After reading this chapter, you should be able to:

- Identify key federal organizations involved in deciding immigration, citizenship, and refugee protection matters.
- Understand that the power and authority to make decisions concerning immigration and refugee matters is based in law.
- Distinguish among the functions of Immigration, Refugees and Citizenship Canada (IRCC), the Canada Border Services Agency (CBSA), the Immigration and Refugee Board (IRB), and the courts.
- Learn about the decision-making roles of officials, including the ministers and their designates of the IRCC and Public Safety and Emergency Preparedness (PSEP), and decision-makers of the IRB, including the chairperson and members.
Introduction

You ask your instructor what you believe is a simple immigration question about a relative who is trying to immigrate to Canada or a friend who is visiting. Why has immigration rejected your relative’s application or why can’t your friend who is visiting work in your restaurant? Do not be surprised if your instructor answers “it depends” or asks you questions in return. Why can’t anyone give you a straight answer? Because on the one hand, immigration is about people and their unique stories; on the other hand, it is a system of laws, regulations, and lots of rules, so a one-size answer does not exactly fit all. Moreover, the rules change, so what was true for your parents, grandparents, and anyone who immigrated to Canada years ago is likely not true today.

Canadian immigration and refugee laws and related processes are complex and subject to frequent changes. Sometimes finding which organization is responsible for a client’s case can also present a challenge for the legal professional, because despite being identified by a unique client ID number with “the immigration department,” a client may have more than one issue to resolve based on their history with “immigration” and how much progress has been made with their application and the decision-making processes. For example, the friend who was working with you at the restaurant tells you she needs to extend her visa because it has expired. Sounds simple enough, but the rules say you cannot extend something that has expired. And if your friend did not have a work permit, she was working illegally. When you find out your friend was using someone else’s identification and SIN … well you now see the case is not simple. It is therefore imperative that a legal professional ensures they have the full facts of a client’s case, and understands which organizations and which appropriate officials will be making decisions.

Chapter 1 set the foundation for various sources of law governing the complexities of Canadian immigration. Now we consider one more piece of the puzzle: the role of decision-makers in immigration and refugee matters. Who makes decisions on cases? What decision-making powers do they have? Where do they get that authority? While you will not find the answers to your questions about your relative or friend in this chapter, you may begin to see why providing advice on immigration and refugee matters is not straightforward. In this chapter, we look at the following three levels of decision-making:

1. the ministers, including officers who work for IRCC and the CBSA;
2. the four divisions of the IRB and tribunal decision-makers; and
3. the courts.

We examine (1) who within the IRCC, the CBSA, and the IRB has the authority in law to make decisions; (2) where to find the source of their jurisdiction to make decisions; and (3) what relationships exist among the three levels of decision-making.
Ministers Responsible for Immigration and Refugee Matters

Section 4 of the Immigration and Refugee Protection Act (IRPA) divides responsibility for immigration and refugee functions among three ministers:

- the minister of IRCC (s 4(1));
- the minister of PSEP (s 4(2)), who is responsible for the CBSA; and
- the minister of Employment and Social Development (ESDC) (s 4(2.1)), who has responsibilities related to employers and labour-market impact assessments.

The following descriptions of ministerial authority relate either to the minister of IRCC or to the minister of PSEP.

Ministerial Authority and Decision-Making Powers

The minister of IRCC heads the department of the same name and is responsible for general areas of immigration, refugees, and citizenship, including the following:

- the development of immigration policy, including guidance to staff about how to carry out their functions and apply legislation;
- an annual plan that sets out the target numbers for immigration;
- immigration programs related to temporary and permanent immigration;
- the settlement and integration of newcomers to Canada;
- the resettlement of refugees;
- policies related to admissibility; and
- policies related to citizenship.

The minister of PSEP heads the department called Public Safety Canada and takes the lead in developing policy related to immigration enforcement functions, such as those carried out by the CBSA. With respect to immigration-related matters, these functions include the management and operation of Canada's borders, in which the following are involved:

- arrests,
- detentions,
- removals, and
- port-of-entry functions.

The IRPA grants broad regulatory power to Cabinet through the governor in council to make rules and regulations in the form of orders in council. This enables the government to respond quickly to adapt the Act’s broad provisions to changing circumstances. As noted in Chapter 1, regulations set out standards and criteria for...
selecting qualified immigration applicants and cover a broad range of definitions. Generally speaking, the regulations can easily be amended by an order in council. For example, the regulations that stipulate the processing fees for the different types of applications for permanent and temporary resident visas can be increased or reduced, or the various categories within the economic classes of immigrants that set out specific criteria within each class can be changed, added to, or repealed.

In some cases, the minister of IRCC is required to table proposed regulations before each House of Parliament (the House of Commons and the Senate) so that these proposals can be referred to the appropriate committee of that House. This is required when the proposed regulations relate to provisions in the following areas:

- examinations;
- rights and obligations of permanent and temporary residents;
- status documents;
- loss of status, and removal, detention, and release;
- examination of eligibility to refer a refugee claim;
- the principle of non-refoulement (which is the principle of international law according to which refugees or asylum seekers should not be forced to return to a country in which they are liable to be subjected to persecution); and
- transportation companies (s 5(2)).

The proposed regulation need only be tabled once; it does not have to be presented to each House of Parliament again, even if it has been altered (s 5(3)). As a result, amendments can be made without further examination by Parliament.

The IRPA empowers the minister to make decisions on a variety of matters and to delegate specific powers and decisions to others.

**Immigration Policy and Administrative Functions**

The minister of IRCC is responsible for immigration policy development and immigration processes. One example of immigration policy is in deciding how many new immigrants to allow each year. The minister of IRCC must consult with the provinces but is responsible for setting the annual targets, including the number and types of foreign nationals who may come to Canada either as temporary or permanent residents, and must table the annual immigration report to Parliament each year on or before the first of November.

