CONSTRUCTING A PRODUCTIVE OTHER

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Robert F. Barsky

Constructing a Productive Other

CONSTRUCTING A PRODUCTIVE OTHER

DISCOURSE THEORY AND THE CONVENTION REFUGEE HEARING

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let all those come who want to; one of us will talk, the other will listen; at least we shall be together.

—George Konrád, *The Case Worker*

Often we make discoveries without realizing what has happened. Something new, something never before seen or said, flashes clearly in the mind. We think, Sure — ! or, Of course, that's right. But, beyond affirmation, we usually find no phrase to capture our new understanding. So we let the moment pass. It fades. We forget.

Once in a while, though, remembering and recording become the highest priority. Sometimes stories are born this way.

—George Szanto, *The Underside of Stones*

Nothing has occurred to me, except my life—

It is a book much used, for many years marked and adorned;
By hard turning stained with spittle and tears;
Trusted body-slave of my treacherous hands—
A cold, stubborn, lonely soul — a great house of dreams...
Closed, it is the picture of the whole mystery
Laid bare, night with all the stars. Opened,
An empty bed with one brown stain.

—Allen Grossman, *An Inventory of Destructions*

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1. Introduction: The Construction of the Other

> In general, an interpretive account is judged successful to the degree that it is internally consistent, that it is comprehensive of the many elements of what is to be interpreted as well as the relations among these elements, that it resolves obscurities, that it proves useful in encompassing new elements coming into view, and that it stands in some rational relation... to previously held interpretations. One account is judged better than another if it enjoys an advantage with respect to those criteria. (Rosenwald 696)

In order to undertake a properly analytical study of legal hearings in general, or of Convention refugee hearings as a peculiar sub-section thereof, one could either refer to the ample literature from the field of law, or else to studies of discourse and discursive practice applied (or applicable) to legal texts or proceedings. Unfortunately, most legal analyses, and indeed most discourse analyses, are incomplete or inadequate in light of the intricacies of Convention refugee hearings, characterized as they are by complex discursive processes such as cross-cultural communication, interpretation (and translation), codified legal procedure, transcription and confession. In order to fully comprehend the distinctive features of a Convention refugee hearing the reader must therefore have access to the formalities and the customs that underwrite the Convention refugee determination process as well as the tools from the realm of discourse theory that help explain this process. As such, the reader of this book will be presented with the (transcribed) texts of two Convention refugee claimants' (Mr. B.'s and Mrs. V.) Convention refugee hearings, summaries of, or references to, pertinent Conventions, laws and Acts that were in effect in 1987 (the time of their arrival in Canada), illuminating passages from other hearings recorded in 1987, citations from a revealing Appeal Court ruling handed down in 1987, and discourse theory appropriate to describing the *construction of the productive other*. This latter process will be approached from angles which emphasize the movement towards otherness and the production process through reference to the works of Marc Angenot, Pierre Bourdieu, Michel Foucault, Erving Goffman, and Teun Van Dijk, as well as other pertinent studies from the domains of discourse analysis and social discourse theory.

Much of this discussion is underwritten by the work of Mikhail Bakhtin because he describes elements of the "othering" process that are particularly well-suited to legal discourse, including "authoring," "answering," "dialogism," and "speech genres" as well as a number of important notions assembled in *Art and Answerability* including "representation" (*Author and Hero*, hereafter *A&H* 28), "projection" (*A&H* 23), "speech genres," "the aesthetic value of outward appearance" (*A&H* 27), the "unconsummated" nature of living beings ("*A&H* 13), and the construction of the hero (*A&H* 6).[1]

Although the process of *constructing a productive other* described herein is a general notion applicable to (for example) contemporary refugee hearings in Canada (and elsewhere in the world), many of the specific administrative procedures described in this book were in effect in 1987 and have over the last few years been modified (particularly following the creation in 1989 of the administrative tribunal called the Immigration and Refugee Board). In certain regards the 1994 adjudication process is much improved (sometimes along the lines of what is suggested during the analysis); furthermore, even despite the many flaws in the Canadian admittance and determination procedures, Canada's record in this regard is among the best in the world. There are, however, residual and emerging impediments to resolving flaws in the admittance and adjudication procedures, focused in particular around continued problems in the areas of refugee *production*, *access* to safe host countries for persons in need, and determination. Problems of *access* and refugee *production*, though briefly mentioned in this text, are beyond the scope of this study; they will be treated at some length in forthcoming work.[2]

Mr B. and Mrs. V., the foci of this study, had both undergone persecution in their country of origin (Chile). They arrived in Montreal in the Spring of 1987, where they claimed refugee status at the Immigration Canada checkpoint in Mirabel Airport. Upon mention of their desire to claim status, they were taken aside by officials who requested that they fill out a number of forms and surrender their passport pending the refugee status determination hearing. The transcriptions of these hearings are the central documents for this study of the determination process. Although this is a very limited corpus in light of the thousands of hearings heard each year, it nonetheless points to some of the challenges and obstacles posed by this kind of procedure particularly when supplemented (as it is) by numerous passages from hearings recorded during the same period.

To facilitate the analysis of these transcriptions and then to set forth the distinct areas which are more accurately problematized through reference to discourse theory, the text of the Convention refugee hearing has been divided into three parts; the opening section (containing the opening statement), the middle section, and the closing remarks. This is neither arbitrary nor incon-

venient for an analysis of how the Convention refugee constructs a productive other during this hearing, because each of these three sections is distinctive in terms of content and discursive strategy. The opening section is a standardized section in which the Senior Immigration Officer, hereafter the S.I.O., reads out the rules governing the hearing and amasses the basic facts of the case by reference to the information provided in the Basic Form and in the opening statement. The middle section is an elaborate (re)articulation of the facts summarized in the opening statement, supplemented with all of the details of the persecution suffered by the claimant in the country of origin. And the closing remarks is (generally) a re-statement of salient elements of the claim as well as an opportunity for the claimant (or the Counsel) to freely state facts which s/he has not yet had occasion to mention. The three sections pose particular problems, and as such can be examined as distinct parts of the whole, with the opening section being akin to a discursive framework or grid, the second to a test of the claimant's skill in repeating the facts of the case without contradicting previous testimony, and the third to a peculiar form of soap-box speech in which pleas, pledges and proofs not previously admitted into the transcript can be "freely" added. For the purpose of the analysis, the reader will be presented first with utterances from the transcribed text, then with a summary of legal analysis containing references needed to understand why those utterances are made (from a juridicial standpoint) and finally, wherever appropriate, with a supplementary analysis from the realm of discourse theory which offers complimentary or, on occasion, divergent information. This latter step will allow the reader to move from the realm of legal and empirical studies into that of constructed Otherness, a path that in my sense reflects a similar movement of claimant as (whole) human being to claimant as Other, where the Other is constructed to mean Canadian Convention refugee claimant.

The theoretical material for this latter task was chosen on the basis of the following criteria: first, it should demonstrate the degree to which the "Other" can be constructed through discourse, and the ways in which this construction can be productive towards a pre-determined end; second, it should emphasize the institutional aspects of language and the ways that particular examples of discursive practices are infused with the social structure within which they occur; and third, it should unveil the ways in which discursive practice further legitimizes the socio-political structures which it expresses and (therefore) helps to reproduce. Because of the particularities of each of the three sections, and because no single discourse theory is applicable to all three, markedly different theoretical apparatuses will be invoked in each section. The overriding goal, however, is to demonstrate the degree to which the Other who emerges from these transcriptions is diminished to the point of near non-ex-

istence because both the means of *production* employed by the parties to the hearing, and the method by which this hearing is constructed, act to diminish rather than complete the claimant. "Production" is therefore appropriate inasmuch as it denotes the process of origination, creation, generation and construction (of the Other), but should not be taken in either the positive sense of improving something, or the cumulative sense of adding something onto an existing structure. In this particular case the constructed Other stands in the place of the original claimant as a doormat would stand in the place of a house; it bears little semblance to the interior space in which lived experience occurs, but rather fits into too-easily accepted bureaucratic procedure that requires a facade of self-justification rather than veritable representation.

Before moving into the analysis, a number of points must be established. First, theoretical approaches to this material must be adjusted in consequence to the distinctive nature of the hearing because much of what could be considered properly applicable theory has limited value in light of the effects of a hearing process which blocks or limits the discourse of the claimant. For this reason, researchers interested in the study of the discursive practice of refugee hearings must first become intimately familiar with the details of the process so as to recognize its inherent discursive limitations and hence the limitations of certain theoretical approaches. The peculiarities of the procedure, for reasons outlined in upcoming chapters, render inoperative studies in otherwise sound areas of interaction or discourse research such as the analysis of gestures, *face*, silence, movement or style; some of these notions will nonetheless be discussed either because they hint at ways in which the speaking circumstance limits what is sayable or because they underwrite other applicable theories. Other theories useful for the purposes of describing self-representation through language will be invoked wherever applicable.

Second, the purpose of these hearings is to narrow the refugee claimant down to the stated grounds for his/her claim so that a decision can be made on the case, so the legal grill or template which is applied to evaluate legitimacy (the kind of persecution suffered) is limited in such a way that it produces a narrative which speaks of a very small and extremely problematic segment of the refugee's experience; persecution and suffering admissible according to the Immigration Act. That the hearings can nonetheless go on for several stressful hours (sometimes producing over 100 legal-sized transcribed pages) suggests that data is either being gathered for some reason only tangentially-related to the determination process, or because the officiating parties to the hearing are attempting to find contradictions in the narrative – something that is more likely to occur during long interrogation (fatigue, different methods of expression, problems with recollection of particular

events). The kinds of subjects that are raised in these peripheral discussions – the family history of the claimant, his/her involvement in illegal activities, the variety and severity of physical and mental abuse suffered during interrogation, the employment history of the claimant and his/her family, the resources (in terms of networks, moneys and other valuables) available to the claimant, the nature of the claimant's resistance to government practices in the country of origin (ie. details concerning guerrilla activities, caches of arms, and so forth) – more often reveal qualities and concerns of the host country than characteristics of the refugee claimant or the veracity of his/her claim. The image of an appropriate refugee (the suitable Other) that is projected by the host country will therefore be an issue in the analysis of the transcribed hearings, as will issues relating to the unstated world view of the interrogating officials, because both provide insights into the exigencies of the determining parties and therefore the kind of discursive construction inherently presupposed. This image and this world view must be discerned from what is said and what is implied in the course of the hearing, for as Blommaert and Verschueren point out,

> the overall set of implications, presuppositions, and background assumptions represents the general world view that the language user assumes he or she shares with other language users. This general world view represents what is "normal" to the group member; that is, it represents a set of assumptions about social being and social behaviour that are acceptable, unproblematic, natural, and so forth. For that reason, for the group member they are hardly perceptible. They are not very salient or remarkable features, but rather subconscious and unquestioned ones. Deviating from this common basis would mean, for a newspaper, a loss of sales, or for a political party, a loss of votes. ("Pragmatics" 504)

They are correct to further suggest that "this observation is a starting point (based on the pragmatic principle that communication is not possible unless it is adapted to a common ground) rather than a research finding for any pragmatic approach to world discourse" (ibid); nonetheless this approach illuminates many otherwise incomprehensible discursive strategies employed by both the S.I.O. and the Counsel.

Third, analysis of this material demonstrates the dubious stature of "Truth" or "Verity" as decision making criteria. The hearing, set up as it was in 1987, cannot claim to consistently amass accurate elements of the Convention refugee's experience because the claimants are advised directly (by their lawyers and by other intermediary persons) and indirectly (by the very nature of the refugee determination system and the official descriptions thereof) to match their experience as closely as possible to the experience deemed acceptable, even if by so doing they must modify the narration of their own

experience. In fact, one (albeit cynical) hypothesis is that the hearing could be seen as a test of the claimant's ability to construct an appropriate version of the "Convention refugee;" in this sense the measure of one's success in *constructing a productive other* as refugee could be seen as a measure of one's future ability to *construct a productive other* as integrated citizen.

Fourth, the description of the international political situation in this book is one which emphasizes the degree to which suffering is inflicted and sustained by the interests of the minuscule elite over the disenfranchised majority. Noam Chomsky's descriptions of international politics are in this regard far more useful for understanding how refugees come to be "produced" in the first place than are any number of analyses which emphasize single events or rectifiable modifications as being at the root of the refugee issue. As a consequence, this book is based upon the presupposition that the policy of accepting refugees is an international *responsibility* that flows directly from (generally pernicious) First World interventionalist policies and the systemic preservation of the many (deleterious) mechanisms that maintain the power of the rich and enfranchised, and *not* an example of (First World) charity.[3] When the process is viewed in this light the distinction between economic and non-economic refugees, which is a cornerstone of the First World screening process, becomes far less convincing, as does the very notion that free migration of persons should be restricted and subjected to regulation.

Fifth, the Convention refugee hearing is a kind of microcosm of both the international system and the bureaucracy designed to deal with inequalities therein. Issues of First World intervention, Third World poverty, and inter-World migration, as well as the effects of colonialism, expansionism, isolationism, imperialism, rejectionism, xenophobia, racism, and unequal distribution of wealth (amongst classes, groups and countries), are all played out on the backs of the disenfranchised persons of this planet; and the load is always heaviest upon the poorest, weakest, sickest and most combative (i.e. those who act to change the system). One goal of this study, therefore, is to demonstrate that discourse analysis[4] is a fruitful way of analyzing flaws in the present system (of which the Convention Refugee assessment processes is but a small part) because it permits us to step back from heavily-codified legal rules and regulations which generally give the mistaken impression that options are limited by prior decisions and pre-determined paradigms.

Sixth, a large measure of aid to suffering refugees can be found in the form of good faith, or what is called in the realm of administrative law "fairness" and "discretion." Determining whether or not a claimant will be accepted on the basis of the testimony provided is not always an easy task because individuals involved in the decisionmaking process can be either

inconsistent, or consistently unfair (for evidence of this see chapter 7, or, for more contemporary studies, see descriptions of the process in Hathaway's *Rebuilding Trust* or the report by J.-H. Roy). The laws outlined in this book, when applied to refugees in a humanitarian and respectful manner, would most certainly assure that a reasonably high level of decency would be maintained within the refugee system; but refugees cannot expect consistently humanitarian treatment because the very system into which the adjudication process is inscribed is steadfastly weighted in favour of those most adept at dealing with Western-style administrative bureaucracies, that is, persons most able to express themselves in a clear and articulate fashion, persons who show appropriate respect to authority, and so forth. This situation must be criticized and corrected from the ground up because this system follows the logic of a larger system which itself should be the subject of continuous scrutiny if not radical re-working; therefore finger-pointing towards particular individuals or isolated decisions, though sometimes valuable, is insufficient.

Finally, this study will demonstrate that even with reference to hearings which led to a successful outcome (Mr. B. and Mrs. V. were granted refugee status in Canada), it is possible to describe the (intrinsic) flaws which lead to the rejection of many equally-credible claims during the same period (see chapter 7). And looking at two successful cases from 1987 as a basis for understanding contemporary issues demonstrates both the value of discourse theory in this regard, and allows one to measure the impact of current flaws: for example, many persons still don't have access to safe havens (on account of lack of information in countries of origin, carrier obligations which restrict the movement of persons who don't hold proper travel documents, visa restrictions, third country clauses which force claimants to request status in the first "safe haven", prohibitive cost of intercontinental travel), to appeals (which should in light of the inconsistencies of decisions be guaranteed), or to fair hearings (on account of their having received inappropriate information, poor counsel, or incompetent interpretation – problems that will be discussed further on).

Discourse Analysis Approaches

Appeals to purely legalistic theories tell so little of the story as to be near-impediments to the understanding of these hearings because they provide the analyst with unrealistic expectations with regards to the application of rules. Appeals to classical approaches to discourse can move one further along the road, but there are numerous deviations that exist which, though on occasion enlightening or exciting, can be perilous or frivolous. Analysis of legal hearings can bring the analyst into a range of disciplines and fields; there have been numerous important studies – in sociology, ethnomethodology, psychology, psychiatry, sociology, communications, and literary theory – which could be (or have been) applied to enlighten certain sections of these transcriptions. That they are not all examined or referred to in this study does not reflect a condemnation on my part, but rather a belief that not all available research concerning hearings can illuminate the movement from human being to claimant and from claimant to Other. Some of the research areas not fully-examined for this study will now be mentioned in the hope that other persons working in these fields of research will use the basic documents (the transcriptions and accompanying documentation) and analysis as a starting point for future work.

First, a rigorous psychoanalytic approach applied to these hearings could help explain certain phenomena – repression, projection, Freudian slips, transference and counter-transference – which surface during interrogations about persecution either in the form of silence or inappropriate statements. The reasons for apparently inexplicable behaviour during the hearings are linked to the array of stressful experiences the claimant endures both in the country of origin and in Canada. This persecution does not stop with the arrival of the claimant in Canada, for "conceivably, his experience prior to becoming a refugee will not have prepared him adequately for the circumstances he will encounter, which may result in a return of uncertainty and fear like that felt in his state of origin" (Dirks 10). Furthermore, the claimant's behaviour may have been affected by the kinds of persecution s/he underwent in the country of origin and in the camps which hold so many refugees before their resettlement:

> What suffering, what privation, what tears, and what triviality... What poverty of intellectual powers and resources, of understanding, what obstinacy in quarrelling, what pettiness in wounded vanity.... They point to one event, the end of some event. They talk about it, they think about it, they go back to it, meeting the same men, the same groups in five or six months, in two or three years....One feels terrified; the same arguments are still going on, the same personalities and recriminations, only the furrows drawn by poverty and privation are deeper; jackets and

> overcoats are shabbier; there are more grey hairs; and everything about them is older and bonier and more gloomy....And still the same things are being said over and over again. (Herzen 147)

This does not only happen in the country of origin; there may be forms of repression or dependence which developed during the time of internment in camps, prisons, or special lodgings in transit countries or in Canada:

> Camp life can drain the self-reliance of the refugee and create such a strong sense of dependence upon others to provide his primary needs that his existence is similar to that of a child. Prolonged confinement in a camp environment may in fact lead to apathy, and the loss of all emotion including hope. The regulated style of life and the lack of any personal privacy promotes a loss of individual identity and an increase in feelings of aggression toward fellow residents as well as outsiders. Residents of the camps, in some instances, feel they are in a condition of social suspension as they experience no sense of progress, advancement, or achievement. (Dirks 11-12)

During the hearing, this behaviour can come out either in bodily movements or in speech; "Every movement of his body betrays his uncertainty, timidity and tension. His fundamental attitude is one of distrust, born of the countless disappointments which have brought him to his present plight" (Cirtautas 16).

These few general observations point to the relations between the psychological experiences of the claimant and his/her behaviour. Studies could be undertaken on the ways in which the psychological scars manifest themselves in speech patterns or strategies in discourse. Important work in the area of psychoanalytic-inspired studies of communication have been undertaken by, among others, Didier Anzieu, John Dore, Bruce Dorval, Marike Finlay, Gustave Nicolas Fischer, Charles A. Kiesler, René Lécuyer, Serge Moscovici, Theodore R. Sarbin and Donald P. Spence, much of which could be applied to psycho-discursive issues arising from these hearings. But for the purposes of this study, the social structures which determine discursive behaviour are far more important than speculation concerning various psychic materials to which we have only indirect access (through the transcribed proceedings). Areas of interest for the psychoanalytic community *per se*, such as the narrative of the self as auto-therapeutic (S. Epstein, W. Loch, R. Schaefer, M. Sherwood, D. Spence), are significant in terms of the mental health of the individual concerned, but seldom have any direct bearing upon the strategies of acceptance and rejection adapted in the actual Convention refugee hearings of 1987 and in the subsequent ruling from the decision-makers (see chapter 5).

Second, although this study will demonstrate the validity of discourse analysis theory for the realm of legal studies, it will not include discussions of the huge (and hugely important) relationship between contemporary theories of discourse and legal hermeneutics. Applying theories from discourse analysis to even the small number of legal texts mentioned in this book demonstrates the urgency of cross-disciplinary studies of materials which even now are closed-off by various institutional and professional restrictions.

Third, there is a veritable wealth of theories from the realm of literary studies whose impact has barely been felt in areas such as legal studies, and some literary theory can be applied with surprising efficacy to non-fictional discourse; in fact, much of the theory described in this study was inspired by (and useful for) literary theory (especially theory of the novel). Furthermore, on account of the complexity of the sentiments described by these claimants, I often call upon passages from literary texts for support; Charles Dickens, Fyodor Dostoevsky, Juroslav Hasek, Franz Kafka, Arthur Koestler, George Konrád, and Primo Levi often manage to synthesize and complete ideas and sentiments that would take many pages of (sociological, political, economic) analysis. This has something to do with the relationship between the whole human being and a fragment thereof,[5] but the true relationship between the two remains something which remains to me somewhat of a mystery. One could probably go further than theories of the novel or studies of the relationship between art (in the novel) and life in order to make arguments about the degree to which S.I.O.s deconstruct the logic of their own arguments, or the ways in which these hearings exhibit the tensions arising as a result of the opposition between classes separated and opposed as a result of the prevailing economic mode of production, or the thematic elements which characterize this kind of hearing as though they belonged to a properly autonomous genre of discursive practice.[6] Some of these issues arise in the sections that follow, but they are of secondary concern to the overall pragmatic approach to discourse theory. The term "pragmatic" is used here in accordance with Jan Blommaert and Jef Verschueren's description in which "'pragmatics is seen in its widest sense as the cognitive, social, and cultural study of language and communication" ("Rhetoric" 5) and in which the focus is similarly upon "implicity information," "overall meaning constructs," "wording strategies," and "reaction and interaction profiles" (*ibid*).

Pragmatics and a Socially-Responsible Form of Discourse Analysis

A pragmatic approach to discourse analysis offers the tools for the study of discourse as well as methods for relating studies of language and discourse to useful political engagement. Teun Van Dijk is in this sense a kind of model,

inasmuch as his work "focuses on social, political or cultural analysis through discourse analysis" ("Preferred Papers for *Discourse and Society*" 1), and inasmuch as he (through his work on racism) works on similar issues to those raised here. The journal he edits, *Discourse and Society* (*D&S*), is a leading forum for studies in discourse analysis, and interestingly enough he defines the work published in the journal with respect to its relation to broader social issues, therefore avoiding "papers that discuss such typical sociolinguistic issues as language variation, language politics or language use in their social contexts, especially if the language-use phenomena studied are within the scope of what is generally seen as the domain of linguistic sentence grammars" (*ibid* 1). Discourse analysis from his perspective must also contribute to socio-political debate, explicitly studying

> relationships between structures, strategies or other properties of discourse (including language use, texts, conversations, communicative interaction, etc) on the one hand, and social or societal (micro or macro) structures or processes on the other. These social structures may well include those of so-called 'social cognition', namely cognitions of groups and group members about social phenomena (e.g. attitudes, prejudices, ideologies, etc.). In order to distinguish *D&S* from journals that publish work on 'context-free' conversational analysis, there is a preference for studies that are not limited to the conversational analysis... but that also focus on, or relate to, broader societal or political (macro) structures, such as groups, institutions or cultures and their relationships. (*ibid* 1)

Discourse analysis thus described can be employed in the service of a radical critique of society; studies of discourse analysis could be "the forum for the formulation of the theoretical and analytical instruments inspired by and supporting the development of counter-ideologies – which challenge dominant ideologies sustaining practices that violate human and social rights" (*ibid* 1). This direction of study is promising and has inspired the politically-implicated analysis that follows.

The field of discourse analysis has grown up in the last few years, thanks to the efforts of important and ever-active theoreticians like Marc Angenot, Pierre Bourdieu and Teun Van Dijk; but its roots, like those of these theoreticians, lie in more traditional studies of language such as philology, rhetorics or literary studies. Contemporary discourse analysis contextualizes and formalizes studies in content analysis, and therefore generates questions concerning the *production*, *reproduction*, *function* and *effect* of basic units of discourse within given ideological configurations and socio-historical moments. These units are bound to their conditions of production and to the socio-historical moment from which they emerge. Therefore, discourse analysis is also a study of the rules, conventions and the procedures which

legitimate and to some degree *determine* a particular discursive practice within a particular chronotope. A thorough analysis of these areas of study covers a broad range of issues, beginning with the overriding problem of how to objectify the system of a corpus, as well as the question of showing "how the functional categories are realised by formal items" (Coulthard 8). The approach and the methodology are multi-disciplinary, a fact which clearly contributes to the quality and the value of the work undertaken in the field but, according to Teun van Dijk, does not necessarily guarantee to influence policy or practices with its findings (in fact, its multi-disciplinarity may have the opposite effect). Van Dijk writes:

> Serious social and political issues do not respect the traditional boundaries between different fields. During the last 25 years, increasingly sophisticated analyses of text and talk, thus, may have elevated the new cross-discipline to a level of academic respectability, but its socio-political effectiveness has remained slight. ("Editorial" 1)

The multi-disciplinarity is at once the strength and the weakness of social discourse as described here for two reasons. First, it sometimes leads persons competent in one field to make uninformed comments about another; and second, since the caption "discourse analysis" encompasses a rather broad church, there is tension, disagreement or even confusion in terms of both the approach and the materials to which the approach is applied. Jean-Jacques Courtine writes:

> Le champ de l'analyse du discours est ainsi le lieu de multiples tensions. Elle est partagée entre des manières de travailler qui l'entraînent vers la linguistique, et d'autres qui la sollicitent du côté de l'histoire. Elle hésite entre l'examen de corpus doctrinaux, avec leurs séries régulières d'énoncés, que ses premières tentatives privilégiaient et celui de pratiques langagières dispersées, hétérogènes. Alors qu'elle s'en tenait à la description de textes, elle se tourne à présent vers des pratiques orales; quand elle observait avant tout l'intertextualité, les processus "verticaux" qui traversent un ensemble de discours pour leur donner cohérence et consistance, elle a recentré l'analyse sur le fil du discours, l'horizontalité d'une séquence discursive énoncée par un sujet. Elle inspectait des centralités discursives, elle entend à présent saisir les marges des discours. (23)

Angenot *et al* offer solid, though heterogenous grounding when they claim that within the compendium of social discourse, there emerge *patterns* (i.e. narrative and argumentational constructs, topical maxims, pragmatic markings, semantic paradigms, sociolectal markers and rhetorical figures) and *facts* which, through usage, become powerful social forces which are neither strictly linguistic or gnoseological, and which function independently

of particular usages and applications. By concentrating upon the words and utterances of social discourse, and by elucidating these *rules*, *conventions*, *procedures* and *facts*, discourse analysts from their perspective emphasize the *materiality* of language, including that language which conveys the ideas, mentalities, values, social imaginaries, and representations studied in idealistic fields such as the history of ideas. Such research also allows us to talk about broader political issues such as which hegemony favours the intelligibility and co-intelligibility of given discursive practice, what kinds of texts are most operative within the parameters of particular socio-discursive conditions, and so forth. As in the case of Van Dijk, Angenot *et al* make a case for rigor counter-balanced by relevance, and methodology suited to the diversity (messiness) of actual discursive practice:

> It is important, however, to guard against all-sweeping syntheses, against broad and nebulous conjectures to which 'discourse' has readily lent itself over the past twenty years. One must equally caution against the enclosure of research within problematics that are too neatly sharpened in their search for methodological purism, where social life is sterilized of its complexity, and 'rigour' serves as an alibi for preserving the innocuousness of reductionist micro-analyses. (6)

In a paragraph reminiscent of Bourdieu's critique of interactionism or of Noam Chomsky's work on language and power, Angenot *et al* insist upon the importance of relating the results of micro-textual research to larger contextual issues:

> In other words, to try to delimit the area of discourse analysis in relation to a set of analytical and hermeneutical tools does not imply that the scholar should remain locked within the prism of discourse. The analyst must also feel the need, and further the development of socio-historical pragmatics which will not remove discourses from their institutional conditions of expression, legitimation and dissemination, nor isolate them from other practices in relation to which they are reciprocally affected. (6)

Another useful area of study as regards to Convention refugee hearings is the *effect* that a discourse has or can have in a given situation:

> In particular, our intention is not only to engage in modes of immanent analysis but also to sound the depths of the *discourse* effect. Our inquiry does not end with the no-doubt primordial question: how do we objectify the "system" of a particular corpus? Other questions perforce ensue: what function does such a discursive "genre" *perform* in social practices? What is its *effectiveness*? How does it get to produce and reproduce itself? And again, how does it function interdiscursively within the general division of discursive labour? What hegemony favours the co-intelligibility

> of subsets that transform the real into discourse? How does a particular text work upon the socio-discursive 'given,' what types of conflicts get suppressed, and what changes arise from this process? (5-6)

Part of the issue concerning the effectiveness of a particular discursive practice is related to the issue of the *sayable*, a notion which relates to other culturally-imposed confines that hinder or bind the refugee as constructed Other. The process of making a claim in this sense is one of creating a "productive other," a satisfactory stand-in for the purposes of the hearing. This "stand-in" will resemble, as much as possible, the kind of "refugee" that is described according to international and Canadian definitions, discussed in the next chapter. The word "productive" here suggests not simply a process of communication, but one of self-representation for a clearly-defined end, an approach that is best elucidated by Mikhail Bakhtin and Pierre Bourdieu.

In one of the seminal passages in the early works assembled in the collection *Art and Answerability*, Bakhtin writes that an author's "productive reaction is manifested" in the structures of the cultural product which he generates, and that "his reaction to the hero [which I am equating here with the reaction to the constructed Other; see chapter 6] does not immediately become a productive reaction founded on a necessary principle, nor does the whole of the hero immediately arise from the author's unitary valuational relationship to the hero." The whole process is wrought with difficulties related to the challenge of producing an Other who can stand as a "whole human being" (6). The author creates the hero of the novel as a dialogic Other, and the degree to which a true dialogue can exist between author and hero is both a measure of the aesthetic value of the novel and of the success of this production process. The refugee claimant as author faces similar challenges but without the creative satisfaction of creating an answerable hero because s/he is never given ample opportunity to effectively create a reasonably complete Other. If credibility flows from adequate dialogue, as Bakhtin would suggest, then the claimant's cause is lost even before the hearing begins.

In the work of Pierre Bourdieu, the term "productivity" is but one of the many expressions or words that he has taken from the language of economics; in his work on language and symbolic power he writes about the linguistic and discursive fields by reference to terms like market, capital, profit, instruments, tools, value, cost, exchange, credit, circulation, power, and so forth. John B. Thompson, in his introduction to the recently-updated and translated version of *Ce que parler veut dire*, which appears in English as *Language and Symbolic Power*, suggests that Bourdieu's use of economic terminology is not a form of economic reductionism but rather that "the practices we describe today as 'economic' in the narrow sense (e.g. buying and selling commodities) are a

sub-category of practices pertaining to a specific field or cluster of fields, the 'market economy,' which has emerged historically and which displays certain distinctive properties" (15). Rather than reducing social and cultural practices to examples of economic exchange, Bourdieu is subsuming economic exchange as one field among many where similar rules and logic apply. Thompson writes:

> Within fields that are not economic in the narrow sense, practices may not be governed by a strictly economic logic (e.g. may not be oriented towards financial gain); and yet they may none the less concur with a logic that is economic in a broader sense, in so far as they are oriented towards the augmentation of *some* kind of 'capital' (e.g. cultural or symbolic capital) or the maximization of *some* kind of 'profit' (e.g. honour or prestige). (15 *author's emphasis*)

Bourdieu hereby furthers Bakhtin's notion of the productive other by linking actions and interests, thus undermining simplistic conceptions of how, and for what purpose, discourse is uttered in given realms and at given times.

The question of the Other as Convention refugee therefore raises issues concerning the kind of merchandise that the claimant is expected to produce, and the necessity of the Other for the production of the self (or the productive other); as Bakhtin states, "I cannot manage without another, I cannot become myself without an other; I must find myself in another by finding another in myself" (*Problems* 287). This matter is complex because the "Other" that the claimant is asked to create varies, sometimes considerably, across time and space, and it is subject to various forces that influence the creation during the process of discursive "production." These forces – juridicial, discursive and sociological – are explored in the following chapters with respect to a number of Convention refugee hearings, notably those of the Chilean claimants, Mr. B. and Mrs. V.

2. The Chronotope for the Convention Refugee Hearing

> At least two general categories of definitions of the refugee concept can be discerned: those which have been used by interested humanitarians such as international relief agencies, and those, more rigorous and precise, which have been drafted by jurists and statesmen. In both categories refugees are considered as uprooted people who are in need and cannot turn to their governments for protection. One of the main features of refugee status is that refugees do not enjoy the protection of any government. The refugees lack both a national homeland and a legitimate state to provide protection. (Salomon 29)

i. The Definitions

There are definitional obstacles which Mr. B. (and Mrs. V.), like all refugee claimants, must confront in the quest for status; the definition of the term "refugee" employed for the purposes of the claim and the proximity of the claim to the current definition. For all issues concerning refugees, definitions play an extremely important role; if "Convention refugee" is opened up to include persons of non-European origin for example, as it was with the 1948 *United Nations Universal Declaration of Human Rights*, then whole new classes of persons can be admitted into host countries (and by extension the number of "refugees" worldwide, which includes those who do not make official application for status, grows). The definitions applied generally reflect the context within which they are used; thus although Mr. B. is already an Other (as claimant), his hearing will be successful to the degree that he is able to create an Other (as Convention refugee) that is productive within the context to which he is speaking. Furthermore, the host society's values are often reflected in the definitions used and the apparatus constructed for their determination. This section is a brief survey of the evolution of meanings ascribed to particular terms in light of the important historical events that effected or produced them. It will allow the reader a glimpse of what "otherness" has meant in this country (especially since the First World War) – what the Other had to do to gain admittance, how the Other was treated, and the historical role of the Other in Canadian society.

Contemporary issues concerning refugees revolve around the question of which definition should be applied and the administrative procedure that will be followed in order to ensure that the rulings are fair and consistent. In general, anti-refugee lobbies propose very narrow definitions, and pro-refugee groups favour broad, all-encompassing ones; all too-familiar discussions of "false claimants," "jumping the queue," the flood of "economic refugees," and so forth are all linked to this question of active definitions. The term "refugee" itself is an example of how group perception can change as regards a particular out-group, and even though "for thousands of years there have been people in refugee-like situations" (Salomon 29), the term itself has its origins in the founding of the nation-state, the time when the contrast between in-group and out-group took on a spatial aspect (see Salomon pp. 30ff.). The term then evolved in accordance with particular changes in inter-state relations, centred on issues concerning marginalization, liminality, and frontiers. The evolution of the term, and the historical details concerning refugees and refugee policy has been dealt with extensively elsewhere (cf. Adelman, Dirks, Salomon, Goodwin-Gill); only the specific details pertinent for the hearings under consideration will be discussed here.

Catherine Wihtol de Wenden offers a summary of changes to the term effected by events in Europe:

> La notion de réfugié remonte au XVIIe siècle, quand des Wallons calvinistes persécutés par les Espagnols se réfugient en France. En Grande-Bretagne, le terme *refugee* désignera par la suite les huguenots persécutés par les Français. La notion désigne alors l'étranger innocent, qui partage les valeurs du pays qui l'accueille alors que celles-ci ne sont pas respectées dans le pays d'où il vient.
>
> Au XVIIIe siècle, le religieux fait définitivement place au politique avec la Révolution française, tandis qu'à la fin du XIXe siècle, apparaît le réfugié national ou ethnique, puisque les minorités ethniques occupent la place jadis occupée par le religieux et le politique. La désagrégation des empires en États, même multinationaux, crée des minorités qui ne s'insèrent pas toutes dans le schéma choisi et font obstacle à la construction de celui-ci. (74)

She then discusses the implications of the individual's adherence to some abstract notion of national collectivity:

> Cependant, ces mêmes États européens fabriquent des clandestins de l'intérieur, sans avoir besoin de faire appel à l'extérieur: "prime à la clandestinité" face aux tracasseries introduites pour le demandeur d'asile respectueux de la procédure, lenteurs de la procédure de traitement des dossiers installant les intéressés dans le non-droit si la réponse est négative, crise des critères de définition du réfugié par rapport à l'immigré en cette fin du XXe siècle. La politique d'opinion, qui répand

> l'image de cette nouvelle figure du faux réfugié-immigré clandestin, au service d'une stratégie de dissuasion à l'égard des candidats potentiels, entretient la confusion dans l'imaginaire collectif au détriment des intéressés. (80-81)

The application of particular definitions in the Canadian context only became significant in the Twentieth-Century; in fact, immigration and refugee policy in Canada was neither strictly formalized nor strictly enforced until the inter-war period. Prior to that time, the government of British North America, and later the governments of the two Canadas, were far more concerned with increasing the population and encouraging settlement than with limiting the inflow of foreigners. Gerald E. Dirks notes that "the states of immigration prior to World War I strenuously encouraged Europeans to settle in their territories. If the potential immigrant possessed physical stamina and could pass a somewhat perfunctory medical inspection at the point of entry, he was admitted" (16). With the onset of the First World War, however, the situation changed dramatically, and the post-war immigration policy reflected a different outlook upon the financial repercussions of immigrants.

Several factors affected this change. First, there was the massive slaughter that occurred on the battlefields during World War I, which led to an unprecedented displacement of persons over the entire continent of Europe and in North America. Then, with the election of the Nazi party in Germany came a wave of Jewish refugees who fled (or attempted to flee) Nazi Germany and reported on conditions therein (see Abella and Troper's *None is Too Many* for Canada's response thereto). It was during this inter-war period, however, that it became evident that the First World would have to bear the burden of some of its imperialist escapades in the Third World on a more or less permanent basis:

> Initially, many governments believed the refugee phenomenon was a temporary condition in the world which would disappear when prevailing political disorders and irregularities within certain troubled states had been set to rest. As time elapsed and the numbers of refugees seeking safety from oppression and persecution failed to diminish, permanent organizations began to evolve out of what originally had been temporary structures. (Dirks 1-2)

It was in these inter-war years as well that the First World reacted with systematic efficacy on issues concerning "human rights violations" abroad.

> Refugees have been a recognizable feature of human society for as long as mankind has resided in organized groups. Yet it has only been in this century, especially during the past few decades, that society and national governments have demonstrated sustained interest in the millions of individuals who have felt com-

> pelled to flee their traditional homelands. This lack of widespread concern for the refugee problem is at least partially explained by the dominant interpretation of the concept of sovereignty which prohibited governments from dealing with or assisting the nationals of foreign states and by the absence of reliable and readily available information regarding the plight of refugees which might have aroused public opinion. (Dirks 1)

The first definition proposed within the context of the United Nations came in response to the newly-established regimes in the Soviet Union and the Eastern bloc following the Revolution of 1917; and the first of the internationally accepted definitions grew out of the debates of the League of Nations Council in 1922 respecting conditions being encountered by refugees from the Soviet Union. One of the more generous of the several dozen definitions offered up in the early part of the century was that the class of persons to be called refugees should include "any person who does not enjoy or no longer enjoys the protection of his government and has not acquired another nationality" (Simpson 7).

What is notable about the significant rise in legislation at the outset of the Twentieth-Century is that it points to a new-found interest in, and legitimation of, state control over migration, immigration, and refugees; Wihtol de Wenden writes: "Le début du XXe siècle sera donc marqué par des échanges de populations dans un contexte nouveau, celui du contrôle progressif de l'immigration. Le réfugié devient alors celui qu'on laisse passer quand on ne fait entrer personne d'autre" (75). There were other urgent calls following the First World War for a broadening of the definition of the term refugee, calls which were "prompted by a desire expressed by a sizeable portion of the international community following World War I and the establishment of the League of Nations, to offer minimal legal protection to thousands of Europeans not then residing in their states of origin" (Dirks 3).

A study of legislation that has been enacted in Canada since 1918 illustrates how the growing awareness of refugees provoked a series of important reactions from the Canadian public, the Canadian courts, and the Canadian legislators. These reactions to some degree reflect the public mood of particular moments in Canadian history, and the rhetoric of the Acts, rulings, and opinions to some degree reflect the contemporary "social discourse" concerning refugees. Yet it is a kind of truism that whatever the dominant mood of the country, purely humanitarian action on behalf of refugees is rarely inscribed upon the pages of Canadian history; as Dirks notes, "it is of some consequence that...refugee admissions...were agreed to by the Canadian government only after it had been ascertained that the people involved would not become public charges" (72). Furthermore, it is often quite easy to uncover some ulterior motive in the benevolence of the

government's action with respect to the admission of new persons into Canada; for the most part, "the extent to which Canada assisted such refugees by accepting them as permanent settlers or immigrants depended upon prevailing political and economic conditions within this country" (Dirks xi).

The refugee "problem" after World War I became increasingly burdensome to the West with the permanent displacement of persons following the national struggles, natural disasters, coups and uprisings that contributed to the War, and which exploded during the wartime period. Some of these sentiments are reflected in the Canada's post-War legislation, in particular in the Amending Act to the Immigration Act, passed in 1919. Article C., for example, provides that the Governor-in-Council might, by proclamation or order:

> prohibit or limit in number for a stated period or permanently in the landing in Canada or the landing at any specified port or ports of entry in Canada, of immigrants, belonging to any nationality or race or of immigrants of any specified class or occupation, by reason of any economic, industrial or other condition temporarily existing in Canada or because such immigrants are deemed unsuitable having regard to the climatic, industrial, social, educational, labour or other conditions or requirements of Canada or because such immigrants are deemed undesirable owing to their peculiar customs, habits, modes of life and methods of holding property, and because of their probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their entry. (Hawkins 17)

Another Act, P.C. 183 January 31, 1923, specifically set out the classes of people eligible for admission in Canada – bonafide agriculturalists, farm workers, domestics, and close relatives of residents of Canada. In effect, the entry of industrial labourers to Canada had terminated at least six years prior to the onset of the Depression. This Act reflected the mood of a nation which was anxious to guard against further intrusion of foreigners; the economic climate was poor, and visible minorities were often the scapegoats when Canadians began to feel a downturn in their standard of living.

As the atrocities that followed the election of the Nazi Party into power in Germany became known in Europe and in the Americas, there was increasing pressure on Canada to change its refugee policy concerning the admission of Jews. The situation in Quebec was by far the most blatantly anti-semitic; Samuel Jacobs said quite simply that "...in the period covering my whole life, I have never seen anything so violent as the campaign which is being propagated against the Jews in the Province of Quebec. We have no doubt whatever that the money required for this purpose is being supplied by Berlin and factions within America" (26 dec. 1933, cited in Dirks 54).

Policy as regards refugees and immigrants seems to have been dictated by the small reactionary factions of Canadian society who feared any change in the "cultural makeup" of the Canadian population and by Trade Unions who lobbied in favour of limited immigration. Burnett notes that "the decision to give economic considerations priority over humanitarianism was buttressed by the anti-Semitism expressed by small but noisy and even violent minorities in various parts of Canada in the 1930's. The most notorious was led by Adrien Arcand in Quebec, but others existed in Ontario and in Western Canada" (38). During this ignominious epoch in Canadian history, there existed ever more stringent laws concerning the entrance of refugees; Dirks attributes the policy concerning immigration to a calculation of the percentage of minorities present in Canada at the time of the claim: "The government's policy...underwent little change between March 1938, when the *anschluss* increased the flow of refugees from German controlled regions, and the actual outbreak of war eighteen months later.... [It] endeavoured not to create a purely humanitarian classification for immigrant eligibility and not to alter the existing ratios of nationalities and races already present in Canadian society" (Dirks 60).

The policy also reflected the mood of a xenophobic populace, and even the voices of those who urged change based on the new reality of political refugees went unanswered in the inter-war period. A.A. Heaps, a Winnipeg Member of Parliament for the CCF Party stated on the 16th of May 1938 that "immigration regulations in Canada are the most stringent in the world. They are inhuman and unChristian....We think it is not in keeping with good liberal doctrine to refuse the right of asylum to a limited number of political and religious refugees" (cited in Dirks 61).

World War II was a watershed for refugee policy internationally, and in Canada. The reasons for this are clear; by the close of 1943, the war had caused the dislocation of at least twenty-one million Europeans either through voluntary decisions to flee the homeland or as a result of the Nazi practice of forcing non-German peoples to work in Germany. This figure rose to approximately thirty million by the end of the European phase of World War II in May of 1945. In response to the international crisis, Canada began studying its own policy immediately following World War II:

> The small interdepartmental committee, established at the request of External Affairs officers, met again in April 1946, and adopted a report to be placed before the Cabinet. In addition to recommending the broadening of categories for immigrant eligibility, the report urged that internationally recognized travel documents which refugees acquired from appropriate agencies should be accepted by

> Canada in lieu of regular passports. The report concluded by reiterating an earlier request for a full review of Canadian immigration policy with the view to planning for the future. (Dirks 139)

Canada continued to favour delegating responsibility for decisions concerning refugees to an international body, the Economic and Social Counsel of the United Nations (ECOSOC); but the Canadian government continued to waiver in its support for specialized agencies such as the United Nations Relief and Rehabilitation Administration or specific sub-committees established to undertake projects under the auspices of the ECOSOC. The Canadian efforts during this period were for the most part directed at participating in the international process of post-war recovery, but always emphasizing that "European refugees should be integrated into European countries" (Dirks 121).

In 1949 the General assembly voted to establish an Office of the High Commissioner for Refugees (OHCR) to direct activities concerning refugees. Since it was to carry out tasks essentially relegated by the Convention, the Office had to wait two years before embarking upon programs for the aid and resettlement of refugees. Of principle concern during this pre-Convention era was the discussions about the definition of "refugee" that would prevail in the final document. The definition that was finally adopted had serious flaws, particularly as regards to contemporary issues in refugee policy.

> In the early years after 1951 [the definition's] major inadequacy lay in the phrases: "As a result of events occurring before January I, 1951" and "as a result of such events." Within a few years of the framing of this definition, it was becoming increasingly clear that all refugee movements did not originate in World War II or its aftermath, and that refugees might well be a continuing feature of the international scene. (Hawkins 158)

This Convention nonetheless fundamentally changed the ways in which refugees were assessed, admitted, and treated by signatories to the treaty. In the Preamble, the contracting parties affirm "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination;" that "the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental human rights and freedoms;" that it is necessary to "revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement;" "that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the inter-

national scope and nature cannot therefore be achieved without international co-operation;" "that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States;" and that "the United Nations High Commissioner for Refugees will be given the task of supervising the protection of refugees by coordinating efforts and conventions aimed at their assistance" (*Convention* i).

The *Convention* came into effect on 22 April 1954, and the "instrument of ratification" was deposited by: Denmark and Greenland, 1952; Norway, Belgium, Luxembourg, Federal Republic of Germany, 1953; Australia, Norfolk Island, Papua, New Guinea, Nauru, the United Kingdom, Northern Ireland, Channel Islands and Isle of Man, 1954. The Convention totally re-defined the entire notion of "refugee," broadening the definition to include persons who were persecuted in any country in the world:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> 1. Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
>
> 2. As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it. (*Convention* 153)

There are some notable characteristics of this Convention, as they relate to this study of Convention Refugee claims. First, the Convention was construed to "prevent this problem [refugees] from becoming a cause of tension" between States. The United Nations was established for the most part in the interest of protecting the West against itself, an objective that was achieved through the passage of Conventions, Acts and Treaties that serve the interests of its most powerful member countries. Second, it is notable that neither the United States nor the Soviet Union ratified this Convention (Goodwin-Gill "Refugees" 130) even though the U.S. adhered, in 1968, to the Protocol Relating to the Status of Refugees "and thus became derivatively bound by all the principal provisions of the Convention on the same subject" (Martin 133). Third, the Convention was originally worded to protect refugees of

World War II; it was only changed (through the "Protocol") after years of protest by countries demanding that the U.N. broaden the definition of "refugee" to include "any person" who suffered persecution in his/her country of origin.

> As a consequence of this growing understanding of the refugee phenomenon in the post-war world, a short Protocol Relating to the Status of Refugees was prepared and submitted to the United Nations General Assembly in 1966. It eliminated the two restrictive phrases, making the Convention applicable to all refugees who came with the UNHCR mandate. Among a few other provisions, it also required "State Parties' to provide the Office of the High Commissioner with information and statistical data on the condition of refugees, the implementation of the Protocol, and the laws, regulations and decrees which are or may later be in force relating to the refugees. The General Assembly noted the Protocol and requested the Secretary-General to submit the text to states to enable them to accede. The Protocol was signed by the President of the General Assembly and by the Secretary-General on January 31, 1967. (Hawkins 158)

Fourth, the Convention specifically prohibits "refoulement," the act of sending refugees back across the border from where they have come and into the hands of the authorities whom they have sought to escape. And Fifth, the Convention allows for each country to have its own mechanism for checking claims; this leads to an extremely uneven treatment of refugees from one country to the next:

> The UN Convention and Protocol do not specify the precise procedures which should be used to determine refugee status. It is left to the contracting states to devise systems of their own and these systems vary widely. In France, for example, the competent authority for determining refugee status is the Director of the Office for the Protection of Refugees and Stateless Persons, an autonomous body attached to the Ministry of External Relations. He is assisted by a council, consisting mainly of government officials, which advises him on matters of general policy relating to he determination of refugee status. Appeals against negative decisions may be brought before a special appeals commission whose decisions may be appealed on questions of law to the Conseil d'État. In Britain, the competent authority for determining refugee status is the Home Secretary. Claims are processed in the first instance by the Refugee Section of the Home Office Immigration and Nationality Department. Appeals against a negative decision may be made to a government adjudicator, with the possibility of further appeals to the Immigration Appeal Tribunal and to the courts. In Sweden, the competent authority is the National Immigration and Naturalization Board whose decisions may be appealed to the government itself within three weeks from the day the board's decision is communicated to the claimant. In the United States, the competent authority is the District Director of the Immigration and Naturalization Service

> (INS) in the area where the claim for refugee status is made. The District Director is required in all cases to seek an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs in the Department of State. (Hawkins 189)

Aside from allowing uneven treatment of refugees in host countries, the document has also proven to be deficient in its projections of how to treat the refugee problem in the long-term; in the name of deficit reduction and protection of the local workforce, various governments in the First World have passed legislation forcing refugees to: claim in neighbouring countries (thus ensuring that Third World refugees remain in the Third World) or in whichever country they pass through (the "third country clause" which effectively limits the refugees choice of safe haven in lieu of places deemed safe by the First World, and ensures that refugees are subject to potentially deleterious forces as international air carrier routes or visa restrictions); be turned back, even on the high seas, if they have been assisted in their voyage or if they are from regions deemed unacceptable to the host country (Haitian, Chinese and Vietnamese refugees hoping to claim status in the U.S. for example); or be obliged to fend for themselves after an initial grace period (see Goodwin-Gill, "Refugees, Non-nationals and the relevance of Constitutional Values" 127ff.).

In terms of definitions, there has been substantial change to the notion of "refugee" since the signing of the Convention.

> Entre 1951 [U.N. Convention]... et 1967 (protocole de Ballaggio supprimant les limites dans le temps et dans l'espace stipulées par la convention de Genève), on assiste à un glissement vers une notion plus large. Dans les années 1960, de nouveaux États du tiers monde sont entrés à l'ONU, conduisant à un élargissement de la prise en charge par le commissariat des Nations unies à des non-Européens. De plus, on assiste à une *production de réfugiés* dans le tiers monde qui ne correspond plus au modèle classique: réfugiés liés à la constitution de nouveaux États ou à des révolutions, impliqués dans un combat, réfugiés souvent combattants et agissants. Mais cet élargissement crée une ambiguïté, qui contribuera à la crise des réfugiés. Enfin, les années 1970 viennent encore compliquer le phénomène, avec la fermeture des frontières à l'immigration de main-d'oeuvre: plus on contrôle les frontières, plus la question du vrai réfugié se pose et plus la reconnaissance du droit d'asile, dont les critères relèvent de la souveraineté de chaque État, oblige à des précisions. (Wihtol de Wenden 75, my emphasis).

Canada only signed the United Nations Convention in 1969 on account of "the fear that her rights of deportation might be limited by United Nations' protection of refugees" (Howard 99). Canada legislated on the basis of the Convention, Protocol and the emerging criteria for adjudicating claims when it passed the 1976 Immigration Act. For the purposes of that Act, a Convention

Refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion

> (a) is outside of the country of his or her nationality and is unable, or by reason of such fear, is unwilling to avail him or herself of the protection of that country, or
>
> (b) not having a country of nationality, is outside of his or her former habitual residence and is unable, or by reason of such fear is unwilling to return to that country.

This definition has been contested on several grounds; however the general opposition to it has been from human rights activists and lawyers who oppose Canada's adherence to the bare minimum of the U.N. Convention. For example, the Convention does not go as far in protecting the rights of individuals as the Canadian Charter of Rights; in order to account for the tenets of the Charter (beyond the acceptance of the notion that all refugees are entitled to a hearing, assured in the ruling on the Singh case discussed further on) the Convention would have to recognize as refugees persons who have been persecuted on the basis of their sex, sexual orientation, age, or handicap. If the refugee is a member of a group whose members have been persecuted but s/he has thus far escaped persecution, s/he is *not necessarily* admissible. Finally, the definition insists upon there being a *well-founded fear* of persecution. These three words are, in effect, at the centre of this study. Discourse analysis can demonstrate what the authorities mean by this qualification, and it can propose more reasonable means to establish such information.

