Submission to the Standing Committee on Citizenship and Immigration

Peter Showler **March 29, 07**

Since the Committee adjourned prior to my appearance on March 29, I have revised my speaking notes for submission in written form. I have made slight revisions to provide comments on information provided to the Committee by Mr. Brown of CIC.

Today I will be speaking primarily as the person who served as the Chairperson of the Immigration and Refugee Board (IRB) at time of the passage of the Immigration and Refugee Protection Act (IRPA). At the time, beginning in 1999, I was intimately involved in the consultations with CIC, the Department of Justice and the Minister of the day, Elinor Caplan, in the development of the Act, including :

- Policy considerations related to drafting of the Act as related to the IRB
- The drafting of the Act and regulations, including the RAD
- The implementation of IRPA at the Board, including the RAD, between passage of the Act in 2001 and the implementation date in June, 2002.

Since time is short, I will restrict myself to comments that you may not have heard before from previous witnesses. Primarily I will address three subjects:

1. Why the reduction of the two-member panel to a single member decision diminishes the quality of the decision and is likely to produce more errors.

2. Why the current judicial review process for the Federal Court is not a reliable safety net for errors made by the IRB.

3. Why the RAD was not intended to cause further delay in the claim process and could, if properly implemented, speed up the process.

1. Why single members produce more errors than two member panels

I should first say that these comments are based on personal experience as well as from the view of managing the Board. During my six years sitting as a member, I have heard hundreds of claims as both a single member and as a part of two-member panels.

The advantages of the two member panel are not just a matter of the claimant receiving the benefit of the doubt where there is a split decision between two panel members. The quality of the two-member hearing is far superior, particularly in difficult hearings where the evidence is complex and the testimony of the claimant requires close and sensitive examination. Two member panels work as partners throughout the hearing process. They agree on the issues in advance, discuss the relevance of the evidence throughout the proceeding and assist one another during the questioning of witnesses. Finally they discuss the law and its application to the evidence. It is a close, collaborative process. The

more difficult the claim, the greater the need for a second pair of eyes and ears and ultimately, for a second opinion on the evidence and the law.

Not all members are equal. Even where both members are experienced and competent, they have different skills: better legal training, more experience with a certain country, better questioning or listening skills. In the best of situations, members complemented one another's strengths and weaknesses. Even with the most competent of members, two members are still better than one for challenging cases.

However, the two member panel becomes far more important for weak or partially trained members. The IRB's training program was centered around the two-member panel. It was generally estimated that a new member required about 6 months to become a reliable, competent member who could hear any kind of case. After the initial three week training period, the new member would be paired with a mentor, an excellent member who had mentoring training. For the initial weeks, the members would sit together, much in the manner of pilots and co-pilots where the mentor could provide careful, detailed on-the-job training. As the member evolved, he or she would sit with other mentors, all the while working with a training team. The key to the mentoring model was the two-member panel.

Of equal importance is the issue of the mediocre or even incompetent member. The Committee is fully aware of the controversies around the appointments process. Although fewer than before, there are still members of limited capacities who are not fully effective members. They cannot preside over hearings effectively; they confuse issues of evidence and law; they do not recognize their own biases. Such members continue to exist within the Board, although fewer than before. For challenging cases, managers would be careful to pair such weak members with stronger members. That option has been lost. Weak members now sit on their own with virtually no regulation or control in the hearing room. The opportunities for supporting them or moderating inappropriate conduct are lost. In addition, managers no longer have the opportunity to sit with the members of their team as part of their training and member assessment roles. In short, all of the training and quality control functions available through two member panels have been lost.

For those who know and understand the business of deciding refugee claims, it is manifestly obvious that the number of incorrectly decided cases will increase significantly where members, particularly weak members, are left to hear cases by themselves.

2. Why judicial review is not an adequate safety net to catch the increased mistakes from single member panels

None of my remarks should be construed as a criticism of the Federal court; they are not. The problem lies in the judicial review process itself, particularly in the application for leave process. It is essentially a judicial triage system intended to quickly identify the

most meritorious cases. Unfortunately it is not effective. Many applications are badly prepared or are incomplete. This is partially due to the lack of legal aid support and the inconsistent quality of legal counsel. Judges are required to make quick decisions on scanty evidence. Where critical errors have occurred in the hearing room, particularly around issues of credibility, only a detailed reading of the transcript of the hearing will allow for a valid assessment of the decision. Transcripts are often not provided at the leave stage of the proceeding. Worse yet, we would not know what evidence was available since the court provides no reasons for its decision when it denies leave. Approximately 89% of cases are denied leave but we do not know why they are denied. We also do not know why approximately 25% of refused claimants do not even seek leave. We do not know if it is an access to justice issue, if they cannot afford a lawyer, if they were denied legal aid, if they know they have an unfounded claim or if they have given up because of the dauntingly high refusal rate.

