

IMPROVING CLAIMS RESOLUTION:
ALTERNATIVE PROCESSES IN CANADA'S IMMIGRATION SYSTEM

by

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DEDICATION PAGE

I dedicate this thesis to my family and friends in thanks for their continuous words of encouragement. In particular, to my husband Andrew Teehan, you are a wonderful cheerleader, editor, friend, partner and sounding board. This thesis would remain an unfinished, expensive pile of kindling if not for you.

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ABSTRACT

This thesis argues that alternative dispute resolution processes form a vital part of Canada's immigration and refugee claims determination system. Using an analytical framework that draws on dispute resolution and relational feminist theory, it explores how alternative processes provide advantages over adversarial ones for claims that engage issues of power and relationships. By aligning claims with appropriate processes, system administrators can improve the fairness, efficiency and durability of resolutions. Introductory Chapters describe the administrative law structure that governs immigration and refugee claims in Canada, and the Immigration Appeal Division's Early Resolution program. This unique initiative integrates alternative processes into the Immigration and Refugee Board of Canada's existing appellate structure. Subsequent Chapters assess how this initiative fares against the relevant scholarship. Strengths and challenges of the current system are highlighted. Concluding sections demonstrate how enhancements to the (i) accessibility of information; (ii) clarity regarding the roles and responsibilities of system actors; and (iii) flexibility in the breadth and depth of available alternative process options, can improve the experience of system users.

GLOSSARY

Act: The *Immigration and Refugee Protection Act*, SC 2001, c 27.

ADR: Alternative Dispute Resolution. Used in scholarship to encompass the range of informal, collaborative processes that are used to resolve disputes outside of oral, adversarial hearings. This project adopts the Immigration Appeal Division terminology of Early Resolution (defined below). The concepts underpinning the terms ADR (as used by dispute resolution scholars) and Early Resolution (as used by the IRB and its IAD) are substantially the same. The term ADR was originally used narrowly by the Immigration and Refugee Board of Canada to describe ADR Conferences (also defined below). The term ADR theory is used herein to describe the body of dispute resolution scholarship reviewed in Chapters 1 and 3.

ADR Conference: A discrete resolution process akin to mediation.

Board: The Immigration and Refugee Board of Canada. See IRB below.

CIC: Citizenship and Immigration Canada.

CBSA: The Canada Border Services Agency.

Division: The Immigration Appeal Division of the Immigration and Refugee Board of Canada. See IAD and IRB respectively, below.

DRO: Dispute Resolution Officer. A (now defunct) position at the IAD, occupied primarily by IAD Members. Under a previous iteration of the IAD's Early Resolution program, DROs would facilitate ADR Conferences. This function is now performed by Early Resolution Officers. See EROs below.

ERO: Early Resolution Officer. A senior civil servant position at the IAD. EROs review and evaluate appeals to the IAD and direct claims to appropriate resolution streams. They also facilitate Early Resolution processes, including ADR Conferences.

Early Resolution (or Early Resolution Processes): A term defined by the IAD to mean "mediation and other proactive interventions".¹ These initiatives are carried out by the IAD in an effort to resolve immigration appeals early and without the need for a formal hearing. Also referred to as Early Resolution initiatives and the IAD's Early Resolution program.

H&C: Humanitarian and compassionate considerations. By virtue of sections 25 and 25(1) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), foreign nationals may request that the Minister consider (or the Minister may consider of their own initiative) whether humanitarian and compassionate considerations (taking into account

¹ See *infra* note 19.

the best interests of any child directly affected) justify exempting the foreign national from certain requirements under the Act.

IRB: The Immigration and Refugee Board of Canada. Also referred to as the “Board”.

IAD: The Immigration Appeal Division of the Immigration and Refugee Board of Canada. Also referred to as the “Division”.

IAD Innovation Plan (or IAD Innovation, Innovation Plan, or Plan): The final report of the IAD Innovation Working Group (see below), released in March 2006.

IAD Innovation Working Group (or Innovation Working Group, or Working Group): A task force comprised of stakeholders that was struck in October 2005 by the IRB Chairperson to examine IAD functioning.

ID: The Immigration Division of the Immigration and Refugee Board of Canada.

Macleod Report: A 2001 independent review of alternative processes at the Immigration and Refugee Board by mediator and dispute resolution scholar Leslie Macleod.

Member: An individual who renders decisions at the Immigration and Refugee Board of Canada. The term is used most often herein to refer to Members of the Immigration Appeal Division.

RAD: The Refugee Appeal Division of the Immigration and Refugee Board of Canada.

Regulations: The *Immigration and Refugee Protection Regulations*, SOR/2002-227.

RPD: The Refugee Protection Division of the Immigration and Refugee Board of Canada.

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CHAPTER 1: INTRODUCTION

I. Why Study Immigration?

Close your eyes for a moment. Imagine Syed, a 39-year-old man and a citizen of Pakistan.² He arrives in Canada and makes a claim for refugee protection. His claim is denied. His removal is scheduled. In the interim, Syed has met and married 30-year-old Chanda. Chanda is a Canadian permanent resident. She lives in the same apartment building as Syed. They were married eight months after his arrival, two months after his refugee claim was determined. At the time of his scheduled removal, Syed is hospitalized, suffering from severe abdominal pain. His removal is postponed to allow him time to recover from an appendectomy. After his release from hospital, Chanda and Syed file an application for spousal sponsorship. They are invited to attend an examination interview. Both Syed and Chanda are questioned with an interpreter present.

Syed's claim for permanent residence is refused. The reviewing officer finds the couple's answers during their interviews are substantially similar, and contain no major contradictions. Still, she rejects the claim "(b)ased on her judgment of their candour, credibility and demeanour", having formed the opinion that the marriage was entered into for the purposes of immigration.³

Chanda retains counsel and obtains leave to judicially review the decision. The Federal Court dismisses the application. The judge finds that the officer's ruling was not an unreasonable finding of fact. His Honour writes as follows:

² The scenario of Syed is based on the facts as outlined in *Shah v. Canada (Minister of Employment and Immigration)*, 33 ACWS (3d) 941, [1992] FCJ No 406 (QL) (TD), upheld [1994] FCJ No 1299 (QL) (CA) [*Shah v. Canada*, cited to QL]. Some creative license is taken to supplement the facts.

³ *Ibid* at 3.

It is not for me to subject the process to appellate review, or to substitute my opinions for those of the officer. In the absence of error or a violation of procedural fairness, I cannot interfere with her decision. The application is therefore dismissed.⁴

Both Chanda and Syed insist that they married because it was time to do so. They met through a mutual friend in their apartment building, a 62-year-old woman named Sana. Chanda says that Syed is a good man, who treats her well. Syed says Chanda is kind and comes from a good family. During his interview Syed gave one incorrect answer. He forgot how many refrigerators are in Chanda's home. He says he was confused by the interpreter.

This particular fact scenario is helpful on multiple levels. It highlights: (a) the impact of immigration and refugee claims; (b) the importance of the processes used to determine them; and (c) the presence of subjective, discretionary decision-making that hinges on credibility assessments. For these reasons, the Canadian immigration and refugee system deserves academic attention. This project focuses on a part of this system that is painfully under examined: how alternative dispute resolution processes can improve the experience of system users and how well current efforts to integrate such processes are faring.

Immigration and refugee claims impact multiple stakeholders. They can, and often do, change the lives of applicants. This is not to inflate their impact. It is an acknowledgement of the context surrounding these disputes. Not all applications have life altering consequences. To assert this en mass dilutes the significance of those that truly do. Denying a visitor visa may simply mean a missed holiday. In some cases,

⁴ *Ibid* at 6.

however, it means missing the birth of a grandchild or long-term separation from family members.

This context is crucial to the theory and recommendations in the Chapters to follow. It is important to step back from the nitty gritty (and often tedious) nuances of this complex legislative scheme. We must humanize these issues. The real people behind “the parties” and “the dispute” belong at the forefront of this scholarly undertaking. It is for this reason that this project opened with an authentic story of real-life people who attempted to make Canada their home.

Immigration and refugee claimants are not a collection of objective, anonymous facts. The government officers, Board Members and counsel involved are not dispassionate, indifferent robots. They are people. They have families. They’re building futures. Each claim is but a piece of that overall picture. Each claim is unique.

No administrative scheme in Canada has a more profound impact upon the lives of individuals than that governing immigration and the determination of refugee status.⁵

For many the consequences are obvious: a refugee claimant fears the threat of physical or emotional harm.⁶ A negative decision for a Federal Skilled Worker Class⁷ applicant may mean a missed job opportunity. For others, the consequences are less apparent.

Immigration decisions, like the case of Syed, determine where people start their lives, who they share their future with, and the opportunities available to their children. On the facts above, Syed and Chanda are a married couple. Whatever else we believe of their

⁵ *Law Society of Upper Canada v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243, [2009] 2 FCR 466, 295 DLR (4th) 488, [2008] FCJ No 1093 (QL) at para 4 [*Law Society* cited to neutral citation].

⁶ The various programs and avenues of entry are discussed in greater detail in Chapter 2 to follow.

⁷ See *ibid.*

relationship, they have merged their lives. They cannot build their life together in Canada. If Chanda returns to Pakistan with her husband, she risks losing her own permanent resident status. She may not be able to work in her chosen field.

There are also vital collective interests at play. National security concerns, strains on Canada's health and social assistance systems, and economic stability are but a few, easy to conjure examples. There is a lively debate in the literature as to whether, and to what extent, these rationales warrant immigration restrictions. Andrew Coyne makes the surprising (yet rather persuasive) case for a complete abolition of immigration controls.⁸ For purposes of our discussion, we adopt (without necessarily accepting) the government's innate assumptions that (i) immigration control is necessary; and (ii) the current controls are appropriate. This project is not an assessment of the validity of these positions, nor an evaluation of the specific controls the Canadian government has chosen. Instead, we channel our efforts toward examining and improving the way in which we determine the applications that are made.

The case of Syed and Chanda highlights the importance of the processes used to determine applications. Not only do immigration decisions have real consequences but they are also extremely difficult to challenge. Where applications are refused at first instance – either by an officer of Citizenship and Immigration Canada (“CIC”) or by a Member of the Immigration and Refugee Board of Canada (the “IRB” or the “Board”) – some parties have recourse to an appellate division of the Board under the *Immigration and Refugee Protection Act* (the “Act”) and associated regulations (the “Regulations”).⁹

⁸ Andrew Coyne, “The Case for Open Immigration” (Winter 1995) *The Next City*.

⁹ In the case of immigration claims, this will be the Immigration Appeal Division (the “IAD”). For refugee claims, appeals lie to the Refugee Appeal Division (the “RAD”). These government bodies and their roles are explored in detail in Chapter 2, along with

Those that do not have a statutory right of appeal under the Act, or who are unsuccessful on such appeal, can seek judicial review from the Federal Courts.

Judicial review is not an appeal. Considerable deference is given to the relative expertise of officers and tribunal members. Leave is required. The remedies are limited. Federal Court jurisprudence is rife with examples of judges grappling with the limitations of judicial review. In a particularly poignant passage, Justice Noel provides the following illustration:

This is a case that gives me substantial difficulty...On each of the Board's findings of implausibility, I would have been inclined to find otherwise...However, it is not for me to substitute my discretion for that of the Board. The question I must answer is whether it was open to the Board on the evidence to conclude as it did. Recognizing that if confronted with the same evidence, I would have been inclined to hold otherwise, I cannot say that the Board ignored the evidence before it or acted capriciously...[T]he fact that I might have seen the matter differently does not allow me to intervene in the absence of an overriding error. I have been unable to find such an error. The Application is therefore dismissed.¹⁰

Based on the facts provided, it does not appear that Chanda made a statutory appeal to the IAD before seeking access to the Federal Courts for a review of the officer's negative decision. The case of *Shah v. Canada*¹¹ predates the current appeal provisions, which received royal assent in 2001.¹² The Act in force at the time did provide sponsors with

the entry requirements for immigration and refugee claims under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "Act"] and *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the "Regulations"]. A glossary of these and other defined terms is found at page vii above.

¹⁰ *Oduro v. Canada (MEI)*, 66 FTR 106, [1993] FCJ No 560 (QL) at para 12 – 14 [*Oduro* cited to QL]. While this case precedes the Supreme Court of Canada's landmark decision in *Dunsmuir* (see *Dunsmuir v. New Brunswick*, 2008 SCC 9) regarding the standard of review, subsequent jurisprudence still shows this significant deference to the IRB and reviewing officers owing to their specialized expertise. See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 and *Canada (Citizenship and Immigration) v. Davis*, 2015 FCA 41 at para 9.

¹¹ See *supra* note 2.

¹² See "Act" *supra* note 9, in particular, ss 63(1) and 72(2).

certain rights of appeal to the IAD.¹³ However, these were subject to exemptions.¹⁴

Without the full facts of the case, it is difficult to determine whether exemptions applied and why certain procedural steps were taken.

That said, the challenges Chanda faced at judicial review still underscore the pivotal role of the IRB's appellate function. Unlike judicial review, the IRB appellate regimes should function to provide parties with a true appeal.¹⁵ This jurisdiction entitles the IAD and RAD to conduct their own independent assessment of the evidence and make substantive determinations. They may also, where appropriate, consider new evidence and even set aside the original determination, substituting it with one that the tribunal Member believes should have been made. This can include substituting a negative decision with a positive one to grant an application for permanent resident status.

The procedural medium through which appeals are determined is crucial. The strengths and limitations of various processes for resolving immigration disputes is

¹³ See *Immigration Act, 1976-77*, c 52, s1. See also *An Act to amend the Immigration Act and other Acts in consequence thereof*, SC 1992, c 49 s 68.

¹⁴ *Ibid.*

¹⁵ For an excellent discussion of IAD and RAD jurisdiction see *Iyamuremye v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 494, [2014] FCJ No 523 (QL), in particular paras 25-41 [*Iyamuremye* cited to neutral citation]. The summary of IAD and RAD jurisdiction in this paragraph is based on the writings of the Court in this decision. Jurisprudence like *Iyamuremye*, which followed shortly on the heels of the RAD's implementation, suggest the tribunal has a narrow (and somewhat worrisome) understanding of its powers. While the powers of the RAD to hold hearings and consider new evidence are more limited than that of the IAD, in *Iyamuremye*, the RAD declined to reassess evidence that was before the initial decision maker, believing it was not within their jurisdiction to do so. The application for judicial review was allowed on this basis. The Federal Court held that the RAD erred in its interpretation that it lacked jurisdiction to independently consider evidence anew and make its own substantive determinations. With no case law on RAD jurisdiction at the time of the hearing the Court commented rather extensively on the issue, reviewing the relevant statutory provisions and leading jurisprudence. See also "Act" *supra* note 9 at s 66-69 and 110 – 111. The statutory appeal and judicial review provisions under the Act are discussed further in Chapter 4 below. See, in particular, *infra* notes 224 - 226 and 231.

something explored in the Chapters to follow. The facts surrounding Syed's application for permanent residence are illustrative of the types of claims that would benefit from more informal dispute resolution processes. The claim turns on a misunderstanding (real or perceived) of the relationship between two spouses. Intangible issues of power, relationships and cultural fluency are engaged. The decision is discretionary and turns largely on the credibility of the applicants. At its core, the officer's task is to decide whether she *believes* the claimants.

Do you believe Chanda and Syed? Imagine Chanda is your sister, your daughter, or your best friend. Do you believe her now? Would it make a difference if Syed's first name were Sam? If he were from South Africa instead of Pakistan? What if their relationship followed the narrative of a more traditional love story? If they had met at a soccer game with friends and fallen head over heels for one another? There are many legitimate, albeit more practical, reasons for partnership. Money. Children. Companionship. These do not make the relationship disingenuous.

Decision makers in this administrative regime are in the unenviable position of making these subjective determinations in the high-stakes, multivariate context identified above. This project is in no way intended to diminish their efforts. It is also not the appropriate forum for normative assertions on *how* particular claims should be decided. It is fruitless to step into the shoes of a decision maker and advocate for a particular substantive outcome. We do not, and cannot, know the true nature of the relationship between parties.

The troublesome part of the story of Syed and Chanda is not that the officer denied their claim. It is that the processes used to determine the claim did not push the parties to

uncover and discuss the underlying issues that may be driving their positions. We do not really know what bothered the officer about the relationship. We do not know why she did not believe the claimants. Adversarial hearings and judicial oversight do little to promote a constructive dialogue with respect to these issues. The Chapters to follow explain why, from a theoretical perspective, more informal processes are better suited to do so.

This project remains focused on process. The hope being that utilizing a better resolution process (one that is procedurally fair, efficient and durable)¹⁶ will bring us closer to the substantive ideal: granting access to those who meet the requisite entry criteria and excluding those who do not. It is also important to note again that the project (deliberately) does not engage in normative assessments of the entry criteria themselves. Whether the criteria are desirable or achieve their intended objective is another project entirely.

II. The Project: Scope and Methods

This project uses doctrinal, historical, empirical and theoretical methods. It first examines the administrative law framework governing immigration and refugee law generally. With this background in hand we consider, from a theoretical perspective, how alternative processes might improve the Canadian immigration and refugee determination system. We then turn our attention to a detailed review of how alternative resolution processes are presently set up. At the time of drafting the IRB's IAD remains the only administrative body to formally implement alternative processes into their existing claims determination system.

¹⁶ A discussion of these normative goals is found in Chapter 3 below.

These descriptive elements of the project provide the factual foundation for a substantive analysis of how well the IAD program reflects (and where it may fall short of) scholarly ideals. The framework for this analysis draws on both dispute resolution theory and relational feminist theory. Suggested reforms and opportunities for improvement are canvassed in the later Chapters.

The descriptions herein of the IAD's appeal resolution system have the added advantage of filling gaps in the existing scholarship. As the Chapters to follow demonstrate, there is currently a striking lack of publicly accessible information on the IAD's existing program, or scholarly consideration of the appropriateness (and potential advantages) of using alternative processes in the immigration and refugee context. It is my hope that, in addition to a scholarly audience, this project will be of some assistance to system users and stakeholders by providing an accounting of why better forms of conflict resolution are so important.

III. The Project: An Overview

The core argument advanced in this project is that alternative processes are better suited to resolving certain immigration and refugee claims than adversarial adjudication. Before delving into an overview of why this is true, and how one identifies such claims, it is imperative to clarify what is meant by alternative processes.

What is alternative dispute resolution?

The core concept of alternative dispute resolution or "ADR" (a term often synonymous with discussions of dispute resolution systems or processes) is flexible and open to interpretation. On its broadest reading, the term is applied to any process used to

resolve disputes outside the formal judicial litigation process.¹⁷ To this end, one might query whether all administrative decisions are, in a sense, alternative. They are, at their most basic level, processes (governed by legislation, regulations, rules and/or protocols) that resolve disputes outside the courts. Tribunals, boards, commissions and other administrative decision makers are creatures of statute, vested with the power to make such determinations. The administrative regime addresses disputes that society has deemed better suited to resolution in more efficient contexts by specialized decision makers.¹⁸ The colloquial understanding (which aligns with our definition below) is much more narrow. ADR is generally accepted to include more informal, collaborative efforts to help parties move toward a resolution of their conflict outside adversarial adjudication. This project focuses on the regime that determines immigration and refugee claims. The question, therefore, is what does ADR mean within this context? The IRB uses several methods that could be described as ADR. The Board uses the term “Early Resolution” to describe these processes, a term which they define as “mediation and other proactive interventions”.¹⁹ The IAD, which becomes the focus of our analysis later on, still uses the term ADR but appears to equate it with a specific dispute resolution process - the “ADR Conference”. ADR Conferences are procedurally akin to mediations. The IAD adopts the broader IRB terminology and currently uses the term “Early Resolution” or

¹⁷ Duncan W. Glaholt & Markus Rotterdam, *The Law of ADR in Canada: An Introductory Guide*, (Markham: LexisNexis, 2011) at 6.

¹⁸ These musings certainly over simplify the concept but make for interesting discussion. The courts, of course, provide some level of oversight by way of judicial review.

¹⁹ Immigration and Refugee Board of Canada – Prepared by: Organization and Classification Directorate Human Resources & Professional Development Branch “An organizational perspective of the IRB, prior to, and after, December 15, 2012” (February 2013) at 20 [“IRB Organizational Perspective”]. This document was disclosed as part of the results of Access to Information Request #A-2014-00082. See *infra* note 25 and

“Early Resolution Processes” to connote all efforts made by staff and decision makers to resolve claims without need for a formal hearing.²⁰ ADR Conferences are but one (albeit important) piece of this overall Early Resolution initiative.

Dispute resolution scholars also utilize the descriptor “appropriate” dispute resolution, rather than “alternative”, to connote a more robust understanding of the concept.²¹ The distinction is intended “to signal that different processes may be appropriate for different kinds of disputes or in different types of settings. By using [this] label, we also acknowledge that we must make choices about how to conduct different processes appropriately.”²² ADR therefore implies a certain flexibility and the tailoring of processes to fit the needs of a particular conflict. It is not the mere classification of processes as falling inside or outside the litigation stream.

The concepts underpinning the terms ADR (as used by dispute resolution scholars) and Early Resolution (as used by the IRB and its IAD) are substantially the same. Both terms accept the fluid and bespoke nature of such processes and the need for flexibility to adapt to the needs of particular parties and disputes. For the sake of simplicity, the balance of this paper adopts the IAD’s terminology of Early Resolution. The term is intended to mirror scholarly use of the term ADR and encompass informal, collaborative processes that are used, recommended or made available by migration authorities to resolve individual complaints outside of an oral, adversarial hearing. This

Appendix A. Note: Appendices A through C are located at the end of this thesis document.

²⁰ IAD counsel session “Let’s Discuss Early Resolution” (delivered at the Immigration and Refugee Board, Toronto, 12 June 2014) [“IAD Counsel Session”].

²¹ Carrie Menkel-Meadow, “Ethics in ADR: The Many C’s of Professional Responsibility and Dispute Resolution” (2001) 48 *Fordham Urban Law Journal* 979, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=288805> at 979 [Menkel-Meadow, “Ethics in ADR”].

mirrors the conception adopted by scholars examining dispute resolution in other legal contexts.²³ The term ADR is still used sporadically throughout the project in reference to the body of scholarship that focuses on dispute resolution theory and practice.

With these key concepts in hand, we turn our attention to an overview of the project itself. The paragraphs to follow provide a Chapter by Chapter breakdown of the overall arc of the project. This is intended as a roadmap for the reader.

Chapter Overview

The first substantive Chapter, Chapter 2, opens by providing a foundational understanding of the regulatory framework governing immigration and refugee law in Canada. It explains: (i) how people enter Canada; (ii) what is required of them in order to do so; and (iii) who decides their claims. The Chapter is primarily doctrinal and provides the background necessary for the reader to locate the IRB, the IAD, and specific types of immigration claims within this broader, complex system.

Chapter 3 introduces the theoretical framework that informs my assessment of how alternative processes are currently used in Canada's immigration and refugee determination system. It draws on dispute resolution and relational feminist theory to explain why alternative processes (as conceived above) are better suited to address the

²² *Ibid* at 979-80.

²³ See for example, John C. Kleefeld, "Class Actions as Alternative Dispute Resolution", 39:4 Osgoode Hall Law Journal (2001) 817. As the title suggests, Kleefeld's work examines the interrelation of ADR processes and class action litigation. He describes alternative resolution processes as follow: "[they are] multi-hued, offering more than just an alternative to litigation. One can choose one's process like paints from a richly coloured palette; even mixing different colours to create new, hybrid processes. The aim of this flexible approach is to resolve disputes in the manner most appropriate to the parties or the dispute at hand. Hence the moniker, preferred by some, of 'appropriate dispute resolution'." See Kleefeld at 822.

disputes that arise in certain immigration and refugee claims. For this reason they form an important part of an effective determination system.

Building on years of scholarly analysis, alternative processes have come to mean something more than simply trial alternatives or mediated settlements. They are flexible, tailored processes. This Chapter explains how goals of fairness, efficiency and durability are advanced by selecting an appropriate resolution process. This determination is informed by the unique characteristics of the parties and their dispute. The scholarship that is canvassed shows how “processes” can, and should, be conceived of much more broadly than simply mediation or adjudication, but instead represent many gradations between and beyond these common examples.

Chapter 4 outlines the IAD’s current claims determination system in detail. Much of the information relied on to produce this current and comprehensive summary comes from requests made under the *Access to Information Act*.²⁴ Requests were made of CIC, the IRB and the Canada Border Services Agency (“CBSA”).²⁵ As noted above, an important component of the IAD’s claims determination system is their inclusion of Early Resolution initiatives. These parallel many of the hallmarks of alternative dispute resolution scholarship. While progressing through a description of the IAD system,

²⁴ *Access to Information Act*, RSC 1985, c A-1.

²⁵ Copies of the language used for the requests and the responding covering letters are attached as Appendix A. The documents provided in response to these requests total thousands of pages. While too voluminous to include herein, copies of completed access to information requests can be obtained from the institution holding the information at no extra cost by referencing the access to information request number. Requests are directed to the Access to Information and Privacy Coordinator of the applicable government institution. Further information can be found online at “Completed Access to Information Requests – Open Government”, online: Government of Canada <<http://open.canada.ca/en/search/ati>> and “Access to Information and Privacy”, online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/atip-airpr/index-eng.asp>>.

discussions highlight how the Early Resolution program aligns with and falls short of the theoretical framework put forth in Chapter 3.

Chapter 5 builds on connections drawn in Chapter 4 to identify and explain in detail the strengths and challenges of the current IAD program. It then discusses concrete recommendations for reform. The analysis centers around three core issues: (i) an imbalance of information as between the parties; (ii) the roles and responsibilities of system actors; and (iii) flexibility in the breadth and depth of available alternative process options. It demonstrates how these challenges impede the goals of fairness, efficiency and durability, and how implementing reforms in these three areas will align the program closer to scholarly ideals. Finally, it draws concluding observations, tying theory to practice. To close, it considers how the IAD's Early Resolution program might provide a blueprint for expanding such initiatives to other types of immigration and refugee claims, or administrative contexts.

CHAPTER 2: IMMIGRATION LAW IN CANADA – THE WHO, THE WHY AND THE HOW

This chapter provides a foundational overview of the complex regulatory framework that governs immigration and refugee law in Canada. It contains a high level summary of *how* applicants immigrate to Canada, *who* determines such applications and *why* the Canadian immigration regime is structured and administered in this way.²⁶ First, core concepts are defined. Next, the key government bodies and decision makers are identified, and their roles within the Canadian immigration and refugee determination framework explained. Subsequent sections outline the broad categories or streams of entry into Canada and the goals that inform them.

I. Defining the Core Concepts of Immigrants, Refugees and Migrants

The term immigration, used herein, applies to those who seek to enter Canada, as permanent residents, pursuant to the programs and requirements in Part 1 of the Act and associated Regulations.²⁷ These individuals actively choose Canada as their destination of choice. The reasons for their decision are unique to the individual. Common examples include economic advancement and family reunification. Immigrants and the term immigration are intended as conceptually distinct from the myriad of individuals who enter Canada each year, on a temporary basis, as visitors (tourists), students, temporary foreign workers, diplomats, business people and the like. These groups of voluntary migrants are in contrast to refugees, those who enter Canada seeking protection within its borders. Migration is used herein as an overarching term to connote all entry into and out of Canada. Migration law is intended to encapsulate the body of legislation,

²⁶ For ease of reference, Figures 1 - 3 to this Chapter provide a visual representation of the Canadian immigration and refugee system.

²⁷ See “Act” and “Regulations” *supra* note 9.

regulations, case law, rules and policy directives that govern entry to, and exit from, Canada.

II. Who are the Key Government Bodies and Decision Makers?²⁸

This section summarizes the key administrative bodies and decision makers regulating migration to Canada. It explains who grants entry, processes and approves applications and determines appeals. As noted above, the Act and Regulations are the core pieces of legislation governing immigration law in Canada. The Act is administered by two Ministers: The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. The latter has jurisdiction over issues of border control and national security. Through the CBSA, the Minister of Public Safety and Emergency Preparedness addresses matters such as detentions, removals and inadmissibility for reasons of security or international human rights violations. CBSA hearings officers also represent the Minister of Citizenship and Immigration in immigration appeals.²⁹

CIC and the IRB both fall within the portfolio of the Minister of Citizenship and Immigration. These two bodies are, in the most general terms, responsible for claims determination. It is important to note however, that the IRB maintains status as an

²⁸ Unless otherwise noted, the overview of the administration of the Act, descriptions of various Ministerial portfolios and administrative departments and decision makers as provided herein is based on the publicly available information contained on the Immigration and Refugee Board of Canada website: Immigration and Refugee Board of Canada, online: <<http://www.irb-cisr.gc.ca/Eng/>>.

²⁹ In appeals before the IAD, the Minister is represented by Minister's Counsel, who is a CBSA hearings officer. See *INFORMATION GUIDE: GENERAL PROCEDURES FOR ALL APPEALS TO THE IMMIGRATION APPEAL DIVISION (IAD)* (October 2002, revised August 2011), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/InfoGuideIadSai.aspx>> and "ENF 19 Appeals Before the Immigration Appeal Division (IAD) of the Immigration and

independent tribunal, separate from the workings of CIC, the CBSA and both Ministers. CIC acts on the front lines, performing an intake and processing function. For immigration applications, CIC officers select those who qualify as permanent residents under the various Family and Economic Class programs (each discussed in detail below). CIC also determines applications for temporary resident programs (temporary foreign workers, visitor visas, work and study permits).³⁰

With respect to refugees, CIC makes the final determination on asylum claims abroad and conducts an eligibility assessment on inland claims, referring those that are eligible to the IRB for a hearing. A CIC or CBSA officer also acts on behalf of the Minister, as Minister's Counsel, when the Minister intervenes in refugee appeals.³¹

The IRB is an administrative tribunal with jurisdiction to conduct hearings with respect to immigration and refugee matters. It is roughly divided into two branches, one that determines immigration issues, and the other that determines refugee matters. On the refugee side, eligible claims that are referred to the IRB by CIC will proceed first to the Refugee Protection Division (the "RPD"), and, where eligible, to the RAD for appeal.

With respect to immigration claims, (excluding claims for sponsorship under the Family Class), hearings are conducted by the Immigration Division (the "ID") of the IRB. The ID conducts hearings on issues of admissibility and detention. An appeal of an

Refugee Board (IRB)", online: CIC <<http://www.cic.gc.ca/english/resources/manuals/enf/enf19-eng.pdf>> at 7.

³⁰ See "Department of Citizenship and Immigration", online: CIC <http://www.cic.gc.ca/english/department/index.asp?_ga=1.26090173.1052655642.1379533300>; "Visit Canada", online: CIC <<http://www.cic.gc.ca/english/visit/index.asp>>; and "Hire Temporary Workers", online: CIC <<http://www.cic.gc.ca/english/hire/worker.asp>>.

³¹ See "Appellant's Guide" (2013, Version 2), online: IRB <<http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/RefAppGuide.aspx>> and "Respondent's Guide" (2013),

ID decision with respect to removal lies with the IAD.³² Sponsorship applications are determined by CIC officers, with a right of appeal (by the sponsoring Canadian citizen or permanent resident) directly to the IRB's immigration appellate branch, the IAD.³³

III. Migration Goals and Objectives

Migration law in Canada serves to foster several core objectives, first and foremost of which is realizing the economic, social and cultural benefits that visitors and newcomers bring to Canada.³⁴ While refugee protection is granted primarily with a view toward fulfilling Canada's international obligations and providing safety and protection to those in need, there are some scholars who argue, rather convincingly, that these social and cultural benefits extend to refugee initiatives as well.³⁵ In fact, recent statistics

online: IRB <<http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/ResIntGuide.aspx#Toc345420815>>.

³² The rights of appeal available to foreign nationals are more limited than those available to permanent residents. The Minister may also appeal to the IAD in certain circumstances where the ID declines to issue a removal order. For more information on appeals to the IAD from ID decisions, please see "Guide to Proceedings Before the Immigration Division" (August 2005), online: IRB <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Documents/RoaAmr02_e.pdf>; "Immigration Division – Immigration and Refugee Board of Canada" (modified 26 June 2014), online: IRB <<http://www.irb-cisr.gc.ca/eng/detention/pages/idsi.aspx>>; "Admissibility Hearings Process" (modified 26 June 2014), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/ProcessAdmEnq.aspx>>; and "Detention Review Process" (modified 7 February 2014), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/ProcessRevMot.aspx>>.

³³ See "Act" *supra* note 9 at ss 63(1). See also "Sponsorship Appeal Process" (modified 2 January 2014), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/ProcessSpoPar.aspx>>.

³⁴ See "Act" *supra* note 9 at ss 3(1) and 3(2). Migration laws balance these benefits against the collective interests referred to in Chapter 1. Common examples include admissibility provisions and visa requirements under the Act.

³⁵ A refugee policy that reflects the true humanitarian spirit of protecting those in need, consistently and with integrity, cultivates a positive national identity for Canadians both domestically and on the world stage. These concepts are explored by Catherine Dauvergne in her book *Humanitarianism, Identity and Nation: Migration Laws in Canada and Australia* (Vancouver: UBC Press, 2005); see also Michael Enright, "Do NOT give us your tired, your poor, your huddled masses yearning to breath free" (7

suggest that refugees may even contribute more to Canada's economic goals than some Economic Class immigrants.³⁶

In recent years, the federal government has actively pursued reforms to the framework of statutes, regulations and policies that control entry into Canada.³⁷ The goals of these reforms, as expressed in government statements, publications, media releases and the like, center around economic growth, increased efficiency and maintaining system fairness. The breadth and frequency of amendments demonstrates the importance of this portfolio. Key themes of fairness and efficiency are emphasized. These objectives are repeated across program initiatives and parallel the goals of the IAD's Early Resolution initiatives, as identified in Chapter 3 to follow. They also drive many of the suggested reforms to these initiatives that are identified and explored in Chapters 4 and 5.

December 2014), online: CBC <
<http://www.cbc.ca/thesundayedition/essays/2014/12/07/michaels-essay/>>.

³⁶ See Graeme Wood "Refugees Reporting Higher Earnings in Canada Than Investor Immigrants" (2 March 2015), online: National Post <<http://news.nationalpost.com/2015/03/02/refugees-reporting-higher-earnings-in-canada-than-investor-immigrants/>>. A detailed description of the various entry streams, including Family Class, Economic Class and Refugee Class programs, is contained in Part IV to follow. The statistical data in Wood's article is based on a Citizenship and Immigration Canada publication: "Business Immigrants – Investors: Findings from the Longitudinal Immigration Database (IMDB)" (March 2012), online: CIC <http://www.cic.gc.ca/english/pdf/pub/imdb/INV_3.pdf>.

³⁷ The following provide a helpful overview of such reforms: "Transforming the Immigration System: Then and Now" (25 May 2012), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/department/media/notices/notice-transform2.asp>>. See also "Annual Report to Parliament on Immigration, 2013 – Section 1: Making Immigration Work for Canada" (28 October 2013), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/publications/annual-report-2013/section1.asp>> ["2013 Annual Report to Parliament"].

Economic Growth

With respect to recent Economic Class reforms, a review of publications and media releases reveals a core and overarching theme: “to [build] an immigration system that is truly *fast and flexible* in a way that will *sustain Canada’s economic growth*”.³⁸ This emphasis is hardly surprising. The link between immigration and the welfare of Canada’s economy is established.³⁹ Immigration has long been used as a tool to address population decline. Recruiting younger immigrants can provide a valuable supplement for the domestic workforce. Immigration also brings indirect economic advantages: an enhanced labour force, a diversification of skills and/or targeting particular market gaps.

Owing to this interrelation between immigration and economic prosperity, recent Economic Class immigration reforms are not only publicly aligned with the goal of economic growth, but also packaged as part and parcel of the government’s broader fiscal policy initiatives. Examples include the Express Entry system and the creation of new Economic Class programs that focus on invigorating domestic venture capital spending and entrepreneurship. Most notable are the Start-Up Visa program, Immigrant Investor

³⁸ “2013 Annual Report to Parliament” *ibid* (emphasis added).

³⁹ See Stan Kustec “The Role of Migrant Labour Supply in the Canadian Labour Market” (June 2012), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/research/2012-migrant/documents/pdf/migrant2012-eng.pdf>>. The author analyzes how migrant labour can best meet the needs of Canada’s labour market in light of the dual challenges of a rise in baby boomer era retirees and a depleting domestic labour force. See also Charles M. Beach, Alan G. Green & Christopher Worswick, *Toward Improving Canada’s Skilled Immigration Policy: An Evaluation Approach*, (Toronto: C.D. Howe Institute, 2011) at 6. The review herein of the economic impact of immigration is based on the excellent overview provided by Beach, Green et al. at 5-9. The authors provide a much broader and highly effective analysis of the economic impact of immigration in Canada generally (with reference to various scholarly perspectives in this area).

Venture Capital Fund pilot program and the forthcoming Business Skills pilot program, all of which are outlined in Part IV to follow.⁴⁰

There have also been reforms to the Family Class that, in government promotion, align with goals of economic growth. Recent amendments to the definition of dependent child under the Regulations reduce the maximum age (from 22 years to under 19 years of age), and remove an exemption for full-time students.⁴¹ The stated intent is to focus processing and integration resources on younger entrants.⁴² Research and consultation cited by the government suggest that older children are not integrating and finding economic success within Canada as well as those who arrive at a young age.⁴³

Fairness

Recent amendments, particularly those within the Family and Refugee Classes, also seek to improve fairness and address instances of perceived fraud within Canada's migration system. Fairness, in this context, is intended to capture both procedural and substantive elements. Procedural in the sense that: (a) applications are processed through to decision in a timely manner and without preferential treatment or "queue jumping"; and (b) applicants receive the due process and procedural fairness to which they are entitled. Substantive in the sense that those who meet the statutory requirements are admitted and those who do not, excluded.

⁴⁰ See, in particular, notes 91 and 94 - 98 below.

⁴¹ See *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2014-133; "Regulations" *supra* note 9 at s 2; and "Regulations Amending the Immigration and Refugee Protection Regulations" online: (18 June 2014) 148:13 Canada Gazette <<http://canadagazette.gc.ca/rp-pr/p2/2014/2014-06-18/html/sor-dors133-eng.php>>.