The minister of IRCC also determines eligibility requirements for foreign nationals, such as the minimum standards they must meet in order to qualify as permanent residents. An example of such a requirement is the “pass mark” for the point system for federal skilled workers (discussed in Chapter 8, Economic Classes).

Under the regulations to the IRPA, each minister has administrative authority over specific areas. For example, the minister of PSEP can designate ports of entry and their dates and hours of operation.
Ministerial Power and Discretion

Section 87.3 of the IRPA sets out discretionary powers and authorizes the minister to issue operational bulletins and ministerial instructions (MIs; see IRPA, s 14.1) that directly affect the daily work of officers (IRCC officers and CBSA officers) in their processing, selection, and intake of cases. This is a rather unusual power, as ministers do not typically participate in the operations of their departmental activities in such detail. Section 87.3(2) states the following: “The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada.” Furthermore, the minister may issue MIs to staff about the processing of applications and requests—their categorization, priority, and even their numbers (IRPA, s 87.3(3)).

The minister may also issue operational bulletins (OBs) to provide guidance and advice to officers in the exercise of their functions and in applying the IRPA, the Citizenship Act, and the related regulations. The OBs may update or replace operational manuals. The fact that they are published on the CIC website means that the public and legal professionals may also have access to them, and can therefore stay abreast of changes to programs, application criteria, and processing procedures.

Under Canadian immigration law, the minister decides whether a person is allowed to enter (is admissible) or to remain, or is to be removed from Canada (see Chapter 3). The minister also has the discretionary power to grant temporary and permanent resident status to foreign nationals on humanitarian and compassionate grounds. This power may be exercised on behalf of both those who wish to come to Canada and those who are already here and wish to remain here but are inadmissible for technical, medical, or criminal reasons.

For example, you may have heard in the media about cases involving a child in need of life-saving surgery that is not available in her home country. How is it that this child may come to Canada for medical treatment if she is not healthy enough to pass the required medical examination? In such a case, the minister of IRCC may exercise his discretionary powers to allow the child entry to this country. Although the child would not normally meet the statutory requirements for admission to Canada, the reasons for allowing her entry to Canada are compelling enough for the minister to grant temporary authorization. The minister may issue a temporary resident permit—formerly known as a “minister’s permit”—that is valid for a specified and limited period of time, and that can also be cancelled.

Security Certificates

In exceptional circumstances, a security certificate may be issued for the purpose of removing from Canada a permanent resident or foreign national. This may be done where there is reason to believe that this person poses a security threat and there is information that needs to be protected for security reasons. The security certificate’s purpose is to ensure that the government’s classified information remains confidential: it has the effect of closing the proceedings to the public and ensuring
the non-disclosure of information that could seriously harm the government’s ability to protect its citizens.¹

On February 14, 2008, Bill C-3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, received royal assent. This Act was introduced in response to the 2007 Supreme Court ruling in Charkaoui v Canada² that additional safeguards should be incorporated into the security certificate process to enhance the protection of the rights of individuals subject to a certificate. This amendment provides that a special advocate must be appointed to act on behalf of such individuals.

When, in a case involving the removal of a permanent resident or foreign national, there is information that needs to be protected for security reasons and there is reason to believe that the person in question poses a security threat, both the minister of PSEP and the minister of IRCC, under section 77(1) of the IRPA, must personally sign a security certificate. This power must not be delegated, because a closed process necessarily lacks transparency and public accountability.

The certificate is then referred to the Federal Court, where, in a closed security certificate hearing, a judge hears evidence, in the absence of the person named, regarding the need to protect national security or the safety of any person. The judge also hears evidence from the person named in the certificate. If the judge decides that the certificate is reasonable, then the certificate automatically becomes a removal order (IRPA, s 80).

**Delegation of Authority**

The IRPA allows certain ministerial powers, duties, requirements, and authorities to be delegated for the purposes of ensuring that Canada’s immigration, refugee-protection, and citizenship programs are delivered efficiently. The minister’s delegation of authority to others is necessary because of the sheer volume of immigration, refugee, and citizenship cases. Generally, whenever the word “officer” is used in the IRPA or its regulations with respect to a power, duty, requirement, or authority, it is because the minister has the authority to designate officers to assume these responsibilities. The ministers of IRCC or PSEP may both delegate their powers and designate officers to enforce certain provisions of the IRPA and its regulations with regard to their respective mandates.

An officer is a public servant defined under section 6(1) of the IRPA. There are several types of officers, including but not limited to visa officers, examining officers, immigration officers, senior immigration officers, and CBSA officers. The minister also has the authority (1) to designate certain RCMP officers to carry out immigration functions at ports of entry, and (2) to delegate to panel physicians (formerly known as “designated medical officers”) the authority to carry out physical and mental examinations. The minister’s delegation of authority must be made in writing and must specify the powers and duties of the designated officers (IRPA, ss 6(1), (2)).

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Most of the powers that the IRPA vests in the minister in relation to the application of the law are delegated to officers through IRCC’s Designation of Officers and Delegation of Authority instrument, which is signed by the minister and updated regularly (see the Publications and Manuals page on the IRCC website). This instrument includes a description of the duties and powers granted to officers working for IRCC, the CBSA, and other agencies. It also includes a section setting out authorities that have not been delegated. For authorities under the specific mandate of the minister of PSEP—for example, authorities related to designating officers as peace officers—there is a separate designation and delegation-of-authority instrument, signed by the president of the CBSA.

**Officers**

As noted above, officers are public servants who work either for IRCC or for the CBSA and are responsible for the delivery of the immigration program both at Canadian missions abroad and at national, regional, and local offices across Canada. Officers who work for IRCC hold a number of positions and carry out a variety of duties, including the following:

- processing applications for temporary residence (such as authorizations for visitors, students, and temporary workers), permanent residence, refugee resettlement, and citizenship;
- providing settlement and integration services for newcomers;
- conducting research;
- reporting and analyzing international trends with respect to migration, refugees, and social policy, which are used to formulate government policy; and
- developing policy and programs.