There are other areas of dissension concerning the contemporary definition of "refugee" used by government and international bodies like the United Nations. Simpson, for example, proposes a more humanitarian approach, which relieves the claimant of some of the burden of proof:

> A refugee is one who has left his country of regular residence of which he may or may not be a national, as a result of political events in that country which render his continued residence impossible or intolerable, and has taken residence in another country or if already absent from his homeland, is unwilling or unable to return without danger to life or liberty as a direct result of political conditions existing there. (3)

The same may be said for Circautas who suggests that "a political refugee is a man who has left his country for reasons of personal conviction in that his political or social views are in conflict with the dominant ideology" (23).

In response to some of the criticisms concerning the narrow definition currently employed, the United Nations High Commission for Refugees proposed, in 1974, a broader and more workable definition which was to include "any person who, owing to aggression, occupation, foreign domination or events seriously disturbing order in either a part or the whole of his country,...is compelled to leave his place of habitual residence" (*Handbook* 10). As yet, however, this has not been adopted by member countries, including Canada.

Related to the question of a humane working definition of "refugee" is a humane working definition of "asylum." The Institute of International Law defines asylum as "protection which a state grants on its territory or in some other place under the control of certain of its organs, to a person who seeks it" (Weiss 3). This definition is broadened by the United Nations in its *Declaration of Human Rights*, where it is confirmed that "everyone has the right to seek and enjoy another country's asylum from persecution" (Article 14). The 1951 Convention codifies this "right;" no (signatory) country has the right to turn back any "individual where his freedom or life would be threatened on account of race, religion, nationality or political opinion." In the Canadian juridical context, asylum

> is not the subject of any Canadian statute. It is given by the Canadian government as a question of grace and, unlike refugee status, it cannot be litigated before the courts. In strict law, it is a part of the Crown prerogative and is vested in the executive with a minimum of review. Of course, anyone denied asylum would still be free to claim refugee status at an inquiry. (Grey *Immigration* 130)

The particularities of asylum, including a proposal for a Convention on Territorial Asylum, have been discussed in great detail by Atle Grahl-Madsen.

The consequences of modifying Conventions for asylum or refugee status are monumental. There are an estimated 15 million refugees in the world (if we use a restricted definition offered which ostensibly includes only persons "who have fled their homes and are now living in exile," see Salomon 13 ff.), of which 12 million are from the Third World, and there are thousands of claimants caught in refugee backlogs around the world. Jonas Widgrent, who since 1987 has been the Coordinator for Inter-governmental Consultations on Asylum-Seekers in Europe and North America at the UNHCR in Geneva, notes the consequences of this trend:

> Between 1983 and 1987, the annual number of asylum applications in Europe has increased three times, the total asylum backlogs (i.e., the number of asylum cases which have not yet been decided upon) has increased four times, now representing seven times the total annual budget of UNHCR, devised for all twelve million

> refugees in the world. At the same time, the average refugee recognition rate in Europe has decreased from 50 to 30 percent, since there are more non-refugees among those who apply. If these trends were to continue for the next four year period, we would be facing a situation where some eight billion dollars were used for a backlog of some 500,000 asylum cases, whereof only some twenty percent after some two to four years would be recognized as refugees. (601-2)

Any number of these backlogged claimants may find themselves returned to their country of origin to (further) suffer human rights abuses; and all of these persons who are without status are in an unacceptable state of limbo which threatens their personal livelihood as well as the entire system of refugee claims. The issue, it seems to me, is not simply one of *freedom from* (oppression, torture, persecution) but *freedom to* (choose, develop, create). This is a critical, yet seldom mentioned factor that bears upon the entire issue of host country treatment of out-groups, for

> it's pretty well known that a stimulating, complex, supportive, nurturing environment in fact enables people to flourish. There's a difference between children who grow up in an orphanage and those who grow up in a supportive environment where they're free to explore. You can see all that. It's a dramatic difference. And it probably reflects things about human nature. I suppose that, at least I would like to believe that people have *an instinct for freedom*, that they really want to control their own affairs. They don't want to be pushed around, ordered, oppressed, etc., and they want a chance to do things that make sense, like constructive work in a way that they control, or maybe control together with others. I don't know any way to prove this. It's really a hope about what human beings are like – a hope; that if social structures change sufficiently, those aspects of human nature will be realized. (Chomsky *Language and Politics* 756, author's emphasis)

Discourse analysis can help demonstrate ways to lay bare the oppressive nature of the social structures to which Chomsky refers, while suggesting ways of bringing present practices into line with the problems faced by the living, breathing, human claimant. Once again, although Canada's system is far more humane than most, we must be on guard against the brutality of bureaucracies; sometimes following Acts, Statutes, rules and regulations leaves open the possibility of abusive authority, as Chomsky suggests with regards to the United States:

> I have often thought that if a rational Fascist dictatorship were to exist, then it would choose the American system. State censorship is not necessary, or even very efficient, in comparison to the ideological controls exercised by systems that are more complex and more decentralized. (Chomsky *Language and Responsibility* 20)

Discourse analysis could go a long way to demonstrating the ways in which these ideological controls work, and the ways in which people's discourse is closed down, diverted, and subjugated to the greater interests of the state.

ii. The Chronotope for the Hearing as Conducted in 1987

As much as this study is a description of the process of the Canadian Convention refugee claim and a study in discourse analysis of documents pertaining to this process, it is also a description of the passage that an individual refugee made from his/her country of origin to the room in which the hearing was actually held in 1987. The first step in the process was that he/she had to alert a police or RCMP officer, an immigration official, or an airline official at the port of entry concerning his/her desire to become a Convention refugee. S/he then filled out a Basic Form (see next chapter), as well as the necessary forms to apply for Medicare and Welfare. At Immigration Canada Headquarters, the refugee was also asked to fill out provincial documents.

If the refugee posed no apparent threat to Canadian society (ie. s/he is not a dangerous criminal, drug addict, or otherwise "undesirable"), then Immigration officials confiscated his/her passport and arranged for accommodation pending the Hearing. Claimants who knew someone residing in the province of entry were encouraged to arrange accommodation with that person. With the necessary documents in hand, a date for the hearing, and a place to sleep arranged, the claimant left the Immigration building but, without any real status in Canada, s/he remained a "refugee." This period can be a busy one for the claimant, who generally spends the weeks prior to the hearing consulting a lawyer (if s/he so desires) and preparing the necessary documents. Since many refugees arrive in Canada without proper identification, they were charged with requesting whatever kinds of materials they can from City Hall, religious institutions, or places of employment in the country of origin pending the date of their hearing.

On the day of the hearing, the claimant presented him/herself at the Immigration Canada Regional Headquarters. These Headquarters varied little from one to the other in 1987, so although some of the details of the process herein described may vary somewhat from one country to the next and sometimes from one year to the next, the basic details, which will be outlined in great detail in the coming chapters, is similar throughout the First and much of the Developing World.

iii. Administrative Law

The fact that the procedure in question here is an administrative one, regulated by procedures from the domain of Administrative law, has important consequences for the adjudication of the claim. The basic principles of administrative law in Canada are described in great detail in fundamental works by Smith, *Judicial Review of Administrative Action*, Wade, *Administrative Law*, and R. Dussault, *Traité de droit administratif canadien et québécois*, but Julius Grey's summary of fundamental premises of administrative law in *Immigration Law in Canada* is sufficient to underline the fundamental characteristics of administrative law; relevant issues in this domain will be expanded further when they are of issue to the hearings. With respect to administrative law's two guiding principles, Grey notes the dialectical tension of a process which on the one hand leans towards review (#1) and on the other towards judicial restraint (#2):

> 1. There can be no power or authority exercised by an official without a statutory or a prerogative source, and all grants of power are generally to be narrowly construed.
>
> 2. Where a discretion is granted to an official, the courts will not review his decision on its merits, but only to see if he stayed within the bounds of his authority and exercised it in a reasonable manner. (1)

The thrust of these two principles will be felt in the analysis of the Convention refugee hearings; on the one hand questions of "fairness," "power," and "authority," regulate or mediate between the authority of the administrator and his actions as such, and on the other issues related to efficacy in decision making limit the court's authority to interfere with the decisions made by officials empowered in the area of administrative law. Grey states that "the essence of this attitude is the refusal of courts to put themselves in the place of officials to make their policy decisions and, generally, to invade those areas of competence left to the other branches of government, the legislature, and the executive. (3)

Administrative law was branched off from constitutional law early in the century, and procedures thereof now deal "with the legal limitations on the actions of governmental officials, and on the remedies which are available to anyone affected by a transgression of these limits" (Jones and de Villars 3). Administrative law governs the actions of administrators who have been delegated certain rights, such as the right to adjudicate refugee claims; as such, "Administrative law... deals with the actions of administrators to whom powers have been granted by laws which have been validly enacted under the constitution" (Jones and de Villars 4). The delegation of authority to ad-

ministrators is ostensibly a practical procedure resulting from the "magnitude of the business of government," the "technical" nature of much government activity, the desire for "greater flexibility," the impossibility of deriving "a general rule to deal with all cases," "the need for rapid government action," the desire to innovate or experiment rather than legislate, the need for rapid response in "emergencies," and the practical matter of requiring that "someone actually has to apply legislation, and that persons has to have authority to do so" (Jones and de Villars 5).

What this means is that administrative law often deals primarily with cases involving the poor, the underprivileged, the disadvantaged and the disenfranchised persons in society. Thus the refugees whose cases we will be examining have the limited powers of representation and appeal because they are dealing with members of the government at every level of their claim because the hearings were until 1989 administered by, ruled upon, and appealed to (if the claimant appeals) government-appointed bureaucrats. If the unsuccessful claimant persisted and was granted a hearing, s/he had a chance for judicial review or appeal in Federal Appeal Court; but even in that case the claim was heard by a judge appointed by the Canadian government. The grounds for the judicial review are generally limited to "substantive *ultra vires*," "exercising a discretion for an improper purpose, with malice, in bad faith, or by reference to irrelevant considerations," "not considered relevant matters," making serious procedural errors," or "making an error of law" (Jones and de Villars 8).

In matters of judgment, the adjudicators in the domain of administrative law are bound to the principles of natural justice and the duty to be fair (see Jones and de Villars 157ff.); thus a high level of discretion (see de Smith 278ff.) is offered to decisionmakers in administrative law, and decisions seldom have to be justified (refugees in 1987 were not entitled to participate in the Committee's deliberations, and reasons were not provided when claimants were refused). Eric Hehner has offered a poignant commentary on the rise of discretionary powers in his article "Growth of Discretions – Decline of Accountability," including the following observation:

> We have changed the activities of government to an extent that makes even more discretionary powers inevitable. We have provided for many such powers, and at an accelerating pace. However, instead of entering wholeheartedly into the creation of discretions with our eyes open to its implications and needs and simultaneously providing machinery to prevent the abuse of discretionary powers, we have tried to pretend that there has been no basic change. We have left discretions to be exercised as much in the shadows of secrecy as possible. It is getting more difficult to tell where lawmaking stops and administration starts. It is getting harder to place responsibility for actions (or lack of them) among the multiplicity of

> government agencies now involved. Even greater use of discretionary powers may be essential but these powers carry with them potential for abuse unless there are surrounding safeguards. (151)

Coupled with other problems regarding admission, eligibility and protection, the question of discretion becomes all the more disquieting for all persons subjected to administrative law, in particular for those persons whose lives depend upon the decisions thereby rendered.

v. The Singh Case

The two transcriptions studied in this book were recorded after a landmark decision known as *Singh v. Minster of Employment and Immigration* (1985) 1 S.C.R. 177, a decision which modified the ways that these hearings were heard and limited the exercise of powers in refugee laws by linking the process to the Canadian Charter of Rights and Freedoms. Julius Grey states:

> *Singh v. Minister of Employment and Immigration* is significant in three distinct ways. It is of great importance in rendering more humane Canadian immigration law. It is a major step forward in the application of the *Canadian Charter of Rights and Freedoms* and other human rights documents. Finally, it reinforces the growing bonds between the "new constitutional law", as best exemplified by the *Charter*, and administrative law. (Grey "Comment" 496)

The details of the Singh case are as follows: after applying for refugee status by filing a sworn statement under section 45 of the Immigration Act and being rejected, Singh requested a redetermination of his claim to the Immigration Appeal Board; however, this being administrative law, the Board simply "exercised its power under section 71 and summarily dismissed the application with no hearing and with only the sworn statement and another affidavit signed by Mr. Singh before it" (Grey "Comment" 497). Thus, as Julius Grey notes, Singh was to be removed from Canada even though at no time was he [Singh] able to put his arguments directly to those who had to decide, to meet them, and to sway them" (Grey "Comment" 497). The Supreme Court ruling which allowed for self-representation beyond the affidavit is based on the *Charter of Human Rights and Freedoms*, a fact that in some ways limits the powers of the government to make purely administrative decisions as it had done in the past. In effect, *Singh* overturned the two Federal Appeal Court decisions, *Singh v. Minister of Employment and Immigration* (1983) 2.F.C. 347, 144 D.L.R. and *Vincent v. Minister of Employment and Immigration* (1983), 148 D.L.R. (3d), in which refugee status was excluded

under section 7 of the *Charter* because the threat to life, liberty or security suffered by the claimant did not occur in Canada. In short, the Supreme Court ruling on the *Singh* case in 1985 "reversed and held invalid the power to refuse to entertain an application for redetermination given to the Immigration Appeal Board by the legislation" (Grey "Comment" 499-500). The fundamental upshot of the ruling was that although the decision would remain administrative, "every applicant for refugee status was going to get at least one oral hearing, compatible with the importance of the refugee issue" (Grey "Comment" 500). In her ruling on the *Singh* case, Wilson wrote:

> Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under section 1 [of the *Charter*]. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in section 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. (218-9)

This ruling had a major impact upon the number of persons waiting for decisions in Canada, although the backlog by then was exacerbated by a trend towards increased claimants that was being felt worldwide:

> Some countries, including Canada, have been swamped with claims for refugee status during the last few years and large backlogs have developed. In early 1984 the backlog of claims for refugee status at the District Director level in the United States was 165,000 including the claims of 115,000 Cubans and 5,000 Haitians. In West Germany, which has been faced with an avalanche of claims, applications pending before the Federal Office for the Recognition of Foreign Refugees were 33,000 in 1982 and an estimated 200,000 in 1983, even after extensive modifications had been introduced in the system. In Canada, the number of persons seeking refugee status increased from 500 claims in 1977 to 6,792 in 1983-4. By the month of March 1987, Canada had a backlog of 23,000 refugee claimants. (Hawkins 190)

The changes to the process, and the growing flows of refugees, created great strains upon the adjudication system. The general atmosphere in Canada during the spring of 1987, the time when Mr. B. and Mrs. V arrived, was one of open hostility towards the growing number of refugees who were now entitled to the oral hearing; there was constant discussion of the "backlog" of "false claimants" and "queue jumpers." The government, under pressure from right-wing protectionist groups, unions, and racist elements among constituents, was preparing to tighten its grasp on the administrative system

regulating the flow of refugees into Canada (Bills C-55 and C-84) while at the same time initiating a massive campaign to process the 23,000 claimants who were awaiting decisions from the Refugee Board. So at least as far as public opinion was concerned, the spring of 1987 was not the best of times to undergo an oral hearing to determine refugee status in Canada; and the situation was not ameliorated by the mechanics of interpretation and transcription, described in the next chapter.

3. Interpreting and Transcribing the Other.

i. Interpreting the Other[*]

In a chapter of Primo Levi's book *The Reawakening* called "The Little Hen," the narrator describes his friend Cesare's attempt to trade six dinner plates for a chicken. Despite the apparent simplicity of the task, Cesare's dream to fill his stomach is impeded by the fact that he only speaks Italian, and the peasants with whom he is trying to negotiate the deal only speak Russian. The narrator attempts to help Cesare by summoning up the few words of Russian that he knows, but to no avail. He writes:

> I was in a pickle. Russian, they say, is an Indo-European language, and chickens must have been known to our common ancestors in an epoch certainly previous to their sub-division into the various modern ethnic families. *'His fretus'*, that is to say, on these fine foundations, I tried to say 'chicken' and 'bird' in all the ways known to me, but without any visible result.
>
> Cesare was also perplexed. Cesare, deep down, had never really accepted that Germans speak German, and Russians Russian, except out of gross malice; then, in his heart of hearts, he was persuaded that they only pretended not to understand Italian through some refinement of the same malice. Malice, or extreme and scandalous ignorance: clear barbarism. There could be no other explanation. So his perplexity rapidly changed to anger.
>
> He grumbled and swore. Was it possible that it was so difficult to understand what a chicken is, and that we wanted it in exchange for six plates? A chicken, one of those beasts that go around pecking, scratching and saying 'coccode-e-eh:' and rather half-heartedly, glowering and sullen, he put on a very second-rate imitation of the habits of the chicken, crouching on the ground, scraping first with one foot and then with the other and pecking here and there with his hands shaped like a wedge. Between one oath and the other, he also cried 'coccode-e-eh;' but this rendering of the chicken's cry is of course highly conventional; it is only heard in Italy and has no currency elsewhere.[7]

This is a description of how one's inability to translate a simple word frustrate the satisfaction of an essential need, in this case that of allaying the hunger that prisoners felt after their liberation from an Auschwitz death camp. In this scene, Cesare refuses to believe that persons cannot understand the Italian word for chicken; after all, if Italian children can understand the Italian word

for chicken, how is it that Russian peasants, who continuously deal with livestock and foodstuffs, cannot understand the Italian word for chicken? Cesare is all the more confounded by the peasants inability to decipher his dramatic rendition of the chicken's behaviour, and of the sound that the chicken makes, rendered into the Italian language as coccode-e-eh (this sounds more like a rooster; however the subject of discussion is indeed a chicken; the 1966 French Grasset translation uses *coccodé*).

The drama and the urgency of cross-cultural communication as rendered by the transcriber and interpreter in times of distress, as well as the sometimes comical, sometimes tragic elements of failed human interaction, are the subjects of this chapter. But rather than elaborating issues arising out of Primo Levi's descriptions of Italian ex-prisoners' attempts to communicate with Russian peasants, the issue here is the plight of persecuted persons who have come to Canada. There are similarities between the two processes, but the arbitrators are not common peasants who can offer food, they are Canadian officials who can offer Convention refugee status; the languages of currency are not Russian and Italian, they are, on the side of the Canadian officials, either French or English, and on the side of the claimants, virtually any language or dialect known to man; and finally, the 'coccode-e-eh,' that untranslatable sound of the Italian chicken, the language that will act as a kind of intermediary between the claimant and the decisionmakers, is, in the case of the Convention refugee claimant, the language of persecution; silence, scars, tears, pleas, and impassioned cries.

The most significant example of the small amount of work that has addressed the specific question of communication breakdowns in refugee hearings is Walter Kälin's article "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing," which discusses "five (partially overlapping) obstacles to an undistorted interaction between asylum-seeker and official:" "a)the manner in which the asylum-seeker expresses him- or herself; b) the interpreter; c) the cultural relativity of notions and concepts; d) different perceptions of time; and e) the cultural relativity of the concepts of 'lie' and 'truth'" (231). Focusing upon the cultural differences between the asylum-seeker and the refugee official, Kälin demonstrates how distortions in the process of communicating the claim seriously jeopardize the apparent veracity of the claimant's narrative. Kälin's work is a real-world example of problems in cross-cultural communication described elsewhere in works by, for example, V.C. Bickley, C. Geertz, W. Gudykunst and Y.K. Kim, K. Oberg, and L. Pospisil, and is an important contribution to the study of claimant success in the courtroom, as explored previously by P. Bohannan, B. Danet, M.B. Hooker, M. Parkinson, K.R. Scherer and others.[8] This chapter complements Kälin's work by focusing upon the role of the interpreter, and by

situating the issues into a context that is uniquely Canadian (Kälin describes his experiences as Counsel for claimants in Switzerland from 1980-1983). My hypotheses as regards to inter-cultural interpretation as practised in these hearings are as follows: first, the system as construed in 1987 could not fulfil the objectives to which it makes claim (through reference to the *1951 Convention Relating to the Status of Refugees* and to the *1967 Protocol Relating to the Status of Refugees*, upon which the *Canadian Immigration Act* is based) because of fundamental flaws in the transmission of the narrative essential for the claim; second, persons of backgrounds that differ dramatically from those of Canadian adjudicators were most handicapped by virtue of their being most dependent upon the interpreter and probably least able to judge the efficacity of their own testimony; and third, the assumption that contradictions during the hearing should be grounds for rejecting or doubting the veracity of the claim placed undue burden upon the refugee and upon the interpreter[9] who is called to represent the narrative before the adjudicators.

The kind of interpretation in question here is cross-cultural, belonging to a realm where words are seldom sufficient, and where culturally contingent renditions of reality through sounds, – 'coccode-e-eh,' 'cocorico,' 'cock-o-doodledo,' become particularly pertinent. Hearings in Canada can be held in either English or French, and they unfold much like any other trial; but because of the peculiarities of the hearings *The Handbook on Procedures and Criteria For Determining Refugee Status* sets out a number of specific Procedures that act as guidelines for signatory countries. Of notable interest for a discussion of interpretation and inter-cultural communication is article 190, which states that:

> It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs. (45)

Article 192 (iv) adds that "the applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned" (46). The technical assistance to which the claimant has access in this country is the Counsel (who is chosen by the claimant) and the interpreter, and s/he may also request assistance from refugee assistance groups including the Office of the United Nations High

Commissioner for Refugees. It should be noted, however, that there is nothing in the Immigration Act that specifically indicates that persons making refugee claims have the right to an interpreter. However, as Wydrzynski notes,

> It is the present policy to provide interpreters for the examination where necessary, as well to translate the transcript of the examination. This right would seem to be guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* in any event. It would seem that because of the critical nature of proper interpretation and translation in reference to refugee claims, a lack of qualified interpreters, where the Commission refuses to allow for corrections, might be seen to nullify the proceedings. (*Canadian* 294)

The procedure follows the tenets of the *Convention* previously described: the basic facts are set out, the persecution is discussed and compared to the kinds of persecution that are acceptable under Canadian (and international) law, the claimant's testimony is scrutinized – which basically means that the Refugee officials look for contradictions or so-called lies, – and then the claimant awaits the final decision. Since the decisions about the validity of a claim were not made by the Senior Immigration Officer present (this has since changed), the role of the interpreter was all the more crucial because the whole apparatus of non-verbal communication was not available to the adjudicators and because there was no way to verify apparent errors or contradictions with the lawyer or the claimant without a follow-up interview.[10] Although most basic observations and conclusions of this chapter could be applied to contemporary adjudication procedures and to procedures followed in many countries of the world, the examples provided arise for the most part from research on hearings that were conducted in 1987, during the period at which decisions were still rendered by the Refugee Status Advisory Committee. Some procedures have since been refined but most of the problems of inter-cultural communication remain as described. Furthermore, all documents quoted in this book are authentic, and the texts are presented here as they were submitted to the decisionmakers; errors of language and syntax in these citations were present in the originals. And finally, the Mr. B's and Mrs. V's testimony was translated during the hearing from Spanish to French; I have rendered it into English for reproduction in this book (remaining as faithful as possible to the language employed in the original).

Most refugee claimants come from the Third World, and therefore speak little or no English or French, or, in some cases, they can speak one or both but prefer to give this crucial testimony in their mother tongue. If the claimant so chooses, s/he has the right to an interpreter. In the case where an interpreter is present, the following swearing-in takes place at the outset:

By the S.I.O. [Senior Immigration Officer] (to the interpreter):

Q. Please place your right hand on the bible. Do you swear sir to translate faithfully, correctly and to the best of your ability from English to Spanish and from Spanish to English all questions, answers, testimony, documents or anything else which may be presented during the course of this examination?

A. I do.

Thank you.

The interpreter's role is to interpret each sentence of the hearing; thus the hearing usually proceeds from one sentence to the next, with a brief pause in between to allow for the interpretation. Variation between the speaker's intended meaning and the text that emerges, is, by the very nature of the procedure, inevitable. Interpreters are given the task of both making possible communication between persons speaking different languages, and acting "as mediator[s] between cultures" (Bickley 107). Walter Kälin points out that even when excellent interpreters are available, systemic problems exist:

> Because of the close links between language and culture, however, even excellent translators fulfil this task only when they attempt to communicate in their translations the cultural context of words and concepts. Interpreters used in the asylum procedure often not only lack this sophistication; sometimes they are also not qualified or they make mistakes because of fatigue resulting from a lengthy hearing. All this may distort the communication between asylum-seeker and refugee. (233)

Any number of examples exist to back up Kälin's claim that a failed interpretation can lead to contradictions in the testimony, which in turn can be grounds for rejection of the claimant as refugee, and a selection of potentially-incriminating errors made by interpreters will be set out further on; however it is useful to first situate these errors in terms of their legal consequences.

ii. Legal Consequences of Failed Interpretation

To state that minor errors made by the interpreter could be fatal is no overstatement, a fact that is demonstrable through reference to the case of Mr. B. (in the next chapters) and to decisions rendered by the Refugee Board and the Federal Appeal Court (see chapter 7). Even under the pre-1989 rules, which were far more lenient than those in place today in terms of appeals (present rules generally require that there be an "error in law," errors in interpretation were generally insufficient grounds for a new hearing because,

as Roger Cantin notes, "minor translation inadequacies in the transcript of the examination under oath are... not defects enough to undermine the validity of the decision of the Minister" (see *Milius and Minister of Employment and Immigration* (F.C.A., no. A-1130-83), Pratte, Marceau, MacGuigan, J.J., December 20, 1984). Cantin does note one exception where, "due to 200 places in the 25 page transcript of the examination under oath which were marked *inaudible*, the Board refused to entertain the application for redetermination because of such serious and fundamental prejudice to the claimant as to nullify the Minister's decision and the examination under oath." This is a truly exceptional case; as such it demonstrates the limits to which one must go before the Board will consider dismissal on the grounds of poor performance on the part of the interpreter.

iii. The Interpreter and the Convention refugee hearing

There are a number of ways in which the interpreter, or the system, can fail the claimant. The presence and the use of an interpreter is at the discretion of the claimant, and in certain cases, it is clear that the claimant should have opted to make use of the interpreter's services. For example, in the case of a Pakistani claimant, the following foray was recorded (all examples are from 1987):

> *By the S.I.O.* (to the person concerned)
>
> Q. Do you think that you have said everything that you wanted to say regarding your fear of persecution?
>
> A. ...
>
> Q. Do you think you have said everything that you want to say, or wanted to say?
>
> A. No, I think I have said everything.
>
> Q. Yes I have said everything, you should say.
>
> A. Yes. Yes.
>
> Q. Are you satisfied that you expressed yourself quite well without the need of the interpreter, only a few times?
>
> A. Yes. I have satisfied myself.
>
> Q. Anything else to say?
>
> A. No.

The second kind of failed interpretation is simply the fault of an incompetent interpreter. In an article by M. Lalonde called "Refugee board says test flawed as 40% fail interpreters' exam," published in the February 18, 1992 *Montréal Gazette*, the accuracy of the interpretations was put into doubt,

confirming some of the worst fears of persons who work in the area of immigration law. In the spring of 1991, interpreters were given tests in order to implement standardized accreditation for interpreters. Of the 370 interpreters who took the tests at the Board's five regional offices, 40% failed. Having seen the results, a former employee of the Québec-Atlantic region office in Montréal is cited in the article as stating that "a lot of people are not getting a fair shake because the interpreters used by the refugee board are not capable of doing their jobs" (A4). In the article there are some remarkable quotes from an immigration lawyer named William Sloan, who states that "I had one [interpreter] who translated 'socialist party' as 'social group,'" and, further on: "I've seen cases where a claimant with two university degrees is made to sound completely garbled (by an incompetent interpreter). That can cause contradictions where their [sic] are none." These contradictions are grounds for rejecting claimants; incompetent interpreters, therefore, like other links in this system, can undermine a potentially valid claim.

Interpreters can also create gaps in the testimony by making incomplete or selective interpretations. If the lawyer or the official do not recognize this early on, then the claimant's testimony might be maligned without anyone ever realizing that the fault is with the interpreter and not with the claimant's description of his or her experience. For example, the case of a Turkish claimant named Monsieur R. was initially heard in French. However, after fifteen minutes of testimony, the following foray was recorded:

> *By the S.I.O.* (to the person concerned):
>
> Q. Monsieur R. on dirait que vous ne comprenez pas les questions. Si il y a des choses que vous ne comprenez pas, faites signe à l'interprète. Il va vous le traduire.
>
> *By the Counsel* (to the person concerned):
>
> Q. Monsieur R. is your French better than your English, or...?
>
> A. My English is better than my French, but...
>
> Q. Okay, we'll continue in English. Okay?
>
> A. No problem.

It seemed as though the testimony was being transmitted correctly and that everything was normal, until some of the answers to questions seemed discontinuous with the questions being asked:

By the Counsel (to the interpreter)

Q. Mr. interpreter, is it an impression I have, or are we losing something in this interpretation? It looks like my client has very long answers and that yours are quite short. Of course, Mr. R. is able to see if everything has been said.

By the S.I.O. (to the Counsel)

Q. Is something wrong?

By the Claimant

A. ...

By the Counsel (to the person concerned)

Q. Mr. R. Please make sure that everything is ... that everything is correct. And please make your answers short... phrase after phrase, so that we are sure not to lose anything.

Further on in the same case, when the Counsel realized that there were many place and proper names that were unfamiliar to him and therefore to the person who would transcribe the case, he again spoke to the interpreter.

By the Counsel (to the interpreter):

Q. Could you please spell something so that we can have some spelling around here?

The kinds of words that were causing difficulty were the first name of the person that helped him and two persons who were killed in the prison where the claimant was being held. That these names be correctly spelled is imperative since it is the kind of empirical data that can be verified by the adjudicators of the case. Much later on in the same hearing the interpreter was replaced not because he could not understand the claimant, but because he had difficulty expressing himself in English.

The other difficulty that the claimant has is that the refugee hearings are legal documents, and as such even small lacunae on the part of the interpreter could be fatal for technical reasons. For example:

By the S.I.O. (to the person concerned):

Q. Let me now ask you five questions related to your persecution. In your country do you have a well-founded fear of persecution because of your race?

A. No.

By the Counsel (to the interpreter):

Q. You're not making an exact translation. I am sorry, I hate to trouble you. I know that this is hard. He said well-founded. You have to translate the whole sentence and you have to try and be precise.

When the Counsel suspects that the interpreter is incompetent, s/he can request that a new one be called; unfortunately, the previous testimony was not deleted, there was simply a pause in the hearing while the interpreter is replaced.

Sometimes the interpreter is called upon to undertake more than just an interpretation, which brings us into the realm of cross-cultural interpretation. This kind of interpretation can take many forms: first, there are clarifications about customs, places, foods, and so forth, where the interpreter helps to describe certain customs to the Canadian officials. For example, in the case of a Sri Lankan claimant:

S.I.O. (to the claimant).

Q. What is your place of birth, and in which country is that?

A. Puthur (phonetic pudder), Sri Lanka, P.U.T.H.U.R.

Q. Wait, is that Puther or Putter?

A. Puther.

By the Interpreter (to the S.I.O.):

Excuse me, th's and d's in Tamil are commonly interchanged.

Second, interpreters are sometimes called upon to verify data concerning the country of origin. For example, in a case involving a Pakistani claimant:

By the Counsel (to the S.I.O.):

Q. ...Following my client's entry into the Pakistan People's Party, he became a very active member, and began making door to door propaganda for that party. In 1974, he was elected area organizer for the P.P.P. in Pira Gahib.

By the interpreter:

Q. The P.P.P. had area organizers?

By the Claimant (to the interpreter):

A. Yes, in 1974 they did.

Third, there is the interpretation of gestures and bodily marks (i.e. scars indicating torture) into text. Until 1989 it was necessary to describe all events that occurred in the room because the decisionmakers were not present; so the interpreter was also called upon to describe bodily marks into words. For example:

> *Counsel* (to the claimant)
>
> Q. Were you tortured during the time that you were interred in the prison in Pakistan?
>
> A. Yes.
>
> Q. Can you give us details?
>
> A. First they kept on beating me and then they took melted wax and which they put...
>
> *By the interpreter:*
>
> He is pointing to his left side of his chest and he says that he has a scar over there still.
>
> *By the Counsel* (to the person concerned)
>
> Q. What did they put there?
>
> A. Scalding hot wax.
>
> *By the S.I.O.* (to the person concerned):
>
> Q. Please take off your sweater and show us.
>
> *By the interpreter:*
>
> The claimant is showing us a long scar, about twenty five centimetres long and a twenty five cent piece in diameter.

Fourth, there is the job of interpreting silence, giving meaning to gaps or silence in the claimant's testimony. A Sri Lankan claimant, for example, refused to reply to certain critical questions; the interpreter was called upon to, as it were, interpret the claimants reticence:

> *By the claimant* (to the S.I.O.)
>
> A. I was there with my father in law, my mother in law and my cousin, in my father in law's house. He had sent the other families home, to Jaffna, to remain there, knowing there were riots. Some members of the government militia came into the house during the riots.

By the S.I.O. (to the person concerned)

Q. And then?

A. They um, they damaged the house.

By the interpreter (to the S.I.O.)

I am sorry, I believe that he means that they destroyed it.

By the S.I.O. (to the person concerned)

Q. Is that correct?

A. Yes. Then they were looking for this man. He was hiding under a bed in the house, with his wife and child. The child was two or three years old. The child escaped from under the bed, he crawled out of the room. The militia snatched up the child and took him, and they wanted to snatch the father. So the father jumped out to save the son. So luckily the son was given to someone who was in the house and who went out with the child. Then my father in law was stabbed badly, more or less killed.

Q. What do you mean more or less killed?

By the interpreter (to the S.I.O.)

They killed him.

By the S.I.O. (to the person concerned)

Q. Is that correct?

By the claimant:

A. Yes. They stabbed him, they beat him, and then they put petrol on him, set him on fire. Then afterwards, my mother in law was sent up north from Colombo to Jaffna.

Numerous other examples of the peculiar role that the interpreter plays in refugee hearings could be mentioned, such as when they must: decipher prices relative to moneys spent in the country of origin; interpret the meaning of time for persons from cultures where time is measured or evaluated differently; provide long descriptions of apparently simple words, like *brother* for example, which happens to mean fellow members of a tribe within certain Ghanian groups, and so forth. These are often uplifting examples of how potentially-crippling misunderstandings can be clarified when the interpreter is allowed to explain more fully the meaning of the words uttered. In fact, it was necessary to look through several hundred cases in order to find the examples provided; even when the claimant is a persecuted nomad from a Saharan tribe, for example, there is little in the way of cultural orientation for

S.I.O.s and adjudicators who generally demonstrate (at least overtly) a feeble understanding of such crucial notions as time, truth, or spatial orientation of diverse cultural groups.[11] They are not as blatantly narrow-minded as Cesare, from the citation mentioned at the beginning, who thinks that everybody does deep down speak Italian and those who don't admit it are simply rude or ignorant. But in asking that interpreters limit themselves to the words without allowing for a larger space of bodily and cultural interpretation, officials who deal with cross-cultural or cross-contextual interpretation are guilty of another kind of closed-mindedness. Too many cases exist in which the officials clearly misunderstood the cultural context of the claim and therefore found contradictions where there were none, or uncovered so-called "lies" when a simple explanation from a learned advisor would have sufficed. There is no reason for Cesare to believe that *coccode-e-eh* does not sound like a chicken, so he uses it, fully expecting the Russian peasants to understand his meaning. And there is no reason for the Ghanian claimant to think that "brother" shouldn't imply "member of a tribe" for the officials at a hearing. But if he is wrong, and if the interpreter does not fill in the appropriate information, the consequences could be tragic.

There is a danger in this suggestion; allowing more leeway to interpreters may act against the interests of the claimant if the interpreter, for whatever reason, does not act in good faith. Appealing to interpreters who are natives of the claimant's country of origin may lead to conscious or unconscious bias practised by a judgemental interpreter or by a suspicious claimant, because, as Walter Kälin notes, "in these cases asylum-seekers regularly suspect the interpreter of being a collaborator with the embassy of their country, capable of passing information to the persecuting government" (233). Considering the refugee claimant's previous experience with government agents and agencies, such a reaction would not be irrational. Or there is the opposite risk, that the officials suspect bias in interpretation because of an apparent collusion between two persons of the same national origin, or because the claimant is friendly with the interpreter:

> The official, therefore, might suspect them [the interpreters] of not merely translating but instead of interpreting and improving upon the statements of the applicant. This becomes a particular problem where, as is often the case, the interpreter comments upon and expresses open support for the asylum-seeker's claims during the hearing. (Kälin 233)

So in light of all of these pitfalls, what reforms should be put into place in the translation/interpretation process? It would appear that too many elements of the original text are missing from the interpretation. For literary

translation, it would be possible to adopt some variation upon the position of Vladimir Nikolayevich Toporov, who suggests that we broaden the domain so as to include the possibility of "comparison," because "it offers yet another guarantee that the meaning of the text and its cultural background will be understood and that the understanding will be complete and accurate" (36). For legal hearings, it is clear that *something* in the way of complimentary information must be added, for by insisting upon an interpretation limited exclusively to words uttered evacuates the cultural data which could be essential to a refugee's claim. There is a significant body of work on translation and interpretation in the field of law which offers insights into rendering technical legal information into different languages, finding adequate tools for understanding the context within which foreign statutes can be understood, and so forth (see for example *Les Cahiers de Droit*). But for the purposes of inter-cultural interpretation and translation in the domain of Convention refugee hearings, it would also be necessary to account for the multiplicity of languages and speech genres that exist in both the source and the target languages. Rendering experiences of persecution through monologized discourse alone is to deny (among other things) that even single national languages contain within themselves a veritable plethora or languages, what M.M. Bakhtin called "heteroglossia,"[12] and accounting for this would require a broader mandate for the interpreter and a broader range of discursive possibilities for the claimant. Bakhtin, for one, is not pessimistic in this regard; he suggests that the kind of interaction that translation and interpretation demand forces us to examine the perspective of the other from both the inside and the outside, leading to a richer and potentially more living sense of the Other's discourse:

> Thanks to the ability of a language to represent another language while still retaining the capacity to sound simultaneously both outside it and within it, to talk about it and at the same time to talk in and within it, to talk about it and at the same time to talk in and with it – and thanks to the ability of the language being represented simultaneously to serve as an object of representation while continuing to be able to speak to itself – thanks to all this, the creation of specific novelistic images of languages becomes possible. Therefore, the framing authorial context can least of all treat the language it is representing as a thing, a mute and unresponsive speech object, something that remains outside the authorial context as might any other object of speech. (*Dialogic* 358)

But interpreters must be provided with the tools for this kind of aggrandizement, and the system must be rendered sufficiently open-ended to permit its participants to learn from, rather than suppress, the persons with whom it interacts. Thus in the short term, before the necessary *radical* upheaval of the

present system that adjudicates migrations of persons, cultural interpreters with a larger range of possibilities should be employed. There may be a second possibility here, that may be more appropriate in light of the present crisis in immigration and refugee law (the rise of the Right, particularly in Germany in France, the present trend towards limiting access to the system through "third country clauses," the introduction of severe penalties for assisting potential claimants, and so forth), which is to recognize the insurmountable difficulties of the hearing, and to put into place instead a system of quotas for each country in the First World which would be geared towards their capacity to absorb new persons. This kind of system, though inherently more impartial, would cause other problems related to domestic regulations (who decides what the quotas will be? Who would oversee the process?), international cooperation, potentially unrealistic or inflexible quotas that cannot account for sudden upheaval, or forms of detrimental competition amongst countries for the most desirable (ie. most Westernized, or highly educated, or rich) refugees (as we see in the realm of refugee determination). But until the system is modified to actually account for day-to-day problems posed by intercultural communication, officials will have difficulty fulfilling their obligations; and if we follow our present course (the Mulroney Bills C-55, C-84, C-86, for example) countries like Canada will continue to modify the system to the point where access to the hearing will be limited to the rich (who can afford trans-continental travel), the well-connected (who can arrange departure), or the most adept in Western-style bureaucracies (who can negotiate successfully during the required hearings), rather than the most needy.

iv. How the transcription process worked in 1987

The transcriptions referred to throughout this book were recorded in an immigration office in Montreal. The room in which this hearing was made in April of 1987 was closed to the public; however it is possible to reconstruct the conditions of production that permitted recording and transcription of the hearings before turning to the analysis of the content of these documents.

The testimony in the transcribed documents referred to in this book was ,in 1987, *the* determining factor in the process of Convention refugee determination. When Mr B. (and later on, Mrs. V), the claimant, sat down in the hearing room, he was asked to justify his claim for refugee status by recounting the elements of his life story which demonstrate that he has a "well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion." In most cases, including that of Mr. B., claimants have never been through a process like this before; he had

to rely upon the advice of his lawyer and the directions provided by Canadian officials. If Mr. B. had made an error in judgement prior to or during this hearing, he could have been sent back to further persecution in his country of origin.

The procedure in 1987 was very strange; a potentially life-and-death decision was taken on the basis of a narrative construction (usually) interpreted (in this case from Spanish to French) by an interpreter, recorded by a cassette recorder controlled by the S.I.O., shipped (in the form of cassette) by government courier to the offices of a private transcription company (beginning in the summer of 1987, the company that bid on and won the transcription contract for the Montreal area was called "Consultexte"), given to an employee of Consultexte by one of the two owners of the company, transcribed by a typist (who knew nothing about the refugee procedure, and who was not in any way familiar with the material upon which s/he was working) onto computer diskette using Wordperfect with the aid of a foot-pedal controlled transcription machine and a rented PC clone, printed onto 8 1/2" X 14" paper by one of the two owners of the company on a dot-matrix printer, then shipped back, generally within 48 hours, for inspection, processing, photocopying and mailing (one copy to the claimant, one copy to the lawyer and eventually one copy to the Committee).

The employee who did the transcribing during the period in question was not a government employee, but rather a typist who was hired for speedy and accurate transcription. Most of the persons hired by Consultexte, for example, were sent by Quantum, a temporary personnel agency located in Montreal (a similar procedure was followed in other centres throughout the country). Other than specific directions concerning the form of the documents and the layout of the pages, the employees (at least in the Montreal office) were given no training and no advice about the procedure, and for a long period during that summer, no employee was required to fill out any employment form or declaration of secrecy. The documents were treated as though they were restaurant menus or automobile manuals; no special security measures were taken to protect the identity of the claimants or the proliferation of copies of the transcription.

When the co-owners of Consultexte realized that it could raise profits by cutting office expenses, they offered to send cassettes to the residences of employees who had (or who were willing to rent or purchase) PC compatible computers. Numerous employees of the company took up the offer, and persons with computers in their homes were then encouraged to sub-contract transcribing work to other employees of the office; thus one person who owned a PC computer could hire several people to transcribe documents in his/her home. This would cut down on fixed costs for the employee who owned

the equipment, travel time for employees who lived close to other employees' residences, and costs for Consultexte. Once this system was inaugurated, Consultexte hired a courier to drop-off cassettes and pick up hard copy of the transcripts every morning at the residence of persons who chose to work at home. The employees were asked to keep a copy (on hard disk or diskette) of each case they transcribed in case corrections had to be made on the transcription, or in case the transcription was lost in transport. The employees were never ordered to delete copies of these files, and there was never any stated restriction about who could have access to this material, and the purposes for which it could be used.

Consultexte came into existence for the sole purpose of bidding for this government transcription contract; all transcription had previously been carried out by government employees. The two co-owners rented two small offices above a shopping mall North-East of Montreal, and they rented the computers, tables and chairs needed to fill their offices. They hired all of their employees in a very short period of time, and when employees did not "work out" they were simply let go and new persons were hired. The turn-over in the company was tremendous because untrained temporary staff – including students, ex-secretaries, typists who had never transcribed, transcribers who had never worked on computers, secretaries who were not familiar with WordPerfect, etc. – were being paid exorbitant salaries (because of the percentage taken by Quantum) and were therefore expected to start working immediately on material that was in some cases extremely difficult to decipher. For example, imagine transcribing, from low quality cassettes, hearings in which a French-speaking S.I.O. and a French-speaking Counsel were asking questions in English to an interpreter who was then interpreting into, say, Twi (spoken in Ghana) for the sake of the claimant who was then (if s/he understood the question) responding in Twi for interpretation back into English. The questions posed by the S.I.O. or the Counsel were sometimes so poorly phrased that it was impossible to imagine what the interpreter chose to ask of the claimant. Sometimes answers from the claimant clearly indicated that the question that the interpreter posed was completely different from the question that the S.I.O. thought he was asking. The result was outright confusion, and the transcriber, who was trying to weed out the questions from the answers, the S.I.O.'s voice from the Counsel's, the English from the Twi, often added to the confusion by misinterpreting the words spoken on the tape.

These transcribers were totally unprepared for the challenges of the job. Since the government contract provided enough work for at least twenty-odd persons transcribing full-time – sometimes day and night – the owners were in constant need of replacement staff to take over from persons who could not keep up the pace. Within the first two months of operation, the owners of

Consultexte probably saw several hundred transcribers come and go; the turn-over was so rapid that employees were not even asked to fill out employee forms until payday, which sometimes meant that employees would work on this material for two weeks before providing their name and address.

After a short trial-period in which employees hired by Consultexte were asked to transcribe, as quickly and accurately as possible, test cases (ie. cassettes of older cases which had been transcribed by government employees before the Mulroney government decided to privatize the transcription process), Consultexte won the transcription contract for cases transcribed in Montreal. New employees were hired, more equipment was rented, and the personnel in the office transcribed roughly 50 to 100 documents per day in English and in French. These documents run anywhere between two pages (in the case of adjournments due to some unexpected occurrence, such as the absence at the hearing of the claimant, the lawyer, the interpreter, etc.) and two hundred pages.

Initially, employees were paid an hourly wage; since Quantum has a standard hourly rate, Consultexte paid roughly $25.00 per hour for each person sent by the agency (Quantum then paid each employee roughly 50% of that amount). Employees who were not send by Consultexte were initially paid around $12.00 per hour. Employees who committed too many errors or who worked too slowly were immediately fired. The offices were extremely small and cramped, with rows of employees working side-by-side. At least half of the employees smoked cigarettes while working, so the cramped poorly-ventilated offices were often stuffy and filled with smoke. When the system of courier delivery to employees houses was inaugurated, the owners suggested a new method of payment. The transcribers were paid by-the-page; the faster they worked, the more money they made per hour. Consultexte was also paid by-the-page; the more pages their employees transcribed, the more money they made.

Employees working by-the-page soon devised systems to raise their productivity. Changing margins, top and bottom, left and right, could reduce the number of characters per page. Although these margins were supposedly standardized, it was possible to make minor changes without detection. Employees were also encouraged to install macros (a method of recording a defined set of keystrokes for later recovery using the Wordperfect command Ctrl-F10); at the beginning and at the end of the hearing there are standardized passages which are simply read out by the S.I.O. Macros were generally made for these sections, as well as for the standardized areas of the transcript such as:

By the S.I.O. (to the person concerned)
By the Counsel (to the person concerned)
Q. [question]
A. [answer]

Transcribers soon learned that it was more profitable if the transcription contained short questions and short answers because each interjection created a blank space between lines of type. Transcribers therefore learned to lengthen the document without dramatically changing the substance of the hearing. For example:

> Q. What happened after you left the prison?
> A. I went home to my wife, who asked me what had occurred. In order to protect her, I decided to keep my activities and my persecution secret. I told her that we had been called to special duty at the company where I worked, and was therefore forced to stay over night. She thought my company boss was a slave driver! She was nonetheless suspicious, for on my arms and legs were wounds from...

could be re-written as follows (a dramatization, but typical of many such situations):

> Q. What happened after you left the prison?
>
> A. I went home to my wife, who asked me what had occurred.
>
> Q. I see. Then what?
>
> A. In order to protect her, I decided to keep my activities and my persecution secret.
>
> Q. Yes. Go on.
>
> A. I told her that we had been called to special duty at the company where I worked, and was therefore forced to stay over night. She thought my company boss was a slave driver!
>
> Q. Okay.
>
> A. She was nonetheless suspicious, for on my arms and legs were wounds from the beatings.

In a simple dramatization like this, a series of short rebuttals or questions would lengthen the text from 11 to 18 lines, raising the per-hour wage by more than 50% with virtually no danger of detection (employees were asked to transcribe each sound). In a situation like this one, it is clear that the Other who is being produced by the hearing bears little resemblance to the Other as Convention refugee that the claimant, with the help of the Counsel, is trying to produce. The transcript is the copy of a hearing that never took place; the distance between the experience of the applicant and the written word grows with each step in this process.

The refugee as "Other" has numerous meanings in this process, all of which are centred around the fact that the claimant must produce some Other who will adequately fill-in for him as Convention refugee. In a very material sense, this document is that Other; the refugee was represented to the Board and to the Minister (who technically made the final decision) in the form of a transcribed document. The way in which this document is transcribed, the clarity of the text contained therein, the accuracy of the transcription (including such elements as spelling, character type, proper punctuation and grammar), the layout of the page (ie. wider margins, short questions and answers), even the quality of the ribbon used in the printer, could have had an effect upon the outcome of the case. Though the effects of these textual characteristics would be difficult to measure, elements like these can affect reading speed (in the case of margins, size of type, short questions and answers), eye fatigue (in the case of poor print quality), and general assessment of the narrator (in the case of poor sentence structure, frequent spelling mistakes, improper punctuation, and so forth).

Furthermore, transcribers are aware that such elements as emotions expressed by higher pitched voices, sobs, long pauses and so forth cannot be accurately represented through printed text. In that sense, the transcriber had a better *feel* for the general sentiments expressed during the hearing than did the decisionmakers. Furthermore, neither the transcriber nor the decision making bodies had access to the non-narrative elements of the hearing, such as gestures, faces, method of expression, style of dress, heat of the room, and so forth. Sometimes these elements are included in the narration by conscientious lawyers who make comments such as:

Bangladesh

By the Counsel (to the S.I.O.)

Q. I would like to point out that the Refugee Status Advisory Committee members not being present here today, that Mr. G. presents himself before us, looking in a very business-like and professional manner, both in his attire and his conduct. Al-

> though I realise that this is a personal opinion, I find it not inconsistent in way, shape or form, believe that he was holding committee positions with a political party as he describes. Mr. S.
>
> *By the S.I.O.*
> Thank you Counsel

or S.I.O.s who make comments such as:

Pakistan

> Q. And what happened?
>
> A. First they kept on beating me and then they took melted wax and which they put... is pointing to his left side of his chest and he says he has a scar over there still.
>
> Q. What did they put?
>
> A. Wax. It was hot and melted wax. Wax W.A.X.
>
> Q. And you have a...?
>
> A. Yes.
>
> Just take off your sweater and show us.
>
> *By the S.I.O.* (to all)
> Mr. S. is showing a long scar.
>
> *By the Counsel* (to the person concerned)
> Twenty five cents diameter.
>
> *By the S.I.O.* (to all)
> The left side of his chest.
>
> *By the S.I.O.* (to the person concerned)
> Continue the time.

The experiences suffered by these claimants are traumatic; in some cases, claimants watched the rape or the slaughter of family members and friends by members of the police or the army in the country of origin. In other cases, claimants were subjected to long terms of incarceration in dark cells, torture with needles, cattle prods, fire or poisonous substances. It is impossible to imagine how such experiences could be recounted in a clear, linear manner, into a microphone, in the presence of perfect strangers; or how narratives of such experiences could be adequately represented as described in computer

type on legal-sized paper. It would be difficult to imagine a *fair* (see the discussion on the basis of administrative law in the previous chapter) system of officiating and adjudicating refugee claims that is more detached, more distant from the suffering experienced by the refugees, and more superficially empirical than this one. Yet, the process fulfilled the needs of the Minister, for when questioned for the grounds for rejecting Mr. X or Mrs. Y, he had the required facts to justify decisions, facts in the form of logical contradictions in the text, omissions in the testimony, or errors in facts presented during the case (see chapter 7).

Very few Counsels or S.I.O.s thought to take the transcriber into account during the hearing; as a result, very few difficulties which arose during the hearing were ever addressed during the hearing itself. There are exceptions:

> *By the Counsel* (to the person concerned)
>
> Q: Of which manner?
>
> A. He told me that by paying $600 to him, he charged me 600, and promised me that he could get me this document to travel.
>
> Q. You mean the Seaman's Card?
>
> A. (...inaudible...)
>
> *By the S.I.O.* (to the interpreter)
>
> Q. Could you repeat that please because I think the typist will have a hard time making that out.
>
> A. He told me that he could help me to come to, to travel outside Egypt by securing that Seaman's Travelling Book for me. He arranged to get me a telex, a cablegram testifying that I have been a Seaman before, so that whenever I get problems, at any of the Immigration authorities in any country, I could provide them with this document. Then a letter with a letterhead from a certain company testifying to the fact that I have been a seaman before.

Sometimes, even despite the efforts of the S.I.O. and the Counsel, the communication difficulties prevailed and what remained after the hearing was a muddled and confusing text. I will now provide a series of examples from other cases to show the range and the extent of problems confronted by the transcribers (and by extension by the claimants) during these hearings, and some of the effects that these difficulties could have on the reader (i.e. the Board).