⁴² See "Regulatory Impact Analysis Statement" online: (18 May 2013) 147:20 Canada Gazette <<http://www.gazette.gc.ca/rp-pr/p1/2013/2013-05-18/html/reg1-eng.html#a2>>; and "Notice – Changes to the definition of a dependent child" (1 August 2014), online: CIC <<http://www.cic.gc.ca/english/departement/media/notices/2014-08-01.asp>>.

Recent reforms to spousal and partner sponsorship criteria are positioned as addressing concerns of fairness and perceived fraud. Changes have introduced, in effect, a conditional permanent resident status for those who enter Canada through Family Class spouse and partner sponsorship programs.⁴⁴ In an effort to address so-called “marriage fraud”⁴⁵ within Canada, the government introduced amendments to the Regulations requiring those who enter as permanent residents through this program to maintain a relationship with their sponsor for a period of two years. If the relationship breaks down within this two-year time frame, the conditional permanent resident status is revoked and the foreign national deported.⁴⁶

The *Balanced Refugee Reform Act* in June 2010 and the *Protecting Canada’s Immigration System Act* in June 2012 introduced a host of amendments to Canada’s refugee determination system.⁴⁷ These include the requirement that the RPD designate a claim as “manifestly unfounded”, where the decision maker rejects the claim believing there is no credible basis for it.⁴⁸ This is promoted as an example of efforts (in the

⁴³ *Ibid.* In particular, “Regulatory Impact Analysis Statement”.

⁴⁴ *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2012-227.

⁴⁵ Instances where foreign nationals take advantage of sponsoring Canadian citizens or permanent residents by feigning conjugal relationships to obtain permanent resident status in Canada.

⁴⁶ See “Regulations” *supra* note 9 at s 72.1; “Regulatory Impact Statement” online: (10 March 2012) 146:10 Canada Gazette <<http://www.gazette.gc.ca/rp-pr/p1/2012/2012-03-10/html/reg1-eng.html>>; and “‘The Jig is Up on Marriage Fraud,’ says Minister Kenney” (26 October 2012), online: CIC <<http://news.gc.ca/web/article-en.do?nid=703499>>. Note: Relief can be sought in instances of domestic abuse and the death of a sponsor during the requisite two year time-frame.

⁴⁷ *Balanced Refugee Reform Act*, SC 2010, c 8 and *Protecting Canada’s Immigration System Act*, SC 2012, c 17 [“Protecting Immigration”].

⁴⁸ “Act” *supra* note 9 at s 107.1

refugee context) to curb fraudulent claims.⁴⁹ The impact of such a designation on claimants is significant. It excludes them from accessing the IRB's refugee appellate branch (the RAD) and the automatic stay of removal that is generally granted while any judicial review application is pending.⁵⁰ Given the severity of these consequences, this does raise potential flags in terms of procedural fairness. A search of online sources at the time of drafting did not reveal any challenges to the provision in the courts as of yet, although this is an interesting avenue for future scholarly pursuits.⁵¹

Efficiency

An overarching theme, present throughout recent migration reforms, is efficiency. The goals of processing applications faster, making better use of scant resources and eliminating backlog, pervade amendments to programs across all streams and categories. Examples include procedural reforms: introducing caps on the number of annual applications to be accepted⁵² and the use of processing moratoriums to suspend certain applications for discrete periods (or in some cases indefinitely).⁵³ Others are more substantive: including the Express Entry system (which entirely alters the way skilled

⁴⁹ "Identifying Unfounded Claims" (modified 2 December 2012), online: CIC <<http://www.cic.gc.ca/english/refugees/reform-claims.asp>>.

⁵⁰ "Act" *supra* note 9 at s 110. See also "Backgrounder — Summary of Changes to Canada's Asylum System", online: CIC <<http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30c.asp>> and Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012), *Comparative Research in Law & Political Economy*, Research Paper No. 9/2012, online: Osgoode Digital Commons <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1007&context=clpe>>.

⁵¹ A LexisNexis Quicklaw search for judicial consideration of section 107.1 of the Act was conducted on March 4, 2015. The search yielded no results.

⁵² See for example "Ministerial Instructions for attaining other immigration goals", online: CIC <<http://www.cic.gc.ca/english/department/mi/>> and *infra* note 73.

⁵³ See *ibid.*

workers gain entry to Canada), and granting broad Ministerial Instruction powers to the Minister of Citizenship and Immigration.⁵⁴

IV. How Permanent Residents Enter Canada

Permanent residents enter Canada through three main streams or categories: through Family Class immigration programs, Economic Class immigration programs and as Refugees.⁵⁵ Each of these is directed toward achieving some or all of the objectives discussed above. The following subsections provide a brief overview of the various streams or categories of entry to Canada, as well as a description of individual programs

⁵⁴ The Express Entry system is discussed briefly in Part IV below. Granting the Minister the power to invoke change by way of Ministerial Instructions has fundamentally shifted the system from one of gradual evolution through consultation, review and time consuming legislative and regulatory amendments to one of shifting, real-time response that has even legal professionals in this area struggling to keep pace. While there are advantages and disadvantages to this development, there is little denying that their adoption represents a milestone. For further information on Ministerial Instructions see “Act” *supra* note 9 at s 14.1 and 87.3. See also “Evaluation of Ministerial Instructions” (December 2011), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/pdf/research-stats/min-instruct.pdf>> and IRB, “Ministerial Instructions” (modified 2 February 2015), online: IRB <<http://www.cic.gc.ca/english/department/mi/>>. Instructions have even been used to address issues of international health and security. Recent instructions suspend, indefinitely, the processing of any temporary or permanent resident applications from “Ebola affected countries”. See “Ministerial Instructions” online: (31 October 2014) 148: 8 Canada Gazette <<http://www.gazette.gc.ca/rp-pr/p1/2014/2014-10-31-x8/html/extra8-eng.php>>.

⁵⁵ “Facts and Figures 2013 – Immigration Overview: Permanent Residents” (modified 14 November 2014), online: CIC <<http://www.cic.gc.ca/english/resources/statistics/facts2013/permanent/02.asp>>. [“Facts and Figures 2013”]. See also “Act” *supra* note 9. Those who enter Canada through the Family and Economic Classes are often referred to as “immigrants” broadly speaking, in contrast to those who enter through the Refugee stream (as “Convention refugees” or “persons in need of protection” as such terms are defined within the Act). See *infra* note 102. Recall those who enter and remain in Canada as immigrants and refugees with permanent resident status are conceptually distinct from the thousands of individuals who enter Canada each year through temporary resident programs. For data on the number and category of annual temporary residents in Canada please see Facts and Figures 2013 – Immigration Overview - Temporary Residents” (modified December 31, 2014), online: CIC <<http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/index.asp>>.

through which applicants can apply and the entry criteria they must meet in order to be successful. While applications in all three streams (Economic, Family and Refugee) are determined based on legislated requirements, the final decision to grant or deny entry is a subjective determination by an administrative decision maker as to whether the requisite criteria are met. Such determinations often involve elements that are inherently discretionary in nature. An exercise of discretion may be explicit in statute, as in the decision to grant or deny an exemption based on humanitarian and compassionate (“H&C”) grounds.⁵⁶ It can also be implicit in an officer’s evaluation and decision-making process, as in the decision to accept an applicant’s assertions, or descriptions of events or experiences, as credible.⁵⁷ A common example of the latter occurs in the context of spousal sponsorship claims. Applicants must prove their relationship is genuine and not entered into primarily for immigration purposes.⁵⁸ At its core this determination is one of credibility. The decision maker grants the application only if satisfied that the relationship is genuine, based on the evidence as presented. As Chapter 3 will demonstrate, the discretionary nature of immigration decisions is an important characteristic in assessing the suitability of claims for Early Resolution. Discretion relies on subjective evaluation. Where contextual factors like culture, custom or relationships are central to a dispute, this thesis asserts that informal processes, which account for these and facilitate open dialogue, are better suited.

⁵⁶ See “Act” *supra* note 9 at s 25.

⁵⁷ For an interesting discussion of discretion in immigration decisions see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 54.

⁵⁸ For a helpful discussion of this requirement see *Sanichara v. Canada (MCI)*, 2005 FC 1015, [2005] FCJ No 1272 (QL) and *Froment v. Canada (MCI)*, 2006 FC 1002, [2006] FCJ No 1273.

Family Class

Entry through the Family Class is primarily about promoting and facilitating family reunification within Canada. Within the Family Class, applicants are admitted based on their familial relationship with a qualifying sponsor.⁵⁹ The application process is two-stage. First, the sponsor submits an application to a centralized, inland processing center, where a CIC officer determines whether they meet the requisite criteria to sponsor a foreign relation.⁶⁰ The sponsor must show that they:⁶¹ (a) are sponsoring a relative that is a member of the Family Class; (b) are a Canadian citizen or permanent resident; (c) are at least 18 years of age; (d) reside in Canada (unless they are a Canadian citizen, are sponsoring a spouse, common law or conjugal partner or dependent child - without dependents of their own - and will live in Canada when their sponsored relative arrives);⁶² (e) undertake to financially support their relative for a specified period of time;⁶³ and (f) sign an agreement regarding the obligations of sponsorship.⁶⁴

⁵⁹ Unless otherwise specified, the descriptions herein of the requirements for family sponsorship are based on the “Act” *supra* note 9 (in particular ss 12-13), the “Regulations” *supra* note 9 (in particular s 116 – 133), and “Apply to Immigrate to Canada”, online: CIC <<http://www.cic.gc.ca/english/immigrate/apply.asp>> [“Apply to Immigrate to Canada”].

⁶⁰ “Guide: Sponsorship of adopted children and other relatives — The sponsor’s guide (IMM 5196 Temp)”, online: CIC <<http://www.cic.gc.ca/english/information/applications/guides/5196ETOC.asp#5196E6>> [“Sponsorship Guide”]. For a good overview of the requirements and processing protocols for sponsorship applications please see also “IP2 Processing Applications to Sponsor Members of the Family Class” (28 February 2011), online: CIC <<http://www.cic.gc.ca/english/resources/manuals/ip/ip02-eng.pdf>>.

⁶¹ See “Regulations” *supra* note 9 at Part 7 – Division 3.

⁶² See “Regulations” *supra* note 9 ss 130(2).

⁶³ See “Regulations” *supra* note 9 at s 132 and “Sponsorship Guide” *supra* note 60.

⁶⁴ For a sample of the Sponsorship Agreement and Undertaking, please see “IMM 1344 – Application to Sponsor, Sponsorship Agreement and Undertaking” (August 2014), online: CIC <<http://www.cic.gc.ca/english/pdf/kits/forms/IMM1344E.pdf>>.

The period covered by the sponsorship undertaking is between three and twenty years, depending on the age and relationship between the sponsor and their relative(s).⁶⁵ The undertaking requires that the sponsor provide financial support to their sponsored relative(s) in the event they are unable to do so themselves.⁶⁶ This includes providing for basic care (food, shelter, etc.) so that the sponsored relative(s) do not avail themselves of social assistance for the duration of the support period.⁶⁷

Sponsors must also meet certain financial and other eligibility criteria. These include: minimum income requirements, and freedom from bankruptcy and any loan, support, undertaking or other similar financial defaults.⁶⁸ They also cannot be in receipt of social assistance (except for reasons of disability) and there are limitations related to criminal convictions, detention and removal orders.⁶⁹

Common qualifying relationships for Family Class sponsorship include spouses, common law or conjugal partners, and dependent or adoptive children.⁷⁰ These are all defined terms under the Regulations.⁷¹ In addition, where the prospective sponsor became a permanent resident themselves as a result of Family Class sponsorship by a spouse, common law or conjugal partner, they are barred from sponsoring a subsequent spouse,

⁶⁵ *Supra* note 63.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ See “Regulations” *supra* note 9 at s 133 and “Sponsorship Guide” *supra* note 60.

⁶⁹ *Ibid.*

⁷⁰ See “Regulations” *supra* note 9 at s 117. It is worth noting that as of August 1, 2014, a “dependent child” must be under 19 years of age. Under the previous definition, children up to the age of 22 could qualify as dependents. Please see “Family Sponsorship” (modified April 15, 2014), online: CIC

<<http://www.cic.gc.ca/english/immigrate/sponsor/index.asp>>.

⁷¹ See “Regulations” *supra* note 9 s 2 & 4.

common law or conjugal partner, unless they have been a Canadian permanent resident for at least five years or became a Canadian Citizen within the previous five years.⁷²

Parents and grandparents can also be sponsored, although these applications are subject to increased restrictions as of late.⁷³ Sponsorship of more remote relations, such as siblings, nephews or nieces and grandchildren, is also possible in certain limited circumstances.⁷⁴ Sponsorship of other relatives beyond these enumerated relations is subject to severe limitations – for example the sponsor must have no other living relative who (i) is a Canadian citizen, permanent resident or Indian;⁷⁵ or (ii) could be sponsored under one of the categories above.⁷⁶

⁷² See “Regulations” *supra* note 9 ss. 130(3).

⁷³ See “Regulations” *supra* note 9 at s 117. See also “Operational Bulletin – 561” (31 December 2013), online: CIC

<<http://www.cic.gc.ca/english/resources/manuals/bulletins/2013/ob561.asp>>. CIC actively encourages applicants to avail themselves of Parent and Grandparent super visas (a multiple-entry visitor visa that is good for up to 10 years) in lieu of sponsorship. See “Sponsor Your Parents and Grandparents” (modified 16 January 2015), online: CIC <<http://www.cic.gc.ca/english/immigrate/sponsor/parents.asp>>. Applications to sponsor parents and grandparents were temporarily suspended pursuant to a set of Ministerial Instructions issued on November 5, 2011. For further details please see “Ministerial Instructions (MI4)” online: (5 November 2011) 145:45 Canada Gazette <<http://gazette.gc.ca/rp-pr/p1/2011/2011-11-05/html/notice-avis-eng.html>>. This temporary suspension was extended until January 1, 2014 by Ministerial Instructions 9 (“MI9”), issued on June 15, 2013. MI9 also capped the number of complete applications accepted annually at 5000, a further limiting measure to manage the processing of parent and grandparent sponsorships. For further details please see also “Ministerial Instructions (MI9)” online: (15 June 2013) 147:24 Canada Gazette <<http://www.gazette.gc.ca/rp-pr/p1/2013/2013-06-15/html/notice-avis-eng.html>>. When the CIC site was accessed on February 24, 2015 it stated that 5000 complete applications had already been received and, as a result, applications suspended until next year.

⁷⁴ These broader relatives are eligible for sponsorship where they are under 18 years, orphaned and themselves not married or in a common law or conjugal partnership. See “Regulations” *supra* note 9 at s 117.

⁷⁵ As that term is defined under the *Indian Act*, RSC, 1985, c I-5.

⁷⁶ See “Regulations” *supra* note 9 at s 117.

Once the sponsor is initially approved, the foreign national submits their application for permanent residence to CIC as a member of the Family Class.⁷⁷ The reviewing CIC officer determines whether the applicant meets the eligibility requirements and admissibility criteria for entry. A determination of eligibility will focus primarily on whether the applicant can prove the familial relationship with their sponsor.⁷⁸ Proof can include DNA, and other documentary evidence.⁷⁹ Admissibility, on the other hand, refers to the general criminal and medical admissibility criteria required of all permanent resident applicants under the Act and Regulations.⁸⁰ Both admissibility and eligibility conditions must be satisfied for a positive decision. Medical inadmissibility, while on its face is seemingly an objective determination, can be a largely discretionary decision. Officers rely on health assessments to decide whether the “foreign national’s health condition is *likely* to be a danger to public health or public safety or *might reasonably* be expected to cause excessive demand”.⁸¹ Chapter 3 highlights how this type of discretion creates conditions whereby alternative processes may be better suited to achieve effective resolutions.

Certain applications are also subject to additional statutory and common law requirements regarding admissibility. For example, common law and conjugal partners

⁷⁷ See “Sponsorship Guide” *supra* note 60. Note that on December 22, 2014, the government launched a new pilot program for spousal sponsorship in Canada. The program allows those who apply for permanent residence through a spousal sponsor to obtain a work permit while their application is being processed. See “Family Sponsorship” (modified 29 December 2014), online: CIC <<http://www.cic.gc.ca/english/immigrate/sponsor/index.asp>>.

⁷⁸ “OP2 Processing Members of the Family Class” (14 November 2014), online: CIC <<http://www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf>> [“OP2”].

⁷⁹ *Ibid.*

⁸⁰ See “Act” *supra* note 9 at Division 4 and “Regulations” *supra* note 9 at Part 3. See also “Sponsorship Guide” *supra* note 60.

⁸¹ “Regulations” *ibid* at s 20. Emphasis added.

must prove that they are at least 16 years of age and that they have cohabitated with their sponsor, in a conjugal relationship (or be unable to do so for reasons of persecution or penal control), for at least one year.⁸² In addition, to approve an application for permanent residence through spousal, common law and conjugal partner programs, the reviewing officer must be satisfied that the relationship between the parties is not one of convenience.⁸³ This requires that the relationship be (i) genuine; and (ii) not entered into primarily for the purpose of gaining a benefit under the Act.⁸⁴ Again, these applications are an excellent example of the types of discretionary decisions that are discussed in Chapter 3. At their core, they require the reviewing officer (and any subsequent decision makers) to determine the credibility of the applicants. They must decide whether they believe the partnership is legitimate. In addition, applicants often rely on documentation (photos, phone records, flight information, receipts, life insurance policies, bills, etc.) to evidence their relationship and/or cohabitation. This creates potential for misunderstandings, particularly where applicants come from cultural or economic backgrounds that are vastly different from that of the administrative decision maker or Minister's representative. Evidencing a marriage or partnership in this way rests on very Western notions of what these relationships should look like. Applicants may not have the disposable income to travel or purchase gifts. They may not have access to life insurance, services or utilities and their customs and ceremonies may not reflect North American expectations. These contextual factors and the importance of cultural fluency are also flagged in Chapter 3 as dispute characteristics that may lend themselves to more informal, collaborative processes.

⁸² See "Regulations" *supra* note 9 at s 1, 2 and 5.

⁸³ "OP2" *supra* note 78 and "Regulations" *supra* note 9 at s 4 and 4.1.

*Economic Class*⁸⁵

The programs grouped under the Economic Class umbrella represent the most diverse subset. Sub-categories within the broader Economic Class include Skilled Worker Programs, Business Immigrant Programs and Live-In Caregivers. The common entry criterion is an applicant's ability to contribute to the Canadian economy. Applicants are also required to meet certain minimum language and education or experience thresholds. The sections to follow offer a cursory overview of the various Economic Class programs and their corresponding entry requirements.

Skilled Worker Programs

The largest percentage of Economic Class immigrants still arrive through the Federal Skilled Worker Class program.⁸⁶ This, along with the new Federal Skilled Trades Class, the Canadian Experience Class and the Provincial Nominee programs, are sub-classified as 'skilled worker' programs broadly speaking. Here entry is tied to the applicants' labour experience and their perceived potential to contribute to the Canadian labour force. The proportion of entries through Provincial Nominee programs is on the rise.⁸⁷ Government emphasis on the Federal Skilled Trades Class and Canadian Experience Class programs also foreshadows a possible spike in future applicants through these avenues.

⁸⁴ *Ibid.*

⁸⁵ The descriptions of Economic Class immigration programs herein (as well as program titles and classifications) are based on "Apply to Immigrate to Canada" *supra* note 59; "Act" *supra* note 9; and "Regulations" *supra* note 9 (in particular s 73-110).

⁸⁶ While the percentages are declining, federal skilled workers and their accompanying relatives still represent over half of all economic immigrants and 32% of the total permanent residents admitted to Canada. See "Facts and Figures 2013" *supra* note 55. Percentage figures are based on 2013 statistics.

⁸⁷ "Facts and Figures 2013" *ibid.*

Beginning in January 2015, entry through existing skilled worker programs within the Economic Class is based on a new “Express Entry” system.⁸⁸ Applicants complete and submit an express entry profile online. Those who meet the requisite entry criteria are placed in a pool of qualified candidates. Those without an existing job offer from a Canadian employer or nomination from a Province or Territory actively promote themselves to fill labour needs. Employers and the Provinces/Territories are able to access the bank of candidates and extend employment offers and nominations respectively. Once candidates have either a job offer or nomination, they are invited by CIC to apply through an existing skilled worker program (Federal Skilled Worker, Federal Skilled Trade, Canadian Experience or a Provincial Nominee program).⁸⁹

⁸⁸ The description herein of the forthcoming Express Entry system is based on the following CIC documents: “Express Entry: Employer Outreach Information Session” (Summer 2014), online: CIC <<http://www.cic.gc.ca/english/resources/publications/employers/express-entry-presentation.asp>>; “Express Entry” (modified 14 July 2014), online: CIC <<http://www.cic.gc.ca/english/immigrate/express/express-entry.asp>>; “News Release: Gearing up for the Launch of Express Entry” (14 July 2014), online: CIC <http://news.gc.ca/web/article-en.do?nid=867809&_ga=1.219094553.1052655642.1379533300>; “News Release: Preparing for the Launch of Express Entry” (23 April 2014), online: CIC <http://news.gc.ca/web/article-en.do?nid=841349&_ga=1.253063689.1052655642.1379533300>; “News Release: Offering ‘Express Entry’ to Qualified Economic Immigrants” (8 April 2014), online: CIC <http://news.gc.ca/web/article-en.do?nid=836509&_ga=1.253063689.1052655642.1379533300>; “Express Entry: What Employers Need to Know” (modified 14 July 2014), online: CIC <<http://www.cic.gc.ca/english/resources/publications/employers/express-entry-sheet.asp>>; “E-Newsletter” (Spring 2014), online: CIC <http://www.cic.gc.ca/english/resources/enewsletter/index.asp?utm_source=bitly-eng#ee>; and “Backgrounder - Expression of Interest (EOI): Preparing for Success in 2015” (modified 28 October 2013), online: CIC <<http://www.cic.gc.ca/english/department/media/backgrounders/2013/2013-10-28b.asp>>. See also Ministerial Instructions 14 and 15: “Ministerial Instructions” (modified 2 February 2014), online: CIC <<http://www.cic.gc.ca/english/department/mi/>>.

⁸⁹ Under the Express Entry system, Provinces and Territories will still be able to select candidates based on existing Provincial Nominee programs to meet their labour needs,

Candidates have sixty days (following an invitation) in which to apply.⁹⁰ Those who are not invited to apply for permanent resident status within twelve months are removed from the pool. These candidates can re-submit an online profile at any time.

The program represents a significant shift in processing protocol. Candidates are no longer processed in queue, based on the order in which applications are submitted and received. Rather, candidates are ranked based on their qualifications and applications advance in priority order. The stated objectives behind this amendment are to meet labour demands in a timely manner, increase processing speed for priority applicants (those who meet entry requirements and have a job offer or nomination) and eliminate backlog. Again, the government is linking reforms to themes of fairness and efficiency. Those who have the requisite qualifications and a position waiting for them within Canada are bumped forward, rather than queuing behind those who do not. By resetting the pool of applicants annually, CIC avoids processing permanent resident applications entirely for those to whom it does not extend an invitation to apply. Any backlog is automatically eliminated.

It remains to be seen how this new initiative will function in practice. The amendments, on their face, have the potential to improve efficiency by saving the time and monetary resources involved in processing all permanent resident applications through to a final decision (regardless of whether the candidate meets the requisite criteria). That said, there are potential indirect consequences. Costs increase for candidates who must submit multiple profiles. The amendments also make an offer of

however a portion of individuals entering through the Provincial Nominee stream annually will be now be “allocated for Express Entry candidates”. See “Express Entry: Employer Outreach Information Session” *ibid* at footnote 3.

employment or nomination a *de facto* requirement for entry through any skilled worker program. These raise concerns as to whether the initiative indeed improves fairness. In an effort to improve processing for so called ‘priority applicants’, it implicitly builds in entry requirements that are not explicitly reflected in the Act and Regulations. This generates additional hurdles for those who meet the technical requirements for entry but have yet to secured a job offer or nomination. It creates ambiguity. A better outcome may be to explicitly amend the legislated entry requirements. In any event, these impacts warrant exploration once the new initiative is more established.

Business Immigrant Programs

Economic Class applications also include Business Immigrant programs: the newly created Start-Up Visa program, the Self-Employed Persons program, and the (now defunct) Investor and Entrepreneur programs. Each of these requires investment or funding toward a Canadian-based business venture or, in the case of Self-Employed Persons, the ability to make a contribution toward athletics or cultural activities in Canada.

*Business Immigrant Programs - The Start-Up Visa Program*⁹¹

The Start-Up Visa program was introduced by a set of Ministerial Instructions, which took effect on April 1, 2013.⁹² It aims to pair immigrant entrepreneurs with Canadian investment funds and business expertise. Applicant entrepreneurs must obtain prior approval and support for their proposal from a recognized Canadian venture capital

⁹⁰ CIC aims to process the majority of files within six months of receiving a completed application. See *supra* note 88.

⁹¹ Unless otherwise indicated, the descriptions of the Start-Up Visa program contained in this section are based on “Apply to Immigrate to Canada” *supra* note 59.

fund, angel investor group or business incubator. The program will remain in place as a pilot project for up to five years (in accordance with legislated limitation periods under the Act).⁹³ Thereafter, the government will have the option of permanently installing it through legislative amendment.

Business Immigrant Programs – Investors and Entrepreneurs

Entry through Federal Investor and Entrepreneur programs is based on a capital investment in Canadian economic ventures. Beginning in 2011, applications were scaled back pending review and evaluation.⁹⁴ The 2014 *Budget Implementation Act* terminated

⁹² “Ministerial Instructions Respecting the Start-Up Business Class” (15 March 2013), online: Canada Gazette < <http://gazette.gc.ca/rp-pr/p1/2013/2013-03-30/html/notice-avis-eng.html> >.

⁹³ “Backgrounder – The new Start-Up Visa Program” (modified 24 January 2013), online: CIC < <http://www.cic.gc.ca/english/department/media/backgrounders/2013/2013-01-24.asp> >.

⁹⁴ Public consultation was sought through formal calls for submissions on the Immigrant Investor and Entrepreneur Programs. For further information on these consultations, please see “Backgrounder: Stakeholder Consultations on Immigration Levels and Mix” (12 July 2011), online: CIC <<http://www.cic.gc.ca/english/department/media/backgrounders/2011/index.asp>>; “Backgrounder: Improving the Immigrant Investor Program” (31 July 2012), online: CIC <<http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-07-31a.asp>>. Effective July 1, 2011, new applications to the Federal Entrepreneur Program were suspended, by virtue of Ministerial Instruction (MI3). See “Ministerial Instructions (MI3)” (modified 1 May 2014), online: CIC <<http://www.cic.gc.ca/english/department/mi/#mi3>>; “Ministerial Instructions” online (25 June 2011) 145:26 Canada Gazette <<http://gazette.gc.ca/rp-pr/p1/2011/2011-06-25/html/notice-avis-eng.html>>; “Operational Bulletin 319” (27 June 2011), online: CIC <<http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob319.asp>>. Similarly, a temporary moratorium was placed on new applications to the Federal Immigrant Investor Program, as of July 1, 2012, pursuant to Ministerial Instruction (MI5). See “Ministerial Instructions (MI5)” (modified 1 May 2014), online: CIC <<http://www.cic.gc.ca/english/department/mi/#mi5>>; “Ministerial Instructions” online: (30 June 2012) 146:26 Canada Gazette <<http://gazette.gc.ca/rp-pr/p1/2012/2012-06-30/html/notice-avis-eng.html#d118>>; “Operational Bulletin 438” (29 June 2012), online: CIC <<http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob438.asp>>.

all existing applications to both programs.⁹⁵ The government slated pilot programs to replace both the Federal Immigrant Investor and Entrepreneur programs respectively. The Immigrant Investor Venture Capital pilot program launched on January 23, 2015.⁹⁶ It pairs immigrant investment capital with Canadian start-up companies that show high growth potential.⁹⁷ A Business Skills pilot program, to replace the former Federal Entrepreneur program, is scheduled for introduction through Ministerial Instructions.⁹⁸

Self-Employed Persons and Live-in-Caregivers

The remaining Economic Class applicants enter through the Self-Employed Persons and Live-in-Caregiver program. The Self-Employed Persons program is designed to recruit individuals to work within Canada, on a self-employed basis, in targeted industries. These include athletics, cultural activities and farm management.⁹⁹

⁹⁵ *Economic Action Plan 2014 Act*, SC 2014, c20. See also special notice bulletin in “Apply to Immigrate to Canada”, online: CIC < <http://www.cic.gc.ca/english/immigrate/apply.asp>>.

⁹⁶ See “Ministerial Instructions 16 (MI16): Immigrant Investor Venture Capital Class”, online: CIC < <http://www.cic.gc.ca/english/department/mi/index.asp#mi16>>.

⁹⁷ *Ibid.*

⁹⁸ For commentary on the proposed new program see “The Immigrant Investor Program’s Overdue End” (12 February 2014), online: Globe and Mail <<http://www.theglobeandmail.com/globe-debate/editorials/the-immigrant-investor-programs-overdue-end/article16838689/>>; and “Canada’s Immigration Minister Gives Glimpse of New Investor Scheme” (30 April 2014), online: workpermit.com <<http://www.workpermit.com/news/2014-04-30/canadas-immigration-minister-gives-glimpse-of-new-investor-scheme>>.

⁹⁹ See “Self-Employed People” (modified 9 October 2013), online: CIC <<http://www.cic.gc.ca/English/immigrate/business/self-employed/index.asp>>. Successful applicants must have prior experience in either (a) athletics or cultural activities and demonstrate the intention and capability to apply this experience and contribute to these activities within Canada or (b) farming experience and have the intention and financial means to purchase and manage a farm within Canada. The term “cultural activities”, in relation to the Self-Employed Persons Program, refers to professions such as artists, musicians, authors and the like. See “Help Centre: Under the Self-Employed Persons Program, what does cultural activities mean?”(modified 27 August, 2014), online: CIC <<http://www.cic.gc.ca/english/helpcentre/answer.asp?q=291&t=6>>.

The Live-in-Caregiver program recruits foreign nationals to provide private care for children, elderly and disabled persons within Canada.¹⁰⁰

Refugees

Refugees make up the final category of permanent residents. Despite the vast scholarship devoted to this area, on average, refugees make up only ten percent of permanent residents accepted into Canada each year.¹⁰¹ This statistic includes those who obtain refugee status through resettlement, sponsorship and in-land claims, as well as their accompanying dependents. The term refugee includes all those who meet statutory requirements and qualify as “Convention Refugees” or “persons in need of protection”, both defined terms under the Act.¹⁰² As refugee claims and protections fall outside the scope of the IRB’s current Early Resolution program, the nuances in criteria and

¹⁰⁰ It is worth noting that, unlike other Economic Class programs, permanent resident status is not granted upon entry through the Live-In Caregiver program. Rather, candidates enter Canada on a work permit and must complete a requisite amount of full-time work within Canada before submitting an inland application for permanent resident status. Candidates are required to fulfill 24 months or 3900 hours of authorized full-time work, within Canada, in order to qualify for permanent resident status. See “Help Centre: How many hours of work experience do I need as a Live-In Caregiver to apply for permanent residence?”(modified 27 August, 2014), online: CIC <<http://www.cic.gc.ca/english/helpcentre/answer.asp?q=258&t=3>>.

Recent amendments to the Regulations, introduced a similar “conditional” permanent resident status for applicants seeking to sponsor a spouse, conjugal or common-law partner through the family class sponsorship program. See *supra* note 46. It is also worth noting that as of November 30, 2014, amendments remove a previous requirement that caregivers “live-in” the homes of their employers. See “Improvements to Canada’s Caregiver Program” (30 November 2014), online: CIC <<http://www.cic.gc.ca/english/work/caregiver/improvements.asp>>.

¹⁰¹ “Facts and Figures 2013” *supra* note 55. Figure is based on the average number of refugees accepted during the last five reported years: 2009, 2010, 2011, 2012 and 2013 respectively.

¹⁰² See “Act” *supra* note 9 at s 96 – 97. The legislative definition of Convention refugee in Canada is based on the United Nations Convention relating to the Status of Refugees. See “Act” s 2 and UN General Assembly, *Draft Convention relating to the Status of Refugees*, 14 December 1950, A/RES/429, available at: <http://www.refworld.org/docid/3b00f08a27.html> (the “1951 Convention”).

decisions are not explored in great detail. That said, these claims do turn largely on credibility determinations and invoke similar concerns regarding potential miscommunications and cultural fluency to that of spousal and partner sponsorship claims. As such, refugee claims are flagged in the concluding sections of Chapter 5 as a natural area to consider expanding the use of Early Resolution processes. To ground this discussion, an overview of the requirements to enter Canada through this stream is provided below.¹⁰³

In short, claimants are admitted to Canada as refugees where they are outside of their country (or countries) of nationality or former habitual residence and, owing to a well-founded fear of persecution on the basis of race, religion, nationality, political opinion or membership in a particular social group, are unable or unwilling to return to that country.¹⁰⁴ Protected persons are individuals within Canada whose removal to their country (or countries) of nationality or former habitual residence would subject them to risk of (i) torture; or (ii) death or cruel and unusual punishment.¹⁰⁵ Those who risk death or cruel and unusual punishment upon their return must be unable or unwilling to seek protection from the state.¹⁰⁶ The risk must be against them personally, and exist regardless of where they reside within their country.¹⁰⁷ The risk cannot be the result of lawful sanctions or an inability on the part of the country to provide adequate health

¹⁰³ Unless otherwise noted, this description draws on the “Act” *supra* note 9 at Part 2 and “Regulations” *supra* note 9 at Part 8.

¹⁰⁴ “Act” *supra* note 9 at 96.

¹⁰⁵ “Act” *supra* note 9 at 97(1). The Minister is also able to designate particular classes of people as persons in need of protection under the Regulations. See “Act” *supra* note 9 at 97(2). Torture is defined in the Act as having the same meaning as Article 1 of the UN Convention Against Torture (UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) 1465 United Nations, Treaty Series 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>).

¹⁰⁶ *Ibid.*

care.¹⁰⁸ It also cannot be something that is faced generally by all people from or within that country.¹⁰⁹ These risks need not be linked to any of the aforementioned enumerated grounds.

The provisions contained in Part II of the Act codify Canada's international obligation against *non-refoulement*, under international conventions and covenants.¹¹⁰ Pursuant to these obligations, those granted asylum are entitled to remain in Canada as long as the threat to their personal safety persists. Those with refugee and protected person status in Canada are eligible to apply for permanent residence.¹¹¹

Even without delving into the extensive body of case law that governs these decisions it is obvious, on the face of the legislation, that they turn primarily on credibility determinations. A refugee's fear of persecution must be "*well-founded*".¹¹² A claimant's risk of torture must be "*believed, on substantial grounds, to exist*".¹¹³ Again, we see discretion and the importance of contextual factors (relationships, cultural fluency, etc.) This is an area ripe for miscommunication as claimants attempt to demonstrate the fear and risk they face upon return. Many will have trouble obtaining documentation. They may be fleeing governments that lack the institutional

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ See 1951 Convention *supra* note 102 and UN General Assembly, *Protocol relating to the Status of Refugees*, 16 December 1966, A/RES/2198, available at: <http://www.refworld.org/docid/3b00f1cc50.html> (the "1967 Protocol"). The text of the 1951 Convention and 1967 Protocol, with introductory note by the United Nations High Commissioner for Refugees (UNHCR), is also available at <http://www.unhcr.org/3b66c2aa10.html>. For more on the 1951 Convention and 1967 Protocol, please see the UNHCR website at <http://www.unhcr.org/pages/49da0e466.html> and UNHCR, "The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol" (September 2011), online <<http://www.unhcr.org/4ec262df9.html>>.

¹¹¹ See "Act" *supra* note 9 at s 21.

¹¹² *Supra* note 104.

infrastructure to provide them, may not have time to obtain them, or may even be fleeing persecution from the government itself. Others are smuggled internationally using fake documents. Refugees also, by their very definition, come from vastly different backgrounds and have lived experiences of which many Canadians remain blessedly ignorant. There may be culturally specific norms at play that inhibit speaking about persecution (particularly sexual abuses). Trauma may also impact claimant's behavior and choices. As noted above, we return to these discussions in Chapter 5.

The Chapters to follow build on the background provided herein to explain, in detail, how Early Resolution processes are beneficial in resolving certain claims and when such processes are currently used in Canada's migration system. The current program is narrow, and integrated into the IAD claims appeal system for only a limited number of immigration disputes. The broader overview in this Chapter helps to orient the reader to understand how those specific claims fit within a much larger regulatory system. It also lays the foundation for discussions, in the final paragraphs of this project, on the potential to expand Early Resolution.

¹¹³ *Supra* note 105.