CBSA officers carry out a variety of duties related to immigration, including the following:

- examining people at ports of entry;
- detaining people who may pose a threat to Canada; and
- removing people who are inadmissible to Canada, including those involved in terrorism, organized crime, war crimes, or crimes against humanity.

Under the IRPA, officers have the power to examine people, perform searches and seizures, and exercise the powers of a peace officer (IRPA, s 139). What follows is a general overview of officers’ authorities both outside and inside Canada.

Note that officers, in their decision-making role, must follow the principles of natural justice by practising impartiality and respecting an applicant’s right to be heard. Generally, it is up to the officer who is examining a person or considering an application (and examining the application’s evidence and documents) to make the decision. In certain circumstances, however, one officer may read, hear, and evaluate all the pertinent information and then submit a report to another officer, who will make the decision. This exception to the rule in administrative law that “the one
who hears must decide” is allowed as long as the decision-maker takes all the information into account. Subsequent chapters in this text will provide further information regarding an officer’s authority to make decisions with respect to applications.

**Before Entry: Examination on Application**

Generally, the officers who work abroad and assess applications at visa offices or consulates are called **visa officers**; CBSA officers working at ports of entry, such as the Canada–US border, airports, or harbours, may have titles such as “border services officer” or “enforcement officer.” Generally, a person seeking to come to Canada must apply for and obtain permission, in the form of a visa, before appearing at a port of entry. Under Canadian immigration law, this permission comes from the minister, who decides whether individuals are allowed to enter because they meet the eligibility criteria and are not inadmissible. In practice, however, the decision-making related to reviewing an application is delegated from the minister to an officer who is working in a visa office abroad, at a port of entry, or at an immigration office within Canada.

A person who wishes to come to Canada must apply for temporary or permanent residence, usually before arriving, and usually by submitting a written application. Written applications must be made by means of forms provided by IRCC. Applicants must follow instructions to ensure that the applications are complete and are accompanied by the necessary supporting documents, that the appropriate fees are paid up front, and that the applications and supporting documents have been submitted to the appropriate office. There are exceptions to the general rule—for example, where an application may be at a port of entry, or where an application may be made from within Canada (described in later chapters).

Whether a person applies abroad, at a port of entry, or from within Canada, their application must be assessed by an officer who is authorized to examine the person (IRPA, s 15(1)) about their admissibility. The officer decides whether the person qualifies under the program to which they applied, such as a sponsored person under the family class or as a federal skilled worker, and whether the person has the right to enter Canada.

Visa officers typically review written applications, ensure their completeness, and evaluate the information provided. They may also interview applicants. CBSA officers typically carry out their duties orally at a port of entry, through examination procedures by questioning the person and eliciting information—for example, about citizenship, residency, intention, employment, and length of stay.

Consider the case of Gautem Patel, a citizen of India who wishes to apply for Canadian permanent residence under the economic class, as a federal skilled worker. The process of reviewing Gautem’s application and examining him in order to decide whether to grant him a permanent resident visa involves several officers, each of whom has a distinct decision-making authority. For example, a visa officer will review Gautem’s application along with his supporting documentation and decide whether Gautem meets the regulatory definition of a federal skilled worker and whether there are any grounds of inadmissibility that would bar Gautem from Canada, while a CBSA officer will examine Gautem when he arrives at a port of entry. The
details of the application procedures for specific immigration programs are explored in later chapters. (See, for example, the Patel scenario under the heading “Federal Skilled Workers” in Chapter 8.)

**Examination at Port of Entry**

The events of September 11, 2001 refocused official efforts to protect the country against terrorists. At times, these efforts reduce the openness and efficiency of cross-border movement that travellers had previously enjoyed. The functions performed by the CBSA reflect these protective efforts. CBSA officers decide who is allowed to enter Canada, who should be detained under the IRPA, and who should be removed from Canada. Every person is examined at a port of entry by an officer who has the authority to allow them entry as Canadian citizens or to admit them as temporary or permanent residents. Section 28 of the Immigration and Refugee Protection Regulations provides that all persons who seek to enter Canada are deemed to be making an application and are therefore subject to an examination. Officers can compel applicants to answer questions; to provide relevant documents, photographs, and fingerprints; and to submit to medical examinations. Officers are required to act in an adjudicative capacity, which means that they must be unbiased in their assessments and evaluations. They render binding decisions after reviewing and considering information that is received as evidence.

**IN THE NEWS**

**Search and Seizure at the Borders**

At the border, CBSA officers are authorized to search travellers and their belongings, including their baggage and electronic devices. They have the power to examine the contents of those devices, including personal files such as photos and email. Travellers have reduced expectations of privacy at the border, but as personal electronic devices have become more commonly used and their users’ expertise has grown, many travellers have been trying to make sure that their information stays private by setting passwords and encrypting their devices.

Recently, CBSA officers’ search and seizure powers were tested when a traveller from Quebec, Alain Philippon, was arrested for declining to share his BlackBerry password with customs officers. He was charged, under section 153.1 of the Customs Act, with hindering a customs officer, which carries a potential penalty of up to $25,000 and 12 months in prison. The case drew the attention of a legal specialist in this area:

Rob Currie, the director of the Law and Technology Institute at the Schulich School of Law at Dalhousie University, said border agents have an established legal right to search you or your bags at the border.

But he said it’s not clear whether they should be able to force a traveller to reveal a smartphone password.

Currie said the charge against Philippon could fall down on that point.

He said a charter challenge under Section 8 could be brought at trial. That section of the Canadian Charter of Rights and Freedoms deals with unreasonable search and seizure, and by extension, the right to privacy. …
Currie said the story coincides with a rising public awareness around electronic security. [He] thinks that even in the past three years, smartphones have become more deeply integrated in the lives of Canadians.

