claimants met the burden of proof and refugee status can be granted to them.

Because the information is scarce, fragmented and constantly changing, RPD members are often unable to draw direct conclusions from facts. As a consequence, they have to draw inferences⁹². These inferences have to be based on reasonable assumptions. In order to do so, Board members may rely on

⁹² In *Bosiakali, Mbokolo v. M.C.I.* (F.C.T.D., no. IMM-4948-00), Nadon, December 14, 2001, 2001 FCT 1381, the Court found that the CRDD had not reconciled the testimony of the daughter, which it found credible and which supported her mother's testimony concerning her arrest, and indirectly corroborated the fact that her father had also been arrested, with the testimony of the parents regarding these events, which was rejected for lack of credibility.

their own judgment to determine whether the story is plausible. For this purpose, RPD members may draw conclusions based on their common sense⁹³, but they must explain the reasons that prompted them to adopt their viewpoint and support it with evidence⁹⁴, especially documentary evidence⁹⁵. They must examine their conclusions carefully⁹⁶ to ensure that they are not founded on simple speculation⁹⁷. In fact, it is not enough simply to state a preference for the most plausible explanation about how events probably unfolded⁹⁸.

Therefore, it is precisely at this stage of the process, when the plausibility of the testimony is assessed, that Board members will use their common sense⁹⁹. While it is acknowledged that common sense knowledge is indispensable in judging¹⁰⁰, this does not mean that it is always fair for decision-makers to use common sense every time they examine the relevance and probative value of facts presented as evidence, especially testimonial evidence. It is not a self-evident truth that a Canadian's common sense knowledge is useful for assessing the credibility or trustworthiness of stories recounted by individuals from foreign cultures¹⁰¹. Obviously, this knowledge will very often bear little or no

⁹³*Alizadeh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. (Quicklaw) no. 11, par. 1 (F.C.A.); *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. no. 415, par. 2 (F.C.A.), a case in which the Court stated that the Board is entitled in assessing credibility to rely on criteria such as “rationality and common sense.” Before the RPD, a passage of Justice O’Halloran’s decision in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 357 (C.A.B.C.) is often quoted: “The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognise as reasonable in that place and in those conditions (...)”

⁹⁴*Arumugam v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. no 122 (Quicklaw), par. 5 (F.C.); *Alza v. Canada (Minister of Citizenship and Immigration)*, (1996) 110 F.T.R. 187 this evidence may consist of general factors or surrounding circumstances that make some allegations improbable.

⁹⁵*Badri v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. (Quicklaw) no 1979, par. 45 (F.C.) but in Part II it will be seen that these uses are problematic.

⁹⁶*Leung v. Minister of Employment and Immigration*, (1994) 81 F.T.R 303, 307.

⁹⁷*Njoko v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. (Quicklaw) no 119, par. 6 (F.C.). If applicable, the decision violates the principles of natural justice and may be quashed.

⁹⁸*Dumitru v. Canada (Minister of Employment & Immigration)*, (1994) 27 Imm. L.R. (2d) 62, 65 (F.C.) A claimant’s testimony ought not to be lightly or readily dismissed. It is not sufficient for the decision-maker merely to indicate that he or she prefers to accept what is considered to be a more reasonable explanation of the events, nor is it appropriate to go on to construct one’s own hypothesis as to how events actually unfolded.

⁹⁹The concept of common sense may be used to refer to both common sense knowledge and common sense reasoning; see Renée ELIO’s article, “Issues in Commonsense Reasoning and Rationality,” in Renée ELIO, (ed.), *Common Sense, Reasoning, and Rationality*, Oxford/Toronto, Oxford University Press, 2002, pages 8-9. In the Anglo-American doctrine, the expression ‘common-sense generalizations’ is used mainly to refer to the two aspects of this concept: William TWINING, *Rethinking Evidence. Exploratory Essays*, Oxford, Basil Blackwell, 1990, p. 352.

¹⁰⁰Claire L’HEUREUX-DUBÉ, «Re-Examining the Doctrine of Judicial Notice in the Family Law Context », (1994) 26 O.L.R. 551, 559.