Figure 1: Administering the Act - Ministries and Government Bodies

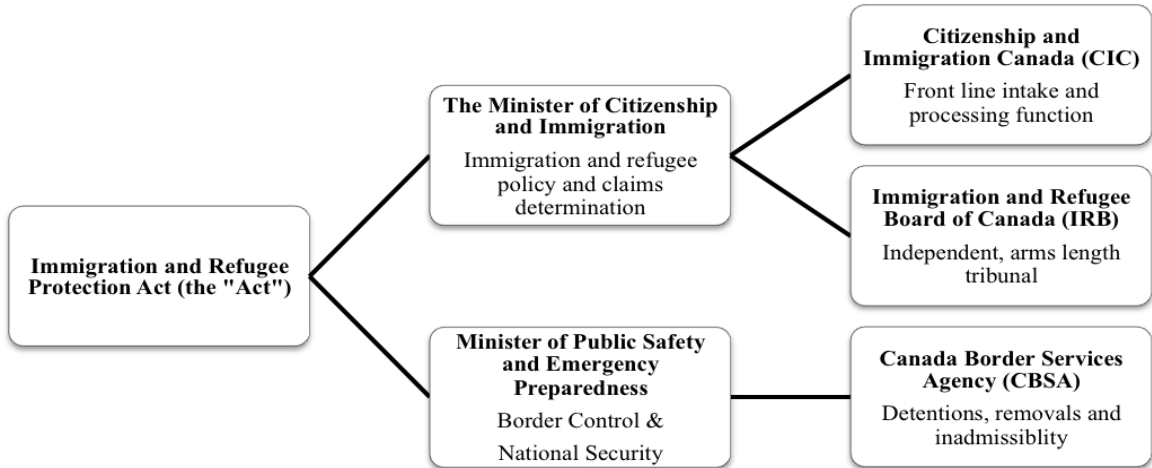


Figure 2: Divisions of the Immigration and Refugee Board of Canada

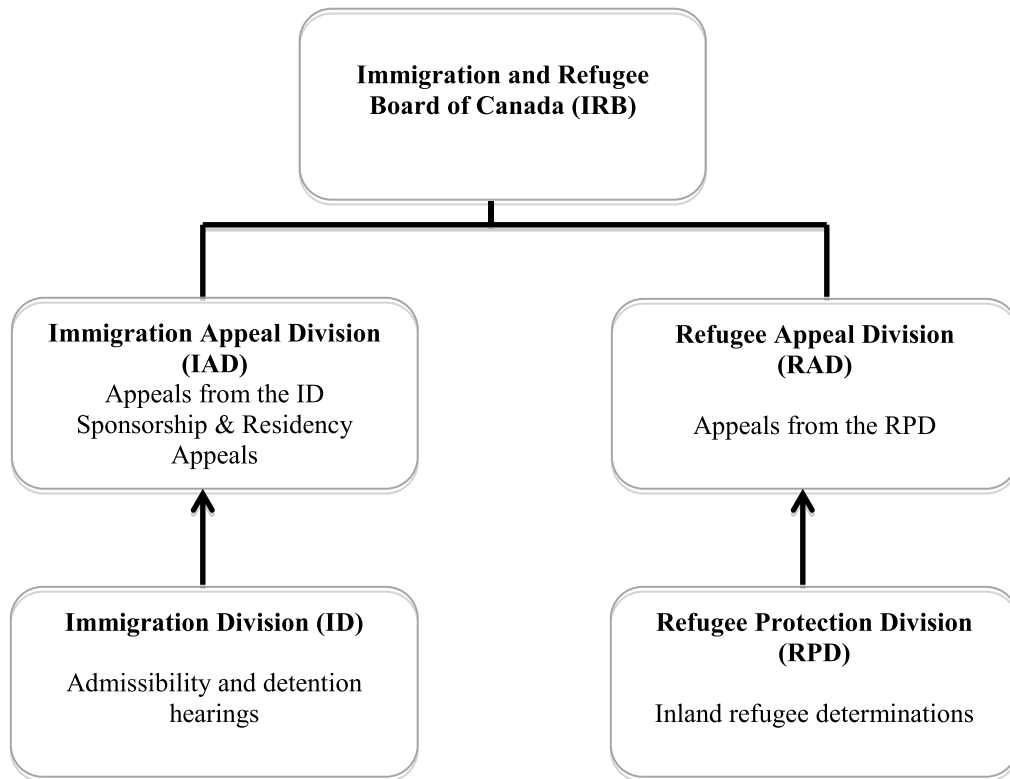
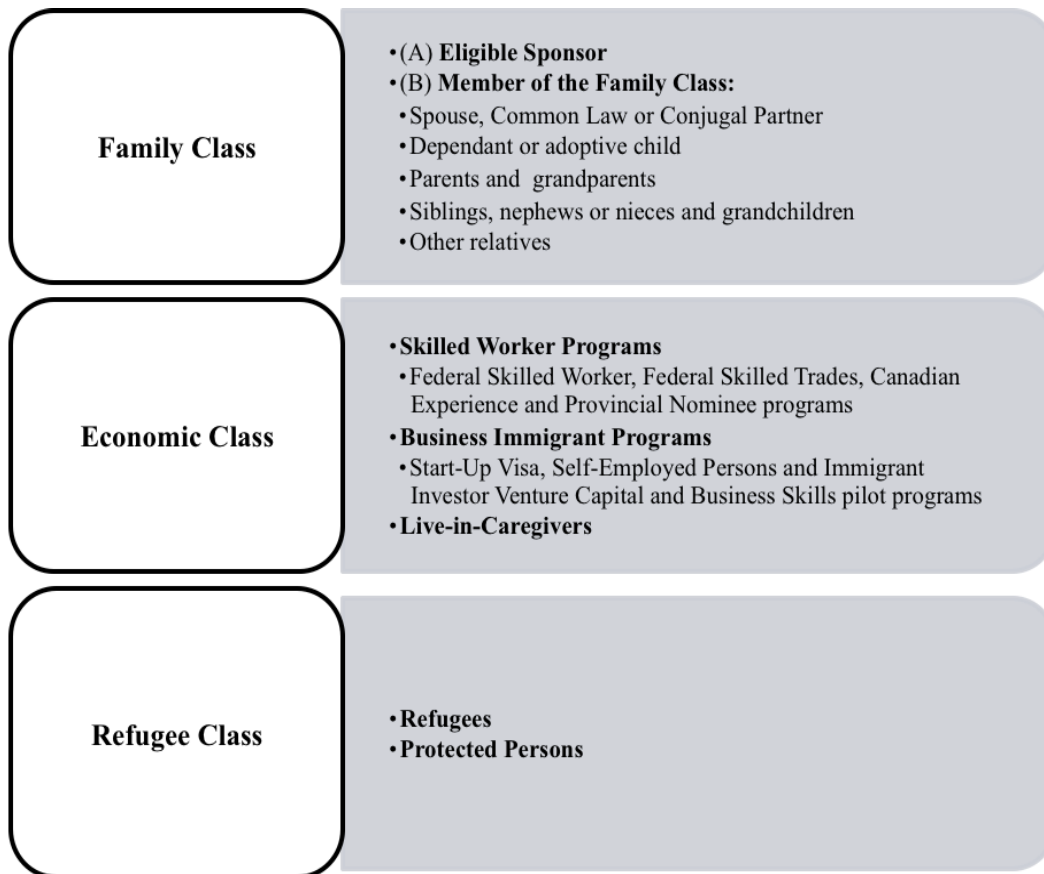


Figure 3: Canadian Immigration and Refugee Programs



CHAPTER 3: ANALYTICAL FRAMEWORK – UNDERSTANDING DISPUTE RESOLUTION PROCESSES

This Chapter sets out the analytical framework that will later be used to assess how alternative processes are used in the Canadian immigration context. First, it examines immigration claims and the characteristics that define them. This analysis explains why alternative processes are useful, and indeed, in some cases, better for resolving immigration disputes than adversarial, rights-based adjudication. This same analysis also identifies features that are helpful in assessing discrete disputes with a view to determining or crafting a process best suited to resolve them. The final sections demonstrate how this framework is applied in legal contexts generally, and how it is helpful as an analytical lens to assess informal resolution processes in the immigration context.

In speaking with both practitioners and scholars about this research project, the general sentiment is one of surprise. Many view immigration disputes as dichotomous. One either meets the necessary criteria or falls short. Applicants have the minimum necessary income or the requisite skills, or they do not. Many therefore question the role of alternative processes like mediation in resolving immigration appeals. There is, however, a place for such processes. Used effectively, they lead to more efficient, fair and durable resolutions. The key is to align disputes with the right resolution process. This requires a nuanced understanding of resolution processes and the social context surrounding immigration disputes.

The sections to follow will demonstrate how two key features of immigration disputes – *power* and *relationships* – inform our assessment of appropriate resolution processes. Power engages issues of race, culture and class. It also touches on the

dynamics of the disputants and the discretionary nature of immigration determinations. Relational issues include external stakeholders, contextual factors, and familial bonds. As illustrated below, it is these key themes of power and relationships (reflected in the characteristics that define the parties and their dispute) that make immigration claims amenable to alternative processes. These themes are also prominent in relational feminist theory. As a result, the paragraphs below draw on a particular body of feminist legal scholarship, rooted in the writings of author Carol Gilligan, to develop a framework for assessing the use of informal dispute resolution processes in the Canadian immigration system.

It is also through the themes of power and relationships that we begin to see discretion and the potential for more creative resolution options in immigration disputes. This Chapter builds on the doctrinal foundation provided in Chapter 2 and shows just how multifaceted these conflicts can be. Intangible interests can drive claims. The desire for family reunification may push appellants to pursue all avenues of review and appeal, even in the face of rejected claims and mounting costs. Subjective determinations can impact resolutions. Officers must decide whether they *believe* that an applicant has a bona fide familial relationship with their sponsor; they must *evaluate* whether an applicant's description of their foreign employment duties and activities align with Canadian occupational equivalents. Many immigration claims are black and white. In these examples, however, we begin to see shades of grey. We see possible miscommunications and misunderstandings. We see discretion. It is here that we begin to understand the potential for more informal and flexible processes.

The opening paragraphs of this project developed an understanding of alternative processes that is malleable and focuses on distinct circumstances. The section to follow suggests an outline for examining the features of individual parties and their dispute with a view to selecting a process for discrete claims. It highlights key characteristics of immigration conflicts and explains how they inform a determination of appropriate resolution processes.

I. Analyzing the Parties and the Dispute

In order to identify an appropriate process to resolve immigration appeals, it is important to understand the background in which such disputes take place. There are unique features that lend themselves to more informal resolution processes. These flow from an analysis of the key characteristics of the parties and the dispute. Dispute resolution literature on negotiation planning provides a useful framework for this type of contextual analysis. The following outline is based on the works of several leading scholars in the area of negotiation theory and practice and identifies the key features that should be considered:¹¹⁴

1. The Parties:
 - a. Who are the parties?
 - b. What are the objectives and positions of the parties?
 - c. What are the interests of the parties?

2. The Dispute:

¹¹⁴ Roy J Lewicki et al., *Essentials of Negotiation*, Canadian ed (Whitby: McGraw-Hill Ryerson Limited, 2011) at 70 – 84; Colleen M Hanycz, Trevor CW Farow & Frederick H Zemans, *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery Publications Limited, 2008) at 41 – 43 and 69 – 81. Applications of this outline and these concepts to the immigration context in the balance of this section, including examples provided, are also informed by these sources.

- a. What are the relevant issues?
- b. What is the “bargaining mix”?¹¹⁵
- c. Are there any other external factors or influences that are relevant to the dispute?

Examining discrete immigration claims based on these characteristics will inform a determination of which process(es) are best suited to resolve the appeal. The subsections below apply this outline to the immigration context, first elaborating upon the features of the parties, and then turning to discuss the features of the dispute.

The Parties

At first blush, defining the parties to an immigration dispute is straightforward. It may even appear redundant to consider it as a point of analysis. The named parties to an appeal are the claimant (appellant) and the government, represented by the Ministry of Citizenship and Immigration and the Ministry of Public Safety and Emergency Preparedness. However, this narrow view may be too restrictive in many cases, and overlook key interests. Spouses, family members and employers all represent potential parties whose views and input may be critical to resolving a claim. Understanding the relationships between these primary and secondary parties may unearth additional issues that are integral to resolving the claim. The threshold question is how wide does one cast the net? Where claims turn on relationships and evidence involving extended parties, proceeding exclusively through traditional adversarial processes may, in fact, be problematic from a conceptual perspective. When viewed through the traditional adversarial model, disputes can become one-dimensional. The discrete dispute between two parties remains in the foreground and eclipses the broader societal context at play.

The complex relationships and interests that inform and underpin the parties and their respective positions are downplayed or, far too often, ignored. Many immigration claims involve complex cultural or social values and norms. There are often multiple stakeholders and the dispute itself represents the intersection of these broader contextual issues. A dispute resolution process that ignores these broader issues cannot respond to them.¹¹⁶ Alternative processes that account for important perspectives, beyond those of the immediate parties, may be better suited to effect a resolution that is fair, efficient and durable.¹¹⁷

There is also an innate power imbalance between the immediate parties to the dispute. While individual circumstances (wealth, political pressure, media attention, etc.) may shift the balance of power in some instances, the overwhelming majority of claimants will occupy a position of inferior power relative to that of the state. Indeed, more often than not, individual circumstances will exacerbate this innate imbalance.¹¹⁸ The sources of this power include superior resources on the part of the state (monetary and human resources, knowledge, etc.) but also the nature of the transaction itself. The

¹¹⁵ Lewicki et al *ibid* at 70.

¹¹⁶ These critiques parallel many of the benefits of restorative justice and are similar to concerns expressed by restorative justice scholars regarding other conceptions of justice and/or dispute resolution processes. See, for example, Jennifer J. Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) at 15 [Llewellyn et al., “Restorative Justice Framework”] and Carrie Menkel-Meadow, “Restorative Justice: What Is It and Does It Work?” (2007) 3 *Annu Rev Law Soc Sci* 10.1 at 10.2 [Menkel-Meadow, “Restorative Justice: What is it?”]. Restorative processes are defined and discussed in Part III below.

¹¹⁷ The identification of these system goals and the interrelation between them, the parties, the dispute and appropriate processes is discussed further in Part IV below.

¹¹⁸ This would be particularly true of self-represented litigants or those seeking an exemption based on H&C grounds. For more information on the requirements for these requests, please see “Act” supra note 9 at s 25 and 25.1.

claimant seeks a benefit from the state; the state decides whether or not to grant the benefit.¹¹⁹

Linked to this imbalance of power are notions of culture, race, gender and class. Considerations of gender are not exclusive to biological gender. They certainly include experiences based on sexual orientation, identity and the like. The correlative and causal relationships between these identifiers are likely as varied as the claimants themselves. Each discrete claim warrants an analysis of whether issues relating to gender, culture, race or class impact the dispute. Their presence creates a potential for unintended errors (miscommunications or misunderstandings) or even intentional abuses (exclusion, manipulation or exploitation). This is of particular importance in the context of immigration claims as, by their very definition, the immediate parties to the dispute are often of different nationalities. The claimant's cultural background, their language, values and experiences, may differ vastly from those of the Canadian officials and decision makers they encounter over the course of their claim. This is perhaps most glaring in Family Class disputes where entry hinges almost entirely on conveying the genuineness of the applicant's relationship with their sponsoring spouse or partner. Courtship, marriage and familial custom are highly contextual and such claims often

¹¹⁹ Acknowledging that this statement is perhaps an oversimplification, it is accepted on its face for purposes of moving forward with the analysis at issue. While beyond the scope of this paper, there is no doubt a fascinating line of future research in exploring the assumptions embedded in this position. Are (and should) such exchanges be conceived of as rights and entitlements or rather, as procedurally fair opportunities? Does the framework or analysis shift based on the answer? This line of query was raised in discussions of this project by a member of my Thesis Committee, Professor Bruce Archibald. The following provides a point of entry for such an analysis: Bruce P Archibald, "Restorative Justice and the Rule of Law: Rethinking Due Process through a Relational Theory of Rights", online: (1 December 2013) SSRN < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395224> [Archibald, "Restorative Justice and the Rule of Law"].

depend on a certain level of cultural fluency on the part of the Canadian immigration official(s), and a dispute resolution process that fosters dialogue, open-mindedness and understanding.

There are also those who question whether alternative processes are appropriate where there is a stark power imbalance between the parties. They suggest vulnerable groups are ill served without the protections of rights-based, adversarial processes. Professor Trina Grillo adopts this position in her discussion of court-annexed mediation in family law disputes.¹²⁰ Family law is often cited as a leader in alternative processes and many jurisdictions utilize some form of mandatory mediation in their family law courts. Grillo's concern is that informal processes, like mediation, can be manipulated and allow race and gender bias to go undetected. She argues they expose vulnerable women to further harm from spouses and impede their ability to advocate on their own behalf to obtain a fair resolution. Gemma Smyth provides a well-reasoned counter in her article "Strengthening Social Justice in Informal Dispute Resolution Processes Through Cultural Competence".¹²¹ Smyth argues that there is nothing inherent in alternative processes that encourages participants to ignore social justice norms. Far from threatening fairness and social justice, informal processes are just as capable as courts at protecting these ideals and, in fact, foster increased dialogue on these issues:

¹²⁰ Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991), 100 *Yale Law Journal* 1545 [Grillo, "The Mediation Alternative"]. The following summary of Grillo's position draw on this work, as well as Joshua D Rosenberg, "In Defense of Mediation" (1991), 33 *Arizona Law Review* 467 [Rosenberg, "In Defense of Mediation"].

¹²¹ Gemma Smyth, "Strengthening Social Justice in Informal Dispute Resolution Processes Through Cultural Competence" (2009), 27 *Windsor Yearbook of Access to Justice* 11 [Smyth, "Strengthening Social Justice"]. Included in Julie Macfarlane, *Dispute Resolution Readings and Case Studies*, 3d ed (Toronto: Emond Montgomery Publications Limited, 2011) at 375.

Trina Grillo argue[s] that social inequality was reified through a mediation process...[T]his [is] in stark contrast to the claim that mediation was a more ‘feminine’ or ‘woman-friendly’ process because it eschewed adversarial methods. The juxtaposition of these competing claims obscures the possibility that mediation and other informal dispute resolution processes can deliver on their promises and incorporate notions of equality and justice. I argue that mediation does not have to involve a trade-off between negotiation and human rights. In short, accepting mediation as a dispute resolution process does not entail ignoring substantive norms or outcomes or giving up on social justice or human rights for the sake of compromise. On the contrary, mediation can generate social justice and entrench human rights in the day-to-day lives of those who engage in it. This paper...argues...[that] settlement processes have the potential not only to ensure increased protections for marginalized populations, they may also increase the quality of discourse around the role of human rights in the day-to-day lives of citizens, thereby strengthening and deepening the role of human rights, cultural competence and social justice in Canadian society.¹²²

An innate imbalance of power between parties to an immigration dispute does not preclude the use of alternative processes, nor does it jeopardize the ability of participants to dispose of disputes fairly and with respect to human rights and social justice.

The objectives and positions of the parties to an immigration dispute will be relatively context specific. At their core, the objective of the claimant is to gain entry to Canada and the objective of the state (through its representatives) is to ensure that those who meet the requisite criteria are admitted and those who do not are denied access. The position of a claimant on appeal is likely that they do (or should) meet the requisite criteria – either because there was a misunderstanding or miscommunication at first instance or because they are “close enough” to one of the minimum threshold requirements for entry that they should be admitted.¹²³

¹²² Smyth *ibid*, cited in Macfarlane *ibid* at 378.

¹²³ For example, claimants who are within striking distance of the minimum necessary income requirements often seek discretionary waiver of its application by the Ministry. For more information on minimum necessary income, see “Guide IMM 5482 – Instructions to fill the Financial Evaluation Form (IMM 1283), online: CIC <<http://www.cic.gc.ca/english/information/applications/guides/5482Eguide.asp>>.

Again, the interests of the parties will vary considerably from claim to claim. Interests are defined as “the underlying concerns, needs, desires, or fears that motivate a [party] to take a particular position”.¹²⁴ In short, positions are *what* parties want; interests are *why* they want it. Understanding the interests of both parties, and identifying mutual interests, is key to developing creative options when resolving disputes.¹²⁵ Often, interests are conceived of in narrow, monetary terms: Party A has an interest in obtaining \$450,000 on the sale of their home so that they can pay off the mortgage owing and have enough left over for a down payment on another house. They may also have an interest in not being taken advantage of by selling the home for less than its (perceived) market value. While crucial, these “substantive interests” often represent only part of the picture.¹²⁶ The work of scholars Lax and Sebenius identify four types of interests that may be invoked in a given dispute: substantive, process and relationship interests as well as interests in principle.¹²⁷ Substantive interests, as alluded to above, are interests in the tangible resources in dispute between the parties and are generally economic. They may be linked to satisfying other long-range goals (moving into a three bedroom house to accommodate the arrival of a new child) or satisfy an inherent need to feel valued or validated.

The remaining interests – process, relationship and interests in principle – are intangible in nature. Given that the tangible resources at issue in an immigration claim are likely restricted to the visa or permit itself, one or more of these intangible interests

¹²⁴ Lewicki et al. *supra* note 114 at 49.

¹²⁵ Hanycz et al. *supra* note 114 at 86-87.

¹²⁶ Lewicki et al. *supra* note 114 at 50-51, citing D Lax & J Sebenius, *The Manager as negotiator: Bargaining for cooperation and competitive gain* (New York: Free Press, 1986). See also Hanycz et al. *ibid* at 49.

will often be at issue. Process interests arise when a party is vested in how the dispute is resolved – for example, they enjoy the rush of competitive bargaining and are keen to negotiate distributively (perhaps haggling over the price of an item at a market). In the immigration context, this may be as simple as a claimant’s interest in having their version of events heard and understood by a decision maker. Even where a claim is ultimately denied or withdrawn, it may be the case that this interest is satisfied by a dispute resolution process that allows for genuine dialogue between the parties and fleshes out any (real or perceived) miscommunications.

Relationship interests arise when one or both parties to a dispute value the relationship between them. Sometimes relational interests eclipse even the immediate outcome of the dispute. Common examples in literature contrast the sale of a house (where the parties are engaged in a one-off transaction and often have little contact with one another before or afterward) with that of an employment dispute (where the parties will likely continue to interact with one another, perhaps for years after the dispute). In the latter case, preserving the relationship may be of greater concern than the substantive outcome of the dispute. As a result, one side may be satisfied with an outcome that is not as favorable in terms of resources, but maintains relations between the two sides. The relationship may be valuable in its own right (the two sides have a close friendship) or it may be that one side derives a benefit from it.

In the immigration context, these relationship interests may manifest themselves in a limited, short-term manner. For example, a claimant may be inclined to withdraw a claim and re-apply at a later date, rather than risk negative findings against them in a

¹²⁷ *Ibid.* The descriptions of these concepts herein are also based on those of Lax and Sebenius.

formal decision that finally disposes of the claim. In this way, claimants sacrifice the outcome of the immediate dispute in favour of maintaining good standing with immigration officials.

There are also broader, more long-term relational interests at play in immigration disputes. Many view these conflicts as akin to one-off business transactions. The applicant is either granted or denied entry and, once the dispute is settled, the parties have little to no future contact. This understanding rests on a very narrow view of immigration disputes and the parties involved in them. As noted above, the parties to an immigration claim can (and arguably should) be conceived of much more inclusively. While the named parties to the dispute are the Minister (represented by an individual officer or employee) and the claimant, the Ministry is part of the broader government machine. The Minister, to a large extent (and particularly to foreign nationals), represents the Canadian government – and perhaps Canada itself.

While the dispute may seem transactional at first blush (and some temporary resident applications may very well be), many have long-term implications. They are often decisions as to who will be admitted into our country, who will build their lives and raise their families in Canada. These claims involve life-long relationships with new Canadian residents and citizens. Claimants have a vested interest in integration and future success in a new country. The Ministry and its representatives also, no doubt, have a vested reputational interest in such claims. They are concerned with how Canada, its government and employees are perceived domestically and abroad. For these claims, it is imperative that resolution processes account for these more contextual factors.

Finally, parties to a dispute may have interests in upholding certain principles. According to Lax and Sebenius these often include concerns about "...what is fair, what is right, what is acceptable, what is ethical, or what has been done in the past and should be done in the future – [these concerns] may be deeply held by the parties and serve as the dominant guides to their action".¹²⁸ Such concerns are likely a factor (to a greater or lesser extent) in all immigration claims. Both parties will be governed by their intuitive beliefs about what is fair or right in the circumstances. Often these beliefs are coloured by the individual experiences of the immediate parties and the collective experiences of their colleagues, friends and family. The Ministry, in particular, will have a vested interest in past and future behavior. Consistency and the precedent value of certain decisions and exceptions no doubt inform their decision-making. The same may be said of other stakeholders. Appellant's counsel or interest groups may be vested in how decisions are applied in future situations.

The Dispute

Defining the issues in a dispute involves identifying the points that need to be addressed in order to come to a resolution.¹²⁹ In the context of a house sale, the typical issues will include the sale price, closing date, conditions, etc. In the context of an immigration dispute, the issues will likely parallel the applicable entry criteria for the discrete claim. Most will be identified in a refusal letter from the reviewing officer, denying the claim at first instance.¹³⁰ There may be others. Perhaps an intervening event has occurred that gives rise to new H&C exemptive grounds. Perhaps there is a new

¹²⁸ See *supra* note 126, cited in Lewicki et al. *supra* note 114 at 51.

¹²⁹ *Ibid.*

¹³⁰ A detailed description of the appeal processes for Canadian immigration claims is provided in Chapter 4 to follow.

protocol or program in place that applies to the applicant. Perhaps there is new, relevant evidence, or case law on a pertinent legal issue. Identifying issues and organizing evidence related to these issues is often the first step to understanding the dispute as a whole.

Once the issues are identified, negotiation literature speaks of defining the “bargaining mix”¹³¹ or evaluating the “value climate”¹³². In short, this refers to analyzing the value – resources and options – that are available to resolve the dispute. Disputes that have multiple issues and abundant resources (or potential for generating creative options) are said to be more conducive to resolution through integrative approaches that focus on interests, rely on open exchange of information and encourage collaboration between the parties in crafting a solution.¹³³ Disputes that turn on a small number of narrow issues, with fixed and limited value often lend themselves to a more distributive approach – one that is binary (win-lose), competitive and adversarial.¹³⁴ Here each party seeks to maximize their gains at the expense of the other.

Given this theoretical basis, it is easy to see why many would view immigration disputes, on the whole, as archetypal of this more binary, distributive variety. The claimant either meets the requisite criteria or they do not. Zero-Sum. In or out. Hence, the inherent uncertainty and skepticism many express when discussing alternative processes

¹³¹ Lewicki et al. *supra* note 114. The description and analysis of these concepts herein are based on this source.

¹³² Hanycz et al. *supra* note 114. The description and analysis of these concepts herein are based on this source. See also *ibid*.

¹³³ For a more detailed description of integrative bargaining see Lewicki et al. *supra* note 114, beginning at 44. See also Hanycz et al. *supra* note 114, in particular, Chapter 3. The description and analysis of this concept herein is based on these sources.

¹³⁴ For a more detailed description of distributive bargaining see Lewicki et al. *supra* note 114, beginning at 17. See also Hanycz et al. *supra* note 114, in particular, Chapter 3. The description and analysis of this concept herein is based on these sources.

in this context. However, this again assumes a more narrow understanding of immigration disputes and the resources available to resolve them. It also lumps all claims together. While some claims may indeed be suited to more adversarial methods, there are others where there is room for more creative, integrative approaches. The reasons are two-fold. First, many immigration disputes are discretionary in nature. Despite the fact that they are made within the context of fixed process rules and entry requirements, final decisions are made by individual administrative decision makers who weigh evidence, make findings of fact and determine credibility. As noted above, in certain immigration claims contextual factors (such as culture and gender) are integral to these determinations. There is potential for miscommunication or misunderstanding where such differences in experience, language or power exist. A resolution process that facilitates dialogue, collaboration and understanding between the parties may be better suited.¹³⁵

Viewing all immigration criteria as innately binary may also be premature. With more creativity, there may be other ways of satisfying particular requirements with respect to certain claims. For example, minimum necessary income requirements are framed as distinctly zero-sum criterion. You either have the requisite amount or you do not. But if one considers this requirement more holistically, in terms of the principle it is trying to achieve (ensuring that those who arrive here in Canada are able to support themselves and their dependents), there may be other ways to meet this concern. Examples include evidence of a forthcoming inheritance, a secured family loan, etc.

¹³⁵ It is important here to flag that the theoretical framework explained in the sections to follow, identifies several important critiques that underscore the potential for errors or abuse in these types of discretionary determinations. This is true of both parties to the dispute.

The last point in our framework of analysis is to consider whether any other external factors or influences are relevant to the dispute. These may include directives from senior decision makers or other external stakeholders, overarching policies, external political influences, etc. Some of these may dovetail with interests in principle. There may be concerns about the precedent impact of certain decisions, or of foreign political events that make (comparatively more private) alternative resolution processes more or less appealing for discrete claims.

II. Looking to Feminist Theory

In searching for a way to evaluate when and why alternative processes may improve dispute resolution in the immigration context, I was struck by the overlap between the features that commonly define immigration parties and disputes and those identified in scholarship on gendered differences in moral development and conflict resolution. Indeed, the themes of *power* and *relationships* identified above echo debates within feminist theory. While an exhaustive review of the scholarship in this area is beyond the scope of this project, the following sections analyze and explain a particular thread of feminist scholarship, rooted in the seminal work of Carol Gilligan: *In a Different Voice*.¹³⁶ Gilligan's concepts of ethic of care and ethic of justice (terms ascribed to female and male moral development and decision making respectively)¹³⁷ have been used as analytical frameworks by numerous scholars. Despite the strong criticism leveled against difference theorists, including Gilligan, the theory, nonetheless, provides a way of understanding dispute resolution. In the same way that Gilligan's

¹³⁶ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 1982) [Gilligan, *In a Different Voice*].

¹³⁷ *Ibid.*

work observes gendered variations in affiliational traits, so too can dispute resolution processes be understood in terms of the extent to which they incorporate context and relationships beyond the immediate parties to the dispute. The critics, for their part, raise important cautions that can be drawn on to create a more informed and nuanced understanding of dispute resolution process design and implementation. The balance of this Chapter summarizes Gilligan's theory on the ethics of care and justice, addresses core critiques, describes how the concepts have informed legal research, and explains how this line of scholarship provides a framework for analyzing disputes, particularly in the immigration context.

The Ethic of Care and the Ethic of Justice

Using excerpts of three empirical studies, *In a Different Voice* presents research on human developmental psychology, with the express goal of finding and expounding the female voice.¹³⁸ Each study draws on interviews with selected participants using questions regarding morality and how they experience conflict.¹³⁹ The results of Gilligan's studies suggest gendered differences in how men and women interact with the world around them and approach moral conflicts.¹⁴⁰ The female ethic of care intuitively approaches conflict with a focus on relationships, connections and resolution through

¹³⁸ *Ibid.* See, in particular, the author's introduction at 1-5.

¹³⁹ *Ibid.* at 2. See also pages 2-3 for a description of each of the three studies, including their participants and methodologies. Participants included males and females of a variety of ages.

¹⁴⁰ *Ibid.* See also Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process", (1985) 1 Berkeley Women's Law Journal 39, which provides an excellent overview of Gilligan's work and its application to legal scholarship. This article was later revised by the author: Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" online: (September 2013) Berkeley Journal of Gender, Law & Justice, Berkeley Law Scholarship Repository: <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1001&context=bglj>> [Menkel-Meadow, "Portia in a Different Voice"].

problem solving.¹⁴¹ By contrast, the masculine ethic of justice prioritizes rights, rules and principled decision-making.¹⁴²

While the two approaches are often understood as being aligned with biological gender, Gilligan herself does not describe the gendered link as absolute. Her conclusion appears to be one of correlation rather than causation. In her own words, she explains her findings as follows:

The different voice I describe is characterized not by gender but by theme. Its association with women is an empirical observation and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex...No claims are made about the origins of the differences described or their distribution in a wider population, across cultures, or through time. Clearly, these differences arise in a social context where factors of social status and power combine with reproductive biology to shape the experiences of males and females and the relations between the sexes...¹⁴³

Despite this, Gilligan's work accepts that certain characteristics are attributable to the respective sexes. As a result, it is subject to postmodern critiques similar to those wielded against other difference theorists.

*The Postmodern Critiques*¹⁴⁴

Critiques of Gilligan's ethic of care framework are broken down in literature into three key themes.¹⁴⁵ The first asserts that research on moral development by Gilligan,

¹⁴¹ Macfarlane *supra* note 121 at 72.

¹⁴² *Ibid.*

¹⁴³ Gilligan, *In a Different Voice supra* note 136 at 2.

¹⁴⁴ Menkel-Meadow, "Portia in a Different Voice" *supra* note 140, provides an excellent and succinct summary of the key critiques leveled against Gilligan's affiliational views. See, in particular, page 40 at footnote 8. Unless otherwise noted, the descriptions herein of these critiques, as well as the scholarly sources cited, are based on this synopsis by Menkel-Meadow (with profound thanks to the author).

¹⁴⁵ Menkel-Meadow's descriptions (see *ibid*) speak of four key areas of critique. The fourth, methodological critiques, are excluded from the discussion herein. Delving into

and other social and psychological scholars, ignores the root causes of the affiliational attributes observed in women. According to this critique, the female inclination to value relationships and connections is itself socially constructed. Women care about relationships because they derive power from their connections with men. In short, “we cannot know what women would value in a world where they were not oppressed”.¹⁴⁶ In a way, this critique, parallels Gilligan’s own initial motivations to seek out and disseminate the excluded female voice.

The second, and perhaps most common, critique of difference theory is that in ascribing differences based on biological gender, we risk further perpetuating stereotypes. By labeling certain qualities as female or male, we allow them to be used (by those with power) to re-oppress women. The following summarizes this concern:

The argument here is that difference exists and is not itself problematic; what is problematic is the uses made of difference by those who have the political power to decide what the significance of difference should be. Differences are problematic when they are presumed to be essential and unchangeable or, in the view of social biologists, biological rather than socially determined. To note the existence of difference does not necessarily assume its cause (there are a wide variety of theories even within the rubric of social construction), nor that particular differences have causal effects of their own... The concern here is that if differences are named and claimed by women, they can be used to support discriminatory practices, both by men and women.¹⁴⁷

discussions of the methodological soundness of Gilligan’s studies and empirical data does not add to the analysis to follow and is beyond the scope of the project. Potential areas for further research in this vein include selection bias, sample size and the extent to which controls were in place to account for other potentially relevant characteristics (race, ethnicity, ability, socio-economic status, sexual orientation, etc.).

¹⁴⁶ *Ibid* at 40.

¹⁴⁷ Carrie Menkel-Meadow, “Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change” (Spring 1998) 14:2 *Law & Social Inquiry* 289 at 294 [Menkel-Meadow, “Feminization of the Legal Profession”].

Lastly, there is a concern that linking attributes to biological gender ignores the impact of race and class.¹⁴⁸ This critique again invokes the idiom of correlation versus causation. By attributing certain characteristics based on gender, one ignores other possible causes. Even when gender is conceived as a product of social construction, rather than an immutable physiological characteristic, this still ignores other sources or bases of oppression and exclusion. This postmodern view of gender resists viewing the sexes as two homogenous, binary groups. Rather, it acknowledges intra-group differences and looks to other, more diverse sources to account for variations in experience.¹⁴⁹

Despite these critiques, Gilligan's work on relational theory offers an interesting framework for thinking about morality, ethics and conflict resolution. Unsurprisingly, it was adopted by many legal scholars as an analytical tool for examining changes in the legal profession – most notably the rise in popularity of alternative processes and the increasing number of women in law.

Applying the Ethic of Care to the Legal Context

In the late 1980s, theorists began applying Gilligan's ethic of care to questions of law and gender. Of particular note in this area are the scholarly efforts of Carrie Menkel-Meadow. Picking up on Gilligan's earlier work on ethics of care and justice, Menkel-Meadow addresses how an increasing female presence might impact law – its structures, the practice of law, legal reasoning and law making.¹⁵⁰

¹⁴⁸ In addition to race and class, one could also consider the impact of any number of additional characteristics including ability, sexual orientation, etc.

¹⁴⁹ Menkel-Meadow, "Feminization of the Legal Profession" *supra* note 147.

¹⁵⁰ See Menkel-Meadow, "Portia in a Different Voice" *supra* note 140.

While sympathetic to many of the critiques outlined above, Menkel-Meadow is, to some extent, a difference theorist herself in that she accepts the possibility that gendered differences (in legal values, reasoning, structures, etc.) may exist. She argues for “explicit testable hypotheses about gender differences to determine their validity”.¹⁵¹ Her core hypothesis is that the different perspectives derived from different life experiences, gendered or otherwise, might incite change in the legal profession. Hers is a “...curiosity about how having two genders (and countless ethnic and racial variations) in an institution formerly all male might alter structures and practices”.¹⁵²

Using Gilligan’s ethic of care as a framework for analysis, Menkel-Meadow suggests that perhaps women, with their emphasis on relationships, connections and problem solving, will introduce different approaches to lawyering.¹⁵³ Her writings in this area are, at their core, a call for further attention and study. She does, however, set up several potential avenues or hypotheses for future pursuit. Chief among these are (i) whether increased gender diversity might alter the primacy of the adversarial model and the norms and values that flow from it - “advocacy, persuasion, hierarchy, competition, and binary results (win/lose)”;¹⁵⁴ (ii) whether the “female voice of relationship, care and connection lead(s) to a different form of law practice?”;¹⁵⁵ (iii) differences in legal

¹⁵¹ Menkel-Meadow, “Feminization of the Legal Profession” *supra* note 147 at 297.

¹⁵² *Ibid* at 314.

¹⁵³ See *ibid* and Menkel-Meadow, “Portia in a Different Voice” *supra* note 140.

¹⁵⁴ Menkel-Meadow, “Portia in a Different Voice” *ibid* at 51. The balance of this section summarizes Menkel-Meadow’s hypotheses on this point. Found, in particular, at 50-55.

¹⁵⁵ *Ibid* at 55. Menkel-Meadow muses that this could lead to more egalitarian, leaderless practice models, collaboration, knowledge sharing, and/or a more robust, contextual view of client needs, experiences and the lawyer-client relationship. See, in particular, pages 55 – 58 and the footnotes therein.

reasoning;¹⁵⁶ and (iv) whether having more women in the role of law makers (judges, politicians, etc.) would impact the substance of laws or the principles we value.¹⁵⁷

The first point is most applicable to our discussions.¹⁵⁸ How might an emphasis on care and relationships disrupt some of the adversarial norms and values that define our legal system? Might we see a different model emerge? One that facilitates communication? One that focuses on maintaining relationships and structuring resolutions that are durable and mutually beneficial? One that looks for common interests and understandings, increases party participation in resolution processes and expands whom we view as stakeholders? Might the attributes that are valued in a male-dominated legal profession (aggression, strength, being a warrior, a bulldog... and so on) give way to others that emphasize connections?

Drawing on these attributes, Menkel-Meadow suggests that the ethic of care is already present in our current system through more alternative resolution processes. In her words, “[m]uch of the current interest in alternative dispute resolution is an attempt to modify the harshness of the adversarial process and expand the kinds of solutions available, in order to respond better to the varied needs of the parties”.¹⁵⁹ Menkel-

¹⁵⁶ Exploring the impact of the female inclination toward developing a more contextualized understanding of disputes, searching for more facts and exploring alternative resolution options and/or processes. See *ibid*, in particular, pages 58-60 and the footnotes therein.