“I think people really are thinking at the front of their minds about, ‘What is the status of my device, and do I want the government looking into it, and what kind of rights do the government have?’” …

The Supreme Court of Canada has already defined how and when police can search smartphones during a criminal investigation. Currie believes the Customs Act, which treats a smartphone the same as a suitcase, needs to be updated.

“It’s becoming increasingly clear that in a customs setting we’re going to need some revision to accommodate the privacy interests in electronic devices, in the same way that the Supreme Court has given us revisions dealing with search and seizure, and dealing with search incident [that leads] to arrest, and that kind of thing,” he said.

Philippon submitted a guilty plea to hindering or obstructing border officials in August 2016 to avoid a trial and was fined $500. The current practice remains in place: CBSA officers are allowed to compel a person to provide passwords and other details contained within their electronic devices.

What do you think? Should CBSA officers be able to compel travellers to disclose their passwords? Why or why not?

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**SEARCH AND SEIZURE**

Some officers are delegated the authority to search and seize; however, they may exercise these powers only when they have **reasonable grounds** to believe that a person who is trying to enter Canada has done any of the following (IRPA, ss 139, 140):

- concealed his or her identity;
- hidden on his or her person documents that are relevant to his or her admissibility;
- committed, or possesses documents that may be used in the commission of, an offence listed in section 117, 118, or 122; or,
- holds any means of transportation, document or other thing that was fraudulently or improperly obtained or used.

Section 8 of the Charter provides that all persons in Canada, including foreign nationals, have the right to be secure against unreasonable search or seizure. Therefore, officers may only exercise search and seizure powers if they have reasonable grounds to believe that one of the above criteria has been met.

Provided that there are reasonable grounds, an officer is authorized under the IRPA to conduct the following types of searches:

- search individuals, their luggage, and their personal effects (s 139(1));
- board and inspect vessels to carry out a search (s 15(3));

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Chapter 2  Decision-Makers

• seize vehicles and other items or assets used in relation to an immigration offence or to ensure compliance with the Act and its regulations (s 140); and

• seize documents that were fraudulently or improperly obtained or used, or likely to be fraudulently or improperly used, such as fraudulent passports (s 140).

Consider the following scenario—a point-of-entry examination of a traveller by officers who are exercising their authority to search and seize evidence:

A female traveller from the United States, Martina Vidi, is stopped at the Peace Arch border crossing from Washington into British Columbia. The CBSA officer has reasonable grounds to believe that Martina is concealing her identity. The officer instructs her to pull her car into a separate lane and advises her that he wishes to conduct a search. Martina complies. The search involves an examination of all her belongings: her purse, her briefcase, two suitcases, other personal effects, and her car. The purpose of the officer’s search is to detect documents or evidence that relate to Martina’s identity, her admissibility, and any potential offences she may be committing under the IRPA. She is asked to empty her pockets and to remove her jacket for examination. There is no physical contact between the officer and Martina, and no force or restraint is used in the search.

In this scenario, Martina consents to the search. If a person for some reason does not consent to the search or behaves in any manner that puts the officer’s safety at risk, the officer may detain the person and compel compliance with the search. Detaining the person, however, triggers his or her right to be advised of the right to counsel. Section 10 of the Charter requires that all persons being arrested or detained, including anyone submitting to an involuntary personal search, must be advised of the reason for the detention and of their right to retain and instruct counsel without delay.

**After Entry: Enforcement**

Certain IRCC and CBSA officers—such as those bearing the titles Citizenship and Immigration (C&I) Officer, Detentions; C&I Officer, Enforcement; C&I Officer, Port of Entry; Border Services Officer; and Case Presenting Officer—have the authority and powers of a peace officer to arrest and detain permanent residents or foreign nationals pursuant to section 138(1) of the IRPA. The authorization is generally given to the “title” relevant to the type of work performed.

Officers have the authority to **arrest** a permanent resident or foreign national who they believe has or may have breached the IRPA, and they may **detain** him if he poses a danger to the public, if his identity is in question, or if there is reason to believe that he will not appear for an immigration proceeding. Officers may also detain a permanent resident or foreign national at a port of entry if

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it is necessary to do so for the completion of an examination, and
• there are reasonable grounds to believe that the person is inadmissible for
reasons of security or criminality, or for violating human or international
rights. ⁴

Generally, an officer must have a warrant to arrest and detain a permanent resi-
dent, foreign national, or protected person (IRPA, s 55(1)). However, the IRPA
makes an exception in section 55(2) for the arrest and detention without a warrant
of a foreign national

(a) who the officer has reasonable grounds to believe is inadmissible and is a
danger to the public or is unlikely to appear for examination, an admissibility
hearing, removal from Canada, or at a proceeding that could lead to the making
of a removal order by the Minister under subsection 44(2); or
(b) if the officer is not satisfied of the identity of the foreign national in the
course of any procedure under this Act.

Return to our scenario involving Martina Vidi:

Suppose that Martina does not agree to the search or behaves in any manner that
puts her or the officer’s safety at risk. The officer has the authority to detain her
without a warrant, and her detention compels her to comply with the search. Of
course, this is predicated on the fact that the officer has reasonable grounds to
believe that Martina is concealing her identity. At this point, Martina must be ad-
vised of the arrest, her right to legal counsel, and the right to notify a representative
of her government.

As peace officers, IRCC and CBSA officers have the authority to apply for and
obtain search warrants under the Criminal Code, and to execute warrants for arrest
and detention. Generally, officers apply for a search warrant to obtain information
that will help them establish a person’s identity, locate a person wanted on an immi-
gration arrest warrant, or obtain evidence related to an immigration investigation.
An officer who wants to obtain a search warrant must make an application to a
judge or justice of the peace, who will decide whether or not to issue the warrant.