¹⁰¹It has almost become a commonplace to denounce the dangers of arbitrary action that a decision-maker’s use of common sense can cause: BITTERMAN, “The Evaluation of Psychological Propositions,” in Leo LEVIN, *Evidence*

resemblance to the events related in the claimants' testimony, which affects the intersubjective understanding between decision-makers and claimants. Anthropological research, in fact, shows that individuals from different cultures have more difficulty in communicating and understanding information¹⁰². Given these circumstances, it is not surprising that they encounter difficulty in forming a coherent understanding of the claimant's narrative and, as a consequence, being able to evaluate the relevancy of this narrative, in part and as a whole.

Therefore, the cultural variable plays a significant role in assessing relevant and assigning probative value to evidence. On this particular point and on several occasions, the Federal Court of Appeal advised IRB members that they must be careful when they assess the standards and practices of different cultures, as to how political, police and social systems function in other countries.¹⁰³ It stated that the claimant's understanding of the facts prior to his escape may seem improbable by Canadian standards, but may be plausible in the context of interpreting a foreign culture.¹⁰⁴ Also, the Federal Court has "cautioned about the perils of drawing inferences from cultural generalizations¹⁰⁵ and relying on stereotypical profiles¹⁰⁶, as well as assessing ethnicity based on the panel's perception of the claimant's

and the Behavioural Sciences A-16 (mimeo 1956), cited in A. Leo LEVIN and Robert J. LEVY, "Persuading the Jury with Facts not in Evidence: The Fiction-Science Spectrum," (1956) 105 *U. of Pennsylvania L. Rev.* 139, 141.

¹⁰²And even profound misunderstanding. There are several books on this subject, especially in the anthropological field. Here are a few references: Clifford GEERTZ, *The Interpretation of Cultures: Selected Essays*, New York, Basic Books, 1973, 470 p. Karlfried KNAPP, Werner ENNINGER and Annelie KNAPP-POTTHOFF, *Analysing Intercultural Communication*, Berlin: Mouton de Gruyter, 1987, 319 p.; A.M. PELOSI, *Intercultural Communication in the Refugee Determination Hearing*, Montreal, School of Social Work, McGill University, 1996, 142 p.; Larry A. SAMOVAR and Richard E. PORTER, *Intercultural Communication: A Reader*, Belmont, CA, Wadsworth, 1994, 330 p.

¹⁰³*Ye v. Canada (Minister of Employment and Immigration.)*, [1992] F.C.J. (Quicklaw) no 584, par. 9 (F.C.A.); *Aden v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. no 1100, par. (F.C.A.); *Pathmanathan v. Canada (Minister of Employment and Immigration.)*, [1993] F.C.J. (Quicklaw) no 641, par. 7 (F.C.); *Karikari v. Minister of Employment and Immigration*, (1994) 169 N.R. 131, 138 (F.C.A.).

¹⁰⁴In a number of cases, the Court has warned the CRDD not to impose Western concepts, Canadian paradigms or North American logic and experience without regard to the sociopolitical context of the case before it and the particular circumstances of the claimant: *Ye v. Canada (Minister of Employment and Immigration)*, cited in note 104.; *Bains v. Canada (Minister of Employment and Immigration)*, (1993), 20 Imm. L.R. (2d) 296 (C.F.); and *Rahnema v. Canada (Solicitor general)*, (1993) 22 Imm. L.R. (2d) 127, 134 (F.C.). In *Rahnema*, the Iranian claimant had explained that on the advice of a smuggling agent, he destroyed a false Iranian passport after passing through Philippine emigration controls on his way to Japan for his trip to Canada. The Court found that the panel's conclusion that the claimant's explanation was implausible amounted to an error of law because the panel had applied its own standard of analysis and judgment "rather than a reasonable standard of one similarly situated" to the claimant. See also *Sun v. Canada (Minister of Employment & Immigration.)*, (1993) 24 Imm. L.R. (2d) 226, 227 (F.C.).