¹⁵⁷ Would this change our understanding of concepts like equality, autonomy and liberty? Would our focus shift from individual rights and freedom from state interference to a greater emphasis on collective rights and obligations on the state to provide for its citizens? Menkel-Meadow also highlights the potential implications for so-called women’s issues like abortion or reproductive rights in terms of how these issues are framed and understood in law. *Ibid*. See, in particular, pages 60-62 and the footnotes therein.

¹⁵⁸ See *supra* note 154.

¹⁵⁹ *Ibid* at 52-53.

Meadow points to mediation as an immediate example,¹⁶⁰ but there are others (restorative processes, integrative negotiation, conciliation, etc.). This notion that certain dispute resolution processes incorporate affiliational values is the foundation for the framework proposed in the sections to follow.

III. The Continuum of High to Low Context - A Framework for Understanding Dispute Resolution Processes

While the works of scholars like Carrie Menkel-Meadow focus primarily on gender and the benefits that may come from increased gender diversity in the legal profession, such scholarship is equally applicable to those excluded on the basis of ethnicity, class, ability and sexual orientation.¹⁶¹ In addition, like Gilligan, Menkel-Meadow's later scholarly works explicitly acknowledge that the two approaches need not necessarily be conceived of as gendered.¹⁶² In this way, ethics of care and justice are conceived of as two different values or approaches.

Just as postmodern feminists promote a more fluid conception of gender (individuals possessing different characteristics, to varying degrees, based on a variety of life experiences), so too can processes reflect the ethics of care and justice to varying degrees.¹⁶³ These values are not necessarily absolute or mutually exclusive – in individuals or processes. The same essentialist critiques levied against gendered characteristics apply to create a more advanced understanding of processes. This notion

¹⁶⁰ *Ibid* at 52.

¹⁶¹ In Menkel-Meadow's own words: "The present essay focuses on gender, but what I have to say about the exclusion of whole classes as subjects of study applies as well to minorities, ethnicities and other excluded, non-mainstream groups, such as the handicapped, lesbians and gay people". See *ibid* at 40, footnote 6.

¹⁶² *Ibid* at 50.

¹⁶³ Similar sentiments are expressed by Menkel-Meadow, see *ibid* at 53.

of fluidity parallels the works of other scholars like Paul Emond¹⁶⁴ and Julie Macfarlane,¹⁶⁵ who describe dispute resolution processes as existing on a continuum. It is here that we find new value in the ethic of care as a framework for understanding dispute resolution processes.

This conception of dispute resolution processes as existing along a continuum is laid out by Paul Emond in a seminal article entitled “ADR: A Conceptual Overview”.¹⁶⁶ Here, Emond first divides dispute resolution processes into two broad camps: irrational processes (he uses resolution by strength or change as examples) and rational processes. He focuses his analysis on rational processes, which he explains further “...divide into a number of process types, all of which fall along a continuum”.¹⁶⁷ At one end of the continuum are consensual models of dispute resolution (private processes that allow the parties to exercise control, with little to no public accountability). At the other are command models (public resolution, characterized by transparency and little party control).



Rather than discrete selections, dispute resolution processes exist fluidly along this spectrum, exhibiting more consensual characteristics, then evolving to resemble more command-based models as one moves from left to right. John Kleefeld summarizes

¹⁶⁴ Paul Emond, “ADR: A Conceptual Overview” in *Commercial Dispute Resolution* (Aurora, ON: Canada Law Book, 1981). Included in Macfarlane *supra* note 121 at 95.

¹⁶⁵ Macfarlane *ibid*.

¹⁶⁶ See Emond *supra* note 164. The summary and descriptions of Emond’s continuum concept herein are drawn from this article.

¹⁶⁷ *Ibid* cited to Macfarlane *supra* note 121 at 95.

Emond's continuum theory well, including reference to his examples as to where key resolution processes fall along the way:

... the spectrum's leftmost end has a high degree of party control with few, if any, predetermined limits on procedure, participation or outcome. It is consensual, private, and confidential. The private negotiation and settlement of most civil disputes falls into this category. Moving to the right on the spectrum are conciliation and mediation, where at least some control, typically over process rather than outcome, is surrendered to another person. At this point the spectrum takes on a more public hue, particularly if the mediator is government-appointed or court-annexed. Further to the right lies the adjudicative processes, with their emphasis on decisions rather than agreements. Even here, spectra lie within the spectrum. Arbitration, for example, usually allows for much party control over who decides the case; court-based adjudication allows for relatively little control. Outcome confidentiality is typical in arbitration, but atypical in court case[s]... At the rightmost end of the spectrum, we move into the regulatory and administrative arena, with a high emphasis on public scrutiny and accountability. Then, ultimately into rule making by majority vote. At this stage, dispute processing is highly public, its contour shaped by the legislature, as in the case of workers' compensation or no-fault automobile insurance regimes.¹⁶⁸

As Kleefeld suggests, there are often "spectra to be found within the spectrum" – or further gradation within various processes.¹⁶⁹ Mediation provides a well-known example. Within this broad process category, there are numerous schools or approaches

¹⁶⁸ Kleefeld *supra* note 23 at 821 – 822. Footnotes omitted. See also Emond *ibid*, particularly the chart included in Macfarlane *supra* note 121 at 96. The dispute resolution processes described are relatively mainstream and likely familiar to many readers. As a result, and in an attempt to streamline this discussion, formal definitions are not included. The Law Society of Upper Canada provides a glossary of processes with descriptions. Please see Law Society of Upper Canada, *Glossary of Dispute Resolution Processes* (Toronto: Law Society of Upper Canada, July 1992) included in Macfarlane *supra* note 121 at 583 ["Dispute Resolution Glossary"]. One point worth flagging is the subtle difference between mediation and conciliation (as these terms are often used interchangeably and processes themselves frequently combined). While both involve the use of a neutral third party to facilitate communication between the disputing parties, conciliation involves much more passive facilitation, often limited to channeling messages between the parties. See "Dispute Resolution Glossary" (citation herein).

¹⁶⁹ Kleefeld *ibid* at 821.

to mediation - facilitative, evaluative and transformative mediation.¹⁷⁰ Each involves a differing degree of input and participation on the part of the parties to the process. For instance, facilitative mediation creates space for parties to generate their own options for settlement.¹⁷¹ This is in contrast to evaluative mediators who inject their personal opinions regarding suitable options and preferences for settlement.¹⁷² Within these differing process approaches, the substance of the options generated may focus on the interests of the parties (interest-based mediation) or their respective legal rights (as with a rights-based approach to mediation).¹⁷³

Describing dispute resolution using analogies of continuums and spectra is helpful for process designers and facilitators as it "...reminds [us] that processes are not mutually exclusive, that one blends into another and that there is no reason in theory or principle why processes cannot be mixed and matched to meet the needs of the parties and the dispute".¹⁷⁴ This echoes discussions above describing alternative resolution processes as "appropriate" dispute resolution,¹⁷⁵ tailored to suit the discrete parties and dispute.¹⁷⁶

This spectrum analogy is also a useful lens for understanding other process features. In Emond's words: "[a]lmost every characteristic which one would use to

¹⁷⁰ For an explanation of these please see Macfarlane *supra* note 121 at 264 – 277.

¹⁷¹ Bernard Mayer, "Facilitative Mediation" in J. Folberg et al., *Divorce and Family Mediation Models: Techniques and Applications* (New York: Guilford Press, 2004), at 29-52 [Mayer, "Facilitative Mediation"]. Included in Macfarlane *ibid* at 265.

Transformative mediation envisions broader effects, whereby the parties' perspectives or beliefs are shifted through the process. See RA Baruch Bush & J Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994) at 28-40, also included in Macfarlane *ibid* at 266.

¹⁷² Mayer, "Facilitative Mediation" *ibid*.

¹⁷³ Carole J. Brown, "Facilitative Mediation: The Classic Approach Retains its Appeal" (December 2002), online: Mediate.com <<http://www.mediate.com/articles/brownc.cfm>>.

¹⁷⁴ Emond *supra* note 164, cited to Macfarlane *supra* note 121 at 97.

¹⁷⁵ Menkel-Meadow, "Ethics in ADR" *supra* note 21.

¹⁷⁶ Emond *supra* note 164.

describe a dispute resolution process falls between two extremes along the continuum”.¹⁷⁷

Professor Julie Macfarlane builds on Emond’s core concept, extending it to features such as the degree to which processes address disputes before they arise:¹⁷⁸



At the far left of the spectrum, Professor Macfarlane places processes such as team building exercises or contract planning; to the right, adjudication. She also extends the analogy to the extent which external rules or the interests of the parties themselves are used in crafting a resolution:¹⁷⁹



Again, adjudication falls to the far right of this spectrum, with solutions tracking enumerated rights, responsibilities or entitlements under law. Interest-based models focus on the needs of the parties themselves, often exhibiting greater flexibility and creativity in terms of procedure and options to resolve the dispute.

The analogy fuses nicely with Gilligan’s writings on ethics of care and justice. Thus, processes can be understood on a spectrum in terms of the extent to which they consider and incorporate the broader contextual factors – relationships, connections, interests and influences - that surround the immediate parties and inform the dispute:



¹⁷⁷ *Ibid*, cited to Macfarlane *supra* note 121 at 95.

¹⁷⁸ Macfarlane *supra* note 121 at 95.

¹⁷⁹ *Ibid* at 95.

At the far right would lie more adversarial processes like adjudication – those that focus on rules and legal entitlements to produce binary results for the immediate parties to the dispute. Relationships, connections and other contextual factors feature more prominently in collaborative process and resolution options, as one moves along the spectrum from low to high-context models. The extreme left of the continuum is occupied by restorative processes that prioritize repairing broader contextual and relational harms – sometimes even over settling the immediate dispute between the parties.

It warrants pausing here to discuss restorative processes and their relation to more traditional informal resolution processes. Restorative justice is often used in the context of youth criminal justice and, most recently, to resolve human rights disputes at the Nova Scotia Human Rights Commission.¹⁸⁰ The resolution process generally involves a third party facilitator who leads participants using discussion circles and questioning.

With its focus on relationships, restorative justice is often described as providing a new ‘lens’ through which to view disputes.¹⁸¹ Instead of focusing on the wrongful act, when viewing a dispute through a restorative lens, one focuses on the relationships between stakeholders and repairing the harm done to those relationships.¹⁸² The following provides a helpful definition:

¹⁸⁰ For more information on restorative justice in Nova Scotia’s youth courts, please see “Restorative Justice Protocol” (October 2007), online: Nova Scotia Justice <<https://novascotia.ca/just/rj/documents/Restorative%20Justice%20Protocol%20Eng%20Web.pdf>>. The Nova Scotia Human Rights Commission has also emerged as a leader in the area of restorative justice. For a description of their new restorative model, please see “Restorative Approaches”, online: Nova Scotia Human Rights Commission <<http://humanrights.gov.ns.ca/resolution>>.

¹⁸¹ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990).

¹⁸² Jocelyn Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) at 89.

Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships. That is, relationships in which each person's rights to equal dignity, concern and respect are satisfied. What practices are required to restore the relationship at issue will, then, be context-dependent and judged against this standard of restoration. As it is concerned with social equality, restorative justice inherently demands that one attend to the nature of relationships between individuals, groups and communities. Thus, in order to achieve restoration of relationships, restorative justice must be concerned both with the discrete wrong *and* its relevant context and causes.¹⁸³

Thus, restorative processes seek to facilitate real and direct communication between the immediate parties and other stakeholders (families, members of the community, employers, coworkers, etc.), many of whom participate in the resolution process itself.¹⁸⁴ These processes provide an opportunity to explore and understand the underlying causes of conflict and offer the possibility of more sustainable, productive outcomes that move the parties and the community forward.¹⁸⁵

Owing to these hallmarks, restorative justice is often associated with, or even subsumed within, the umbrella of traditional alternative resolution processes:

The move to [alternative resolution processes] is motivated by some of the same values as restorative justice...[These include]...the 'search for a more consensual approach to problem solving, more accessible and community-oriented forms of dispute resolution... [and for] a process that generates 'win/win' rather than 'win/lose' or zero sum results'...¹⁸⁶

Both are often consensual and collaborative. Like alternative resolution, restorative justice "[seeks] alternative processes for different and more humane and tailored

¹⁸³ Llewellyn et al., "Restorative Justice Framework" *supra* note 116 at 15.

¹⁸⁴ See Menkel-Meadow, "Restorative Justice: What is it?" *supra* note 116. This article is an extremely helpful overview of and introduction to restorative justice processes. The discussions of restorative justice theory, including its goals and functions, throughout this thesis draw on this source, along with Llewellyn et al., "Restorative Justice Framework" *ibid*.

¹⁸⁵ Menkel-Meadow, "Restorative Justice: What is it?" *ibid* at 10.10.

¹⁸⁶ Llewellyn et al., "Restorative Justice Framework" *supra* note 116 at 100 citing Emond, *supra* note 164 at 4.

outcomes”.¹⁸⁷ Restorative justice is not one size fits all but incorporates the same flexibility that is often characteristic of other informal processes. Many scholars object, however, to the labeling of restorative justice as alternative dispute resolution,¹⁸⁸ pointing to the narrow conception of disputes often found in more traditional processes:

In other words [traditional alternative processes] [do] not question the basic understanding of disputes as isolated incidents limited to the individualistic level. Rather, [they work] to find other ways to do justice as conceived of by the existing system. What this highlights is the need to evaluate processes by their outcome (whether they restore or not) rather than by the extent to which they differ from existing practices.¹⁸⁹

The goal of restorative justice is restoring relationships, not achieving a settlement¹⁹⁰ (as is often the case with traditional alternative processes). This notion that alternative processes can (or should) advance goals beyond resolving the immediate dispute between two parties is not, however, unique to restorative justice. It is reflected in certain schools of mediation¹⁹¹ and also, more broadly, in the writings of scholars like Bernard Mayer who question the presumption that dispute professionals focus exclusively on conflict resolution.¹⁹²

Mayer advocates for a more nuanced approach he terms “conflict engagement”.¹⁹³ He challenges professionals to see the multiple stages of conflict and roles they can play in them. Mayer urges those who seek to help the parties as conflict professionals to view claims more holistically, and to wear different hats and pursue different goals at various

¹⁸⁷ Menkel-Meadow, “Restorative Justice: What is it?” *supra* note 116 at 10.3.

¹⁸⁸ Recall that the IAD adopts the term “Early Resolution” to describe a host of alternative processes, including mediation, used in their appeal resolution system.

¹⁸⁹ Llewellyn et al., “Restorative Justice Framework” *supra* note 116 at 100.

¹⁹⁰ *Ibid.*

¹⁹¹ See *infra* note 195.

¹⁹² See, in particular, Bernard Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (San Francisco: John Wiley & Sons Inc., 2004) [Mayer, *Beyond Neutrality*]. The summary to follow of Mayer’s ideas is based on this source.

points during the life of a dispute. We return to this theory in Chapter 5 when we discuss the roles and responsibilities of Early Resolution Officers (“EROs”). These conflict professionals perform valuable roles as evaluator, advisor and facilitator in the IAD’s Early Resolution program.

Returning to our discussion of restorative processes, Emond’s continuum analogy is again helpful in bridging this debate.¹⁹⁴ Once we see dispute resolution processes as fluid, blending into one another along a spectrum, we can see the values associated with ethics of care and justice as but another characteristic, represented to a greater or lesser extent as one moves along. In this way, restorative processes, with their heavy focus on context and relationships, are merely further along the continuum from other more traditional forms of Early Resolution (to use the IAD terminology), like mediation. It is important however to keep the context we are examining (the IRB claims determination system) in the forefront of our minds. The processes used cannot rest so far along the spectrum so as to prioritize goals (for example, transforming the way parties relate to one another¹⁹⁵ or repairing relational harms¹⁹⁶) above achieving a final resolution of the immediate dispute between the parties.

In this way, Gilligan’s work on ethics of care and justice informs the way we understand dispute resolution processes for purposes of this project. It remains a valuable analytic tool, despite the postmodern critiques leveled against difference theorists. The

¹⁹³ *Ibid* at 184.

¹⁹⁴ See Emond *supra* note 164.

¹⁹⁵ Transformative mediation, first articulated by scholars Bush and Folger, seeks to transform how parties understand and interact with one another. Mediators practicing within this school may pursue transformation as the ultimate processes goal, even above settling the immediate dispute. See Bush and Folger *supra* note 171.

¹⁹⁶ See *supra* note 190.

concepts themselves are not linked in any way to biological gender or other individual characteristics. The theory is not used to explain or extrapolate from behaviours.

In fact, many of the critiques inform the analysis. In the same way that conceptualizing the genders as two binary groups ignores important intra-group differences in experience, we develop a much more nuanced understanding of the benefits of Early Resolution when we conceptualize processes as fluid, adapted to fit the parties and the dispute. Just as critics caution that gendered characteristics can be used by those in power to discriminate against women, so too can resolution processes (if manipulated) be used to disadvantage vulnerable groups.¹⁹⁷ Far from discounting the theory's value, the critiques outlined above assist in formulating a more nuanced and advanced conception of dispute resolution processes. We learn from the previous iteration. The section to follow moves forward to apply this framework to the context of immigration disputes and shows how alternative processes are best suited to resolve certain claims.

IV. Applying the Model to Immigration Disputes

The starting point in determining a process and strategy to resolve disputes is to determine the goals or objectives of the dispute resolution model.¹⁹⁸ According to the IAD, its Early Resolution program “[attempts] to resolve... appeal[s] without a

¹⁹⁷ As mediation gained more widespread support, feminist legal scholars were quick to point to the potential dangers inherent in the process. Writings, particularly in the area of family law, suggest that where processes, like mediation, purport to be relational and entice parties (particularly women) to focus on connections and attempt cooperative resolution, they are severely disadvantaged by those who would manipulate the process and exploit their inclination to operate within an affiliational model. See, in particular, Lisa Lerman, “Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women” (1984) 7 Harv Women’s LJ 57; and Grillo, “The Mediation Alternative” *supra* note 120.

¹⁹⁸ See Lewicki et al. *supra* note 114 at 67 and Macfarlane *supra* note 121 at 577.

hearing”.¹⁹⁹ This suggests a focus on efficiency. While no doubt vital, and often cited as a benefit of Early Resolution in general, the goal of the system and individual resolution processes must be broader than efficiency alone. There is a concern, raised particularly with respect to mediation, that efficient resolutions may be favoured over equitable ones.²⁰⁰ In a race to decrease backlog, increase processing efficiency and meet budget constraints, there is a danger of encouraging settlement when doing so may in fact be to the detriment of participants.²⁰¹ This is particularly poignant given the innate power imbalance between the parties to immigration disputes at the Board.

Public documents from the IRB, and its IAD, clearly acknowledge this and suggest the Board’s goals for the Early Resolution program are, in fact, twofold: (a) to resolve claims more efficiently; and (b) to ensure this is done fairly.²⁰² Though not necessarily explicit, the sentiments reflected in Board documentation suggest a concept of fairness that is both objective and subjective. For our purposes, the normative goal should certainly encompass notions of substantive and procedural fairness, and also a

¹⁹⁹ Written interview of Ms. Julie Morin, Special Advisor, Deputy Chairperson’s Office, Immigration Appeal Division of the Immigration and Refugee Board of Canada (14 August 2014, updated 4 September 2014) in responses to Question #8 [“IAD Interview”].

²⁰⁰ See Smyth, “Strengthening Social Justice” *supra* note 121. Similar concerns over participant experiences are cited by architects of the Nova Scotia Human Rights Commission’s new restorative model as factors that drove that Tribunal’s shift away from mediation processes and toward a restorative justice model. For more information on this and the Commission’s restorative model see *supra* note 180 and the links therein.

²⁰¹ For a similar critique see Philip Bryden & William Black, “Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission’s Early Mediation Project” (2004) 37 UBC L Rev 73 at 82.

²⁰² See for example: “Immigration Appeal Division Innovation Plan” (March 2006), online: IRB < http://www.irb-cisr.gc.ca/Eng/ImmApp/Documents/IadSaiInnovation_e.pdf > [the “IAD Innovation Plan”]; and “IRB Organizational Perspective” *supra* note 19, the latter of which cites the Board’s mandate as being “responsible for making well-reasoned decisions on immigration and refugee matters, *efficiently, fairly and in accordance with the law*” [emphasis added].

certain level of satisfaction by the parties, that the resolution aligns with their personal notions of what is fair and right in the circumstances. These goals reflect the Board's administrative law requirements regarding procedural and substantive fairness, but also a concern that the program maintains the integrity of the broader immigration and refugee system, as well as government and national reputations.²⁰³ The Board's notion of efficiency is also quite broad and includes speed or processing time, and also cost - both in terms of monetary resources and the emotional toll of seeing an appeal through to determination.²⁰⁴

In addition to efficiency and fairness, dispute resolution literature underscores the importance of durability as a process goal.²⁰⁵ This is notably absent from what the IRB has explicitly identified as goals for its Early Resolution initiatives. Durability refers to instances of recurrence, or how well the resolution "sticks" after the dispute is finally

²⁰³ This echoes the discussions of reputation interests in Part I above.

²⁰⁴ See *supra* note 202. Also, an independent evaluation of the IAD's ADR program (commissioned by the Board) evaluates the program in relation to how well it meets its three stated objectives "providing a *quality alternative* to the adversarial hearing process, increasing the *speed* of dispute resolution, and improving the *efficiency* of dispute resolution, including reducing the *financial* and *emotional* costs of dispute resolution" [emphasis added]. See Leslie Macleod "Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board - Executive Summary" (March 2002), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarEval.aspx>> ["Macleod Report"]. While the final report is not available publicly, it was released as part of Access to Information Request #A-2014-00056 made to the IRB during the course of this research. See Appendix A. Unless otherwise noted, pin cites to the "Macleod Report" are to the full report. Finally, the IAD's website describes the ADR program as "consistent with the Immigration and Refugee Board's vision to deal with matters '*simply, quickly and fairly*'" [emphasis added]. See "Alternative Dispute Resolution at the Immigration Appeal Division" (3 October 2003), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarGuideApp.aspx>> ["ADR at the IAD"].

²⁰⁵ See W Ury, J Brett and S Goldberg, *Getting Disputes Resolved* (San Francisco: Josey-Bass, 1988) [Ury et al., "Getting Disputes Resolved"] included in Macfarlane *supra* note 121 at 591. See also Macfarlane *supra* note 121 at 575.

determined.²⁰⁶ This includes recurrence by the parties themselves (if one disputant reneges on the agreement) and also recurrence by other similarly situated parties.²⁰⁷ In the immigration context, examples of the former might include withdrawal and re-filing by the claimant (without a material change in circumstances), unnecessary appeals, filings or judicial reviews. An example of the latter might be a subsequent sponsorship claim by another relative claiming the same (debunked) family relationship. The concept of durability is, to some extent, reflected in the Board's stated goals of efficiency and fairness. If parties are satisfied that the process and outcomes obtained at the Board are fair and sensitive of their time and resources, recurrence is less likely. That said, it is important enough as a stand-alone objective that it is included, for our purposes, as a third prong in a normative list of goals for the IAD's Early Resolution program.

How then do these goals translate to selecting an appropriate or "good" process for each discrete claim? Scholars Ury, Brett and Goldberg discuss what makes a dispute resolution process "better" in their book, *Getting Disputes Resolved*.²⁰⁸ According to Ury et al, parties resolve disputes with reference to three factors: (i) reconciling the interests of the parties; (ii) determining which of the parties is right; or (iii) determining which of the parties is more powerful.²⁰⁹ The "better" approach – a greater focus on interests, rights or power - depends on how one prioritizes four cost/benefit criteria: (i) transaction costs; (ii) satisfaction with outcomes; (iii) effect on relationship; and (iv) recurrence.²¹⁰ These criteria overlap nicely with the process goals identified above – efficiency, fairness

²⁰⁶ Ury et al., "Getting Disputes Resolved" *ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.* Cited to Macfarlane *supra* note 121 at 595. The explanations of these concepts to follow are also those of Ury et al.

and durability. Our analysis to follow also layers in the characterization of processes as high-context vs. low-context, an understanding that flows from Gilligan's theory on ethics of care and justice.

Ury's "transaction costs" refer to "the time, money, and emotional energy expended in disputing: the resources consumed and destroyed; and the opportunities lost".²¹¹ In short, efficiency costs. Outcome satisfaction is the extent to which the resolution fulfills the interests underlying the dispute and aligns with the parties' notions of what is 'fair' (substantively and procedurally). Again, this echoes the explanation above of fairness as a process goal. Ury's reference to long-term relationship effects parallels the relationship and reputational interests discussed in Part I above. As such, it is included with our understanding of fairness, to the extent that the resolution fulfills the interests underlying the dispute. Recurrence, in Ury's analysis, has the same meaning ascribed to durability in our discussion above. The important thing to take away from Ury's analysis is the inter-relation between these factors. To the extent that efficiency is heavily prioritized, it may come at some expense to fairness and durability. The inverse is also true. The emphasis may shift, depending on the claim in question, but it is important to be mindful of this association and strive for the appropriate balance.

Keeping these identified program goals in mind – efficiency, durability and fairness – we select a range of models that work best given the discrete parties and the dispute.²¹² A key factor in deciding between distributive (competitive, rights-based, binary) models and integrative (collaborative, interest-based, win-win) models will be the

²¹¹ *Ibid.* Cited to Macfarlane *supra* note 121 at 595.

²¹² Hanycz et al. *supra* note 114; Lewicki et al. *supra* note 114; and Ury et al., "Getting Disputes Resolved" *ibid.*

issues and resources identified to resolve the dispute.²¹³ Disputes that involve multiple issues, abundant resources or the discretion to generate more creative options likely lend themselves to more integrative processes.²¹⁴

Characteristics of power and relationships are important to determining appropriate resolution processes.²¹⁵ This is particularly true of immigration disputes. Claims that focus heavily on relationships (between the parties or with broader stakeholders) or require more contextual understanding on issues related to power (gender, cultural fluency, etc.) to clarify misunderstandings, determine credibility or exercise discretion, also lend themselves to more interest-based, and I argue (drawing on the feminist scholarship above), high-context processes. Indeed, many of the intangible interests discussed above (relationships, external stakeholders, cultural norms and individual beliefs of what is right or fair) can also be understood as contextual factors.

Again it is important to remember that resolution processes are flexible. Characteristics are not absolute and can be tailored to meet the unique needs of the parties and dispute. In the words of John Kleefeld, the paints can be mixed into any variety of colours.²¹⁶ Focusing too heavily on contextual factors can derail a simple dispute between the parties that does not involve any relational interests or require input from broader stakeholders. In the same way, a case that turns purely on legal interpretation – perhaps a case involving serious criminality – may be best suited to a rights-based process. Focusing on the needs and interests of the parties or other broader, systemic issues might simply prolong a final determination in some claims, resulting in

²¹³ Hanyecz et al. *ibid* at 42.

²¹⁴ See *supra* note 133.

²¹⁵ Hanyecz et al. *supra* note 114 at 42-43.

²¹⁶ See Kleefeld *supra* note 23.

unnecessary time and expense or diminishing the finality and durability of a decision by unearthing superfluous issues. By the same token, ignoring contextual issues for a claim in which they are vital may lead to similar inefficiencies through judicial review by a dissatisfied party.

Again, processes are neither purely focused on rights or interests, nor devoid of relational or rule-based values. They will rest along a continuum,²¹⁷ exhibiting these characteristics to a greater or lesser extent along the way. Ury et al. suggest a similar fluidity in their understanding of interests, rights and power. Rather than existing as three discrete process options, they are understood as concentric circles:

The relationship among interests, rights, and power can be pictured as a circle within a circle within a circle. The innermost circle represents interests; the middle, rights; and the outer, power. The reconciliation of interests takes place within the context of the parties' rights and power. The likely outcome of a dispute if taken to court or to a strike, for instance, helps define the bargaining range within which a resolution can be found. Similarly, the determination of rights takes place within the context of power. One party, for instance, may win a judgment in court, but unless the judgment can be enforced, the dispute will continue. Thus, in the process of resolving a dispute, the focus may shift from interests to rights to power and back again.²¹⁸

In this way, not only should processes be tailored to the parties and dispute at the outset, but may require a shift in focus as the claim moves through the resolution process. The level of flexibility and analysis underscores the importance of having a qualified person in place within the IAD's dispute resolution system in order to analyze claims, stream them through to appropriate processes, monitor their progress and make adjustments as

²¹⁷ See Emond *supra* note 164.

²¹⁸ Ury et al., "Getting Disputes Resolved" *supra* note 205, cited to Macfarlane *supra* note 121 at 593.

necessary.²¹⁹ As noted above, in the Canadian immigration context, this role is fulfilled by EROs. The remaining Chapters discuss how Early Resolution initiatives have been integrated into the IAD appeal structure, as well as strengths, challenges and potential recommendations regarding the current Early Resolution program.

²¹⁹ Similar sentiments are shared by scholars Julie Macfarlane (see Macfarlane *supra* note 121 at 575) and Bernard Mayer (see Mayer, *Beyond Neutrality supra* note 192).

CHAPTER 4: EARLY RESOLUTION AT THE IMMIGRATION AND REFUGEE BOARD OF CANADA

As alluded to earlier, alternative processes are integrated in a modest, but expanding, way in the Canadian immigration context. The term immigration is used here deliberately. Such processes are limited to the umbrella of Early Resolution initiatives at the IAD. Recall from our discussions in Chapter 2 that the IAD represents the immigration appellate branch of the IRB (the independent, arms-length tribunal tasked with deciding immigration and refugee matters).²²⁰ There are no structured programs in place to offer creative resolution options for parties dissatisfied with the determination of refugee claims at first instance. First, this Chapter locates the IAD's Early Resolution program within the regulatory framework provide in Chapter 2. It then explains, in detail, how this program has evolved from an early pilot project in a single IAD office in the late 1990s to the structured initiative of today. The final section examines how the IAD's current Early Resolution program functions: the protocols that are followed, the parties and system stakeholders involved, the types of processes that are used, and the types of claims that are streamed to Early Resolution. This discussion also begins to assess how the IAD's Early Resolution initiatives in practice align with the ADR and feminist theory presented in Chapter 3. It flags areas where the current system reflects, and falls short, of these theoretical ideals. These issues are flushed out in greater detail in Chapter 5, which discusses strengths, challenges and potential reforms at length.

²²⁰ "About the Board" (modified 26 February 2015), online: IRB < <http://www.irb-cisr.gc.ca/Eng/BoaCom/Pages/index.aspx>>.

I: When is Early Resolution used in the Canadian migration context?

To understand when Early Resolution is used, it is helpful to review the appeal routes available to claimants. Based on recent access to information requests,²²¹ it appears Early Resolution processes are only actively integrated into Canada's migration system by the IAD, as part of their appeal procedures. Formal appeal or reconsideration options that are executed by other administrative decision makers under the Act (for example CIC or CBSA officers or indeed, other branches of the IRB – the ID, RPD or RAD) do not integrate alternate processes into their dispute resolution systems in any official capacity. Whether such processes are employed by front line decision makers within these organizations on an informal or ad hoc basis (perhaps even unconsciously), or whether they are used to resolve internal conflicts among organizational staff, remains unknown and beyond the scope of this project. Broadly worded access to information requests to these bodies for records or information of any kind on the use (or even contemplated use) of such processes yielded no results.²²² It is therefore assumed, for purposes of this research, that programs are not currently in place or contemplated. Thus, under the current system, only claimants whose appeals lie to the IAD have the potential to encounter a formal Early Resolution program when resolving their dispute. This excludes large categories of applications.

Early Resolution is not currently used to resolve refugee claims. Those seeking refugee or protected persons status within Canada will first have their claim determined

²²¹ See Appendix A.

²²² *Ibid.*

by the RPD of the IRB.²²³ Both the claimant and the Minister may, subject to certain restrictions, appeal a negative determination to the RAD of the IRB.²²⁴

With respect to immigration matters, statutory rights of appeal under the Act are still limited. The IAD has jurisdiction over three categories of appeals: sponsorship appeals, residency obligation appeals and removal order appeals.²²⁵ Parties dissatisfied with the initial determination of their claims may appeal to the IAD in the following situations: (i) a sponsor may appeal a CIC decision denying permanent resident status to their alleged relative; (ii) a permanent resident may appeal a finding that they are offside their residency obligations under the Act; (iii) a permanent resident, refugee, or foreign national (with a permanent resident visa) may appeal a removal order; and (v) the Minister may appeal a determination of admissibility.²²⁶ To commence an appeal, the appellant must file a notice of appeal, and any requisite supporting documentation, within the prescribed time limit (as a general rule, within 60 days of the decision for residency determinations rendered outside Canada and within 30 days of the decision for all other

²²³ See Chapter 2, Part II.

²²⁴ See “Act” *supra* note 9 at s 110. The limitations to the statutory right of appeal are contained in s 110(2). One of the more contentious limitations includes a bar on appeals by individuals seeking refuge from designated countries of origin (a defined term, under s 109.1 of the Act, ascribed to those nations that are, in the opinion of the Minister, less likely to produce refugees by virtue of their democratic values and capacity to provide protections to nationals). Examples of designated countries include the United States of America, Australia and the United Kingdom. See “Designated Countries of Origin”, online: CIC <<http://www.cic.gc.ca/english/refugees/reform-safe.asp>>.

²²⁵ See “Immigration Appeals”, online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/ImmApp.aspx>>.

²²⁶ See “Act” *supra* note 9 at s 63. Note: part (ii) refers to situations where a foreign national receives a negative decision on removal when seeking entry to Canada.

eligible claims).²²⁷ Once the notice of appeal is received, IAD officials will review the claim and decide the appropriate resolution stream.²²⁸

All other claims are excluded from the IAD's appellate jurisdiction. This balance represents a large cross-section of total applicants, and notably includes: (a) those seeking temporary residence in Canada (visitors, students, temporary work permits, etc.);²²⁹ and (b) applicants who seek permanent resident status through Economic Class programs.²³⁰ These applicants can re-apply to the original decision maker (generally a CIC officer). However, absent a material change in circumstances, such reconsideration attempts are rarely successful.

It is worth noting, that where a statutory appeal is unavailable (or unsuccessful), dissatisfied parties may avail themselves of the judicial review provisions under the Act.²³¹ All statutory avenues of appeal must first be exhausted and leave obtained from a

²²⁷ See *Immigration Appeal Division Rules*, SOR/2002-230 at r 3 – r 11 [“IAD Rules”].

²²⁸ This streaming process is discussed at length in Part III below. See also the following IAD appeal process summaries: “Sponsorship Appeal Process” *supra* note 33; “Removal Order Appeal Process”, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/ProcessRoaArm.aspx>>; and “Residency Obligation Appeal Process”, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/ProcessResObl.aspx>>.

²²⁹ For more information on visiting Canada and temporary resident visas please see “Visit Canada”(modified 26 January 2015), online: CIC <<http://www.cic.gc.ca/english/visit/index.asp>>.

²³⁰ For more information on economic class programs please see “Apply to Immigrate to Canada”, online: CIC <<http://www.cic.gc.ca/english/immigrate/apply.asp>>. The commentary in the balance of this paragraph is also based on this source.

²³¹ See “Act” *supra* note 9 s 72-75 and *Federal Courts Act*, RSC, 1985, c F-7 at s 18, 18.1. For further information on judicial review of immigration and refugee decisions in Canada please see the following CIC resources: “Apply to the Federal Court of Canada for Judicial Review”, online: CIC <<http://www.cic.gc.ca/english/refugees/inside/appeals-review.asp>>; “Enforcement Manual ENF09: Judicial Review”, online: CIC <<http://www.cic.gc.ca/english/resources/manuals/enf/enf09-eng.pdf>>; “Overseas Processing Manual OP22: Judicial Review”, online: CIC <<http://www.cic.gc.ca/english/resources/manuals/op/op22-eng.pdf>>.

judge of the Federal Court.²³² As in any application for judicial review, this option is not a true appeal. Rather, the court will determine whether, on the applicable standard of review, the result was open to the decision maker based on the record as a whole, and whether the principles of natural justice and procedural fairness were properly observed. Only in very limited circumstances may parties seek to appeal an unfavourable Federal Court decision to the Federal Court of Appeal.²³³

To summarize, the IAD is the only administrative decision maker in the Canadian migration context with a formal Early Resolution program. The IAD has jurisdiction over four types of appeals:

- Sponsorship appeals;
- Appeals from a removal order issued by a CBSA officer or the ID;
- Residency obligation appeals; and
- Minister's appeal of an ID decision made in the context of an admissibility hearing.²³⁴

As Part III below demonstrates, the IAD does not offer Early Resolution processes for all appeal claims within its jurisdiction. The Board controls its own processes, and specialized IAD officers (EROs) determine which resolution processes are appropriate for each specific appeal. Many claims are streamed directly to an adversarial hearing at the direction of the assigned ERO.

It is also important to recall from the overview provided in Chapter 2, that the claims falling within the IAD's appellate jurisdiction represent but a small portion of

²³² See "Act" *supra* note 9 at s 72.

²³³ To do so, the Federal Court justice hearing the initial application for judicial review must certify a serious question of general importance. See "Act" *supra* note 9 at s 74.

²³⁴ "Immigration Appeal Division Innovation Initiative Information Sheet" (modified 20 January 2014), online: IRB: <<http://www.irb-cisr.gc.ca/Eng/NewsNouv/info/Pages/IadSaiInno.aspx>> ["IAD Innovation Information Sheet"]. See also *supra* notes 225, 226 and 228.

Canada's overall immigration and refugee determination system. The balance of the project focuses on this narrow slice of the overall migration framework. The sections to follow provide an historical overview of how the IAD's program has developed, and a description of the current regime. The concluding thoughts in Chapter 5 address whether the program might be expanded to other claims, IRB divisions, or other administrative decision makers.