Removal

After being admitted to Canada, some permanent residents and foreign nationals
may do something (for example, commit a criminal act) or may fail to do certain
things (for example, to renew a visitor’s visa) that makes them “inadmissible.” (Inad-
missibility matters are explored more thoroughly in Chapter 3.) When such activities
come to the attention of an officer, the law allows for the removal of the individuals
involved. In such a case, the officer writes an inadmissibility report to be reviewed

⁴ For an overview of arrests and detentions, see Canada Border Services Agency, "Arrests, Deten-
tions, and Removals" (1 November 2016), online: <http://www.cbsa-asfc.gc.ca/security-securite/
arr-det-eng.html>.
by the minister or (as happens in practice) by the minister’s delegate. The minister’s delegate will review the written report and decide whether to remove the person directly or whether a hearing is required. The IRPA provides the authority to issue removal orders to both the minister’s delegate and members of the Immigration Division of the IRB, depending on the circumstances. The minister’s delegate is given the power to issue removal orders against permanent residents only in cases where the permanent resident is inadmissible because of a failure to comply with residency obligations, and only under circumstances prescribed in the regulations. There are three kinds of removal orders: departure orders, exclusion orders, and deportation orders (see Chapter 14).

Consider the following scenario, which illustrates the minister’s authority to make decisions that could lead to a foreign national’s removal from Canada. In this scenario, the minister’s authority has been delegated to officers, who carry out the immigration functions.

Jose Rodriguez comes to Canada to visit his uncle Juan, who owns a small restaurant. One of Juan’s employees quits suddenly, so he asks Jose to come and work for him until he can find a replacement. Jose agrees and, over a period of several weeks, works as a waiter and bus boy, and even helps out in the kitchen. His uncle pays him cash for his services. Jose was allowed entry to Canada as a temporary visitor but had no authorization to work. He is now considered to be in a state of non-compliance—namely, working without the proper work authorization—and is now inadmissible. Jose comes to the attention of immigration officials, and an officer writes a report against him.

In Jose’s case, the minister (or, in practice, the minister’s delegate) will review the officer’s admissibility report and make a decision that could ultimately lead to Jose’s removal from Canada. The removal process is explored in detail in Chapter 14.

**Minister Responsible for Citizenship Matters**

In addition to the immigration and refugee portfolios, the minister of IRCC also has authority over citizenship. In the same way that the IRPA confers immigration functions on ministers, section 2(1) of the *Citizenship Act* allows for citizenship functions to be assigned to the appropriate member of Cabinet—currently, the minister of IRCC. These functions include the following:

- granting Canadian citizenship to new Canadians;
- providing documentation of citizenship to citizens;
- promoting Canadian citizenship;
- making decisions on applications for renouncing or restoring Canadian citizenship; and
revoking citizenship from a Canadian if the individual obtained her citizenship by false representation, fraud, or by knowingly concealing material circumstances.

Under section 23 of the Citizenship Act, the minister may delegate authority over these functions, in writing, to those responsible for applying the law. As a matter of policy, the power to determine citizenship status and to grant, retain, renounce, or resume citizenship is delegated only to Canadian citizens who are citizenship officers and citizenship judges. Citizenship judges are appointed by the governor in council upon recommendation of the minister of IRCC.

The Citizenship Act grants broad regulatory power to Cabinet through the governor in council to make rules and regulations in the form of orders in council. The minister of IRCC is required to table proposed regulations before each House of Parliament (the House of Commons and the Senate) so that they can be referred to the appropriate committee of that House.

The proposed regulation need only be tabled once, however, because it does not have to be presented to each House of Parliament again, even if it has been altered (Citizenship Act, s 27.1(2)). As a result, amendments can be made without further examination by Parliament.

The minister has the authority to prescribe the form of citizenship applications, certificates, and other documents.

**Immigration and Refugee Board**

**Structure**

Established in 1989, the **Immigration and Refugee Board (IRB)** is Canada’s largest independent administrative tribunal that conducts admissibility hearings, detention reviews, immigration appeals, refugee protection hearings, and refugee appeals. It is sometimes referred to as “the board” or by the name of one of its four tribunals, or divisions, which are as follows:

- the Immigration Division (ID),
- the Immigration Appeal Division (IAD),
- the Refugee Protection Division (RPD), and
- the Refugee Appeal Division (RAD).

Each division is headed by a Deputy Chairperson (DC) who works at the board’s head office in Ottawa. Generally, the work of the board is conducted in three major regions in Canada (Central, Western, and Eastern) for which there are Assistant

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Deputy Chairpersons (ADCs) for each division, in each region. An organizational chart for the IRB and its four divisions is provided in Figure 2.1.

Each division performs specialized functions, such as adjudicating immigration matters and appeals or deciding claims for refugee protection. The IRB reports to Parliament through the minister of IRCC. The minister is represented by officers from either IRCC or the CBSA, who may appear before the divisions as a party to one of its proceedings. However, the board functions independently from government and, like all tribunals, is expected to exercise its role in an impartial manner.

In addition to the chairperson, DCs, and ADCs, the board is composed of members, who have specialized knowledge to preside over hearings and make decisions within a particular division, a registrar for each region, and tribunal staff, who support the decision-makers and the tribunal’s operations. The board has a dual accountability structure in which (1) the decision-makers are responsible to the chairperson through their respective managers—namely, the DCs and ADCs, and coordinating members; and (2) the public servants are responsible to separate managers—namely, the executive director, director general, regional director, and registrar. “Member” is the term used by each tribunal to denote the role of the decision-maker in immigration and refugee cases.

Decision-makers are appointed by one of two processes depending on the tribunal to which they are appointed in their area of specialization. They are appointed either by the governor in council process or by the merit process as public servants.

**Figure 2.1  Structure of the Immigration and Refugee Board**
In the first process, the governor in council (GiC) appoints members to two of the board’s tribunals: the IAD and the RAD. The selection process for these appointments includes the review and selection of qualified candidates by a Selection Advisory Board (SAB), which is chaired by the IRB’s chairperson and composed of at least seven members. The SAB makes recommendations to the minister of IRCC, who recommends appointments to the GiC. The minister is responsible for managing all GiC appointments within his portfolio.