¹⁰⁵In *Najeebdeen, Mohamed Saly v. M.C.I.* (F.C.T.D., no. IMM-5438-98), Lutfy, July 30, 1999, the Court held that it was wrong to extrapolate that a specific incident alleged by a claimant was implausible because it ran counter to the general political relationship between groups (the Tamil Muslim community and the Sri Lankan government). See also *Ponniah, Ganeshalingam v. M.C.I.* (F.C., no. IMM-4620-02), Russell, September 2, 2003, 2003 FC 1016; *Ali, Ahmed v. M.C.I.* (F.C.T.D., no. IMM-3981-02), Russell, September 2, 2003, 2003 FC 982.

¹⁰⁶*Tubacos, Zoltan v. M.C.I.* (F.C.T.D., no. IMM-1373-01), Kelen, February 28, 2002, 2002 FCT 225; *Cazak, Liliana v. M.C.I.* (F.C.T.D., no. IMM-1110-01), Blanchard, April 9, 2002, 2002 FCT 390; *Trembliuk, Yuriy v. M.C.I.* (F.C., no. IMM-5873-02), Gibson, October 30, 2003, 2003 F.C. 1264.

physical appearance (...) without regard to how the claimant would be perceived in his or her home country”¹⁰⁷.

The Court stresses the importance of taking the cultural variable into account in assessing testimony. It urges IRB members to challenge their common sense assumptions and to take a critical look at their own knowledge of the world. Unfortunately, Board members draw inferences without checking with the claimants whether their constructions of reality are coherent with the claimants’. In short, one may be sceptical about the chances that these inferences are accurate, because they originate in the minds of people (decision-makers) with little knowledge of the context of the information. Part of the problem would be solved by proper questioning during the hearing aiming at understanding how and why claimants think that specific information they provide is relevant. Upon reading Board members’ decisions and listening to recording of some hearings¹⁰⁸, this issue appears to be seldom raised.

It may be partly due to the fact that the *Immigration and Refugee Protection Act* explicitly requires Board members to base their decision on “credible and trustworthy” information. The legislative omission regarding an assessment of “relevancy” and “probative value” may be one of the causes of the problem. In this view, it may be more appropriate to add these words to the existing section 170h) of the Act.

The actual provision reads:

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

The provision with modification could read:

“may receive and base a decision on credible or trustworthy evidence that is adduced in the proceedings and considered relevant and of probative value in the circumstances;”

¹⁰⁷ In *Pluhar, Lubomir v. M.C.I.* (F.C.T.D., no. IMM-5334-98), Evans, August 27, 1999, and in *Mitac, Josef v. M.C.I.* (F.C.T.D., no. IMM-5988-98), Lutfy, September 13, 1999, the Court stated that reliance on a tribunal member’s observations concerning a claimant’s “physical appearance” is, in the absence of expert evidence, “inherently dangerous.” But see *Bartonik, Daniel v. M.C.I.* (F.C.T.D., no. IMM-304-00), Muldoon, July 26, 2000, where the Court upheld the CRDD’s finding that the claimant was not a Roma and would not be perceived as one after considering factors such as appearance, language, cultural practices and friends. See also, to the same effect, *Tugambayev, Azamat v. M.C.I.* (F.C.T.D., no. IMM-3806-99), Reed, June 30, 2000. In *Mikhailov, Alexandr v. M.C.I.* (F.C.T.D., no. IMM-4265-99), Denault, August 24, 2000, the CRDD disbelieved the attacks suffered by the claimant were of an anti-Semitic nature because, as confirmed by the claimant himself, he “does not have a Jewish name, is not a practising Jew, and his physical appearance does not lead you to believe he is Jewish.”

¹⁰⁸ See Crépeau, Rousseau, Foxen, Houle et al., *loc. cit.*, note 11.