A Broad Range of Alternatives

The most significant development in the IAD's program is an expanded understanding of process alternatives. The term ADR was originally used narrowly by the Board to describe ADR Conferences. As noted earlier, this is a discrete resolution process akin to mediation.²³⁵ The program has evolved from this limited view toward a more nuanced understanding. The language used to describe the program has expanded in tandem. The more inclusive terminology of Early Resolution processes is now adopted. These include a developing spectrum of alternatives: paper hearings, informal dialogue between parties, and ADR Conferences. Where Early Resolution is available, it offers a flexible range of dispute resolution processes as alternatives to the traditional adjudicative model.²³⁶ The Board has embraced a model of early review, evaluation and streaming and has created a full-time senior civil servant position dedicated to guiding and tailoring the resolution process to discrete parties and their dispute. This represents a promising first step toward the fluid, customized understanding of "appropriate" dispute

²³⁵ See Chapter 1, Part III; and *infra* note 244. This process is discussed in detail in Part III to follow.

²³⁶ "IAD Interview" *supra* note 199, in response to Question #1.

resolution advocated for in Chapter 3 above.²³⁷ For purposes of consistency, we continue to use the term Early Resolution throughout this Chapter.

II. A Historical Perspective²³⁸

Informal resolution was first considered by the IAD in 1997 as consultations and development began in the Central Region to integrate a mediation processes into the organization's appeal processes.²³⁹ A working group of internal and external experts was established, who reported positively to then IRB Chairperson Nurjehan Mawani at the end of that year.²⁴⁰ In March 1998, the IAD assembled an "ADR Advisory Committee" with representatives from CIC, members of the bar, senior IAD staff and conflict resolution consultants.²⁴¹ With training and protocols in place, a pilot project was launched in the IAD Toronto office in July 1998, introducing an informal resolution option for certain appeal claims.²⁴² The Toronto pilot project compared a randomly selected group of three hundred sponsorship appeals to a randomly selected control group of the same size and claim type. The claims consisted of "[f]ive primary types of appeals within the case management system (adoption, marriage and fiancé(e), financial, medical

²³⁷ See Chapter 3, Parts III and IV. In particular, *supra* notes 175 and 176.

²³⁸ Unless otherwise indicated, the historical overview provided in this section is based on the following resources: "IAD Interview" *supra* note 199, responses to Question #1; "Alternative Dispute Resolution at the Immigration Appeal Division" (3 October 2003), online: IRB < <http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarGuideApp.aspx>>; and the "Macleod Report" *supra* note 204.

²³⁹ "IAD Interview" *supra* note 199, in response to Question #1. The IRB is divided into three regions: Central, Eastern and Western Regions. The Central Region includes Toronto, the Eastern Region includes Quebec, Ottawa and the Atlantic Provinces, and the Western Region includes British Columbia and the Prairies.

²⁴⁰ "Macleod Report" *supra* note 204 at 10. See also "Former Chairpersons of the Immigration and Refugee Board of Canada", online: IRB < <http://www.irb-cisr.gc.ca/Eng/BoaCom/bio/Pages/BioFormAnc.aspx>>.

²⁴¹ "Macleod Report" *ibid* at 11.

and criminal admissibility).”²⁴³ All sponsorship claims within these categories were streamed to the pilot. Parties could opt-in or opt-out in certain circumstances, upon request.

The project introduced a resolution process akin to mediation – later labeled ADR Conferences.²⁴⁴ ADR Conferences were facilitated by a neutral third party called a dispute resolution officer (“DRO”).²⁴⁵ In most cases, the DRO function was fulfilled by IAD tribunal members, although in some cases public servants were placed in this role.²⁴⁶

The results of the pilot program were generally positive and are summarized in the Macleod Report as follows:

...[R]esults were positive for all case types except adoption. 54% of the ADR cases resolved without a hearing, compared to 32% for the control group. The ADR cases took on average of one hour as compared to 3.4 hours for hearing. The ADR cases that did not go to a hearing took 146 days to process as compared to 401 days for the control group. The number of days for processing cases that did not settle at ADR and went to hearing was 232 versus 349 for the control group and the relative length of sitting time, 2.1 vs. 3.4 hours respectively. Satisfaction rates were 89% for appellants and their counsel and 75% for Minister’s counsel.²⁴⁷

²⁴² See *ibid* at 11 and “IAD Interview” *supra* note 199, in response to Question #1. The balance of this paragraph draws on these sources to describe the Toronto pilot project.

²⁴³ “Macleod Report” *ibid* at 11. The language of the Macleod Report is somewhat ambiguous as to whether all financial, medical and criminal inadmissibility claims are included with this list. This may be owing to limitations in the source documents used to formulate the report. That said, based on the balance of the Report and other documentation reviewed, I understand the initial list of eligible claims to include all adoption, spousal, fiancé(e) sponsorship claims, as well as all sponsorship claims refused on the basis of financial, medical or criminal inadmissibility.

²⁴⁴ As a result of the Macleod Report, the term “ADR Conference” was adopted in lieu of mediation to acknowledge differences between the processes. See *infra* note 281 for further discussion.

²⁴⁵ “Macleod Report” *supra* note 204, see in particular pages 14-15.

²⁴⁶ *Ibid* at 113. This ad hoc system existed until the IAD adopted a recommendation contained in the Macleod Report, amending the selection criteria for DRO’s and filing the role with IAD members only. This role was revised again in 2012 with the creation of a new position of early resolution officer. See Part III below.

²⁴⁷ *Ibid* at 11-12. The methodology for determining satisfaction rates during the pilot project is not explicitly clear.

As a result, ADR Conferences were permanently integrated into the case processing procedures for certain sponsorship appeals in Toronto.²⁴⁸ In April 2000, the process was introduced into the Western Region and thereafter, in June 2003, expanded to the Eastern Region.²⁴⁹ The aim of the program was “to create an environment of co-operation and problem-solving between the parties that would be conducive to the resolution of appeals without litigation where appropriate”.²⁵⁰ The objectives reflect the more high-context approach to conflict resolution identified in Chapter 3. This focus on cooperation, problem solving and dialogue already suggest a more affiliational process, relative to adversarial hearings.

Evaluation following the pilot project in Toronto set out to integrate Early Resolution into the IAD’s existing case management initiative with a goal of “...match[ing] each IAD appeal with a dispute resolution process that best suits its features”.²⁵¹ The consultations and evaluations in the years to follow also incited adjustments to the types of appeal claims that were streamed into the program. Of the initial sponsorship claims that were eligible for ADR Conferences – “adoption, marriage and fiancé(e), financial, medical and criminal admissibility”²⁵² – adoption was removed early on based on poor resolution levels at mediation.²⁵³ As a result, such claims were not included in processing protocols as the program expanded into the Western and Eastern

²⁴⁸ *Ibid* at 11 and “IAD Interview” *supra* note 199, in response to Question #1.

²⁴⁹ “IAD Interview” *ibid*, in response to Question # 1.

²⁵⁰ “Macleod Report” *supra* note 204 at 11.

²⁵¹ *Ibid* at 12.

²⁵² *Supra* note 243. Again, the documentation is not explicit, but based on the wording of the documentation reviewed, I understand the initial list of eligible claims to include all adoption, spousal, fiancé(e) sponsorship claims, as well as all sponsorship claims rejected on the basis of financial, medical or criminal inadmissibility.

²⁵³ “Macleod Report” *supra* note 204 at 12.

Regions. Appeals based on financial inadmissibility were temporarily suspended from eligibility, while case law on the application of H&C considerations in such claims was in flux, but were reintroduced to the program in 2001 on the heels of IAD and Federal Court decisions clarifying the issue.²⁵⁴

By this time, the volume of sponsorship claims eligible for ADR Conferences outpaced the capacity of IAD staff in the Toronto and Vancouver offices to offer mediation in all cases. Claims were selected for inclusion “*randomly with some screening*”.²⁵⁵ Pairing disputes with a resolution processes based on random selection with limited screening certainly does not reflect the advanced theoretical conceptions of “*appropriate*” dispute resolution of scholars like Menkel-Meadow.²⁵⁶ While the section to follow shows the IAD evolving beyond these arbitrary methods of process selection, in favour of a more principled and informed assessment of discrete claims, it still bears highlighting their dangers (if only for the sake of vigilance and to underscore the positive changes that have followed). Rising case loads and limited resources are ongoing realities for the Board. These pressures cannot jeopardize overarching system goals of efficiency, fairness and durability. Forcing claims through informal processes where they are not appropriate offends principles of fairness by potentially exposing parties to manipulation or uninformed procedural decisions. This is particularly true of self-represented appellants who risk feeling pressured to withdraw claims. Streaming claims

²⁵⁴ See *Jugall v. Canada (Minister of Citizenship and Immigration)* (1999), 2 Imm LR (3d) 222 (Imm & Ref Bd (Appeal Div)); *Canada (Minister of Citizenship and Immigration) v. Dang*, [2001] 1 FC 321. See also *ibid* at 13.

²⁵⁵ “Macleod Report” *ibid* at 13 (emphasis added). While it is not clear from the report what early screening processes entailed, this reader was left with the impression that streaming decisions within the pool of eligible claims was rather ad hoc. There is no suggestion of the individualized early review, assessment and streaming that EROs perform for each appeal claim under the current system.

to informal processes like mediation when they are ill suited also creates additional procedural hurdles for parties. This results in increased inefficiencies (in the form of additional time and resources) where disputes fail to settle. We see these inefficiencies reflected concretely in the statistics reviewed in Chapter 5. Average processing times for claims determined at a hearing (following failed Early Resolution attempts) is nearly a year longer than those sent directly to a hearing.²⁵⁷

Beginning in early 2001, regional offices began to individually tailor which types of sponsorship claims were streamed. For example, the Toronto office (for a time) directed all medical inadmissibility appeals to a full hearing, owing to low resolution rates at mediation.²⁵⁸ During this period, Canada’s immigration and refugee regime was also undergoing a large-scale overhaul. In 2001, the Ministry of Citizenship and Immigration introduced a new legislative regime (the Act and Regulations) governing immigration and refugee claims in Canada.²⁵⁹ This new regime included new Rules for each of the IRB divisions, with the exception of the not yet activated RAD.²⁶⁰ The IAD Rules included in this regulatory package, and still in force today, include explicit authority for the Board to use informal processes in resolving appeal claims.²⁶¹ Rule 20 grants the IAD the authority to “*require* the parties to participate in an alternative dispute

²⁵⁶ Menkel-Meadow, “Ethics in ADR” *supra* note 21 at 979.

²⁵⁷ Average processing times for claims sent to hearing after unsuccessful Early Resolution attempts in 2013 was 23.2 months versus 14.1 months for those sent directly to a hearing. The same statistics for the period January – March 2014 (the most up to date statistics available at the time of release) were 13.0 and 23.4 months respectively. These statistics were released as part of Access to Information Request # A-2014-00081. See Appendices A & B.

²⁵⁸ “Macleod Report” *supra* note 204 at 13.

²⁵⁹ “Act” and “Regulations” *supra* note 9.

²⁶⁰ The Refugee Appeal Division Rules were not introduced until 2012: see *Refugee Appeal Division Rules*, SOR/2012-257 [“RAD Rules”].

²⁶¹ “IAD Rules” *supra* note 227 at r 20.

resolution process in order to encourage [them] to resolve an appeal without a hearing.”²⁶² Processes are therefore mandatory, where the Board deems them appropriate, and are conducted without prejudice.²⁶³ Parties can opt-out of ADR Conferences (with the consent of both sides and approval of the IAD).²⁶⁴ They must participate “in good faith”, and be “prepared to resolve the appeal”.²⁶⁵

From a purely theoretical perspective, there is great value in voluntary participation. Informal and collaborative processes seek to facilitate dialogue and exchange of information between the parties. This is certainly hindered where one party does not want to engage or doubts the legitimacy of the process. Scholar Bernard Mayer is critical of mandatory mediation initiatives in his book *Beyond Neutrality*, suggesting they may further erode the confidence of disputants in the role and effectiveness of conflict resolution professionals.²⁶⁶ Mandatory participation again invokes the fairness concerns raised by scholars like Trina Grillo.²⁶⁷ However, parties cannot be compelled to

²⁶² *Ibid.* [Emphasis added].

²⁶³ *Ibid.* at r 20(4). The IAD’s authority to require party participation under Rule 20 is discretionary. See “Alternative Dispute Resolution Program Protocols” (13 January 2003, amended May 2004). [“ADR Program Protocols”] contemplate both opt-in and opt-out procedures. These are discussed in further detail in Part III to follow. The protocols appear to have been removed from the IAD website and are no longer accessible online. A January 2003 version of the document was available on the IRB website as a link to the page “ADR at the IAD” *supra* note 204, when accessed on or about 15 April 2014. A May 2004 version of the document was available from a secondary online source: CCAT at <<https://www.ccat-ctac.org/downloads/MBourassaProtocols.pdf>> until on or about February 2015. Informal discussions with IAD staff suggest the protocols are in the process of being revised. A copy of the January 2003 version of the protocols, saved in PDF from the IAD website on or about 15 April 2014 is included as Appendix C.

²⁶⁴ “ADR Program Protocols” *ibid.*

²⁶⁵ “IAD Rules” *supra* note 227 at r 20(3).

²⁶⁶ Mayer, *Beyond Neutrality* *supra* note 192. Voluntariness is also emphasized as a key principle in restorative processes. See, for example, Bruce Archibald and Jennifer Llewellyn, “The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia” 29 Dalhousie LJ 297.

²⁶⁷ Grillo, “The Mediation Alternative” *supra* note 120.

settle a claim through alternative means. There is nothing inherent in the mandatory nature of the program that would change this. If there are concerns of manipulation or pressuring of vulnerable parties, these are issues that must be addressed regarding specific system actors or systemic reviews.²⁶⁸ The issues regarding mandatory participation lie more with how this may undermine efficiency.

There may have been a benefit in the Board having the power to compel parties together initially. Rule 20 was introduced in the early 2000's, just as the IAD was formally integrating alternative processes into appeal resolution frameworks across its regional offices. The initiative was new and it is reasonable to assume it would face resistance and skepticism from parties (particularly counsel). This hesitance is exacerbated where parties do not have access to information on the program, its objectives and benefits. But now that the program is established, the better approach is for the IAD to channel efforts into improving the legitimacy of the program - training staff, monitoring results, consulting stakeholders and promoting information, evaluation and improvements in the public sphere. If parties have faith in the process and see results, this will drive their participation. Pushing parties to participate in processes they do not believe are beneficial threatens to undermine the efficiencies the IAD is trying to achieve through these methods. Again, unsuccessful Early Resolution attempts have an enormous impact on the average processing times of claims.²⁶⁹

²⁶⁸ Professor Joshua Rosenberg makes similar arguments regarding Grillo's critique of mandatory mediation in family law disputes. To the extent that problems exist in specific mandatory mediation programs, the better solution is to address those shortcomings rather than abandoning mediation altogether. See Rosenberg, "In Defense of Mediation" *supra* note 120.

²⁶⁹ *Supra* note 257.

Despite this debate, Rule 20 represents a significant step. It legitimized the program and the Board’s authority to integrate alternative processes into its claims resolution systems. It is also a public acknowledgement, on the part of the Board, that Early Resolution processes are appropriate, and indeed beneficial, in resolving certain immigration claims. Prior to this formal delegation of authority, the IAD relied on its powers as a court of record as well as its mandate and core values: striving to achieve “simple, quick, and fair” resolutions.²⁷⁰ In publicly adopting informal resolution processes as a permanent fixture in its appeal system, the Board signifies a shift. It began investing research and resources in improving the program, which by this point was a permanent fixture in Toronto and expanding to other major regional offices.²⁷¹

Also in 2001, the Board commissioned mediator and dispute resolution scholar Leslie Macleod to complete an independent review (the “Macleod Report” or the “Report”).²⁷² This initiative, an enormous undertaking and investment on the part of the Board, was part of a series of recommendations from external facilitators tasked with reviewing the program in the fall of 2000.²⁷³ The Report’s mandate was to evaluate the program based on how well it met three major objectives: “providing a quality alternative

²⁷⁰ See “Macleod Report” *supra* note 204 at 5; *Immigration Act*, RSC 1985 c I-2 at s 69.4; “IAD Innovation Plan” *supra* note 202; and “IRB Organizational Perspective” *supra* note 19.

²⁷¹ See *supra* note 249 and “Macleod Report” *supra* note 204. At “IAD Counsel Session” *supra* note 20, Assistant Deputy Chairperson Noeline Paul also referenced consultations with former Deputy Attorney General of Ontario Mr. George Thomson on how mediation might facilitate dispute resolution in the immigration context.

²⁷² “Macleod Report” *supra* note 204.

²⁷³ Elana Fleischmann and Maureen Gauci, *Facilitation Report*, April 2001. See also *ibid* at 13. The following reviews and evaluations were also conducted in the program’s early days as the IAD worked to improve with input from internal and external experts and stakeholders: Jamieson, Beals, Lalonde & Associates Inc. (at the request of CIC’s Corporate Review Unit in April 2001); and an internal IAD evaluation in 1999 (based on

to the adversarial process, increasing the speed of dispute resolution and improving the efficiency of dispute resolution, including reducing the financial and emotional costs of dispute resolution.”²⁷⁴

Key conclusions were, on the whole, positive and encouraged the continued use of alternative processes within the immigration context.²⁷⁵ According to the evaluators, the program met its core objectives and provided a process that was “fair and worthwhile and often produc[ed] savings in terms of costs and time.”²⁷⁶ The Report flags areas of concern and identifies several concrete recommendations to help the program reach its full potential. The key conclusions of the evaluation are summarized in the executive summary as follows:

1. The IAD employs a unique ADR process;
2. Participants generally have positive experiences in the mediation process;
3. The contribution of DROs to the ADR Program is highly valued;
4. The ADR Program enjoys varying levels of support amongst stakeholders;
5. Minister's counsel are perceived to be resistant to the ADR Program;
6. Appellants' counsel do not meet a sufficiently high level of competency;
7. Cases that resolve at ADR produce time savings. Cases that do not resolve at ADR take longer to reach a hearing than do cases not streamed into ADR;
8. The hearings associated with failed ADR cases take longer, on average, than other hearings in Toronto;
9. ADR offers cost advantages to Appellants in certain circumstances;
10. The ADR Program is a cost effective alternative to hearings; and
11. The resolution rate of cases within the ADR Program compares favourably with other similar Programs.²⁷⁷

the 300 ADR streamed and 300 control claims in the Toronto pilot project). See *ibid* at 66.

²⁷⁴ *Ibid*. For a detailed review of the objectives and methodology, please see page 17 of the “Macleod Report”.

²⁷⁵ For a full description of conclusions and suggested reforms, please see “Macleod Report” Executive Summary *supra* note 204.

²⁷⁶ *Ibid*, Executive Summary. Pinpoint cite unavailable for online source.

²⁷⁷ “Macleod Report” *supra* note 204 at 67-71. See also Executive Summary online. Pinpoint cite unavailable for online source.

The Report also identifies the following areas of concern:

- Cases are not exclusively randomly selected for mediation;
- Parties should be able to confer prior to mediation;
- Mediation should be used for cases that will likely benefit from it;
- The ADR Program is not operating at capacity;
- There is concern that the public interest is not well served in some individual cases; and
- Failure to disclose pertinent information in advance of the mediation hampers resolution possibilities.²⁷⁸

The Report's recommendations for improvement focus on concrete reforms tied to each of the three core objectives. Examples include:

- Increasing efficiency by improving the amount of time to bring a claim through to a hearing if ADR Conferences are unsuccessful;
- Identifying mediated cases as distinct for purposes of internal monitoring and case management;
- Improving effectiveness by reviewing, enumerating and communicating selection criteria for cases streamed to ADR Conferences;
- Creating and/or making parties aware of opt-in and opt-out procedures;
- Filling all DRO positions with IRB tribunal members;
- Developing a new name to describe the mediation-like process used by the Board;
- Improving training (for DRO, Minister's Counsel, Appellant's Counsel and Interpreters);
- Enhancing stakeholder consultation;
- Producing guidelines and protocols regarding various procedural elements;²⁷⁹
- Encouraging dialogue amongst DROs, and between parties prior to mediation; and
- Modifying the IAD Rules and expanding the program to other appeal claims²⁸⁰

²⁷⁸ *Ibid*, Executive Summary. Pinpoint cite unavailable for online source. Critical issues are explained, in detail, in the Full Report beginning at 71.

²⁷⁹ For example confidentiality, postponements, caucusing, opening statements, withdrawals and consents, drafting agreements, exercising discretion, allocation of responsibilities as between parties etc.

²⁸⁰ *Ibid*, Executive Summary. Pinpoint cite unavailable for online source. This list represents a quoted selection of the recommendations provided. For a full listing of all recommendations see Executive Summary *ibid* or the Full Report at 71 – 119, with a summary of the recommendations at 111 – 119.

Following on the heels of the Macleod Report, many of these recommendations were implemented. IAD members were appointed to take on DRO functions, the term ADR Conference was adopted in lieu of “mediation”, training sessions and DRO meetings were expanded and the Board released a number of guides and protocols on ADR Conferences.²⁸¹ The increased structure, transparency and accountability that resulted following the evaluation are laudable. In order to access the benefits of the program and participate in a meaningful way, parties must understand how the process works.

However, not all of the recommendations and concerns were addressed. As the sections and Chapter to follow demonstrate, one glaring shortfall is a severe lack of information available to claimants on how the IAD’s Early Resolution current program functions in practice. The descriptions of the program herein (both current and historical) were prepared largely with the help of documents released as part of the Access to Information Requests,²⁸² a recent IAD Counsel Session,²⁸³ and interviews with system stakeholders.²⁸⁴ While eternally grateful for the assistance I received, particularly from the IRB, the fact that a complete overview of this important program could not be assembled entirely from public sources is troubling. The section below begins to assess this, and other challenges, in light of the ADR and feminist theory brought forth in Chapter 3. This is not to discount the many ways in which the current system reflects

²⁸¹ See “ADR Program Protocols” *supra* note 263; “ADR at the IAD” *supra* note 204; “Appellants’ Guide to ADR Conference Re: Sponsorship Appeals” (October 2003, revised October 2006), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarGuideAppMarAdd.aspx>>.

²⁸² See Appendix A.

²⁸³ “IAD Counsel Session” *supra* note 20.

²⁸⁴ “IAD Interview” *supra* note 199.

best practices from our theoretical framework. Both are highlighted below and unpacked in detail in Chapter 5.

III. The Current Regime

In October 2005, faced with an exponential growth in processing times and claims inventory, the IRB Chairperson struck the IAD Innovation Working Group (the “Innovation Working Group” or the “Working Group”).²⁸⁵ The Innovation Working Group, comprised of stakeholders including IAD staff, tribunal members, CBSA and CIC representatives and members of the bar, was tasked with “re-examin[ing] and re-think[ing] how the IAD functions as an administrative tribunal”.²⁸⁶ These consultations identified three core concerns driving the IADs growing backlog: “a need for early information to allow for informed triage and case streaming decisions; a need for resources, mechanisms and processes to support early resolution outside the hearing room; and...a need for effective case management throughout the appeal process.”²⁸⁷ In particular, the Working Group identified a key challenge in obtaining early information and evidence to support the claim on appeal. Appellants are required to submit only the limited material provided in the CIC letter of refusal along with their notice of appeal.²⁸⁸ This makes early evaluation and streaming extremely difficult. It results in unnecessary delays and missed opportunities for effective Early Resolution processes. The Working Group also cited a lack of resources directed to early resolution initiatives. With early review, informal resolution and ADR Conferences all working at capacity, many appeals that may have been well suited to consensual processes were eventually streamed to a full

²⁸⁵ “IRB Organizational Perspective” *supra* note 19.

²⁸⁶ “IAD Innovation Plan” *supra* note 202 at 5.

²⁸⁷ *Ibid* at 2. Further descriptions of these challenges herein are based, in particular, on pages 5-6 of the IAD Innovation Plan.

adversarial hearing. Given the resources (time, money and emotional strain) of litigation, this was an extremely costly glitch.

In March 2006, the Working Group released its final report, the Immigration Appeal Division Innovation Plan (“IAD Innovation”, the “IAD Innovation Plan”, “Innovation Plan”, or “Plan”).²⁸⁹ The Innovation Plan is intensely promising. It looks at disputes more holistically and embraces dialogue, flexibility, early exchange of information and a tailoring of dispute resolution processes based on discrete parties and their disputes. This focus on dialogue and early exchange of information is consistent with many of the concerns and recommendations that flow from the Macleod Report.²⁹⁰ The Plan’s holistic conception of conflict, and tailored approach to process determination, echo the scholarship of Mayer, Menkel-Meadow, Kleefeld and others.²⁹¹ This link is flushed out further in the paragraphs to follow as we review the IAD Innovation Plan in more detail.

IAD Innovation aims to “...[chart] a course for the IAD as a less formal, more flexible tribunal that is able to deliver administrative justice more simply and quickly, with the same high standard of fairness”.²⁹² To do so the Working Group identifies core principles, deemed its “Framework for Transformation”, that will guide changes in how the IAD performs its function.²⁹³ These are as follows: (i) a pro-active approach to adjudication by IAD Members that addresses systemic or recurring jurisprudential issues

²⁸⁸ *Ibid.* See also “IAD Rules” *supra* note 227 r 3-11.

²⁸⁹ “IAD Innovation Plan” *ibid.*

²⁹⁰ “Macleod Report” *supra* note 204.

²⁹¹ Kleefeld *supra* note 23; Mayer, *Beyond Neutrality* *supra* note 192; Menkel-Meadow, “Ethics in ADR” *supra* note 21; Menkel-Meadow, “Portia in a Different Voice” *supra* note 140; Emond *supra* note 164; Lewicki et al. *supra* note 114 and Hanyecz et al. *supra* note 114.

²⁹² “IAD Innovation Plan” *supra* note 202 at 1.

consistently and encourages more control over individual claims proceedings; (ii) specialized case management teams, in each region, operating under the direction of senior public servants; (iii) a focus on resolving claims as early as possible and, wherever possible, by consensus and without a formal hearing; and (iv) directing resources to the front end of the appeals resolution process.²⁹⁴

The Innovation Plan suggests changes that further “two separate, yet complementary, strategies”: one promoting enhanced adjudication, and the other enhanced case management.²⁹⁵ Enhanced adjudication strategies promote coordination, and seek to make more effective use of plenary sessions, policies, guides and persuasive decisions to improve consistency and efficiency. Enhanced case management recommends establishing a national file management system, and regional multi-level teams whose responsibilities would include “advanced triage, the pursuit of early resolution, and case management.”²⁹⁶ These teams would function with senior civil servants as well as at least one Member to provide advice on adjudication strategy and act as final decision maker for any out-of-hearing resolutions.

To further these strategies the Innovation Plan puts forth 26 discrete recommendations. Each is grouped according to three distinct stages of an appeal claim: Early Information-Gathering; Early Resolution; and Hearing Readiness, Hearing and Post-Hearing Matters.²⁹⁷ The first two are central to our discussion. The recommendations for stage one (Early Information-Gathering) center around increasing the amount of information available to IAD staff at the outset of an appeal to facilitate

²⁹³ *Ibid* at 2

²⁹⁴ *Ibid* at 2.

²⁹⁵ *Ibid* at 6. The descriptions of these strategies herein are based on this source.

²⁹⁶ *Ibid* at 7.

effective triage and appropriate streaming to promote early resolutions. They include (i) standardizing the information provided by CIC upon refusal; (ii) requiring a more comprehensive notice of appeal (one that clearly states grounds and includes all evidence to be relied upon); and (iii) integrating specially trained regional teams to analyze and stream files “to match each appeal to the resolution or adjudication process that best corresponds to the particular demands of that case”.²⁹⁸ Early review is fully embraced. The recommendations contemplate expanding it through such specialized teams by increasing capacity and completing reviews earlier in the process (in some cases even before the full record is received).²⁹⁹

Early Resolution recommendations focus on improving human resources within the IAD. They include streamlining mechanisms to address questions from appellants,³⁰⁰ directing triage teams, expanded use of ADR Conferences (earlier in the appeal process and in other types of claims), and exploring the viability of a customized mediation/arbitration pilot project at the IAD.³⁰¹

Also interesting for our purposes, is a recommendation (grouped under the Hearing Readiness, Hearing and Post-Hearing Matters stage) advocating for a more informal adjudicative setting. The Innovation Plan states that:

[t]he hearing room and its processes are currently unnecessarily formal, judicialized and adversarial. Hearings are presently conducted in a manner that differs sharply from the ADR process, which is held in an informal setting, is less adversarial, and is more accessible and understandable to appellants, and facilitates credibility assessments. In recognition of the fact that the IAD is an administrative tribunal and not a court, the IAD intends to

²⁹⁷ *Ibid* at 2. The descriptions of these strategies herein are based on this source.

²⁹⁸ *Ibid* at 10.

²⁹⁹ *Ibid* at 10.

³⁰⁰ Suggestions include information sessions, dedicated phone lines, integrated case management systems, etc.

³⁰¹ “IAD Innovation Plan” *supra* note 202 at 10.

adopt a hearing room process and structure that is less court-like and less formal. Additionally, for the purposes of achieving this mission, the IAD needs to revisit the effectiveness of the existing adjudication model used in its proceedings.³⁰²

The recommendations caution that this more informal approach may not be suitable for all claims, in particular those involving serious criminality or security concerns.³⁰³

Without an explanation as to why these types of blanket exclusions are made it is somewhat difficult to assess whether they are warranted. There may be practical reasons behind the decision; security protocols for claimants subject to detention may not be compatible with a more relaxed atmosphere or seating arrangements. That said, the Board is advocating for a more informal and less adversarial hearing setting because it makes the processes “more accessible and understandable to appellants, and facilitates credibility assessments”.³⁰⁴ These surely improve the fairness, efficiency and durability of the resolutions obtained. Why then would it not want these same benefits to extend to claims involving serious criminality or security concerns? These claimants are surely entitled to them and the Ministry aided in the process.

However, the Board’s comments do again signal a more flexible understanding of resolution processes. To use Kleefeld’s language, the Board appears to see some of the variations within the spectrum of resolution processes.³⁰⁵ IAD hearings themselves are much more informal than criminal trials. There are many ways in which we can inject more creative, cooperative and collaborative attributes into a traditional IAD hearing before we cross into the orbit of another process along the spectrum. Sharing documents (particularly country of origin information), accommodating the presence of support

³⁰² *Ibid* at 8.

³⁰³ *Ibid* at 11.

³⁰⁴ *Ibid*.

persons and minimizing the use of legal jargon are just a few examples that come to mind. In other words gradation exists within the umbrella of processes we would consider adversarial and adjudicative. This also echoes the feminist legal writings of Carrie Menkel-Meadow.³⁰⁶ It infuses the more affiliational attributes of an ethic of care.

The IAD Innovation Plan does represent a crucial shift. It solidifies an approach that embraces flexibility as integral to achieving fair, efficient and durable resolutions. Similar to Bernard Mayer, the Plan recognizes that immigration disputes are comprised of multiple phases, each one requiring different actions from EROs and IAD Members.³⁰⁷ Like Carrie Menkel-Medow, it envisions a pairing of disputes with “*appropriate*” resolution processes.³⁰⁸ IAD Innovation strives for “an integrated team of trained triage and resolution experts” to “[direct] incoming files into the stream judged to provide the best chance of resolving the appeal in the earliest and most informal manner possible”.³⁰⁹ It also emphasizes the “[importance] that the approach to streaming be flexible and not create process silos”.³¹⁰ This all aligns nicely with the theoretical understanding of resolution processes presented in Chapter 3. The tribunal’s own summary echoes this:

The IAD Innovation Initiative is about transforming the way immigration appeal cases are processed and resolved. The transformation will bring greater flexibility to the IAD. This means being able to resolve more cases earlier, and outside the hearing room, wherever possible. The benefit is a more efficient tribunal that is able to deliver the same high standard of administrative justice in a more timely and efficient way.³¹¹

³⁰⁵ Kleefeld *supra* note 23 at 821.

³⁰⁶ Menkel-Meadow, “Portia in a Different Voice” *supra* note 140.

³⁰⁷ Mayer, *Beyond Neutrality* *supra* note 192.

³⁰⁸ Menkel-Meadow, “Ethics in ADR” *supra* note 21.

³⁰⁹ “IAD Innovation Plan” *supra* note 202 at 8.

³¹⁰ *Ibid* at 8.

³¹¹ “IAD Innovation Information Sheet” *supra* note 234 at 2.

It is important to recall, however, that the IAD Innovation Plan is the product of a creative initiative at the Board to critically reflect on its functioning and brainstorm innovative ways to improve its performance. It represents an ideal. In some areas, (discussed below) practices are still catching up with theory.

The IAD has taken two major steps in implementing its Innovation Plan: drafting and disseminating formal principles and procedures for case management and streaming,³¹² and developing and staffing special regional triage teams of senior civil servants called EROs.³¹³ The recommendations outlined in Chapter 5 build on these important steps. The IAD Streaming Procedures enumerate, by case type, the appropriate resolution process for each category of claim. These are reviewed below with descriptions of each resolution stream. The Case Management Principles formally adopt a policy of flexibility that focuses on the individual needs of the parties and dispute when streaming claims to a resolution process.³¹⁴

Commensurate with other large-scale shifts in Canada's migration law landscape,³¹⁵ 2012 also brought important change to IRB processes. Beginning in

³¹²“Procedures for Streaming Immigration Appeal Division Cases” (December 2006), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/StreamCritCateg.aspx>> [“IAD Streaming Procedures”]; “Case Management Principles” (May 2010), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/CasPrincip.aspx>>.

³¹³ “IRB Organizational Perspective” *supra* note 19.

³¹⁴ An independent evaluation by KPMG in 2008 reviewed the IRB's overall case scheduling processes. The final report highlights the early review and triage initiatives of the IAD as means of managing case flow. See KPMG, “Evaluation of IRB's Case Scheduling Processes”, online: IRB <<http://www.irb-cisr.gc.ca/Eng/transp/ReviewEval/Pages/EvalSchedMise.aspx>>.

³¹⁵ See “IRB Organizational Perspective” *supra* note 19. The government's initiation of the RAD and introduction of sweeping refugee reforms had enormous domino effects on the Board's structures and policies. Several new positions were created and restructured in their wake. See also “RAD Rules” *supra* note 260 and “Protecting Immigration” *supra* note 47.

December 2012, the IAD created the ERO position. The core responsibilities of the position, as described in IRB documents, “[are] the early resolution of appeals through mediation and other proactive intervention, delivery of regional projects and programs in support of the IAD, and quality assurance activities.”³¹⁶ Creating this new senior civil servant position fulfills a key recommendation of the IAD Innovation Plan.³¹⁷ With the new, dedicated ERO position all attempts to resolve claims outside a formal adversarial hearing (including ADR Conferences) are grouped under the umbrella of Early Resolution processes.

Formal Early Resolution programs are permanent fixtures of the claims processing systems for IAD regional offices in Toronto (since 1998), Vancouver (since 2000), Montreal and Calgary (both since 2003).³¹⁸ The Ottawa regional office used ADR Conferences as part of its case processing for a time (beginning in January 2004), but case processing has been discontinued in Ottawa across all IRB divisions - including the IAD.³¹⁹ Board documentation does not pinpoint the reasons behind these types of staffing and workflow decisions. Presumably the Board is balancing a myriad of budgetary, resource, caseload and personnel issues. But there is certainly a general concern regarding access to Early Resolution initiatives. Those who do not live in Canada’s large city centers cannot utilize these programs. Access to processes that, in appropriate cases, improve the efficiency, fairness and durability of resolutions should not be left to such arbitrary determinations. This is an access to justice issue. It is certainly at odds with

³¹⁶ “IRB Organizational Perspective” *ibid* at 20.

³¹⁷ Presentation by Sharon Silberstein (Legal Advisor, IAD), *Overview of Early Resolution Program*, as part of “IAD Counsel Session” *supra* note 20.

³¹⁸ “IAD Interview” *supra* note 199; Macleod Report *supra* note 204 and “ADR at the IAD” *supra* note 204.

³¹⁹ “IAD Interview” *supra* note 199.

principles of fairness. Future scholarly efforts might consider how advances in technology (particularly video conferencing and the emerging field of online-dispute resolution) might help address this issue.

With a primary focus on early information and assessment, hearing alternatives are explored right from the beginning of the IAD's appeal system. Once a Notice of Appeal is received, files undergo an initial review and screening by an ERO officer to determine the most appropriate course of action.³²⁰ Early review is intended to manage and monitor the IAD's inventory of files, and quickly stream individual claims through appropriate processes to control costs and increase processing times, while respecting procedural fairness.³²¹ This benefits both the Board and individual appellants. Available avenues include: (a) Paper Hearings Stream; (b) Early Informal Resolution Stream; (c) Alternative Dispute Resolution Stream; and (d) Hearing Stream. The ERO's role is vital. They are intended to bring an organic, evaluative layer to the program so that it does not become a slave to efficiency. EROs remain active in the streaming process, collecting additional information and encouraging direct communication between the parties.³²² This is all done in an effort to resolve the claim without the need for an oral hearing.³²³ Where these efforts break down, EROs attempt to narrow issues and obtain an agreed

³²⁰ Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of "IAD Counsel Session" *supra* note 20.

³²¹ *Ibid.* See also "IAD Streaming Procedures" *supra* note 312.

³²² IAD, "Policy Governing Communication Between Early Resolution Officers and the Parties and Members of the Immigration Appeal Division" (5 June 2013), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolladSaiComm.aspx>> ["ERO Communication Policy"].

³²³ *Ibid.*

statement of facts wherever possible.³²⁴ They meet with parties to ensure files are hearing ready.³²⁵

In adopting this new approach, the IAD embraces a certain flexibility as the program matures. This development shows a promising shift toward an understanding of alternative systems and processes that aligns with scholarship in this area. It is designed not as a one-size fits all solution (streaming claims to a hearing or single alternative process), but rather one that aims to adapt and shift within a framework based on the needs of the parties and the dispute.