Members of the IAD and the RAD are appointed to hold office in a regional or district office of the board during good behaviour for a term not exceeding seven years, subject to removal by the GiC at any time for cause. Members may be reappointed to the same position or, in some cases—where statutory provisions allow—reappointed to another position. At least 10 percent of the members of the two divisions must be members of at least five years’ standing at the bar of a province or notaries of at least five years’ standing at the Chambre des notaires du Québec.

Decision-makers of both the ID and the RPD are public servants. Public servant decision-makers apply for their positions under the federal government’s merit-based process and, if qualified, are appointed in accordance with the Public Service Employment Act (IRPA, s 169.1(2)). Public servant decision-makers have no time limit on their terms, and are subject to the same terms and conditions of employment as other federal public servants.

The chairperson is appointed to the board by the GiC. As Figure 2.1 illustrates, each division is headed by a deputy chairperson (DC), who is assisted in the regional offices by assistant deputy chairpersons (ADCs) and coordinating members (CMs). They are all considered to be members, although they have administrative responsibilities in addition to hearing and deciding cases. The ID does not have CMs. The deputy chairperson of the IAD and a majority of the ADCs of that division must be members of at least five years’ standing at the bar of a province or notaries of at least five years’ standing at the Chambre des notaires du Québec.

The chairperson and other members of the board (including public servant members in the ID and RPD) must swear the oath or give the solemn affirmation of office set out in the rules of the board (IRPA, s 152.1).

Generally, members hear and decide cases without additional formal responsibilities.

**Chairperson’s Powers**

The chairperson is the IRB’s chief executive officer and has a range of statutory powers over the management of decision-makers, including the authority to supervise and direct the work of the board; to designate coordinating members to the IAD and the RAD; to assign members to the IAD and the RAD; and, with the approval of the GiC, to assign an IAD or an RAD member to work in another regional or district office for up to 120 days to satisfy operational requirements (IRPA, s 159(1)(c)).

The chairperson can delegate certain powers to the deputy chairs, to the ADCs, or to other members, including CMs, only in relation to the IAD and the RAD. For

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6 Prior to legislative changes, members of the RPD were also appointed by the GiC.
example, the chairperson may delegate to an IAD member powers in relation to the RAD, and may delegate to an RAD member powers in relation to the IAD.

The chairperson's powers in relation to the RPD cannot be delegated to an ID member, and vice versa; powers in relation to the ID or the RPD may only be delegated to the DC, to the ADCs, or to other members, including CMs, of that division.

The chairperson also has the authority to issue guidelines to decision-makers and to identify any of the board's decisions as jurisprudential guides (IRPA, s 159(1)(h)). As well, the chairperson has the exclusive authority to make the rules of practice and procedure for the tribunal; these powers may not be delegated (IRPA, ss 159(2)(a), 161).

The role of a DC is to oversee the management of decision-makers. With the exception of the power to make the rules of practice and procedure, the DC's authority may be delegated to a board member.

**Members’ Powers**

As noted above, decision-makers at the IRB in all divisions are called *members*. Members are selected for their expertise and for their experience in a variety of fields, including but not limited to general law, immigration and refugee law, and human rights.

Members have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act*. These powers include the power to summon witnesses and to require them, on oath or affirmation, to give evidence, orally or in writing, and to produce documents. Members may do anything they consider necessary to achieve a full and proper hearing. They may also determine whether a hearing will be held in public or in private and may choose whether to conduct hearings by telephone or by video conference. Members have the authority to designate a representative for a person if he or she is a minor or a person who is unable to appreciate the nature of the proceedings.

Should a person fail to appear for his or her hearing, the member assigned to hear the case has the statutory power to determine that the hearing has been abandoned. The member may also refuse an applicant’s withdrawal and make a finding of abuse of process.

The IAD is a court of record and has an official seal (IRPA, s 174(1)). It also has “all the powers, rights and privileges vested in a superior court of record” (IRPA, s 174(2)).

Members in all divisions of the IRB have the power to apply the Charter and may declare a specific section of the IRPA inoperative if they find it to be in violation of a Charter right.

**The Board’s Four Divisions**

Each of the board's four divisions has jurisdiction to hear and decide specific types of cases. Each division is supported by its own tribunal rules, which set out its practices and procedures so that those who appear before the tribunal (that is, the parties and their counsel), the members, and the tribunal staff have clear and consistent direction about how to present or process a case. What follows is a brief description
of each division's decision-makers and jurisdiction. Details of their procedures are described in later chapters.

**Immigration Division (ID)**

Members of the ID are not bound by any legal or technical rules of evidence; they may receive and base their decisions on any evidence they consider credible and trustworthy (IRPA, s 173). Members of the ID are responsible for hearing and deciding matters regarding the following:

- admission or removal of permanent residents and foreign nationals, and
- review of immigration detentions.

Admissibility hearings determine whether a person should be allowed to enter or remain in Canada, or should be ordered removed from Canada. To return to our earlier scenario featuring Jose Rodriguez—who was caught working without a work permit—the matter will likely be referred for a hearing before a member of the ID. At the hearing, the minister, represented by a hearings officer, will argue the case, including the ground for admissibility, removal, and detention. Jose will also have the opportunity to argue his own case, and has the right to be represented by counsel.

ID members review immigration detentions and hear the reasons why a person ought to be detained or released under the IRPA. In our example, Jose can be detained if the minister's representative makes a case that there is a risk that Jose won't appear for removal. At the detention review, Jose will appear before a member of the ID to argue for his release, while the hearings officer will argue against his release or ask that certain conditions be imposed on a release order. ID proceedings and procedures are explored in greater detail in Chapter 14.