However, adding this prescription would not provide sufficient guidance to Board members and require from them to be wary of their own prejudices and preconceptions and the premises on which they base their arguments. When decision-makers have testimonies of persons coming from another cultural background, fairness may require that they be able to identify areas about which they are ignorant and be capable of admitting their ignorance of other cultures, thereby giving the claimant a chance to refute inaccurate information, if any, or allowing the decision-maker to become attuned to the claimant's reality. The Supreme Court of Canada has already begun to move in that direction by developing the concept of 'judicial notice'.

With a view to achieving greater intersubjective understanding, the Supreme Court has made significant changes to the common law evidence system, mainly by creating a greater openness to the evidence of social facts in order to give judges an opportunity to gain a better understanding of the parties' cultural background (in the broad sense, i.e. social, political and economic). This occurred during cases involving fundamental rights and freedoms in which the Court agreed, for example, to hear testimony from caregivers, including an expert, in order to learn about battered wife syndrome.¹⁰⁹ This quest to understand context was pursued notably in cases involving aboriginal¹¹⁰ and matrimonial¹¹¹ law in which judges based their decisions not only on evidence presented by caregivers to better understand social phenomena such as the impoverishment of women following divorce, but also on the rule of judicial notice. The use of this rule for this purpose was particularly groundbreaking because judges have traditionally used it to take notice of generally known facts or facts that can easily be checked and need not be questioned.¹¹²

In 1994, Justice L'Heureux-Dubé wrote about relationships between judicial notice and the common sense knowledge on which decision-makers rely to make their arguments. She asserted that common sense includes:

¹⁰⁹*R. v. Lavallée*, [1990] 1 S.C.R. 852. With respect to the use of social facts in the context of constitutional interpretation, see Danielle PINARD's outstanding articles, "Charter and Context: The Facts for Which we Need Evidence, and the Mysterious Other Ones," (2001) 14 *Supreme Court L. Rev.* 163-173; "The evidence of social facts and the Brandeis briefs: Certain reservations," (1996) 26 *R.D.U.S.* 497-513.

¹¹⁰*R. v. Sioui*, [1990] 1 S.C.R. 1025, 1050;

¹¹¹*Moge v. Moge*, [1992] 3 S.C.R. 813; *Willick v. Willick*, [1994] 3 S.C.R. 670, 699.

¹¹²*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1923] A.C. 191, 213 (H.L.). It was asserted in the Baldwin case that a court may consult a general or even technical dictionary: *Baldwin and Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, 684 and 691 (H.L.). In the case of administrative tribunals, the concept has a much broader scope. It includes not only facts of which judges may take judicial notice, but also facts and opinions within its specialized knowledge. For the RPD, see the *Immigration and Refugee Protection Act*, cited in note 8, paragraph 170i) "The Refugee Protection Division, in any proceeding before it: i) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge": France HOULE, "The Use of Official Notice in a Refugee Determination Process", (1993) 34 *C. of D.* 573.

*...a prism of personal experience and understandings through which judges and jurors, as factfinders, both perceive and interpret that which is put before them. Not all factfinders, however, will perceive the same circumstances in the same way. Moreover, while the prism held by most factfinders may constitute a perfectly adequate analytical framework in most situations, in certain contexts it may not accord with reality, and may therefore impede rather than advance the question to find facts in a way that is reflective of how people really experience the world.*¹¹³

Thus, when decision-makers' common sense hinders rather than advances their understanding of the context, Justice L'Heureux-Dubé considers it possible to take judicial notice of what she calls "social framework evidence," because it can play "both a meaningful and a necessary role in re-aligning that prism with reality."

In a refugee determination process, decision-makers not only can go beyond the evidence adduced at the hearing but should do so to ensure that all the relevant information to assess a claim is taken into consideration. In this respect, they take notice of a broad category of information which is called their specialized knowledge, which include knowledge of relevant facts and places in country of origin of claimant (geographical, historical, political, etc.), but also social codes governing individuals within a particular cultural group. This last point is particularly important in order to understand the context of the claim properly. The Board is already providing training to raise the sensitivity of Board members to cultural issues. Perhaps, this practices can be formalized. Indeed, as well as country reports, the mandate of the Documentation Centre could be expanded to include the production of 'cultural frameworks'. They could be referred to by Board members when needed through the use of actual provision in the Act which prescribes: "(the Board) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge;"