Poland:

By the Counsel (to the person concerned)

Q. To which school did you go?

A. Elementary. After gastronomical school. And after to the high school.

Q. In 1984, which school did you attend?

A. The answer gastronomical school.

By the S.I.O. (to the person concerned)

I will ask you, Mrs. K., please to wait for the translator to translate the question for your answer. I understand it might be difficult but we'll try to do this.

In this case the claimant has opted for an interpreter but has discovered in the course of the hearing that his English was good enough to understand the questions. What the transcriber hears, therefore, is an interpreter translating questions while the claimant simultaneously answers the question in English.

[later on during the same hearing]:

A. Well I wanted to continue my family traditions and I wanted to join the cruise or the (...inaudible...).

Q. Did you want to work as a steward?

A. Yes.

Q. And what happened? Did you...?

A. ...

Since each person is speaking into a microphone, the entire text has by now become inaudible to the transcriber. S/he has therefore resorted to the use of three points (indicating silence) or (...inaudible...) indicating points at which the words on the tape cannot be understood. The S.I.O., who has to be sensitive to the fact that the product they are working on is indeed an audio cassette intervened at this point during the testimony and, for some reason, addressed the applicant in French:

By the S.I.O. (to the person concerned)

Si vous voulez attendre que le traducteur traduise, sans ça on ne pourra pas se retrouver. Nous allons prendre une pause de quelques minutes. Il est actuellement 11h35.

A. Okay.

In the next example the whole problem of interpretation, which will occur throughout many of the hearings, is brought to the fore during the continuation of a hearing which was originally halted because the interpreter was deemed to be incompetent. The legal implications of garbled testimony will be noted later on, but for the moment relevant passages will simply be mentioned. Note the number of (inaudible) and (phonetic) notations and the quality of the transcription/interpretation:

Pakistan:

By the Counsel (to the person concerned)

Q. I had a quick but precise look at the transcript of the examination that started on the 3rd of April. And I realized that although in the physical sense we had a problem with the interpretation, the way the case was proceeding on paper looks rather complete. And I believe that the client knows approximatively where we are and I would like him to start from there.

A. God, beneficent and merciful, there was a slogan of Mulas (phonetic) that Ahamodi (phonetic) teachers should be transferred from Redwah, R.e.d.w.a.h. The government accepted this demand of theirs, and slowly and gradually teachers were transferred from Redwah, and to replace them the people who liked Mulas (phonetic) and were not Ahmodis were replaced. Whose mission was that the children of ahmodis, the future of the children of ahmodis (phonetic) should be spoiled. My younger brother was supposed to appear in high school and F.A., for which the teachers were not preparing them. It was the question of their educational career, so because of this in 1980 my father took them to Sialkot, S.i.a.l.k.o.t. So that they would be admitted in a good school or college. But they couldn't get any admission in a school or college because their certificates were from Robwa (phonetic). Because they used to say that you are a Ahamodi, and they would refer to give admission. In 1981, they also tried to get the admission, But they couldn't get it. So in 1982 by brother and mother appeared in the (inaudible).

To listen to such testimony is difficult, but to read it is almost impossible. The Counsel, whose English is less than perfect, nonetheless begins to worry about the transcription of the narrative:

By the Counsel (to the person concerned)

Q. Excuse me, I want to make sure that what my client says will be reproduced on transcript?

By the S.I.O. (to the person concerned)

Q. Sure, it will be.

By the Counsel (to the person concerned)

Q. I will check for the pronunciation.

He is herein referring to the fact that the lawyer and the claimant have the right to make corrections on the transcription before it is sent for review by the Board. These corrections are generally made in pencil or pen, and are written directly onto the transcript. The hearing continues:

> A. Everyone has the right to freedom of thought, conscience and religion, this right shall include freedom to change his religion on a belief and freedom, either in community with others and in public or in private to manifest his religion or belief in teaching practice, worship and observance. But president of Pakistan (inaudible) country to this, ordinance no. 20 of 1984, in which the section of 298 b and c is written in English I will read it myself.
>
> Q. Go ahead.
>
> A. Clause 298 b. Misuse of epithets, descriptions and titles, etc. result for certain holy persons or places no. 1: any person of the (inaudible) group or the (inaudible) group who call themselves Ahundis (phonetic) or by any other name who by name who by words either spoken or written, or by visible representation (inaudible) or addresses...
>
> Q. My dear friend, my client is in fact, is this what you are reading, the ordinance?
>
> A. Yes.

The claimant has the right to refer to notes during the hearing, and as such has decided, evidently against the advice of his lawyer, to read out an ordinance concerning international human rights. The lawyer interjects:

> I think that to prevent problems of transcription, I will produce a copy of this ordinance.
>
> *By the S.I.O.* (to the Counsel)
>
> That is a good idea.

The decisions based on such blatantly flawed material could be overturned on these grounds, however the precedents indicate that the case must be virtually incomprehensible (cf. *Mian v. M.E.I.).*

The next passage contains legal advice from the lawyer to his client:

> *By the Counsel.* (to the person concerned)
>
> Q. The committee members they know this by heart now, understand?
>
> A. Yes.
>
> Q. I have discussed with my client, and he agreed to produce a copy of the ordinance, although I know that the committee members have dozens of them, but to prevent problems of transcription I would rather produce a copy than have my client read it.

By the S.I.O. (to the person concerned)

Q. That is fine, this document, which is the transcript of ordinance number 20, will be introduced at your examination as Exhibit E-3.

EXHIBIT E-3: COPY OF ORDINANCE FROM THE U.N.

Sir, if you now see the human rights charter, article number 18.

A. (...inaudible...)

Q. Pardon?

A. (...inaudible)

Q. If it is a (inaudible).

A. If it is ordinance number 20 is (...inaudible...)

Q. If it is a north pole, this ordinance number 20 is a south pole.

The document in question is a Human Rights Charter from the United Nations. The refugee now goes on to explain why he brought this document into the hearing.

A. This ordinance has taken up my peace of mind, and there is a permanent fear on me...

By the Counsel (to the person concerned)

Q. To make sure that the Committee members understand, when you refer to north pole and south pole. You're saying in fact that both stands are in extreme opposite directions, is that right?

A. That's correct.

Q. Continue.

Details concerning the legal implications of such garbled testimony will be made with reference to an Appeal case that was brought before a Federal Appeal Court (see chapter 7). For the moment, however, some general tendencies concerning how the claimants were considered in such a procedure can be ascertained from the information already provided. Not only does the government violate basic tenets of fairness and humanity when it reduces claimants to a pile of (sometimes incomprehensible) 8 1/2" X 14" sheets of paper, it has also assured its own inability to fulfil international obligations. Asking that the state uphold the values and obligations to which it has voluntarily concurred is a very serious request with important consequences (think of the number of United Nations' resolutions are contravened each

year). Noam Chomsky's response when asked the question of what kinds of changes he would suggest occur within the logic of the U.S. political system could in this regard have important resonance for all countries in the world:

> Within the state system – let's forget the long-term thing – what would a reasonable U.S. policy be? A reasonable policy, for example, would be to follow the U.S. Constitution. That's a good start. According to the U.S. Constitution, treaties that are duly entered into are the supreme law of the land. And there's a number of treaties that are not unreasonable, like the United Nations Charter, which among other things prevent the use or threat of force in international affairs. That's a good principle. I'd like to see some U.S. government start to abide by domestic U.S. law. That would be a good start. That position is considered very *radical*, so when I say the U.S. government ought to observe U.S. law, that's considered *radical*. The reason is because we intuitively take it for granted that it's a lawless state and we're a lawless and violent people, so we do anything we feel like. The law is only something that you apply to other people if they get in the way. But if we had the honesty to say that we also ought to follow our own laws, then I think there would be improvement. (*Language and Politics* 746)

These transcriptions could act as a kind of window on the world of government policy and operations; if we assume that there is in fact a certain logic to the system, it is clear from the transcription and adjudication processes that the goal of the procedure had little to do with the interests of the refugee. These documents, which were treated with so little care during this period, contained highly-sensitive refugee testimony; the location of prison camps, the names of subversives, the kinds of military installations in the country of origin, the source of financing for subversive activities, and so forth. At one point in a Convention refugee hearing, the S.I.O. gave the impression that the information contained in the transcription might even be used for other than the prescribed purposes:

> A. So because of that I tried my best. So through an agent I first of all I got, first of all I went to Canadian Embassy in Islamabad, I.S.L.A.M.A.B.A.D. on the 21st of July, 1985 to get the visa. I wanted to get a peaceful way but your embassy in Pakistan gave me the wrong direction to get the visa, to get my name and I was mentally tortured there and I was questioned.
>
> Q. What do you mean "there"?
>
> A. In Canadian Embassy Islamabad.
>
> Q. You were threatened there in the Canadian Embassy?
>
> A. Yes.
>
> Q. *I am sure the Minister of Foreign Affairs will be interested in knowing which way are you threatened in the Canadian Embassy?* (my emphasis)

If the Minister of Foreign Affairs and the person in the embassy have access to this information for the purpose of a reprimand, it is not unreasonable to wonder where else these transcriptions might have circulated.

There is a more general principle at stake here. What we have seen is the set of procedures applied in the course of the hearing in order to produce an Other who is stripped of memories (of experiences which have no direct bearing on the case), gestures, narrative style, context, voice and body. Theorizing about the relationship between this transcription and the claimant whose voice was recorded leads to unresolvable issues concerning the relationship between narrative and life, living and non-living, reality and non-reality. However there is a way to talk about the ways in which a situated self reacts in narrative to a particular set of contextual constraints, constraints which in this case transform the persecuted self into illegible material. This process of transcription is a poorly-conducted transformation of the living, breathing, sobbing, laughing, scarred, terrified claimant into the Other as non-living sign material on the page, for the purposes of determination. These hearings were not calibrated to *living* things, because a like-minded bureaucracy's only interest in what is alive and what is not alive is the set of procedures that is appropriate to each. There are numerous reasons for that which will be explored further on with the help of theoreticians and historians, including Mikhail Bakhtin and Ernst Mayr, beginning with the next chapter in which the fact-finding hearing is described with regards to the constraining discursive paradigm.

*The section on translation and interpretation has been published in a somewhat different form as "The Interpreter and the Canadian Convention Refugee Hearing: Crossing the potentially life-threatening boundaries between 'coccode-e-eh,' 'cluck-cluck,' and 'cot-cot-cot.'" *Traduction, Terminologie, Rédaction* (*TTR*), 1994.

4. The Opening Section: The Discursive Paradigm

> [W]e were sick to death of this law, which shows its moderation by withdrawing the truncheon from the testicles it has fractured, which translates the hymn of vengeance into the language of meteorology, and time and again indulges in the dreary, millennial gag of washing its hands; we hated its hairsplitting distinctions between legality and its abuses – in fact we hated the law itself. (Konrád *Case* 88)

Refugee hearings are a peculiar hybrid of courtroom-style interrogation, loosely-structured story-telling, and inter-cultural discussions involving bureaucrats (who rarely exhibit an understanding of the Third World countries from which most refugees come) and claimants (who generally exhibit as little understanding of the host country as the bureaucrats do of the country of origin). In order to understand the workings of the hearing process, it would be necessary to either participate in the interviews or to read the testimony of the claimants. The purpose of this chapter is to describe in legal terms the opening section of a Convention refugee hearing with reference to case of Mr. B., and then to complement this legal analysis with a discursive one that will more adequately describe the strategies, the stakes, and the constraints imposed by the structure of this kind of interview. The first objective is accomplished through reference to the laws and the precedents that predetermine the form and content of the opening section; as such the reader will be privy to the kinds of laws, precedents and jurisprudence to which the decisionmakers made reference in its reading of the hearing. The second objective requires a more adequate analysis of the power structure and the discursive conventions which overdetermine the purely legalistic analysis. A careful reading of Convention refugee hearings demonstrates that the criteria for adjudicating this case is not purely legalistic; if it were, the decisions would be far more predictable than they are, that is, there would be evidence of a stronger correlation between the content of the hearing and the success of the claim than actually exists. Applying insights from the realm of discourse analysis, social discourse theory and pragmatics turns out to be far more

valuable than a purely legalistic study because it reveals the variance between the laws and statutes regulating legal hearings and the actual discursive proceedings.

Although technical, the legalistic information concerning the opening section of the claim is essential background reading for persons interested in how cases like this one were decided in 1987. Only those cases and laws which pertain to the specific section of the hearing in question will be cited, along with some broader discussions concerning the principles of administrative law that underwrite them. The case will be presented chronologically and exhaustively for two reasons. First, it is difficult to follow the subsequent middle section of the hearing without a full understanding of the regulations described at the outset; and second, any error or contradiction contained within the entire hearing can be grounds for refusing admission to the claimant. As such it is necessary to detail the each comment and reply that the refugee makes. The errors which often determine the fate of the refugee are often subtle, even invisible; the value of discourse analysis applied to this particular hearing is that it allows for both micro and macro analyses of the language, permitting the reader to comprehend particular discursive strategies within the context of the hearing. Thus following the presentation of the opening section of the hearing and the legal statutes that underwrite it, reference will be made to the works of Michel Foucault, Pierre Bourdieu and Marc Angenot, theoreticians who have studied the framework into which specific discursive practice is inscribed. The complementary information thus provided with reference to this particular case give some indication of the dynamics of this kind of hearing. Without analyzing a representative quantity of cases recorded during this period, this study cannot claim to be exhaustive; but by indicating the kinds of problems that can arise during this kind of hearing it is possible to make useful observations about this procedure and others like it.

i. A General description of the Hearing.

The Hearing in question was taped, and the languages spoken were French and Spanish (where necessary, documents and proceedings have been translated into English for the purposes of this analysis). The persons present for the Hearing were the claimant, the S.I.O., the Spanish-French interpreter, the Counsel and the wife of the claimant (she acted as an observer and therefore did not participate in the Hearing; however, her claim will be scrutinized further on to demonstrate the corroborating role that women often play in these hearings).

The document which was produced following the Hearing is the transcription of the conversation between the parties to the hearing. Appended to this transcription is a photocopy of the form upon which the refugee notes the grounds for which this claim is being made; thus under the heading "Actual claim of refugee status according to the terms of the convention" appears, in section 33, the following paragraph:

> 33. Reasonable grounds for fear of persecution must be based upon at least one of the five categories mentioned in the definition of the refugee as described in the United Nations Convention concerning refugees as well as the *Immigration Act* of Canada. Please indicate the grounds upon which your claim is being made.
>
> RACE [ ]
> RELIGION [ ]
> NATIONALITY [ ]
> POLITICAL OPINIONS [X]
> MEMBERSHIP IN A PARTICULAR SOCIAL GROUP [X]
>
> Please outline in general terms and in chronological order the incidents which led to your fearing persecution and why: (18)

Following these paragraphs, the refugee has included an ANNEX which justifies his having marked off POLITICAL OPINIONS and MEMBERSHIP IN A PARTICULAR SOCIAL GROUP. All of the documents have been translated to reflect, as closely as possible, the original French text. It is worth noting, however, that there were significant errors of grammar and syntax exactly as they were transcribed; the grammatical and syntactical errors from the original texts have been rendered as accurately as possible in the English. The ANNEX reads as follows:

> I worked for the Telephone Company of Chile, where I was elected as a delegate of the Industrial Union. At the same time, I was a sympathizer of the Centre Left Party of Chile.
>
> In September of 1984, during a meeting of the union, the police appeared and arrested all persons on the premises. We were accused of inciting subversion and promulgating Communist ideas, and all of this because the goal of the meeting was to fight against government decisions to arbitrarily lay off workers and to privatize the telephone company. I was held and then released later on. I was interrogated concerning my activities, beaten and insulted.
>
> On September 5, 1986, as I was leaving my work, I was intercepted by heavily armed men. I was held for a period of around 48 hours. I was threatened and beaten, I needed medical treatment after my release.

> Following this event, I was layed off without any apparent reason. On November 13, 1986, my house was searched and I was detained over a period of seven days.
>
> Faced with this situation that I endured in my country, and after discussion with my wife, I decided to leave my country.
>
> I fear for my life if I was forced to return to Chile. Even if there were changes in Chile since my departure the situation remains very unstable and it is certain that Pinochet's sympathizers and extreme right-wing groups would not leave us alone, for a long time. (18)

This annex is a summary of the case, and the oral hearing is an elaboration of the facts contained herein, with careful attention to details including names, dates, and places mentioned.

To the page following the Annex are affixed photocopies of the Chilean passport belonging to the claimant. The first page of this passport contains information (reading from top to bottom) including the series number, the name of the country, the passport number, the words "Valido para viajar por todo el mundo" (valid for travel throughout the world), the expiry date, and the word "renewable." Page 20 of the transcription contains photocopies of pages 2 and 3 of the claimant's passport. Page 2 contains the personal description of the bearer including (from top to bottom): Identification Card number; Nationality; Date of Birth; Marital Status; Profession; Address; and Notes (none). Page 3 contains (from top to bottom): the series number; the name of the country, the words "Personal description," the name of the bearer, a photo of the bearer, the signature of the bearer, and a thumb print. On the next page of the transcription, pages 4 and 5 of the passport appear, with, on page 4, the "Personal description" which includes the following statement: "The bearer of this passport is accompanied by his wife," a blank line, and then a list of children, followed by 5 blank lines. On page 5 of the passport, following the name of the country and the series number, is written: "I certify that the personal description, identification, card number, photograph, signature and the thumb print belong to the bearer of this passport." There is a stamp after this paragraph followed by the words "impuesto pagado," taxes paid, followed by the words "this passport issued in" followed by a stamp saying "Santiago," then "On" followed by 2 ENE 1987. The bottom of the page is stamped with the "signature and seal of chief of the bureau of identification," Erika Eugenia Stemann Pari, "Jefe de Pasaportes y Extranjeri." All of this information integral to the documentation provided during the hearing since it establishes the identity of the claimant, the authenticity of the passport, the itinerary of the claimant, and the existence (or not) of visas and other official documentation normally required for travel from one country to the next. This information, including dates, visa stamps, entry

stamps and personal identification information will be correlated by the S.I.O. and later on by the Committee with the information provided on the Questionnaire and during the hearing.

On the next page of the transcription appears a photocopy of the "Questionnaire for convention refugee claimants," a form which was filled out by hand and signed (three days before the Hearing) by the claimant. The first part of the Hearing will be conducted with reference to the information contained therein. This questionnaire contains the personal data of the claimant; name, date of birth, place of birth, citizenship, and the most recent address in the country of origin. Most of the questions following these first six are simple yes-no questions; for the case with which we are dealing, relevant answers will be filled into square brackets: Are you a Canadian citizen? [no]. Do you have, or have you ever had, permanent residence in Canada? [no]. Have you ever spent any time in Canada? (if yes, provide details) [no]. Has anyone ever made a claim on your behalf for permanent residence in Canada? (if yes, give details) [no]. Do you plan to stay in Canada? [no]. Where were your parents born? [Chile]. Of which country are your parents citizens? [Chile]. Has one of your parents ever stayed in Canada? [no]. Did you ever request refugee status or permanent residence in another country? (if yes, give details) [no]. Have you ever been admitted into another country as refugee or permanent resident, or have you ever been offered said status? (if yes, give details) [no]. What is your marital status? [married]. What is the full name, date of birth, and citizenship of your spouse? [1948, Chile]. When and where were you married? [Santiago, 1970]. Were you or your spouse married more than once before? [no]. Did your spouse ever stay in Canada? [no]. What is your wife's address in Montreal? Do you have children? (if yes, give details). [one, born in Montreal]. Do your parents live in Canada? (if yes, give details). [yes, in the United States].

The next section, questions 27-31, concerns the passport of the claimant. Herein are questions concerning the passport number, the country, the dates for which it is valid, the cost of the passport [2,400 pesos], whether the claimant ever requested a new passport [yes] and for what reason [lost]. Although unremarkable for the case at hand, this section is extremely important in some cases, such as those in which claimants purchased forged or stolen passports for entry into Canada. An example, from another case transcribed during the same period in 1987, involves a Somalian claimant:

> Q. Did you have any trouble in leaving Somalia for Saudi Arabia?
>
> A. ...
>
> Q. Did you have trouble leaving Somalia with the Immigration Officials at the airport?

> A. Well the immigration, I give them money you know. Every officer you know, I give them money.
>
> Q. Did you give money to anyone at the airport in order to leave?
>
> A. Yes, I did.
>
> Q. Who did you give the money to? Do you know the name of the individual you gave the money to and how much you gave?
>
> A. The total money that I gave was at least 5,000 Somali shillings.
>
> Q. To an individual at the airport?
>
> A. 2,000 for the passport, and 3,000 for the airport immigration officer and the Somali NSS in the airport.
>
> Q. Do you know the names of any of these people, Somalian officials?
>
> A. There was a middle man between us and me you know.
>
> Q. What was the middle man's name?
>
> A. Middle man, his name was M-.
>
> Q. You, did you in order to effect these so called bribes, did you pay him and he would pay the official? Is that correct?
>
> A. No, he was the middle man, I paid and then he went in the office and he came back without money. That means he give the money to him. And then nobody talk to me when I was you know, waiting my flight.

This kind of interchange is often cited by anti-refugee groups as evidence of a refugee's criminal behaviour. They believe that the use of false or stolen documents should be grounds for returning refugees to the country of origin, just as some governments believe that airlines should pay fines for permitting persons to travel without proper documents (which deters airline companies from assisting persons who may have veritable claims; see Amnesty International, *Les sanctions aux transporteurs*). The logic that underwrites this kind of thinking is clearly unintelligible except as a means to deter credible claimants; on the one hand, persons making claims for refugee status are supposed to prove that they have been persecuted and that they have lost their rights, and on the other hand the fact that they try to board airplanes without visas or proper identification demonstrates renders them undesirable. The irreconcilable position, often popularized in the press, is that these persecuted persons should have sauntered into their local passport office and requested proper identification so that they could flee the country in an acceptable fashion.

The next section of the form contains one question about whether the claimant needed an exit visa to leave the country of origin [no], followed by questions 32-45, which ask for information concerning the claimant's travel information: What is the name of the airline? [Varig]. What was the itinerary? [Santiago-Sao Paolo-Rio-Toronto-Montreal-London]. When was the ticket

purchased? [86-12-31]. Where was the ticket purchased? [Santiago]. How much did the ticket cost? [1,206 US$]. Who put up the money to pay for the ticket? [family]. When did you arrive in Canada? [1987]. What status did you claim at the port of entry? [refugee]. When was the refugee hearing? [1987]. What is your address in Canada? [Centre]. What have you done since your arrival? [student]. Do you work in Canada? (if yes, give details) [no]. If you do not work, who pays your expenses in Canada? [Welfare]. How many years of schooling did you have? [9 years : 1950-1956 (elementary), 1973-1976 media (high school)]. Some of this information could perhaps be useful to the government later on, in particular to correlate information concerning ease of travel from country of origin to Canada, itinerary, networks for refugee travel, moneys available to the claimant, and so forth. The final section, question 46, concerns work experience (over the last two years) [Compañia de telefonos de Chile, constructing telephone lines, from 1971-1986]. The form is then signed and dated, and there is a final paragraph stating that:

> This form must be filled out faithfully and accurately. You must take an oath or make a solemn declaration, at the time of your hearing under oath and you will be asked to swear or to declare that all information provided in this form are true and exact.

Statements concerning the veracity of the information provided will recur during the hearing, and although it seems reasonable that all statements be made "faithfully and accurately" and that all information be "true and exact" it must nonetheless be noted that this is a central criteria for the adjudication of the claim. Furthermore, the information provided will be correlated by the S.I.O. whenever possible, suggesting that consistency and repeatability are fundamental components of Truth. These categories for the verification of the narrative are similar to scientific ones; scientific experiments are generally deemed valuable if they can be repeated, and the testimony of the Convention refugee will be considered accurate and truthful if it conforms to the same test. In fact, there is no reason to believe that a claimant's narrative should be chronological, consistent or verifiable given the number of extant mitigating circumstances (persecution, fear, mistrust, inter-cultural misunderstandings, errors in the physical translation of a hearing from words in a native language to transcribed and translated text on a page, and so forth). But this is the criteria, a scientifically-inspired criteria for verification that relies upon consistency, accuracy, and accountability to God (everything is uttered under oath). Although we take it for granted in our society, this criteria is in some ways aberrant, and the flaws inherent in such a method lead to many of the problems that arise during testimony and adjudication.

The two most fundamental issues that arise in this area of the transcript, the problem of chronologically-recounted narratives and that of a scientific criteria for adjudicating claims, can only be fully understood through reference to texts outside of the legal realm. As to the first issue; although numerous sources could be cited in regard to problems with chronologically-recounted narratives, I will refer to a "Ruling on Preliminary Issues" made (huis clos) by the Immigration and Refugee Board (T90-02606) in 1991 so as to emphasize (from an expert witness) the difficulties in the recounting of narratives faced by a claimant who has undergone a trauma (in the case of Mr. B., torture). The determination system was modified in 1989, however this expert testimony nonetheless applies to the case of Mr. B. both in terms of the issues raised and in terms of the arrival date of the claimant.

The case in question concerns another Chilean claimant who initially claimed status upon his arrival in Canada in May of 1986, and who went through a series of hearings (and other legal procedures) on account of his having engaged in criminal activities (shoplifting and selling cocaine) following his arrival in Canada. One of the expert witnesses for this ruling is Dr. X, an "expert in memory," who was called to testify concerning the unreasonable delay in the consideration of the case and the rehabilitation of the claimant. With regards to the recounting of narratives and the recollection of details, Dr. X sets out a theory by which he differentiates between the "working memory" (the "short term memory") and the "long-term memory" by suggesting that the process of long-term memory storage involves the "encoding" of experiences for "retrieval" later on. He also suggests that persons also have a "flashbulb memory which relates to major events" (9). The problem of recalling details in chronological order in cases where the persons has been tortured (as Mr. B. has) are quite clear from the statement of this memory expert:

> Under stress, there can be a retrieval failure. There is a failure of memory through a lapse of time, but a traumatic experience would cause a person to have a greater flashbulb recollection. The torture or beating of a victim, being an unpleasant event, would cause the person to remember the event. On the other hand, because of the unpleasantness, there could be repression of the experience in the unconscious mind. (9-10)

This passage sets forth a number of problems in the procedure of the hearing, and it suggests that the "retrieval" could be subject to various levels of distortion which would be difficult to predict; Mr. B., who has been tortured, may recall intimate details of the torture itself and have difficulty with

memories prior to this trauma, or he may suppress it altogether (a natural psychic defense). Either way, the recollection is bound up with a whole series of uncomfortable events:

> Memory varies between individuals and it can vary within the individual. A person would be able to remember the gist of an experience over a period of time, but the recall of the critical details depends on the person doing the remembering. If a person was beaten, he would remember the event except if it caused a trauma, which would cause him to lose his memory of the incident altogether. If someone was tortured or threatened with death, he would remember the event. (10)

There are two conclusions; first, it is impossible to actually tell whether or not the claimant "suffered a trauma," and second, even if he recalls the torture the importance of the experience as "flashbulb memory" may lead him to play down or omit other details pertinent to the case. These factors must be accounted for as we move to the analysis of the Mr. B.'s hearing, in which he is supposed to "outline in general terms and in chronological order the incidents which led to your fearing persecution and why" (18).

In terms of the second point, the scientific criteria employed for adjudicating the claims, it is once again useful to refer briefly to the work of Mikhail Bakhtin. In his work on "situatedness," Bakhtin is concerned with the situated self, the I as an organism who continuously responds to the environment, whether this environment is conceived of socially, semiotically, or physiologically. At any given moment, and this is the peculiarity of personhood, the temperature outside of the body has an effect on the body system and is therefore not disconnected from the kinds of responses that the person will make in language. The person is situated not only in terms of a time, a place, a temperature, and so forth, but also in the history of all the nows that were here before the person arrived here (at the interview), and in a series of nows that the person uses to organize behaviour in a meaningful pattern insofar as s/he can in the present moment. All of those activities of answering the present moment, even as conceived as a function of past-future projections, is what is alive in the person. So temporality is non-reversible, the person represents a sequence insofar as s/he is a living system. Bakhtin is a useful theoretician for discussions concerning the transcription process because he is interested in the subject as a living *system*, whereas the decisionmakers in the case of Mr. B. were not interested in the refugee as a series of poorly-recorded sign material.

This discussion prompts the question of why decisionmakers favour an empirical, verifiable system for determining the fate of claimants. Throughout the hearing, it is clear that both the Counsel and the S.I.O. were interested in

recording empirical facts, solid evidence, and verifiable information (see chapters 5 ff.). This perhaps is reasonable; what criteria could be employed to assess the accuracy of the claims if not a verifiable one? Obviously, the decisionmakers are attempting to simplify their own task by provide a simple means for refusing cases that are not in accord with their notion of acceptable behaviour. But considering what is at stake here, and considering that the Convention concerning refugees is calibrated to saving the lives of innocent victims, this apparently rational methodology in fact, according to this expert witness, could be fundamentally flawed. Furthermore, the elimination of whole realms of knowledge and experience as practised during this hearing is in accord with a scientific criteria that is unsound for the issues at hand, because it pre-supposes that complex living structures can be filtered down to a small number of pertinent facts as though they were but physical compounds. Thus when the word "scientific" is used here, it refers to the kind of empirical sciences practised in the domains of mathematics and physics, rather than biology.

Perhaps there is some logic to using a procedure that seems more in accordance with non-living things. The history of biology has been advanced in the face of a constant challenge from physics, which establishes its privilege on the basis of its ability to deal with *things*, things that are defined as objects, that aren't alive, precisely because they don't have irreversible temporality peculiar to them. For mathematical analysis, objects have a successional temporality; that is, there is often little importance ascribed as to whether x happens before y, or y happens before x. The order of the event must simply be accounted for in the methodology; so the power of physics, from at least the 17th Century (see Ernst Mayr's *The Growth of Biological Thought*), has been that it was conceived as a *real* science, as what everybody thought science should be. The fact that biology dealt with a messier phenomenon, things that came into and then went out of life, gave it a lower status in the scientific disciplines and led to the application of criteria inappropriate to the peculiarities of living things.

> The recognition that in the biological sciences we deal with phenomena unknown for inanimate objects is by no means new. The history of science, from Aristotle on, has been a history of endeavours to assert the autonomy of biology, and of attempts to stem the tide of facile mechanistic-quantitative explanations. However, when naturalists and other biologists as well as some philosophers stressed the importance of quality, uniqueness, and history in biology, their efforts were often ridiculed and simply brushed aside as "bad science." (Mayr 35-6)

There has been a long struggle in biology to establish itself as a hard science in the face of a physics-inspired model of predictability and reversibility. The use of this physical sciences-inspired empirical system for adjudication of Convention refugee claims carries in its train (dubious) preconceptions about how knowledge can be gathered, and once gathered how it can be assessed. A model of assessment based upon analogies from the physical sciences denies the characteristics distinguishing living from non-living things,[13] with consequences that are harmful to those forced to rely upon such a system.[14] This aspect of the process remains similarly flawed in the present system of refugee determination and in many other adjudicating procedures.

ii. The Hearing.

a. Opening Procedure

The standard opening procedure sets forth the rules that govern the interaction between claimant and State (and its representatives). The Hearing begins with an opening statement from the S.I.O. who fills in the blank spaces with chronotopical information. For the purposes of this study, only the English versions of these passages will be cited; however it should be noted that a significant body of jurisprudence discusses variations between English and French language versions in identical sections of the law.

> This is an examination under oath pursuant to subsection 45(1) of the Immigration Act of 1976. This examination is being held at Canada Immigration Centre, Law Enforcement Branch, Montreal. On this [day of month, year] it is now 1:50 in the afternoon. My name is [name], Senior Immigration Officer. This examination under oath arises from an inquiry which was held on the [day of month, year] at Canada Immigration Centre, Law Enforcement Branch and which was adjourned on the same date respecting your claim to be a Convention Refugee.

Though brief, this paragraph in some ways sets out the limits and the aims of this hearing. This is an "examination under oath," directed by a S.I.O. It is undertaken to establish the validity of a claim that was made at the "Law Enforcement Branch" of Immigration Canada, and it will be made orally. The hierarchy and stakes are clear; the overriding institutional apparatus is Immigration Canada. The law that gives the rights to the parties to the hearing and which brings the procedure into existence is Section 45(1) of the Act. The claimant is being given a chance to prove his legitimacy as a Convention refugee by these institutions and if he fails, he will be sent out of the country. A number of legal documents describe the nature of this hearing and the powers of the persons who direct and adjudicate it. Before moving on to the

role and the purpose of the hearing, this legal apparatuses will be described, and a short discussion of how the resulting conversation could be analyzed will ensue.

In an unpublished manuscript called *Redetermination of a Claim to be a Convention Refugee; A Review of the Jurisprudence* (1986), Roger Cantin, a Legal Adviser to the Immigration Appeal Board, assembled the pertinent jurisprudence that regulated the rulings for refugee determination during the period with which we are concerned. His work is coherent and thorough, and since this particular text looks like a manual for the Immigration Appeal Board, it will be a key reference for my own discussion of legal materials pertinent to the case of Mr. B.

Cantin notes that during the initial inquiry (which in this case "was adjourned on the same date respecting your claim to be a Convention Refugee") the presiding adjudicator must first decide "whether a removal order or departure notice would have been made or issued if it had not been for the claim." This initial claim is itself an grey area within the system; the very existence of a pre-hearing suggests that the claimants eligibility as a Convention Refugee Hearing is to some degree contingent upon the (variable) decisions made during the initial hearing by immigration officers who question the claimant even before s/he has had legal Counsel.[15] If the adjudicator decides that the claimant is a person "not described" as in the report which instigated the inquiry, then the claimant would be allowed to enter or to remain in Canada under s. 32 of the Act; however if s/he nonetheless would like to claim refugee status, then s/he would claim following procedures for "in-status" described in the *supra* to the act.

If the claimant concludes that the person would have been issued a removal order were it not for the claim, then there will be a second hearing in which the claimant will be examined under oath by a S.I.O.; the present document is the transcription of one such hearing. This is a *purely administrative hearing*, which limits the rights of the claimant in ways that could not occur if this were a criminal proceeding. Despite the apparently negative connotations of assessing these claims in criminal court, the claimant would not bear the burden of proof in criminal court, and s/he would always have the right to appeal.

Under the system as described, there is a possibility for redress even within the administrative system; an example is in *Singh (Kashmir) v. M.E.I.* (1983) where the claimant was denied the right to Counsel for a segment of the inquiry. In the ruling it was stated that the claimant may give testimony after the Hearing in order to provide "... any facts in support of his claim which may not have been included or may have been incompletely or inadequately included in the transcript of his examination before a senior immigration

officer" (457). The brunt of this right to further representation falls upon those who have clearly been fundamentally abused during the Hearing; in *Re Singh (Kashmir) v. M.E.I.*, Thurlow, C.J. (Mahoney, J., concurring) state that:

> The authority conferred on the board in dealing with an application is thus very particular and very narrow. It does not include authority to refer the matter back to the Minister or to consider to take any action in respect of defects or irregularities that may appear to have occurred in the proceedings leading up to the Minister's determination. Only in a case where what occurred at the examination was so *fundamentally erroneous as to be a basis for treating the Minister's determination as a nullity so that the Board's jurisdiction to entertain an application for redetermination could not be said to attach* do I conceive that it might be open to the Board to deal with the application otherwise than as directed by s-s. 71(1) and in such a case the Board's course, as I conceive it, would not be to entertain the application but would be simply to quash or refuse to entertain it on the ground that there had been no Minister's determination. (456 *author's emphasis*)

Cantin provides some legal basis for questioning the credibility of the S.I.O. as an examining officer when he states that:

> Where a senior immigration officer sheds his objectivity and assumes an adversarial approach by cross-examining or impeaching the credibility of the claimant, there will be prejudice to the claimant in such a serious and fundamental way as to nullify the Minister's determination and the examination under oath and deny jurisdiction to the Board. (11-12)

The role of the S.I.O. in 1987 was simply that of an interrogator. S/he had no decision making power in the case and, even though s/he was an employee of Immigration Canada, s/he made no recommendations during or after the hearing. S/he did, however, direct the questions and follows the basic procedure of the hearing and as such had a responsibility to ensure that the refugee was given the full opportunity to articulate his/her case. The S.I.O. risked to overstep the bounds of appropriate behaviour by interfering in other ways which Cantin would find legally objectionable, such as "constantly interject[ing] in the examination so as to deprive the claimant of the opportunity to properly outline the basis of his claim and where he further refuses to allow the claimant to refer freely to any notes he may have brought to the examination" (12).

In Cantin's view, "even comments by the claimant's solicitor at the examination, which could be said to indicate a lack of confidence in his client's claim such that fair representation is absent, will cause a serious and fundamental prejudice to the claimant so as to nullify the Minister's determination and the examination under oath and deny jurisdiction to the Board"

(12-13). The claimant was protected under law, therefore, where serious errors in procedure occur during the hearing. The claimant was also protected if, for example, the S.I.O. failed to inform the claimant as to his/her right to Counsel, or if the Counsel, through inexperience, failed to file submissions at the correct time. Translation problems could also be grounds for a new claim, however, "minor" deficiencies in translation were *not* considered serious enough to undermine the validity of the decision of the Minister (see chapter 3).

A second alternative was open to persons who considered themselves abused by the initial hearing during the period in which the case which we are examining was heard. Following a suggestion made by Thurlow, C.J., in *Re Singh (Kashmir) v. M.E.I.*, claimants could also make applications to the Federal Court, Trial Division "for a writ of certiorari to quash the said determination" (Cantin 14); and Stone, J. suggested that, until an application was made for redetermination of the claim, claimants could attack the conduct of the hearing under s. 18 of the *Federal Court Act*. The possibility of resorting to certiorari proceedings is not a guaranteed recourse for persons seeking recourse, however; Marceau, J. in *Milius v. M.E.I.* questioned the efficacy of such a procedure:

> [...] the scheme of the Act with respect to a refugee status claim appears to me to preclude the possibility for a claimant to resort to certiorari proceedings for reason of inaccuracies in his examination under oath, because it itself provides for an alternative remedy which was devised in part to cover precisely the case. In the declaration under oath that he is required to file when he applies under Section 70 of the Act for a redetermination of his claim by the Immigration Appeal board, an applicant has all the opportunities he may wish to have to rectify, complete, or otherwise explain the answers he actually gave or appears to have given during his previous examination by the Senior Immigration Officer. It seems to me that, by providing for a remedy entirely adequate, the Act must be seen as excluding the common-law right to impugn by certiorari the making of the minister's order on the sole basis that his examination (or the transcript thereof) could be improper or unsatisfactory (see de Smith's *Review of Administrative Action*, 425).

In any case, if the claimant allowed a redetermination of the hearing, then s/he was considered to have waived the irregularities which occurred during the Hearing. In this matter, Cantin cites Stone, J.:

> Although I would agree that the Applicant cannot be taken to have waived the irregularity while the examination was being conducted, he may be taken to have done so by making application to the Immigration Appeal board for redetermination of his claim on the basis of the transcript of that examination and the content

> of his statutory declaration. *The application to the Board was an entirely fresh proceeding* (Cantin 16; See *Singh (Kashmir) and M.E.I.*, p. 465, and *Arumugam and M.E.I.*).

Cantin goes on to say that "where his application for redetermination of his claim to Convention refugee status was actually dismissed by the Board, the claimant cannot then attack the Minister's decision by application for writ of certiorari" (16). The precedent cited, *Milius v. M.E.I.* contains the following reasons from Pratte:

> [O]nce the Board has determined a person not to be a refugee pursuant to section 71, the only way in which that determination may be deprived of effect is by a direct attack against it under section 28 of the Federal Court Act; it cannot be challenged indirectly by attacking the decision of the Minister which preceded the decision of the Board. Once the determination of the Minister has been replaced by the determination of the Board, it is a futile and frivolous exercise to try and test the validity of the Minister's decision. (6)

The whole question of when the refugee's rights to appeal based on questionable conduct during the Hearing is an important one which must be handled very carefully lest the refugee forego his/her rights to redetermination by the simple act of requesting appeal. What is clear from these precedents is that legal Counsel in these matters is of the utmost importance, and that more favourable channels of appeal, like the Federal Court, Trial Division, are not necessarily open to the refugee no matter how strong his/her claim.[16]

From a discursive point of view, the stakes and the hierarchies of the hearing are obvious from the start, and a whole realm of knowledge that is needed to understand how this hearing is initially construed is glossed-over by the description of the hearing and even by the legal documentation that presumably explains it. The first major infusion of discourse theory, therefore, will set out the implicit criteria for adjudicating and hearing this case through reference to these opening passages describing the form and the purpose of the hearing. The relevant works for these passages are from the realms of interaction theory, which sets out some of the stakes and qualities of the oral interview, and social discourse theory, which describe the discourse paradigm within which all utterances are heard and, eventually, adjudicated.

The S.I.O, despite the limitations of his/her power, directed the proceedings towards a pre-determined end and acted as the government representative of the examining party. The refugee claimant answered the questions of the S.I.O. and the Counsel in the hope of proving that the claim was valid. Just as a legal analysis describes what is juridicially admissible,

reference to interaction theory demonstrates the degree to which the power of recounting the story is limited by the framework of the proceedings, and also sets out some of the structural problems that an "examination under oath" can (and will) produce for this claimant.

Ideally, it would be possible to describe how the interaction between claimant and State occurs solely through reference to interaction theory; unfortunately, "interaction," as it occurs in these (and other legal) hearings or inquiries, has a very different meaning from "interaction" as described by theorists who, for the purposes of their researcher, have imagined a more open-ended discussion. Work undertaken in this area is of value because it helps describe how and why these hearings went wrong; however, some otherwise valuable characteristics of social interaction theory will ultimately be set aside because they describe in overly idealistic terms the ways in which social interaction occurs.

Among the theorists who are viewed as forefathers of contemporary theories of social interaction are Michael Argyle (the link between work on human verbal communication and on non-verbal behaviour), Gregory Bateson (the Palo Alto School), Ray L. Birdwhistell (studies in non-verbal discourse), H. Garfinkel (ethnomethodology), Erving Goffman (ritual interaction and strategic organization), and E.T. Hall (anthropology of space). These studies were undertaken within the context of different disciplines and fields, but various researchers have attempted to categorize research into social interaction and assign it an autonomous place in social science research:

> On a parlé à leur sujet d'une sorte de "collège invisible" de chercheurs ayant subi les mêmes influences, ayant des orientations comparables, travaillant séparément mais se retrouvant périodiquement pour confronter leurs méthodologies, leurs recherches et leurs résultats. Ce qui les rapproche, c'est une façon originale d'aborder les phénomènes relationnels, que l'on a pu placer sous l'étiquette de "nouvelle communication." (Marc & Picard 10)

"Nouvelle communication" thus joins "social interaction" as a domain that is broad enough to account for the subject matter. There are others, of course. Germaine de Montmollin, in her study *L'Influence sociale*, speaks of reciprocal influence as a basis of social interaction:

> ...dans la mesure où la perception du sujet percevant est modifiée par l'attente d'une réciprocité, il y a interaction sociale. De même, le fait que le sujet perçu peut l'amener à modifier son apparence, ses attitudes, ses paroles, ses conduites, c'est-à-dire les indices qui servent de base aux jugements du percevant, ce qui transforme la perception du percevant; on est donc en présence d'une interaction sociale. (21)

Edmond Marc and Dominique Picard use this term, "interaction sociale," as the name of their survey of relevant theories:

> Il ne s'agit donc pas d'opposer, par cette expression, des interactions qui seraient sociales à d'autres qui ne le seraient pas, mais de montrer la part du social présente dans toute rencontre; elle est repérable même dans les relations les plus intimes. Cela vient du fait que toute rencontre interpersonnelle suppose des *interactants* socialement situés et caractérisés et se déroule dans un *contexte* social qui imprime sur elle sa marque en lui apportant un ensemble de codes, de normes et de modèles qui à la fois rendent la communication possible et en assurent la régulation. (Marc & Picard 15)

This approach, applied to the opening section, demonstrates that interaction is a reciprocal and not a linear process, that interaction is made up of non-verbal elements whose presence is an integral part of social interaction, that social interaction is a circular system of actions, reactions, stimuli and responses, and that there is an intersubjective element of discourse that justifies a "psychosocial approach" (inspired by the "social psychologists" including Floyd Henry Allport and Jean Maisonneuve) which can account for the interaction between the conscious and the unconscious of the participants:

> Si on peut...décrire et comprendre [la communication] à partir de l'observation des comportements et des échanges verbaux, une partie de sa signification échappe à l'observation et découle du vécu des interactants, de leurs sentiments intimes, de l'imaginaire que suscite le rapport à l'autre et de leurs relations affectives. (Marc & Picard 20)

Unfortunately, the refugee claimant is simply not sufficiently well-represented in the transcription to allow for a full-scale social interaction analysis. This is particularly true for the kinds of approaches suggested by Marc and Picard, contingent as they are upon psychosocial theory. As stated earlier on with respect to psychoanalytic approaches to discourse, studies of the unconscious, the realm of "l'imaginaire," and the questions about "leurs sentiments intimes" are beyond the scope of this study for both practical and theoretical reasons. Nonetheless, some basic descriptive information concerning social interaction can be gleaned from research in this area, and in particular from the research of Erving Goffman and his followers.

Goffman offers the means by which the researcher can penetrate some of the natural defenses, masks and manoeuvres presented during the process of oral interaction. He was a pioneer in work on self-presentation and strategies of discourse, and as such has made significant contributions to the kinds of sociological studies that help explain the difficulties inherent in

attempts to represent oneself through discourse that produce apparently irrational (and ultimately life-threatening, if it is the basis for the rejection of a claim) discursive behaviour during Convention refugee hearings. Teun A. Van Dijk notes:

> The work of Goffman (1959, 1967, 1974, 1981) has had decisive influence on this insight into the nature of talk as a means of self-presentation. Not only is the well-known protection of self-esteem involved here, but also the presentation of preferred roles or relationships. A doctor or a teacher signals in many ways, when going about the routine activities of talking to patients or students, that s/he is talking as a doctor or a teacher. This implies, among other things, that such social roles are not given or defined *a priori* but dynamically enacted and negotiated during the ongoing encounter. In this sense, the dynamic and local accomplishment of roles in strategic encounters is rather different from the abstract role definitions of a structural sociology. (4-5)

Goffman proposes in *Interaction Ritual* that researchers examine "face to face interaction in natural settings" (1), which in his view should be a study in its own right, "analytically distinguished from neighbouring areas, for example, social relationships, little social groups, communication systems, and strategic interaction" (3). He privileges what he calls "natural sequences of behaviour occurring whenever persons come into one another's immediate presence" (2), and to that end he makes in-depth studies of "the syntactical relations among the acts of different persons mutually present to one another" (2). As such, his work is a useful point of departure, particularly as regards frame analysis, rituals, and the *play* of conversation. The rules as set out in this early passage read out by the S.I.O. should indicate to the claimant that Truth, as established through correlation and repeatability, will be of utmost importance, and that he as claimant is responsible for uttering everything that is necessary for the adjudication of the claim. There are a number of other rules that will be read out further on; but Goffman was indeed correct to employ such terms as strategies and negotiations, for this is an accurate description of the ways in which the hearing has been described thus far.

Goffman made other observations about social interaction in natural settings that described "face-to-face" interaction; in this area fall his empirical studies of facial expression, his attempts to correlate physical characteristics with the content of an utterance, and so forth. Much of this work has inferential value, however up until 1989 parties responsible for adjudicating the case were not present during the hearing, rendering impertinent reference to the value of the refugee's appearance as a sign that can be analyzed as communica-

tion. Nonetheless, some of his observations deserve mention because categories, such as "face," can be read to suggest something beyond physical appearance. An example of his beliefs in this regard is that

> the ultimate behavioral materials are the glances, gestures, positionings, and verbal statements that people continuously feed into the situation, whether intended or not. These are the external signs of orientation and involvement – states of mind and body not ordinarily examined with respect to their social organization. (1)

The facial expression in this scenario is a clear reflection of the speaker's (or listener's) "state of mind."

> One objective in dealing with these data is to describe the natural units of interaction built up from them, beginning with the littlest – for example, the fleeting facial movement an individual can make in the game of expressing his alignment to what is happening – and ending with affairs such as week-long conferences, these being with the interactional mastodons that push to the limit what can be called a social occasion. A second objective is to uncover the normative order prevailing within and between these units, that is, the behavioral order found in all peopled places, whether public, semi-public, or private, and whether under the auspices of an organized social occasion or the flatter constraints of merely a routinized social setting. Both of these objectives can be advanced through serious ethnography; we need to identify the countless patterns and natural sequences of behaviour occurring whenever persons come into one another's immediate presence. And we need to see these events as a subject matter in their own right, analytically distinguished from neighbouring areas, for example, social relationships, little social groups, communications systems, and strategic interaction. (*Interaction* 1-2)

Goffman herein offers a means for describing the "face" that one wears for a hearing, where "*face* may be defined as the positive social value a person effectively claims for himself by the line others assume he has during a particular contact." This face, while produced by the individual, is created in continuous response to social context; as such, "face is an image of self delineated in terms of approved social attributes – albeit an image that others may share, as when a person makes a good showing for his profession or religion by making a good showing for himself" (*Interaction* 5). He brings the notion of "face" to bear upon his study of the "empirical face" and the projected face, the face which we as speakers imagine that we are projecting; thus

> if the encounter sustains an image of him that he has long taken for granted, he probably will have few feelings about the matter. If events establish a face for him that is better than he might have expected, he is likely to 'feel good;' if his ordinary expectations are not fulfilled, one expects that he will 'feel bad' or 'feel hurt.' (*Interaction* 6)

Not only do we wear our faces like we wear our clothing, in Goffman's scheme we even grow attached to certain faces as we would to a pair of well-worn jeans. "In general, a person's attachment to a particular face, coupled with the ease with which disconfirming information can be conveyed by himself and others, provides one reason why he finds that participation in any contact with others is a commitment" (*Interaction* 6). He also posits that the "face" is one of our personal resources; if this is the case, then the refugee's disadvantage during this hearing exists before the hearing either begins. In this "examination under oath," the Convention refugee wears the face of an outsider, and, by virtue of his/her position during the hearing, is assumed to be lying until he/she proves that the story recounts is true and within the limits of the acceptable as defined by the *Immigration Act.* As such, his/her choice of faces will be extremely limited; he/she is a victim, who must prove to (through discussion with the S.I.O. and Counsel) that the story recounted is true and appropriate.

> The line maintained by and for a person with others tends to be of a legitimate institutionalized kind. During a contact of a particular type, an interactant of known or visible attributes can expect to be sustained in a particular face and can feel that it is morally proper that this should be so. Given his attributes and the conventionalized nature of the encounter, he will find a small choice of lines will be open to him and a small choice of faces will be waiting for him. Further, on the basis of a few known attributes, he is given the responsibility of possessing a vast number of others. (*Interaction* 7)

The speaker must analyze the discursive situation and choose a correct face; but if the interviews are carried out in an antagonistic way, if the person is forced to defend his/her activities or the presentations made by his or her media form, then this unified face is likely to break down. This is a crucial observation for the analysis of a Convention refugee claim, for these persons are victims who have been persecuted by officials in their country of origin. If the questions posed during the hearing seem antagonistic the claimant may become resistant, or "in wrong face:"

> A person may be said to *be in wrong face* when information is brought forth in some way about his social worth which cannot be integrated, even with effort, into the line that is being sustained for him. A person may be said to *be out of face* when he participates in a contact with others without having ready a line of the kind participants in such situations are expected to take. (*Interaction* 8)

It is in such a situation that the person concerned will lose his/her "poise," which is employed by Goffman "to refer to the capacity to suppress and conceal any tendency to become shamefaced during encounters with others" (*Interaction* 9). This kind of observation is important for an analysis of the Convention refugee hearing inasmuch as it dramatizes the degree to which the institutional face is (in most cases) a "face on loan," an unfamiliar face which is probably not in accord with other faces that the interviewee wears during a given day:

> In any case, while his social face can be his most personal possession and the centre of his security and pleasure, it is only on loan to him from society; it will be withdrawn unless he conducts himself in a way that is worthy of it. Approved attributes and their relation to face make of every man his own jailer; this is a fundamental social constraint even though each man may like his cell. (*Interaction* 10)

And finally, Goffman suggests that an attack may lead to a defensive position on the part of the interviewee; the information obtained when s/he assumes this pose is bound to be of limited value since it is a fundamentally defensive "face saving" one:

> [T]he person will have two points of view – a defensive orientation toward saving his own face and a protective orientation toward saving the other's face. Some practices will be primarily defensive and others primarily protective, although in general one may expect that these two perspectives to be taken at the same time. In trying to save the face of others, the person must choose a tack that will not lead to loss of his own; in trying to save his own face, he must consider the loss of face that his action may entail for others. (*Interaction* 14).