**Immigration Appeal Division (IAD)**

Members of the IAD have jurisdiction to hear and decide four types of appeals:

1. *Sponsorship appeals*—appeals from Canadian citizens and permanent residents whose applications to sponsor close family members to come to Canada have been refused;
2. *Removal order appeals*—appeals from individuals (permanent residents, foreign nationals with permanent resident visas, and protected persons) who have been ordered removed from Canada;
3. *Residency obligation appeals*—appeals from permanent residents regarding decisions made outside Canada on the residency obligation under section 28 of the IRPA; and
4. *Minister's appeals*—appeals from the minister, who may appeal a decision made by the ID at an admissibility hearing.

There are certain immigration matters for which a person has a statutory right to appeal decisions to the IAD. Section 63 of the IRPA provides appeal rights to sponsors, permanent resident visa holders, permanent residents, and protected persons, as well as to the minister (against a decision by the ID).
In hearing appeals, IAD members are not limited to reviewing findings of fact from the first hearing. Appeals hearings are considered to be de novo hearings (Latin for “starting afresh,” or “from the beginning”), and the IAD must receive any additional evidence that is provided and base its decision on its own assessment of the evidence—including the credibility of witnesses—even if the rules of evidence have not been strictly followed. IAD hearing procedures are explored in greater detail in Chapter 15.

Let’s return to our scenario concerning Juan and his nephew Jose:

Because of all the problems that Juan, the restaurant owner, has had because of hiring his nephew Jose, he has encouraged his wife, Marie, to help out more at the restaurant. But this requires them to put their two children in daycare. As a Canadian citizen, Marie decides to sponsor her mother’s immigration from Mexico, with the plan that her mother will look after the children while Marie works in the restaurant. The sponsorship application is refused. What recourse does Marie have?

Permanent residents and Canadian citizens, like Marie in our scenario, have the right to appeal decisions to refuse their sponsorship applications to the IAD. A member of the IAD will hear and decide the appeal. In this example, Marie (the appellant) will present her case, and a hearings officer will represent the minister as the respondent at the appeal hearing. As noted earlier, the IAD is the only division that has “all the powers, rights and privileges vested in a superior court of record.” Members may swear in and examine witnesses, and they may issue orders for the production and inspection of documents (IRPA, s 174(2)).

**Refugee Protection Division (RPD)**

Members of the RPD are responsible for hearing refugee claims made by persons in Canada and determining whether the claimants are Convention refugees or persons in need of protection.

Refugee hearings are generally informal and non-adversarial. Members of the RPD are not bound by any legal or technical rules of evidence; they may receive and base their decision on any evidence they consider credible and trustworthy. They may inquire into any matter that they consider relevant to establishing whether a claim is well founded. Furthermore, members may take judicial notice of facts and of information or opinions within the division’s specialized knowledge (IRPA, s 170(i)). Refugee hearings are discussed in greater detail in Chapter 13.

**Refugee Appeal Division**

The IRPA provides that a refugee claim may be appealed to the Refugee Appeal Division (RAD) by an unsuccessful refugee claimant or the minister.
• on a question of law, of fact, or of mixed law and fact (IRPA, s 110(1)); and
• not later than 15 working days after the day on which the person or the minister receives written reasons for the decision (IRPR, s 159.91(1)(a)).

Members of the RAD—like members of the RPD—are not bound by any legal or technical rules of evidence; they may receive and base their decision on any evidence they consider credible and trustworthy. They may inquire into any matter that they consider relevant to establishing whether a claim is well founded. Like the RPD, members of the RAD may take judicial notice of facts, information, or opinions (IRPA, s 171(b)). The RAD’s procedures are explored in greater detail in Chapter 15.

Courts

Matters involving the IRPA and the Citizenship Act may come before the courts by way of judicial review or appeal. Judicial review enables the courts to oversee administrative decisions, such as those made by the minister, by members of the IRB, and by citizenship officers. Although the courts defer to the expertise of administrative tribunals and generally accept their findings of fact, the court will determine on judicial review whether the administrative decision-making process was fair and was based on the appropriate legal considerations.

When hearing appeals from lower court decisions, courts consider whether decision-makers erred in their interpretation of the law or in their application of the law to the facts. Findings of fact, such as the credibility of a witness, are not generally reconsidered on appeal—only points of law are argued.

The federal courts have jurisdiction over the interpretation and application of the IRPA and the Citizenship Act. The trial court is the Federal Court, and the appeal court is the Federal Court of Appeal. If a significant legal issue is in question, decisions of the Federal Court of Appeal may be appealed to the final decision-maker in Canada—the Supreme Court of Canada.

Federal Court and Federal Court of Appeal

The Federal Court has jurisdiction to review decisions, orders, and other administrative actions of the IRB, IRCC, the CBSA, and citizenship officers and judges. In this way, the courts perform a supervisory role. Judicial review may be sought by either party (the individual or the minister) provided that an application for leave to the Federal Court is made within the statutory time limit of 15 or 60 days—for matters arising in and matters arising outside Canada, respectively—after receiving the disputed decision. A Federal Court judge will either grant or deny leave for judicial review. The IRB may also refer any question of law, jurisdiction, or practice to the Federal Court at any stage of a proceeding.

Any person who wishes to challenge a decision, determination, or order under the IRPA may make an application for leave to the Federal Court. The Federal Court derives its review authority from section 18.1(3) of the Federal Courts Act. The grounds for review are set out in section 18.1(4) as follows:
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or
(f) acted in any other way that was contrary to law.

On judicial review of an IRB decision, the Federal Court may do any of the following:

• send the matter back for redetermination by a different member or panel,
• quash the IRB decision, or
• uphold the IRB decision.

If a party is dissatisfied with a decision of the Federal Court, leave for appeal may be sought from the Federal Court of Appeal. However, section 74(d) of the IRPA provides that an appeal may be made only if the court certifies that a serious question of general importance is involved, and states the question. The appeal then deals only with this particular question. The decision of the Federal Court is final, and no further appeals are allowed.