In sum, it may become crucial in the future to broaden the principle of fairness and develop some case law on the duty of intercultural understanding. This duty might lead to the formulation of procedural and evidentiary principles that could help decision-makers question their own understanding of the world and

¹¹³C. L'HEUREUX-DUBÉ, *loc. cit.*, note 101, 559. See also her dissenting opinion in *R. v. Osolin*, [1993] 4 S.C.R. 595, 626: "For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth (...)." Professors Walker and Monahan wrote several articles about the use of social sciences research and data context of a trial. As Justice L'Heureux-Dubé noted in her article, *loc. cit.*, note 101, 555, they divide their classification of the facts into three categories, which they name: (1) social authority; (2) social framework; and (3) social facts. See the articles by Laurens WALKER and John MONAHAN, "Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law," (1986) 134 *U. Pa. L. Rev.* 477; "Social Frameworks: A New Use of Social Science in Law", (1987) 73 *Va. L. Rev.* 559; "Social Facts: Scientific Methodology as Legal Precedent", (1988) 76 *Ca. L. Rev.* 877; "Empirical Questions Without Empirical Answers," (1991) *Wis. L. Rev.* 569.

align it with the understanding of the parties testifying before them¹¹⁴. This duty could also lead to changes in how certain principles of administrative law are applied in making individual decisions, such as the right to be heard and to make one's case, the obligation to give reasons for decisions, and the extent to which information and opinion on different cultures falls within the specialized knowledge of the decision-makers of certain administrative tribunals.

CONCLUSION

Administrative tribunals are entitled to use the formal common law rules of evidence in their decision-making process, but they must avoid two pitfalls. They must ensure that the use is valid in positive law (in justifying the use and by correctly using the rule) and that it is compatible with an evidence-free regime. My research shows that the Refugee Protection Division fails on both accounts. The findings demonstrate that research needs to be made on how in practice evidentiary issues, notably related to the assessment of evidence, are dealt with by Board members within administrative tribunals. Critical analysis is needed to show how their practices are or are not compatible with the application of an evidence-free regime in a given administrative tribunal. In the long run, this type of research will help to design specific legislative provisions adapted to each tribunal so that they will know what the boundaries of their actions are with regard to the taking and assessing of evidence in the particular context in which they have to operate.

On the theoretical level, this research also raises another problem. Indeed, RPD members' reasons for decisions show that they perform an *a priori* classification of evidence based on a hierarchy, with the most credible and trustworthy evidence at the top and less credible, trustworthy evidence lower down. This concept of a hierarchy of evidence is a foundation of the theory of evidence that have dominated in the Western civil and common law traditions for more than 200 years. This theory, which some authors call 'foundationalism'¹¹⁵, is strongly influenced by the rationalist school and a deductive method of

¹¹⁴Judicial notice would be particularly suitable for this type of task in family law cases, as Justice L'Heureux-Dubé explained in her article, *loc. cit.*, note 1, 568-571. See also: Susan G. DRUMMOND, "Judicial Notice; the Very Texture of Legal Reasoning," (2000) 15 *Can. J. of L. & Soc.* 1-37. Jean CHEVALLIER's paper, "Remarques sur l'utilisation par le juge de ses informations personnelles," (1962) 60 *Rev. Trim. Dr. Civ.* 5, 18-19. Rather than stressing the type of knowledge required to determine the extent to which it is legitimate for judges to use their personal knowledge, this author focuses on the role such knowledge plays in the decision-making process. He could not use his personal knowledge during the process of establishing the facts, but during the process of assessing the facts. See also Kenneth Culp DAVIS, "An Approach to Problems of Evidence in the Administrative Process," (1942) 55 *Harvard L. Rev.* 364-425; Kenneth Culp DAVIS, "Judicial Notice," (1955) 55 *Columbia Law Rev.* 945, 952-959 which proposes a distinction between "adjudicative facts" and "legislative facts" which is helpful for deciding whether facts of which judicial notice are taken should be disclosed to interested parties during the decision-making process in order to give them a fair chance to make their case.