Goffman's work also lays some of the ground for later work on narrative self-construction, the ways in which we fashion ourselves through discourse; for example, he writes that "to display or express character, weak or strong, is to generate character" (*Interaction* 237). But despite these many valuable points, a discourse analyst must compliment Goffman's analysis through reference to work more suited to transcribed inter-cultural legal discourse, for a number of reasons. First, although Goffman proposes several useful strategies for examining day-to-day discourse, he never sets out a thorough methodology. Each text follows a logic which could best be described as

intuitive, and although many of his findings seem reasonable, it would be difficult to confirm most of them. Second, for analyses of inter-cultural legal discourse, Goffman's work is far too 'occidentocentric,' even despite the odd reference to interaction between (say) Chinese and Americans. Most of his observations describe the Western partner, without consideration of how (for example) an immigrant or another out-group member would either act or react in a given situation. The kinds of faces available to the speaker would presumably vary across cultures and through time; without a kind of cultural touchstone, any assessment made on the basis of face would be mere conjecture. For example, the nomadic tribesman has faces which Goffman would not recognize within the parameters set out in his own work. S/he will therefore be lacking in what Goffman calls "tact, savoir-faire, diplomacy or social skill" (*Interaction* 7). Where Goffman's work would be useful, perhaps, is as a sort of handbook which would be distributed to each refugee upon arrival in Canada, so that s/he could avoid the pitfalls of Canadian social interaction rituals.

Third, Goffman's use of immutable categories poses significant theoretical problems for researchers interested in inter-cultural discourse. He suggests that "the interchange seems to be a basic concrete unit of social activity and provides one natural empirical way to study interaction of all kinds" (*Interaction* 20). When a stand-off or a snag develops during this interchange, it will be reconciled according to the following formula; there is a challenge, an attempt to reconcile, an offer of compensation, a punishment, and a gratitude. This may be an adequate description for informal social interaction; but to follow this apparently invariable formula for analyses of refugee hearings could be overly reductive. A snag in a refugee hearing often results in a complete breakdown, unapparent in the transcription, wherein the refugee stops elaborating his answers, or stops telling the truth because he/she feels that the S.I.O. or lawyer cannot be trusted with the details of the case. This event is not an effort of "face-saving" (as Goffman would call it) but rather it is linked to a series of culturally-contingent norms concerning secrecy and trust.

Fourth, one of the underlying problems with Goffman's approach stems from his belief in the existence of a universal *human nature*, a notion which is of value for this study, but not as he defines it:

> Throughout this paper it has been implied that underneath their differences in culture, people everywhere are the same. If persons have a universal human nature, they themselves are not to be looked to for an explanation of it. One must look rather to the fact that societies everywhere, if they are to be societies, must mobilize their members as self-regulating participants in social encounters. One way of mobilizing the individual for this purpose is through ritual; he is taught to be per-

> ceptive, to have feelings attached to self and a self expressed through face, to have pride, honour, and dignity, to have considerateness, to have tact and a certain amount of poise. There are some of the elements of behaviour which must be built into the person if practical use is to be made of him as an interactant, and it is these elements that are referred to in part when one speaks of universal human nature. (*Interaction* 44-5)

The question of "human nature," despite my reservations about Goffman's use thereof and my concern about finding immanent and non-social elements of society which shape our behaviour, could play a role in studies of inter-cultural interaction, but the categories assigned are insufficiently articulated. Human nature in his work is a theoretical black hole that is pointed to whenever the intellectual apparatus cannot account for particular behaviour. Nonetheless, Goffman's work contains a remarkable degree of intuitive sense, and his general observations can be correlated with reference to the work of other theoreticians. Pierre Bourdieu, for example, complements Goffman's work by criticizing any attempt to study language by concentrating upon variations upon a given linguistic norm:

> [D]istinctive deviations are the driving force of the unceasing movement which, though intended to annul them, tends in fact to reproduce them (a paradox which is in no way surprising once one realizes that constancy may presuppose change). Not only do the strategies of assimilation and dissimilation which underlie the changes in the different uses of language not affect the structure of the distribution of different uses and language, and consequently the system of the systems of distinctive deviations (expressive styles) in which those uses are manifested, but they tend to reproduce it (albeit in a superficially different form). Since the very motor of change is nothing less than the whole linguistic field or, more precisely, the whole set of actions and reactions which are continuously generated in the universe of competitive relations constituting the field, the centre of this perpetual movement is everywhere and nowhere. (64)

Further on, he points to the importance of the so-called "deep mechanisms" which underlie these variations and which are necessarily absent from the interactionist's approach which "consists in reducing relations of power to relations of communication" (167):

> The 'interactionist' approach, which fails to go beyond the actions and reactions apprehended in their directly visible immediacy, is unable to discover that the different agents' linguistic strategies are strictly dependent on their positions in the structure of the distribution of linguistic capital, which can in turn be shown to depend, via the structure of chances of access to the educational system, on the structure of class relations. Hence, interactionism can know nothing of the deep

> mechanisms which, through surface changes, tend to reproduce the structure of distinctive deviations and to maintain the profits accruing to those who possess a rare and therefore distinctive competence. (64-5)

Bourdieu could be understood to be placing a series of theoretical roadblocks on the route towards understanding the discursive practice of the Other by suggesting that each statement be read in light of a vast backdrop of sociological information about the speakers and the speech situation. By accentuating the importance of the sociological circumstances that led to the utterance, Bourdieu sets the stage for our understanding that discourse is seldom uttered with the utopian goal of *communicating* (or the even more utopian goal, described by Bakhtin, of *dialogizing*). Seeing discourse in this light on the one hand demystifies it, and on the other complexifies it because another level of meaning is introduced to the purely semantic and formal ones.

In summary, social interaction theory in general and Erving Goffman's work in particular made valuable forays into the area of discursive strategies and the need for the adjudicating body to take into account previously overlooked semiotic, semantic, and corporal material. He also points to the importance of studies that make reference to the speaker's body – literal or not. Literal references to the body are of course inapplicable to this particular study, as are many elements of otherwise valuable work on the role of the body in communication, because of the use of transcriptions. A brief survey of similarly inapplicable work includes: Michael Argyle's study of bodily communication; Ray L. Birdwhistell's work on body motion; Jacques Corraze's work on non-verbal discourse; Jacques Cosnier *et al*'s work on gesture; Paul Ekman *et al.*'s work on emotion and on hand movements; Norbert Freedman *et al*'s work on motor behaviour during speech; Roland Gori's work on the body as sign in interaction; and Dominique Picard's work on the body in social relations. The approach to this material must be based on a study of the language itself, and of the power relations that structure the production of this language. This fact that decisions were made on the basis of transcribed materials suggests in very concrete terms the degree to which this "Other" has been reduced in his transformation from living claimant to transcribed hearing. This reduction will continue as a result of other characteristics of the hearing which will unfold with the laying-bare of the procedure and the discourse of the various parties.

One final point. These hearings are conducted orally, generally in the form of questions and answers. This format is not intrinsically ineffective for the discovery of information about a person or for the elaboration of ideas. Pierre Bourdieu for example discusses the positive sides oral interaction in a book called *Choses Dites*, which is a collection of questions and answers that

follow formal presentations (ie. conference papers)that have been transcribed. Reference to this book offers a measure of the distance between the ideal situation herein described and the actual transcription of Mr. B's case, for it illustrates yet again the degree to which the Convention refugee as Other has been reduced to a tiny fraction of his actual self as persecuted human being.

The advantage of an oral hearing in terms of accumulating information is that unexpected and potentially revealing shifts might occur within the dialogue between the Counsel, the Claimant, and the members of the ruling body. Bourdieu writes:

> [L]a présence d'un auditeur, et surtout d'un auditoire, a des effets qui ne sont pas tous négatifs, surtout lorsqu'il s'agit de communiquer à la fois une analyse et une expérience, et de lever des obstacles à la communication qui, bien souvent, se situent moins dans l'ordre de l'entendement que dans l'ordre de la volonté: si l'urgence et la linéarité du discours parlé entraînent des simplifications et des redites (favorisées aussi par le retour des mêmes questions), les facilités procurées par la parole, qui permet d'aller très rapidement d'un point à un autre, en brûlant les étapes qu'un raisonnement rigoureux doit marquer une à une, autorisent des resserrements, des raccourcis, des rapprochements, favorables à l'évocation de totalités complexes que l'écriture deploie et développe dans la succession rapide des paragraphes ou des chapitres. (7-8)

He also speaks of the ability to grasp extremely complex concepts.

> Le souci de faire sentir ou de faire comprendre, qui est imposé par la présence directe d'interlocuteurs attentifs, incite un va-et-vient entre l'abstraction et l'exemplification, et encourage la recherche des métaphores ou des analogies qui, lorsqu'on peut en dire les limites dans l'instant même de leur utilisation, permettent de donner une première intuition approximative des modèles les plus complexes et d'introduire ainsi à une présentation plus rigoureuse. Mais surtout, la juxtaposition de propos très divers par leur circonstance peut, en faisant découvrir le traitement d'un même thème dans des contextes différents ou l'application à des domaines différents du même schème, donner à voir en action un mode de pensée que restitue mal, quand il ne le dissimule pas complètement, le fini de l'oeuvre écrite. (8)

Bourdieu's analysis, if applied to the hearing, suggests that an open-ended form of interrogation might work to the advantage of both decisionmakers (by lending itself more readily to the discovery of unexpected facts), and the refugee (who will have the opportunity to connect apparently disparate experiences that are related to the claim):

> La logique de l'entretien qui, en plus d'un cas, devient un véritable dialogue, a pour effet de lever une des censures majeures qu'impose l'appartenance à un champ scientifique, et qui peut être si profondément intériorisée qu'elle n'est même pas ressentie comme telle: celle qui empêche de répondre, dans l'écriture même, à des questions qui, du point de vue du professionnel, ne peuvent apparaître que comme triviales ou irrecevables. (8)

What Bourdieu has described is the utopic form of such exchanges as oral hearings, where the parties to the hearing have relative freedom and where there is a measure of equality between the interrogator and the interrogated. This is hardly the case, as will become clear as the hearing unfolds.

b. Swearing-in the Interpreter

The Hearings are held in either English or French; if the claimant so chooses, s/he has the right to an interpreter. In the case where an interpreter is present, the following swearing-in takes place:

> Q. Please place your right hand on the bible. Do you swear sir to translate faithfully, correctly and to the best of your ability from English to Spanish and from Spanish to English all questions, answers, testimony, documents or anything else which may be presented during the course of this examination?
>
> A. I do.
>
> Thank-you.

The difficulties that arise as a result of the interpretation process have been previously described (chapter 3).

c. The Swearing-In of the Counsel

The refugee has the right to Counsel, either a lawyer or any other person chosen by the claimant. In the case at hand the claimant retained the services of Maitre G.:

> *By the S.I.O.* (to the person concerned)
>
> Q. Sir, I notice that you are accompanied today by Maître G. Should I understand thereby that Maître G will act as your Counsel during this inquiry?
>
> A. Yes

By the S.I.O. (to the Counsel)

Q. Maître G, for the purposes of this transcription, would you please spell your name and address?

A. L. G., -- Street, Montréal.

Claimants had a right to the services of a barrister or solicitor or other Counsel pursuant to s. 45(6) of the Act and failure to comply with his/her duty to inform the claimant of this right is grounds for re-examination, as is inexperience or errors committed by the Counsel in the course of the process or the Hearing;[17] however, as Cantin notes, "where the adjudicator informs the claimant only of his right to representation by Counsel, not by a barrister or solicitor, but the quality of actual representation is satisfactory, the mere technical irregularity of not informing the claimant of his specific rights under s. 45(6) of the Act will not be enough to deny the Board's jurisdiction" (13).

Notice that the presence of the Counsel may also be related to issues beyond the control of the claimant; in the following example of a Yugoslavian claimant who underwent his hearing in 1987, it is clear that the claimant is not fully cognizant of the importance of a Counsel:

Q. I notice that you are not accompanied by a Counsel to represent you, do you wish to proceed alone, or do you wish the presence of a Counsel?

A. Yes.

Q. Yes what?

A. Considering the fact that this is my second attempt to get through this stage, and my inability to find the appropriate person or lawyer, basically because of vacations, were unavailable, I have decided that today I go through this procedure all alone.

Q. Very well. If at any time during the course of this examination you wish to be represented, please tell me and we will adjourn the examination to allow the presence of your Counsel.

d. Recognizing the Witness

With the consent of the refugee, witnesses were permitted to observe, but not participate in, the hearing. In the case at hand, the witness was the claimant's wife whose transcription is referred to later on in the study.

By the S.I.O. (to the observer)

Q. I notice the presence of a woman in this room. Could you please identify yourself madame?

A. Mrs. V.

By the S.I.O. (to the person concerned)

Q. So, sir, do you have any objections to this woman acting as observer?

A. No, none at all.

Q. She is your wife?

R. Yes.

e. Swearing in the Claimant

The next section of the hearing is the last preliminary before the narration of the claimant's reasons for claiming refugee status in Canada. Here, the refugee takes an oath, and then confirms that the information contained in the basic form and the passport, referred to above, are indeed accurate.

> Q. Okay. So, sir, since all testimony is made under oath, I will swear you in. Would you please place your right hand on the Bible. Do you promise to tell the truth, the whole truth and nothing but the truth? Say, "I do."
>
> A. I do.

f. Describing the Procedure of the Hearing

Oddly enough, the case at hand does not contain a critical section of the hearing, that in which the S.I.O. explains the purpose and the sequence of the hearing. Generally, after swearing in the claimant, the S.I.O. read out a standard passage containing most of the procedures and presuppositions which underline this process. There are slight variations in this standard statement; it varies somewhat from hearing to hearing, and the English version lays different emphases than the French; a representative example of the English version is as follows:

> *By the S.I.O.*
>
> Before you begin your declaration, I would like to make the following points, sir. You should give me only the information which is essential to your refugee claim.

This is the first limitation placed upon the refugee during the hearing; all information must pertain directly to the claim, and any irrelevant discussion will be blocked by the S.I.O. I will provide an example from another case:

Now there is the issue in your transcript of marriage by proxy I presume is the word which is an interesting item in the transcript.

By the Committee Member (to the Counsel)

But I do not see any connection of that with the declaration, Me. R. And unless you do and I have missed something I am not going to ask questions about it.

A. Right, there is nothing really linked with the case.

This kind of limitation upon what can be uttered in the course of a hearing raises a number of issues to which we shall return; how is the refugee claimant, who is unfamiliar with the process and with the norms for argumentation, supposed to determine what is and what is not pertinent? How can certain episodes, not directly related to the persecution but nonetheless valuable in terms of the experience of the refugee, be deemed inappropriate or inadmissible? As with other factors that limit the ability of the claimant to make his/her case, this one works against persons who come from cultures vastly different from that of the host country, persons who have less money and therefore little choice of Counsel, and persons who have no means of verifying the accuracy of the translation or transcription of the hearing.

The passage continues: "Information should be as closely related to the definition of a Convention Refugee as possible." This sentence brings us to the second major point; all information must pertain to the claim, and the limits of that information are dictated by the Convention Refugee definition, provided earlier on. This is a critical point which has as a consequence the effect of limiting the kinds of discourse theories applicable for the legal hearing. An example of a theory that is otherwise extremely useful for the kind of material at hand is that described in the works of Teun Van Dijk. One of his works, *Communicating Racism*, is particularly well suited to the study of interviews and to the analysis of the depiction and construction of immigrants in ordinary discourse. Van Dijk is a discourse analyst, whose works have been, for the most part, studies of how races are depicted by individuals, institutions, media, social groups, and government bodies. In *Communicating Racism* Van Dijk undertakes discourse analysis of interviews which he and his students make of both everyday and prominent citizens in the Los Angeles area, and in the area around Amsterdam. The interviewers do not identify the goal of the interview, but are simply asking "neutral" questions concerning immigrants, refugees and foreigners in the neighbourhoods and workplaces of the interviewees. Van Dijk is interested in the content of these interviews, but also in how the interviewers express their attitudes, and how they convey the attitudes which they have formed during so-called everyday conversation.

> It first requires the creation of a sophisticated "diagnostic" battery of structures of text and talk that are preferred in the expression or legitimation of ethnic prejudices or dominant group relations. Even pauses, repairs and hesitations in conversation may be relevant to detecting underlying processes of self-monitoring speech on "delicate" topics. Narratives about personal experiences with "them" may suddenly not only lose their Resolution category – thereby signalling how the "unresolved problem" of "foreigners" in the neighbourhood or city is cognitively represented in mental models – but also essentially become embedded in an argumentation in which "lived" personal events are used as persuasive premises that support a generally negative conclusion: "They" do not belong here. (22)

The first step in this analysis is to undertake a systematic analysis of the talk, both linguistically and semantically.

> Following earlier work in discourse analysis, we first distinguish between global, macro level, and a local, microlevel of talk. At the global level, there are the various 'themes' or topics, that is, the semantic macrostructures of conversation. If people talk about foreigners, what kind of topics are discussed, whether spontaneously or prompted by questions of the interviewer? At this global level, we also distinguish various sorts of 'schematic' organization, such as argumentation structures or the narrative structures of stories. At the local level, we deal with the structures of individual turns, moves, sentences, and speech acts, and their mutual relationships. Thus, we focus on semantic moves that are accomplished within overall strategies of discourse and interaction, as well as the expression of meaning in style, rhetorical operations, and conversational formulation.... (22)

The initial systematic discourse analysis is primarily structural, concentrating upon the major properties which characterize discourse on ethnic groups. Following that, the discourse is contextualized and analyzed as a form of interaction, "a cognitive and social accomplishment within a communicative context."

> It will become clear, for example, that at several levels of analysis, talk about ethnic groups involves complex strategies and moves aiming at positive self-presentation within the overall goal of negative other-description. Especially when delicate topics are discussed, and when social norms are rather strict, face saving is essential: The expression of even the most racist opinions tends to be embedded in moves that are intended to prevent the inference that the speaker is a racist. In our discourse analysis, then, we already pay attention to this interactional dimension of everyday talk about foreigners. (22)

Some persons interviewed by Van Dijk demonstrate both racist attitudes and some notion of their adherence to a dominant white group.

> In this way, they enact, at the same time, various forms of intergroup conflict, dominance and power, and other macro social dimensions of racism. The topics of talk, for instance, reflect the social position of the speaker as a group member and, conversely, the social dimension enables us to understand why people discuss certain topics, such as competition, and not other. (22)

Van Dijk is also concerned with the "cognitive" aspect of racist discourse, the ways in which the talk is "cognitively interpreted, programmed, planned, monitored, and executed" (22). In this way, his work can account for the development of attitudes expressed by the interviewees. In each analysis of specific cases, therefore, he makes reference to the role of the media, the education system, the institutions, the textbooks used in classrooms, the depictions of persons in advertisements, and so forth.

> From its overall topics, narrative or argumentative organization, to its local moves and lexical style, talk expresses cognitive representations of knowledge, beliefs, and attitudes, as well as the mental operations or strategies that are applied in their retrieval, storage and usage in discourse production. In other words, we also pay attention to the cognitive relevance of such discourse characteristics. Because we have no direct access to mental structures and strategies, discourse structures are the only empirical data that may reveal what people think about ethnic groups. In other words, discourse analysis also allows us to account for the structures of ethnic prejudice and, conversely, shows us how ethnic attitudes are expressed and formulated in talk and interaction. It now becomes clear why, in our view, discourse plays such a central role in this study: It not only represents an important social phenomenon by itself, but it also enables us to link cognitive dimensions of ethnic prejudice with its interactional and societal functions. (*Communicating* 22-3)

Van Dijk suggests that we can overcome limitations imposed by the lack of cognitive material by making a direct link between the discourse of the hearing and the cognitive dimensions of prejudiced behaviour. This may indeed be possible; however prejudiced behaviour is both upheld and institutionalized within the contextual framework operative at the time of the discourse, and as such we will eventually have to relate both dimensions, cognitive and discursive, to a larger dimension.

Overall, although Van Dijk's work is in the same domain and therefore offers useful guidelines for analysis, his has limitations with regards to these hearings. The very semantic and semiotic materials upon which he relies for his probing studies of ordinary racism depend upon what he calls a "battery" of linguistic material, including pauses, repairs and hesitations, and he (to some degree) depends upon this group of deviations in the smooth discursive practice of the interview in order to pick out areas of resistance or silence. This material is in the case of transcribed hearings unavailable. Furthermore,

the interviews which are the subject of Van Dijk's interest are in virtual accord with the description of the productive oral interchange described by Bourdieu; speakers are free to roam from subject to subject, theme to theme, while the interviewer awaits the right moment for further questioning. This luxury is not afforded to the analyst of a highly constructed Convention refugee hearing in which "Information should be as closely related to the definition of a Convention Refugee as possible." The realm of possible subjects is so severely limited by the framework thus described as to encourage simple narratives which accord to what the decisionmakers deem to be important. Furthermore, Van Dijk states that he is conducting a form of interview in which the interviewer is "neutral" and the interviewee is free to discuss his views in whatever manner he feels most comfortable with. Neither of these conditions prevail in the Convention refugee hearing, and in fact to read descriptions of interviews or discourse as described by Pierre Bourdieu or Mikhail Bakhtin, the possibility that such an interview could exist is small. Furthermore, the fact that Van Dijk cites small segments of interviews in an order suited his analysis is less applicable to a hearing in which information is transmitted with regards to previously stated utterances. Van Dijk's work offers extremely important tools for relating psychic material to discursive behaviour, and for relating discursive behaviour to broader social concerns, and as such his project is of considerable interest. But to fully evaluate the ways in which the claimant is circumscribed and diminished as Other, other theories are required.

Mr. B.'s hearing continues:

> The Refugee Status Advisory Committee knows the situation in your country therefore do not describe the general historical detail in [name of country] unduly, rather emphasize specific events that occurred either to you or to members of your immediate family.

This Refugee Status Advisory Committee was set up pursuant to section 48 of the *Immigration Act, 1976* "as a recommendatory body to advise the Minister, with regard to individual claims by persons who seek protection as Convention Refugees" (Wydrzynski *Canadian* 296), and it ostensibly acted as the decisionmaking body referred previously. As in the other areas of refugee adjudication, "the Minister is given the authority to appoint such persons as he considers appropriate to the Committee, and the Act does not prescribe any notion of how the Committee shall be constituted" (*ibid*).

The information that this Committee received from newspapers, embassies, Amnesty International and so forth was kept on file, thus allowing its members to "know the situation in your country." We can infer from this that

an analysis of press clippings from the time of the hearing would be a useful exercise in discourse analysis inasmuch as it would reveal some of the sources upon which the Committee relied for its judgement concerning the overall political situation in effect in the country of origin. The refugee's experience may, of course, be quite different from the official version; and the fact that a host country may have ties with a country (ie. trade agreements) could limit the degree to which that country would accept evidence of human rights violations in that given country in the form of refugees (see further on under "who can persecute?").

The next lines are crucial, since they dictated the manner in which the narrative had to be recounted: "Try to maintain a chronological order of events as much as possible. Try to be as precise as possible, describing the names, the dates and the places that you will mention during your declaration." This requirement caused difficulty for two reasons; first, it is difficult to recall any event, especially a traumatizing event like torture, in chronological order several years after the fact. Second, factual errors, such as errors in chronology were (and still are) grounds for rejecting certain claims. The interest of the decisionmakers is clearly in empirical information, chronologically-ordered and verifiable. The consequences of this have been discussed previously, and will be of issue further on as well. The passage continues:

> At the end, time will be allotted to you and to your Counsel to add any personal information to your declaration. A recording is being made of everything that is being said in this room. It will be transcribed by typewriter and an English copy will be sent to you as well as to your Counsel. Upon receiving it you should review to see that there are no errors or omissions that are left uncorrected. You should forward the corrections or any annexes to us as quickly as possible, within 21 days. We will forward them to the Committee who will review your declaration and make a recommendation to the Minister. The Minister will advise you in writing of his decision.
>
> Q. Do you understand the way we will proceed?
>
> A. Yes.

This statement had been the subject of a significant amount of jurisprudence. For the purposes of this study, the most important commentary concerns the severe limits of the examination under oath, as described in *Saraos v. M.E.I.*:

> The examination under oath made pursuant to subsection 45(1) is merely an examination of the person claiming to be a refugee. It is not an inquiry on the validity of the claim. The senior immigration officer conducting the examination acts ir-

> regularly, therefore, if he does more than examine the claimant. For example, he cannot examine a person other than the claimant; neither can he produce documents in order to refute the claimant's assertions.

This is a highly problematic area of this procedure; how is it possible to "examine" the claimant without rendering some judgement as to the validity of the claim? Given the evaluation criteria, is it not possible that the S.I.O. could influence the outcome of the hearing by either asking, or not asking, particular questions?

g. The Limits of the Sayable

The long statement just set out and described from a legal standpoint is in effect the limitations that are placed at the outset of the hearing upon what is sayable. Following Foucault's *épistémè* (or related notions such as *topos*, *présupposé*, *Voraussetzung*, *idéologème*, *intertextualité*, *enthymème*, *maxime idéologique*), statements must to some degree correspond to our commonly recognized and accepted rules and procedures of pertinence, seriousness, and rational thought. *Topos* (place, common place) implies "toute proposition irréductible logiquement, sous-jacente à un énoncé persuasif spécifique, autrement dit les vérités probables sous leurs formes les plus générales, considérées comme éléments présupposés par tout raisonnement particulier" (Angenot *Glossaire* 210). *Épistémè*, from the Greek term which means "habilité," "knowledge" or "savoir," is often invoked in discourse research ever since Michel Foucault adopted it in his work *Les Mots et les choses* to designate

> les axiomes théoriques irréductibles d'une époque donnée, axiomes qui, du point de vue de l'épistémologie historique, déterminent les conditions de possibilité du savoir et leurs principes d'ordination, non pour une discipline particulière mais pour le savoir de cette époque dans toute son étendue. (Angenot *Glossaire* 75).

The object of epistemological research, according to this designation, "consiste donc notamment à identifier et à décrire des épistémès successives" (Angenot *Glossaire* 75). The study of discursive formations therein begins with the axis of the division of labour, where society is divided into "specialized, non-discursive disciplines at the intellectual level [which] correspond to specialised fields of knowledge" (Link, in Cros *Theory* x).

> For its effectiveness in forming societal "objects," as well as in according competence to selected speakers, any historical ensemble of discursive formations (and here Foucault sometimes speaks of "interdiscursive configurations") is an ex-

> tremely important factor in the *disposition of power*. Foucault is obviously aware of the functional importance of these discursive power networks (in his final phase he spoke of the instruments of power) within the overall system of social reproduction in a society, including its economy. (*ibid* xii)

Marike Finlay similarly pinpoints the relationship between the discourse of a given 'champ' and the broader *épistémè* to which it belongs in her study of the privilege accorded to scientific discourse:

> If statements exhibiting the same procedures can be called a discourse, the set of all procedures taken together constitutes an episteme. Discourses are variations upon the episteme. The episteme also cuts across disciplinary boundaries. Quantum mechanics and the popular newspaper science column, though of clearly different genres and based in markedly separate institutions, both draw upon the same sort of rationality for their proof and in order to legitimate their claims to truth. (Finlay *Social* 19)

The analysis of discourse must be situated with respect to an historical context because rules and procedures underlying discursive practice change across time and across geographical space. What this implies in terms of the hearing is that the argument, however valid, will follow certain discursive conventions that reflect the social discourse of Canadian society in 1987. Examples of this include the pertinence of certain kinds of information, the interest in certain subjects, the status of given statements, the humour of given situations. In order to describe the ruling discursive paradigm active at the time of this hearing, it would be necessary to undertake a massive study of the compendium of social discourse and the relative effectiveness of particular discursive practices in the realm of the legal hearing. The overriding question, to which observations and tentative postulations must refer, concerns the legitimation of statements and beliefs, and as previously mentioned, the legitimation of statements is confirmed or discounted on the basis of a criteria apparently inspired by the realm of science. Therefore, the first step in establishing the validity of a given statement or procedure is to draw upon rational scientific proof, a realm to which we ascribe a special validity; "procedures which merely draw upon the good will of the speaker, though not insignificant, will in many cases be less powerful" (Finlay *Social* 19). This brings us to a number of broad social and political issues concerning the ways in which certain kinds of knowledge or procedures are privileged by given societies; here one would have to examine which kinds of research are funded by government or private institutions, which procedures legitimate or validate statements (i.e. in the law court) or findings (i.e. in the scientific laboratory), and what kinds of information is propagated in the media (as in the representation of certain forms

of social interaction as being valid or justifiable or acceptable) or in government documents, textbooks, etc. The larger social discourse compendium contains given presuppositions which can often be related back to the interests of the ruling class; to discover how such power interests operate on the level of discursive practice, discourse analysis attempts to show also the procedures propagated by, and contained within, the objects which it studies. Just as there are discourses *on* legal procedure, for example, so too are there discourses *of* legal procedure. In short, in order to discover the discursive rules and norms active in a given discursive paradigm, it would be necessary to have an intimate familiarity of the social discourse universe. The consequence of this general observation is that foreigners are less likely to understand the nature of this discursive paradigm if the society in which they live is substantially different from the one in which they are making the claim. In short, the more foreign Canadian culture is for the claimant, the more difficult it will be to make a legitimate claim.

An important element in the determination of the validity of a given discursive practice is to measure the acceptance of certain theories or procedures by the regular channels within which such discourse circulates or is presented. For example, various debates concerning the problems of immigrant assimilation, from the legal mechanisms which allows them to be admitted into the country to the rights which they have in the schoolyard, follow a similar format and structure of argument; if the object is to convince parties to a hearing that a claim is valid, then it will be necessary to have an understanding of the procedures that condition the validity of an argument and which inform such categories as "sincerity, pertinence, informativity," (Finlay 20) and so forth. Furthermore, if privilege is given to a particular discursive domain, such as science, than it is useful to understand the elements of scientific discourse that are evoked in our evaluations of arguments so as to use them for our own use. Finlay writes:

> Both Feyerabend and Foucault have argued that there is a convergence of *knowledge* and other cultural practices. Feyerabend as well has demonstrated that the role played by the *religious* practices of the church was strictly related to scientific practices of astronomy. In a much similar vein one might demonstrate that some of the practices of science in policy spheres reconfirm or reproduce the rules of scientific discourse in the classical epoch. Furthermore, these rules might be seen to circumscribe not only *pure* or *high* science but also most cultural discourses including those of sexuality, criminology, psychiatry and jurisprudence. Foucault calls these *lower* and "minor" or *local* knowledge (Foucault 1961; 1966; 1969; 1980). The ensemble of such overlapping procedures of discourses of knowledge would constitute what might be called the world view about what science,

> knowledge and truth are. An awareness of the world view about scientific investigation will subsequently explain the methods, approaches and statements made in science, including mandated science. (21)

This section theorized the question of the sayable in order to clarify why the hearing is structured as a fact-finding inquiry which places emphasis upon empirical data (the kind of persecution, the details concerning the flight and so forth) and cross-checking (between the basic form and the testimony made during the hearing). In other words, the refugee is called upon to say certain things and not others, there is a limit to the *sayable*, which will set out the limits of the acceptable, or the privileged elements of discourse throughout this hearing:

> The boundary between what is politically sayable or unsayable, thinkable or unthinkable, for a class of non-professionals is determined by the relation between the expressive interests of that class and the capacity to express these interests, a capacity which is secured by its position in the relations of cultural and thus political production. (Bourdieu *Language* 172)

The boundaries of the sayable acts as a limiting factor inasmuch as they further reduce the range of possible subjects and responses available to the refugee as Other. This is all the more evident when one considers this section in light of the earlier sections on social interaction which suggested that the refugee is already "faced" with an unknown, and therefore presumably antagonistic, structure when s/he sits down to construct him/herself as acceptable refugee. As the claimant as Other is reduced before those who will help elucidate the claim, his/her odds of being accepted as Convention refugee diminish.

There is another issue here; the limits of the *sayable* are more likely comprehensible within a broader study of power structures in discourse, whereas the limits of the *thinkable* are intimately related to the cultural background of the individual speaker. To undertake a study to determine how these two limiting factors act within a particular case would require intimate knowledge of the cultural baggage carried by the refugee, as well as a complete familiarity with the kinds of legal and political forces at work in legal interaction described in the early sections of this study. And to fully understand the implications of inter or trans-cultural communication, it would be necessary to engage whole systems of cultural stereotypes and conventions which are related to this study, but are in its details beyond our scope (for a glimpse at the stakes and the perils involved, see Susanne Günther's recent article on "German-Chinese Interactions").

g. The Identification Section

The information gathered during this hearing is, as already pointed out, empirical. This is in accordance with the scientific grill or template previously described through reference to Foucault and Finlay; indeed it is proof that a purely legalistic analysis is far too limited inasmuch as it fails to describe why certain areas of the refugee's experience are played up while other (potentially valuable) areas are ignored. In the section (deemed the "identification section" – the hearing is in fact not divided into sections but each one follows the same procedure), the information provided to officials when the claimant first asked for asylum at the airport is verified; the following section is nothing more than a cross-checking of details already provided.

> *By the S.I.O.* (to the person concerned)
>
> Q. Thank you, sir. What is your full name?
>
> A. Mr. B.
>
> Q. Have you ever been known by any other name?
>
> A. No.
>
> Q. Where and when were you born?
>
> A. September 194-.
>
> Q. Where were you born?
>
> A. V–.
>
> Q. In which country?
>
> A. Chile.
>
> Q. You are citizen of which country?
>
> A. Chile.
>
> Q. Have you ever acquired the citizenship of another country?
>
> A. No.
>
> Q. I have before me a passport from the Republic of Chile, bearing the number xxxxx, issued to Mister B. On page 3 of this passport there is a photo, as well as a signature. Is this your signature on page 3?
>
> A. Yes.
>
> Q. This passport was issued in Santiago the 2nd of January, 1987, and it is valid until the 2nd of January 1989. This passport contains 36 pages. Sir, is this the passport with which you travelled to Canada?
>
> A. Yes.
>
> Q. I return the passport and I present to you copies of certain pages of your passport. Would you please examine them and tell me if they correspond to your passport?
>
> A. Yes.
>
> So the photocopies of pages 1,2,3,4,5 are affixed to the transcription as exhibit C-1.

Exhibit C-1 – photocopies of the passport

Q. Have you completed the basic form, sir?

A. Yes.

Q. May I please see it? Sir, at item 26, under parents residing outside of Canada, you mention a sister who lives in California?

A. Yes.

Q. Have you other parents outside of Chile?

A. No.

Q. You have no brothers or sisters in Chile?

A. No.

Q. Father, mother?

A. No.

Q. On page 4 of this document, there is a signature. Is this your signature?

A. Yes.

Q. To the best of your knowledge, are the answers contained in this document true and indeed your own?

A. Yes.

So the basic form is duly affixed to the transcription as exhibit C-2.

Exhibit C-2 – Basic form.

Q. So, sir, I will now read you the definition of a refugee according to the Convention. I will as the interpreter to translate the definition directly.

(Definition is read by the interpreter in Spanish).

Sir, do you understand the definition as described in the Convention?

A. Yes.

Q. In your opinion, does this definition apply to your case?

R. Yes.

Q. So, sir, it is now time for you, with the help of your lawyer, to give us the reasons why you have requested refugee status in Canada.

This completes the opening section in which the criteria for the ruling is set out, and the refugee is advised that the narrative s/he is about to recount should coincide as much as possible with the definition of the Convention refugee described in s. 2 of the Act. The definition is usually omitted from the Hearing, but when it is read, the standard form is as follows:

> "Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or
>
> (b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country.
>
> (2) The term "Convention" in the expression "Convention refugee" refers to the United Nations Convention Relating to the Status of Refugees signed at Geneva on the 28th day of July, 1951 and includes the Protocol thereto signed at New York on the 31st day of January, 1967.[18]

iii. Well-Founded Fear:

The most important repercussions of the administrative nature of these hearings is set out here, since it is here that the law states that it is the onus is on the claimant to prove that s/he has a *well-founded fear* of persecution. This has numerous implications. First, Canada has no *responsibility*, in juridicial terms, for the plight of the refugee. Canadian officials do not have to prove that the person making the claim is *not* a refugee, but rather the claimant must prove that s/he *is* one. In criminal cases in Canada, defendants are innocent until proven guilty; in administrative law relating to refugee status, the person is an illegal alien until proven to be a Convention refugee. How does the claimant make his/her case? By proving that s/he has a *well-founded fear* of persecution in the country of origin or in the country of former habitual residence, depending upon the case.

iv. "Well-Founded Fear of Persecution"

These five words are, in a sense, what this study is all about. How does a claimant prove such a fear, and can a transcription be evaluated to measure the veracity of such a sentiment? The Conventions, laws, Acts, codes, statutes and case precedents that concern this issue can be traced through international courts and tribunals, national immigration acts and amendments thereto, Supreme and Federal Court rulings, and decisions made with regards to particular cases. The basic standards to which much of these rulings ultimately refer to the *Handbook on Procedures and Criteria for Determining Refugee*

Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, published by the Office of the United Nations High Commissioner for Refugees in Geneva in September 1979. *Well-founded* is described in this document as follows:

> To the elements of fear – a state of mind and a subjective condition – is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration. (11-12)

The handbook then goes on to clarify the so-called "objective element:"

> As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated int he definition, or would for the same reasons be intolerable if he returned there. (12-13)

For the most part, Canadian rulings in this area coincide with the U.N. Convention. In *Kwiatkowsky v. M.E.I.*, for example, Wilson J., stated for the court that "he may as a subjective matter, fear persecution if he is returned to his homeland but his fear must be assessed objectively in order to determine if there is a foundation for it" (862). This ruling contains views similar to those expressed in *Nunez Velose et al. v. M.E.I.*, where Board Member Houle stated:

> Neither the Act nor the Convention defines a "well-founded fear", and with good reason, since fear is essentially a subjective element which is experienced or felt differently, depending on the place, the time and the person concerned. Nevertheless, this subjective element can be assessed objectively – in other words, the person claiming refugee status must establish in a consistent, plausible and credible manner that specific events have occurred or specific persons have intervened in his life in such a way as to produce in him the overwhelming feeling that a sustained threat – physical or moral – is being directed against him, or against his basic and inalienable human rights (3) [note that this final statement is contradicted by *Seifu v. M.E.I.*, cited further on].

The reasons for this persecution must coincide with those set out in the Convention; as such the claimant could (should?) in some cases modify the narrative so that there is a closer coincide between the experience and the definitions provided.

In theory, the level of persecution necessary in order to make a claim should not vary from one country to the next; whole populations, according to international law, do not become accustomed to (i.e. conditioned to withstand) higher levels of persecution because they exposed *en masse* to brutal treatment from the government over a prolonged period of time. Atle Grahl-Madsen writes that

> ... if a person is subjected to any measures as deprivation of life or physical freedom for political reasons, he is a victim of persecution. It does not alleviate his situation in the very least if the measure is part of a general policy, or if whole strata of the population are subjected to the same kind of measures.... Once a person is subjected to a measure of such gravity that we consider it 'persecution,' that person is 'persecuted' in the sense of the Convention irrespective of how many others are subjected to the same or similar measures. (213)

In general, evidence of past persecution is the grounds for determining the validity of the claim. However, in some cases conditions in the country of origin may have changed since the claimant's flight; in an example of improved conditions since the claimant's departure, Board Member Glogowski stated in *Ferreyra and M.E.I.*:

> If the conditions in the claimant's country of nationality have changed to such an extent that there is no longer reason to believe 1) that he can entertain a well-founded fear or 2) that he is unable or unwilling to avail himself of the protection of his country, then the Board does not see how the claimant could be given the status of Convention refugee. (8)

This is a controversial area; first, it may be that conditions in the country of origin have changed temporarily (ie. the case of the 1991 coup d'État in Haiti, in which the military came to power and ousted President Aristide), or second, that the person, by making a claim for status in another country, has put him/herself in danger back home. Of the first case, Board Member Teitelbaum in *Gonzales, Ruiz Angel (Jesus) v. M.E.I.* wrote (in a dissenting opinion) that "there was insufficient evidence to support the idea that promises made by the President of Peru have been fulfilled to the extent that someone like Mr. Gonzales with a political-activist background, would be immune from suspicion in the event anti-government attacks occurred." Considering the

amount of time that Canadian officials have taken in the past to determine claims — the case with which we are concerned took nearly five years from the initial claim to the final decision — there are further problems of re-adaptation, repatriation, and so forth, even if conditions have improved in the country of origin. For examples of cases where the conditions in the claimant's homeland have deteriorated since his/her departure, see *Mushtaq v. M.E.I.* and *Kifletsion v. M.E.I.* In these situations, the refugee can be deemed a "refugié sur place."

Of the second case, that the claimant has put him/herself in danger back home by making a claim for status in Canada, see *Wieckowska v. M.E.I.* (defense lawyer Julius Grey) in which Board Member Glogowski stated:

> If the Board would accept the applicant's Counsel's suggestion that every person becomes 'a political refugee' as soon as a newspaper in Canada mentions somebody's name as seeking 'political asylum' without any other grounds for considering his refugee claim, it would, in the opinion of the Board, completely destroy the whole humanitarian concept of helping people who really have a 'well-founded fear of persecution' to seek refugee status under sections 45, 70 and 71 of the *Immigration Act, 1976*. (6)

Cantin makes reference to several rulings in his discussion of persecution that occurred in the past, that is, prior to the claimant's arrival in Canada. In *Oyarzo v. M.E.I.*, Thurlow, C.J. (Kelly, D.J., concurring) stated that "[...] since it is the foundation for a present fear that must be considered, such incidents in the past are part of the whole picture and cannot be discarded entirely as a basis for fear, even though what has happened since has left them in the background" (781). The force of this ruling is that a claimant who has been persecuted in the past, even several years in the past, nonetheless has the right to claim refugee status. The question of *memory*, and the refugee's ability to recount the story of the persecution without making factual errors, will be dealt with later on. Suffice to say that the determination procedure is for the most part premised upon the assumption that errors or inconsistencies in the transcription are grounds for refusal; as such, claims of persecution from the distant past are necessarily more difficult to plea and to prove.

By contrast, a claimant can also claim to have been persecuted even if s/he has not *yet* suffered persecution; In *Seifu v. M.E.I.*, Pratte, J. stated (for the Court) that "in order to support a finding that an applicant is a Convention refugee, the evidence must not necessarily show that he "has suffered or would suffer persecution;" what the evidence must show is that the applicant has good grounds for fearing persecution for one of the reasons specified in the Act" (1).

In the *Handbook on Procedures and Criteria for Determining Refugee Status*, the grounds are layed for such a claim:

> These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. (13)

In a ruling on a case in which the claimant did not immediately apply for refugee status upon arrival in Canada, and therefore supposedly did not demonstrate the behaviour of someone who had a "well-founded fear of persecution," Board Member Chambers (Members Loiselle and Tremblay concurring) in the case of *Islam v. M.E.I.* stated:

> Much was made of the fact that Mr. Islam did not immediately, upon his arrival in Canada, declare himself as a refugee claimant to the immigration authorities. Again, we should not apply our own standards to one who has lived in fear of uniformed authorities for so long a period. We cannot assume that the niceties of Canadian immigration law are well known to the inhabitants of bazaars and villages of Bangladesh. (4)

Christopher J. Wydrzynski's article "Refugees and the Immigration Act" makes this same point:

> The humanitarian basis of the refugee admission should remain the central focus. It may be unfair to require strict criteria such as ongoing flight, continual fear, or lack of delay when dealing with such problems. True refugees are quite likely to be fearful and suspicious of governmental authority. None of these factors should be considered sufficient reason to reject a claim. At best they only contribute to the value of the evidence presented. (173)

Notwithstanding the apparent severity and uniformity of the procedure for determination, it is nonetheless the case that not all persons who apply for status are measured according to the same criteria. There exists a number of legal precedents and government bills that touch upon this issue with regards to the 1987 determination system; for the moment it suffices to note the existence of the so-called "designated classes" set out in Section 6(2) of the Immigration Act. This is an important area since, as Gilad notes, "many of these people brought to Canada as either private- or government-sponsored immigrants, would not be able to meet the Convention definition of refugee, that is they would not be able to establish both a subjective fear and concrete evidence of that fear" (124). These claimants, who come from U.N. recog-

nized areas of persecution, are considered for status according to a relaxed definition of persecution. Since the case with which we are concerned was filed by a Chilean claimant, it is of particular importance to note that oppressed persons from Chile are a part of this class, *but only as of 1989*. We can reasonably assume that this aided in the ruling on the case (in 1991), but it was not a factor during initial deliberation or during the transcription (1989). The designated classes were as follows:

> 1) The Indochinese who have fled one of the communist Southeast Asian regimes (Vietnam, Laos, and Cambodia) after April 30, 1975, the day that North Vietnam won the war;
>
> 2) The self-exiled of communist East Europe, with the exception of Yugoslavia (a party to the UN Convention) [note the irony of this now, in 1994];
>
> 3) Political prisoners and oppressed persons, including the nations of El Salvador, Guatemala, Poland and Chile (as of 1989). These persons are permitted to apply for refugee status within their countries, but they still must qualify under the UN definition of refugee, or a *relaxed definition of political persecution*. (Gilad 124, *my emphasis*)

This "relaxed definition of political persecution" appears in the *Immigration Manuel* (1982) which states that the definition applies in certain cases:

> ...as a direct result of acts that in Canada would be considered a legitimate expression of free thought or a legitimate exercise of civil rights pertaining to dissent or to trade union activity, have been (i) detained or imprisoned for a period exceeding 72 hours with or without charge, or (ii) subjected to some other recurring form of penal control. (5)

This "designated class" has been the subject of intense scrutiny, and it will be of further concern in the course of a later discussion concerning the implications of favoured treatment for persons from states with particular status vis-à-vis our own.

v) *Who can persecute?*

The final two words of the five word sentence fragment "Well-Founded Fear of Persecution" are "of persecution." The notion of "well-founded fear of persecution" *usually* implies a government-sanctioned persecution or persecution which the country of origin's officials could not impede (see *Rajudeen v. M.E.I.* further on). This has evolved somewhat since 1987 in Canada, particularly as regards battered women who have made successful claims on the grounds that the country of origin cannot protect the claimant

from her spouse. Many if not most of the refugees who claim status in Canada claim that they have been persecuted, either directly or indirectly, by government officials including bureaucrats, police, or members of the military. This suggests that if a host-country government has good relations with a country of origin government, it would be hypocritical of them to accept refugees from that country – particularly if there was some clause in (say) a trading agreement that encouraged "fair" treatment of detainees. Therefore refugees who had been persecuted by the government of'El Salvador at the time when the U.S. government sanctioned government-sponsored death squads, for example, were more likely to make successful claims for status in Canada or in Europe than in the United States, because American officials tried for a long time to establish the legitimacy of the El Salvadorian regime even in the face of reports (long discussed by Chomsky and recently officially confirmed) concerning government slaughter of innocent citizens.

This also raises the issue of who can persecute; what happens in cases where the refugee is persecuted by, say, gang members from a rival political group and not by officials from the ruling party? There are some precedents, including *Rajudeen v. M.E.I.* in which Stone stated:

> Obviously, an individual cannot be considered a "Convention refugee" only because he has suffered in his homeland from the outrageous behaviour of his fellow citizens. To my mind, in order to satisfy the definition the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in it knowingly tolerating the behaviour of private citizens, or refusing to being unable to protect the individual from such behaviour.
>
> It is true that the acts complained of were not committed by the state or its agents. On the other hand, a consideration of the evidence as a whole convinces me that the police were either unable or, worse still, unwilling to effectively protect the applicant against the attacks made upon him. Accordingly, because of his race and religion, the applicant could not reasonably expect to be protected by an important state agency against unlawful attacks. In my view, he had good reason to be fearful and, objectively, such fear was well-founded. (135)

According to Cantin, this was an extremely important ruling inasmuch as that the Board has, as a result of the ruling, extended "the category of "agents of persecution" to include more than government authorities and agents. Persecution would include:

> 1) persecution committed by the state concerned,
>
> 2) persecution condoned by the state concerned,
>
> 3) persecution tolerated by the state concerned, and

> 4) persecution not condoned nor tolerated by the state concerned but nevertheless present because the state refuses or is unable to offer adequate protection to the claimant." (42)

Therefore a claimant can argue that s/he has been persecuted by government authorities by virtue of the failure of representatives of the government to act, or the inability on the part of the claimant to seek help or redress. With respect to inability, the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* states:

> The term *unwilling* refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase "owing to such fear." Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution." Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee. (23)

The right to claim status on the basis of said inability or unwillingness is an internationally recognized right, described in Guy S. Goodwin-Gill's *The Refugee in International Law* as follows:

> Cause and effect are yet more indirect where the government of the country of origin cannot be immediately implicated. Refugees, for example, have mob violence or the activities of so-called "death squads." Governments may be unable to suppress such activities, they may be unwilling or reluctant to do so, or they may even be colluding with those responsible. In such cases, *where protection is in fact unavailable, persecution within the Convention may result*, for it does not follow that the concept is limited to the actions of governments or their agents. (42)

An example of this phenomenon in Canadian jurisprudence is *Surujpal vs. M.E.I.* in which a husband and wife fled their native Guyana and claimed Convention refugee status in Canada. The Board found them not to be refugees since they had been persecuted by actions committed or sanctioned by the state or "organs of the state," but rather had suffered in the hands of overzealous supporters of a political party. Macguigan J.A. held that "In our view it is not material whether the police directly participated in the assaults or not. What is relevant is whether there was police complicity in a broader sense" (75). This "complicity" includes the inability on the part of the claimants to seek redress from the authorities:

> [T]he facts here more strongly indicate State complicity in the persecution, since the applicants and their families did go to the police but did not obtain redress. It is not required that State participation in persecution be direct; it is sufficient that it is indirect, provided that there is proof of State complicity. (76)

Of course, the claimant must establish that s/he was willing to avail him/herself of the protection of that country, but was unable to do so for good reason. In *Canada (Attorney-General) v. Ward*, Federal Court of Appeal, Urie writes:

> If a claimant is "unwilling" to avail himself of the protection of his country of nationality, it is implicit from that fact that his unwillingness stems from his belief that the state and its authorities cannot protect him from those he fears will persecute him. That inability may arise because the state and its authorities are either themselves the direct perpetrators of the feared acts of persecution, assist actively those who do them or simply turn a blind eye to the activities which the claimant fears. While there may well be other manifestations of it, these possibilities clearly demonstrate that for a claimant to be unwilling to avail himself of the protection of his country of nationality, to provide the foundation for a claim to be a refugee he must establish that the state cannot protect him from the *persecution* he fears arising, in this case, from his former membership in the INLA, i.e. he must establish that what he fears is in fact persecution as that term is statutorily and jurisprudentially understood. On that basis the involvement of the state is a *sine qua non* where unwillingness to avail himself of protection is the fact. (11)

Therefore, the parties to the persecution, and the relations between said parties and the official bodies of the country of origin, are all considered in rulings on the persecution suffered by the claimant.

vi. *Forms of persecution*

The claimant must, according to Cantin, prove some form of persecution, some harassment, including physical mistreatment, deprivation of liberty, torture, or "infringement of fundamental rights of the claimant" (Cantin 45). In *Oyarzo v. M.E.I.*, Thurlow, C.J. wrote that:

> [...] the Board in stating that the applicant "was never arrested or persecuted..." appears to infer that "arrest" is an essential element to "persecution." [...] The board attaches significance to the fact that the security forces had ample opportunity between 1974 and 1979 to arrest the applicant if they so wished. In my view, the Board's reasons imply that it defined "persecution" as necessarily requiring deprivation of the applicant's liberty. If this is so, then the Board erred in law, in my view, in applying such a restrictive definition. (781)

In an important section for the purposes of the case at hand, Cantin notes that:

> A series of short detentions, minor physical mistreatment and interference in the claimant's privacy at home may constitute persecution, not in the form of physical mistreatment, but as an infringement of fundamental rights of the claimant. Where a claimant is denied all opportunity to work or is even forced to accept work manifestly incompatible with his occupational training in order to survive, persecution may be found to exist if this situation is linked to one of the reasons specified in the definition of "Convention refugee." Similarly, the Board has found that denial of education and medical aid on the basis of one of the grounds specified in the definition of "Convention refugee" also constitutes persecution of the claimant. (45-6)

This passage may give the mistaken impression that economic conditions are grounds for a refugee claim. That this is not so is openly stated in the literature, and backed up in cases such as *Alarcon v. M.E.I.*, where the Board noted that "economic conditions which cause high unemployment throughout the country is not a base, in the opinion of the Board, to consider that persecution, because this would have applied to the total population of the country" (3). However, that an entire population is suffering persecution is not in itself grounds for rejecting a claim:

> [I]f a person is subjected to any such measures as deprivation of life or physical freedom for political reasons, he is a victim of persecution. It does not alleviate his situation in the very least if the measure is part of a general policy, or if the whole strata of the population are subjected to the same kind of measures [...] Once a person is subjected to a measure of such gravity that we consider it 'persecution', that person is 'persecuted' in the sense of the Convention irrespective of how many others are subjected to the same or similar measures. (Grahl-Madsen 213)

One final point with respect to "well-founded fear of persecution" involves the relationship between 'persecution' and 'prosecution;' In *Musial v. M.E.I.*, Pratte J. stated:

> A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it. In my opinion, therefore, the Board was right in assuming that a person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs. (294)

Christopher J. Wydrzynski gives a lighter interpretation of this area when he writes:

> Of course, this interpretive principle is not absolute, and where it is shown that criminal prosecution or military service was used as a form of selective punishment by a State based on the claimant's race, social group, nationality, religion or political opinion, a successful claim might be established on this basis. (323)

vii. Well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion

In order to clarify the meaning of this second part of the pivotal sentence in the Immigration Act for rulings made in 1987, it is once valuable to appeal to the authority of the *Handbook on Procedures and criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*.