Non-lawyers, such as immigration consultants and paralegals, are not authorized to represent clients in Federal Court or the Federal Court of Appeal (Federal Courts Act, s 11; Federal Courts Rules, s 119). In appropriate cases, non-lawyers who are representing immigration or refugee clients should explain the judicial review process and refer their clients to an immigration lawyer. For self-represented litigants, the Federal Court provides information on court process and procedures on its website.

**Supreme Court of Canada**

The Supreme Court of Canada is the final court of appeal from all other Canadian courts on all subject matters. Before a case can reach the Supreme Court, all other avenues of appeal must be exhausted.

A party who is not satisfied with a Federal Court of Appeal decision has the right to seek leave to appeal to the Supreme Court, under section 40(1) of the Supreme Court Act. The Supreme Court may grant leave to appeal only if (1) the case involves a question of public importance, (2) it raises an important issue of law or mixed law and fact, or (3) the matter is, for any other reason, significant enough to be considered by the Supreme Court.

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8 RSC 1985, c F-7.
9 SOR/98-106.
## APPENDIX

A summary of the various decision-makers discussed in this chapter—their functions, responsibilities, and activities—is provided in the following table.

### Table 2.1 Immigration and Refugee Decision-Makers

<table>
<thead>
<tr>
<th>Decision-Maker(s)</th>
<th>Organization</th>
<th>Function</th>
<th>Responsibility or activity</th>
</tr>
</thead>
</table>
| Minister and designated or delegated officers | IRCC | Immigration | Responsible for:  
- immigration policy development  
- annual immigration plan  
- temporary residents immigration programs  
- permanent residents immigration programs  
- settlement and integration of newcomers to Canada  
- pre-removal risk assessments  
- most policies related to admissibility |
| Minister and designated or delegated officers | PSEP/CBSA | Immigration/enforcement | Responsible for:  
- management and operation of Canada’s borders and port-of-entry functions  
- arrests  
- detentions  
- removals  
- background checks of immigration applicants |
| Minister only | IRCC | Enforcement | Responsible for:  
- signing security certificates  
- referring security certificates to the Federal Court |
| Minister and designated or delegated officers | IRCC | Refugee protection | Responsible for:  
- the resettlement of refugees  
- admissibility of refugee claimants in Canada  
- determinations of eligibility |
| Minister and designated or delegated officers | PSEP/CBSA | | Responsible for:  
- background checks of refugee claimants  
- removal of refugee claimants where a “danger opinion” exists |
| Minister and designated or delegated officers | IRCC Citizenship Commission | Citizenship | Citizenship program and policy |
| Member | IRB: Immigration Division | Immigration | Hears and decides:  
- admissibility hearings for persons who are inadmissible to or removable from Canada  
- detention review hearings into the reasons for detention of persons under the IRPA  
Issues removal orders in complex cases |
<table>
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<tr>
<th>Decision-Maker(s)</th>
<th>Organization</th>
<th>Function</th>
<th>Responsibility or activity</th>
</tr>
</thead>
</table>
| Member            | IRB: Immigration Appeal Division | Immigration | Hears and decides appeals against  
|                   |              |          | • the minister’s decision to refuse a sponsorship application (sponsorship appeal)  
|                   |              |          | • a removal order decision by a member of the ID or the minister from a permanent resident, foreign national with a permanent resident visa, or protected person who has been ordered removed from Canada (removal order appeal)  
|                   |              |          | • an immigration officer’s decision that a permanent resident has lost his permanent resident status (loss-of-permanent-residence appeal)  
|                   |              |          | • an appeal from the minister responsible for the CBSA, who may appeal a decision made by the ID at an admissibility hearing (minister’s appeal)  
|                   |              |          | Note: The IAD does not hear appeals against a removal order for a person who is a security threat or war criminal, has committed crimes against humanity, is involved in organized crime, or is a serious criminal, because such persons have no right of appeal.  |
| Member            | IRB: Refugee Protection Division |          | Hears claims made by persons in Canada and determines whether or not the claimants are Convention refugees or persons in need of protection  |
| Member            | IRB: Refugee Appeal Division |          | Hears appeals from decisions from the Refugee Protection Division by failed refugee claimants and the minister  |
| Citizenship officer or judge | Citizenship Commission |          | Decides citizenship applications for  
|                   |              |          | • grant of citizenship  
|                   |              |          | • retention of citizenship  
|                   |              |          | • renunciation of citizenship  
|                   |              |          | • resumption of citizenship  |
| Judge             | Federal Court |          | Decides reasonableness of a security certificate  
|                   |              |          | Conducts judicial review  |
| Judges            | Federal Court of Appeal |          | Hear appeals from the Federal Court  |
| Judges            | Supreme Court of Canada |          | Hear and decide an appeal only if  
|                   |              |          | • the case involves a question of public importance,  
|                   |              |          | • the case raises an important issue of law or mixed law and fact, or  
|                   |              |          | • the matter is, for any other reason, significant enough to be considered by the Supreme Court  |
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REVIEW QUESTIONS

1. List the ministers authorized by the IRPA to carry out immigration and refugee functions, and the responsibilities of each.
2. Provide an example of a minister’s authority that cannot be delegated.
3. Provide examples of an officer’s duties that are related to the examination of an application.
4. Under what circumstances can an officer exercise his or her search and seizure powers?
5. Can an officer arrest and detain an individual under the IRPA without a warrant? Explain.
6. Which minister is responsible for citizenship functions?
7. Which statute provides this authorization?
8. What are decision-makers at the IRB called?
9. Members of which divisions are appointed by the governor in council?
10. Members of which divisions are public servants?
11. In which court is a judicial review conducted?
12. If a party is not satisfied with a decision of the Federal Court, can that party appeal to the Supreme Court of Canada? Explain.