So the dilemma is this: The IRB's knowledge and experience of the refugee hearing process suggests that single member hearings will result in a greater number of incorrect decisions. But with a triage system operating at the Federal Court which screens out the great majority of cases without explanations for why those applications were denied, we have no way of knowing whether incorrectly decided cases have been inadvertently screened out. The genuine and reasonable concern for many advocates is that there are too many badly decided cases that are falling between the cracks.

Mr. Malcolm Brown of CIC told the Committee on March 29, that "the quality of those decisions (single member decisions) stand up to scrutiny".

With respect, I must tell you that Mr. Brown has no empirical basis for making that statement. CIC is not in the business of deciding inland refugee claims. They have a limited, peripheral understanding of the process. However, more to the point, even the Board or the Court is not in a position to know if the quality of single member decisions stand up to scrutiny because we do not know why cases are screened out at the leave stage before the Federal Court. No one is in a position to say that the quality of single member decisions can stand up to scrutiny. There has been no meaningful scrutiny of single member decisions and that is what an appeal before the Refugee Appeal Division would provide.

My own private view, but it is not one that I can substantiate for the reasons stated above, is that a significant number of claims are being badly decided, particularly on issues of credibility, by mediocre members who lack the moderating benefits of sitting with a more competent member. However the judicial tool that was designed to identify those errors, the RAD, has not been implemented.

3. Does the RAD cause an increased delay in the refugee claim process?

Both Mr. Aterman and CIC have told you that the average processing time for a RAD appeal would be about 5 months which is a reasonable estimate. However Mr. Brown

mischaracterized the nature of the discussion when he stated that the RAD simply added another layer to the claim process which was quite satisfactory as it was. In response to a question from the Committee, he stated that the system should not be changed in a piecemeal way by adding or changing only a single element. However, he failed to mention that the legislative scheme in place that had been approved by parliament was a single member panel balanced by a full appeal to the RAD. The piecemeal change was the failure to implement the RAD at the time of implementing single panels.

Perhaps of more importance for the Committee to know, the RAD was originally intended to speed up the claim process, not slow it down. As the process was originally conceived, there would be no stay of removal for any rejected claim which was confirmed by RAD. It was accepted that claimants could not be foreclosed from seeking leave for judicial review but they would be granted no automatic stay of removal. There was a subsequent decision to allow the automatic stay for a period of two years to permit the RAD to become fully operational and to establish a record of clear reliable decisions. It was generally believed that if the RAD were able to establish a reputation for reliable, well-reasoned decisions, the Federal Court would only grant stays of removal in exceptional situations.

It was also intended that no Pre-removal Risk Assessment (PRAA) would be required if the claimant were removed within 60 days of the RAD decision. If CIC were adequately resourced to do its job effectively, it was intended that the great majority of refused claimants would be removed within the 60 day limit. The success of the system would turn on the RAD's ability to produce reliable decisions. The theory was a good first decision, a prompt and reliable appeal followed by prompt removal.

I invite the members of the Committee to compare that objective with the current delays related to both the H & C process and the Pre-removal Risk Assessments. CIC has stated its concerns about the costs related to a five month delay for the RAD process whereas their own processes impose delays of years rather than months although the exact amount of delay has not been disclosed by CIC. We do know that these very slow and expensive administrative processes only result in reversal rates of approximately two per cent. It should be no secret to any member of this Committee that they are defending a discredited and ineffective process.

Conclusion

As the RAD was originally conceived to work in concert with single member decisions and a deferential Federal Court, the legislative scheme passed by parliament is still capable of producing faster and more reliable decisions than the present half implemented model.

I must add one brief word on the time required for the implementation of the RAD. Mr. Aterman told you that the IRB would require 12 months to implement the RAD. This is a surprising estimate and in my view excessive. The entire Immigration and Refugee Protection Act was implemented by the Board in 2002 in 9 months and that was an

undertaking that involved significant changes to all four divisions of the Board. More importantly, most of the implementation work for the RAD, the completely new division, was already done when the government decided to postpone implementation in April, 2002. All of the architecture and design were completed as were job functions, processes and jurisprudential issues. The RAD Rules were completely drafted and ready. It is correct that staff would have to be hired and trained but this would require no more than 4 to 6 months. This is one particular challenge, an IT system for the RAD that would have to be effectively integrated with the Board's present system. That is a matter of great technical complexity that I am not in a position to comment on. In that regard, Mr. Aterman is the most reliable source of information.

Peter Showler was the Chairperson of the Immigration and Refugee Board from 1999 – 2002. He sat for six years as a member of the Convention Refugee Determination Division from 1994 – 99. Mr. Showler teaches Advanced Refugee Law at the University of Ottawa Law School and is the author of *Refugee Sandwich: stories of exile and asylum,* a book that describes the inner workings of the IRB within a fictional context.