The Handbook notes the ambiguity and the overlap of some of these terms in a discussion concerning the relationship between "nationality" and "political opinion: "It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific 'nationality'" (19). In many cases, refugees will claim status under two or more of these criteria, at which time the S.I.O. may attempt to separate the grounds for each claim by asking pointed questions pertaining to each.

The first three terms, "race," "religion" and "nationality," are defined in three paragraphs of the *Handbook*; "race," according to the interpretations provided, "has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as *races* in common usage. Frequently, it will also entail membership of a specific social group of common descent forming a minority within a larger population" (18). According to Canadian law, race may also include Jews, Gypsies or members of a tribe.

"Religion" (which, according to Canadian law, includes not having one) is protected by the Universal Declaration of Human Rights and the Human Rights Covenant, which "proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance" (18).

"Nationality" is given a broader interpretation herein because "in this context is not to be understood only as *citizenship*. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term *race*" (18).

The final two areas, "membership in a particular social group" and "political opinion" are, of course, more problematic. What constitutes "membership?" How can we define a "social group?" How can we prove whether a person was a member of said group? When does one express a political "opinion" in a manner that is likely to lead to persecution? Not surprisingly, Canadian jurisprudence has had to deal with these issues, and a survey of some of the cases follows.

The *Handbook* describes a "particular social group" as an entity comprised of "persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality" (19). Furthermore,

> membership in such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies. (19)

In *Canada (Attorney-General) v. Ward*, J.A. MacGuigan offers a glimpse at the complexity of making rulings concerning said membership:

> There is in fact nothing absolute about social groups, particularly non-natural social groups. They may have ideologies, but some members may not adhere to them, belonging rather for reasons of prestige, or fear, or some other non-ideological reason. Such groups may have membership initiations or fees or lists, but many camp-followers may be drawn to their side and be perceived as members by the world, but yet not be members in the way others are.... The concept of social group should not, in my opinion, be wielded like a broad-sword to lop off all individualizing circumstances within an arbitrarily designated circumference. In a world fractured by racism and religion, politics and poverty, reality is too complex to be thus limited by conceptual absolutes. (19)

"Political opinion" is the most vague, and (as a consequence?) one of the most frequently cited of all headings under which refugees claim status in Canada. It includes persecution for holding known or alleged opinions contrary to the government or ruling party. Cantin notes that "it is widely accepted

that *political opinion* may be taken as meaning *political activities*," and that "political" must be determined from the viewpoint of the governing authority in his homeland" (58). Ruling on *Re Inzunza v. M.E.I.*, D.J. Kelley wrote:

> [...] I do not deal with the allegation that the Board erred in its interpretation of "political activities," other than to say that the crucial test in this regard should not be whether the Board considers that the applicant is engaged in political activities but whether the ruling government of the country from which he claims to be a refugee considers his conduct to have been styled as political activity. (109)

According to Cantin, "political activity" includes

> being a member of an opposition party (preferably, an executive member), making speeches, delivering pamphlets or holding meetings. However, even minimal involvement, where there is a substantiated well-founded fear of persecution, can support a claim to Convention refugee status. In some cases, it is even possible that a claimant who was never involved in politics will fear persecution because he was falsely associated with a political movement for one reason or another. (59-60)

This completes a basic legal analysis and explanation of the legal apparatus concerned with the opening section for the period in which the case of Mr. B. was recorded. My contention is that a purely legal analysis must be supplemented in the manner undertaken here in order to describe the power of the parties to the hearing, the nature of the discursive relations described by the opening passages, and the constraints that have been imposed upon the claimant by virtue of the ways in which the system is elaborated. Proper contextualization and description of these elements are achieved through a pragmatic analysis using tools from discourse theory, and in the next section relevant theories will once again be described in order to complete the more technical but also more limited legal interpretation.

5. The Middle Section: The Life Story

> The examination of the witnesses confirmed the charge in every particular. It became clear that the accused had made a bad impression on everyone beforehand. Nor did it help his cause when it emerged that he was illegitimate and that he drank rye-brandy. "I can't drink cognac," the accused volunteered. At these words, the Presiding Judge ordered that the prisoner be removed, but he was brought back on an intervention by the defense. This episode did not pass without an emotional scene. As he was being taken out, the villain repeated emphatically: "I can't drink cognac; I can't afford it!" Great excitement among the jury. "If he could afford to drink it, he would," one juror remarked. A storm of applause from the public gallery and shouts of: "Old brandy-vat!" A call of "Really" from the jury. General uproar. A heckler is ejected by the prison guards. A call from the Presiding Judge. "Where do you think you are, in a theatre?" (Jaroslav Hasek, "Robbery and Murder in Court" 17).

At this point in the proceedings, the facts concerning the identity of the refugee have been established, and the standard laws and codes pertaining to the Convention Refugee claim have been read. From this point until the closing statements at the end of the hearing, the refugee will ostensibly be asked to prove that his experience demonstrates "a well founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion."

In the case at hand, the refugee has chosen to allow his Counsel to make an opening statement on his behalf, a statement which will stake out the area of the claim.

> *By the S.I.O* (to the Counsel)
>
> Q. Maitre G., do you have an opening statement to make?
>
> A. Yes Madam T.
>
> Mister B. begins his story in 1984, when he was a delegate for his union. At the same time, he sympathized with the Centre Left Party.
>
> In September 1984, after the meeting of the union, he was arrested and released later.

> In May of 1986, his wife received two phone calls in which death threats were uttered against her husband if he continued to participate in the union and also in the political party.
>
> On September 5, 1986, he was stopped in the street, detained, interrogated, and liberated two days later.
>
> On September 2, 1986 he was layed off, and following the reason given to him by the company, this was the result of a shortage of personnel... the reduction of personnel, I am sorry.
>
> On November 13, 1986, his house was searched, he was arrested and detained for a period of seven days. He was seriously brutalized during this detention.
>
> Now, I would like to ask a number of questions to Mister B, relating to the facts which I have just mentioned. (3-4)

This statement establishes the grounds for the claim, but also lays bare some underlying strategies for the presentation of the case. The narrative as described begins in 1984, when the claimant was elected to be a delegate to the Union of his company. At that time, he sympathized with an opposing political party, the "Centre Left Party." The Counsel is therefore attempting to make a claim based on two headings in the definition previously discussed; persecution for *membership in a particular social group*, and *political opinion*. Other elements of the claimant's life, in particular events which occurred prior to 1984, are not of any interest as far as the Counsel is concerned. The refugee claimant's narrative begins with his joining the Union and with his sympathy with an opposing political group; the attempt to transform this individual into a Convention refugee claimant with a legitimate claim has begun.

The Counsel establishes the verity of this case by noting that the officials began harassing him immediately after his election to the Union position. Just as a narrative concerning torture requires that scars remain upon the claimant's body, one which concerns political persecution requires immediate recognition from the government officials that the activities are undesirable. This kind of 'proof' of persecution, although in itself virtually impossible to verify (except perhaps through correlation), is typical of virtually all cases, and indeed the legal precedents already discussed demonstrate why a Counsel would use this strategy.

In the third paragraph, the Counsel mentions a second proof of harassment, which will later be correlated in the testimony of his wife. The claimant's wife will, in effect, serve as a witness to the persecution all the way through this claim and in her own claim to which we shall turn later on. Once again, in this paragraph the Counsel makes a direct link between the political activities and the (threatened) persecution; if her husband does not refrain from his activities in the Union and in the political party, he will be killed.

That same year, the claimant was intercepted in the street and detained (paragraph 5) and then layed off from his work (paragraph 6). Finally, in November, his house was searched and he was detained and tortured.

As far as the criteria set out earlier on is concerned, the claim is now in a sense complete. The claimant fulfils the obligations set out in the two passages of the definition, and he has made a sworn statement concerning his identity and the veracity of the statements. However it is at this point that the questioning begins, and, in accordance with the criteria for adjudication previously described, it is at this point that the refugee officials begin looking for inconsistencies in the narrative.

In discursive terms, the section begins with the construction of a productive Other; by beginning his story in 1984 with mention of his being a delegate for his Union and a sympathizer of the Centre Left Party, Mr. B., as represented in this statement, is being constructed as responsible (he is employed by a state-run organization), involved (he is a delegate to the Union), and opposed to the oppressive ruling powers (he sympathizes with the Centre Left Party). Presumably on the advice of his lawyer he hereby begins the process of constructing a "refugee self." Given what we know about his life, he could have also constructed a number of other selves: a "family man self," a "potentially valuable citizen self," "a leader self," "a devoted employee self," "a moral self," and so forth; but, logically enough, he is looking for a self that will productively fulfil his wishes, a self as Convention refugee. If he were to have constructed another self during this hearing he would be acting inappropriately for the circumstance; in this regard, the claimant must adequately assess the situation in order to focus upon those aspects of his long and complex life which are most likely to get him admitted into Canada. In this regard, the hearing is more of a test of the claimant's ability to sort through his experience for appropriate selection than it is an evaluation of whether or not his experience is in line with our definition of the Convention refugee. Whether the experiences are "true" or "false" is hereby subordinated to the larger concern of whether this individual has adequately assessed the requirements of this hearing and is able to articulate appropriate content in an acceptable narrative form. In this sense, persons most familiar with Western forms of argumentative strategy and criteria for truth are favoured; long circular diatribes lacking detail may make reference to experience admissible according to the Convention but may do so in ways that are to our adjudicators incomprehensible and therefore unacceptable. If this is the case, as the procedure for this hearing suggests, then the grounds for admissibility are indeed more contingent upon manner of self-construction and expression than upon veritable experience.

In a recent article called, appropriately enough, "Mario Cuomo Decides to Run: The Construction of the Political Self," Marcus J. Wiesner undertakes a hermeneutic investigation of a portion of Governor Cuomo's diary published as *Diaries of Mario M. Cuomo: The Campaign for Governor*. The objective of the study is to analyze the process by which Cuomo constitutes himself as a political self through description and auto-narrative. Cuomo himself makes reference to this process, and to one of the many difficulties thereof, in the introduction to his *Diaries*:

> For the most part, the transition from private to public life was a smooth one, but it has produced one hard question arising out of the apparent paradox created by what seem to be the conflicting values of religious belief and governmental action. I have given a great deal of thought to the matter of where private morality ends and public policy begins, but still the question remains a delicate one. (15)

There are two aspects of Wiesner's analysis of these *Diaries*, the proposition that "narrative was used to create a convincing, even compelling self that the author claimed represented his authentic self," and "that the writing of the narrative was therapeutic in reconciling the political self on display to his inner self" (85). The first objective aligns with the objectives of the Convention refugee claimant; not only is the claimant trying to create a "convincing, or even compelling self", but he too is trying, in this case through the use of as much presumably verifiable empirical material as possible, to suggest that this convincing self is his "authentic self." This is the value of Wiesner's overall goal of determining "how someone creates a picture of himself, and the inner and outer utility of the portrayal" and his interest in the "'fit' of the self-representation after it has been subjected to disciplined analysis" (88). The "picture of himself" in the claimant's case is a sketchy one of danger, violence, and uncertainty: "he was arrested," "death threats were uttered against her husband," "he was stopped in the street, detained, interrogated, and liberated two days later," "he was layed off," "his house was searched," "he was arrested and detained for a period of seven days," "he was seriously brutalized during this detention."

As much as Wiesner's description applies to this section, however, I view the notion of *utility* in far more pragmatic ways, and as such find that his second objective (construction as therapy) is of little interest. That the claimant may feel better after the hearing is neither verifiable nor very interesting, for he/she will probably feel significantly worse if rejected (just as Cuomo will probably feel let down if he is not accepted as a candidate; he will feel that however great the psychic satisfaction after this process, that he must have made a miscalculation in the construction of his political Other, a notion that

will undoubtedly throw the whole reconciliation process into doubt). Whether or not the authentic self was reconciled with the self as Other is only interesting to the degree that we could measure the distance between the two; my own hypothesis is that in the case of the claimant the distance is necessarily great, and that were that not the case the refugee would probably have diminished chances of being admitted as a refugee.

One area of particular interest in this study is that of "narrative voices," wherein Wiesner speculates about the various voices and their respective effects in the constitution of Cuomo as political self. He says for example that "a *repertorial voice* described everyday events matter-of-factly – his political activity, his concerns about the progress of his sons and daughters" and so forth, "a *story-telling* voice appeared at intervals, in the 'spruce-sentinel' recounting, to provide accounts that had the quality of a short story or vignette," and an *introspective* voice "fostered reader acceptance of his other voices" (91, author's emphasis). According to Wiesner, these devices, coupled with narrative techniques like 'presupposition,' ("creation of implicit rather than explicit meanings") and 'subjectification' ("depiction of reality through the filter of consciousness of the protagonist") contribute to the construction of the credible political self inasmuch as they "convey to the reader Cuomo's principles, priorities, devotion to family and religion, political philosophy, worthiness, fairness, compassion, decency, reasonableness, balance and maturity, intellect, wit, descriptive and oratorical powers, toughness and capacity for leadership" (91).

The same process undoubtedly occurs in the Convention refugee hearings, but the process is complicated by the existence of the mediators (the statement in question, for example, was probably written by the Counsel), the incompetence of the Counsel (his errors could undermine the credibility of the claimant by muddling the story), and the necessarily limited number of voices available for self-expression on the part of the claimant. Cuomo is able to articulate a full and compassionate auto-narrative because he is able to talk about a full range of experience; in that sense he is like the hero of a novel as described in the next chapter with reference to the work of Mikhail Bakhtin. Since voices are linked to experience – Cuomo uses mundane descriptions of domestic life to illustrate his dedication and commitment to his family for example – then the smaller the range of experience conveyed the fewer voices available for self-expression. Here is another way in which the hearing as presently construed limits the degree to which the claimant can present a credible vision of himself or herself as "whole human being" or, if you will, "human being." Recall the procedure of the hearing:

> You should give me only the information which is essential to your refugee claim. Information should be as closely related to the definition of a Convention Refugee as possible. The Refugee Status Advisory Committee knows the situation in your country therefore do not describe the general historical detail in [name of country] unduly, rather emphasize specific events that occurred either to you or to members of your immediate family. Try to maintain a chronological order of events as much as possible. Try to be as precise as possible, describing the names, the dates and the places that you will mention during your declaration. At the end, time will be allotted to you and to your Counsel to add any personal information to your declaration.

The two first sentences set out the area of central concern; if Cuomo was required for the construction of himself as political self to limit his diaries to that which is "essential" to this construction, and if this construction was dictated by some exterior document – say the rules and regulations for applying for candidature for leadership of the Democratic Party – then he would be restricted to information about his citizenship, his allegiance to the Party, his criminal record (if applicable) and his solvency. His Otherness for the purpose of the political self would be directly linked to the *Manual for Applicants Who Wish to Lead the Democratic Party* (something like this must exist somewhere!), just as the refugee's Otherness for the purpose of the refugee self is directly linked to the definition; s/he is forced to become party to, or representative of, the definition. Even contextual information would be irrelevant for the construction process because the Committee is fully aware of the situation (in the country of origin). As outlined earlier on, the "time allotted to you and your Counsel to add any personal information" to the declaration becomes a last gap attempt to claim allegiance to the flag. There is little impetus to state other facts in other voices; in fact there is a kind of inherent obstruction to such a possibility.

Wiesner's article and his techniques for discourse analysis raise an important point concerning narrative voices. Discourse analysis theorists, including Teun Van Dijk, acknowledge the importance of Mikhail Bakhtin's work as an historical precedent to contemporary work in discourse analysis, a kind of artefact to which we can refer only when tracing the history of up-to-date theories; as such, reference is seldom made of his theories of language, even when they are evidently applicable. In this case, the theory of speech genre could have been used to a great advantage because it describes the construction of different narrative voices, and it allows the theorist to articulate the debilitating effect that being limited to a single speech genre has upon persons interested in self-description through narrative. If the claimant is reduced to describing a single kind of experience related to one element in his or her life – persecution – then s/he is destined to become the "generic" refugee, the

story that has been heard before. Therefore accusations about refugees being told what to say (i.e. by their Counsel), backed up by evidence that many refugee stories are similar, become grounds for tightening up the system even though the system's overall ground rules (stipulated in the Act) demand such limitation, and the method of questioning (imposed by the form) generally limits the kind of stories and therefore the kind of self-representation that is possible under the circumstances. The next chapter of this study recuperates areas of Bakhtin's work which have been overlooked by discourse theorists in this regard.

There is another barrier in any attempt to apply Wiesner's findings to the refugee hearings, which is related to the earlier discussion concerning social interaction theory. He uses the work of D. Steele in his search "to discern a unity from the facts of the narrative presentation" (93), which is undoubtedly a valuable approach for examining the internal coherence of the text:

> When one has ferreted out the various instances where the text is inconsistent, where an author has strained the fabric of a narrative to make it fit together and where vital information has been omitted, one has simply shown that the author is mortal and like all human beings tells lies, distorts the facts, and leaves out information that would defame him or her. To be more than incidental interest, this data must be systematized by the interpreter. S/he must show that these disparate notions form a heretofore unseen unity which tells us something we have not known about the author or texts. (Steele 262)

Steele, like Wiesner, is overly concerned with the internal turns and strategies in the language to truly recognize what is at stake in the legal hearing. Steele and Wiesner concentrate upon the narrative product, thus leaving out important issues concerning the conditions of production. Systematizing the data available to the analyst of Convention refugee hearings and arranging it into "a heretofore unseen unity" only demonstrates that there is a remarkable penury of data. Thus we can show that this Other has a surprisingly small range of leeway in terms of subject matter and, as indicated earlier on, available voices. For discourse analysis in general, and in this case specifically, it is necessary to step outside of the text and provide the kinds of empirical information necessary to establish the power relations that so limit the range and conditions of possibility in the hearings. This issue will be examined further on with regards to the work of Pierre Bourdieu.

Finally, it is important to question the notion of narrative as "autotherapy." As mentioned above, this idea is intriguing but unimportant for questions concerning the relationship between the constructed Other as Convention refugee and the persecuted claimant as human being except, perhaps, to the degree that is demonstrates that discourse frequently serves

some purpose other than communication. The refugee's overriding goal is to be accepted into Canada, and if this task implies that he undertake the process of constructing the Other in discourse, so be it. But this does not imply that there is or should be any attempt to adequately communicate any particular referential sign material beyond what is needed to be accepted as a refugee.

This further underlines the difficulties facing a Convention refugee claimant; in therapy or in open-ended diaries the melding of the political self with the authentic self is a conscious effort to bring together two entities which exist and which can be integrated through unconstrained discourse. In the case of the Convention refugee, the Other is foreign and in a sense bears no relation to the authentic self. As such, Wiesner's hypothesis that a "truer" self could emerge from this process is untrue for Convention refugee claimants for the same reasons that it could be true for the construction of the political self through the creation (and publication) of personal diaries. Referring to Donald Polkinghorne's *Methodology for the Human Sciences*, Wiesner states that

> in order for a person to come to a unified and concordant self-concept and personal identity, he/she needs to synthesize and integrate the diverse social responses experienced. The instantiations of conduct that constructed a political self and the carefully monitored 'good story' told by an ostensible authentic self, may provide means for constructing a truer tale and transformation to a more authentic self. (98)

Even if this were the case, the important aspect as far as the claimant is concerned is that this short narrative describing events leading up to and following the persecution be adequate for the purpose. "Authenticity," therefore, seems to me irrelevant. "Productivity," the success of the narrative for the pre-determined goal, is the issue at hand. As the hearing progresses, the evidence of this will be compounded.

During the hearing, the Counsel's objective is to ask as many relevant questions as possible to ensure that the necessary ground is covered and to ensure that the claimant sounds convincing. The S.I.O., though technically not there to "trip-up" the claimant, nonetheless returns to issues that were unclear, contradictory or absent during the hearing. In general, the Counsel (if there is one) begins, and the S.I.O. intervenes to request clarifications, or else s/he takes notes throughout the hearing and then asks for a series of clarifications at the end of the Counsel's question period. The hearing may go on for as long as is necessary, however questions which are irrelevant to the claim (according to the heading selected) are usually blocked (or at least discouraged) by the S.I.O. or by the Counsel. The Hearing continues:

By the Counsel (to the person concerned)

Q. You were a member of which Union, Sir?

A. The Industrial Union.

Q. In which company?

A. The telephone company of Chile.

One of the most interesting facets of this particular case is the degree to which the claimant is inscribed into the Chilean system; he is working for the state telephone company, and his subversive activities, those for which he was persecuted, are related to his activities in the Union for this company. The claimant is not in any way marginal; he has been working for the company for eight years, and he was duly elected to a post in the union.

Q. And you were elected member delegate of the union in which month of 1984?

A. I don't remember which month, but it was at the beginning of the year.

By the S.I.O. (to the person concerned)

Q. Of 1984?

A. Yes.

Here is the first intervention from the S.I.O., occurring, not surprisingly, with the first lapse in the memory of the claimant. The S.I.O. is asking for a clarification of the date, even though it was written in the appendix to the hearing, the opening statement, and on the Basic Data Form referred to earlier on. A contradiction at this point, even if it was based on a problem of translation, could have been a decisive error. This is the only intervention the S.I.O. makes in this case until much further on in the testimony, suggesting either a general satisfaction with the unfolding of the testimony or a sense that there are no contradictions in the narrative. The fact that contradictions, errors or re-statements of the same facts is important is proven both by this short intervention and by the fact that penned-in X's are found in the actual transcript at each point where there is a correction in the testimony. Who made these marks is unclear, however their presence in the margins of the manuscript is notable.

From this point on the testimony contains a great many repetitions of the testimony already provided; the tactic seems to be to lay emphasis on the areas of the claim which justify it according to the definition of Convention refugee read earlier on. The next question from the Counsel reads as follows:

Q. Do you have any...you have...you were elected only as delegate to the Union?

A. As delegate

Every word must be transcribed as it is stated during the hearing; in the absence of speech, there are also other markings that the transcribers are told to include. Long pauses are supposed to appear as dots [...], inaudible words are (inaudible), phonetic spelling must be noted (phonetic), and all sounds from the different parties to the hearing must be noted. The transcripts are, for the most part, made up of short questions and short answers. This may be the actual format of the hearing; however it may also be that the transcriber has added extra questions or brief answers which, as we saw earlier on, may have contributed to the number of pages that the transcription takes up.

This short question also raises another issue; the Counsel in this case is himself from South America, and is one of the preferred Counsels for Chilean refugee cases. His first language is Spanish, and the reader will note throughout the testimony that there are a number of grammatical errors in his questions and in the interpreter's version of the answers provided by the refugee (there are far more syntactical and grammatical errors in the original French which are difficult to represent in the English). This is further compounded by the transcriber who may also make typos or grammatical errors, and by the parties to the hearing who forget to fulfil their obligation to spell out foreign words for the sake of the transcriber. Again, it is not in the interest of the transcriber to carefully re-read the transcript before sending it off to the company, since this costs valuable time (money). Note that the Counsel or the refugee may correct the errors on the transcript within 5 days of receipt; in this case, it does not appear that any such errors were noted. Given the importance of clear answers and consistent testimony, the presence of an interpreter and the refugee's appeal to a Counsel whose first language is not that of the hearing are to be considered risky endeavours. If the Counsel asks confusing questions, is not well prepared, or has a problem with the language of the hearing, testimony may appear muddled or confused. Although all of these problems are present in any hearing, they are exacerbated here because the ruling bodies are not present during the oral hearing. They will have to make up there minds based on the *transcriptions* which are quite different from the oral testimony, especially in moments of confusion where a simple outburst of laughter or the clearing of a throat may clarify matters considerably.

The hearing continues:

Q. And as a delegate, what were your tasks in the Union?

A. My role was to inform other members of the Union who were not... who could not participate in the meetings. This information was transmitted through bulletins, information sheets, and circulars. Also I was engaged to make up this material.

Q. And you remained as delegate until which period?

A. Until the day when I was sent... when I was layed off from my work

Perhaps it was because of his role in the state telephone company, or perhaps because he was duly elected to the post in the Union, but for some reason neither the S.I.O. nor the Counsel asked the claimant why he did not resign from the Union or the company following the first threats. That this question was not posed perhaps reflects a Canadian attitude towards major state-owned utilities and towards major democratic workers' unions, and as such could be considered an example of how Canadian values are reflected in the hearing. Another Canadian value represented in the types of questions asked is *accuracy*, a fact that is discernable from the Counsel's and the S.I.O.'s insistence on exact data wherever possible. This person has suffered from persecution, including physical abuse, in the hands of the Chilean police, and the major concern on the part of the interrogator is in the accuracy of the dates provided during the hearing. It would be surprising, perhaps even abnormal, that the claimant know the precise answer to many questions concerning dates and other details of his detainment, because he has been tortured for his participation in Union activities and because he has been jailed for a relatively long period of time. Yet, as we shall see, the claimant never fails to answer a question concerning precise details (except in the one area above where the S.I.O. intervened). If he or his Counsel were astute, and one can assume from the transcription that they were, they understood either prior to the hearing or after that first intervention that the emphasis would be placed upon empirical data. The proof? The following 22 lines are comprised of questions from the Counsel and answers from the claimant concerning dates, frequency, head-counts, and place names.

Q. And this date was October 10, 1986?

A. That's right.

Q. Okay. And you began working for the company when?

A. From November 16, 1971 until October 10, 1986.

Q. How often did you participate in Union meetings?

A. During the months of October, November, December, which were the months the most... with the most conflicts, well, we began more or less in September because that was the beginning of the negotiations. [end of page 4]

Q. You are speaking of 1986?

A. Of 1986.

Q. And before then, in 1984, when you were... that is to say when you were elected as delegate of the Union?

This last question is incomprehensible in the transcribed form. The following answers reflect this muddle, which is either the fault of the interpreter, the Counsel or the transcriber (from the transcription, there is in fact no way of finding the culprit). All that remains are a few lines in the transcription:

A. We had... there were not very many, let us say, because there was no authorization to have them.

Q. But were there... did you participate in a meeting in September of 1984?

A. Yes.

Q. What happened afterwards during this meeting?

A. Well, during this meeting, we were dealing with... we were discussing the issue of our colleagues who had been layed off arbitrarily. Well, all of a sudden, the police appeared and began to arrest all of those persons who were present in the... in the assembly. We were taken to the commissar of the sector...

Q. On this date, how many persons were present at this meeting?

A. We were around 28 or 30 people.

Q. Where was this meeting held?

R. It was in the Union offices on Santo Domingo Road: S.A.N.T.O. D.O.M.I.N.G.O.

The spelling out of place names is in accord with the directions that the S.I.O. has been given; since these transcriptions are usually made by persons with no interest in, or experience with, refugees, all place names and proper names are taken to be foreign. From the questions asked and the clarifications made, one is also led to believe that neither the Counsel nor the S.I.O. know geography, customs or contemporary political activities in the refugee's country of origin. Many of the pages of transcription are filled up with questions concerning basic customs and habits of the refugee in the country of origin.

Q. This is in Santiago?

A. In Santiago, Chile.

> Q. And that was the night when the police arrived on the premises?
>
> A. Yes.
>
> Q. And how did the police get into the building?

Although the Counsel is posing the questions here, there is an aggressive insistence upon detail, for several reasons. First, since the actual life experience of this claimant cannot really be proven true or false, the decision-makers will have to rely upon the information in this transcription for their portrait of his previous experience. One way of measuring whether he is lying during his testimony is to ask him about basic customs and attitudes prevailing in the country at the time. These answers could be correlated either unofficially or officially by either the Committee or the Minister (who technically made the final decision according to 1987 procedure). The sensitive nature of this material cannot be played down; each hearing contains contain names, dates, places, customs and intimate details of local or national groups and governments; and yet, these documents were transcribed in 1987 by private transcription companies which in some cases sent cassette recordings of cases to employees' homes for transcription. Even if the bureaucrats charged with adjudicating and verifying these cases did not unduly diffuse information, it is frightening to think of what private transcription companies could have done. The hearing continues:

> A. Well, they rang the doorbell, the policemen introduced themselves, and then they entered without requesting permission.
>
> Q. Could you please repeat what you just said before this sentence?

It is impossible to assess what happened at this point in the hearing: either there was a technical problem with the microphones; the refugee spoke too silently; the S.I.O. grimaced; or the Counsel simply did not understand the reply. This could, in some cases, have led the refugee to retract his testimony, or to become concerned about the allegiance of his Counsel. These claimants have learned to fear authority because they have been persecuted by officials from their own government. No place in their country of origin was safe for them; they had no recourse from the police (in fact in most cases, including this one, it is the police that interrogate and even persecute, rather than protect), the legal system, the Church or any government agency. Claimants come to Canada believing that our system will be better for them; however since there is no reason for them to believe that they should trust Canadian authorities. The decision is probably made during the hearing. If the questions

are strange, overly personal (beyond the very nature of the hearing, which is itself highly personal) or in some way aggressive, it would not be surprising if the claimant became wary and held back information critical to his or her claim. Such does not appear to be the case in this particular instance; however the potential is there.

> A. The policemen rang the doorbell, and, all of a sudden, as soon as the door was opened, they came in. I would say that there were around eight armed policemen.
>
> Q. And did you also say that one had requested permission?

The potential for confusion in these cases is bewildering. The question posed by the Counsel was, presumably, "Did you also say that one of them had requested a permit." The question apparently makes reference to an earlier statement concerning authorization for the meeting: "We had... there were not very many, let us say, because there was no authorization to have them." A confusing answer in itself, but one which seems to suggest that meetings were held infrequently because the Union was unable to secure official permission to hold them. In the context of the questions asked following this reply, however, it would be impossible to guess which "permit" the Counsel is referring to. The claimant never mentioned "permit," he mentioned "authorization" (which could be oral), and the question immediately prior to this one concerned the behaviour of the eight armed policemen. The logical inference here is that the Counsel is referring to a warrant; however, we cannot be sure because the question occurs immediately after this confusing section where the Counsel asked that the claimant repeat his answer to the previous question once again. A reluctant claimant could, at this point, decide that this hearing is being carried out in bad faith. Or, confused by the proceedings, the claimant might begin to provide irrational answers to the (irrational) questions. In this case, the refugee managed to guess correctly which question was being posed (or so it appears), and he replied as follows:

> A. We always tried to ask for a permit, but it was useless to do so because meetings were prohibited. We had organized this meeting nonetheless because it was very important, it was the question of the laying off of certain employees who has been layed off, as I said earlier, arbitrarily. As a result, I think, of its affiliation to the Centre Left Party, because they were not in agreement with the telephone company and with the ruling powers.

It appears from this statement that the Union itself, and not just the claimant, is associated with the "Centre Left Party." Furthermore, he states that the Union was in disagreement with the telephone company and (therefore) with

the regime. This places the claim into another realm; the affiliation with the Union may tacitly imply an affiliation with the opposition party. This suggests that a person might join the Union in order to affiliate with the party, or that a person might not join the Union because of its affiliation with this (or perhaps any) political party. No question is raised at this point, even though the claim may have just moved from one which is based on "affiliation with a particular social group" *and* "political opinion," to simply "affiliation with a particular social group." Instead, the Counsel chooses to ask the following question. "Is the telephone company, a State-owned company?" The question raised concerns the status of the telephone company in Chile, the answer to which was probably known by the Counsel, the S.I.O., the Committee and the Minister. However, it is a potentially important piece of information given that the lawyer probably wants to establish the state's role in the persecution, for reasons outlined in the previous chapter.

> A. Yes, it belonged to the government. Well, it belonged to the government, we were protesting in the company because we were trying... we were actively trying to sell it. And this was the fundamental problem that we were trying to resolve during the meeting. [end of page 5]
>
> Q. Were you arrested?

The question posed returns us to the issue of the refugee's own experience as a persecuted person according to the tenets of the definition read early on in the hearing. His opinions concerning the sale of the company for which he worked, for example, is of no interest to the Counsel given his quest to establish the claimant as "refugee." The important facts are stated at the outset of the hearing, and then once again in an annex, and the hearing is nothing but a clarification of details concerning the proximity of this claimant's case to the particular definition chosen. In this sense, the claimant truly is an "Other;" he must select (or even invent) information which make him out to be what we want him to be; and any deviation from this path is grounds for closing off the discourse, or even rejecting the claim.

The answer to the question, which we knew in advance to be "yes," leads to a significant area of the hearing: "Q. How?" When questions of detainment, torture or persecution arise, the officials present at the hearing usually demand precise details. Although this may strike the Canadian reader as normal procedure, it in fact is in no way necessary given the tenets of the Immigration Act or the Convention. The S.I.O. and the Counsel invariably intervene during the discussion of torture to ask specifics concerning the parts of the body affected, the method of torture, the duration of each torture session, the appearance (and if possible the name) of the person(s) who did

the torturing, and so forth. In this particular instance, the claimant was simply detained, so no elaboration was required; however, when the physical brutality is described later on in the hearing the interrogation will be intensified in ways that resemble other cases. For the moment, it is important to recall that neither the Act nor the Convention compels the officials to provide intimate details; the questions concerning the torture should stop as soon as the claimant has stated whether or not s/he has been subjected to physical abuse (by persons who *can* persecute according to Canadian law) in the country of origin.

The hearing continues:

> A. We were detained, we were taken to the commissariat, we were interrogated about... they asked us questions about the meeting, we were accused of inciting subversion, we were accused of dealing with communist issues. The only thing that we were trying to doe was to help our co-workers who had been layed off. All of the subjects discussed were strictly related to the Union. We were convened to the... we were called before a judge and I think that from that moment on, we were already... we were classified as undesirable persons... opposed to the government.
>
> Q. You are speaking of all the persons, roughly 28-30 people who were detained on that day?
>
> A. Yes.
>
> Q. Did policemen do the interrogating? (p. 6, emphasis added)

Once again, the tactics of the Counsel are clear as he asks yet again if it was indeed an official of the government who undertook the questioning. Although this is a moot point, given that it was the police who were holding the claimant prisoner and given that he was forced to appear before a judge, the Counsel is nonetheless making sure that this aspect of the claimant's story is clearly understood. The narrative concerning the life story of the claimant never really broadens during the hearing; it is a linear re-telling of the facts presented earlier on during the opening statement. As such, it appears that the interrogation is a simple attempt to test the narrator's credibility; it provides officials with a chance to try to "trip up" the claimant and therefore demonstrate that the story has been fabricated.

The tactics of the claimant are by now becoming clear. He is obviously sensitive to the Canadian system of values and beliefs, for his testimony has followed the kind of course described in both the legal documentation and in the pamphlets made available to claimants (and the general public) in airports and immigration offices (the manuals in use in 1987 were called *Refugee Backlog* and *Refugee Determination*). He has portrayed himself (he has constructed an Other) as a person who was altogether mainstream and legitimate.

He claims to have held a steady job for eight years, to have won the confidence of his peers (as demonstrated by his winning a place in the Union bureaucracy) and to have had reasonable (centre-left) political opinions. In the paragraph above (note my *emphasis*) and in a paragraph further on, the claimant states that the ruling right wing had, during his internment and interrogation, branded him a *Communist*. This information serves two purposes; on the one hand the label "communist" presumably gave Chilean police officials an excuse for interrogating the claimant; on the other, it provides him with the opportunity to distance himself from Communism and to thus reiterate his support for Western-style democracy. He is, consciously or not, fashioning himself to be an upstanding Canadian (or at least North American) citizen; the image projected is that of a skilled worker, a steady employee, an honest and upright believer in American First Amendment rights like the right to assemble and freedom of speech, a good husband, a solid provider, and an enemy of Communism. Even though he resisted authority, he did it for legitimate reasons, reasons which in a sense accord with fundamental Canadian beliefs. He is further demonstrating that he can follow the regulations of the refugee claim procedure in a sensible Canadian fashion; his answers are complete, his behaviour is within an acceptable realm for an interview of this sort, and he seems to be aware of what is at stake.

As the hearing continues, the claimant provides a reasonable and detailed answer to the Counsel's question:

> A. Yes. Well, they asked us if we were treating communist subjects, we were grossly insulted and we were beaten with billy clubs on two occasions; when we left the Union meeting and when we climbed down from the police vans. We were freed, but our addresses were noted. Before this, some of the others were released, some of them were released two hours later, and others, especially the directors of the Union, were only released the following day.

The pattern of questioning used in this case is similar to other cases involving physical brutality. The emphasis is always upon the two areas already mentioned: empirical facts (When and where did the meeting occur? Who was present? What was your involvement with the group? Were the officials who broke up the meeting from the government? Did you recognize the person who beat you? Did you seek redress from government authorities?, and so forth); and physical abuse (Who beat you? What instrument did they use? How long did the beating last? Were you alone? Did you consult a physician?, and so forth). The following citation is taken from another Chilean claim, recorded at roughly the same time in Montreal. The circumstances are similar; the claimant was a member of a similar group, and he was persecuted for

membership in a social group and for illegal assembly. In this example, the stated task of the group was to help the poor, and as such they held meetings in a social club; like Mr. B, they were not authorized to congregate and the police had, on occasion, used the force to disperse them. The questioning followed the same pattern as we have seen in the case of Mr. B:

> Q. What was the type of treatment that you and your colleagues sustained at the hands of the authorities?
>
> A. We were injured and we were beaten.
>
> Q. And would this be inside your social club or would this be...? What particular time did this corporal abuse take place? Would it be during the course of meetings or would it be when you were leaving your meetings? I'd like you to be more specific.
>
> A. It was already outside in the street when the meeting was over. I was brutally beaten by the police.....

For the purposes of the hearing, the fact that he was beaten should be sufficient; but once again, details are of primary importance:

> Q. In what fashion were you beaten?
>
> A. Well they give us... they were knocking us with their hands and with their feet and using the sticks.

This kind of questioning occurs in almost all hearings; and if the Counsel doesn't insist upon the details concerning the physical abuse, the S.I.O. will. As a result, testimony given during these hearings is very difficult to read; it is intensely private, and it is often hideous. To attempt to rule upon a case, using chronological errors as a criterion, demonstrates a distance from the material that first-time readers would have difficulty in assuming. In this regard, I would suspect that citations from George Konrád's *The Case Worker* are more pertinent to the sentiments of S.I.O.s and more adequate descriptions of their work than any number of directives or cases that could be conjured up to describe appropriate S.I.O. behaviour.

What follows in the hearing of Mr. B. is yet another factual error caused (I assume) by a mixup in the Counsel's mind about the two episodes of internment suffered by the claimant:

> X Q. Did you say eight days later?
>
> A. No.

Q. I am sorry. That is, the directors were held more, for a longer period that yourself?

A. Yes, they were held until the next day. (6)

Inscribed into the margin of the original transcription is a large "X" beside the question "Did you say eight days later?" (I have made a smaller representation thereof). One would suspect that the Counsel is making reference to the incident which occurred on the 13th of November, 1986, described in the opening statement: "On November 13, 1986, his house was searched, he was arrested and detained for a period of seven days. He was seriously brutalized during this detention." (4). As noted earlier on, the source of this X is unclear. What is clear is that errors of this sort stand out on a transcription; even though the Counsel apologized, the paragraph stands. During an oral testimony, such evidence remains (i.e. when a witness provides information which the judge rules inadmissible); however it remains in a different form, not bearing the same weight as printed words referred to later on as inapplicable or inappropriate. Furthermore, there are gestures associated with statements; one could imagine that the Counsel waived his hand before his mouth, or tapped his head, or excused himself in a very loud voice. In this case, the Counsel would appear incompetent, or inattentive. In my experience, transcribed testimony has a more lasting and indelible effect upon the reader than does awkward testimony upon the witness.

In order to correct himself the Counsel asks a question concerning other members who were detained, the answer to which had been provided earlier on when the claimant stated that "Before this, some of the others were released, some of them were released two hours later, and others, especially the directors of the Union, were only released the following day" (6). The answer to that question appeared in at least three places in the transcript: in the words "some of us were released;" "others, especially the directors of the Union" (and we know that the claimant was not a director) "were only released the following day;" and in the opening statement where the Counsel himself stated that "In September 1984, after the meeting of the union, he was arrested and released later" (3).

The hearing continues with another set of empirical questions concerning details of the release, descriptions of pertinent activities, dates, numbers of persons, duration of events and so forth:

Q. Did you have to sign a book before your release?

A. Yes, of course.

Q. And afterwards, you returned to work the next day?

A. Yes, as usual.

Q. And afterwards?

A. The time continued to pass, I continued my normal Union activities, I continued with my work as well and the year went by in this manner, up until the moment when I was intercepted in the street. I was leaving my work, it was nighttime, I was heading towards my house and I was intercepted by a vehicle.

Q. Do you remember the date?

A. I think it was September 5.

Q. 1986?

The opening statement contained the following declaration: "On September 5, 1986, he was stopped in the street, detained, interrogated, and liberated two days later." The lawyer insisted, presumably, that the claimant be as accurate as possible about dates. Apparently, in cases where the claimant was unsure, he simply stated that he was so as not to call attention to his inability to recall a small detail. The lawyer clearly recognizes the criteria for accepting claims, and may have advised his client accordingly.

A. From 1986. And these men intercepted me, I was driving in my car, they obliged me to leave my car. They obliged me to open the trunk of the car. These persons were heavily armed. [end of page 6]

Q. How many persons?

A. Three persons. They ordered me to take my keys, to lock the car, they threw me into the trunk of their car. We travelled for around fifteen minutes, we arrived at a place unknown to me.

Q. How were these persons dressed?

A. In civilian attire, they were not identified. As I said, they took me to a place unknown to me, they locked me in a cell that was very small, very depressing, and the next day they interrogated me. They were quite hard on me, they asked me about my activities in the Union and in the Party.

Evidence of this kind of treatment usually comes in the form of oral testimony which is authenticated through reference to bodily evidence of physical brutality. Claimants are asked to provide medical certificates which indicate that such and such a scar may have been caused by such and such a form of torture. Generally, there is no witness to such activities, and rarely can there be written documentation to *prove* that someone has been incarcerated or tortured (just as there is no evidence to prove that the officers were wearing civilian attire). In this particular case, however, there was a kind of indirect witness, the claimant's wife, who would at least be able to corroborate

statements about the days in which he was absent from the house. It is notable that until this point, questions about the claimant's family, friends, personal life, in short questions concerning any details other than those directly related to his being constructed as a Convention refugee, have not been posed. In fact, his wife will later corroborate the story in her own testimony. In both cases, the goal of the procedure is quite simple and the tactics are obvious; all statements must confirm the claimant's status as a Convention refugee.

The questions continue and, as expected, the Counsel continues to ask questions concerning the physical abuse suffered by the claimant. The Counsel clearly has a sense of what constitutes appropriate behaviour for a Canadian Convention refugee claimant.

> Q. Could you tell us in which fashion you were, they treated you?
>
> A. Yes. They beat me physically, and they, say, were morally aggressive by their insults. Well, the questions that they asked me concerned especially what we were doing in the Union, what we talked about, also if we had contact with other political parties. They asked if we really incited people to act subversively in the enterprise.

This question satisfied the Counsel's continued interest in the physical abuse. He now turns to a series of empirical questions.

> Q. You were questioned for how long?
>
> A. I would say one hour, a little more, I am not exactly sure.
>
> Q. And you were held for how long?
>
> A. Approximately forty-eight hours.
>
> Q. Do you remember how frequently you were interrogated?
>
> A. No, I was interrogated only once.

In order to follow the formula previously described, all that would be missing from this interrogation is corroboration; sure enough, the following questions concern the presence of other persons in the prison:

> Q. Were you the only person to have been held that day?
>
> A. Yes, because I was driving my car towards my house when I was stopped.
>
> Q. And in the place where you were held, were there other persons?
>
> A. No. At least, I did not see anyone, because I had my eyes covered for most of the time. It seems to me that I was in an underground section.
>
> Q. That is to say, you have not...you could not hear the voices of other persons who were being held?

> A. Yes, we heard people, yes. The people around us, in the area, but in the room in which I was held, I was alone.

He then returns to the empirical questions:

> Q. And you were held for forty-eight hours, is that right?
>
> A. Yes.
>
> Q. In which circumstances were you liberated?
>
> A. Well, before letting me out of the cell, they threatened me several times, then they forced me out very brutally. While forcing me out, they pushed me, they punched me, they kicked me. When I was close to the stairs, they hit me and made me fall down the stairs. They threatened me a lot by saying that I should not make any comments because there could be very grave consequences for me. They said to me that they would go to my house and bother my family. And the, I was freed, that is to say [end of page 7] that they put me into a car in the same manner as they had when they brought me. Well, they freed my hands because I had been wearing handcuffs, they told me not to remove that which covered my face for at least two minutes. And after that, I took off the cover from my eyes, and I was just beside my car. Well, I took my car and I drove to the house.
>
> Q. What was your physical condition at that time?
>
> A. Well, I was hungry because I had not eaten anything for forty-eight hours. My body heart, I had several bruises, and I was dirty. Well, I arrived at my house, I took a bath, my wife prepared something to eat, and she gave me clean clothes. Well, I did not want to worry my family, so I never told them about what happened to me... what had happened. When I arrived, she asked me why I had not, why I was not there the day before. I told her that I had been obliged to leave my work on account of an emergency, because during the month of September we experienced a lot of attempts to bomb the enterprise, with dynamite, so I had a lot of work outside of the city. My wife asked me why I had bruises on my arms, my elbows, and I told her that I had had an accident at work, that I had fallen. And on Monday I went to work, as usual.
>
> Q. At that time, were you in need of medical treatment?
>
> A. I went to the company medical centre where I was diagnosed as having only bruises, so I was given pills and I did not want to say anything to the company doctor about what had happened because they control everything, the people from the government. The security is very strict in the company, so it was not a good idea to say what had happened to me. It was necessary to simply keep quit. And luckily, it was nothing more than a few bruises.

Whereas to this point the pattern of questioning was such that the lawyer's questions were almost as long as the claimant's answers, the claimant now begins to speak for himself. The pattern of the claimant's responses are quite evidently in line with the general formula that prevails in this hearing. He describes events chronologically, he makes frequent and elaborate reference

to the brutality of the torture, and he includes as much dispassionate empirical evidence as possible. The claimant has either been well advised, or he has been attentive to the proceedings. This adaptation to the method of interrogation is typical of most hearings; what follows is a citation from a similar (Chilean) case (cited above) in which similar details are recounted. The Counsel, S.I.O. and interpreter are different from those involved in the case of Mr. B:

> Q. What happened there?
>
> A. That's where they just finished beating us and they let us there at the bottom of Agua Santa.
>
> Q. En route to Agua Santa you indicated that you were beaten. In what way were you beaten?
>
> A. They were using their sticks to beat on us and also using their hands.
>
> Q. This is inside the car or the vehicle?
>
> A. Yes.....
>
> Q. You mentioned that you were left at the place indicated several minutes ago. How did you get home?
>
> A. I just walked because my house was not too far away from the place where this happened.
>
> Q. Did you require any type of medical treatment?
>
> A. No.
>
> Q. Did you discuss this with any of your family members upon arriving home?
>
> A. No because I was living alone.
>
> Q. But did you discuss this with any other family members?
>
> A. No because I didn't want to have my family involved in this.

The degree of secrecy that is manifest in these descriptions is truly remarkable; he did not discuss his experience with members of his family members "because [he] was living alone." He did not discuss this with any other family members later on "because [he] didn't want to have my family involved in this." The case of Mr. B. is virtually identical; "Well, I did not want to worry my family, so I never told them about what happened to me... what had happened.;" "I told her that I had been obliged to leave my work on account of an emergency, because during the month of September we experienced a lot of attempts to bomb the enterprise, with dynamite, so I had a lot of work outside of the city." "My wife asked me why I had bruises on my arms, my elbows, and I told her that I had had an accident at work, that I had fallen." This level of secrecy is common amongst Convention refugee claimants. The facts of the Mr. B. case, in light of a discussion on secrecy, are remarkable. In

September of 1984, he was brought into custody, along with other members of the union, because he was participating in a secret meeting. He returned home that night and, from all indications, he never told his wife about his experience. In May of 1986 his wife received death threats, presumably because of the claimant's involvement with the union; yet he supposedly never divulged his problems with the authorities. On September 5, 1986 he was pulled over by the police, detained and brutalized. There is no way to know what he told the police about his activities in the union, but it is clear that he never told his wife about his true whereabouts. Following his detention, he visited the company doctor, who presumably asked him how he received these injuries. Because "I went to the company medical centre where I was diagnosed as having only bruises, so I was given pills and I did not want to say anything to the company doctor about what had happened because they control everything, the people from the government. The security is very strict in the company, so it was not a good idea to say what had happened to me. It was necessary to simply keep quiet," he did not tell the doctor about the police brutality. He could not trust the police, the legal system, the government or the employees of his company (he even showed up for work the day after each aggression). Furthermore, he chose not to trust his wife or his doctor, the two persons who we would assume to be the most trustworthy in these situations (in fact, numerous refugees who arrive in Canada were helped by doctors who sympathized with their plight and therefore signed false documents, provided critical information, and so forth). In short, the claimant has exhibited a high level of suspicion and fear in the face of officials and personal acquaintances (including his wife). Furthermore, he has been forced to invent stories to cover up his true activities: when he was absent from the house for two days, he said he had been working on emergency repairs; when he returned with bruises on his body, he told her that he had fallen down while at work. Being a "subversive" individual in his country of origin forced him to take many precautions against possible reprisal, and also encouraged him to keep friends and acquaintances and professional persons in the dark about the persecution because he presumably feared for his own life and for the lives of those persons who knew what was going on. Even after significant persecution, he never revealed to his wife that he was involved (indirectly through his adherence to Union policy, or directly through his sympathies) with a political party. We read later on page 13:

> Q. But the question was to find out when you discussed your activities with your wife.
>
> A. It was after November 13th, after the searching of the house. It is only now that my wife was informed about my participation in the Union.

> Q. You mean to say that at the time of your being layed off you never discussed it with your wife?
>
> A. Yes, she knew it, because I presented my dismissal slip and I showed her the indemnity that I received.
>
> Q. Of course she was aware of your being layed off, but I am talking about whether she, at the time of your dismissal, if she was cognizant of your activities?
>
> A Yes, I told her that the reasons that ... that led to my dismissal were undoubtedly of a Union type.
>
> Q. That means that she was aware of your activities before November 13, 1986?
>
> A Yes, but I did not reveal my level of involvement. She also had no idea that I was a member of a political party.

The secrecy demonstrated by this claimant is, once again, typical; most persons seeking status have learned to keep quite even when it would appear that seeking help may assist them in their plight. The following citation from another Chilean case demonstrates the similarities in the concerns of Canadian officials, and in the pattern of secrecy demonstrated by the claimant:

> Q. You mentioned you were walking alone?
>
> A. Yes. And all of a sudden, very near Agua Centre, two people approached me and said that they were members of the security services. Then I asked them to identify themselves. They did not accept my suggestion and they forced me to go with them and they forced me to step into a blue wagon. And they took me to an abandoned house in the neighbourhood of the airport of Rodello R.O.D.E.L.E.L.L.O. Then they took me out to a chair....
>
> Q. How did they beat you this time?
>
> A. They were giving me punches on my face. They beat me so brutally until I was almost unconscious. Later on they left me abandoned. I don't know exactly where because when I recovered I was already in a centre of assistance, the public assistance of Via del Mar.
>
> Q. Is that the emergency hospital?
>
> A. Yes, it's a clinic....
>
> Q. Were you questioned by anyone while you were in this particular emergency room?
>
> A. No they just take care of my injuries.
>
> Q. The doctor released you and did you go home?
>
> A. Yes because I didn't want to make any complain and hear the police which is always in this clinic because I was so much traumatized that I want to go home immediately.

A far more dramatic example is from a Ghanian claimant who had been arrested and tortured with a hydraulic pump (see below). Despite the gravity of his injuries, he resisted to seek assistance from anyone, including his wife:

> Q. And during all the time of your detention, did you ask to see a lawyer?
>
> A. A lawyer.
>
> Q. Yes, to be assisted by a lawyer?
>
> A. I wasn't given that chance.
>
> Q. But did you ask it?
>
> A. And I did not make such a request.
>
> Q. For what reason?
>
> A. Right from the (inaudible) I was denying what they were trying to put on me so I did not want to get the assistance of a lawyer to substantiate. To gain the requisition of a lawyer to be personal means confirmation of their intention so I did not do that to substantiate what they were thinking.
>
> Q. And did you have the right to be in communication with your family?
>
> A. In fact, my idea of joining this thing from the very beginning has not been in the knowledge of my wife because she wouldn't like it, so I kept all the activities that I was doing with this movement quite secret from my wife.
>
> Q. But what was the reaction of your wife when she has seen that you didn't appear during almost one month?
>
> A. I was based in Cape Coast and my wife was also... she was working in the capital, Accra. So for quite some time she wasn't here with me. I didn't even know what happened until I came out. Since I was in Accra, so when I was released I went back and had to tell her... I didn't actually tell her what has actually brought me here because I didn't want with my (inaudible) and all those problems. At that time it was... already she was also pregnant at that time so I didn't want to put her into more problems.