¹¹⁵This name comes from the expression "empiricist foundationalism" from a book by S. Haack on "coherentist" and "foundationalist" epistemologies. Susan HAACK, *Evidence and Inquiry: Towards Reconstruction in Epistemology*,

reasoning. It is equally important to note that some of the Federal Court's decisions reviewing RPD cases are a clear expression of this perspective. However, in other decisions, Federal Court judges urge RPD members to distance themselves from this perspective and to adopt another analytical framework to assess the evidence that is more evocative of the empirical school and based on an inductive method of reasoning. Based on this philosophy and its method, some authors have proposed a theory on evidence that they have called 'coherentist'. For future research, an interesting hypothesis can be formulated on the basis of this observation.

Indeed, it appears that two theories of evidence are at work in the refugee determination process. An examination of favourable and unfavourable RPD decisions may reveal that in the refugee determination process, the rationalist perspective is more often relied on in negative decisions, while the empirical view is more commonly used in favourable decisions. If after exploratory research the hypothesis proved to be correct, questions such as the following could be raised: Are these two theories conflicting? Can they be operational at the same time in the same legal system without one having precedence over the other? The results of this research can be illuminating for future reference for Parliament, Administrative Tribunals and Courts.

One last observation concerns the incorporation of cultural pluralism and intercultural understanding into the law of evidence. It is acknowledge that requiring the players in a system, mainly the decision-makers, to reconcile their view with realities experienced by other people¹¹⁶, poses an enormous challenge. However, it deserves our attention for at least two reasons. The first is that the problems related to the lack of reflection about incorporation of the cultural dimension into the decision-making process do not affect just refugee claimants. Ethnic groups as well as aboriginals also suffer injustices before our justice system, especially in criminal law.¹¹⁷

The second reason is that it is important to start thinking through and establishing procedural and evidentiary mechanisms that will be adapted to future societies to avoid the fraction of our legal systems.

1993, Oxford, Blackwell, pages 13-19. On knowledge and coherence, see Paul THAGARD, Chris ELIASMITH, Paul RUSNOCK and Cameron SHELLEY, "Knowledge and Coherence," in Renée Elio, (ed.), *Common Sense, Reasoning and Rationality*, 2002, Oxford, Oxford University Press, p. 104; Robert AUDI, "Fallibilist Foundationalism and Holistic Coherentism", in Louis P. POJMAN (ed.), *The Theory of Knowledge: Classical and Contemporary Readings*, 1993, Belmont, CA, Wadsworth, p. 263; D. DAVIDSON, "A Coherence Theory of Truth and Knowledge," in Ernest LEPORE (dir.), *Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson*, Oxford, Basil Blackwell, 1986, pp. 307-319; Stephen READ and Amy MARCUS-NEWHALL, "Explanatory Coherence in Social Explanations: A Parallel Distributed Processing Account," (1993) 65 *Journal of Personality and Social Psychology* 429-447; Paul THAGARD, "Adversarial problem solving: Modeling an opponent using explanatory coherence," (1992) 16 *Cognitive Science* 123-149.

¹¹⁶One book that deals with this issue and determination of the refugee status is: Robert F. BARSKY, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing*, Amsterdam/Philadelphia, John Benjamins Publishing Co., 1994, 272 p.

¹¹⁷Remedial action has been taken, especially through the incorporation of concepts such as restorative justice and sentencing circles.

For example, there was a great deal of discussions recently in Canada on the issue whether some religious groups of people (Muslims and Jews) should be entitled to establish their own tribunals to solve legal issues, notably related to family matters, arising among the members of their communities. The large migratory movements are not about to abate. Though Western governments have erected barriers at their borders, it is doubtful that they will prove effective. They only delay the moment when the doors must open, which will have profound effects on the composition of tomorrow's societies, on the concept of citizenship and on the establishment of mechanisms with respect to evidence that will ensure a fair decision-making environment for all.