This suggests the IAD, at the very least, aspires to create a claims resolution system that focuses on the nuances of individual claims, rather than simply streaming files that meet certain hard and fast, objective criteria. That said, it is still unclear as to whether EROs possess the discretion to truly tailor processes (or create new, hybrid ones) where the circumstances of a discrete claim warrant it. Lack of a current and comprehensive protocol on the IAD's Early Resolution program makes it difficult to make definitive statements or assessments. It appears that EROs rely on standard IAD streaming protocols as their default, with some flexibility to direct claims to another approved process where necessary.³²⁶ These points are unpacked at length in the Chapter to follow. For our purposes it is sufficient to say this perceived lack of discretion raises flags. Stilted streaming practices, based on objective protocols rather than subjective claims assessment, does not align with the ideals of appropriate and tailored resolution

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ See "IAD Streaming Procedures" *supra* note 312. PowerPoint presentations from the "IAD Counsel Session" *supra* note 20, released as part of Access to Information Request #A-2014-00080 also address this issue. See also Appendix A. The types of claims are sorted by resolution stream in the discussion below.

processes. A lack of information about the IAD system is also concerning. It exacerbates the power imbalance that innately exists between the parties. If appellants do not understand the system actors and processes, this can impede the very dialogue and exchange of information that more informal processes seek to facilitate. Strategic negotiation theory actually suggests that in situations where there is a lack of information sharing, or one party is ill-prepared, more distributive strategies (particularly guarding and withholding information) are encouraged.³²⁷

With these caveats in hand, the sections to follow explain each of the four streams of the IAD's Early Resolution framework in turn. Details of the procedural steps and resolution processes included within each are provided, as well as the types of claims directed to each stream. Most of the claims streamed to informal resolution initiatives, including ADR Conferences, are sponsorship claims. This aligns with the overarching assessment of these claims in Chapter 3 as prime examples of decisions that hinge on contextual factors (cultural norms, external stakeholder, relational and other intangible interests) and discretionary determinations. However, there are other types of claims (certain residency obligation appeals for example) that are also directed to more informal processes.

Early Informal Resolution

The IAD's early informal resolution processes encompass, as the name reflects, all informal efforts to move the parties closer to a resolution. They include a wide range: phone calls, correspondence, meetings or attempts to compile agreed statements of fact.³²⁸ They may resemble something akin to conciliation processes, with the ERO

³²⁷ Lewicki et al. *supra* note 114 at 17; Hanycz et al. *supra* note 114 at 59-60.

³²⁸ "IAD Streaming Procedures" *supra* note 312.

bridging communication between the two sides.³²⁹ Here the ERO acts as an intermediary between the parties, collecting and delivering information that may help to resolve the appeal.³³⁰ The ERO is a pipeline for communication, with the added value of substantive expertise, and extensive training to bridge impasses and highlight the type of information that may help move the parties closer to resolution.

After completing their initial review, the designated ERO will forward an Early Review Letter to the parties.³³¹ It outlines the reasons for refusal and for requesting any submissions and early disclosure.³³² The Early Review Letter facilitates dialogue and information exchange. It also sets out the timelines for filing submissions and supporting evidence.³³³ Parties are asked to direct their submissions at the grounds for refusal and any applicable H&C grounds.³³⁴ Any disclosure should be in accordance with the IAD Rules, copied to the other party (with a note in the covering letter confirming service).³³⁵ All communications between the ERO and either party, as well as between the ERO and IAD Members, is governed by IAD policy.³³⁶ In short, *ex parte* communications are permitted, with a view to moving the parties toward a resolution. Written communications are copied to the other side and oral communications are disclosed to the

³²⁹ *Ibid.*

³³⁰ Handout from “IAD Counsel Session” *supra* note 20 [“IAD Handout”].

³³¹ *Ibid* and *supra* note 320

³³² *Ibid.*

³³³ The appellant is generally given 28 days to file submissions and supporting evidence, the Minister is given a further 28 days to respond, and then the appellant a further 7 days for any reply. Parties may apply to extend these timelines if necessary, in accordance with IAD Rules. See Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of “IAD Counsel Session” *supra* note 20. See also “IAD Rules” *supra* note 227 at r 28-36 (Documents) and r 42-45 (Applications).

³³⁴ “IAD Handout” *supra* note 330.

³³⁵ *Supra* note 333.

other party at the earliest opportunity. The types of claims streamed through Early Informal Resolution include:³³⁷

- Sponsorship claims that are refused on financial grounds;³³⁸
- Medical inadmissibility;
- Non-compliance with the Act;
- Claims where a sponsor’s residency in Canada is at issue; and
- Sponsorship claims where more information is needed on the relationship or certain criminality issues, in order to determine if the issue is a legal one, involves H&C considerations, may be suitable for an ADR Conference, etc.

In many cases these Early Informal Resolution Initiatives are used to gather more information before directing claims to other streams. The IAD appears to have chosen for inclusion claims that require more documentation in order to assess whether contextual factors are at play. This would certainly align with theoretical best practices of assessing claims on an individual basis. If these initiatives help EROs build a more complete picture of the parties and their disputes, this is a welcome decision.

If “tangible results” are not seen within four weeks, streaming protocols direct EROs to select an alternate resolution stream.³³⁹ If the appellant does not respond to the ERO’s attempts to make contact, abandonment proceedings can be commenced.³⁴⁰

³³⁶ “ERO Communication Policy” *supra* note 322. See also “IRB Organizational Perspective” *supra* note 19 regarding Governor in Council appointments at the IAD. The summary of this policy herein is based on this document.

³³⁷ Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of “IAD Counsel Session” *supra* note 20. This list is quoted from notes taken during the presentation. Pinpoint cite is therefore unavailable. See also “IAD Streaming Procedures” *supra* note 312 for a full listing of streaming procedures by claims type.

³³⁸ For example, where the sponsor fails to meet minimum necessary income requirements, is receiving social assistance or has defaulted on a previous sponsorship undertaking.

³³⁹ “IAD Streaming Procedures” *supra* note 312.

³⁴⁰ *Ibid* at 3; “Act” *supra* note 9 s 168(1).

One would expect that abandonment proceedings are not something EROs undertake lightly. Still, in light of the lack of available information on the program, this is worrisome. This is particularly so with respect to self-represented appellants. It is possible that appellants may not understand the severity of not responding to Early Resolution letters or calls. They may face language barriers or rely on inaccurate information from friends or relatives that have gone through immigration proceedings before that were streamed directly to hearings. A parallel can be drawn to summary judgment proceedings in a civil context. Adopting this route may achieve short-term efficiency gains for the Board but it is certainly not advancing fairness. It is not a determination on the merits or an informed settlement decision. A better option may be to stream such claims to hearings.³⁴¹

There is also no definition in the protocol as to what constitutes “tangible results”.³⁴² However, a lack of any information or assistance from the parties may indicate that the initial process was inappropriate. These potential missteps should be included in program monitoring and evaluation efforts and brought forward to ERO meetings and discussions so that the program and streaming protocols continue to evolve.³⁴³ There is no hard and fast rule in ADR theory when it comes to pairing claims with the appropriate processes, only general guidance. Achieving success in this specific context will be an ongoing effort of trial and error for the Board. The statistics discussed in Chapter 5 to follow show clearly that efficiency, in particular, is severely hindered

³⁴¹ It may well be that this is in fact the common practice.

³⁴² “IAD Streaming Procedures” *supra* note 312.

³⁴³ IAD responses in “IAD Interview” *supra* note 199 (Question #13) indicate that regular ERO meetings do take place.

where claims advance through multiple resolution processes. Program goals are best served through ongoing evaluation and reform.

Paper Hearings Stream

Paper hearings are used to resolve appeals where written submissions and supporting materials alone are sufficient to resolve the determinative issue(s).³⁴⁴ After completing their initial review, the designated ERO will again forward an Early Review Letter to the parties, alerting them that the claim is streamed to a paper hearing.³⁴⁵ Letters address the reasons for refusal, and request submissions and early disclosure.³⁴⁶ Submissions and materials are coordinated and collected by the ERO and a final decision made by an IAD Member in chambers.³⁴⁷

The authority for hearings in writing comes from IAD Rule 25(1), again part of the original division rules, but a section that appears to have renewed relevance as an enumerated stream of the IAD's Early Resolution framework.³⁴⁸ If a claim cannot be finally determined through the paper stream, an IAD member will select an appropriate resolution stream.³⁴⁹ As final determinations are rendered in chambers, only those without

³⁴⁴ "IAD Handout" *supra* note 330.

³⁴⁵ *Ibid* and Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of "IAD Counsel Session" *supra* note 20.

³⁴⁶ *Ibid*.

³⁴⁷ Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of "IAD Counsel Session" *supra* note 20.

³⁴⁸ "IAD Rules" *supra* note 227 at r 25(1).

³⁴⁹ "IAD Streaming Procedures" *supra* note 312.

need for oral testimony or credibility determination are deemed appropriate.³⁵⁰ Examples include:³⁵¹

- Issues over which the IAD has no jurisdiction;³⁵²
- Prohibited relationships;
- Sponsor has existing unfulfilled undertaking;
- Sponsor was granted permanent resident status less than five years ago via spouse or partner sponsorship;
- Family member not examined upon entry;
- Legality of marriage or adoption; and
- Res judicata issues.³⁵³

The claims chosen for inclusion in this stream do, overall, appear to align quite well with the factors identified in ADR scholarship. Most turn on questions of legal interpretation (jurisdiction, res judicata issues and legality of marriage or adoptions), or of an administrative nature (unfulfilled undertakings, resident status and examination upon entry). Claims that turn on credibility assessments are excluded entirely. The only exception is prohibited relationship appeals. While the familial relationships at focus in these appeals may could make them suitable for ADR Conferences or other more affiliational, collaborative processes (like spousal and partner sponsorships), these decisions do turn on more objective criteria (the age of the spouses, polygamy, etc.) rather than subjective assessments of the legitimacy of the relationship itself.

³⁵⁰ See “IAD Rules” *supra* note 227 at r 25(1) and Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of “IAD Counsel Session” *supra* note 20.

³⁵¹ Presentation by Leigh Sokoloff *ibid*. This list is quoted from notes taken during the presentation. Pinpoint cite is therefore unavailable. See also “IAD Streaming Procedures” *supra* note 312 for a full listing of streaming procedures by claims type.

³⁵² For example: no right of appeal, file closed or expired, sponsor is not a citizen or permanent resident.

³⁵³ For example: attempting to re-litigate issues already determined, previously refused or dismissed claim or abuse of process.

*Alternative Dispute Resolution Stream*³⁵⁴

The IAD's ADR stream brings parties together in an ADR Conference. Minister's Counsel, the appellant (who in the case of sponsorship appeals is the sponsoring Canadian citizen or permanent resident), their counsel and an interpreter (if required) are all present. The process is facilitated by the ERO assigned to the appeal. Any additional documents to be relied on at the ADR Conference must be provided to the IAD and Minister's Counsel at least 10 days in advance.

Claims streamed to ADR Conferences include:³⁵⁵

- Spousal, common law and conjugal partner sponsorship appeals;³⁵⁶
- Financial refusals;³⁵⁷
- Failure to produce all necessary documents on application;³⁵⁸
- Minor criminality issues;³⁵⁹ and

³⁵⁴ Unless otherwise noted, the section to follow is based on the following IAD documents: "ADR at the IAD" *supra* note 204; "ADR Program Protocols" *supra* note 263; "IAD Handout" *supra* note 330; "Appellant's Guide to Alternative Dispute Resolution Conference re: Sponsorship Appeals - ADDENDUM – Marriage, Common-law or Conjugal Partner Cases" (October 2006), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarGuideAppMarAdd.aspx>>; "Appellants' Guide to Alternative Dispute Resolution (ADR) Conference Re: Sponsorship Appeals Other Than Parents and Grandparents – ADDENDUM – Sponsor's Minimum Necessary Income (MNI)" (July 2014), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarGuideApp08a.aspx>>; and "Appellants' Guide to Alternative Dispute Resolution (ADR) Conference Re: Parents and Grandparents Sponsorship Appeals – ADDENDUM – Sponsor's Minimum Necessary Income (MNI)" (July 2014), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarGuideApp08a2.aspx>>. It also draws on "IAD Interview" *supra* note 199.

³⁵⁵ Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of "IAD Counsel Session" *supra* note 20. This list is quoted from notes taken during the presentation. Pinpoint cite is therefore unavailable. See also "IAD Streaming Procedures" *supra* note 312 for a full listing of streaming procedures by claims type.

³⁵⁶ With some exceptions, these most often include claims where the genuineness of the relationship is in question.

³⁵⁷ Particularly those where an appellant is close to the minimum necessary income requirements under the Act, or if there are H&C grounds.

³⁵⁸ See "Act" *supra* note 9 at s 16(1).

- Certain residency appeals.

As noted above, financial refusals and spousal, common law and conjugal partner sponsorship appeals have been highlighted in earlier discussion as prime examples of contextual, discretionary claims. As a result, it is no surprise to see them included with this list. Recall, however, that for sponsorship claims the statutory right of appeal rests with the Canadian citizen or permanent resident sponsor.³⁶⁰ The foreign national seeking permanent resident status as a member of the family class is not a party to the IAD appeal. This means that for spousal or partner sponsorship appeals directed to ADR Conferences, the foreign national (whose relationship with their sponsor is often the central point at issue) is not present as of right. While the IAD allows foreign spouses or partners to participate “in some cases” via teleconference, this is often at the request of the appellant and is subject to IAD approval.³⁶¹ In many cases, the perspective of the permanent resident applicant is limited to letters or affidavits submitted as part of the paper record.³⁶² When a dispute turns on issues of credibility, the absence of such an important voice is at odds with theoretical aims of facilitating dialogue, collaboration, and accounting for relational interests. It thus undermines the very benefits that more informal and affiliational processes (like ADR Conferences) seek to achieve. We return

³⁵⁹ For example, claims where a five-year rehabilitation period has elapsed.

³⁶⁰ See *supra* note 226.

³⁶¹ “IAD Interview” *supra* note 199, in response to Question #14 and “IAD Counsel Session” *supra* note 20. The IAD did note, in their response to Question #14, that foreign applicants might be able to attend an ADR Conference if they were in the country. My impression however, based on the discussions of appellant’s counsel at the IAD Counsel Session, is that examples of foreign applicants participating in ADR Conferences (whether in person, via teleconference or otherwise) are rare. As part of its response to Question #14, the IAD also indicated that it does not currently gather statistics on this issue.

³⁶² “IAD Interview” *ibid.*

to this point in the Chapter to follow as we further unpack the role of EROs in Early Resolution initiatives.

Residency appeals are a welcome addition to the list of claims streamed to ADR Conferences. Once claimants are granted permanent resident status in Canada, they must live in Canada for at least two out of every five years.³⁶³ Where they fall offside these obligations, their residency status can be revoked.³⁶⁴ Appeals of negative determinations are to the IAD.³⁶⁵ Like sponsorship claims, these too may initially appear cut and dry (appellants either meet the criteria or do not) but can involve important contextual factors. Particularly where discretionary determinations, familial relationships or humanitarian factors are at play, ADR Conferences likely provide the best medium to canvass these underlying issues.³⁶⁶

Parties whose claims are not streamed to ADR Conferences by the ERO assigned to the file may opt-in to the process by application. Either party may apply. With the approval of the ERO and consent of the other party, a conference will be scheduled.³⁶⁷

³⁶³ See “Act” *supra* note 9 at s 28.

³⁶⁴ See “Act” *supra* note 9 at s 46.

³⁶⁵ See “Act” *supra* note 9 at s 63.

³⁶⁶ Time spent traveling with certain relatives can impact the 2/5 calculation, as can travel as an employee or contractor for a Canadian business. See “Act” *supra* note 9 at s 28. These all have the potential to require discretionary determinations (are familial relationships proven, does a resident fit within the definition of employee etc.). Officers are also able to consider H&C grounds, taking into account the best interests of the child. See “Act” *supra* note 9 at s 28

³⁶⁷ Comments made by IAD staff during a recent counsel session suggest that Minister’s Counsel may elect not to participate in ADR Conferences where they do not believe the process beneficial (see “IAD Counsel Session” *supra* note 20). Comments during the same session suggest that a reciprocal form of unilateral opt-out is not available to appellants. “ADR Program Protocols” *supra* note 263 do speak of opt-in and opt-out measures but explicitly require consent of both parties and the IAD. How this apparent conflict is reconciled internally within the IAD remains unclear. As noted above, informal conversations with IAD staff indicate revised ADR Program Protocols are forthcoming.

The ADR Conference unfolds according to the procedural steps common to most mediations. Opening statements are made, as are introductions, an explanation of confidentiality³⁶⁸ and caucusing, and a description of the process and the roles of each party in it. Parties are then given an opportunity to explore the issues and ask questions. Caucusing is often used by the ERO to discuss settlement options with each party individually. Caucus discussions are shared in plenary sessions, unless parties ask that they remain confidential. A resolution can be reached either by the appellant withdrawing their claim or by consent of the Minister to allow the appeal. If Minister's Counsel consents, the parties sign a Summary of Agreement, which is approved by an IAD member in chambers.³⁶⁹ Where the appellant withdraws their claim, a withdrawal form is completed. If no agreement is reached, the ERO will explain the reasons and next steps to the appellant. The claim will then be scheduled for a hearing. Before a hearing takes place, the ERO will remove any without prejudice documents or notes from the ADR Conference or other Early Resolution processes.

Hearing Stream

After initial triage, if the hearing stream is selected, the ERO estimates hearing length based on issues and complexity.³⁷⁰ Where claims have proceeded through one or

³⁶⁸ ADR Conferences are without prejudice. Information shared cannot be used at a subsequent hearing, if one is necessary. See "ADR Program Protocols" *supra* note 263.

³⁶⁹ Members approve any settlement as they are the only decision makers authorized to render a final determination of IAD appeals. See "Act" *supra* note 9. The Member reviews the Summary of Agreement to "ensure that the issues and facts have been adequately addressed and are set out in the document; ensure that there has been no error in law; and ensure there is nothing egregious on the face of the document". See "ADR Program Protocols" *supra* note 263 at 6. This ensures that the public interest component of the IAD's mandate is fulfilled. The member does not engage in a thorough file review, nor do they supplement their views for that of the parties' agreement. See again "ADR Program Protocols" *supra* note 263 at 6.

³⁷⁰ "IAD Streaming Procedures" *supra* note 312.

more Early Resolution processes, this estimate can be revised (by either the ERO or member), as further information is obtained in the file.³⁷¹ In addition to any file preparation conducted by the ERO, appellants will receive a Notice to Appear before an IAD member at a scheduling conference.³⁷² At that time a hearing date and time are set. There are several options available with respect to the length of hearing.³⁷³ Claims that are not successfully resolved through Early Resolution are scheduled for a hearing. Other claims that are commonly streamed directly to hearings include misrepresentations, Ministerial appeals of ID admissibility decisions, and adoption cases where the genuineness of the parent-child relationship is at issue.³⁷⁴ Where an IAD Member gives substantive advice to EROs during Early Resolution efforts, they cannot render the final determination of that claim.³⁷⁵ This applies to both paper and oral hearings.³⁷⁶ Further details on the procedure followed in IAD hearings can be found in Information Guides online. A general guide to appeals as well as guides tailored to specific claim types (sponsorship, residency obligation and removal order appeals) are all provided.³⁷⁷

³⁷¹ *Ibid.*

³⁷² “Information Guide – General Procedures for all Appeals to the Immigration Appeal Division (IAD)” (28 June 2002, revised October 2002, revised August 2011), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/InfoGuideIadSai.aspx>> [“General Information Guide”].

³⁷³ Officers may designate a claim for short hearing. These are used for claims that turn on a single issue. The IAD will usually hear 6-8 short hearings per day. Medium hearings are usually scheduled 3 per day and full hearings 2 per day. Complex hearings, those lasting more than half a day, are available but exceptional. See “IAD Streaming Procedures” *supra* note 312.

³⁷⁴ See *ibid* for a full listing of streaming procedures by claims type.

³⁷⁵ See “ERO Communication Policy” *supra* note 322 at 4.

³⁷⁶ *Ibid.*

³⁷⁷ See “General Information Guide” *supra* note 372. See also “Information Guides – Removal Order Appeals and Sponsorship Appeal Hearings”, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/InfoGuideIndex.aspx>>;

Despite recommendations in the IAD Innovation Plan to adopt more informal hearing procedures, these guides do not contain any formalized reference to such initiatives.³⁷⁸ The gaps between the ideals of the IAD Innovation Plan foreshadow the challenges identified in Chapter 5. Many focus squarely on issues of flexibility and information dissemination. That said, the IAD has made laudable improvements to the program since its inception. Chief among them are the newly created role of ERO and an evolving understanding of resolution processes. These provide a strong foundation on which to develop and improve the program going forward. The recommendations put forth in Chapter 5 build on these strengths.

“Information Guide – Residency Obligation Appeal Hearings” (August 2005, revised August 2011), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/InfoGuideReside.aspx>>.

³⁷⁸ Based on a review of public, and internal materials obtained through access to information requests, it also appears that the IAD has yet to pilot a mediation/arbitration stream similarly recommended in “IAD Innovation Plan” *supra* note 202. It is possible that such initiatives are still in early consultative stages.

CHAPTER 5: ANALYSIS, RECOMMENDATIONS AND CONCLUSIONS

This project is not an evaluation of the IAD's Early Resolution program (not in the true sense of the word evaluation). Such an undertaking would require access and resources that are beyond its purview. Instead, we rely on publicly available and accessible information. This project is not an analysis of Canada's immigration and refugee system, or of the appropriateness or desirability of recent amendments to the programs therein. These are questions for future scholarly endeavors. This project examines how alternative resolution processes are integrated into Canada's immigration and refugee determination system, and assesses these initiatives against an analytical framework based on dispute resolution and relational feminist theory. It advocates that alternative processes are not only suitable, but an important component to dispute resolution in this context.

Earlier Chapters provide an overview of the framework of statutes, regulations and policies that govern immigration and refugee law in Canada, and explain, based on leading scholarship, how alternative processes improve the fairness, efficiency and durability of claims resolution in this area. The previous Chapter details the procedural workings of the IRB's current immigration appeal system and the Early Resolution processes integrated into it. It also locates this unique, alternative resolution program within the broader Canadian migration structure. Chapter 4 also includes both the historical evolution and a description of the program in its current iteration.

This was done in an effort to increase the scope of available information on this important initiative. A program as developed as the IAD's Early Resolution processes is

unique in the immigration context.³⁷⁹ There is potential for Canada to emerge as a leader in creative approaches to immigration conflict. There is also potential to dramatically improve the experience of those who seek entry to Canada.

This Chapter explores the strengths and challenges of Early Resolution in Canada's immigration context. Descriptions in Chapter 4 have already highlighted key ways in which the program reflects and falls short of theoretical ideals. These are distilled herein into what I identify as the two core strengths of the IAD's current program: (i) its flexible understanding of alternative processes; and (ii) dedicated early resolution officers. With respect to the former, the IAD aims to assess and pair each immigration appeal with a resolution process that considers the characteristics of the individual parties and their dispute. This reflects the advanced scholarly understanding promoted by leading theorists, in particular Paul Emond and Carrie Menkel-Meadow.³⁸⁰ The Board has even taken the practical steps necessary to install dedicated, highly trained employees to perform these crucial assessment, advisory and facilitation tasks. With the

³⁷⁹ During the preliminary research for this project, comparative methods were used to canvass the immigration systems in the United States and Australia. While both employ alternative processes like mediation, this occurs in generalist courts and tribunals with jurisdiction over a wide range of legal disputes. Alternate processes are currently used by Australia's Administrative Appeals Tribunal (the "AAT"). This generalist tribunal "provides independent merits review of administrative decisions" made by a wide range of government bodies and other administrative decision makers. See "What We Do", online: AAT <<http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm>>; and "Alternative Dispute Resolution (ADR) Guidelines", online: AAT <<http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution/ADRGuidelines.htm>>. The following also provides an interesting (albeit somewhat outdated) overview of Early Resolution processes in Canadian and Australian immigration systems: Katherine Hooper, "Model Litigants, Migration, Merits Review and...Mediation?" (2013) 32(1) University of Queensland Law Journal 157. The US Second Circuit Court (whose docket includes immigration claims, among others) has a mediation program in place. See Daniel Forman, "Improving Asylum-Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the Process" (2008) 16 Cordozo J of Int'l & Comp Law 207.

ERO position, the IAD has the potential to create conflict resolution specialists whose multifaceted role reflects the progressive thinking of scholar Bernard Mayer.³⁸¹

The challenges facing the IAD flow from gaps between these ideals and the realities reflected in practice. First, there is a disconnect between the IAD's aspirations to create an accessible, easy to understand system³⁸² and the reality that publicly available information on the Early Resolution program is outdated, difficult to locate or non-existent. Second, the theoretical ideals of a flexible, individualized tailoring of processes to disputes are seemingly hampered in reality by a rigid adherence to established processes and protocols. Finally, EROs are hindered in their ability to maximize their aspirational effectiveness by a lack of clear protocols outlining their roles and responsibilities within the appellate system. Each of these challenges threatens the ability of the IAD's Early Resolution program to advance the identified goal of more fair, efficient and durable immigration resolutions.

The recommendations advanced in the final section flow from each of these identified challenges in an attempt to steer the program back in line with theoretical best practices. First, however, we canvass some empirical data in an attempt to get a pulse on the current program and test some of the theoretical hypotheses discussed thus far.

I. The Current System: Is it Working?

Objectives

Informed by ADR scholarship, the IAD's Early Resolution program should strive to achieve efficient, fair and durable resolutions for each appeal file.³⁸³ As noted above

³⁸⁰ See Emond *supra* note 164; and Menkel-Meadow, "Ethics in ADR" *supra* note 21.

³⁸¹ Mayer, *Beyond Neutrality supra* note 192.

³⁸² "IAD Innovation Plan" *supra* note 202.

³⁸³ Ury et al., "Getting Disputes Resolved" *supra* note 205 at 575.

this project is not a full-scale evaluation. It lacks the access to preserve, gather and analyze data on appropriate performance markers. Indeed, simply developing the markers themselves would require considerable input from various system participants. That said, a cross-section of the empirical statistics tracked by the IRB, as a matter of course, were released through access to information requests.³⁸⁴ Resolution rates for claims sent to ADR Conferences or other Early Resolution processes are between 33 and 47 percent over the last five years.³⁸⁵ These are down from the statistics reported in the Macleod Report in 2001, which saw resolution rates of around 50 percent.³⁸⁶ Another troubling statistic, however, is the continued delay experienced by parties whose claims fail to resolve through Early Resolution efforts and thereafter proceed to a formal hearing.³⁸⁷ This trend was also identified by the Macleod Report, and appears to be worsening with time.³⁸⁸ Where claims do resolve through Early Resolution initiatives, however, the time and cost savings to the parties are substantial.³⁸⁹

It is difficult to draw definitive conclusions from these statistics. Macleod & Associates conducted their evaluation before the introduction of broader Early Resolution initiatives. Informal efforts at the time were limited to ADR Conferences, so the statistics

³⁸⁴ These were released as part of Access to Information Request #A2014-00081. See Appendix A. Copies of the statistics referred to in this section are included as Appendix B.

³⁸⁵ The figures in this section are based on the last five years for which statistics were available at the time of drafting: 2009, 2010, 2011, 2012 and 2013 inclusive.

³⁸⁶ “Macleod Report” *supra* note 204.

³⁸⁷ Those that go on to a hearing after unsuccessful Early Resolution attempts are disposed of in 20 months. The raw processing time for those who go on to a hearing after unsuccessful Early Resolution attempts has also, with the exception of 2011-2012, been steadily increasing over the past five years. See *supra* note 384.

³⁸⁸ “Macleod Report” *supra* note 204.

³⁸⁹ The average processing time for claims resolving through Early Resolution is 7.5 months. Average time for those proceeding directly to hearing is 12 months. See *supra* note 384.

do not compare apples to apples. There is also a methodological weakness in my empirical data. Access to information requests were made in the preliminary stages of this project, based information from online government sources. The information suggests that the use of alternative processes is limited to Family Class sponsorship claims.³⁹⁰ As such, access to information requests targeted data on these particular claims. However, our discussions in Chapter 4 reveal that, while sponsorship claims represent a large portion of those directed to Early Resolution streams, there are others. It is impossible to say with certainty whether the resolution rates or processing times cited above are skewed by the absence of this cross-section of claims from these results.

What we can say with relative certainty is that the Board has struggled with crushing caseloads, particularly between 2005 and 2010. This is reflected in the statistics obtained as part of this project, and aligns with concerns expressed in Board documents.³⁹¹ Increasing caseloads are identified by the IRB as a key contributor to processing delays and were the core driver for the creative IAD Innovation initiative.³⁹² However, without more insight from the Board, we are left to speculate as to what the overarching trends might indicate.

Declining resolution rates could indicate that the appropriate claims are not being directed to Early Resolution streams. It could also indicate training deficiencies, or a lack of process legitimacy in the eyes of system users. There could be a whole host of reasons. The challenges discussed below represent an effort to identify some potential contributing factors. They draw on the authoritative theory of scholars identified in Chapter 3. The reforms that follow flow from these challenges and are intended to be

³⁹⁰ See, for example, “ADR at the IAD” *supra* note 204.

³⁹¹ See Appendix B and “IAD Innovation Plan” *supra* note 202.

incremental and manageable steps toward improvement. It is unlikely that the program is altogether ineffective. The Board appears to have managed the drastic spike in caseload during the 2005-2010 period, with significant reliance on its emerging Early Resolution initiative.³⁹³ These statistics do, however, suggest that the Board needs to critically examine the program, and that another full-scale evaluation may be in order.

Until empirical evidence definitively suggests otherwise, the work of scholars like Emond, Menkel-Meadow, Mayer and Kleefeld maintains that the best way to improve the IAD user experience is to create a flexible framework whereby each claim is assessed early and the parties are assisted in navigating their conflict through a dispute resolution process tailored to meet their needs.³⁹⁴ This will involve adopting processes that are more or less affiliational (high-context) and interest-based, depending on the characteristics of the parties and their dispute. To do so, the Board must expand on the key strengths of the existing system: the dedicated, highly trained triage teams of EROs and a flexible understanding of alternative processes. Both help to achieve program goals. The recommendations provided herein are intended to build on this solid foundation.

Strengths

A Flexible Understanding of Alternative Processes

The IAD deserves accolades for adopting a more flexible understanding of alternate processes. Reflected most fervently in its 2006 Innovation Initiative,³⁹⁵ the

³⁹² See “IAD Innovation Plan” *supra* note 202.

³⁹³ See Appendix B. The caseload spike between 2005 and 2010 is met with a two and three fold increase in claims directed to alternative processes.

³⁹⁴ Similar sentiments are reflected in the IAD’s Innovation Plan recommendations. “IAD Innovation Plan” *supra* note 202.

³⁹⁵ *Ibid.*

division stresses a need for individualized, informed assessment and tailored resolution processes. This parallels Kleefeld’s scholarly ideal from our opening Chapter:

[Alternative processes are] multi-hued, offering more than just an alternative to litigation. . . . The aim of this flexible approach is to resolve disputes in the manner most appropriate to the parties or the dispute at hand. . . .³⁹⁶

In the system envisioned by the Innovation Plan, resources are directed toward front-end procedures: early information gathering, triage and case management. This is all done with a view toward understanding and streamlining claims to processes that offer the best chance for resolution in each discrete case. The Initiative reflects a high watermark for insightful and innovative thinking on the part of the IAD.³⁹⁷ It provides a glimpse of an administrative tribunal that is reflecting on its role, objectives and responsibilities. It is a concerted effort to ask tough questions about the division’s functionality – present and future. It is refreshing. It is progressive. It is strikingly unbureaucratic.

In this mold each claim is viewed individually. Case management and resolution programs are fused to create a tailored experience designed to resolve each claim as “simp[ly], quicky[ly] and fair[ly]” as possible.³⁹⁸ This shift in thinking is the foundation that will allow the system to evolve to meet the demands of a growing case inventory and increasing resource constraints. The approach reflects many of the hallmarks of noted dispute resolution scholars: Carrie Menkel-Medow’s “appropriate” dispute resolution and

³⁹⁶ Kleefeld *supra* note 23 at 822.

³⁹⁷ The subsection to follow identifies challenges in the current model. The system, as reflected in public documents, still falls somewhat short of the ideal reflected in the IAD Innovation Plan.

³⁹⁸ “IAD Innovation Plan” *supra* note 202 at 2. These objectives mirror those discussed in Chapters 2 and 3 above. The normative objectives put forth in this project – efficient, fair and durable –also reflect in these concepts.

Paul Emond's continuum analogy.³⁹⁹ These scholars advocate for creativity. They view processes as malleable. The IAD Initiative mirrors this more advanced understanding of conflict resolution. It looks to the discrete parties and their dispute to determine an appropriate process. It views alternate resolution processes as more than simply mediation. It is the foundation of a system with the potential to address the unique attributes of individual immigration appeals.

Dedicated Early Resolution Officers

One of the core recommendations flowing from the IAD Innovation Plan was to create and staff dedicated teams of specialized senior servants to perform early review, assessment, case management and resolution functions.⁴⁰⁰ This initiative was implemented in 2012 with the creation of the full-time ERO position. Positions exist in all three major regional offices: Toronto, Vancouver and Montreal.⁴⁰¹ A total of sixteen have been created thus far, with authority granted to the Deputy Chair to add more as needed.⁴⁰²

EROs are primarily responsible for "... the early resolution of appeals through mediation and other proactive interventions, delivery of regional projects and programs in support of the IAD, and quality assurance activities."⁴⁰³ A detailed description of their key activities is included in a recent IAD Classification Committee Report, and reads as follows:

³⁹⁹ See Emond *supra* note 164; and Menkel-Meadow, "Ethics in ADR" *supra* note 21.

⁴⁰⁰ "IAD Innovation Plan" *supra* note 202 at 8.

⁴⁰¹ "Note to File: Early Resolution Officer (ERO), Immigration Appeal Division (IAD) Classification Decision Number DN1472 (August 22, 2013). Released (with Annex) as part of Access to Information Request # A-2014-00082. See Appendix A.

⁴⁰² *Ibid* at 4.

⁴⁰³ "IRB Organizational Perspective" *supra* note 19 at 20.

- Conducts detailed file reviews and analyzes the nature of the appeals, applications and the documentation filed; identifies legal, procedural and factual issues; identifies evidentiary needs; communicates with the parties as required to assure the adequacy of evidence to be presented and as well to resolve as many issues as possible in advance of a hearing in the IAD; identifies the required actions and recommends or proceeds with them.
- Identifies the best route for the timely disposition of cases including whether they can be resolved through non-hearing processes; initiates requests for information, conducts interviews, and facilitates a dialogue between the parties or acts as intermediary in order to ascertain whether there are common interests that may lead to the resolution of appeals without the need to appear before a Member; acts accordingly to resolve cases where possible.
- Conducts mediation sessions; arranges, participates in and conducts meetings with the parties, external stakeholders and persons appearing before the IAD; ensures the availability of the required information or encourages the production of required information to assist in reaching agreements; acts as a resource-person to the parties in the preparation of the sessions; develops plans and strategies for the conduct of mediation; drafts and/or clarifies agreements reflecting solutions arrived at through mediation with both parties.
- Initiates, prepares for and presides over non adjudicative proceedings where issues have arisen relating to scheduling or non-compliance with procedural requirements, or in order for parties to discuss or state their joint agreement with respect to disposition of the appeal.
- Provides quality assurance with respect to hearing readiness, monitoring and analysis in support of the early resolution and support services provided to the IAD within the region.
- Provides leadership in major reviews, studies and projects thus influencing the development and integration of sound management and operational practices within the IAD; monitors and analyzes current issues and incidents; identifies new developments; and provides management with updates and status reports.
- Provides advice and coaching to IAD and Registry personnel. Participates actively in professional development sessions and training.⁴⁰⁴

The ERO's role, *vis-a-vis* the parties, is an active one. They are engaged at the outset of the appeal and remain connected throughout the life of the claim. They provide more than simply a case management function. Their role is also one of advisor. They bring

⁴⁰⁴ IAD, "Report: Classification Committee - Early Resolution Officer" (1 June 2012) convened 14 May 2012 (Correctional Services of Canada: Laval, Quebec) at 1-2

knowledge and expertise on substantive issues, procedural matters and conflict resolution strategies.⁴⁰⁵

This aligns well with Bernard Mayer's progressive views, discussed earlier, on the role of dispute resolution professionals.⁴⁰⁶ Mayer, a sociologist, mediator and dispute resolution scholar, challenges the role of conflict practitioners. Mayer's critique arises from what he calls a "crisis" confronting conflict resolution.⁴⁰⁷ The crisis is a failure on the part of the field to "engage in its purpose seriously...[and to] address conflict in a profound or powerful way."⁴⁰⁸ As a result, dispute resolution specialists do not play a pivotal role in the world's leading conflicts. In many cases they are altogether absent. Compounding this, those in conflict doubt the role of dispute resolution professionals. They perceive those tasked with resolving the dispute as inefficient and ineffective, and question what they bring to the table.

Mayer's proposed solution is a more nuanced understanding of conflict and the role of conflict professionals:

As is usually the case with crises, we face a significant opportunity as well as a major challenge. We can realize that opportunity if we are willing to grow beyond our dependence, indeed our fixation, on neutrality as a defining characteristic of what we do and if we can see our role in conflict as far broader than that of dispute resolvers. Our challenge is to change our focus from conflict resolution to constructive conflict engagement and, accordingly, change our view of ourselves from neutral conflict resolvers to conflict engagement specialists. If we do this, we can become a more powerful and accepted force for changing the way conflict is conducted.⁴⁰⁹

[“Classification Committee Report”]. Released as part of Access to Information Request # A-2014-00082. See Appendix A.

⁴⁰⁵ *Ibid* at 4.

⁴⁰⁶ Mayer, *Beyond Neutrality* *supra* note 192. The summary to follow of Mayer's ideas is based on this source.

⁴⁰⁷ *Ibid* at 3.

⁴⁰⁸ *Ibid* at 3.

⁴⁰⁹ *Ibid* at 3.