Now all of these claimants, including Mr. B., have arrived in Canada; Mr. B. arrived under false pretext (he did not leave Chile saying that he was off to claim refugee status in Canada) and he surrendered himself to uniformed officials. Under the tenets of the Immigration Act, he is now being asked to divulge all of the aspects of this secret life, to let down his guard and to freely recount his narrative of persecution and torture to uniformed strangers. He is asked to describe one of the most traumatic experiences imaginable (torture) in intimate detail. And he is asked to back up each statement with a linear description of events leading up to and following episodes of persecution with as many empirical details as possible. In short, someone who has learned that secrecy is the key to survival is now being told that exposure is the key to success. What evidence does the claimant have that he is being told

the truth by Canadian officials? If he was able to tell his wife that he was at work while in fact he was being incarcerated and brutalized by Chilean police, wouldn't he be able to tell Canadian authorities whatever they wanted to hear in order to save his skin and protect his family? What if he had heard from somebody that his transcription would be turned over to the RCMP and CSIS who would do with it what they wished? What if he was to believe that if he is rejected for status in Canada that he will be sent home to Chile? What if he had read that transcriptions of hearings were being transported around major Canadian cities to hundreds of persons whose only qualifications were their ability to type quickly?

The question here is not whether or not he is giving false testimony; the point is that our system is construed to discern Truth and Empirical Evidence. The claimant is therefore encouraged to testify in a manner that is highly formalized, emphasizing very specific elements of his past. This is a construction process, and the final product will be the construction of an Other by a claimant who has been made to feel Other to Canadian society since his arrival.

The hearing continues:

> Q. Afterwards, on September 5 1986, you continued to work for the company?
>
> A. Yes, I continued to work for the company. I continued to work until October 10th. And I continued my activities normally, as always.
>
> Q. You mentioned the 10th of October?
>
> A. Yes.
>
> Q. What happened on the 10th of October?
>
> A On October 10th, they informed me that I was being layed off and that I had to leave the premises, and that they would never let me return. I was only able to meet or communicate with my co-workers in the union offices. But I continued to work, I had my car that I used as a taxi, that is to say, even when I left my work I continued my work as a taxi driver. Well, I continued very actively my activities, in the Union, because I was looking for a way to recover my job. Considering the fact that I was a person who had a certain, say, a good number of years of experience in the company...
>
> Q. What reason did the company give for laying you off?
>
> A. Because they had decided to reduce the number of personnel.
>
> Q. Had you received a notice to this effect before (inaudible)...
>
> (the cassette is changed).
>
> Q. I will repeat the question. Did you, before being layed off, did you receive a notice? [end of page 8]

This adjournment reminds us of the circumstances surrounding this hearing; at this point the cassette has come to the end, and the S.I.O. has put in a new cassette before continuing the questions.

> A. No. Well, they did not tell us anything. The day that I presented myself to work they had simply brought me to the Security area where I was told that I was to go to the Personnel office. There I was met by Mister J., the manager of the Personnel Department. He informed me that I was being layed off because the company was in a phase of reducing the personnel. That was the reason.
>
> Q. And in your opinion, this was the real reason for your being layed off?
>
> A. I think not. But because of the problems that the company had... the company was not in agreement with us because we were against the government and I was... I was layed off because I was always distributing bulletins, notices, information. Information concerning the company's propositions because this was the moment of negotiations. The company was in the middle of taking away many of our guarantees and we were not in agreement with the choices offered by the companies. And to simplify their task, they started laying off members of the Union, especially persons who... the heads of the Union.
>
> Q. That is to say, you were not the only person to be layed off.
>
> A. No. On that particular day, roughly twelve persons were layed off.
>
> Q. And that includes the President, the Vice-President, the Secretary-Treasurer, and the entire administrative Board of the Union?
>
> A. The president was not present because he had been exiled to the South of the country one year earlier. The same thing with the Secretary, we were only with the Vice-President and the Treasurer and this group, the Treasurer and I, we were layed off. And also they layed off other personnel from other sections of the Union.
>
> Q. When you say that the President and the Secretary had been sent to the south of the country, this was the result of their Union activities?
>
> A. In part, yes, this was the reason, also they had... also the case was that they had participated in a strike, that was when they were arrested, I don't know what they had been accused of, but the fact was that they were sent away.
>
> Q. Did the union in fact take steps towards reintegrating you in your work?
>
> A. Yes, we were trying to organize meetings, but it was useless, we could not do anything.
>
> Q. Did you receive compensation for your... for the years of service that you had given to the company?
>
> A. Yes.
>
> Q. And that was for the fifteen years of service in the company?
>
> A. Yes. When I had worked for ten years in the company, I was given something, I asked for 75% compensation for the years of service and now, when I was layed off, they gave me the rest. I was paid in full.
>
> Q. And afterwards, you said that you continued to work as a taxi driver?

A. Yes, I continued to work as a taxi driver. Well, my wife also worked, she was working right up to the moment of her departure for Canada

By the S.I.O.

For the moment, we will adjourn for a few minutes.

(ADJOURNMENT)

So this is a continuation of the declaration under oath, the same persons are present.

The validity of the claim is built upon the foundation of well-founded fear of persecution; therefore, the Other as Convention refugee must be able to prove that he was, and would in all likelihood continue to be, persecuted in the country of origin. The Counsel and the claimant therefore place a great deal of emphasis upon the persecution of this narrated Other. At this point, the claimant is preparing to describe the most important persecution he suffered, and he has therefore taken a break before proceeding. When he returned, he uttered (or perhaps read) the following statement:

By the person concerned

A. And on Thursday November 13th, when I was at my house and it was around midnight, there was a knock at the door, and I went out to see and there were four people there. They immediately entered the house, while two persons escorted me outside immediately, they detained me, and the began to search the house. The made me get into a vehicle. One of the persons who took me into the vehicle returned to the house. These persons were in civilian garb, they were accompanied by a military jeep, and I had to wait their while they searched, they searched everywhere in my house.

It seems to me, now that I think about it, that they were looking for arms, explosives, and subversive documents. They found nothing because I had nothing of this nature.

Well, I was taken to a place unknown to me because they took me there in a closed vehicle. The vehicle was closed, the truck was closed, it was not armoured, not like an armoured car. The vehicle was dark green, I was thrown inside of it, head first, I was handcuffed and I was taken away, I don't know where. This... from the moment when I left my house to this time it took around half an hour to arrive at our destination.

I was interrogated on the third day, and was treated very badly. In this time I was beaten often, and I was left unconscious. In another occasion, they threw a pail of water on me. The next day, I was very sore, I had a cold and the day after my ques-

tioning a doctor, I think it was a doctor, arrived and after examining me he ordered that... that they feed me because they were holding me without... they did not give me anything to eat. They brought me a blanket to cover me up.

Three days more went by, I don't remember exactly how much time, but the fact is that I was set free on the seventh day.

Based on my reading of this transcription, this would appear to be the most important testimony given during the hearing. Given that this is the first long-winded description provided by the claimant, and given that the hearing was adjourned just prior to his making this statement, it would appear that the Counsel had placed a lot of emphasis upon this portion of the testimony as well. If this is true, then we can conclude that descriptions of torture carry considerable weight in these hearings and that claimants are advised by their Counsels, and by the very pattern of questioning in the hearing, to offer as many details as possible concerning their suffering. Notice too that the claimant has continued to placate Canadian authorities on two fronts; first, he reiterates that the persecution was carried out by government authorities ("These persons were in civilian garb, they were accompanied by a military jeep"); that the authorities singled him out for persecution because of his activities ("It seems to me, now that I think about it, that they were looking for arms, explosives, and subversive documents.") and that his activities were not what Canadian society would consider subversive ("They found nothing because I had nothing of this nature."). Typical of the pattern of questioning already noted is the following segment in which the Counsel asks for empirical evidence in the form of particular details of the detention centre, as well as for possible collaborators to the persecution. The claimant provides as many details as possible while reiterating that his life, and the lives of his family members, were (and continue to be) in danger:

By the Counsel (to the person concerned)

Q. And where were you held?

A. I don't know, sir.

Q. But could you describe... were you in a cell, in a room?

X A. The entire time, I had my eyes covered. It seems to me that during this time, it was a rather large room which, because I even heard eating, I think that I was in a room, in a room right beside a large room because I could constantly hear persons.

When I recovered a little bit, they released me in a quit street. Of course, they threatened me a lot, they said that I had to quit for good, for the last time, my activities in the Party. And they also said that I have no reasons to visit the Union be-

> cause I was already layed of. Well, the threats, with the insults...[end of page 10] while they were making these threats they said that if they saw me again they would look for me or look for my family or look for my son.

The "X" on the transcription is adjacent to another significant area of the testimony, where the claimant states that he had been blindfolded throughout the process. I would assume that this has been noted for the simple reason that if one detail appears in this testimony which would suggest that the claimant could see, then there would be basis for rejecting him on the grounds that he contradicted himself. The testimony continues:

> Q. And while you were being held, you were questioned?
>
> A. Yes.
>
> Q. You were held for how long?
>
> A. Around seven days. I was held, they picked me up at the house on a Thursday and I was released on a Thursday or a Friday. When I was released, I was in the street, I picked myself up as best I could because I felt very bad. I went to a main Street and I took a taxi. And the taxi driver did not want to take me at first because he saw that I was in bad shape, he thought that I was a beggar because I was very dirty.
>
> Q. You were released at approximately what time?
>
> A. It was very early in the morning, say around 5:30 in the morning.
>
> Q. Where?
>
> A. Well, they threw me out on a road called S. L., near an avenue called A. V. Well, I headed home, but before then I had to explain to the taxi driver that I was not a beggar, but that I had had an accident. And my wife paid the cost of the taxi, that is what we owed, because when I was forced out of my house I was not given the time to take my things. And my wife at that time, immediately asked me what had happened, and it is logical, she asked me how I had been treated. Well, first she made me a bath, and she called the doctor because it had already been arranged that as soon as I returned a doctor would be called, a contact had been made, it was with the family doctor. The doctor said that he should be called at any hour of the day or night.
>
> Q. What was this doctor's name?
>
> A. A. S. Well, he had his office on B. Avenue. He said that I had been beaten by professionals because it was almost impossible to detect the blows, that the blows did not leave any bruises, but internally I was... I was in very bad shape. He gave me a shot, I don't know what and he continued to take care of me and the following week I was already recovered.
>
> We began to explore ways of leaving the country because I was already traumatized by this situation.

The claimant is not only expected to recount the events leading to his or her claim in a rational, linear manner, but he is, as we have seen above, expected to provide evidence, usually in the form of documents or empirical facts, to back-up his story. Sometimes, the S.I.O. or the Counsel seek to establish credibility by looking for physical marks of persecution; the body of the other is the scene of the Other's validation as legitimate refugee. In the questioning above, the interrogator has been attempting to ascertain through the establishment of empirical facts, evidence that the beating described actually occurred. This too is typical; questions concerning medical treatment in the country of origin are often raised, and, on occasion, evidence is presented that shows that the claimant has been to a physician in Canada for further analysis or treatment. Since no visible marks remain on the body of the claimant, the Canadian officials will have to rely on the veracity of details provided in order to rule on the case. This is not always the situation. Canadian officials looking for bodily evidence for narrative sometimes make reference during the hearing to physical marks which validate the story. They also demand as many details concerning the method of torture as possible, so that the most gruesome details are recounted by the persecuted claimant during the testimony; this example is from Ghana:

> Q. Can you describe more what happened to you?
>
> A. I was blindfolded. In the course of being blindfolded I felt somebody holding my hand and something pierced through my hand, but I did not... I said I have been blindfolded, so to be precise I did not know what instrument was used or what actually was being used, but all I can feel is the pain, something pierced my right hand, a pain in the right hand. And (...inaudible...) I felt, I think something has... a weight has been put on my right hand. But it was so swollen. In fact, at that instant I thought that was the end so I just gave in and lied down. The only thing I felt blood was oozing from my right hand. And as you can see, you can see there's a great difference between the left and then the right hand.
>
> Q. It was on the right hand that you feel...?
>
> A. Yes it was on the right hand that I felt...just instantly, I felt something pierce in the palm of the right hand. I was blindfolded so I did not actually know what instrument was used or what actually was used to pierce me. I had enough idea about it, a light idea about it, only when I left the country and I had an operation in Peru. It was there that the doctor who had the operation told me I had hydraulic in my body. So I do not know what actually was used to pierce my hand. It was the doctor... at the moment here in Canada I'm still undergoing treatment to still verify how my hand can be rectified, but I think I have a document to that effect to meet a doctor for subsequent operation on the right hand.

The next section of the hearing for Mr. B. is standardized to the degree that each claimant is asked for specific details concerning his or her flight from the country of origin, his/her travel trajectory, and the resistance that s/he met in attempting to secure exit visas, passports, airplane tickets, and so forth. The goal of this questioning is, in light of the previously-mentioned Canadian jurisprudence, very clear. First, the authorities are continuing in their quest to determine the veracity of the claim by asking for empirical facts. Since travel documents and trajectories can be verified, the authorities make careful reference to passport stamps, airplane tickets, airline schedules, and other details. The upshot of this policy of haggling over tiny details with dramatically persecuted persons (as in the case of the Ghanian claim cited above) is that the veracity of the entire claim is put into question by ultimately inconsequential (but verifiable) details. The following examples explain how potentially critical mix-ups can occur because of the way in which the hearing is contrived.

First, an example from a Ghanian case that was poorly transcribed and, it appears, poorly translated:

A. I left the country it was on the 17th.

Q. Of which...?

A. Of June.

Q. When were you released?

A.I was...

- You mentioned that you were released on the 20th June '85.

A. Sorry, I left the country on June '84.

Q. When were you released?

A. I was released on the 17th.

By the S.I.O. (to the person concerned)

Q. You told us a few minutes ago that you were released on June the 20th.

A. I left...

Q. Now you are telling us that you were released on the 17th.

A. It's a mistake....

By the Counsel (to the person concerned)

- You mentioned that you report yourself to the police two times.

A. Yeah, just two times.

- Between the...

A. Between 17th and then 20th.

Q. In three days you report two times?

A. Pardon?

Q. In three days you report yourself two times?

A. Two times, yeah. Every day you are supposed to...

- But you mentioned that it was at every week you should report.

A. No, I haven't said that.

There is no way of telling what the problem was in this particular case, however it is not unreasonable to imagine that the claimant did not understand the questions, or that the answers were being misinterpreted. Since the claimants are allowed to bring notes into the hearings, it should be a simple matter to explain travel trajectories; if mix-ups occur, for whatever reason, the claimant loses credibility. This is an area in which the Counsel could help the claimant to ensure that s/he is properly prepared, and to ensure that the translation is accurate and complete.

Second, Canadian jurisprudence indicates that a "well-founded claim" is often demonstrated by a sense of urgency demonstrated by the claimant; as we saw earlier on (and as we'll see in the appeal case), claimants who waited several months before surrendering themselves to authorities were often met heavy resistance. This criteria is arbitrary inasmuch as it resists the psychological and the empirical factors which could restrict the claimant and limit his ability to undertake the proper steps to free himself from a situation in which s/he is being persecuted. A Canadian would presumably flee persecution and claim status in a safe haven as soon as possible; but this may not be how other persons would behave under similar circumstances and there is no reason to expect that they should.

Third, Canadian authorities have shown themselves to be extremely interested in the question of why the claimant chose Canada instead of some other country.[19] If the itinerary of the claimant included stop-offs at other "safe" countries, officials want to know why the claimant continued the journey. The assumption is that claimants have the right to asylum, but not necessarily asylum in their country of choice. This of course means that persons from the Third World are more likely to make their claims (or are forced to make their claims) in other Third World countries because of the prohibitive costs and the strict document control involved in travel from the country of origin to Canada. Furthermore, if the claimant does not file for status in another "safe country," s/he undermines the claim to "well-founded fear of persecution" because there was no urgency in actions taken. There may in fact be good reasons why even a clearly legitimate refugee would not claim status in a "safe country," as shown in the following Ghanian claim:

Q. And did you ask a refugee status in Egypt?

A. Yeah, maybe I should have done so but here too the problem of Arabic was... I even thought that it was even worse in Egypt. Here was a country... very little English is spoken. I entered to realize that maybe I'd come to the wrong place. Moslems with... their religion being Moslem, the language being Arabic was just too much of a novice so before I could again become familiar with the place and then know where to go, it was too late. But I made an effort to do that. And I even went as far as going to the United High Commission office, United High Commission for Refugees. I even met one Ghanian who was the resident director there, by name Mr. K. G. (phonetic) but the time limit. By that time I had outlived the time by which I could do that so I didn't do that.

The section of the hearing in which the travel trajectory is set forth is now complete, and Mr. B. is now subjected to another set of commonly asked questions concerning his flight from the country of origin:

Q. What steps did you take to leave the country?

A. I immediately took steps to obtain the passports and the airplane tickets. After receipt of the passports we travelled to Linaris, L.I.N.A.R.I.S. for reasons of security for my family and for myself. I travelled in mid-January... I travelled to Santiago in mid-January to pick up the passports. I returned to the city of Linaris and we did not return to Santiago before the very day of the flight.

Q. That is to say, after your release you did not return to your house? No, I am sorry. After your return to the house you did... you moved to Linaris?

A. A few days later, yes. [end of page 11]

By the S.I.O. to the person concerned

Q. And which month was this?

A. This was around ... around Christmas. Christmas day, the 25th, the nativity, we travelled to Linares.

By the Counsel (to the person concerned)

Q. That is to say from the 20th... approximately from the 20th of November 1986 until the 25th of December you stayed in your house?

A. Yes, we stayed there, because our child was finishing his last exams and my wife was working, so we decided that when we would be prepared to depart, my wife would quit her job. During this period we sold most of our things and then for reasons of security we travelled to the city of Linares where we have family, and as I said earlier, I returned to Santiago only to pick up the passports, this was shortly afterwards ... in the middle of January, and then we returned directly to the international airport on the very day of our departure.

Unlike many Convention refugee claimants, Mr. B. and Mrs. V. arrived in Canada with financial resources gained as a result of the sale of some of their personal possessions. This obviously helped them flee Chile (flights for three people could cost several thousand dollars, particularly if an intermediary is involved) and it allowed them the (unusual) luxury of choosing a country as far away as Canada.

> Q. And you have... you arrived here on January 25th 1987?
>
> A. Yes.
>
> Q. Did you receive any phone calls?
>
> A. In May, I think that it was in the month of may that my wife received two phone call. During these calls threats were uttered against me. ...

This is a mysterious section; the claimant has been told to recount his story chronologically, and the Counsel has up until now assisted by asking questions in chronological order. In a demonstration of his confusion as to the details of the case, confusion that could have been grounds for refusing the claimant's testimony, the lawyer asks about phone calls received in Chile immediately after asking about the claimant's arrival in Canada. Somehow, the claimant was able to guess what the Counsel was asking and he replied without (transcribed) hesitation. But the S.I.O. was understandably confused:

> *By the S.I.O.* to the person concerned
>
> Q. May of which year?
>
> A. Of 1986. They told her that I should quit the Union and the Party. And if I did not, they would kill me. In the two calls that she received she was told the same things. Well, my wife at this time was not aware of my activities because I ... I never spoke about the subject. Well, she said to me once: "listen, someone called you and said such and such a thing". I told her not to be concerned because it could be someone making a lousy joke.
>
> And the second time that they called, my wife demanded to know what was going on and so I told her that it must be someone either from the government or from my company. Following this answer that I provided, well, she was appeased.
>
> Q. After this, you were picked up on September 5th, 1986?
>
> A. Yes, that is what I said, yes.

The Counsel resumes questioning at this point, and elucidates his (justifiable) concern about the claimant's previously discussed ability to withhold details of his persecution from his immediate family:

By the Counsel (to the person concerned)

Q. And what was your wife's reaction?

A. In this occasion as well my wife ignored what had happened. When I returned the next day, my wife asked what had happened. I told her that I had fallen, that I had had an accident at work. And well, this is all I said.

Q. And after November 13, 1986?

A. After my recovery from the bad treatment that I had received, I continued to work with my car until around December 20th, right up until the moment when we decided to travel to Linaris.

Q. But the question was to find out when you discussed your activities with your wife?

A. It was after November 13th, after the searching of the house. It was only then that my wife learned of my participation in the Union.

The claimant therefore *never* told his spouse the whole story of his persecution; he revealed the details of his involvement with the union when it was no longer possible to offer an alternative story.

Q. That is to say at the time of your being layed off, you did not discuss this with your wife?

A. Yes, she knew, because I had shown her my dismissal slip and I showed her the indemnity that I had received.

Q. Of course she was aware of your being layed off, but I am speaking about her knowledge, a the time of your being layed off, if she knew about your activities?

A. Yes. I told her that the reasons which... which had led to my being layed off were undoubtedly, only on account of the Union.

The tactics of the Counsel are hereby easily discernable, and the dangers of these tactics are revealed. The Counsel asks about Mrs. V.'s knowledge concerning the persecution suffered by Mr. B., and Mr. B. erroneously thinks he is asking whether Mrs. V. knew *all* of the details concerning his union activities. The result is an apparent contradiction in the testimony.

Q. That is to say, she was aware of your activities before November 13th, 1986?

A. Yes, but I had not told her about my level of involvement. She also had no idea that I was a member of a political party.

Having resolved this issue, the questioning continues; note however that this confusion could be grounds for rejecting the claim:

Q. What led you to leave your country of origin?

A. Well, desperation, the preoccupation that I had, I felt terrified. Every time I was in my car and I saw vehicles beside me, I thought that I would be stopped. I felt persecuted continuously and for those reasons, I was forced to emigrate.

Q. And to leave the country?

A. Yes, to leave our country.

Q. Did you have difficulties obtaining your passport?

A. Yes, when I appeared in the passport office to fill out an application, a person appeared before me and told me that for the moment passports were not being issued, that there was a "prémission" [?]. I don't know... I don't know the reasons for this attitude. I think that the reason, that the reason was that the identification section of the passport office was being moved from McKenna Street: M.C.K.E.N.N.A. to Moneda Street: M.O.N.E.D.A., a distance of roughly one kilometre.

Well, I had no other choice that to begin to... I had to begin to try to have some information. After a while, the name of Mr. R., I contacted this person and he helped me obtain the passports. Well, above and beyond the price of the passport, we had to pay this man. He charged us ten [note the following paragraph] thousand pesos for each passport, on top of the official price of the passport which is two thousand four hundred pesos.

In the right margin at the point where I have added the square brackets, there is a hand-written "X 3" and the word "chargé" [charged] has been circled. I presume that this indicates that the price of the passport was in fact either 3000 pesos (three instead of ten) or 30 000 pesos (10 000 X 3). In either case, the testimony that follows confuses matters further, because it is not clear whether the price they paid is on top of the normal 2 400 pesos charge, or was in lieu of the 2 400 pesos charge. This is not critical, but it is confusing.

Q. And why did you have to pay this amount?

A. Because he had to ... we wanted to... no. We were forced to abandon the country.

Q. Had you other difficulties with the law in your country?

A. None, Well, the proof is that I had worked for fifteen, almost sixteen years in the company, I had no criminal or police record. I think that the only thing they had against me was my belonging to a party opposed to Pinochet's regime. This was my only record.

[end of page 13].

The next question is a standard one, asked at every hearing. In some cases the answer is obvious, especially where the claimant has, say, escaped from prison and fled the country of origin: "Q. And if you had to return to Chile

tomorrow, what would happen to you?." Persons who have been rejected status and who have explored all avenues for legal recourse and appeal must leave the country within a short time after the Minister has signed the deportation order. This question sounds like a threat, and it is here that we often encounter the refugee (as Other) in a state of submission and at the point of begging for help. Furthermore, the claimant often at this point elucidates his or her warm feelings towards Canada and Canadian officials.

> A. I think the same things. I would suffer from the same things and even more by virtue of the fact of our being here in Canada. And the fact of being here for me and for the government, these are serious things and over and above this, I have been accused of I don't know what, because we are here to present the actual reality of the country, we have spoken of repression, of abuse of human rights and for this reason I could not return to my country.

This is a turning point in the testimony of most claimants, inasmuch as it represents the occasion in which the claimant is allowed to speak on a general topic, in a relatively unstructured way. What is fascinating about a comparison between transcripts, even transcripts from different countries wherein claimants were subject to different forms of torture, is that the responses to this question are generally identical from one case to the next. Virtually every claimant states that s/he would be injured or killed if s/he returned to the country of origin. Most of them then add that Canada has been and will continue to be a safe, democratic, freedom-loving nation. It is as though claimants have, at the end of the hearing, established that certain statements have been well-accepted by the parties to the hearing, statements about the true nature of their suffering and their plans to fully adapt into Canadian society. A sampling of the responses to this short question demonstrates the similarity of sentiments expressed. The passages chosen were taken from six different cases representing claimants from five different countries and, as is the case with each example cited in this thesis, each passage comes from testimony given in Montreal in 1987.

Example 1: [the former]Yugoslavia

> A. Considering I had worked on the ship before and had quite a bit of experience, and thoroughly knew all the secrets and compartments of the boat, it was not very difficult for me to safely and secretly journey across the Atlantic. Certainly I could have had the choice of staying in Belgium, but I had no particular information about Belgium, and certainly no indication about opportunities as I believe I could find in Canada. Having however visited Canada a couple of times, especially Montreal, I was in a position to find a lot about Canadian reality. I, what I had found on my previous visits to Canada were the things that I hold basic and essential for a decent life, that is an extreme degree of democracy, in this country,

among which the freedom of speech, the freedom of religion, important as I do believe in God, and the system and the country had a high degree of humanitarian activity, or treatment, or establishment. I found that life was rather comfortable, and with plenty of opportunities. On top of everything, I found Canadians to be cosmopolitan and of high sense of hospitality. Like every other young man I too have a basic need to work and earn a living and earn progress, respectably. That is all.

Example 2: Pakistan

A. Yes. And now the political government in Pakistan is getting worse, we cannot possibly have security. There are riots, and among themselves, and the country is often in curfew. Being moslem country, people do not prefer women working. So I could not work there. It is hard to live a life without working, and to take care for three children. The education, education too is dropping. There is no proper education, and also the main point is that one of my daughters being quite healthy and intelligent. But she has the instability of walking. There is no facilities or schools for such children in Pakistan. Here in Canada, she is going to school and gets the treatment in the schools only. If she is in Pakistan there is no future in it. In Canada she could live independently, so therefore we claim refugee status on humanitarian grounds. So as to live and work peacefully in Canada and to develop the future of my children.

Example 3: Ghana:

Q: Who gave you the idea to come in Canada?

A: I suggested it to the Roman Father, the Priest, that I would like to leave Egypt, because of what I have already said. They asked me where I wanted to go. I told them any place where I would be safe, I would like to go any place where I would be safe. Actually having told them this. They told me they couldn't procure a visa for me. There was no way they could get me a visa.

Example 4: Ghana

Q. So you are afraid of being taken in, or what specifically are you afraid of?

A. If I am sent back there, if they don't shoot me to die, the things they will do to me will cause my death.

Q. How did you come to choose Canada?

A. When I went to Egypt I was looking for a safe place to seek refuge, and I thought about it, and I knew that Canada is a very safe country and it understands people, that is why I came here. Also the white lady that I met is a member of a Church, and she told me that usually people who have problems due to political reasons go to Canada, if I had money she could help me come to Canada....

Q. Do you feel you had a chance to explain everything you wished?

A. I just want to say thanks, that at least when I arrived at the port of entry I was allowed to enter, and if I am still alive, it is due to the Canadian government's kindness, so I am thanking you. And God bless Canada.

Example 5: Bangladesh

A. Since 1980 until now, I have tried my best to cope with the situation and to stay in Bangladesh, at various times I had to leave because I was facing all sort of danger in my country. I came out of my country several times and after staying outside for a few years, I returned, hoping that the situation would be much better, and always wanted to live with my family and all this time I was trying to find a place where I could stay peacefully with my family and continue a peaceful life. But unfortunately the political situation in my country has forced me, has compelled me to go outside of the country and try to make a living in the absence of my family. It was only in Oman when I was going through a newspaper. I don't remember the exact date. There was a news about countries giving shelter to political refugees and Canada's name was on the top of the list. From the Human Right Organisation, Canada Received a Gold Medal for her sympathy and shelter for the Convention Refugees. So I have chosen Canada to be my country, so that I can start a new life here. I hope that my statement under oath will be carefully considered and make me allowed to stay here so that I can make Canada my future country. (12828)

Example 6: Poland

Q. What your real personal political opinions are?

A. Could you precise this question, because I am not member of Communist Party. I do not belong to any Communist organisation.

Q. Certainly you do have some personal opinions and these are as far as the prevailing political system in Poland.

A. First of all I hate the Communism and the Soviets. Also I hate our government which was never elected by Polish people but imposed by the foreign power, the Communist Soviet Union. This government does not represent us, only oppresses us....

Q. Also you experienced some difficulties with the other passport.

A. Yes, because always I was asked, "Are you a member of Communist Party", so I told them always, not that I don't belong to the Communist Party, even more, I hate Communist Party.

Example 6 is a form of what I would call "indirect praise," where the claimant voices his appreciation of Canada and Canadians by uttering remarks which are in accord with our own policies and our national political ideology as perceived by outsiders.

The hearing continues, again moving to another (unmarked) section in which the officials attempt to establish the reasons for the claimant's coming to Canada as opposed to some other "safe" country:

Q. You have a sister in California. Did she leave the country in the same... for the same reasons?

A. No, she left the country for other reasons, it was a question of destiny, pure and simple. Well, I don't know my sister, can I explain a little bit?

Well, my parents died when I was very young and we were two, me and my sister who is seven or eight years younger than I. Our father abandoned us when my mother died because she died before him. Well, from that moment onwards, we were separated and I don't know her, she married someone in Chile and she travelled to the United States. He is an American citizen and for ... it is a question of destiny that all of a sudden we got into contact through other members of the family. when I was 25-30 years old, I knew my uncles and well, they communicated with me regarding her existence, they gave me an address here, in the United States. I wrote to her immediately and we communicated thereafter by means of telephone calls and letters.

As the hearing draws the a close, we have short interventions from the S.I.O. He has been virtually silent to this point, however it should be noted that this Counsel has followed an extremely standard form of questioning utilized as well when S.I.O.s are alone with the claimant.

By the S.I.O. (to the person concerned)

Q. Your mother died in which year?

A. Well, I will soon be forty years old, I was around eight years old because I know that my sister is very, very ... she is a baby.

Q. And when your mother died, your father abandoned you?

A. Yes.

Q. And after that, your father is dead or is he still alive?

A. According to members of my family that I met recently, my father died around 1975.

By the S.I.O. (to the Counsel)

Q. Have you any other questions, Maitre G.?

The Counsel, in the question which follows, seems to demonstrate a certain animosity towards his own client:

By the Counsel (to the person concerned)

Q. Do you have ... for the ... the idea of requesting refugee status in the United States in light of the presence of your sister?

A. Yes, I wanted to enter the United States as a tourist, I asked for a visa twice and I was refused. I also went to the Canadian Embassy, but I did not even have the chance to fill in a form, I was refused.

Q. You were in a hurry to leave the country and that is why you chose (inaudible) Canada?

A. Yes.

By the Counsel (to the S.I.O.)

I have no more questions.

Thank you, Maitre.

Here ends the questioning of the Counsel. The client's best interests would have been served if the Counsel had been thorough and consistent in his questions so as to assist in the production of an Other as credible refugee. Questions which raise suspicion, or which are unrelated to the claim, or which generate contradictions in the hearing, should not be asked by the Counsel if he has the interest of his client in mind. In this case, the Counsel was relatively consistent and accurate; however, there were errors which, as we shall see later on in the appeal case ruling, could have been grounds for rejection.

The S.I.O. now picks up the questioning and, interestingly enough, begins with an error: "Sir, you began to work for the telephone company in Chile in 1971?" In the transcription, the date 1971 in this passage is circled, and 72 is written in. The S.I.O., purposely or not, has asked a kind of trick question and, as we shall see, neither the claimant nor the Counsel noticed. The claimant answered "yes." Now the S.I.O. asks questions which are unrelated to the claim, or certainly unrelated to the latter parts of the narrative. This section could be cordoned off, for the questions which follow (posed by the S.I.O.) seem more pertinent to the issue of whether or not Mr. B. would be a good Canadian than whether or not he is a legitimate refugee; they have no overt bearing upon the case as described, or upon the hearing as set out by the Immigration Act or the United Nations Convention.

Q. You mentioned at item 45 that you finished your studies ... and taken, that is to say secondary studies from 1973 to 1976?

A. Yes, secondary studies.

Q. Were you doing both at the same time, studying and working?

A. Yes, at night.

Q. At night what, studying?

A. Yes.

Q. You finished your secondary studies?

A. No, I did not have the time to finish them.

Q. In which year did you quit?

A. I don't remember very well. I did not finish secondary school, I did two years.

As far as the S.I.O. is concerned, this is all of the information that is required; there are no questions concerning the reasons he left school, the type of training he may have had at work, his potential interest in completing his studies. The information he sought was purely empirical, concerning the level of studies the claimant had attained. It is now clear that as an employee, this claimant would fit into the class of skilled persons who would probably be looking for a job as a labourer in the same sector.

The S.I.O. then tries to close off the hearing, making sure that the claim is clear and that the basis for the claim is set out in purely empirical terms. As such, there is a series of questions to which the answers are already known, as well as a few questions which clear up possible loose ends in the testimony. He does this by attempting to ensure that there is a clear correlation between the persecution and the motive for the persecution provided by the claimant. This may be standard procedure, but it may also be because of the questions raised concerning other layoffs in the company. Because there seems to have been a general down-sizing trend effective in the company when the claimant was layed off, there could be question as to whether the persecution for his Union and political activities precipitated his losing the job at the phone company.

Q. You say that your problems began in 1984?

A. Yes.

Q. When you were elected as delegate of the Union?

A. Yes.

Q. And before 1984, did you have any problems?

A. No.

Q. No problems as all?

A. No.

Q. Were you a member of a political party?

A. No. Simply, I signed up in 1984 as a member.

Q. A member of which party?

A. Of the Radical Party of Centre Left.

Q. You also mentioned that in 1986, on October 10th, you were layed off?

A. Yes.

Q. And how were you layed off? Was it by verbal notice or by written notice?

A. Both.

Q. Ah, both. Explain once again please?

A. I was given a letter and afterwards, the manager called me for an interview. Well I was told, the manager explained that I was being layed off by a reduction ... by virtue of a plan to reduce the personnel and that unfortunately it was my turn. He did it very nicely. Well, for formal reasons he told me that I must always keep in touch to see if there are possibilities for reintegration, but it was impossible.

Q. You say that you also received written notice?

A. Yes.

Q. And following the interview with the head of personnel you received what type of letter?

A. It was a short letter, they said that for ... on account of a plan to reduce personnel, the company had to reduce the number of employees. And that unfortunately, it was necessary to reduce the number of personnel and that you are a person affected by this decision. This is all that I remember about this letter.

Q. Were there other employees layed off in October of 1986?

A. Yes.

Q. How many?

X A. I think that at that time, we were around eighteen persons layed off.

In this case, the X in the margin does not seem to indicate an error in the transcription, but rather a detail that was important to someone in the process of considering the claim. That there were eighteen people layed-off at the same time, and that there is no indication that these were eighteen persons involved in either the Centre Left Party or the Union, one could suspect that the company may have been laying people off as a matter of course, and that the claimant's losing his job is unrelated to his political opinions. Even if this were the case, it does not really have a direct bearing upon the case since being fired is the least of the persecution suffered by the claimant; yet the questions, once again by the Counsel, lead one to suppose that the motivation for the firing is being put into question. Why the Counsel is once again working against what appears to be the interests of the claimant is unclear.

Q. And what reason was given to these employees?

A. Exactly the same one.

Q. Do you have any idea how many persons were layed off in 1986?

A. I don't know exactly, but it was a lot, at least four hundred people.

By the S.I.O. (to the Counsel)

Q. Any other questions?

By the Counsel (to the person concerned).

Q. The letter that your received, you received it on the same day, October 10, 1986?

A. Yes.

Q. Before then, you had no ... you had never received a letter, a notice concerning your being layed off?

A. No, nothing at all, no.

By now, the refugee has recounted everything that has happened in his life that the lawyer deems pertinent for the claim. He has, in effect, told his "life story," or at least every component thereof deemed necessary for the purposes of this hearing. Studying this kind of narrative requires specific tools, for no matter how limited the "life" described therein, there are nonetheless significant details supplied and a long period of time discussed. One method of analyzing this narrative as a whole does exist in an area of study that is subsumed under the general heading of "life-story research," which, when applied to these hearings, further emphasizes the diminished nature of the constructed Other that is Mr. B. as Convention refugee claimant. This research approach is derived from sociological studies in which an individual's oral account of his or her life (or some aspect thereof) is recorded and then analyzed and given shape. This work has been developed and studied by researchers including Daniel Bertaux, Mary Chamberlain, Consuelo Corradi, Simone Clapier-Valladon, Norman Denzin, Franco Ferrarotti, Eric Krueger and Barnett J. Mandel. Krueger sets the tone in a 1924 article called "The Value of Life History Documents for Social Research" when he suggests that:

> Personal documents of the life-history type, but including the diary and letter types when these cover long periods, give a connected account of a life. The result is a total picture of the personality on the one hand and a detailed description on the other hand of the series of situations and attitudes which make up the life story. The connected life accounts permits an appreciation of the personality from the standpoint of the conditioning inner attitudes and the fixation of these attitudes into reaction patterns. (201)

This is a very promising area of study, with important contributions to a general "history from below" (Ferrarotti 59). In a recent article called "Text, Context and Individual Meaning: Rethinking Life Stories in a Hermeneutic Framework," Consuelo Corradi investigates the epistemological suppositions of this approach and attempts to account for relevant materials traditionally left out of life story research, including "the conditioning that the researcher exercises upon his or her 'object,' the individual experience expressed by the narration, and the flexibility of the heuristic situation" (106). By briefly referring to Corradi's work, I hope to on the one hand situate the Convention refugee hearing in this tradition of study, and on the other explicate the differences between an inquiry of this sort and the attempt to truly recount a life story.

Corradi's work re-emphasizes an earlier point which related work in confessions and biography in fiction to self-description in legal hearings. She describes a life story by underscoring two general tendencies:

> In the first place, an autobiographic narrative consists in giving an order to the whole of past events, in finding an unbroken line that establishes a necessary relationship between what the narrator *was* and what s/he *is* today; the narrative mediates between past, present and future, i.e. between past experiences and the meaning they have now acquired for the narrator also in relation to a future project. A life story is not merely a collection of past memories, nor is it fiction; it occupies an intermediate epistemological space between history and literature since, like the former, it is essentially indebted to a past that 'happened' and, like the latter, it is able to make use of rhetorical techniques. (107)

Several salient points are raised in this first description; of these points, that of the relationship between who the narrator was and who s/he is today is undoubtedly the pivotal one. Having read the initial description of the Convention refugee hearings, one could be mistakenly led to believe that the life story is of central concern because "information should be as closely related to the definition of a Convention Refugee as possible" suggesting that decisionmakers want to know what the claimant *is* (doing in Canada), and that "the Refugee Status Advisory Committee knows the situation in your country therefore do not describe the general historical detail in [name of country] unduly, rather emphasize specific events that occurred either to you or to members of your immediate family" suggesting that they are interested in knowing what the refugee *was* doing back home and, finally, what the relationship is between these two kinds of experience. That life stories research postulates a possible accord between the two realms suggests that there is a potential for consistency between the past and the story thereabout.

The second major area of interest in life story research concerns the relationship between the teller and the tale, the questioner and the information revealed during the interrogation:

> [T]he narrative is engendered by a question on the part of the researcher, and it takes shape in a dialogue that places narrator and researcher on an equal footing. In fact, very soon after the beginning of the interview there will no longer be a questioner and an answerer, one who understands and one who is understood. Instead each of the participants is understood by the other and altered by the interaction with the other.... This face-to-face relationship directs the life story and makes it the product of an intersubjective process of knowledge. The life story contains both the narrator and the researcher; through dialogue the latter becomes a constituent element of his or her own object of study. (108)

This second description, critical to our understanding of the ways in which the Convention refugee hearing differs from a life story, contains some of the same presuppositions concerning the relationship between the questioner and the person questioned as we saw in the work of Teun Van Dijk. There is never a moment during the Convention refugee hearing in which a true "dialogue" (in Bakhtin's sense of the word, as we shall see later on) occurs, or that the narrator and questioner (researcher) are on an equal footing. Furthermore the notion of there being someone who understands and one who is understood is true only in (Saussurian) theory. Corradi states:

> The dialectic of otherness, too, gives rise to a specific criterion of evaluation. The presence of the researcher, which creates but also presses to bridge the gulf of otherness, is traditionally viewed as a distorting factor. If we take the dialectic of otherness as one of the premises of biographical materials, it becomes, on the contrary, the *locus* of knowledge and the epistemological origin of a criterion for analyzing such material. (108)

Even the notion that the "overall meaning" of the narrative can be compared to "other life stories collected in the same social environment and reflecting the same historical period or the same family of problems" (108) has limited applicability here; what we have learned through comparison of various transcriptions is that the institutional framework dictates such a restrictive narrative form that the constituted Other cannot have a life story and, unless certain conditions are met, is unlikely to have a suitable refugee story either. When for example Mr. B described events directly pertaining to his persecution, he was strictly in the realm of the chronological and the empirical. When he was not, he was in "normal" time, the time when nothing important occurs, the time which we would normally consider "life."

Q. And afterwards, you returned to work the next day?

A. Yes, *as usual.*

Q. And afterwards?

A. The time continued to pass, I continued *my normal Union activities*, I continued with my work as well and the year went by in this manner, up until the moment when I was intercepted in the street. I was leaving my work, it was nighttime, I was heading towards my house and I was intercepted by a vehicle.

Q. Do you remember the date?

A. I think it was September 5.

Later on we have another reference to the time in between moments of persecution:

Q. Afterwards, on September 5 1986, you continued to work for the company?

A. Yes, I continued to work for the company. I continued to work until October 10th. And I continued my activities *normally, as always.*

We can learn nothing about the normal life of this person except in very empirical terms (employment, address, and so forth); and other than the few events related to persecution, we cannot have access to the lives of these claimants as refugees either. The hearings, however, have turned out to be revealing in an unexpected way; they have permitted us to read backwards, to evaluate the institution more fully than the refugee. This is what Corradi calls "a different way of looking at biographical materials," which emphasizes the ways in which documents "'fix' the transient event of speech:"

> By redescribing the social system in which the author is placed, the text reveals the broader sociohistorical horizon which functions as background to the narrative. Paying attention to the *context* does in fact mean that the researcher takes the life story/text as the starting-point for reconstructing in their full breadth the social structure and historical moment that limit and give perspective to polysemic individual meaning. (109).

Corradi suggests further on that these two approaches are and must remain inextricably related:

> The emplottment is a further hermeneutic criterion for biographical materials since the connections established between text, context and biographical events have a two-fold explanatory function: we 'explain' the biography by relating it to the social structure and, vice versa, we break down a social structure into its constituents and assess its differential weight and meaning for the lives of individuals. (110)

Corradi's point of view is to emphasize the space within which communication can occur, suggesting quite accurately that "dialogue begins if and when the researcher's motivations for conducting the investigation find a meeting-point in the narrator's motivations for taking part in it" (108-9), an approach which allows entrance to the full array of legal, bureaucratic and intercultural factors which play a role in the hearings. Corradi's study emphasizes motivation and conceptualization as being the two limits of the actual space of interaction: "the structural network in which researcher and narrator participate – the motivations of 'self' and the conceptualization of 'other' – mark the boundaries within which a social identity comes into existence" (109). Accounting for the barriers erected by these two structures is a major undertaking.

Reference to the work of Bakhtin or Bourdieu shows that life story research is hindered by formal structures which minimize the space of interaction, particularly in legal hearings; thus life story research as described by Corradi has limited value in the face of the institutional and power constructs that precede interaction. The pertinence of studying 'life story' research in general is to establish the relationship between individual narratives and broader issues of context and, as Corradi has admirably undertaken, to put into question the division between qualitative and quantitative analysis of these documents. But in the realm of the "diminished other," such distinctions cannot alas account for the "life stories" of the constructed Other as Convention refugee claimant.

6. The Closing Section: The un-Dialogic Other

> I am not the hero of my own life. (Mikhail Bakhtin "Author and Hero in Aesthetic Activity" 112)

> Now his life is drawing to a close. Before he dies, all that he has experienced during the whole time of his sojourn condenses in his mind into one question, which he has never yet put to the doorkeeper. He beckons the doorkeeper, since he can no longer raise his stiffening body. The doorkeeper has to bend far down to hear him, for the difference in size between them has increased very much to the man's disadvantage. "What do you want to know now?" asks the doorkeeper, "you are insatiable." Everyone strives to attain the Law," answers the man, "how does it come about, then, that in all these years no one has come seeking admittance but me?" The doorkeeper perceives that the man is nearing his end and his hearing is failing, so he bellows in his ear: "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it." (Franz Kafka, *The Trial*, 214)

This final section contains the least-structured questions of the entire hearing, thus providing an opportunity to return to Mikhail Bakhtin's work on discursive practices present in legal and confessional discourse.[20] The goal is not to offer Bakhtin's work as an antidote to theories previously mentioned, nor to suggest that there could or even should be a single theory that can encompass the intricacies of even one section of a hearing. But Bakhtin's work has been neglected in analyses of legal discourse, and this has happened to the detriment of discourse theory. In particular, for sections beginning with questions such as: "Sir, do you have anything else to add to this declaration?"; or "Do you have anything to add, Maitre G.?" are well-described by Bakhtinian notions such as dialogism, speech genres, reported speech and open-endedness. My reading of Bakhtin's work is one that emphasizes its radical nature, and as such I would not apply his work in a liberalistic fashion by claiming that his work could help amend the present system; by its very nature, Bakhtin's work forces the reader to consider utopian alternatives which would permit the kind of open-ended speech favoured in his discussions of the carnival and

the novel.[21] Before turning to a Bakhtinian analysis, however, the closing statements will be noted and final references to juridical information will be made.

The "closing section" previously defined begins as follows:

> *By the S.I.O.* to the person concerned.
>
> Q. Sir, do you have anything else to add to this declaration?
>
> A. First, we arrive in this country having fled a dictator under whom we could not continue to live. I come with my family to your country to ask for political asylum and permanent residence because in our country, we do not know our future.

This final statement offers the claimant the potentially vivifying chance to utter whatever s/he wishes; but in the hundreds of claims examined for this study there were but a handful which contained new or potentially valuable information in the final section. The mode of questioning employed and the structure of the hearing resist whole areas of the claimant's potentially-valuable experience, and by the time s/he arrives at the final section s/he has *learned* from the procedure what is expected and therefore rarely attempts to deviate by offering new angles from which the persecution could be seen. For example, persecution described in early sections as arising out of a person's membership in a particular social group could be complexified in this section through reference to the ways in which this affiliation led to other difficulties (not previously described, or considered by the applicant, in terms of *persecution*). This could also be occasion for clarifying points in the testimony with which the claimant felt uncomfortable, or in which s/he had felt limited by the nature of the interrogations; but instead, the utterances at this point are generally re-statements of testimony already provided (as in the case of Mr. B.), declarations of love for Canada and adoration for its people, or no statement at all. The claimant is apparently tuned-in to what (s/he thinks) is expected from him/her, and for this reason this section seldom contains any surprises or unexpectedly valuable information (even if unrelated to the claim)

Mr. B.'s claim ends on an unexpected note, with a new intervention from the Counsel:

> *By the Counsel* (to the person concerned).
>
> Q. Mister B., you have a son who accompanied you here?
>
> A. Yes, sir.
>
> Q. How old is he?

A. Fifteen years old.

By the S.I.O. (to the person concerned).

Q. This is the only child you have?

A. The only son.

Q. You travelled with your wife and your child on the same date?

A. Yes, all together.

By the S.I.O. (to the Counsel).

Q. Do you have anything to add, Maitre G.?

A. No.

Q. Any submissions?

A. No submissions.

Thus ends the questioning by both the Counsel and the S.I.O.; all that remains is the (standard) concluding statement and the sworn testament concerning the accuracy of the transcription:

> *By the S.I.O.* (to the person concerned).
>
> So, sir, you will receive a copy of the transcription, your lawyer will receive a copy. You may read the transcription and if there are corrections, don't hesitate to make them and send them to us as soon as possible.
>
> So I consider this hearing finished.
>
> I hereby certify that this is a truthful and exact transcription of this hearing.
>
> *[signed]*

This brief final statement is usually somewhat more elaborate in English, although that may be because the formula was slightly modified between April and June of 1987 (when the English version was recorded):

> Q. Sir, a transcript of your examination under oath will be made. You and your Counsel will each receive a copy of this transcript.[22] If there are corrections to be made to the transcript, please make them on an affidavit and send them to us at the earliest possible date. Another transcript will be sent to the Refugee Status Advisory Committee in Canada (*Immigration Act*, 1976, *supra* note 1, ss. 45(4), 48). The Refugee Advisory Committee will carefully review your examination and will make its recommendation to the Minister of Immigration. Based on that recom-

> mendation, the Minister will decide if you are a Convention Refugee.[23] You will be personally informed of that decision. Thank you all. This examination under oath is now completed and it's now twenty minutes after three. Thank you all for your presence during this examination.
>
> COMPLETED DECLARATION UNDER OATH

The refugee had the right to make corrections to this transcription, however "nothing of substance may be altered" (Wydrzynski 294). Within fifteen days of a negative ruling from the Minister, the refugee also had the right to appeal to the Immigration Appeal Board. If no such application was made, the initial inquiry was resumed and the adjudicator presiding "shall make the removal order or issue the departure notice that would have been made or issued but for that person's claim that he was a Convention refugee" (*Immigration Act, 1976*, ss. 32(6), 46). The fact that this is a *purely administrative decision* (for reasons see *Singh et al. v. M.E.I.*; *Saraos v. M.E.I.*; *Mensah v. M.E.I.*; *Brempong v. M.E.I.*) now comes into play, for now that the hearing is over, there is limited grounds for appeal even if the claimant recognized an error in the testimony and make a claim to the Immigration Appeal Board within fifteen days (these grounds have been further limited since 1987).

One avenue open to the refugee was noted in a ruling by Walsh, who suggested application to the Board for redetermination of the claim and not, for example, in by a writ of certiorari (see *Arumagam v. M.E.I.*, p. 19). This application is difficult to win without evidence of errors in law, and therefore, the element of *discretion* (both from the Courts and from the Minister) is extremely important in the final ruling. In this respect, consider the ruling of *Saraos v. M.E.I.*, pp. 307-308, which states that the Minister may "consider and base his decision on any evidence or material obtained from any source, without having to give a chance to the claimant to respond to that evidence." This was further strengthened by the ruling of Wilson, J. in *Singh et al. v. M.E.I.* on pages 196-7. Cantin summarizes her findings:

> She felt that the process leading to the Minister's determination was insulated from input of the claimant, other than his claim and the transcript of his examination under oath. Wilson, J. concluded that neither s. 45 of the Act nor the common law obligation of fairness at this level required an opportunity to be given to the claimant to be heard or to respond to the advice given by the Refugee Status Advisory Committee to the Minister. (19 n. 51)[24]

The protection offered to the refugee is that the decision is supposed to be *fair*, an important notion in any matter of *discretion*. Wilson J. in *Singh et al v. M.E.I.* stated that the Refugee Status Advisory Committee and the Minister

"[...] have an obligation to act fairly in carrying out their duties in the sense that decisions cannot be made arbitrarily and they must make an effort to treat equivalent cases in equivalent fashion" (197). During the period in which cases were administered and decided in this fashion, however, it was difficult to determine if this requirement for *fairness* was being upheld a problem inherent to administrative law. As James A. Jerome, Associate Chief Justice, wrote in *Sobrie v. Minister of Employment and Immigration*, rulings can be, or even should be, based upon variable criteria from one case to the next:

> Obviously, the purpose behind s. 115(2) of the *Act* is not merely to repeat the procedure of evaluating an immigrant on the usual grounds specified in the *Act*. The intention is to provide a fresh view of the immigrant's situation from a new perspective. It follows that for the Minister to fairly consider an application under this section, he must be able to direct his mind to what the applicant feels are his humanitarian and compassionate circumstances. These may have nothing to do with the facts contained in the file of his previous immigration proceedings. (7)

This kind of thinking is intrinsic to the entire practice of administrative law. In a passage of *Principles of Administrative Law* dealing with the difference between "general" and "inflexible" policy in administrative rulings, David P. Jones and A.S. de Villars bring to light some important notions concerning "discretion:"

> ...the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review.
>
> On the other hand, it would be incorrect to assert that a delegate cannot adopt a general policy. Any administrator faced with a large volume of discretionary decisions is practically bound to adopt rough rules of thumb. This practice is legally acceptable, provided each case is individually considered on its merits. (137)

After a careful review of all pertinent sections of the *Immigration Act* as well as jurisprudence that has come out of cases handled in accordance with said *Act*, a crucial point emerges. The issue is not purely formal, and the problem is not to simply suggest a better format for juridical review; the fact is that the refugee as Other exists in a realm of discursive relations that is far more complex than legal references would have us believe.

Several points remain to be discussed, in particular the relations amongst the various parties to the hearing, the relative power of each participant, and the kind of interaction that produces the Other as described here. Since the

legal apparatus is useful on a procedural level, and since other theories mentioned to this point allow the researcher to note the flaws of the hearing rather than to construct a vision of the power structures present during the hearing, it is useful to return once again to the works of Mikhail Bakhtin.

Bakhtin and Legal Discourse

Bakhtin's work was cited at the very outset of this study as both a motivation for the study of Otherness, and as a precursor in important areas of discourse analysis. A partial list of pertinent areas of Bakhtin's work for details of the hearing described thus far would include his work on the excess of the author's seeing and knowing (i.e. *Art and Answerability*, hereafter *Art* 12), the vital aspect of any experience that can never be described by the author (cf. Ippolit's confession in *The Idiot* 396 ff.), the relationship between appearance and impression, narrative and perspective, uniqueness and annihilation of difference for the purposes of gaining access to his experience (ie. *Art* 23), the theory of voices and speech genres (as means of identifying typified discursive practice) (ie. *Dialogic Imagination*, hereafter *Dialogic* 303 ff., specific examples from Dickens' *Little Doritt*), the "excess" of seeing and the action of "filling in," from my own excess, the gaps in the narrative of the other (again, Ippolit's speech in *The Idiot* and Bakhtin's *Art* 146), the whole notion of 'sympathy,' which is central to our forming a relationship with a character such as the *Man from Underground*," (ie. *Art* 82), and the *transgredient moments* introduced into a reading of a confession from an Other and the ways in which these moments define the axiological positions of both the confessor and the confessee.

Having examined contemporary studies in discourse theory, it is now useful to return to some of these elements in Bakhtin's work because he (like Dostoevsky) was interested in the kinds of problems raised in confessional and legal discourse, and by extension in the drama, the intricacy, and the constraints of any situation wherein someone is judged in accordance with a set of immutable laws.

References to issues pertaining to legal discourse and juridicial practice are found in various works by Bakhtin, but are nowhere assembled or fully elaborated. We can assume, however, that he wrote a significant body of work on legal discourse in the early 1920's; Clark and Holquist, for example, state that "a letter of January 1922 to Kagan Bakhtin notes that he [Mikhail] has been working on an essay about 'the subject in moral life and the subject in the law,' which is to serve as an introduction to a major work on moral philosophy" (53, and reference 37 p. 364). Notebooks from this period, which evidently contain portions of this study, have apparently survived. Holquist

notes that "one series [of notebooks], which deals with the ethical nature of deeds in everyday life, may well be a portion of the book on moral philosophy referred to in *Art* in 1921, which is itself probably a version of the text on 'the subject in ethics and the subject in the law' whose completion was announced in *The Life of Art* in August 1922" (54). Remnants of his work on legal discourse can be recovered through reference to a range of texts, notably those assembled in *Art and Answerability*, *Marxism and the Philosophy of Language* and *The Dialogic Imagination*.

i. Self and Other, Other as Author

In "Discourse in the Novel" Bakhtin makes frequent reference to the inadequate juridical and ethical techniques that have been developed to deal with legal discourse:

> Juridical (and ethical) techniques have been developed for dealing with the discourse of another [after it has been uttered], for establishing authenticity, for determining degrees of veracity and so forth (for example, the process of notarizing and other such techniques). But problems connected with the methods used for formulating such kinds of discourse – compositional, stylistic, semantic and other – have not as yet been properly posed. (*Dialogic* 350)

With reference to his work on character's discourse in the novel, he writes:

> The enormous significance of the motif of the speaking person is obvious in the realm of ethical and legal thought and discourse. The speaking person and his discourse is, in these areas, the major topic of thought and speech. All fundamental categories of ethical and legal inquiry and evaluation refer to speaking persons precisely as such: conscience (the "voice of conscience," the "inner word"), repentance (a free admission, a statement of wrongdoing by the person himself), truth and falsehood, being liable and not liable, the right to vote ... and so on. An independent, responsible and active discourse is *the* fundamental indicator of an ethical, legal and political human being. (*Dialogic* 349-350)

Bakhtin's approach clearly puts into question any theoretical enterprise that is an attempt to judge the individual through an examination of the inner man, because the individual is *unique* in Bakhtin's sense can only be revealed in dialogue, and therefore with reference to the Other. Holquist writes:

> A first implication of recognizing that we are all unique is the paradoxical result that we are *therefore* fated to need the other if we are to consummate our selves. Far from celebrating the solipsistic "I," Bakhtin posits uniqueness of the self as precisely that condition in which the necessity of the other is born. ("Introduction," *Art and Answerability* xxv)

This is the point at which author-ing meets other-ing and theory of the novel meets constructing others in discourse. The process of constructing this self as Other is similar in Bakhtin's sense to constructing the hero (in the dialogic novel) because "I give shape *both* to others and to my self as an author gives shape to his heroes" ("Introduction," *Art and Answerability* xxx); and it is in this sense that "art and life are not one, but they must become united in myself – in the unity of my answerability" (Bakhtin, "Art and Answerability" 2). The creation of the Other as described throughout this text is a dynamic process whereby the claimant responds to the immediate situation to which the Other must answer, just as the creation of the hero must occur within a dialogic interaction capable of producing a "dynamically living relationship" between author and hero ("Author and Hero in Aesthetic Activity" 4). Bakhtin emphasizes our own inadequacies in terms of auto-representation, the upshot of which (ie. for the Convention refugee) is our inability to monitor the image that we are producing (a phenomenon exacerbated in cross-cultural discourse situations):

> [E]ven though I do not ordinarily represent to myself an image of myself, I could do it with a certain amount of effort. In such a case, I could represent it to myself as delimited from all sides, of course, much as I see the other. This represented image, however, lacks any inner cogency, for I do not stop experiencing myself from within myself, and this self-experiencing remains with me or, rather, I myself remain *in* it and do not introduce it into the mentally represented image of myself.... While my mental representation of another human being corresponds quite adequately to the full-ness of my actual seeing of him, my *self*-representation is contrived and does not correspond to any actual perception. The most essential part of my actual experience of myself is excluded from outward seeing. ("Author and Hero" 37)

This passage is a useful description not only of problems inherent in assessing the representation of the overall image of the self to the other, but of those inherent in any attempt to monitor the image projected in a discursive situation. Without adequate assessment of either the image or the process of constructing this image, the refugee could draw inaccurate conclusion concerning his performance and therefore *learn* the wrong kinds of lessons in the course of the proceedings.

Bakhtin's work undermines attempts to make the individual an object of indifferent analysis (an accusation that could be levelled against virtually any "hearing"), and as such his work is valuable for studies of the adjudication process. His approach does not begin with the assumption that it is possible to "approach him [the accused, the refugee, the or confessor or the witness] and reveal him – or more precisely, force him to reveal himself" (*Problems* 251-2); instead he proposes a locus in which an addressor converses with him dialogically in the hope of creating a level of dialogic understanding novel to all parties. Though idealistic, like many of his loci for interaction (the dialogue, the carnival, the dialogic novel, the author-hero relationship), such a vision is nonetheless applicable to legal hearings when considered in light of the works of theoreticians who contextualized spaces of interaction through their linking of language and sociopolitical structures, notably Bourdieu and Foucault.

Bakhtin's work often complements areas (which I consider) proper to Pierre Bourdieu, in particular with regards to Bourdieu's work on "who speaks?" in *Language and Symbolic Power*. In *Marxism and the Philosophy of Language*, for example, he writes that "juridicial language intrinsically assumes a clear-cut discrepancy between the verbal subjectivism of the parties to a case and the objectivity of the court – between a ruling from the bench and the entire apparatus of judicial-interpretive and investigative commentary" (*Marxism* 123). The consequences, according to Bakhtin, are that "the stronger the feeling of hierarchical eminence in another's utterance, the more sharply defined will its boundaries be, and the less accessible will it be to penetration by retorting and commenting tendencies from outside" (*ibid*). The space in which the hearing occurs is wrought with "hierarchical eminence," a fact that may explain why Bakhtin concentrated upon the utopic discursive spaces created through dialogism and within the carnival, and, as a counter-example, the discourse of law. In the place of this "hierarchical eminence" Bakhtin proposes that persons truly concerned with the "life situation of a suffering human being" in the interest of performing "an ethical action such as providing assistance, consolation, or cognitive reflection" must attempt to consummate the self and the Other through an act of projecting oneself into the Other and then returning to the self, "because only from this place can the material derived from my projecting myself into the other be rendered meaningful ethically, cognitively, or aesthetically" ("Author and Hero in Aesthetic Activity" 26). If there is no projection there can be no understanding, and if there is no return then there is the "pathological phenomenon of experiencing another's suffering as one's own... – an infection with one's suffering, and nothing more" (*ibid*).

> Strictly speaking, a pure projection of myself into the other, a move involving the loss of my own unique place outside the other, is, on the whole, hardly possible; in any event, it is quite fruitless and senseless. When I project myself into another's suffering, I experience it precisely as *his* suffering – in the category of consolation or an acto of assistance. Referring what I myself have experienced to the *other* is an obligatory condition for a *productive projection into the other* and cognition of the other, both ethically and aesthetically. (*ibid.*, my emphasis)

In order to consummate we must return to our own place, for only by doing so is it possible to complete the material acquired during the moment of the projection. If this is achieved, then the body which until then had been but the source of description of the suffering becomes "an expression which embodies and consummates the suffering expressed" thus allowing us to complete him with our own situatedness (*ibid* 27). This is the point at which the interaction becomes dialogical and the parties thereto become vivified; but such a recognition of the Other's humanity through respect for his/her uniqueness and experience cannot in Bakhtin's opinion occur in the confines of the highly codified, formalized and hierarchized hearing as previously described (with regards to Bourdieu's work).

ii. Bakhtin and the confession

The Convention refugee hearing has been shown to be a kind of confession which lays bare certain areas of the claimant's experience in order to establish eligibility for refugee status. This awkward procedure could lead to dramatic revelations and important communications between the claimant and his Other as confessor, marking the end of an old life and the beginning of a new one for the once-persecuted claimant; unfortunately, the details of torture and persecution fundamental to this kind of confession are often too wrought with pain for adequate recollection. Bourdieu, in his analysis of oral discussion, notes the obvious resistance on the part of the confessor (or in this case the claimant) to divulge certain kinds of valuable testimony when he states that

> ...l'on se doit d'aller en chaque cas au point où l'on attend le maximum de résistance, ce qui est l'inverse exact de l'intention démagogique, et de dire à chaque auditoire, sans provocation, mais aussi sans concession, l'aspect de la vérité qui est pour lui le plus difficile à admettre, c'est-à-dire ce que l'on croit être sa vérité en se servant de la connaissance que l'on croit avoir de ses attentes non pour le flatter et le manipuler, mais pour "faire passer", comme on dit, ce qu'il aura le

> plus de mal à accepter, à avaler, c'est-à-dire ce qui touche à ses investissements les plus profonds, on sait que l'on est toujours exposé à voir la socio-analyse tourner au sociodrame. (*Choses* 9-10)

S.I.O.s are generally untrained to deal with such strain, and are therefore in a situation that overwhelms, confuses, or simply renders them mute. Not surprisingly, it has recently been revealed that some S.I.O.s pass notes, giggle, and exhibit insensitive behaviour;[25] once again, we return to the realm of Konrád's *Case Worker*:

> I myself, I believe, am a burden bearer without illusions, specifically of the complaining type, and I would gladly pass on my load to anyone willing to take it. Why should I of all people be saddled with these outcasts? True, I fell into this trap of my own free will, but at least I feel entitled to gripe about it. I am an underpaid, disabused, middle-level official like hundreds of others; even when I have change in my pocket, I tend to cross the street when I see a beggar; I hate visiting sick people in the hospital; I grumble when I have to stand up for an old lady on the bus; rather than listen to the snivelling of the widower next door, I avoid saying good morning to him. Why, then, have I chosen a job that obliges me, day after day, to put up with the stench of other people's suffering? How could I possibly summon up enough sympathy to contend with the misery that is wearing out the chair on the other side of my desk? (21)

The S.I.O.s, like the bureaucrats in the welfare organization for children, are placed in the role of confessees, but are not provided the tools for such a role or indeed the motivation to acquire the true understanding Bakhtin deems possible (and necessary) between confessor and confessee.

> Ill at ease, the client remains standing until offered a chair; nervously he fiddles with a cigarette, and eventually asks for permission to light it. His sweat glands operate at full capacity, his breath goes sour, the blood rises to his forehead. Finally, after beating about the bush for a while, he delivers himself of confessions that close friends would hesitate to make to each other. Since there are no counterconfessions to distract him, the floor is all his. Even a civil servant, silently smoking amid bleak official furniture, can serve as confessor. He leans forward attentively and asks two or three expert questions; that suffices to release the flood. (Konrád 15)

The ways in which the power of this flood is dammed and diverted can only be described by a study of the discourse and the power relations active therein, previously described. What remains is the strategies by which the self is constructed with reference to the Other, and the ways in which the confession acts out in discourse the physical and discursive limitations imposed by the structure of legal hearings. Bakhtin's work is particularly useful in these areas

because there is a strong link between discourse of the confession and the attempt to translate oneself from inner language into the language of outward expressedness, areas described by Bakhtin in his study of author/hero and self/other relations.

> The point at issue here is precisely how to accomplish the task of translating myself from inner language into the language of the unitary plastic and pictorial fabric of life as a human being among other human beings, as a hero among other heroes. ("Author and Hero in Aesthetic Activity" 31).

The confession is a mode of discourse that was a lifelong interest for Bakhtin and concurrently of "enormous importance in Dostoevsky" (*Problems* 262). Concerning Dostoevsky, Bakhtin wrote:

> The problem of *confession* in cases being investigated for trial (what has made it necessary and what provokes it) has so far been interpreted only at the level of laws, ethics and psychology. Dostoevsky provides a rich body of material for posing this problem at the level of a philosophy of language (of discourse): the problem of a thought, a desire, a motivation that is authentic – as in the case of Ivan Karamazov, for instance – and how these problems are exposed in words; the role of the other in formulating discourse, problems surrounding an inquest and so forth. ("Discourse" *Dialogic* 350)

The *confession* is a laying bare, a communion of sorts with another, in which the confessor *reveals the depths of the human soul* (cited in *Problems* 143-4). In his prefatory note to *Three Tales of Edgar Poe*, Dostoevsky wrote that "he [Poe] almost always takes the most extraordinary reality, places his hero in the most extraordinary external or psychological position; and with what power of penetration, with what stunning accuracy does he tell the story of the state of that person's soul!" (*ibid*) This is an overstatement, however, for Dostoevsky always insists that the confessee holds back an element of the narrative that could render the confession complete. In *The Idiot*, he clearly defines the parameters within which the realist novelist works and thus sets out the limit to which vitality can enter into narrative:

> [I]n every idea of genius or in every new human idea, or more simply still, in every serious human idea born in anyone's brain, there is something that cannot possibly be conveyed to others, though you wrote volumes about it and spent thirty-five years in explaining your idea; something will always be left that will obstinately refuse to emerge from your head and that will remain with you forever; and you will die without having conveyed to anyone what is perhaps the most vital point of your idea. But if I too am now unable to convey all that has been tormenting me for

> the past six months, then at all events you will understand that, having attained my present "last conviction", I have perhaps paid too much for it; it is this I thought necessary, for certain reasons of my own, to emphasize in my "Explanation." (406)

Bakhtin, like Dostoevsky, outlines a vision of confession which would make its realization nearly unimaginable; Harriet Murav gives a good example from a letter that Dostoevsky wrote to his brother upon emerging from prison in 1854:

> In this letter Dostoevsky compares describing his experience among the convicts to a repetition of sorts of the old wound. The crucial line translates as "How can I convey to you everything that is going on in my head?" More literally, and closer to the Russian, it would read; "How can I hand you my head".... Dostoevsky says that it would be "impossible" for him to describe everything he lived through and that of which he came to be convinced. (859)

Authoring, othering and confession meet in the attempt at constructing self through others and others with regards to the situatedness of the self. Writing on the work of Dostoevsky with reference to Bakhtin's studies of confession, Robin Miller notes that "ideally, a confession could register and convey the condition of the inner man, but ... in reality, the very act of making a confession – the attempt to portray one's inner being – could easily falsify or change the essential idea the author of the confession was initially trying to express" (97). Miller hereby describes the intrinsic perils of a dynamic relation in which "essential ideas" central to one's own conception of the "inner being" could be changed in the course of the living interaction. This is not, as she suggests, a "falsification" (which "inner man" is being falsified?), but rather a creation that occurs between the situated selves in dialogue. The problem for the claimant is that such a self might not be "productive" to the clear ends of refugee determination even though potentially "productive" for other reasons. Bakhtin stated in the 1961 notes to *Problems* that confession *could* be "a meeting and interaction between the others' and one's own's eyes, and intersection of worldviews ... an intersection of two consciousnesses," "a dialogic *concordance* of unmerged twos or multiples" (*Problems* 289, author's emphasis).

Most of Bakhtin's work on confession is found in *Problems of Dostoevsky's Poetics*, wherein he concentrates upon Stavrogin's confession to Tikhon in *Besy*, and upon the question of the narrator's self-representation in *Notes From Underground* (from here on *Notes*). Here, Bakhtin characterizes this confession mode of discourse as being "the only form of speech that could resist an external, finalizing definition, given by another. The hero's speech about himself is essentially self-protective. The hero never utters his last word

about himself. He holds something in reserve, a "loophole," ... which allows for the possibility of altering the 'ultimate, final meaning of one's own words'" (Murav 859). In a similar vein, David Lodge writes that:

> To allow characters to speak with their own social, regional and individual accents, whether in quoted direct speech ('dialogue' in the ordinary sense of the term) or by allotting them the task of narrating itself, as in the epistolary novel, the confessional novel, and the colloquial vernacular narrative known to the Russians as *skaz*; or by means of free indirect style, a rhetorical technique discovered by novelists in the late eighteenth century and developed to stunning effect in the nineteenth and twentieth – to do all or any of these things in narrative is to make interpretive closure in the absolute sense impossible. (23)

In this perspective, the narrator of *Notes* must reject the prostitute Liza because she understands him; this creates a vicious cycle in which the confessor needs the confessee, but only in so far as the confessee is unable to know the confession in advance (see *Problems* 253-4). Thus,

> Bakhtin valorizes the confessional mode in terms of "adequacy" or authenticity, but this positive language is at odds with the negative formulation of the vicious cycle. The confessional utterance, whether it is found in dialogue with another, as in the example of Stavrogin and Tikhon, or in an extended first-person narrative, is marked by opposition, struggle, and distortion. The consequence of the loophole, or the word with the sidelong glance, is that the hero's self-definition is rendered unstable. "The loophole profoundly distorts his attitude towards himself." (Murav 860; internal citation from *Problems* 234)

Bakhtin's work on confession is important here because it forces the reader to contemplate the relationship between the confession and the notion of Otherness; for in Bakhtin, no confession can occur without the presence of the Other:

> Bakhtin does not distinguish between confessional discourse that is addressed to another, before whom one could possibly distort oneself, and confessional discourse that is not oriented towards another, and hence would be free from such temptations, as Miller suggests. For Bakhtin all confession as self-utterance must necessarily be addressed to another. Without another, there can be no self. This point ... is part of a set of assumptions shared by the Bakhtin group, but it emerges with particular force in Bakhtin's 1961 notes, entitled "Toward a reworking of the Dostoevsky Book." Bakhtin wrote that "the most important acts constituting self-consciousness are determined by a relationship toward another consciousness". (Murav 859; internal citation from *Problems* 287)

Thus, the value of Bakhtin's work with respect to confessional discourse is multi-faceted, and is particularly useful here since it both draws the Other into inexorable relations with the claimant, and insists upon the impossibility of full expression unless the conditions for Bakhtinian dialogue can be met. The reality of the hearings, as described, clearly demonstrates the obstacles to such an occurrence.

iii. Bakhtin and Theory of Rhetoric

Discussion of confession and of legal discourse lead as well to the area of rhetorics, a good reference point for an analysis of Bakhtinian Otherness. Some of the issues in this study could to some degree be analyzed by reference to theories of rhetoric and Bakhtin, an area which has benefitted greatly from recent work by Don Bialotosky, Robert Busch, William McClellan, Nina Perlina, Susan Wells, and others.

Bakhtin's interest in dialogue led him to employ rhetoric as a counter-example to dialogism and heteroglossia. For instance, in Bakhtin's work the confession (or the Hearing) is (ideally) a dialogic process and not an exercise in rhetoric where

> there are unconditionally right and the unconditionally guilty; there is total victory, and annihilation of the opponent. In dialogue, annihilation of the opponent also annihilates the very dialogic sphere in which discourse lives.... This sphere is very fragile and easily destroyed (the slightest violence is sufficient, the slightest reference to authority, etc). (Caryl Emerson cited in *Problems* xxxvii)

This kind of monologic versus dialogic tension occurs in many contexts and in numerous discussions in Bakhtin's work, including comparisons between Tolstoy and Dostoevsky, the dialogic versus the monologic novel, and the relationship between Bakhtin's work and that of contemporaries who were more interested in, for example, the formal method of literary scholarship. Both Nina Perlina and Robert Busch have studied this distinction with reference to one of Bakhtin's apparently dialogic others, V.V. Vinogradov. Perlina writes:

> Where Bakhtin states that any individual discourse act is internally a non-finalized, open-ended rejoinder, Vinogradov demonstrates that even a real-life dialogue is built by a set of clear-cut monologic procedures. Where Bakhtin finds dialogic reaccentuation of another person's utterance, the hidden multi-voicedness, or the polyphonic 'word with the loop[hole],' Vinogradov discovers the speaker's attempt to muffle the voice of the opponent, to discredit his speech-manifestations, and to advance his own monologic pronouncement over the dialogic reply of another per-

> son.... Within the framework of Vinogradov's poetic system, a speech partner is the rhetorician whose main intention is to make his oratory the only effective and authoritative speech manifestation. ("Dialogue" 15-16)

Bialotosky notes that Bakhtin's work on rhetorics always accounts for the two parties to the discourse, even in a monologue. He states:

> The apparently single-minded advocate, then, pressing a case with all available means of persuasion, must be a two-sided participant in a two-sided forum, one whose very participation in that forum is an acknowledgment of the two-sidedness of the question and a response to the other side. There is no contradiction, then, between openness and advocacy, for the real contradiction lies between both openness and advocacy, on the one hand, and ignorance and silent repression, on the other. Even monologic utterances participate in the struggle of logos with anti-logos, but closed minds and heavy hands do not. (3)

This is one of the many points of resemblance that Bialotosky notes in his comparison of Bakhtin's view on rhetorical otherness and that of Michael Billig. Billig's work is certainly in accordance with the kind of analysis undertaken in the early part of this study inasmuch as he suggests that the motivation for the discourse must be monitored continuously in order to extract contextualized meaning:

> [T]o understand the meaning of a sentence or a whole discourse in an argumentative context, one should not examine merely the words within that discourse or the images in the speaker's mind at the moment of utterance. One should also consider the positions which are being criticized, or against which a justification is being mounted. Without knowing these counter-positions, the argumentative meaning will be lost. (91)

For Billig, as for Bakhtin, the argumentative context is always present; in the case of simple declarative statements made by the claimant, or in simple (apparently non-argumentative) questions asked by the Counsel or the S.I.O., the interests, and therefore the point of view of the parties, are always in evidence. Bialotosky states:

> Though these institutions can limit the issues under debate, the speakers who can participate in them, the arguments that can be introduced, and the judges who can decide, and though they can use the instruments of state or corporate power to maintain order in their chambers and enforce their decisions, they cannot forestall the anti-logoi that may be provided by their logoi, silence second-guessers, or prevent oppositional words in the inner speech of others. (4)

By judging the cases by such narrow criteria, and by insisting upon the empirical in the face of dialogic opposition, decisionmakers too often resist the interactional dialogism implicit in Bakhtin's description. What this suggests is that Bakhtin's work could be used to defile the basis upon which systems of determination (like the one herein described) are erected by questioning the application of confessional discourse to empirical scrutiny. Bialotosky concludes that

> such appropriations of the verbal arts by more prestigious and powerful sciences during the past three hundred years – grammar by linguistics, dialectic by logic and "scientific method," rhetoric by stylistics and psychology – aimed to make the verbal liberal arts more rigorous and reliable but have also made them narrow, abstract, and irresponsible toward the practices which, as arts, they once not only studied but taught. In this context, Billig and Bakhtin revive a rhetoricized dialectic or a dialectical rhetoric in order to open fields delimited by narrow logical paradigms to ambivalent genres and attitudes which those univocal paradigms cannot comprehend. (5)

iv. Monologism and Directing the Testimony

Rhetorics thus described leads to discussions of "monologism," defined by Bakhtin with reference to single-voiced or authoritative discourses such as those that occur in the domain of law. One of the ways in which this kind of legal rhetoric is created is by limiting the range possible discourse. This occurs in the Convention refugee hearing in several ways; first, because the decisionmakers are "aware of the general situation in the country of origin," refugees are asked to "limit their statement to facts related to the particular case." Second, complex testimony must be construed to fit into legitimate categories of persecution (*race, religion, political opinions or membership in a particular social group*). An example is the case of the Tanzanian woman who fled Tanzania and sought refuge in Pakistan, and then fled Pakistan to seek Refugee Status in Canada. In this segment, she was asked why she fled Pakistan despite her being granted status in that country. She claimed that she was persecuted by reason of her religious beliefs, but her narrative probes, or spills over into, other areas which are not specifically covered by the Act:

> *S.I.O.*. What happened to you in Pakistan that convinced you that you should apply for Refugee Status in Canada.
>
> *Claimant.* I had to stay home to look after the children. I could not work.
>
> *S.I.O.*. Did you try?

> *Claimant.* Yes, but they don't let women in the big shops unless very highly educated, and I am not. And no women are allowed to work in factories, so I cannot work.
>
> *S.I.O.*. But you are claiming Refugee Status on the basis of race, religion, nationality, membership in a particular social group or political opinion. What is pertinent here to these categories?
>
> *Claimant.* Because we are not allowed to dress in short dresses. They all say "cover your body well. And your face."
>
> *S.I.O.*. Yes but the question is about persecution on the basis of one of the five categories.
>
> *Claimant.* When we go out, if we don't cover ourselves, people stare at us.
>
> *S.I.O.*. Is that all?
>
> *Claimant.* And they throw stones at us.
>
> *S.I.O.*. Now this is what we wanted to hear. Did this happen to you?
>
> *Claimant.* Yes.
>
> *S.I.O.*. Because of religion?

The S.I.O. is herein refusing the narrative of the claimant by directing the testimony towards his pre-determined goal. This narrow interpretation resists both the form of the experience as it occurred and as it is recalled during the testimony. The experience itself is intertwined in a fabric of events wherein certain threads – say the memory of the car in which the refugee was transported to the prison is tied in with the experience of torture in the prison since they used a car of the same make to run over his feet – are inexorably linked (knotted) to other threads only distantly related. The claimant's transcription, like the novel in the hands of the formalist community is, as Bakhtin says in "The Problem of Speech genres," "suffocating in the captivity of narrow and homogenous interpretations" (97). Like Bakhtin's monologic author, the S.I.O. is not listening to the "fundamental heteroglossia inherent in actual language; he mistakes social overtones, which create the timbres of words, for irritating noises that it is his task to eliminate" (*Dialogic* 327). Or, paraphrasing Michael Holquist's definition of heteroglossia from the appendix of *The Dialogic Imagination*, rather than accounting for the social, historical, meteorological and physical conditions which affect the meaning of a word or statement in the heteroglossia, the S.I.O. strictly conforms to the procedures of the Hearing, thus defying the logic of the *dialogic imagination*.

This discrepancy arises because the frame of the Hearing is poorly-crafted to suit the tapestry of discourse that it is supposed to encompass, and because the parties to the hearing are, as we have seen, ill-equipped to deal with the bridge between discourse and life.

v. Mediations.

One might argue that Bakhtin is too forceful in his critique, that the hierarchy in the courtroom is to some degree mitigated because unlike the author/reader relationship in the novel, the claimant/decisionmaker relationship is arbitrated by mediators. Unfortunately, even despite their best efforts or high level of competence, these mediators can serve as barriers to understanding on account of the limitations imposed by the procedure.

The three potential mediators are the S.I.O., the Counsel, and the interpreter. The S.I.O., who directs the proceedings, but purportedly makes no recommendations or judgements during the examination and has no decision making power over the case, nonetheless colours the narrative through the pattern of questioning, "rhetorical discourse" (*Dialogic* 353), quibbling over fine points, and style of speech. For example, in a Hearing containing numerous long pauses and inaudible whisperings, the S.I.O. interjected and said "I'm sorry. Speak before the microphone. If you want to look at your lawyer or signal to him, bring the microphone before him. But speak before the microphone." Out of context, that is to say, transcribed into the proceedings, this is a damaging interjection. The same applies to the Counsel. Technically, his/her role is to "assist the Refugee by asking questions;" but in certain cases the length and breadth of questioning can serve to compromise the claimant's testimony by insisting upon inappropriate levels of detail.

Then there is the Interpreter, who promises to "translate faithfully, correctly and to the best of his/her knowledge from English or French to the Refugee's native language and vice versa." The interpreter makes no comments during the Hearing (other than the rare occasion when they are asked to clarify a point concerning customs, exchange values, calender differences, and so forth); but the interpreters accuracy and choice of words can, as previously described, *colour* the testimony, sometimes inadvertently (which is to some degree unavoidable), and sometimes because of factors extraneous to the language itself. Discursive practices of refugees who speak without the assistance of an interpreter are often less *tactful* (here Goffman's work on "tact, savoir-faire, diplomacy or social skill" is of particular interest; see *Interaction* 7 ff.) – the Refugee might successfully convey his/her narrative to those present in the room, but s/he will fail to realize that the transcription cannot convey the full range of discourses emanating from the individual. Finally, there was in 1987 a silent mediator between the claimant and the Committee, the transcriber, who listened to the tapes and typed the proceedings of the Hearing into a computer.

The resulting transcription contains the narratives of these three (four?) mediators, and is therefore a hybridization of linguistic consciousness which are discordant and foreign one to another, but at the same time entangled or

inexorably knotted together. The different parties to the Hearing speak different languages, and they also use dissimilar vocabularies, forms, and conceptualizations, because they represent different (sometimes opposing) compendiums of societal interest groups.

These presence of differing (or opposing) interests does not overrule the possibility that alliances will be formed between the various parties to the hearing. There is a relatively small number of Counsels, immigration officials and a qualified interpreters active in a city at any given time. These individuals have long-term working experience with one another, and animosities or alliances are probably inevitable, and sometimes discernable in the transcription.

vi. Languages of the Hearing

The different parties to a case therefore work in *different languages*, both in Bakhtin's sense of *polyglossia*, where two or more national languages interact in a single cultural system, and in the Bakhtinian sense of *heteroglossia*, which reflects a polyglot world of conflicting and interacting

> social dialects, characteristic group behaviour, professional jargons, generic languages, languages of generations and age groups, tendentious languages, languages of the authorities, of various circles and of passing fashions, languages that serve the specific sociopolitical purposes of the day, even of the hour (each day has its own slogan, its own vocabulary, its own emphases) – this internal stratification present in every language at any given moment of its historical existence is the indispensable prerequisite for the novel as a genre. (*Dialogic* 262-3)

The heteroglossia is not *in itself* a barrier to a fair Hearing, in the eyes of Bakhtin. In the "Response to a Question from the *Novy Mir* staff," Bakhtin wrote that "in order to understand, it is immensely important for the person who understands to be *located outside* the object of his or her creative understanding – in time, in space, in culture" (*Speech* 7). This is true for different languages in the same culture, but in Bakhtin's work such "creative understanding" is maximally achievable among different cultures:

> In the realm of culture, outsidedness is a most powerful factor in understanding. It is only in the eyes of *another* culture that foreign culture reveals itself fully and profoundly (but not maximally fully, because there will be cultures that see and understand even more). A meaning only reveals its depths once it has encountered and come into contact with another, foreign meaning: they engage in a kind of dialogue, which surmounts the closedness and one-sidedness of these particular meanings, these cultures. We raise new questions for a foreign culture, ones that it

> did not raise itself; we seek answers to our own questions in it; and the foreign culture responds to us by revealing to us its new aspects and new semantic depths. (*Speech* 7)

The practical, bureaucratic aspect of refugee hearings, the fact that the first priority is to process and adjudicate rather than to "understand" the discourse and profit from the presence of a foreigner, serves as a barrier to Bakhtin's vision of a world that "becomes polyglot, once and for all and irreversibly" (*Dialogic* 12) and where a culture "loses its sealed off and self-sufficient character [because it] becomes conscious of itself only as one among other cultures and languages," and where "from behind its words, forms, styles, nationally characteristic and socially typical faces [will] begin to emerge, the images of speaking human beings" (*Dialogic* 370). Such a world would certainly be desirable; but Bakhtin has more than an idealist's vision of open dialogic discourse affected through the levelling of the present system of power relations. In fact, we could not claim to have the tools necessary to effect a proper analysis of refugee discourse until this apparently lofty ambition is achieved. Bakhtin notes in "Discourse in the Novel" that "stylistic analysis [of the novel] encounters a whole series of difficulties, especially when it deals with different works from distant times and alien languages, where our artistic perception cannot rely for support on a living feel for a language" (*Dialogic* 417).

This is true for analyses of artistic works, like the novel, but equally true (and for the same reasons) for legal or everyday discourse. In *Marxism and the Philosophy of Language*, Bakhtin writes that

> to understand another person's utterance means to orient oneself with respect to it, to find the proper place for it in the corresponding context. For each word of the utterance that we are in process of understanding, we, as it were, lay down a set of our own answering words. The greater their number and weight, the deeper and more substantial our understanding will be. (102)

In this respect, the ideal refugee official would believe in the principle of free migration, be well-versed in the culture and norms of the claimant's country of origin, sympathetic to the plight of persecuted peoples, and sensitive to the different languages spoken by and among each speaker. The need for "sympathetic" employees is of central importance here; bad faith in this system, even if Bakhtin's analysis is rigorously applied, could easily undermine any attempt at helping the persecuted refugee.

vii. The "Authentic" Voice of the Subject.

Alongside of the search for the Refugee amidst this group of mediators arises the need to locate an *authentic voice*, to establish when the Refugee is speaking *from experience* and when s/he is using *reported speech* – that is, repeating what s/he was told to say by a friend or so-called expert. Decision-makers in this process seem to consider that the space in which the Hearing occurs as one in which everything that has occurred in the life of the Refugee could and should be laid bare, and in that sense, the person is asked to speak as though they have been removed from his/her world, as though secrets could be revealed without penalty or as though beliefs could be unveiled. This is an element of the broader compound of problems that arise when the language of state apparatus is used as the measuring stick to evaluate the heterogeneous speech of everyday life. Susan Stewart writes:

> In such domains as the exclusion of bi- (and multi-) lingual education, language requirements attached to immigration restrictions, tensions between nonstandard and standard "dialects" (these terms themselves the necessary fictions by which a transcendent "standard" is created), and the language of state apparatuses in general, the Cartesian position functions to reinforce state institutions and to trivialize change and everyday linguistic creativity. To silence the diversity of the powerful "unsaids" of actual speech in favour of an opaque and universal form of language is to strip language of its ideological significance – a stripping that is itself strongly and univocally ideological. (Morson *Bakhtin* 44)

Refugees are asked to speak "freely;" and in the end, they are permitted to make a final statement, as Mr. B. did:

> *By the S.I.O.* to the person concerned.
>
> Q. Sir, do you have anything else to add to this declaration?
>
> A. First, we arrive in this country having fled a dictator under whom we could not continue to live. I come with my family to your country to ask for political asylum and permanent residence because in our country, we do not know our future.

The S.I.O. is suggesting that the refugee claimant speak freely. He suggests that they let down their guard, like the characters in Dostoevsky's *Bobok* who are in an *anacrisis*, in the extraordinary situation of living out "*the final life of the consciousness* (the two or three months before it falls asleep forever), freed from all the conditions, positions, obligations, and laws of ordinary life, as it were a *life outside of life*" (*Problems* 140). Perhaps he is hoping to provoke the refugees, like Baron Klinevich the corpses, "to reveal themselves with *full*, absolutely unlimited *freedom*" (*ibid*). Says Klinevich: "Ladies and Gentlemen! I suggest that we should get rid of all sense of shame" (*Bobok*

178). But by the end of the hearing, it is apparent that certain kinds of information is favoured; and so this open-ended speech at the end appears more like an opportunity for the S.I.O. to reinforce (in case it was ever necessary) the degree of "freedom" enjoyed by Canadian refugee claimants. The speech by Bobok's carnival "king," cited by Bakhtin, is an ideal description of what is demanded of the refugee: the "surface" in this passage would make reference to the refugee's home country, the "grave" is the carnivalized marginal space within which the refugee is asked to testify, without retribution, about his previous activities:

> But meanwhile I want us not to lie. That's all I want, because it's the most important thing. It's not possible to live on earth without lying, because life and lies are synonymous; well, here we'll tell the truth for fun. Damn it, the grave means something, you know! We'll all tell the stories of our lives and not be ashamed of anything. I'll be the first to tell about myself. I'm a beast of prey, you know. Everything up there was tied together with rotten ropes. Away with the ropes, and let's spend those two months in unashamed truth! Let's strip ourselves naked!
>
> Naked, naked! The cry was unanimous. (179)

Benoit Bouchard, Minister of Employment and Immigration in 1987, stated at that time that "95% of all Convention Refugee claims are bogus" (*The Montreal Gazette* August 8 1988, A1). He and his officials thus began with the assumption that most claimants lie in order to secure refugee status in Canada. "Stop lying," they tell the refugees, drop all marks, all protection, all devices for rhetorical manipulation: "...we are two beings, and have come together in infinity ... for the last time in the world. Drop your tone, and speak like a human being! Speak, if only for once in your life, with a human voice" (252). *But*, "tell us a story that is worthy of our attention." "Show us your scars." "Heed the advise of your lawyer." "Trust us." "Give us empirical facts that confirm your opening statement." As Goffman notes, such trust is contingent upon a levelling of distinction between interactants, a stipulation that is seldom fulfilled during a hearing, an interview, or a session: "Perhaps the clearest form of this is found in the psychiatrist-patient relation, where the psychiatrist has a right to touch on aspects of the patient's life that the patient might not allow himself to touch upon, while of course this privilege is not reciprocated" (*Interaction* 64).

Not surprisingly, therefore, a whole variety of (discordant) voices – sometimes contradictory, sometimes unrelated – speak through the voice of the single applicant. In "Who Speaks for Bakhtin?" Gary Saul Morson (taking the side of "moi") writes that "we cannot really express ourselves fully, because we are always talking to someone, in some situation, a fact which

makes every statement, in all senses, "partial." We never just speak as "a speaker" but as some *sort* of speaker, in some sort of role, using some sort of genre: as poet, journalist, father, mother, petitioner, interrogated prisoner." His respondent, Elle, replies: "Shades of Soviet conditions in that last example, especially when he says that the process of interrogation changes the one interrogated." Moi concludes on a note reminiscent to my own when he states that "We are never fully ourselves in our utterances" (Morson *Bakhtin* 17-18).

Bakhtin offers a methodology for discerning the different voices active in a single narrative, and even more important, explains why these other voices exist – thus defusing arguments currently employed that suggest that a refugee should be rejected if he or she is found to have lied. Refugee hearings contain a plethora of inaccurate, unusual, contradictory, or out-of-place statements which, if an effective methodology could be worked out, could be set aside from the central dialogue and ascribed to one or several sources other than the experience of the Refugee. I shall provide an example of such a statement and then bracket it off from the rest of the transcript by explaining its source.

> *By the S.I.O.* (to the claimant)
>
> Q. Why did you choose Canada?
>
> A. Because in this country, democracy really exists.
>
> Q. Who told you about Canada?
>
> A. A *friend of mine* knew that Canada was helping people who had these kinds of problems. Political ones I mean.
>
> Q. I noticed that your itinerary was as follows: Santiago, Buenos Aires, Miami, New York. Correct?
>
> A. Rio de Janeiro too.
>
> Q. Had you not contemplated claiming Refugee Status or political asylum in those countries?
>
> A. They are not real democracies.

This "friend" is later revealed to be an individual the claimant met in the Buenos Aires airport. He was the man who sold him the ticket to Canada and who provided details of how to secure Refugee Status in Canada. The advice, repeated by the refugee (the statement about "real democracies") was curiously out of place in an otherwise very personal claim based on specific experiences from his home country. Advice of this kind is often provided by brokers and black-market salespeople that refugees meet upon departure from their home country (i.e. in airports) or while in prison. In restating the

words of this "friend" the claimant is, in Bakhtin's sense, speaking another language, insofar as it is a variant of his or her everyday discourse, and using another's speech, with regard to his or her own direct discourse. Bakhtin's theories of reported speech and heteroglossia help to nullify the potentially damaging effect of these moments in the testimony by explaining to *why* they are in the testimony. In "Discourse in the Novel" Bakhtin writes:

> Every conversation is full of transmissions and interpretations of other people's words. At every step one meets a "quotation" or a "reference" to something that a particular person said, a reference to "people say" or "everyone says," to the words of the person one is talking with, or to ones own previous words, to a newspaper, an official decree, a document, a book and so forth. The majority of our information and opinions is usually not communicated in direct form as our own, but with reference to some indefinite and general source: "I heard," "It is generally held that...," "it is thought that..." and so forth.... Thus talk goes on about speaking people and their words everywhere – this motif returns again and again; it either accompanies the development of the other topics in everyday live, or directly governs speech as its leading theme. (*Dialogic* 338-9)

Related themes, already mentioned, are *heteroglossia*, "another's speech in another's language, serving to express authorial intentions but in a refracted way," (*Dialogic* 324) and *reported speech*, "speech within speech, utterance within utterance, and at the same time also speech about speech, utterance about utterance" (*Marxism* 115). If decisionmakers were to use Bakhtin's findings, the refugees cases would be viewed in a more favourable light; but Bakhtin would like to go further, into discerning the voices; and here the theory and the (lack of) proposed methodology pose significant problems.

viii. Discerning the Subject in Discourse.

If there is a methodology described by Bakhtin for such discernment, it is most fully elucidated in "The Problem of Speech genres;" but minor sketches of a methodology are to be found in virtually all of his major texts. In *Problems of Dostoevsky's Poetics*, for example, Bakhtin writes that on occasions "when there is no access to one's own personal "ultimate" word, then every thought, feeling, experience, must be refracted through the medium of someone else's discourse, someone else's style, someone else's manner, with which it cannot be merged without reservation, without distance, without refraction" (202).

The distance to which he refers suggests that the speech would stand out, would be recognizable if examined with respect to other speeches from the same individual. Thus Caryl Emerson and Michael Holquist write that "al-

though he recognizes their enormous variety, he is able to conclude, unlike Saussure, that the immediate reality of living speech *can* be studied" ("Introduction" Bakhtin *Speech* xvi); and Michael Holquist writes that the "individual *style* of an utterance can be determined" because, especially in ("maximally codified") genres like those used in giving orders or requesting information, individuals can register values by assimilating particular intonations, word choices or speech genres (*Art* 66). What makes study of Bakhtin's speech genres so difficult is their apparent heterogeneity. Gary Saul Morson writes that

> Speech genres temporarily crystallize a network of relations between or among interlocutors – their respective power and status, their presumed purposes in communicating, their characterization of the subject of discourse, and their relation to other conversations. Children learn genres from their earliest experiences with language. Because the social relations that are crystallized in specific genres change, so do the genres themselves. (Morson "Introduction" *Bakhtin* 89)

If "The Problem of Speech genres" was followed, the analysis would proceed from the following starting point:

> Language is realized in the form of individual concrete utterances (oral and written) by participants in the various areas of human activity. These utterances reflect the specific conditions and goals of each such area not only through their content (thematic) and linguistic style, that is, the selection of the lexical, phraseological, and grammatical resources of the language, but above all through their compositional structure. All three of these aspects – thematic content, style, and compositional structure – are inseparably linked to the *whole* of the utterance and are equally determined by the specific nature of the particular sphere of communication. Each separate utterance is individual, of course, but each sphere in which language is used develops its own *relatively stable types* of these utterances. These we may call *speech genres*. (Bakhtin *Speech* 360)

Such is the general definition; with respect to details, Bakhtin suggests that the diversity of speech genres is "boundless" (*ibid*), and should include "short rejoinders of "daily dialogue," "everyday narration,"writing," and so forth (*ibid*). This is important because "each sphere has and applies its own genres that correspond to its own specific conditions" (*Speech* 64). To speak of certain subject matter or in certain contexts, one would appeal to a particular stable reference for style, vocabulary and form. "A particular function (scientific, technical, commentarial, business, everyday) and the particular conditions of speech communication specific for each sphere give rise to particular genres, that is, certain relatively stable thematic, compositional, and stylistic types of utterances" (*Speech* 64). Bakhtin's theory of speech genres emphasizes these

conditions that give rise to particular genres, an emphasis that undermines comparisons between his work and that of speech act theorists who isolate statements which perform certain activities *when prescribed conditions are met* (see J.L. Austin's *How to do Things with Words* pp 6 ff. and John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* pp. 37 ff.)

Assuming that speech genres do exist, that they are discernable, where is one to begin teasing them out? Where are the seams, the different coloured threads, the creases and the patterns? Or, is it sufficient to recognize that such threads exist? Numerous linguists and philosophers would question the very enterprise; but Bakhtin has already anticipated their doubts:

> It might seem that speech genres are so heterogeneous that they do not have and cannot have a single common level at which they can be studied. For here, on one level of inquiry, appear such heterogeneous phenomena as the single-word everyday rejoinder and the multi-volume novel, the military command that is standardized even in its intonation and the profoundly individual lyrical work, and so on. One might think that such functional heterogeneity makes the common features of speech genres excessively abstract and empty. This probably explains why the general problem of speech genres has never really been raised. (*Speech* 61)

Other than raising the general problem and providing general guidelines for effecting an elementary analysis, Bakhtin does not provide a theory of speech genres that would actually be applicable to teasing out individual voices in refugee discourse; he provides no examples or fully elaborated methodology in the essay. In fact, the reader must turn to another essay, "Discourse in the novel," wherein he analyzes Charles Dickens' *Little Doritt*, in order to see how individual speeches can be broken up into different styles (i.e. parodic stylization of the language of ceremonial speeches; see pp 303 ff., *Dialogic*). This analysis provides a sense of how such a theory might work in easily recognizable examples, but it is inadequate for analyzing all possible cases or, even more important, for analyzing or even recognizing the grey areas between speech genres, what Katerina Clark and Michael Holquist calls in *Mikhail Bakhtin* "the borders" (233-4). Clark and Holquist write a commentary on Bakhtin's theory of *reported speech* that is very significant to theoreticians interested in studies of speech genres or to any other research concerned with discerning "voices" in narrative (see John Dore's work with Bruce Dorval):

> The problem of reported speech is how to handle the borders, how to demarcate the places where one person's speech ends and the other person's speech begins, and ends. The answers to such questions, the ways to control the traffic in voices, constitute the substance of whole disciplines and social institutions. Jurisprudence,

> for example, developed a set of procedures to try to overcome the notorious porousness of borders, producing such rebarbative categories as "parties of the first part" and "parties of the second part." The law's most important assumption about the borders between authorial and reported speech holds that the speech of those before the bench is prey to contingency and subjectivity. Law assumes a disparity between this subjective speech and the objectivity of the court's own apparatus of investigation and reporting. (*Mikhail* 233-4)

John Dore has attempted several applications of Bakhtinian genre research, studying the interaction of thematic content, linguistic style and discourse structure. In "Linguistic Indeterminacy and Social context in Utterance and Interpretation," Dore and McDermott conclude that the range of variations, misinterpretations, erroneous restatements and heterogeneous speech genres preclude and possibility of tracing *the source* of a given utterance. In the paper, they use a linguistic approach and an interactional approach to analyze twenty seconds of interaction among six first-grade children and their teacher, who are sitting around a table during a reading lesson. In this analysis, the authors have focused on a single ambiguous utterance (Rosa's "I could read it") to show the difficulty of locating even the (apparently) most simple statements in an (apparently) equivocal situation. The conclusion is not unexpected:

> We have had a complex story to tell about a few words; and we have shown some of them to be different from what they would seem in a more traditional analysis. The words are in no way remarkable, and the collusion and duplicity that mark their utterance and interpretation are perhaps at the core of conversational practices in human institutions.... What is remarkable is that so much analysis has been required for us to show how the words functioned in the lives of a few young children and their teacher. (395)

What is further remarkable is that the analyst could easily be misled by the ambiguous, the incomplete, the misunderstood – even in this simple strip of discourse. In the context of refugee hearings, the consequences of erroneous evaluation far outweigh any benefit of the aforementioned analysis; and the complexity of a thorough analysis precludes the possibility that such a methodology could be rendered practical. However, as stated earlier, the simple fact that such analysis could show that speech genres which have different references and sources *can exist*, is already a major advancement over practices that anticipates clear testimony and looks disfavourably upon garbled discourse. Such a recognition would put into question the practice of rejecting applicants who, during the course of the hearing, "lie." But the strength of Dore's conclusion is diminished when we consider that the strands of discourse are to some degree the product of the framework and the

discourse practised therein. It is difficult to take a strand of discourse uttered by a child before falling asleep and determine its source; but the general contours of the utterance could nonetheless be set out if we knew the events in the child's day, his/her plans for the following day, and so forth. So too with refugee hearings; it would not be to anybody's advantage to seek out the authentic discourse using Bakhtinian techniques, but it would certainly be valuable to consider the goals and experience of the different parties to the hearing while analyzing utterances. It is also crucial to recognize the complexity of the utterance and the difficulties posed when one asks that an addressee respond to empirical questions with consistently rational and chronological. The transcription of the Hearing, in other words, does not contain a closed language system and as such it cannot be read as a form of *unified document* and it cannot be dismissed on the basis of a single claim that calls into question its underlying motivation, philosophy or narration.

ix. Directing the narrative

One of the most important consequences of the theories of interactive discourse, Otherness and production of selfhood described thus far is that we can learn therefrom of the virtually insurmountable barriers facing the refugee who is trying to make a claim in this system. According to the description thus far, the refugee is not only in danger of making an error during his/her testimony, but is indeed bound to misjudge the audience unless s/he is cognizant of prevailing laws, customs and attitudes; as Bakhtin notes:

> The *word is oriented towards an addressee*, towards *who* that addressee might be: a fellow-Member or not of the same social group, of higher or lower standing (the addressee's hierarchical status), someone connected with the speaker by close social ties (father, brother, husband, and so on) or not. There can be no such thing as an abstract addressee, a man unto himself, so to speak. With such a person, we would indeed have no language in common, literally and figuratively.... In the majority of cases, we presuppose a certain typical and stabilized *social purview* toward which the ideological creativity of our own social group is oriented, i.e. we assume as our addressee a contemporary of our literature, our science, our moral and legal codes. (*Marxism* 85-6)

The implications are that a Refugee might, because of inappropriate advice or lack of acumen, misjudge his audience from the outset, or alter the narrative because of what s/he considers a poor reception of his/her words. The conversation is alive, and is continually in motion; "the word in a living conversation is directly, blatantly, oriented towards a future answer-word: it provokes an

answer, anticipates it, and structures itself in the answer's direction" (*ibid*). A refugee lawyer named Walter Kälin confirms this theoretical notion with empirical evidence when he writes that

> former members of political parties and groups which were illegal in their home countries have deeply internalized the values of secrecy and suspicion toward outsiders; they were part of a social network largely founded on these values which were crucial for the success of the organization and the freedom and even survival of its members. Such persons have difficulty in communicating openly and revealing themselves, their feelings, beliefs, and experiences to everyone not belonging to their social group because by doing so they violate basic norms of that subculture. If in the course of the asylum hearing, they perceive the interrogating official as not sharing their own ideology and political views, they are likely to be reserved and hesitant in the manner in which they express themselves and thus to present a fragmented and confused story. (232)

The more general observations made by Michael Holquist reinforces and expands, Kälin's empirical observations: "The speaker's evaluative attitude toward what he is talking about (even attempting to be neutral is to enact certain values), plus his judgment as to whom he is talking determine the choice of language units (lexical, grammatical) and communication units (the composition of the utterance, the speech genres employed)" ("Answering" 66).