He urges conflict professionals to stop focusing exclusively on resolution and instead see the multiple stages of conflict and roles they can play in them.⁴¹⁰ In his words, as conflict resolution practitioners, when “we embrace this whole trajectory and the multiplicity of ways in which we can assist people through the course of conflict, we can begin to think of ourselves as conflict specialists, and we can think of our task as helping people to engage in conflict powerfully and wisely.”⁴¹¹ Mayer draws on the works on William Ury in *The Third Side*⁴¹² to consider other roles that conflict resolvers can play. This may include advisors, coaches, decision makers, case managers, file organizers, process designers, evaluators or even advocates.⁴¹³ Like Mayer’s theory, the aspirational role of EROs sees them evolving over time to develop an expertise in the “dynamics of conflict”.⁴¹⁴ They will bring with them the knowledge and tools to help the parties constructively address conflict.

The Division is also committed to improving the skills of individual EROs. Each officer receives regular training, assessment and performance review. Reviews monitor abilities in substantive knowledge, managing parties and case files, productivity, communication, flexibility, engagement and motivation, and ethical behavior.⁴¹⁵ In addition, officers work with supervisors on a Personal Learning Plan to foster core competencies of mediation skills, written communication, listening and cognitive skills

⁴¹⁰ *Ibid* at 184-85.

⁴¹¹ *Ibid* at 182.

⁴¹² William Ury, *The Third Side: Why We Fight and How We Can Stop* (originally released as *Getting to Peace*), (New York: Penguin Books, 2000).

⁴¹³ Mayer, *Beyond Neutrality supra* note 192 at 116.

⁴¹⁴ *Ibid* at 12-13.

⁴¹⁵ “Performance Review Form – Early Resolution Officer Position” (March 2006). Release as part of Access to Information Request # A-2014-00082. See Appendix A.

and creativity.⁴¹⁶ They identify individual learning objectives, where further training or assistance is required, and pursue learning activities to meet these needs.⁴¹⁷ This reflects an investment in continued learning and development, for individual EROs as well as the program as a whole. EROs also assist in developing IAD protocols and other procedural guides.⁴¹⁸ In this way, there is potential to grow and develop the system organically. EROs are integrated as a central piece of this ongoing evolution. They provide a medium for developing and maintaining a repository of institutional knowledge. Collectively and individually, these specialized teams can amass an expertise in immigration conflicts. Over time, they can bring a unique expertise to claims resolution: identifying characteristics about the parties, their dispute and their approaches to conflict that lend themselves to a particular process(es) or hybrids thereof.⁴¹⁹

The Board's public adoption of a flexible understanding of processes and its multifaceted ERO position align well with the scholarly framework presented in Chapter 3 above. Both are wonderful examples of fusing theoretical archetypes with the practical considerations of the real-life immigration context. The section to follow identifies ways in which the Board's execution appears short of these ideals.

Challenges

As noted above, the challenges identified herein highlight ways in which the current IAD system falls short of theoretical ideals. Since the Board's own IAD Innovation Plan reflects many of the understandings and best practices of the scholarly

⁴¹⁶ "Personal Learning Plan" (15 May 2013). Released as part of Access to Information Request # A-2014-00082. See Appendix A.

⁴¹⁷ *Ibid.*

⁴¹⁸ "Classification Committee Report" *supra* note 404 at 4.

⁴¹⁹ Part II below includes recommendations to help foster this more nuanced role for EROs.

framework, the foundation clearly exists to make these improvements. The challenges identified herein also parallel many of those identified in the Macleod Report, particularly those regarding procedural protocols and the responsibilities of system actors.⁴²⁰

Unequal Access to Information

The single biggest challenge facing users and stakeholders of the IAD's current Early Resolution program is unequal access to information. Publicly available information on the program remains piecemeal. Protocols, guides and reports are scattered across many different pages on the main IRB website.⁴²¹ Many documents remain outdated, despite significant and pertinent reforms.⁴²² With respect to other important aspects of the program, in particular procedural steps and future initiatives, information is altogether absent.⁴²³

⁴²⁰ See "Macleod Report" *supra* note 204.

⁴²¹ For example, the "ERO Communication Policy" (*supra* note 322) is grouped with the Board's general collection of Legal and Policy References, while links to basic (albeit largely outdated) information on ADR Conference procedures are on the main Immigration Appeals webpage under the general dropdown menu for Immigration Appeal Division. These documents make no mention of EROs or Early Resolution initiatives. The Division specific "IAD Streaming Procedures" (*supra* note 312) are also included on the main Immigration Appeals webpage, yet the Board's related "Case Management Principles" (*supra* note 312) are located with Legal and Policy References. Subheadings and cross-referencing of documents between various portions of the Board website would go a long way in aiding new system users.

⁴²² For example, "ADR Program Protocols" *supra* note 263. At the time of drafting, the most recent version of this document is a decade old and contains no mention of the critical changes introduced in December 2012. There is no mention of EROs in any of the documents linked to the IAD webpage "ADR at the IAD" *supra* note 204.

⁴²³ See *ibid.* Talk of a mediation/arbitration pilot that appeared in the "IAD Innovation Plan" (see *supra* note 202) seems to have fallen silent. There is no mention of the initiative on the IRB webpage, nor in the previous 2 iterations of the Board's Report on Plans and Priorities, tabled in the House of Commons. See "2014–15 Report on Plans and Priorities", online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/pubs/Pages/rpp1415PartIII.aspx>>; and "2013–14 Report on Plans

Dispute resolution scholarship highlights the importance of access to information in facilitating dialogue and information exchange. As discussed in Chapter 3, Lewicki and Hanycz (et al., respectively) note the strategic risks to parties in proceeding within an integrative framework when they either (a) are faced with distributive tactics like information guarding; or (b) are themselves ill-prepared for the resolution process.⁴²⁴ It is difficult to imagine how parties, particularly those without counsel, could adequately prepare or properly respond to distributive tactics by steering the process toward more integrative approaches, when they lack access to basic information on how the program itself functions. This certainly impedes fairness and likely results in claims being subsequently streamed to adversarial hearings. This hinders gains in efficiency and durability.

From the writings of Ury et al., we understand that fairness includes a sense of satisfaction with the resolution process.⁴²⁵ It is reasonable to expect that parties would experience fear, frustration and annoyance when navigating the process without access to proper information and resources. For counsel and other frequent system users legal processes are routine and comfortable. For the general population, however, they are daunting and disorienting. Fairness is thus further undermined when the program is not understandable or accessible to all parties.

A lack of access also conjures up themes from post-modern feminist critiques.⁴²⁶ Information is power. Access to information allows one party to increase their relative power over the other. Post-modern feminists caution against the potential for institutions

and Priorities”, online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/pubs/Pages/rpp1314PartIII.aspx>>.

⁴²⁴ Hanycz et al. *supra* note 114 and Lewicki et al. *supra* note 114.

⁴²⁵ Ury et al., “Getting Disputes Resolved” *supra* note 205.

and processes to be manipulated by those with power at the expense of more vulnerable groups. This is certainly not to suggest that the IAD or CBSA are in any way acting nefariously. Preparation and dissemination of up-to-date information is a resource-intensive undertaking. To do so in real time would be a challenge for any institution. The breadth of programs within the purview of the IRB necessitates some delay in updating public documents. However, alternative processes are meant to create an environment that is more collaborative, affiliational and adept at considering contextual factors (including relationships, race, culture and gender). Information imbalance threatens this theoretical ideal and goes against the program goal of maximizing fair outcomes.

In this way, inequality of access exacerbates the innate imbalance of power that characterizes the relationship between the parties in immigration disputes. This is particularly true in the case of self-represented appellants. Those without formal legal training rely exclusively on available and accessible information in the public sphere, particularly the IRB webpage and other online sources. The current situation creates an information vacuum. Those without first-hand experience in navigating the IAD appeal system are left disadvantaged *vis a vis* frequent users representing the Ministry. Indeed, CBSA invests well in ongoing training for Minister's Counsel. Independent professionals provide them with mediation and conflict resolution training very similar to that provided to the EROs who facilitate the process.⁴²⁷

⁴²⁶ See Chapter 3 beginning at 59.

⁴²⁷ Based on a review of training documents released as part of Access to Information Requests #A-2014-00580 (from the CBSA) and #A-2014-00080 (from the IRB). See Appendix A.

A lack of accessible information also impedes access to justice. Alternative resolution is, by its very nature, meant to improve access. The movement toward informal processes was driven by a “search for a more consensual approach to problem solving, more accessible and community-oriented forms of dispute resolution”.⁴²⁸ Administrative tribunals, like Canada’s IRB, are intended to provide less formal, more accessible alternatives to courts. Their viability as such requires they be user-friendly. This extends to self-represented users who must be able to find and understand procedural requirements. The Board itself has acknowledged this concern. The principles guiding the IRB’s overarching case management strategy emphasize the importance of straightforward, transparent processes to the tribunal’s overall function:

In order to function as alternatives to courts, tribunals have to promote a greater level of access to justice. That means that case management systems, and in particular the way in which the public understands and has access to those systems, must be simple and clear.⁴²⁹

The information currently available in the public sphere on the IAD’s Early Resolution program makes adhering to this standard increasingly difficult.

Process Rigidity

While the IAD is embracing an evolving understanding of alternative processes (one that is fluid and informed by the characteristics of discrete parties and their dispute), the Early Resolution program itself appears somewhat stalled in its execution of this ideal. The conceptualization of a continuum is there. Its breadth and depth remain narrow. EROs evaluate claims early in the appeal process and direct them (based on their

⁴²⁸ Llewellyn et al., “Restorative Justice Framework” *supra* note 116 at 100 citing Emond *supra* note 164 at 4.

⁴²⁹ “Case Management Principles” *supra* note 312 at 2.

assessment) to one of four resolution streams.⁴³⁰ They do so with a view to resolving claims without a full adversarial hearing. But, EROs seemingly lack the discretion to utilize new or hybrid processes, or even to substantially alter procedural practices for standard processes. Nor does there appear to be a reporting structure in place that would allow EROs to seek approval to do so from more senior IAD personnel, where unique circumstances warrant. To draw on Paul Emond’s continuum analogy, EROs currently direct claims to specific procedural points along the spectrum, rather than moving along it to adopt a bespoke process.⁴³¹ The role of EROs remains limited in this way. Claims are streamed to a fairly rigid roster of processes. This contradicts the clear emphasis that Emond, Menkel-Meadow, Macfarlane and Hanycz et al. place on individualized assessment and flexibility.⁴³²

This is not an argument for wholesale discretion. Just as a certain degree of flexibility is desirable (in order to respond to unique circumstances) so too is stability. Immigration appeals are expensive and time consuming. System users are entitled to a reasonable level of predictability upon which to govern their actions. To this end, protocols, streaming and standard processes are invaluable. The system should operate within a reasonably predictable framework. That said, truly engaging in the pursuit of “appropriate” dispute resolution⁴³³ requires some degree of *inter* and *intra* process creativity. With input from the parties (and IAD Members as necessary) this could be as involved as exploring something akin to mediation/arbitration models or simple as

⁴³⁰ See Chapter 4 Part III. The streams are (1) Early Resolution; (2) Paper Hearing; (3) Alternative Dispute Resolution Stream; and (4) Oral Hearing.

⁴³¹ See Emond *supra* note 164.

⁴³² See Emond *supra* note 164; Menkel-Meadow, “Ethics in ADR” *supra* note 21; Macfarlane *supra* note 121; and Hanycz et al. *supra* note 114.

⁴³³ Menkel Meadow, “Ethics in ADR” *ibid*.

integrating other stakeholders into an ADR Conference. Absent some limited discretion to address unique circumstances, the program risks becoming stilted. Processes will become increasingly siloed. Resolutions will not reflect the high standards of substantive and procedural fairness that the Board sets for itself. The IAD will miss opportunities to generate efficiencies and durable, more satisfying outcomes for all parties.

Ambiguity of ERO Roles and Responsibilities in the Public Sphere

Many of the core concerns contained in this last point have been alluded to in the sections above. Despite the key position occupied by EROs in the IAD's Early Resolution program, a complete picture of their roles and responsibilities within it is notably absent from publicly available sources. Alternative processes cannot be successful if they are inaccessible to the parties.

An online overview from the tribunal's website still references Dispute Resolution Officers (DROs):

The ADR process at the IAD usually involves an in-person meeting - an ADR Conference - that is scheduled to last for one hour. The IAD assigns a member to act as a dispute resolution officer (DRO) for each appeal that is selected for the ADR process.⁴³⁴

So too does the IAD Interpreter Handbook.⁴³⁵ Under previous iterations of the program, ADR Conferences were facilitated by DROs, many of who were IAD Members and performed the function on an ad hoc basis. In a sense, the DRO role has evolved and expanded into the current ERO position.

⁴³⁴ "ADR at the IAD" *supra* note 204.

⁴³⁵ "Interpreter Handbook – Immigration and Refugee Board of Canada" (December 2012), online: IRB <<http://www.irb-cisr.gc.ca/Eng/BoaCom/pubs/Pages/Interpret.aspx#Toc342656904>>.

The IAD's Streaming Procedures⁴³⁶ and the Board's Case Management Principles⁴³⁷ make no mention of the role EROs play in the review, assessment and streaming of appeal claims. Neither do online descriptions of the IAD appeal processes for Sponsorship, Residency and Removal appeals⁴³⁸ nor Appellant's Guides for ADR Conferences in sponsorship appeals.⁴³⁹

In fact, the only direct reference to EROs that could be found in the IAD's online documents at the time of drafting is a policy regarding ERO *ex parte* communications.⁴⁴⁰ The document establishes a consistent and transparent protocol between process participants on this important issue. It defines key terms and provides a reasonable overview of the tribunal's Early Resolution initiatives and EROs' responsibilities within them. However, it is buried with the Board's Legal and Policy References, separate and apart from the IAD portion of the website and all other references to alternate processes. As such, the document does little to inform the public (or appellants) on the robust role of EROs in the appeal process. If anything it creates ambiguity where it conflicts with other reference documents.

The importance of understanding the critical roles and responsibilities of EROs is two-fold. It assists in correcting information imbalance, particularly when self-represented appellants confront Minister's Counsel with the collective knowledge of habitual system use. It also helps to foster respect amongst counsel and other system

⁴³⁶ "IAD Streaming Procedures" *supra* note 312. This document provides a good overview of early information gathering, evaluation and streaming procedures but refers to "triage officers" as performing these functions rather than EROs.

⁴³⁷ "Case Management Principles" *supra* note 312.

⁴³⁸ See IAD Appeal Process documents listed in *supra* note 228.

⁴³⁹ See IAD Appellants' Guides listed in *supra* note 354.

⁴⁴⁰ "ERO Communication Policy" *supra* note 322.

users for the expertise that EROs bring to the claims resolution process. This engagement and advisory function is discussed further in the section to follow.

II. Moving Forward: Recommendations for Reform

The recommendations for reform discussed herein draw on the challenges identified in the preceding section. They attempt to bridge gaps between the theory and practice. The first is a cry for increased information in the public sphere. Addressing this accessibility issue will allow all parties to properly plan and engage in informal, collaborative processes. It also minimizes concerns that more vulnerable parties could be exposed to manipulation or disadvantage. The final two reforms relate to the role and responsibilities of EROs. Addressing ambiguities around discretion and neutrality allow these critical system actors to execute the truly flexible and tailored resolution experience that the IAD is striving for.

Information Preparation and Dissemination

As noted above, many of the current guides and protocols for the IAD's Early Resolution program are conflicting, difficult to locate or incomplete. Others are a decade out of date. This makes it difficult for appellants (particularly self-represented ones) to participate effectively in the appellate process. It also undermines the legitimacy of this important initiative. The IAD has made crucial advancements to its program. Many of these are not reflected in public information. A great deal of time and resources have been invested in research, training and evaluation. Accounting to the public on these steps will increase faith in the system. System users are also entitled to a certain level of predictability. They are entitled to know the procedural options available to them and to

seek the advice of counsel to best position themselves and strategically prepare for those steps.

In keeping with the normative themes of adaptability and accessibility in ADR scholarship, the Board should update protocols, policies and guides that address its appeal resolution system. These should reflect the more holistic approach to Early Resolution adopted by the Board.⁴⁴¹ They should address the program as a whole, tying together early evaluation, case management initiatives, streaming, all resolution processes, the roles of key parties, research and any future initiatives in one cohesive, easily accessible webpage. Many of the building blocks for this initiative already exist on the IRB site. As noted above, the ERO Communication Policy provides a good starting point for developing a comprehensive summary of the program, background and defining key terms. No doubt, much more of the heavy lifting and drafting has already been done for internal documents. The results of the access to information requests obtained in preparing this project certainly reflect this.

The IRB and CBSA have also invested considerable time and resources into training initiatives for EROs and Minister's Counsel respectively. This brings a great body of institutional skill and knowledge to bear on Early Resolution initiatives. This same skill and knowledge does not exist in the case of all appellants. Thus, in addition to the substantive and procedural resources suggested above, the Board may consider including links to basic training materials on dispute resolution within the IAD site. This addresses concerns of fairness and access. Doing so will also bring increased proficiency to individual claims processing. Appellants (and even some counsel) will benefit from

this baseline understanding of the benefits and strategy of early conflict resolution. The bibliographical references in Chapter 2 may even provide a starting point. Several introductory texts and articles were used as preliminary research for this project and provide a primer in basic dispute resolution theory and practice.

Prioritizing information accessibility will also have indirect advantages. Ensuring that a comprehensive roster of resources are available and easily accessible for appellants allows the Board to divert valuable resources toward more fruitful pursuits. IRB staff will reduce the time spent addressing questions and explaining the program to parties. This time is much better spent on claims processing and program evaluation functions.

Roles and Responsibilities of Early Resolution Officers

In light of the concerns expressed above, it is imperative that cohesive protocols explain not only the procedural avenues of the IAD's Early Resolution initiatives, but also clearly communicate the roles and responsibilities of the parties within them. As discussed, beginning at page 132 above, this improved transparency and accessibility allows alternative processes to deliver on their promise of increased collaboration and dialogue and vastly improves the fairness of the resolutions achieved.

In drafting these documents, the roles and responsibilities of EROs deserves particular attention. First, EROs must be vested with the discretion to move beyond established processes, where unique circumstances arise and the parties would benefit. This includes exploring new processes and tailoring procedural protocols of existing ones. Secondly, the EROs emerging role as conflict resolution advisor requires the IAD to consider whether they are (and/or should be) a classic third-party neutral.

⁴⁴¹ The current IAD webpages gives the mistaken impression that the Board's Early Resolution initiatives are limited to ADR Conferences. When, in fact, they have moved

With respect to the latter, the writings of Bernard Mayer again provide an interesting perspective.⁴⁴² Mayer suggests that the dependence and fixation of conflict professionals on neutrality limits their role and accepts a very limited view of conflicts themselves. Many individuals engaged in conflict are not looking for third-party neutrals. They are skeptical of their effectiveness and instead often seek someone to explain issues and help them to evaluate options. Yet practitioners “understand [their] value to people in conflict in terms of [their] ability to remain neutral and to guide them through a decision-making process.”⁴⁴³ Rather, as noted above, Mayer argues for “conflict engagement”, which adopts a broader, and more holistic understanding of conflict.⁴⁴⁴ In this approach, some of the roles played by EROs will require neutrality, particularly decision-making functions (commencing abandonment proceedings for example).⁴⁴⁵ Other functions, particularly Early Informal resolution attempts and case streaming decisions, are hindered by an arms-length, disengaged facilitator who channels communications between the parties.

This is not to suggest that professionals who engage with disputes in this way align themselves with one position or party over another. In fact, the opposite is true. Conflict engagement professionals are vested in the *process*, not the *outcome*. Scholarship recognizes these subtle differentiations between neutrality and impartiality.⁴⁴⁶ In Mayer’s words “[w]hen we act to serve a system rather than

well beyond this early understanding of alternative resolution as exclusively mediation.

⁴⁴² Mayer, *Beyond Neutrality* *supra* note 192. The summary to follow of Mayer’s ideas is based on this source.

⁴⁴³ *Ibid* at 116.

⁴⁴⁴ *Ibid* at 184.

⁴⁴⁵ See “IAD Streaming Procedures” *supra* note 312 at 3; and “Act” *supra* note 9 at s 168(1).

⁴⁴⁶ See Macfarlane *supra* note 121 at 361-362.

functioning as either allies or third parties, we play a different role – one that can help transform the nature of conflict, but is focused on the functioning of a system rather than the resolution of any particular conflict.”⁴⁴⁷ Mayer’s theory of conflict engagement, and his more refined view of conflict professionals – those who participate throughout the process, performing many roles (evaluator, facilitator, decision maker, advisor) – also harks back to concepts of relational feminist theory. He appears to view conflict through a lens that includes attributes very similar to Gilligan’s ethics of care: collaboration, partnership and problem solving. He focuses on the entirety of a conflict, the parties, their needs, and relationships between the stakeholders. This is in contrast to the more rigid, impersonal ethic of justice, with its focus on rules and principled decision-making.

This more nuanced understanding therefore fits well with a flexible and personalized understanding of processes. Unsurprisingly, the evolving role of EROs draws on many elements of Mayer’s notion of conflict engagement.⁴⁴⁸ It also mirrors the themes of connection, relationships and problem-solving echoed in relational feminist scholarship. EROs have already moved beyond the limited scope of neutral ADR Conference facilitator. They engage with each discrete conflict, and the parties to it, from the very beginning of the claim. They often assume the role of advisor, organizer, case manager and designer. They are the connection between the many layers of immigration conflicts. They gather information, narrow issues, facilitate resolution and advise on hearing preparedness. They bring to the resolution process not only substantive knowledge of immigration laws, but also the tools and skill to address these unique conflicts in constructive ways: communication, understanding, active-listening. With

⁴⁴⁷ Mayer, *Beyond Neutrality* *supra* note 192 at 243.

⁴⁴⁸ See *supra* notes 405 and 406 (along with the preceding paragraph) and 419.

time, EROs can build a repository of this institutional knowledge. They can become astute at identifying connections and trends in parties and their approaches to conflict. With these incremental developments, their expertise will lie in immigration conflicts and the social context in which they exist.⁴⁴⁹ Their interest is not in one position or party over the other, but rather in the system itself and selecting a process that will best achieve the program's overall objective: achieving a result that is fair, efficient and durable.

It is important to note however that this remains a very aspirational picture of the role of EROs. It builds on the image reflected in forward-looking initiatives like the IAD Innovation Plan and internal training documents. The public face of the Early Resolution program does not yet reflect these attributes. The role of ERO is still relatively new and will require iterative evaluation and improvement. This requires careful staffing. Individuals must possess the knowledge and skills to command the respect of IAD Members, parties and their counsel as the relative experts within this realm. This requires diligence on the part of both the IAD and individual officers to maintain skills and knowledge through regular, ongoing training. Continued dialogue with system users and the public on the role of EROs will also help to gain (and maintain) support for the valuable contribution they bring to claims resolution.

In light of their increasing significance, the IAD might also consider developing and disseminating a formal code of conduct for EROs. Their role is a unique one. They perform many duties and they interact with many other system participants. It is not always clear whether their relationship with other participants is as subordinate, colleague or advisor. This ambiguity creates ethical issues. Enumerating the obligations and

⁴⁴⁹ This lends support to the IAD's decision to staff the ERO role internally, rather than relying on a roster of external dispute resolution professionals. The advantages and

responsibilities of EROs would also provide a level of transparency and accountability that legitimizes their role further in the eyes of parties, stakeholders and the public.

Codes of conduct represent an area of increasing importance and focus within dispute resolution literature. Codes are established for many dispute resolution professionals: negotiators, mediators, arbitrators, etc.⁴⁵⁰ They are developed, once a profession reaches a certain level of maturity, in order to provide minimum standards of conduct, protect members of the public and provide ethical clarity.⁴⁵¹ The Board has already taken steps to create a code for its Governor in Council appointed Members.⁴⁵² This represents a solid template and natural stepping-off point should the Board decide to take on such this initiative with respect to EROs. In addition, and based on my own review of scholarly articles in this area,⁴⁵³ the following represents a list of potential factors the IAD should consider addressing:

- Core competencies;
- Training;
- Confidentiality;
- Obligations regarding neutrality and impartiality (including a definition of these terms and an accounting of whether they are applicable during all or some of an ERO's responsibilities);
- Responsibilities when acting as an ADR Conference facilitator (in particular, note taking and drafting agreements);
- Clarify obligations, responsibilities and reporting obligations *vis-a-vis* all parties (in particular, Members, CIC and CBSA officers, Minister's Counsel, and appellants). With respect to appellants, a code should address the fact

disadvantages of doing so certainly represent an interesting avenue for future scholarship.⁴⁵⁰ For an excellent list of examples see Carrie Menkel-Meadow, "Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts" (2009) 14 Harv Negot L Rev 195 at 196-199.

⁴⁵¹ *Ibid.*

⁴⁵² IRB, "Code of Conduct for Members of the Immigration and Refugee Board of Canada" (15 December 2012), online: IRB <<http://www.irb-cisr.gc.ca/eng/BoaCom/empl/Pages/MemComCode.aspx>>.

⁴⁵³ *Supra* note 450 and Smyth, "Strengthening Social Justice" *supra* note 121.

that a solicitor-client relationship does not exist between ERO and appellant and that independent representation is encouraged;

- Conflicts; and
- Links to any policy, protocols, guides that govern or outline the roles and responsibilities of EROs.⁴⁵⁴

Developing a code of conduct would also account for the unique context surrounding immigration disputes. The role of EROs as dispute professionals is unique in that they are also government employees. Many appellants (particularly self-represented litigants) may not appreciate the subtle divisions between various government branches. “Officers” who review and determine their initial immigration application may bleed into the “officers” who represent CBSA in the appellate process, as well as “officers” who facilitate early information gathering and resolution. Ensuring that the mandate and obligations of EROs are clearly defined and differentiated from other system actors is crucial to legitimating this more nuanced role. It allows them to function as respected advisors. It allows them to bring added value to the process and allays concerns from critics.

With respect to the opening paragraphs of this section, one can also argue that increased discretion naturally flows from this refined role for EROs. As experts in immigration conflict, EROs will be best situated to determine and execute creative process solutions. Final process election will no doubt take place in connection with the parties and IAD Members, as necessary. This tailoring may include exploring entirely new or hybrid processes or modifying established process protocols. Current legislation and IAD Rules allow for these exercises in discretion.⁴⁵⁵

⁴⁵⁴ By way of example: “IAD Streaming Procedures” *supra* note 312; “Case Management Principles” *supra* note 312; and “ERO Communication Policy” *supra* note 322.

⁴⁵⁵ See “IAD Rules” *supra* note 227 at r 20(1), which grants the IAD authority to “require the parties to participate in an alternative dispute resolution process in order to encourage

Earlier discussions from Chapter 4 provide a concrete example of how existing process protocols might be modified at the discretion of EROs. Recall that in the context of spousal and partner sponsorship claims (many of which are often streamed to ADR Conferences), the right of appeal rests with the sponsor.⁴⁵⁶ As a result, the foreign applicant does not participate in ADR Conferences (or other Early Resolution processes) absent efforts by the parties to include this stakeholder perspective. This often rests with the appellant or their counsel to either introduce written evidence from a foreign spouse or partner (by way of letter or affidavit) or seek approval from the IAD to include them directly, in person or via teleconference.⁴⁵⁷

However, the more nuanced role of EROs described above envisions a situation whereby EROs, as conflict specialists, are ultimately responsible for the resolution process. Along with the discretion to tailor processes to unique circumstances, EROs should also bear the responsibility to ensure that (as far as possible) all relevant parties and stakeholder perspectives are represented in that process. This parallels the role that EROs play in readying claims for a hearing, where they work with parties to ensure that all documents and witnesses are in order.⁴⁵⁸ This should be no different in the context of informal processes. Where EROs recommend more collaborative, affiliational ADR Conferences for sponsorship appeals, they should also, at their own initiative, seek to

the parties to resolve an appeal without a hearing”. The language “alternative dispute resolution processes” is broad enough to provide EROs the authority to tailor procedural norms, in existing processes, where necessary. As IAD appeals must be determined by a Member, the discretionary power of EROs to elect or recommend new resolution processes should be limited where the process would render a final determination of the claim. Common examples are arbitration or med/arb hybrid processes. In such circumstances, EROs should be required to seek and gain approval from the presiding IAD Member before pursuing or recommending such processes to the parties.

⁴⁵⁶ See discussion in Chapter 4 at *supra* note 360.

⁴⁵⁷ See discussion in Chapter 4 at *supra* notes 361 and 362.

include the foreign applicant in the process. This is particularly so where the genuineness of the relationship and the credibility of the foreign applicant is central to the dispute. It is difficult to facilitate dialogue on such issues and address underlying relational interests when a key party to the conflict is absent. Giving voice to this perspective is crucial to achieving a fair, efficient and durable resolution.

In summary, this Chapter has thus far presented both the strengths and challenges of the IAD's Early Resolution program. It demonstrates how the initiative's flexible understanding of alternative processes and dedicated EROs reflect many of the ideals of leading ADR and relational feminist scholars. It also explains how a disconnect between the Board's own aspirational goals and current execution can be minimized through improvements that create a clear, comprehensive and accessible body of information on the program itself: its structure, processes and actors, and the interrelation between these constituent parts. These reforms will steer the program back toward the scholarship and improve fairness, efficiency and durability.

The final section to follow contains concluding observations, weaving together the theory and practice examined throughout the project. It considers potential avenues for expanding Early Resolution to other claims and decision-making bodies. These are provided not in an effort to advocate for expansion necessarily, but rather as a stepping off point for future scholarship in this important but under-examined area. Finally, it returns to the starting point of our discussion: the importance of immigration and refugee claims to those who experience them first hand.

⁴⁵⁸ See "Classification Committee Report" *supra* note 404.

III. Concluding Thoughts

Reforms Bridge Theory and Practice

By adopting the reforms outlined in this Chapter, the IAD appeal system is improved for users and stakeholders alike. Providing timely, accurate and easily accessible information on the Early Resolution program is imperative. Public dissemination of information promotes transparency and accountability. The public and system users are entitled to understand the procedural protocols in place and the roles and responsibilities of system actors. This maintains the legitimacy of government action and facilitates access to justice. The IAD has built the foundation for an exciting and important initiative. It deserves accolades. Implementing these reforms brings the program closer in line with ideals that, ADR theory suggests, will increase the fairness, efficiency and durability of resolutions. The reforms are also intended to be incremental and manageable. The IAD must grapple with the realities of budgets, resources and caseloads. This scholarly critique makes every attempt to respect those constraints.

The value of continued evaluation and reform to the systems through which we determine migration claims cannot be overstated. As shown in the opening paragraphs of this project, with the story of Syed and Chanda, these decisions have a profound impact on the lives of real people. They quite literally change, and in some cases save, lives. They are costly and time consuming for all parties. There is limited recourse for those dissatisfied with them. It is therefore imperative that architects not only revisit these systems but also allow stakeholders the opportunity to provide input. This is facilitated through public dissemination of information.

The current Early Resolution program has enormous potential. When successful, it achieves time and cost savings for both parties. It allows participation and facilitates dialogue to clarify miscommunications or misunderstandings that may have impeded decision makers at first instance. It also presents an outlet to address more intangible interests that may otherwise drive a party to pursue claims unnecessarily. In this way resolutions become more efficient, fair and durable. These advantages hinge on pairing claims with appropriate processes, drawn from a flexible array of options. The scholarship of experts like Ury, Emond, Menkel-Meadow, Macfarlane and Mayer provide the theoretical model; the IAD's Early Resolution program has created a strong foundation to make these aspirational principles a reality.

Potential Expansion?

In light of this, an important area for future scholarship is examining the potential use of the IAD's Early Resolution program as a blueprint to expand these initiatives to other immigration claims, decision-making bodies or even other administrative law regimes. Expanding informal resolution initiatives to CIC or the CBSA would have the added advantage of moving early resolution efforts to the front end of the determination process. Expanding within the IRB, however, may be the most organic avenue. It would allow the Board to further utilize the considerable institutional investments made to date in research, training, evaluation, infrastructure, and protocols.

Refugee claims represent a particularly appealing avenue for expansion. They fit squarely within the characteristics identified by ADR scholarship as being particularly amenable to informal resolution processes. As noted in our overview of this entry category, many turn on issues of credibility. Reviewing officers must decide whether

they believe that a claimant's fears are well-founded. Contextual factors, in particular culture fluency, are crucial and the potential for miscommunication exists even with the most well-intentioned decision makers. Fear and trauma may also impact behavior. More informal, affiliational and collaborative processes could create a more comfortable atmosphere and facilitate communication.

This is not intended as anything more than a stepping-stone for future scholarly endeavors. Expanding Early Resolution within the immigration and refugee system is a polycentric issue that involves weighing many theoretical, as well as practical, considerations. Resources, staffing and caseload management are but a few. Scholarship from areas of domestic and international criminal law may be helpful in bringing forth some of the scholarly critiques regarding the appropriateness of alternative processes in the refugee context. The experiences of international war crime tribunals and truth and reconciliation commissions would be particularly helpful for comparative methodology. These issues certainly lie well beyond the scope of the current project but represent important areas of exploration as the IAD program matures.

The IAD's program represents a unique and creative approach to claims resolution in the administrative law context. The tribunal deserves accolades for exploring and growing the initiative. With the reforms suggested herein, it is my sincere hope that it will promote dialogue among, and provide guidance to, other dispute resolution system designers.

The People Behind the Parties and the Dispute

The opening paragraphs of this project presented the story of a Canadian permanent resident, Chanda, and her husband Syed. They sought to obtain permanent

resident status for Syed through a Family Class sponsorship application. They were ultimately unsuccessful. The story involves a married couple who assert a legitimate relationship and want to reside in Canada, and a CIC officer who does not believe that this is true. The conflict that exists between these two parties will have to be resolved. The system and processes in place can either improve or impede the fairness, efficiency and durability of the outcome. The preceding pages have explained why, in certain cases, informal, collaborative processes are better suited than formal, adversarial hearings to do so.

After delving into a review of the complicated nuances of Canada's regulatory framework, detailed administrative procedures, and dense scholarship on complex feminist and dispute resolution theory, it is important to return to why I took on this project in the first place. This is why we circle back to the story of Syed and Chanda. The immigration conflicts we have been discussing are not abstract. They involve real people: officers, Members, applicants, and counsel. Their impact reverberates out, in concentric circles, around these immediate parties to other stakeholder groups: family members, other Canadian government bodies, advocacy groups, other potential applicants, international governments, members of the Canadian public, and so on, and so on. This context – power, relationships, culture, and other intangible interests – is vital to an informed discussion of dispute resolution in this setting.

This makes for fascinating scholarly study, but these issues also have very important consequences. As noted earlier, the IAD's current Early Resolution program represents a unique and creative endeavor. It provides a strong foundation that can be built on, expanded and improved. There are, however, some red flags. These appear to

be an issue of executing some of the best practices identified in scholarship, rather than the theoretical underpinnings themselves. Nonetheless, they are worthy of continued consideration and evaluation. This may take the form of another independent review, or it may be something that the government takes on internally. Either way, this information must form part of the public discourse. These are important issues for Canada. Building an immigration and refugee determination system that we are all proud of is something we can, and should, strive for together.

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- “What We Do”, online: AAT <<http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm>>.
- Wood Graeme. “Refugees Reporting Higher Earnings in Canada Than Investor Immigrants” (2 March 2015), online: National Post <<http://news.nationalpost.com/2015/03/02/refugees-reporting-higher-earnings-in-canada-than-investor-immigrants/>>.

OTHER MATERIAL

- “Alternative Dispute Resolution Program Protocols” (13 January 2003, amended May 2004).
- Fleischmann, Elana and Maureen Gauci. *Facilitation Report*, April 2001.
- IAD counsel session “Let’s Discuss Early Resolution” (delivered at the Immigration and Refugee Board, Toronto, 12 June 2014). [“IAD Counsel Session”].
- Macleod, Leslie. “Assessing Efficiency, Effectiveness and Quality: An Evaluation of the ADR Program of the Immigration Appeal Division of the Immigration and Refugee Board - Executive Summary” (March 2002), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarEval.aspx>>.
- “Note to File: Early Resolution Officer (ERO), Immigration Appeal Division (IAD) Classification Decision Number DN1472 (August 22, 2013).

IAD. “Report: Classification Committee - Early Resolution Officer” (1 June 2012)
convened 14 May 2012 (Correctional Services of Canada: Laval, Quebec).

“Performance Review Form – Early Resolution Officer Position” (March 2006).

“Personal Learning Plan” (15 May 2013).

Presentation by Sharon Silberstein (Legal Advisor, IAD), *Overview of Early Resolution Program*, as part of “IAD Counsel Session”.

Presentation by Leigh Sokoloff (IAD Early Resolution Officer), *Early Resolution Stream*, as part of “IAD Counsel Session”.

Written interview of Ms. Julie Morin, Special Advisor, Deputy Chairperson’s Office, Immigration Appeal Division of the Immigration and Refugee Board of Canada (14 August 2014, updated 4 September 2014).

**APPENDIX A:
LANGUAGE AND RESPONDING COVER LETTERS –
ACCESS TO INFORMATION REQUESTS**

Citizenship and Immigration Canada (“CIC”):

NOTE: Attached are copies of requests made under the *Access to Information Act*, RSC, 1985, c A-1, to the Immigration and Refugee Board of Canada (“IRB”) and Canada Border Services Agency (“CBSA”) respectively. For purposes of this request, please exclude consultations with these two government institutions, as appropriate, in order to avoid duplicative efforts and results.

1. All records, including but not limited to guidelines, bulletins, protocols, descriptions, statistics, policy documents, briefing notes, research, evaluations, planning initiatives, action plans, eligibility criteria, training/processing or other manuals, reports, correspondence, memoranda and/or notes regarding alternative dispute resolution or early settlement processes or programs, including but not limited to the potential or feasibility of such processes or programs, at CIC, the IRB and/or CBSA.
2. The following statistics regarding family sponsorship claims:
 - (i) the total number of claims (positive and negative decisions);
 - (ii) the number or percentage of total claims represented by each of the following categories of relatives*: spouse/partner, dependent child, parent/grandparent, adoptive child and other;
 - (iii) the number or percentage of claims that were granted and denied, respectively, for each of the category listed in (ii) above; and
 - (iv) where a negative decision was rendered, the grounds or reasons for denying the claim.

Please limit request to claims between 2001 - 2014.

*If statistics are not maintained based on the categories listed in (ii) above, please provide statistics based on other available categories, as appropriate, or disregard and amend (iii) to provide statistics regarding the number or percentage of total claims that were granted and denied during the relevant period.

Canada Border Services Agency (“CBSA”):

NOTE: Attached are copies of requests made under the *Access to Information Act*, RSC, 1985, c A-1, to the Immigration and Refugee Board of Canada (“IRB”) and Citizenship and Immigration Canada (“CIC”) respectively. For purposes of this request, please exclude consultations with these two government institutions, as appropriate, in order to avoid duplicative efforts and results.

1. All records, including but not limited to guidelines, bulletins, protocols, descriptions, statistics, policy documents, briefing notes, research, evaluations, planning initiatives,

action plans, eligibility criteria, training/processing or other manuals, reports, correspondence, memoranda and/or notes regarding alternative dispute resolution or early settlement processes or programs, including but not limited to the potential or feasibility of such processes or programs, at CBSA, CIC and/or the IRB.

Immigration and Refugee Board of Canada (“IRB”):

NOTE: Attached are copies of requests made under the *Access to Information Act*, RSC, 1985, c A-1, to Citizenship and Immigration Canada (“CIC”) and Canada Border Services Agency (“CBSA”) respectively. For purposes of this request, please exclude consultations with these two government institutions, as appropriate, in order to avoid duplicative efforts and results.

1. All records, including but not limited to guidelines, bulletins, protocols, descriptions, policy documents, briefing notes, research, evaluations, planning initiatives, action plans, eligibility criteria, training/processing or other manuals, reports, correspondence, memoranda and/or notes regarding alternative dispute resolution or early settlement processes or programs, including but not limited to the potential or feasibility of such processes or programs, by the IRB (in particular the Immigration Appeal Division (“IAD”)), CBSA and/or CIC.
2. Statistics regarding family sponsorship appeals, in particular the following:
 - (i) the percentage of the total IRB caseload represented by such appeals;
 - (ii) the total number of sponsorship claims appealed to the IAD of the IRB;
 - (iii) the number or percentage of total appeals processed by each IAD regional office;
 - (iv) the number or percentage of total appeals represented by each of the following categories of appeals*: adoption, spouse and partner, financial, medical, criminal inadmissibility and other;
 - (v) the number or percentage of appeals sent to alternative dispute resolution or early settlement processes or programs (“ADR”) by the IAD for each of the category listed in (iv) above;
 - (vi) the number or percentage of appeals sent to ADR by each regional IAD office;
 - (vii) the number or percentage of appeals sent to ADR by the IAD that result in a withdrawal by the appellant (if statistics are available for the percentage of appeals resolved pre-ADR and those resolved through ADR, please provide this breakdown, if statistics are available on the appellant’s gender and country of origin, please provide this breakdown);
 - (viii) the number or percentage of appeals sent to ADR by the IAD that result in recommendation by Minister’s counsel that the appeal be allowed (if statistics are available for the percentage of appeals resolved pre-ADR and those resolved through ADR, please provide this breakdown, if statistics are available on the appellant’s gender and country of origin, please provide this breakdown);

- (ix) the number or percentage of appeals sent to ADR by the IAD that proceed to a hearing following ADR (if statistics are available on the appellant's gender and country of origin, please provide this breakdown);
- (x) the average processing time and sitting time of appeals resolved through the IAD's ADR process;
- (xi) the average processing time and sitting time of appeals sent directly to an IAD hearing, without ADR; and
- (xii) the average processing time and sitting time of appeals that proceed to an IAD hearing, following an unsuccessful attempt at ADR;

Please limit request to appeals between 2001 - 2014.

*If statistics are not maintained based on the categories listed in (iv) above, please provide statistics based on other available categories, as appropriate, or disregard and amend (v) to provide statistics regarding the number or percentage of total claims that were sent to ADR during the relevant period.

3. Documents regarding IAD members that facilitate ADR (referred to in IRB documentation as Dispute Resolution Officers), including but not limited to, names, professional background, political affiliation, training processes, qualifications, appointment, hiring or selection process and/or criteria, job descriptions, salary, protocols, evaluations, directives (including in particular requests by observers for permission to attend an ADR session), memoranda, bulletins and reports.

4. Any unreported decisions and reasons that were prepared following the resolution of an IAD appeal through ADR.

5. A copy of the complete report prepared by Ms. Leslie H. Macleod entitled "Assessing Efficiency, Effectiveness and Quality", released in or around March 2002, including any summaries, notes, comments, memoranda, amendments, research, action plans or similar documents related thereto.



Immigration and Commission de l'immigration
Refugee Board et du statut de réfugié

344 Slater Street, 14th Floor
Ottawa, Ontario K1A 0K1

PROTECTED

Our File #: A-2014-00056 / SB

May 13, 2014

Nicole Melanson
c/o Ms. Denise Melanson
4093 Bayview Avenue
Orillia, ON L3V 6H7

Dear Ms. Melanson:

This letter is in response to your Access to Information Act request dated March 31, 2014, which was received by this office April 14, 2014, for:

“A-2014-00056 - A copy of the complete report prepared by Ms. Leslie H. Macleod entitled “Assessing Efficiency, Effectiveness and Quality””

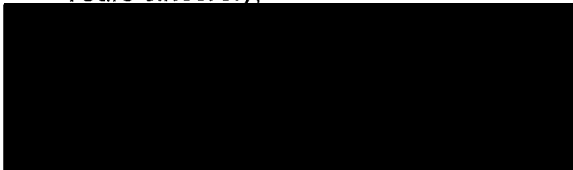
Please find enclosed a copy of the records that respond to your request. No severances or exemptions have been applied.

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within sixty days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

Information Commissioner of Canada
30 Victoria Street
Gatineau, Quebec
K1A 1H3

Should you have any questions concerning this matter, please do not hesitate to contact me at 613-995-3514 or Sean Boileau at 613-996-2696.

Yours sincerely,



Eric Villemare
Director, Access to Information and
Privacy

Enclosure: CD containing 486 pages

Canada



Immigration and Refugee Board Commission de l'immigration et du statut de réfugié

344 Slater Street, 14th Floor
Ottawa, Ontario K1A 0K1

PROTECTED

Our File #: A-2014-00081 / SB

June 6, 2014

Ms. Nicole Melanson
Schulich School of Law
2590 Robie Street, Unit 1
Halifax, Nova Scotia B3K 4N6

Dear Ms. Melanson:

This letter is in response to your Access to Information Act request dated April 8, 2014, which was received by this office May 5, 2014, for:

"Statistics related to Family Sponsorship Appeals"

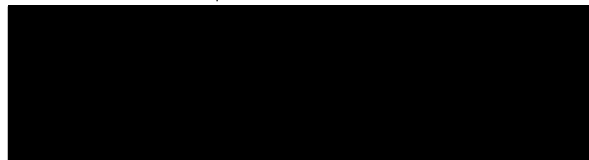
Please find enclosed a copy of the records that respond to your request. No severances or exemptions have been applied.

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within sixty days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

Information Commissioner of Canada
30 Victoria Street
Gatineau, Quebec
K1A 1H3

Should you have any questions concerning this matter, please do not hesitate to contact me at 613-995-3514 or Sean Boileau at 613-996-2696.

Yours sincerely,



Eric Villemare
Director, Access to Information and
Privacy

Enclosure: E-mail attachment with Excel Spreadsheet

Canada

* E-mailed scanned copy to requestor



Immigration and
Refugee Board Commission de l'immigration
et du statut de réfugié

344 Slater Street, 14th Floor
Ottawa, Ontario K1A 0K1

PROTECTED

Our File #: A-2014-00082 / SB

July 28, 2014

Ms. Nicole Melanson
Schulich School of Law
4093 Bayview Avenue
Orillia, Ontario L3V 6H7

Dear Ms. Melanson:

This letter is in response to your *Access to Information Act* request dated April 8, 2014 which was received by this office on May 1, 2014, for:

“Documents related to IAD members and/or Dispute Resolution Officers that have worked in the Dispute Resolution position (or any previous title for the Dispute Resolution position). Specifically, I request the names, training processes, qualifications, appointments and selection processes (including criteria, job descriptions and salary ranges). For the period of January 1st, 2012 to March 31st, 2014, I request all records. For the period of 2001 to 2011, I request one example of an employee per year.”

I have enclosed the records that respond to your request. You will note that information is withheld from disclosure pursuant to section 19(1) of the *Act* (copy of the relevant section is attached).

Also, please note that prior to 2012, the position of Dispute Resolution Officer did not exist and therefore no records exist for the examples of employees from 2001 to 2011. The salary ranges for the positions are all available online at: http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/coll_agre/pa/pa08-eng.asp

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within sixty days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

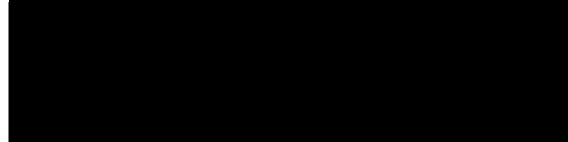
Information Commissioner of Canada
30 Victoria Street
Gatineau, Quebec
K1A 1H3

Canada

- 2 -

Should you have any questions, please do not hesitate to contact me at 613-716-9986 or Sean Boileau at 613-769-4143.

Sincerely,



Eric Villemaire
Director, Access to Information and
Privacy

Enclosure: CD containing 75 pages

Access to Information Act

19(1) PERSONAL INFORMATION

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.



Immigration and
Refugee Board

Commission de l'immigration
et du statut de réfugié

344 Slater Street, 14th Floor
Ottawa, Ontario K1A 0K1

PROTECTED

Our File: A-2014-00083 / SB

Your File #:

May 1, 2014

Ms. Nicole Melanson
Schulich School of Law
2590 Robie Street, Unit 1
Halifax, Nova Scotia B3K 4N6

Dear Ms. Nicole Melanson:

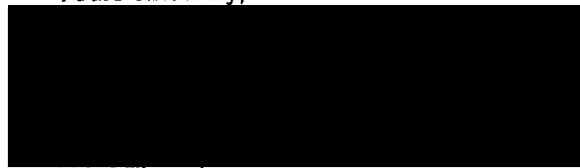
This is further to your *Access to Information Act* request dated April 22, 2014 for:

"Any unreported decisions and reasons that were prepared following the resolution of an IAD appeal through ADR."

Please be advised that as per your request via e-mail on May 1, 2014, your request has been abandoned.

Should you have any questions concerning this matter, please do not hesitate to contact me at (613) 995-3514 or Sean Boileau at 613-996-2696.

Yours sincerely,



Eric Villemare
Director, Access to Information and Privacy



Citizenship and Immigration Canada / Citoyenneté et Immigration Canada
Access to Information and Privacy Division
360 Laurier Avenue West
Citizenship and Immigration Canada
Ottawa, Ontario
K1A 1L1

A-2014-01075 / RD

Nicole Melanson
2590 Robie Street, Unit 1
Halifax, Nova Scotia B3K 9N6

JUN 23 2014

Dear Ms. Melanson:

This is further to your request submitted pursuant to the *Access to Information Act* for the following records:


"Regarding any alternative dispute resolution process, early settlement process, or other similar redress mechanism that provides unsuccessful immigration applicants with a means to resolve their application, please provide information regarding any such processes currently in place at CIC or the potential or feasibility of CIC offering such a process. Exclude claims based on refugee or protected persons status. Exclude possible Cabinet confidence, and non relevant information as not relevant. Exclude records that require consultation with the IRB and the CBSA. Also, only provide final versions or latest versions where no final versions exist. Please provide records from January 1, 2001 to April 11, 2014"

The processing of your request is now complete and I am pleased to enclose the documents requested. Certain information qualifies for exemption pursuant to section(s) 21(1)(a) advice or recommendations, 21(1)(b) consultations or deliberations of the *Access to Information Act*.

You are entitled to submit a complaint to the Office of the Information Commissioner of Canada (OIC) regarding the processing of your request within 60 days of the issuance of this letter. For additional information on how to submit a complaint, visit the OIC website at www.oic-ci.gc.ca.

Should you have any questions, please do not hesitate to contact Ray Davidson by email at the following address: ray.davidson@cic.gc.ca.

Sincerely,


Greg Zawadzki
Director

Encl., pages 1–11.

PLEASE QUOTE OUR FILE NUMBER IN ANY FOLLOWING CORRESPONDENCE

Canada

CIC's ATIP Division adheres to the "10 Principles for Assisting Applicants," which are available at: www.cic.gc.ca/dutytoassist.



Access to Information Act

21(1) OPERATIONS OF GOVERNMENT

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

- (b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,
- (b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,
- (c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or
- (d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,



SEP 15 2014

Ms. Nicole Melanson
2590 Robie St.
Unit #1
Halifax, NS B3K 4N6

Our File
A-2014-00580 / DL

Dear Ms. Melanson:

This letter is in response to your request under the *Access to Information Act*. Your request reads:

“rescope of request May 13, 2014, do not provide e-mails, no draft of documents only last version, if document are in both official language only provide English version.

1. *All records, including but not limited to guidelines, bulletins, protocols, descriptions, policy documents, briefing notes, research, evaluations, planning initiatives, action plans, eligibility criteria, training/processing or other manuals, reports, correspondence, memoranda and/or notes regarding alternative dispute resolution or early settlement processes or programs, including but not limited to the potential or feasibility of such processes or programs, by the IRB (in particular the IAD, CBSA and/or CIC.*

2. *Statistics regarding family sponsorship appeals, in particular the following:*
 - *The percentage of the total IRB caseload represented by such appeals;*
 - *The total number of sponsorship claims appealed to the IAD of the IRB;*
 - *The number or percentage of total appeals processed by each IAD regional office;*
 - *The number or percentage of total appeals represented by each of the following categories of appeals: adoption, spouse and partner, financial, medical, criminal inadmissibility and other;*
 - *The number or percentage of appeals sent to alternative dispute resolution or early settlement processes or programs by the IAD for each of the category listed in 4;*
 - *The number or percentage of appeals sent to ADR by each regional IAD office;*
 - *The number or percentage of appeals sent to ADR by the IAD that result in a withdrawal by the appellant (if statistics are available for the percentage of appeals resolved pre-ADR and those resolved through ADR, please provide this breakdown, if statistics are available on the appellant's gender and country of origin, please provide this breakdown;*
 - *The number or percentage of appeals sent to ADR by the IAD that result in recommendation by Minister's counsel that the appeal be allowed (if statistics are available on the appellant's gender and country of origin, please provide the breakdown);*
 - *The number or percentage of appeals sent to ADR by the IAD that proceed to a hearing following ADR (if statistics are available on the appellant's gender and country or origin, please provide the breakdown);*
 - *The average processing time and sitting time of appeals resolved through the IAD's ADR process;*

** Please limit request to appeals between 2001 and 2014, **If statistics are not maintained based on the categories listed in 4 above, please provide statistics based on other available categories, as appropriate, or disregard and amend 5 to provide statistics regarding the number or percentage of total claims that were sent to ADR during the relevant period.*

3. *Documents regarding IAD members that facilitate ADR, including but not limited to, names, professional background, political affiliation, training processes, qualifications, appointment, hiring or selection processes and/or criteria, job descriptions, salary, protocols, evaluations, directives (including in particular requests by observers for permission to attend an ADR session), memoranda, bulletins and reports).*
4. *Any unreported decisions and reasons that were prepared following the resolution to attend an ADR appeal through ADR.*
5. *A copy of the complete report prepared by Ms. Leslie H. Macleod entitled "Assessing Efficiency, Effectiveness and Quality", released in or around March 2002, including any summaries, notes, comments, memoranda, amendments, research, action plans, or similar documents related thereto."*

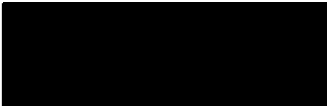
The processing of your request is now complete. Please note that certain information has been exempted pursuant to section 19(1) of the *Act*.

As the Canada Border Services Agency is committed to providing the highest level of client service, we would be pleased to assist you with any questions or concerns you may have regarding the handling of your request. You may contact Dany Lapointe at 613-952-3532 or by email at Dany.Lapointe2@cbsa-asfc.gc.ca, using our file number as a reference.

Should you be dissatisfied with the processing of this request, you may file a complaint within sixty days of receipt of this notice to the Information Commissioner of Canada by writing to:

Office of the Information Commissioner of Canada
30 Victoria Street
Gatineau, Québec K1A 1H3

Yours truly,


Alain Belléville
Manager
Access to Information and Privacy Division
410 Laurier Avenue West, 10th Floor
Ottawa, Ontario K1A 0L8

Enclosures: A copy of the section cited
A copy of the release package to the applicant

APPENDIX B: STATISTICS¹

1) Total number of sponsorship claims appealed to the IAD of the IRB:

2001	3,452
2002	3,817
2003	4,786
2004	4,490
2005	4,695
2006	5,009
2007	5,636
2008	4,945
2009	4,869
2010	5,076
2011	4,533
2012	3,727
2013	3,436
Jan to Mar 2014	1,025

2) The number of appeals sent to ADR by the IAD that resulted in withdrawal by the appellant:

	Pre-ADR	ADR	Total Withdrawn
2001	53	91	144
2002	39	66	105
2003	90	151	241
2004	77	118	195
2005	22	74	96
2006	21	111	132
2007	33	103	136
2008	41	292	333
2009	51	199	250
2010	57	149	206
2011	44	170	214
2012	23	133	156
2013	11	75	86
Jan to Mar 2014	3	19	22

¹ As noted in the body of this thesis, these statistical tables were released by the Immigration and Refugee Board of Canada as part of Access to Information Request #A-2014-00081. See also Appendix A.

3) The number of appeals sent to ADR by the IAD that resulted in a recommendation by Minister's counsel that the appeal be allowed:

	Pre-ADR	ADR	Total Allowed
2001	16	535	551
2002	11	392	403
2003	67	695	762
2004	73	734	807
2005	16	697	713
2006	16	926	942
2007	18	893	911
2008	9	968	977
2009	12	892	904
2010	9	748	757
2011	3	614	617
2012	5	446	451
2013	4	306	310
Jan to Mar 2014	0	89	89

4) The average processing time (in months) of appeals resolved through the IAD's ADR process:²

2001	n/a
2002	n/a
2003	n/a
2004	n/a
2005	n/a
2006	n/a
2007	n/a
2008	7.9
2009	7.9
2010	6.3
2011	6.6
2012	7.5
2013	9.5
Jan to Mar 2014	n/a

² For this statistical table, the IRB provides the caveats that “[average processing time] covers 97-98% of sponsorship appeals” and “[average processing time] for ADR was first captured in 2008”. See *ibid.*

5) The average processing time (in months) of appeals sent directly to an IAD hearing, without ADR:

2001	6.1
2002	6.5
2003	6.6
2004	7.3
2005	8.4
2006	8.5
2007	8.7
2008	9.7
2009	10.7
2010	11.2
2011	10.7
2012	12.5
2013	14.1
Jan to Mar 2014	13.0

6) The average processing time (in months) of appeals that proceeded to an IAD hearing, following an unsuccessful attempt at ADR:

2001	10.3
2002	10.1
2003	10.7
2004	12.2
2005	14.9
2006	15.3
2007	14.4
2008	16.8
2009	18.3
2010	19.6
2011	20
2012	19.5
2013	23.2
Jan to Mar 2014	23.4

**APPENDIX C:
ALTERNATIVE DISPUTE RESOLUTION PROGRAM PROTOCOLS¹**

¹ This cover page is intentionally left blank. The document to follow is a copy of the IRB’s “Alternative Dispute Resolution Program Protocols” (13 January 2003). This version of the protocols was downloaded and saved to PDF from the IRB website on or about 15 April 2014. At the time, it was available on the IRB website as a link to the page “Alternative Dispute Resolution at the Immigration Appeal Division” (3 October 2003), online: IRB <<http://www.irb-cisr.gc.ca/Eng/ImmApp/Pages/IadSaiAdrMarGuideApp.aspx>>. As noted in the body of the thesis, it appears to have been removed from the IRB website and is no longer available online. Informal discussions with IAD staff suggest the protocols are in the process of being revised. It is included herein for the reader’s ease of reference, without affiliation or endorsement from the IRB.

Immigration and Refugee Board of Canada

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> [About the Board](#)

> [Legal and Policy References](#)

> [Legal References](#)

Alternative Dispute Resolution Program Protocols

Amended: January 13, 2003

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PROTOCOLS

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[Opting-In](#)

[Opting-Out](#)

PROTOCOL - MEETING PARTIES

Toronto

- Check the assigned Alternative Dispute Resolution (ADR) room to confirm that Minister's counsel has arrived. Substantive issues relating to the case should not generally be discussed at this point.
- If an interpreter has been ordered, check for attendance. If the interpreter has not arrived, ask the Case Clerk to call the Interpreter's Unit.
- Shortly before the ADR Conference is scheduled to begin, go to the 2nd floor reception to call the Appellant (and counsel, if the Appellant is represented).
- Escort the Appellant and counsel to the ADR room.
- If the Appellant (and/or counsel, if represented) has not arrived on time, check at reception every five minutes until arrival or a period of thirty minutes has elapsed.
- If the Appellant (and/or counsel, if represented) arrives late, remind them of the importance of a timely start.
- If the Appellant arrives but counsel does not, seek the direction of the party as to whether he or she wishes to proceed. Determine whether, in the circumstances, it is appropriate to proceed.
- If the Appellant does not arrive (or counsel does not arrive and he or she is a necessary participant) consider, as appropriate:
 - calling the Appellant or counsel's office;
 - rescheduling to another date;
 - treating the case as a "no show" and referring to "no show" court.
- If Minister's counsel does not appear, call the Citizenship and Immigration Canada (CIC) office at [telephone number].
- If a support person or observer presents, handle in accordance with "Protocol - Support Persons and Observers."
- When all necessary participants are in the room, begin the ADR Conference.

The procedure is as above, except:

- Minister's counsel proceeds to the ADR room.
- After receiving notification that the Appellant (and counsel) have arrived, escort the participants to the ADR room on the other floor.
- If Minister's counsel does not appear, call the CIC office at [telephone number].

PROTOCOL - SUPPORT PERSONS AND OBSERVERS

Support Persons

Note: "Support Persons" refer to those other than counsel. Given the nature of the ADR process and the limited time available, support persons will not generally participate in the ADR conference. If they are involved, their participation should generally be restricted to answering questions.

- If a support person arrives, deal with their role at the outset.
- Explain that ADR is generally limited to the parties and their representatives and ask the party who brought the support person what the support person's intended role is. The role sought may or may not be appropriate in the circumstances.
- The party may request, for example, that the support person:
 - Participate fully in the ADR session (including speaking in plenary and in caucus);
 - Support the party throughout the ADR session but not play an active role (not speaking in plenary and/or in caucus);
 - Be available for support in caucus only;
 - Be available for support outside the ADR process (for example, by waiting in reception).
- If the party indicates that the support person is there to provide support outside the ADR process, invite the support person to wait in reception and advise that, subject to confidentiality requirements, the party may access the support person during breaks.
- Consider, as appropriate, informing Minister's Counsel of support persons whom the Appellant advises will not be coming into the room but will be waiting in reception.
- If the party wants to pursue having the support person participating in the ADR session or supporting the party in plenary and/or in caucus, ask the support person to sit outside while the issue is discussed. Further explain that Minister's counsel must agree to any degree of involvement of the support person.
- Ask Minister's counsel for his/her views.
- If Minister's counsel consents, advise the support person and proceed. Note that the support person's involvement should not generally involve participation at the table beyond answering questions asked of them. The support person should make an undertaking to that effect.
- If Minister's counsel does not consent, explore whether there is some way to accommodate the interests of the Appellant and Minister's counsel.
- If there is no agreement, exclude the support person. Given the time limitations on ADR sessions, deal with the issue as expeditiously as possible.
- If a support person is involved, ensure that s/he agrees to be bound by confidentiality.

Observers

- If an observer (for example, government official, consultant, or student) requests permission to attend an ADR session, consider the merits and advise.
- If you grant permission, explain that their attendance is conditional upon the approval of the parties and counsel.
- Advise observers that they must not speak or disrupt the ADR in any way and that they must keep any identifying information confidential.
- Seek permission from the parties either in advance of the mediation or upon meeting them at the outset of the ADR Conference and explain the purpose of the observation.

PROTOCOL - OPENING STATEMENT BY DISPUTE RESOLUTION OFFICERS (DROs)

The opening statement made by DROs serves two principal purposes:

- sets the tone for the session and puts the parties and representatives at ease; and
- conveys critical information about the ADR process.

The opening also serves to reduce the power that resides in the Minister's counsel. Noted below are key areas that must be addressed. The italicized portions provide suggested language. DROs should maintain adherence to this language as much as possible to provide consistency in:

- the way in which they conduct ADR sessions; and
- the way in which ADR sessions are conducted generally by DROs within the Immigration Appeal Division (IAD).

Welcome and Introductions

- Welcome parties and representatives.
- Introduce yourself and invite all participants to introduce themselves to each other.
- Address participants by their surnames.
- I'm going to tell you about the ADR process and our various roles and ask some questions of both parties. When I'm finished, Minister's counsel will likely want to ask the Appellant some questions.

Nature of the ADR Process

- This ADR process is provided by the IAD to give you an early opportunity to resolve your case. For the Appellant, it's a chance to tell your story. For Minister's counsel it's an opportunity to review and discuss information relevant to the case.
- If your case does not resolve through ADR, your rights to a hearing are not affected by participation in this ADR session.
- The ADR process is informal.

Roles of the Participants

- As DRO, my role is to assist the parties in discussing the issues raised by the refusal.
- I will not decide the outcome of this case. I will assist the parties to discuss the case objectively and impartially.
- I am a member of the IAD. I am not employed by Citizenship and Immigration Canada (CIC) as Minister's counsel is. If this case goes to hearing, another person will hear it without receiving information from me. The hearing will be a fresh start.
- I may, however, provide you with an evaluation of the case - what I think would happen if the case went to hearing.
- Please feel free to ask questions of me now or at any time.
- *Minister's counsel* is the representative of the Minister of CIC who is required to uphold the immigration laws of Canada and has discretion to decide whether to recommend that this appeal be allowed.
- The original decision refusing the Applicant was made by a visa officer overseas - not by Minister's counsel.
- *Appellants* are encouraged to participate fully in the ADR session by providing relevant information and discussing the merits of their case with Minister's counsel.
- *Appellants' counsel* are also encouraged to play a meaningful role by supporting the Appellant, assisting the Appellant to bring forward information that would be helpful, and providing their perspective on the case.

Confidentiality

- [Hand out sheet entitled "Explanation of Confidentiality"].
- The ADR session is confidential. What is said and produced for the ADR session is not to be used by one party against the other if the case goes to hearing.
- For example, Minister's counsel cannot introduce something said at the ADR Conference to cross-examine the Appellant at a hearing. However, information you provide can be disclosed if it is independently available, relates to an offence under Canadian Immigration legislation or a breach of the Immigration Appeal Division Rules, or you consent.
- Each participant is free to take notes. Minister's counsel and the Appellants' counsel may share notes or other information with their colleagues. My notes will not go into the hearings file. You should not use laptop computers or recording devices for purposes of taking notes during an ADR Conference unless I am satisfied that special circumstances exist.
- Do you have any questions about what I have said or about the sheet entitled "Explanation of Confidentiality"?

Caucus

- I will likely caucus (have a private meeting) with each party at some point during the ADR session.
- Caucuses are used most often to discuss each party's views about the prospects of settlement and options for settlement.

- I may share what you say to me in caucus with the other party if I think it would be helpful unless you specifically ask me to keep certain information confidential.
- Feel free to ask for a caucus with me at any time or, Appellant, to request a private meeting with your counsel. Anything you say at that meeting is completely confidential.

Potential Outcomes

- There are a number of potential outcomes in this case.
- If Minister's counsel is satisfied with the information provided, s/he will recommend that the appeal be allowed and the sponsorship application will continue to be processed. The standard that Minister's counsel will use is the likelihood of the case being allowed at a hearing.
- The recommendation is subject to the approval of the tribunal.
- If Minister's counsel is not satisfied, the Appellant has two choices; namely, to withdraw the appeal or to proceed to hearing.

Other Matters

- The ADR session has been scheduled for approximately one hour. If you need a break at any point, please let me know.
- The session will work better if parties listen carefully to each other. If you have a question that comes to mind while the other person is speaking, please hold it until the other person is finished.
- Are there any questions about the process?

Introductory Questions

- Questions must be tailored to the case. The following are examples:
- For Appellant:
 - Why is it important to you that your relative come to Canada?
 - Tell us about your relationship and how it developed.
 - What is your understanding as to why your sponsorship application was refused? What is your understanding of the issues?
- For Minister's counsel:
 - What are your main concerns in this case?
 - Why is it important that we canvas this case thoroughly?

EXPLANATION OF CONFIDENTIALITY

ADR is a confidential process. If your case does not settle through ADR, what is said during the ADR process cannot be used by either party against the other during the hearing. However, information you provide can be disclosed if it is independently available, relates to an offence under Canadian Immigration legislation or a breach of the Immigration Appeal Division Rules, or you consent.

Documents that you use for the ADR Conference will not go on the hearing file unless you agree. Each participant may take notes at the ADR Conference. Your counsel and Minister's counsel may share the information they get through this process with their colleagues. DROs will not share information with members who could hear your case if it does not resolve. An agreement to resolve is not confidential.

PROTOCOL - OVERCOMING IMPASSES

You may encounter impasses during the ADR session. Impasses may occur at any stage of the process. They may be caused by psychological unwillingness to settle a dispute, lack of trust, poor communication, unrelated interests, intransigence, the undesirability of solutions under consideration etc. Impasses may be overcome through the actions of the parties or through your assistance. Some of the techniques useful for overcoming impasses include:

- Improving lines of communication
- Reality-checking
- Caucusing
- Option generation
- Adjournment
- Use of outside expert/evaluator
- Modifying the dispute resolution process

PROTOCOL - CAUCUSES

Caucuses are generally held because of internal dynamics relating to:

- Substantive issues (e.g., seeking private evaluation from DRO, highlighting concerns about other party's case, exploring options, breaking impasses);
- Process issues (e.g., educating a party about the process; exploring any discomfort with the process, addressing improper conduct, preventing premature commitment to a position);
- Relationship issues (e.g., to provide relief when emotions are running very high).

Practice Guidelines:

- In your opening statement, advise the parties of the possibility of caucusing, describe a caucus, and explain the confidentiality rule (see "Protocol - Opening Statement by DRO").
- Hold as much of the ADR session as possible in plenary. Hold caucuses when one is requested by a party or counsel or when you have a particular reason for holding a caucus. You should generally refrain from holding caucuses until the parties have had a sufficient opportunity to interact and develop rapport.
- If you caucus with one party, ensure that you caucus with the other party afterwards.
- If a party asks to caucus alone with his/her counsel, arrange for such as soon as is practicable.
- Similarly, if a party asks to caucus with you, arrange for such as soon as is practicable.
- If a party is represented, caucus with party and counsel together unless they request otherwise. If you think it is necessary to speak to counsel alone (e.g., to speak about a conduct issue), ensure that the client is agreeable.
- When you decide to caucus with one party, take the following steps:
 - Announce in plenary that you are going to hold a caucus;
 - Identify the party you will meet with first;
 - Describe the purpose of the caucus;
 - Estimate the length of time you intend to spend in caucus; and
 - Provide some suggestions as to what the other party might consider while you are away.
- In each and every caucus session, repeat the confidentiality rule and clarify it if asked. Advise that you may share information provided in caucus with the other party if you think it will be helpful, unless the party specifically instructs you not to. If the parties are hesitant about the confidentiality rule, advise parties that they are free to select a confidentiality rule that requires you to obtain their approval before sharing information if they prefer.
- In accordance with general practice, evaluations should generally be delivered in caucus to allow the strengths and weaknesses of each party's case to be reviewed privately.
- You will generally initiate a caucus with Minister's counsel first.
- When caucusing with Minister's counsel, ask for his/her view of the case before offering any comments yourself.
- Provide an evaluation if requested by Minister's counsel. If it is not requested, offer to provide one if appropriate.
- Do not provide legal advice. You may provide legal information about particular legislative provisions or case law or your view of the likelihood of success if the case proceeds to hearing, but should not advise parties as to how to proceed in the particular circumstances of their case. You may suggest options for resolution if the party is amenable to them.
- If the caucus session extends beyond the time you estimated, advise the Appellant of your revised estimate.
- Ensure that you caucus with the Appellant no matter what action you expect Minister's counsel to take. This is an important component of the obligation to act in an impartial and even-handed way.
- If Minister's counsel has concerns about the case, use the caucus with the Appellant to relay Minister's counsel's concerns and enquire as to whether there is any additional information to share.
- If additional information is provided, either take it back to a caucus with Minister's counsel to discuss or return to plenary to canvas.
- If Minister's counsel does not have concerns and is prepared to consent, caucus with the Appellant to advise as to the process.
- Provide an evaluation if requested by the Appellant or counsel. If it is not requested, offer to provide one if appropriate.
- Each time you complete a caucus with a party, advise the other party (within the bounds of confidentiality) of what was accomplished in the previous caucus. This need not be a full restatement of what was said in caucus.
- Request that Minister's counsel return to the plenary session following the final caucus whether or not they are willing to share much information from caucus.¹⁹¹
- In plenary, invite Minister's counsel to advise the Appellant as to his/her view of the case and whether s/he

will consent or not. Minister's counsel should provide a view of the case, in general terms. If not prepared to consent, Minister's counsel may, for example, indicate that there are credibility issues without giving details as to inconsistencies.

- If there is no consent and withdrawal merits discussion, Minister's counsel should remain.
- It is preferable that Minister's counsel also remain for scheduling.
- If the Appellant wishes a debrief, Minister's counsel can be released.

PROTOCOL - SUMMARIES OF AGREEMENT

- During the opening statement, the DRO is to explain that if Minister's counsel agrees to recommend a consent to the appeal, a Summary of Agreement form must be completed and taken to a tribunal member for endorsement in the form of an order to check for completeness and correctness.
- If Minister's counsel consents to an appeal at the ADR session, a "Summary of Agreement" form is prepared by the DRO in consultation with the parties, to reflect the reasons for the consent.
- The Summary of Agreement is a form of recommendation to the IAD.
- The appeal still has to be allowed through an order signed by a member of the IAD in chambers.
- The member who reviews the agreement must not have been the DRO in the case or have had any involvement in it. The separate roles of members as DROs and as decision-makers must be preserved.
- The main reason for drafting the Summary is to ensure transparency in decision-making. The document is also used by CIC to provide the visa post with a rationale for consenting to the appeal.
- The integrity of Canadian Immigration legislation is central to the public interest.
- The tribunal member reviews Summaries of Agreements to ensure that the public interest is served. This does not involve a file review or invite the member to substitute his or her view.
- The member is to:
 - ensure that the issues and facts have been adequately addressed and are set out in the document;
 - ensure that there has been no error in law; and
 - ensure there is nothing egregious on the face of the document.
- The DRO is to draft the Summary of Agreement form in accordance with the agreed terms of settlement. The DRO should receive input from both of the parties and counsel and check the document for completeness and correctness.
- If the ADR session results in a withdrawal, the withdrawal form must be completed. No substantiating information needs to be provided.
- If Minister's counsel recommends that the appeal be allowed, sufficient information to justify that recommendation must be provided in the Summary of Agreement.
- If Minister's counsel agrees to recommend the appeal be allowed on certain conditions within a period of time, Minister's counsel may provide the requisite information.
- If a Summary of Agreement is contemplated, the DRO should advise parties at the ADR session that the Summary of Agreement will remain on the IAD file and is accessible as are other IAD documents.
- If requested, the DRO should provide a copy of the Summary to the Appellant.
- This practice is to be periodically reviewed by the IAD to ensure that it is in accordance with governing legislation and policy.

PROTOCOL - OPTING-IN

- For case types outside the mandatory program, both parties are required to consent to a case's inclusion.
- If fewer than 100% of cases within designated case types are selected, opting in is allowed on the application of either party.

PROTOCOL - OPTING-OUT

- It is recognized that some cases may be unsuitable for ADR.
- Parties may mutually opt out of ADR no less than ten days prior to the scheduled ADR Conference date upon approval by a designated IAD official.
- The party wishing to opt out must contact the other party.
- If the other party consents to opting-out, the instigating party must file a notice of mutual agreement with the IAD for consideration.
- The IAD must respond within five days.
- The IAD may relieve against time limits in appropriate circumstances.
- If the other party does not consent to opting-out or if the IAD denies the request to opt out, the case proceeds to an ADR Conference.
- The rate of opting out will be monitored carefully by the IAD and if it exceeds more than 20% in any three-

month period or it appears to be abused, its continuation will be reviewed by the IAD.

- The following criteria will be considered by the IAD in the exercise of its discretion as to whether or not to allow the opting-out:
 - Whether there is a serious legal, constitutional, or Charter issue;
 - The novelty of the issue(s);
 - Whether the case is likely to establish an important precedent;
 - How significant the public interest issues are;
 - Any impediment(s) to the attendance of the Appellant at an ADR Conference; and
 - Whether the parties have made genuine efforts to resolve the case through prior discussion.
- Opting-out will be limited to those cases in which ADR is clearly not the most appropriate dispute resolution process.

Related Links

- [Appellants' Guide to ADR Conference Re: Sponsorship Appeals](#) *(October 2003, revised October 2006)*
- [Appellants' Guide to Alternative Dispute Resolution \(ADR\) Conference Re: Sponsorship Appeals Addendum Marriage, Common-law or Conjugal Partner Cases](#) *(October 2006)*
- [Appellants' Guide to Alternative Dispute Resolution \(ADR\) Conference Re: Sponsorship Appeals Addendum Sponsors Minimum Necessary Income \(MNI\)](#) *(October 2006)*
- [Assessing Efficiency, Effectiveness and Quality: An Evaluation fo the Alternative Dispute Resolution \(ADR\) Program](#) *(October 2003)*
- [Alternative Dispute Resolution \(ADR\) at the Immigration Appeal Division](#) *(October 2003)*

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