There is another level of addressees described in Bakhtin's work, the more ethereal "superaddressee." In certain cases, (religious) individuals may direct their discourse to this being, or they may appeal to him or her to render a judgement on the case. Caryl Emerson and Michael Holquist state:

> Working as always with a specular subject (a self derived from the other), he [Bakhtin] makes it clear that speakers always shape an utterance not only according to the object of discourse (*what* they are talking *about*), and their immediate addressee (*whom* they are talking to), but also according to the particular image in which they model the belief they will be understood, a belief that is *a priori* of all speech. Thus, each speaker authors an utterance not only with an audience-addressee, but a *superaddressee* in mind. ("Introduction" *Speech* xviii)

This *superaddressee*, in Bakhtin's view, "assumes various ideological expressions (God, absolute truth, the court of dispassionate human conscience, the people, the court of history, science, and so forth)" (*Speech* 126). If the Refugee is pleading his case to this ethereal being, the Hearing might become incomprehensible; but officials must realize that many (social) factors like this one can over-determine the structure of an utterance and that this kind of plea does not necessarily suggest the inadmissibility of the claim. Competent

speakers with valid claims who could conceivably make successful ovations during their narrations may mis-direct their testimony, or they may not have a practical command of the specific generic forms appropriate to a Refugee Hearing. In this regard Goffman writes: "If a person is to employ his repertoire of face-saving practices, obviously he must first become aware of the interpretations that he ought perhaps to place upon theirs. In other words, he must exercise perceptiveness" (*Interaction* 13).

Finally, the hearing could be described in more generous terms as a unique opportunity generously offered by the Canadian government to suffering persons, an occasion for persecuted persons to be recognized as such:

> [T]here is a... profound difference between my inner experience of my own body and the recognition of its outer value by *other* people – my right to the loving acceptance or recognition of my exterior by *others*: this recognition or acceptance descends upon my like a gift, like grace, which is incapable of being understood and founded from within myself. And it is only in this case that certainty in the outer value of my body is possible, whereas an immediately intuitable experience of that value is impossible – all I can do is have pretensions to it. ("Author and Hero in Aesthetic Activity" 49).

If this is the case, then the strangeness or incomprehensibility of certain testimony could at least be accounted for, if not understood.

x. The framework of the Hearing: A Bakhtinian Perspective.

Within the logic of Bakhtin's work, the problem of analyzing these transcriptions begins with the flawed framework of the hearing. The nature of the structure, *the very presence of a structure for a dialogue*, poses insurmountable difficulties for the (Bakhtinian) analysis. Bakhtin makes a critique of Freud's interview that could be applied to the Hearing when he

> stresses the shaping power of the specific dialogic situation of the psychoanalytic interview. Going beyond Freud's own individual-centred notions of transference, Bakhtin explains that the interview situation is a highly complex one and must be understood in light of the social dynamic between doctor and patient [for which one could undoubtedly substitute S.I.O. and the Refugee], and not – or not only – in terms of the patient's individual psyche [individual experience]. (Stewart 50)

Furthermore, the hearing was in 1987 construed in such a way as to demand that words wholly represent the lived experience of the claimant, thus eliminating areas of potential concern including *intonation*, *non-verbal method of discourse*, and the *socio-ideological and political moment of the*

utterance; but unlike other theoreticians previously discussed, Bakhtin privileges the word (while accounting for the body in, for example, his study of the carnival and carnivalized discourse – see *Rabelais and His World*). For example, Bakhtin states in *Marxism and the Philosophy of Language* that "it is owing to this exclusive role of the word as the medium of consciousness that the word functions as an essential ingredient accompanying all ideological creativity whatsoever," and that "all manifestations of ideological creativity – all other nonverbal signs – are bathed by, suspended in, and cannot be entirely segregated or divorced from the element of speech" (15). Nevertheless, words cannot wholly supplant other ideological signs:

> None of the fundamental, specific ideological signs is replaceable wholly by words. It is ultimately impossible to convey a musical composition or pictorial image adequately in words. Words cannot wholly substitute for a religions ritual; nor is there any really adequate verbal substitute for even the simplest gesture in human behaviour. To deny this would lead to the most banal rationalism and simplisticism. (*Marxism* 15)

Bakhtin's "Discourse in Life" describes how the verbal situation of the utterance (the event), and the strictly linguistic factors of the discourse, *merge*, "forming an indissoluble unit" (cited in Clark and Holquist's *Bakhtin* 203). On the one hand this bond is of central importance to when there are questions concerning tortures or stresses that the refugee underwent in the country of origin; in these cases the S.I.O. will insist on bodily evidence of physical suffering (medical documents or scars). On the other hand, the fact that emotions don't really translate into words (or that there is a complex dialectic between the two methods of signifying), and that the S.I.O. and Counsel ask empirical questions expecting clearly elucidated answers, suggests that a whole realm of language which would likely work in the favour of the claimant is left out of the transcription, as though words can be separated off from bodies without any consequential loss of meaning, a postulate that (among others) Dore and McDermott adamantly refute:

> Since we will be analyzing gestures and multiple-person, postural configurations as well as speech sounds, it is crucial to avoid the *inane conceptual dichotomy* between verbal and non-verbal behaviour. Neither talk nor movement constitutes in its own right a proper unit of conversational analysis; the interactional powers which people achieve with either one can be understood only as they are embedded in and constitutive of the chain of activities in which people are mutually engaged. Those gestures that are left undescribed, or emotions that are only present in the form of garbled language transcribed, or such notes as "recess taken," or "could you repeat that?" are easily misconstrued in transcription. (376)

But what sign material is pertinent to the case? or, better still, which of the many forms of non-linguistic discourse narrated by the Refugee will best assist him/her in presenting the case? Bakhtin provides a broad range of possibilities when he describes sign material of the psyche as "any organic activity or process: breathing, blood circulation, movements of the body, articulation, inner speech, mimetic motions, reaction to external stimuli (e.g., light stimuli) and so forth." He then expands even further, to include "anything and everything occurring within the organism can become the material of experience, since everything can acquire semiotic significance, can become expressive" (*Marxism* 28-9).

Given the obvious dangers of an over-dependence upon scientific apparatus (blood tests, lie detector machines, videotapes and so on), and given that most non-verbal discourse is readable by the attentive listener/observer, the only hope in the present system is that the adjudicating party will be flexible enough to permit entry of the whole body, the "whole human being," so that at least there will be a chance for sympathetic readings of the diverse elements of painful testimony.

xi. Dialogism

The most useful theory of social interaction for the purposes of analyzing refugee hearings is most likely a hybrid of several different approaches; Bakhtin's work is herein singled-out because it is coherent, manageable, and in my opinion the best single theory for cross-cultural studies in social interaction. In addition, his theory of dialogism gives us a (utopian) objective to strive for which could perhaps serve as a litmus test for efforts at reforming the system. Holquist writes that

> it is becoming increasingly evident that Bakhtin's lifelong meditation on dialogue does not have a place solely in the history of literary theory, capacious as the borders of that subject have recently become. It is now clear that dialogism is also implicated in the history of modern thinking about thinking. (*Dialogism* 15)

The potentially-liberating elements of Bakhtin's work are for the most part inscribed in his theory of dialogism, a concept which has as its very centre the requirement that we judge other bodies in relation to our own. "Dialogism," says Michael Holquist, "argues that all meaning is relative in the sense that it comes about only as a result of the relation between two bodies occupying *simultaneous but different* space" (*Dialogism* 21), and where the position (in the broadest sense of the term) of the observer is of crucial import.

Once again, however, the stress upon interaction between bodies which governs the understanding of dialogism also implies that the observer is an active participant, and that within the logic of such a system the parties to the dialogue *author* one another with their verbal (and non-verbal) reactions to the other. The implications of such a theory of discourse are numerous, especially when applied to the text of a legal hearing where there is a tangible outcome, a ruling, which must emerge at the conclusion: first, there can be no objective, empirical, predictable or repeatable criteria by which different hearings can be judged. This does not mean that judges (or Ministers, or Committees) cannot render judgements, but it does mean that discussions on what does or does not constitute a "lie," for example, can be relegated to a technical issue of whether or not the lie in question is pertinent to the claim and moreover whether the situation in which the lie was uttered is more or less likely to produce *lies* in general.

Second, it may be interesting and useful to discover why the claimant found it necessary, in light of his or her perception of the proceeding, to lie about his age, exaggerate his stay in prison, or confuse the names of his children. That he was advised, perhaps, by a friend, Counsel, cousin or co-worker that Canadian officials frown upon admissions from older persons, from fathers, or from persons who have not spent sufficient time in jail, may have been reason enough for him to have lied, and the discovery of such a (mis?)-perception may assist decisionmakers in future cases. Third, the whole question of mitigating circumstances, which is generally difficult to speak of in concrete terms, can be approached with respect to Bakhtin's theories by talking about the questions of perspective; it may very well be that the position, both figural and spatial, in which the claimant is placed in the hearing is uncomfortable, foreign, complex, incomprehensible, or misleading, to the point where a "lie" becomes justifiable, nay logical, within the context. Bakhtin's "law of placement" both explains abnormal or unusual behaviour and offers the possibility that the system could be improved to provide the claimant with a more amenable or comfortable perspective; as Holquist notes, such thinking requires very broad-minded analyses of the perspective from which parties to the hearing participate. For example, in a simple conversation, although the parties are each direct participants, each person is experiencing a different event; "our places are different not only because our bodies occupy different positions in exterior, physical space, but also because we regard the world and each other from different centres in cognitive time/space" (*Dialogism* 21).

Finally, the ways in which we perceive others is structured both by the ways in which we perceive ourselves and by some immutable laws concerning the chronotope (time/space). Bakhtin writes that "for the perceiver, their own

time is forever open and unfinished; their own space is always the centre of perception the point around which things arrange themselves as a horizon whose meaning is determined by wherever they have their place in it" (*Dialogism* 22). The perceiver is perceived from the opposite perspective, that is as closed off and finished, and likewise the perceiver perceives others in the same manner. The Convention Refugee claimant as Other does not occupy a particularly significant space with respect to other spaces, but rather "in the homogenizing context of the rest of the world" (*ibid*).

Reference to Bakhtin's work shows that the problem of Refugee Hearings exists between the realms of strangeness and familiarity, between the "ideal" situation of unfamiliar parties who carry on a veritable *interchange*, and the "ideal" situation of familiar parties participating in the same social purview – a situation that allows officials to understand each utterance as both a description and a password into the rich context of the speaker. Bakhtin's work suggests the need for a method of accounting for *intonation* and non-verbal discourse, a carefully-screened interpreter, a loosely structured hearing, well-informed Counsels and officials, and flexible strategies for assessing contradictory or impertinent testimony. The adoption of this methodology, along with other tools of discourse analysis previously discussed, would help unearth, rather than bury, the dialogism of the Convention Refugee Claimant.

7. The Implicit and Explicit Criteria for Rendering the Decision: The Woman as Witness and The Appeal Case

> Perhaps [the prisoner in cell] No. 402 was an unpolitical doctor or engineer who trembled at the thought of his dangerous neighbour. Certainly without political experience, else he would not have asked for the name as a start. Presumably mixed up in some affair of sabotage. Has obviously been in prison quite a time already, has perfected his tapping and is devoured by the wish to prove his innocence. Still in the simple belief that his subjective guilt or innocence makes a difference, and with no idea of the higher interests which are really at stake. In all probability he was sitting on his bunk, writing his hundredth protest to the authorities, who will never read it, or the hundredth letter to his wife, who will never receive it; has in despair grown a beard – a black Pushkin beard – has given up washing and fallen into the habit of biting his nails and of erotic day-dreams. (Arthur Koestler, *Darkness at Noon*, 27).

There is no way to determine what kinds of deliberations occurred in the offices of the Refugee Status Determination Committee in Ottawa; persons interested in the criteria employed to determine the validity of a claim in 1987 must look to the kinds of cases accepted (in particular the countries of origin), the kinds of information sought during the hearings (so as to get a sense of where the emphasis lies), and to the Refugee Appeal Board and Federal Appeal Court decisions. This chapter will buttress the reading of the hearings given to this point by providing details from Mrs. V.'s testimony and from a Federal Appeal Court case which mentions criteria for accepting claims for the general period in which Mr. B's and Mrs. V's cases were heard.

i. The Female Claimant as Witness

The question of female claimants is an extremely important area which, for the purposes of this study, will only be examined with regards to the relationship between the persecuted male claimant's transcription and that of his wife. Several preliminary remarks are in order. Women are often subjected to different kinds of persecution in the country of origin than men.

There are many reasons for this, some related to the role of women in different societies around the world, others to the possibilities for international travel that are open to persecuted women who could, if given the chance, apply for status as Convention refugees. Generally speaking, women are not given the opportunity to participate in high level government, union, or political activity in the (Third) World as frequently as men are. As such, many women who claim status have suffered as a result of the actions of somebody else (husbands, brothers, fathers, friends), or they have become a tool in the oppression of others (wives, relatives or friends of activists are threatened, brutalized, raped, or condemned to lowly employment or status). This is a general tendency, and that there are exceptions; however, the discrimination against women around the world ensures that women generally have less access to the kinds of societal organizations which would permit them to voice opposition, but in cases where they are active nonetheless, they often have less opportunity for travel or flight because of restrictions, official or otherwise, placed upon them by societal norms, religious customs, and family obligations. As a result, the majority of claimants who arrive in Canada are men, some of whom arrive alone with the intention of aiding their wives and family once they gain status. In certain cases, such an effort implies a potentially deadly multi-year wait for those left behind in the country of origin. Recall that the husband, though "on hold" in Canada, is not subjected to the same level of continuous persecution as the wife and family may be as a result of the flight of the husband to Canada. And finally, the kinds of questions asked by Canadian officials, who have their own attitudes towards women (in the Third World), can have the effect of reinforcing inappropriate perceptions concerning the role and experience of the persecuted female claimant, or reducing the claim to a less dramatic form of domestic persecution. The categories of persecution set up by the Convention are implicitly geared towards members of the society who are in positions of power vis-à-vis the ruling class; as such, groups of persons (including women) who are perceived to dwell at the exterior of such power struggles are necessarily discriminated against by the very procedure and criteria of the Convention refugee hearing in Canada. This was true in 1987 and remains ostensibly true today despite ameliorations.

The transcript of Mrs. V. provides legitimacy to the narrative of Mr. B; was not subjected to the same kind of persecution as her husband, but she witnessed, and in some ways suffered, the pain and humiliation he endured. Only relevant passages of this hearing will be cited because many of the sections in Convention refugee hearings are identical from one case to the next.

The procedure begins with verification of information on the Basic Form, as well as the passport, before moving to the crux of the matter:

> *By the Counsel* (to the S.I.O.)
>
> Q. Yes. Madame V. did not have particular problems in Chile. As such she will be basing her declaration entirely upon that of her husband, with bears the dossier number xxx-x-xxxxx. In any case this is to say that the woman will corroborate certain facts mentioned by her husband.

The role of the female claimant, despite whatever persecution she suffered, is herein openly stated. She will corroborate the narrative of her husband and therefore request status on the basis of her being married to the claimant. What is interesting is that she too suffered in Chile; however this opening statement suggests that were it not for her husband's (more dramatic) persecution, she would not have a valid claim.

The claim continues:

> *By the Counsel* (to the claimant)
>
> Q. Mrs. V., you were present here at the time of the declaration made by your husband?
>
> A. Yes.
>
> Q. He had... he spoke to us about some telephone calls in the month of May 1986. You were the person who effectively... who received these telephone calls?

Once again, the problem of the language spoken by the Counsel is immediately conspicuous in the errors and corrections on the transcription. So too is the implicit assumption that even though *she* received the menacing phone calls, it was he who was being persecuted and not her. She was only a witness to his persecution by having answered the telephone calls.

She answers as follows:

> A. Yes. The first week of May I received a telephone call. It was the voice of a man. He asked about my husband, as to whether or not he was home, and I said that he was not home. So I asked him why he was looking for him. He said "well this is not important, I will give you the message." And he told me that I should tell my husband that he should immediately quit the Party and the Union. And I asked him "who are you?" He did not want to identify himself. He insulted me and then hung up.

This is in fact a revelation; Mr. B. never told the parties to the hearing that his wife learned of his activities from an anonymous caller. This information corroborates observations made in the last chapter concerning the level of secrecy maintained by the claimant Mr. B. concerning his persecution.

Q. Following this one, did you receive any other calls?

A. Yes, the following week I received other calls. But it was my son who received them.

The French language, spoken during the hearing and then transcribed a few days later, is once again so filled with errors as to preclude the possibility of fully understanding the narrative. In response to the question "did you receive any further calls [plural] after this one?" she replies "yes, the next week we received other calls [plural]. But it is my son who received it" [the call, singular]. This is not clarified, but the obviously erroneous response to the question of whether she received other calls is corrected as a result of the S.I.O.'s question in the next line:

By the S.I.O. (to the interpreter)

Q. The following week?

A. The following week.

The narrative then continues with the claimant describing the phone call received by her son:

By the Claimant (to the Counsel)

And my son asked him what he wanted. And this person asked once again about my husband. He told him that he was not at home. At that time I was not home either. Well this guy told him that when we would return... he said that he would call back later

Well at the end of May, the voice of a man ... well someone called, it was the voice of a man. And at this time I was already home because it was 8:00PM. And my husband was not home yet. And he repeated the same things he had said the first time. And again followed by insults.

Although the level of spoken French is as poor as in the previous transcription, the transcription itself is more accurate. Accords between verbs and direct objects or subjects are made more frequently, noun genders are frequently correct, and there are fewer typos. This renders the transcription more legible, giving the impression that the applicant is more articulate in the French language (even though this is a transcribed translation) and therefore a better candidate for Canadian citizenship. An articulate interpreter, Counsel and S.I.O. as well as a competent transcriber all contribute to the quality of the transcription; this could be of issue in virtually any administrative procedure – particularly those decided on the basis of written texts.

The hearing continues with a garbled question, posed by the Counsel:

> Q. Was this the same voice as the time before?
>
> A. I would say that yes, it was the same voice. After this I spoke to my husband about this call. He told me that I should not concern myself because perhaps it was persons making a bad joke. Because ... because to that point I knew that my husband was in the Union but I did not know that he belonged to a political movement. (4)

The Other created Mr. B. is in this hearing receiving support from Mrs. V. She is not describing her experience as much as she is simply conforming to the regulation that says that the details provided during the claim should coincide as closely as possible with the definition of Convention refugee. She has also confirmed that Mr. B. was as secretive as he said he was concerning his activities, once again demonstrating the level of apprehension the claimant had in regards to authority and the capacity he had for secrecy even as concerns issues which directly involved his family. She further demonstrates that the claimant is quite capable of lying when he feels it to be necessary; even though she received information concerning his activities in the union, he continued to play down his involvement and persistently refused to provide further details. This of course is the Catch-22 of the entire process; in order to have arrived in Canada in the first place most claimants have to lie at some point in the trajectory – whether it be to save their own (or somebody else's) lives in the country of origin, to flee the country, or in order to ensure safe passage to Canada. But lying is the criteria for rejecting a claimant; indeed this whole process is set up in order to establish whether or not the claimant has lied. So during the hearing they must admit, under oath, to have lied.

The hearing continues, and Mrs. V. is called upon once again to simply confirm her husband's testimony:

> *By the Counsel* (to the claimant)
>
> Q. And afterwards, your husband was detained on September 5, 1986? [end of page 4]
>
> A. Yes.
>
> Q. What was your reaction when he returned to the house?
>
> A. Well I was a little bit worried but he had the problem of having to leave frequently in order to do work outside of Santiago. This was because of his work at the company. Sometimes he did not have the time to inform me because he was sent away in great haste. And when I saw that he was not coming back I thought that he had... that he had left the city to work. so when the (inaudible) evening

> came, he left to change his clothing and to take a shower. I saw that he had bruises on his arms and on his back. I asked him what .. what had happened. He told me that he had fallen while working. He gave me no other explanation.
>
> I was insistent with my questions. He insisted with his explanations. Well, in the end I believed what he had told me.

The story correlates exactly what Mr. B. stated during his testimony; in fact, there is hardly one word more or less than what is necessary for this purpose. Nor are there any questions posed by the S.I.O. or the Counsel which are not related to Mr. B.'s testimony. Even apparently logical questions, such as "how is it that Mr. B., who repaired lines for the telephone company, was not able to phone you to tell you that he would be home the following day?" are never asked. As mentioned earlier on, to ask Mrs. V. whether the voice on the telephone call received by her son was the same as that in the call she received is strange, and to accept her answer without asking how she confirmed this is likely to raise some questions later on. This kind of questioning is not necessarily to the benefit of the claimant; if the Committee, who is not present in the room, cannot imagine how she could confirm such a fact, they may dismiss her testimony by thinking that she is simply backing up her husband's phoney claim. If the question would have been asked (and here I am speculating), she may have answered that she imitated the voice for her son and he confirmed that her method of imitation led him to believe that he indeed received a call from the same person. This is believable; but without such a clarification, the testimony seems strange. In the previous paragraph she does demonstrate a capacity for inquisitive thinking; she states that her husband's story concerning the accident at work did not satisfy her at first, that she continued asking questions to find out where the bruises came from. In the end, she suggests, his adamancy and, in a sense, the possibility that he could have been bruised by falling from a pole (or whatever) convinced her that he was telling the truth. Perhaps she had reason to believe that he was lying to her; after all, she had just learned by an anonymous phone call that her husband was participating in a political party without her knowledge. However neither the S.I.O. nor the Counsel asked her whether she made a link, openly or to herself, concerning the threatening phone call, his absence, and marks of a beating on his body. This kind of "confirmation" of facts is so primitive as to be easily dismissable by careful readers.

The hearing continues:

> Q. And you also discussed with him the ... on October 10th concerning his being layed off?
>
> A. Yes we spoke on this subject.

Q. And after this the house was searched on November 13th, 1986?

A. Yes that is right.

Q. What happened, were you there?

A. Yes I was there. We were looking at the t.v. at night when these persons came to search the house and arrest my husband. To tell you the truth it was a terrible thing. Because at that moment I thought about many things. We think of the worst scenarios. They searched the entire house. They even searched the yard. Also they searched the first and second floors of our house. They had... they brought me outside so that I would show them my husband's car. They also searched everywhere in the car. Also they took my husband and my son and I felt a great level of fear staying in the house.

Well all we could do was to ask God that he return and that he return in good shape. And that night I prayed a lot with my son.

Q. What shape was the house in when the policemen or whoever they were departed?

A. Everything was in disorder. Things had been thrown. I had... I realized that I would have to begin to put things back into order.

Q. How long did they stay in your house?

A. About half an hour.

The hearing proceeds as expected; the Counsel once again asks all the questions, and the answers provided are in accord with the testimony she heard in the case of her husband which was adjourned only 15 minutes earlier. There are some new details, such as her religious beliefs, which are important inasmuch as they explain where she sought comfort or aid during this traumatic time. She also plays the role of the mother who comforts her family and who would have noted the condition of the house after the departure of the police. So other than confirming the testimony of the husband and providing more empirical facts, she is asked about issues with which she as a woman would be concerned.

The testimony continues with another incomprehensible question:

Q. Your husband was detained by the persons. Afterwards were you returned to your husband ... did you see your husband again?

A. Seven days later he returned. When these persons searched my house and took away my husband, they told me that I should not do anything... I should not tell anyone. I asked them where they were taking him. They told me that they could not disclose this information. And I did not do anything because that is what they told me. And well in Chile we cannot do anything because the government controls all of these organizations, the organizations that hold power. Well, the only thing that we did was to await his return.

Mrs. V. hereby provides a reason for the secrecy and the lying; Mr. B. and Mrs. V. could not know who to trust. The "organizations," including the doctors, the judicial system, the unions and so forth are all linked to the system of political power in the country. In such a situation one apparently learns how to lie and how to provide appropriate representations of oneself simply as a means of survival. The questioning continues:

> Q. When your husband returned what was his physical state?
>
> A. Well he was in quite bad shape. I saw him as being very thin. He was dirty. He had a cold... a very serious cold. And when he arrived he was unshaven, he was dirty, he was abandoned. He arrived. He took a shower as best he could.
>
> Well, I called our family doctor and we had already arranged that we call him. Our family doctor saw him. He examined him.
>
> Q. You are speaking of Dr. A. S.?
>
> A. A. S. Yes that is right.
>
> *By the interpreter*
>
> I will spell it for you... (the interpreter spells out the name)

The transcriber has certain tools at his or her disposal when s/he does not understand the testimony; when it is impossible to understand a word or a sentence, the transcriber can write (inaudible). When a word is said but not spelled out during the hearing, the transcriber can write (phonetic). These markings are supposed to be removed when the proper spelling is pronounced; in this case, it was left as is.

> *By the Claimant*
>
> He examined him. He found some bruises. As I said earlier a serious cold as well with the basis for...
>
> *By the interpreter* (to the Counsel)
>
> Q. How does one say...?
>
> A. Pneumonia.
>
> Q. Pneumonia.

The Counsel speaks Spanish, and is therefore a good safeguard against errors committed by the interpreter. In this case, the interpreter even resorts to the Counsel when unable to translate the word *pneumonia* into French.

By the Claimant

... pneumonia. He was given (inaudible) penicillin, an antibiotic for the ... for the cold and also a medication to treat the inflammations and some vitamins.

By the Counsel (to the claimant)

Q. You have... following this incident you stayed in your house until when?

A. Well I worked and I stayed at the house until he recovered.

Q. O.K. But was to find out when the family moved, that is to say stayed there before... moving to Linares.

A. Well we were there until the night of the 24th. On the 25th we travelled to Linares.

Q. You mentioned December, is that right?

A. Yes.

Q. That means that you travelled on the 25th of December?

A. Yes to Linares.

Q. And you stayed there until your departure on January 24 1987?

A. That is correct [end of page 6].

Q. Did you do with your furniture in the house and your house as well?

A. ...

The Counsel's command over the French language has had serious repercussions throughout this case. Usually, the claimant has been able to guess the meaning of his questions, but in this case, she is stumped. This leaves a glaring hole [...] in the testimony; the interpreter recognizes the error and repeats the question so that the Counsel will reconsider the question:

By the interpreter (to the Counsel)

Q. Did you....

By the Counsel (to the claimant)

Q. What did you do with your furniture and your house as well?

A. Until this date we sold almost everything. The only think that we did not sell is our house. A brother ... one of my brothers lives in this house .

Q. Did you go with your husband to pick up your passport?

A. No my husband travelled alone.

Q. That is to say from Linares to Santiago to pick up.

A. No I did not travel.

Q. No but what I am saying is that he travelled to Santiago from Linares to pick up the passport?

A. Yes.

Here ends the questioning of the Counsel, who in the course of the hearing has not asked questions for any other purpose than confirming the testimony of her husband. We do not know if she had any political affiliations, political viewpoints, or membership in a party or in a social group; nor do we learn if she had been persecuted in any other way than as an observer in the case of her husband, or if she has any other testimony, though not related to her husband's case, that might give her added credibility as a claimant. He did not even ask if she was employed or if she had any duties or experiences, which may be relevant to the case. Furthermore, there are no questions, in either transcription, concerning the role, the fate, the experience or the desires of the child. Even though he was directly implicated in the whole affair, as indicated in this transcript, he is not questioned or directly referred to. The child is important but absent. Mrs. V. is, in a way, equally effaced. She is simply the Other's Other, the witness to the existence of her husband as Other. She has, in that sense, even less of an identity than her husband.

The S.I.O., obviously noting one of the glaring omissions on the part of the Counsel, asks one question in regards to other persecution she may have suffered. He then follows up with some simple questions concerning her familial relations in Canada and in Chile, satisfied that it will not be necessary to press the issue of her persecution:

By the S.I.O. (to the claimant)

Q. Madame have you personally had problems with the authorities from your country.

A. No. Truly no.

Q. You were married in 1970?

A. Yes, correct.

Q. Do you have family here in Canada?

A. None.

Q. And your whole family, father, mother, brothers, sisters, are in Chile?

A. Yes.

Q. For which company did you work in Chile?

A. I worked in a real estate office.

Q. You were a secretary?

A. That is correct.

Q. And what happened to your employment, did you leave it?

A. Yes.

Q. Madame is there anything else you would like to add to this declaration?

A. I would like to confirm and reconfirm that what my husband said, because in all truthfulness our situation in Chile was impossible

Q. Thank you madame.

By the S.I.O. (to the Counsel)

Q. Me G. de you have any other questions or submissions to make?

A. ...

In the absence of an answer, the reasons for which are never stated, the Counsel offers the claimant a conclusion to the testimony:

By the Counsel (to the claimant)

Q. It was because of the problems that your husband had that you decided to leave your country?

A. Yes because in all truthfulness I must follow him wherever he goes.

In this strange final summary, and even stranger final answer, the claimant and Counsel combine to give the impression that she has come along not because she felt persecution, not because she was threatened, not because she was abused by the anonymous telephone caller, not because her house was ransacked by the police, not because her husband was jailed for union activities, not because her husband was beaten by members of the police, not because her husband was forced to live out a lie because of his fear to voice his opinions and to confide in his wife, not because she feared for the safety of her son, but because she felt obliged to follow her husband wherever he chose to go. She has, in a final blaze, burned any bridge that she could have erected to prove that she too may have a claim and she now depends entirely upon the success of her husband's quest for status. Even the S.I.O. seems surprised:

By the S.I.O. (to the Counsel)

Q. Nothing else?

A. ...

Q. Thank-you Me. G.

Half an hour after the beginning of the hearing, the S.I.O. announced that the hearing was over, and that a decision would be taken by the Minister in due time (five years). The claimant has been reduced to an onlooker, and her role in the society, decided in advance and illustrated during the hearing, has been that of a witness.

ii. Other Women as Claimants:

Other cases confirm this general tendency in the questioning of female applicants. In the example that follows, several previously noted tendencies reappear. First, the problem of the language reaches new heights when the Counsel, forgetting that he is supposed to be speaking in English, begins his summary in French. The reason why he started in French becomes obvious as the testimony continues; he is incapable of properly expressing his case (in either language), and he is therefore doing more harm to the claimant than good by stumbling through the concluding statement in this manner. Second, the question of the female claimant is brought to the fore here because the Counsel in a sense requests special treatment for his claimant because she is a woman. He does this without reference to Canadian jurisprudence or international conventions:

Tanzania:

> *By the S.I.O.* (to the Counsel)
>
> Q. Maitre, is there anything you would like to add?
>
> A. Bon, je voudrais tout simplement corriger, au moment donner....
>
> Q. In English?
>
> A. Excuse me. I just want to make some corrections. Madame Jaffer asked for refugee status on all of the grounds, but I am sure that the Committee could make the difference, since they hear the declaration. In Tanzania, I think that the revolution happened in 1971, affect the life of this lady, because she was alone, and also because she was a woman, and the practice of the military against the woman was aggressive and there was no respect for the woman, so she was feared that one day the military will came and took her or took one of her child. She didn't left in 1971 because she was alone, she was, there was no enough money for her to leave her country, but since 1971 she tried, by working to save some money, and finally she succeed only in 1979 to left the country. She go in Pakistan because it was more nearest, but in Pakistan it was more safety maybe but for the economy it was impossible for her to live there because the religion is so strict that as a woman she cannot work. It is not allowed in this country for a woman to work, because Mrs Jaffer she could work in shop, or in factory, but the woman they are not allowed when there is a public relation with other people. So as she explained she just asked,

have to stay, in their home, and wait and wait and wait and pass the time. So it is not a life, and she is responsible of the family, she is the principle support of the family she has three kids, and in, it is three children, one of...

Q. Them?

A. Them is, how you say in English, handicappé, in French...

Q. Handicapped?

A. Handicapped. And she explained that in Pakistan there was no future for this person. There was no school enough specialized to accept this child. So that is why she came in Canada because she finds the school and enough access to give some treatment to this child. But in Canada she was a minister permit, and with the minister permit it is not a life because she cannot work. So she don't, she have to feed his children, and the only thing that she wants is to be independent and to have a normal life. So that is why she didn't have any choice to ask the refugee status. So since the time that she went trouble in this country in 1971, so as she explained she asked the refugee status for human grounds considering she is a woman, a principal supporter of the family, and she needs to work and to have the right to work she must be in an open country, and Canada could offer to her this possibility. That is it.

The second example occurs in the testimony of a woman from Sri Lanka who feared for her safety, and the safety of her child. The Convention does not specifically mention "sex" in its description of reasons for persecution; it only notes "race, religion, nationality, membership in a particular social group, or political opinion." Considering the kinds of persecution women suffer around the world *simply because of their sex*, this is an astounding omission from the definition. Consider the following example:

Sri Lanka

Q. Why had you not chosen to go and meet him at the airport. I know it is some distance but I would imagine you would be quite excited to see him. Why did you not go to Colombo to meet him and travel back together?

A. At that time it's very difficult for a woman to go with her children alone through Sinhalese areas and it's not safe, it's not advisable.

Q. Why?

A. I had a fear in my mind that I could be attacked by Sinhalese at any time.

Q. Do you believe that fear, that there is reason to have less fear today in Sri Lanka in similar situations?

A. No, the situation is more than less.

Many cases contain questions concerning the safety of children; once again, children are not mentioned in the Convention refugee definition, and once again, the question of children is always asked to women, and rarely to men:

Sri Lanka

Q. Why do you think that a young boy, such as any one of your sons would want to join a terrorist movement?

A. The situation that exists in Sri Lanka, the problem that the army gives to the Tamil people will make my children to think that if I join with the Tamil youth maybe I can fight against that army.

Q. Continue.

A. For these reasons I would not like to lose my children. In Tamil areas most of the schools have been closed and they are being used as army camps. Even the few schools that function, it is not properly functioning.

Q. What are the children doing?

A. Most of the students, they fear going out, so they are staying at home.

Q. Who are they afraid of?

A. They are afraid of the army.

Q. Continue.

A. The news I got in April 1987, most of the school were damaged by bomb of the army. There's no situation that exist for the students to go to school in Tamil areas.

Q. Why do you think schools are being bombed?

A. Because most of the Tamil children they gather at schools, so easy to destroy them.

Like persecution for economic reasons, persecution for familial reasons are in these examples recast into one of the acceptable categories. It appears as though these categories are more acceptable because they favour active males who are bread winners in the country of origin and are likely to be *good First World citizens* when they arrive. The systems biases are virtually transparent when examined with reference to a small number of representative refugee claims; and equally transparent is the move from human being to a witness whose quality of life as the wife of a persecuted person living under an oppressive regime is important only inasmuch as it confirms some empirical facts the husband's case. Mrs. V's transcription is particularly pertinent in this regard:

By the Counsel (to the S.I.O.)

Q. Yes. Madame V. did not have particular problems in Chile. As such she will be basing her declaration entirely upon that of her husband, with bears the dossier number xxx-x-xxxxx. In any case this is to say that the woman will corroborate certain facts mentioned by her husband.

She has no other voice in this claim, no personhood other than that of collaborator for certain kinds of facts provided by her husband during her hearing. The questions follow this template exactly (the questions cited were asked by the Counsel):

> *By the Counsel* (to the claimant)
>
> Q. Mrs. V., you were present here at the time of the declaration made by your husband?
>
> Q. He had... he spoke to us about some telephone calls in the month of May 1986. You were the person who effectively... who received these telephone calls?
>
> Q. Following this one, did you receive any other calls?
>
> Q. Was this the same voice as the time before?
>
> Q. And afterwards, your husband was detained on September 5, 1986? [end of page 4]
>
> Q. And you also discussed with him the ... on October 10th concerning his being layed off?
>
> Q. When your husband returned what was his physical state?

Admittedly this example emerges from only one case; however the same procedure is even followed in the case of Mr. B. Although he has more leeway, almost all questions asked pertain directly to chronological or topological details. Recall the opening statement read out by Mr. B.'s Counsel, for example; or better still, note that the kind of questions that were posed during Mr. B.'s is a simple clarification of information provided in the first statement:

> Q. You were a member of which Union, Sir?
>
> Q. In which company?
>
> Q. And you were elected member delegate of the union in which month of 1984?
>
> Q. Do you have any...you have...you were elected only as delegate to the Union?
>
> Q. And as a delegate, what were your tasks in the Union?
>
> Q. And you remained as delegate until which period?
>
> Q. How often did you participate in Union meetings?
>
> Q. And before then, in 1984, when you were... that is to say when you were elected as delegate of the Union?
>
> Q. But were there... did you participate in a meeting in September of 1984?
>
> Q. On this date, how many persons were present at this meeting?
>
> Q. Where was this meeting held?

The information asked is purely empirical, chronological, and absolutely related to the initial statement. One would assume that virtually anyone could make a claim by simply memorizing the initial statement and providing small details which could be extracted therefrom (in fact, this kind of accusation is often used to justify further tightening up the system). The process encourages, nay demands, this kind of reduction and precision. There is no whole human being at the end of such a process; there is the Other as Convention refugee claimant, the Other as repetition and clarification of the original statement. Normal problems concerning our ability to 'know' somebody through reference to techniques, including denial, silence, selectivity, omissions, self-interest (see Bourdieu), and so forth are so massively compounded through this process that there is not even any sense considering the possibility that this is a 'life'-story even though the issue is an endangered human life.

iii. The Appeal Process: Judge Mahoney Rules

> Sometimes I think that spending my days amid lost causes when I myself stand to lose nothing, living amid endless debt when I myself have no creditors, allotting twenty minutes or at the most half an hour to each appointment because others are waiting, putting off complainant and complainee on formal pretexts, trusting that they will shortly exchange roles, disposing of hopeless cases with a semblance of action, making hasty decisions on the basis of unconfirmed reports and prejudiced testimony, sacrificing lesser interests to greater interests with a minimum of hesitation, using preposterous legal phraseology to drown the unique individual case in an ocean of remotely similar cases, neglecting the usual for the unusual, taking the handy legal shortcut rather than the roundabout path of sympathy and indignation, dealing superficially with thousands of clients instead of giving three or four, or even one, the attention they deserve – all this, I sometimes think, is plain fraud. (Konrád *Case* 104)

On a number of occasions during the empirical transcription and analysis of the cases of Mr. B. and Mrs. V., muddled areas of the hearing were described as grounds for rejecting claims for refugee status in Canada. This opinion is based upon my reading of this and other cases reviewed internally, by the Refugee Appeal Board, and externally, by the Federal Appeal Court. Appeal Court rulings are collected in the Refugee Board libraries, where they are stored in binders alphabetically ordered according to the last name of the claimant. These rulings contain the salient information from the case, and the judge's (or Board member's) opinions concerning the evidence presented. In Federal Court rulings, one judge will write his/her opinion on the case, and

the ruling will contain information concerning the opinions of the other two judges. If there is a dissenting opinion, the dissenting judge will often write his or her opinion on the case, explaining why s/he came to a different conclusion.

This section contains a Federal Appeal Court ruling in which Judge Mahoney wrote an opinion to which two other Federal Court judges concurred. The case is a review of rulings made by both the Refugee Board and the Refugee Appeal Board. The ruling is of particular interests since it both describes and overturns the decision of two other administrative bodies which chose to reject the claimant's plea, and it is peculiar inasmuch as it contains a both a general description and a resounding critique of the Convention refugee determination process as it was carried out in 1987. Furthermore, in his ruling Judge Mahoney summarizes the facts of the case while making continuous reference to the initial transcript, the initial decision of the Board, and the ruling of the Refugee Appeal Board who had reviewed and rejected the appeal case. We therefore have the opportunity to evaluate the grounds for rejecting a claim, information which will help to demonstrate the importance of the small contradictions and errors which were pointed out in my reading of the cases of Mr. B. and Mrs. V.

This chapter forms a crucial link in my argument since it demonstrates the degree to which problems of language and communication may reflect badly upon the claimant; furthermore, it confirms that the Refugee Status Advisory Committee and the Refugee Appeal Board could legitimately refuse to admit a claimant on the basis of a small error or even an omission during the hearing. Not all persons rejected for status in 1987 made appeals to the Refugee Appeal Board, and even fewer would have made further application to the Federal Appeal Court. If this case is any indication, then a significant number of persons deported from this country following unsuccessful claims for status could and should have won their case.

This is the case A 1265-87, between Charles Kofi Owusu Ansah and the Minister of Employment and Immigration, heard in the Canadian Federal Court of Appeal by Judges Patrick M. Mahoney, JA, Carrel V. Heald JA and James K. Hugessen, JA. The hearing was heard in Toronto, Ontario on May 10, 1989, and is dated May 19, 1989. The applicant appeared on his own behalf (i.e. he was not represented by Counsel) and the Minister of Employment and Immigration (the respondent) was represented by Ms. C. Bell Q.C. The Solicitors of the record were as follows: the applicant on his own behalf, and John C. Tait, QC, Deputy Attorney General of Canada, Ottawa ON, for the respondent.

The applicant had requested that the Court overturn a previous appeal heard by the Immigration Appeal Board concerning his request for Convention refugee status in Canada. The claimant's country of origin is Ghana, where he was persecuted by government authorities. Although the ruling for the most part speaks for itself, I will add several remarks to those of Judge Mahoney so that the reader will be able to correlate this information with that contained in previous chapters of this study. Judge Mahoney begins as follows:

> The applicant applies, pursuant to s.28 of the Federal Court Act, to set aside the decision of the Immigration Appeal Board which found him not to be a Convention refugee. I do not propose to recite the Applicant's evidence as to why he fled Ghana. Suffice it to say, had the Immigration Appeal Board found him credible, it would, in my opinion, have necessarily been led to the conclusion that his fear of persecution by Ghanian authorities for his political opinion was, indeed, well founded, there being clearly established a probability that Ghana, under its present military government, is a country in which such persecution may take place. (1)

This opening statement confirms that the Canadian government considered that Ghana was a country where citizens were subject to persecution from the authorities. This section relates to the statement which is read out during each hearing, that "the Board is aware of the general situation existing in your country, and therefore requests that you stick to facts pertinent to your own claim." The issue in the Board's decision was the credibility of the claimant; he was rejected, according to Judge Mahoney, despite the fact that Immigration Canada considers that Ghanian authorities are responsible for persecuting their citizens.

In the next paragraph, Judge Mahoney describes in general terms some of the cases involving Ghanian citizens which he has reviewed of late. This is the most unusual section of the case because, in my own experience, Appeal Court rulings generally make specific reference only to the information directly pertaining to the case at hand (and to previous jurisprudence). Here, the judge makes reference to the Refugee Appeal Board's general mishandling of cases from Ghana, as though he were suggesting that there was some extra-legal reason why Ghanians were being refused entrance into Canada as Convention refugees. He states: "It has been my impression, gained from the recent perusal of the records of a number of Ghanian claims of Convention refugee status before the Board, that it [the Refugee Appeal Board] has been reaching for inconsistencies in claimants evidence to support findings of lack of credibility" (1). According to Judge Mahoney, the Board is simply referring to inconsistencies, and as we shall see further on, minor inconsistencies, in its decisions to reject applicants. He is suggesting that Ghanian claims have been

singled out, or that this is particularly prevalent in cases involving Ghanians. Since there is no reason to believe that Ghanians were at this time safe in their own country (the opening sentence stated the contrary) or that Ghanians are particularly taken to lying under oath, we could assume that Mahoney is sensitive to some form of prejudice in the decisions made by the Board. Suffice it to say that virtually every utterance, and certainly every prolonged dialogue or monologue, contains material which is at some level contradictory. Judge Mahoney seems aware of this when he made this comment, for he does not seem to entertain the possibility that a refugee claimant should be rejected on these grounds.

Judge Mahoney then makes some comments about the procedure of handing down decisions on the basis of a written transcription; he states that "the bases for these adverse findings as to credibility, as in this case, are not usually those peculiar to a tribunal before which a witness actually appears and denied a tribunal reviewing a written record" (1-2). In other words, the claimant has been deemed not credible on the basis of a procedure in which the ruling body never actually sets eyes on any of the parties to the procedure. As in the cases of Mr. B. and Mrs. V, the decisions referred to here were based on information contained in the transcription, and in the case of Mr. Kofi the observations that contribute to his rejection "are based on inconsistencies gleaned by the Board from the record of the examination under oath conducted pursuant to s. 45(1) of the Immigration Act, 1976, and from the transcript of the claimant's evidence before it" (2)

In the case of Kofi vs. M.E.I., "the inconsistencies relied on often go unnoted during the Board's hearing and unremarked by Counsel in argument before it" (2); neither the claimant, the interpreter, the Counsel or even the S.I.O., thought that the "inconsistencies" were notable; all parties to the Kofi case presumably agreed that the hearing was accurate and complete. The S.I.O. could bear some of the responsibility here, but the real culprit is this system; if the rules according to which winners and losers will be determined are kept secret, so that the decisions will be made after the game is over, how can the refugee hope to clear up potentially innocent mistakes committed during the process?

We also learn that this is indeed the document upon which the Board based its decisions; Judge Mahoney is herein confirming that the transcription which has been the subject of my analysis is the crucial document for determining whether or not a claimant will receive refugee status. However, Judge Mahoney does not stop there; he then goes on to scrutinize the process, calling into question many of the same processes that appeared flawed in the study of the successful claims of Mr. B. and Mrs. V. He states: "In many cases, this among them, the claimant's evidence has been given through interpreters,

usually different at each proceeding. The process is fraught with the possibility of innocent misunderstanding" (2). This is indeed a problem; an "innocent misunderstanding" caused by a poor translation, an apparently unimportant inconsistency or, as we shall see further on, an omission, could be the reason why a persecuted person is returned to a country like Ghana which, even in the opinion of Immigration officials, is a dangerous country.

Judge Mahoney then reiterates the importance of the fact that the decisions are made at a different place (Ottawa) and at a different time than that of the hearing. He also draws attention to the ways in which this process differs from other legal procedure:

> It is also to be noted that, in the scheme of the legislation, reasons for a decision are composed by the Board some considerable time after the decision has been rendered not, as in the usual judicial proceeding, as a critical part of the decision making process. Few judges, I suspect, would attest to not having ever changed their minds in the process of writing reasons. The Board's reasons serve no purpose but to justify its prior decision. (2)

This last statement by Judge Mahoney *and concurred by two other Federal judges* describes the review process as an unsatisfactory procedure. The Board reads a case, makes a decision based on a procedure which is fundamentally flawed, and then in the Appeal the members of the Refugee Appeal Board simply look for (irrelevant) contradictions or omissions in the testimony to use as grounds for backing up the decision of the Board. This is a monumental accusation, especially coming as it does from a Federal Appeal Court judge.

Although it is easy to forget, in light of the repercussions of the accusations that Mahoney levels against the system as a whole, the issue before the court is the Refugee Appeal Board ruling in the case of Charles Kofi Owusu Ansah. Although Judge Mahoney chose to make some important and unusual remarks concerning the flaws in the system itself, the balance of the ruling concerns this one case. Judge Mahoney begins with a general observation which holds true for the entire case and for other cases of Ghanians who have sought recourse at the Refugee Appeal Board: "In the present case, the Board has, in my opinion, overreached itself in its search for inconsistencies in the Applicant's evidence" (2). He then discusses each example cited by the Refugee Appeal Board in order to demonstrate the arbitrary and flawed methodology they have applied to this case in order to judge the credibility of the claimant.

> . I shall deal with them seriatim after dealing with another basis upon which the Applicant's credibility was called into question. The Applicant, without baggage, little money and no identification, fled Ghana to Togo through the bush on May

> 30, 1987. He proceeded by bus through Benin to Nigeria the same day. He bribed Nigerian border guards to gain entry . He did not claim to be a refugee in any of those countries. He was not asked about Benin. As to Togo, he explained he felt he was still within the reach of Ghanian authorities next door. He testified to kidnapping. As to Nigeria, it also has a military government and he feared it would return him to Ghana if it learned what he had done there. (2)

This is an extremely valuable point, and it is not disputed by Judge Mahoney. The basis of Bill C-55 (proposed in 1987, with certain similar notions reiterated in the recent C-86), was that refugees who have fled their country of origin but have not made claims in ports of entry in countries en route to Canada must be returned to one of these countries (the "safe third country clause"). This law is fundamentally flawed, since it is based upon fallacious assumptions. If the human rights record in Togo is considered by Canadian officials to be acceptable, then Togo is a "safe third country." This *may* be true as far as citizens of Togo are concerned; but even if this were so, it does not follow that Togo is a safe place for a Ghanian to claim status because, as this claimant has noted, officials from Togo are likely to return Ghanians to their country of origin. By calling attention to this kind of technical information, Judge Mahoney puts into question the whole system of adjudication, as well as a series of laws which the Mulroney government has passed in the name of "authenticity" and "efficiency," including C-55.

Judge Mahoney's reading of the case continues as follows:

> He planned to go to Europe but had no money for the passage. A fellow Ghanian, a cook on a ship, supplied seaman's identification and smuggled him aboard. He travelled as a stowaway in the cook's cabin. The ship sailed from Port Harcourt on June 28 direct to Rio de Janeiro, arriving July 14. The seaman's identification got him past both Nigerian and Brazilian authorities. He initially intended to stay in Brazil but soon decided not to claim refugee status until he reached an English speaking country. The cook lent him $500 in exchange for which he obtained a boarding pass for a Varig flight to Toronto. He left Brazil and arrived in Canada July 23 and immediately claimed to be a Convention refugee. (2-3)

This, in a nutshell, is the trajectory of the claimant. Judge Mahoney notes the importance, as far as the Refugee Board is concerned, of an indirect trajectory from the country of origin to Canada; based on information concerning this trajectory, "the Board began building the case against the Applicant's credibility..., at p. 3 of its reasons" (3). From here on, Judge Mahoney cites the Board's ruling; for the first time we will have the opportunity to assess the viewpoint of the Board and the criteria according to which the cases are assessed. In order to distinguish between my comments, Judge Mahoney's

comments and those of the Board, excerpts from the Board's ruling will be *italicized*, as will citations from other cases or from regulations to which the Board makes reference in its ruling.

In the opening remarks from the Board, we learn the importance of direct travel from the country of origin to Canada; "*From the time that the applicant escaped from his country he has resided in three countries, that is, Togo, Nigeria and Brazil for over a period of 53 days. Mr. Owusu-ansah never bothered to seek asylum in these countries at any time*" (3). The extenuating circumstances to which Judge Mahoney referred in his summary of the case are not even considered by the Board; whatever his reasons, Kofi simply "never bothered" to claim status in Togo, Nigeria or Brazil. The Board justifies its own assessment by making reference to one of its earlier rulings:

> In relation to such action by an applicant, the Board stated its position in the case of Mudathir where it stated at p. 5 of its reasons:
>
> A person who claims to be a Convention refugee must prove, on balance of probabilities that he has a well-founded fear of persecution. While it may be true that a refugee claimant need not claim refuge in the first country he comes to, when he leaves the country which, in his opinion, is persecuting him, he should act in respect of his fear without unreasonable delay. Failure to do so goes to the root of his credibility in respect of well-founded fear. (3)

Judge Mahoney comments on the Board's ruling:

> It was, indeed, 53 days from the date the Applicant left Ghana, May 30, until he arrived in Canada, July 23. He was at sea 16 of them but there were 37 days during which he might have claimed to be a Convention refugee in a country other than Canada, assuming, of course, that those countries are parties to the Convention and have implemented it by whatever domestic process prevails. Nothing on the record discloses that they have but, since the Applicant is without Counsel, that is a matter which I am content to leave to another day when the board's discretion to take judicial notice of such facts may be adequately argued. The significant point is that the Applicant did offer explanations as to why he had not sought to remain or claim to be a refugee in Togo, Nigeria and Brazil. Each explanation appears plausible. The Board did not find them otherwise. It ignored them except to observe that others of his political movement were operating in Togo and Nigeria. (3-4)

We now have confirmation both from the Federal Appeal Court and from the Refugee Appeal Board itself that so-called "safe third countries" may not be safe for everyone, first of all, and second, there is no justifiable reason why someone should not target Canada as a desirable place for a claim, even if they have to forsake other possibilities along the way.

Judge Mahoney continues: "Carrying on from the passage quoted above, the Board said:"

> *The various events of the applicant's odyssey as related by him in the record, as well as during the course of the hearing, are full of inconsistencies and contradictions which lead the Board to question the credibility of the applicant. I wish to highlight some of these inconsistencies and contradictions. Exhibit A-2 is a letter from the applicant's uncle which was introduced at the hearing. In this particular letter the uncle of the applicant stated that the two individuals who were crossing the border with the applicant at the time of his arrest were shot. The applicant himself informed the Board that the two individuals who were with him at that time had run away.* (4)

Judge Mahoney provides the Federal Court's reading of the same transcription:

> The Applicant and his two companions were challenged by three soldiers on a bush path at midnight. The Applicant was apprehended, put in a vehicle and taken by three soldiers to prison. He testified that the other two fled and that shots were fired. The Applicant did not testify to having seen or heard of them since. That occurred in early May, 1986. The uncle's letter, dated March 20, 1987, in its relevant part, says: *"Your mother has been very worried that, you might have been shot by the border patrol unit, since two of those guys who attempted to run away were shot on sight."* (4)

This apparent inconsistency was noted by the chairman during the hearing; Judge Mahoney cites from page 144 (!) of the transcription of Kofi's hearing, a transcription which would resemble those of Mr. B. and Mrs. V:

> *Chairman*: Thank you. You stated that these people were able to run away.
>
> *Witness*. Yes.
>
> C. Is there any reason why your uncle refers to his letter to you that these people were shot on sight.
>
> W. May be that might be the information that he received, because at that point I was arrested and detained, so what I knew was maybe they have escaped.
>
> C. You would have been aware if they dropped on the spot.
>
> W. at that point, if they had dropped I would have known. (4)

Judge Mahoney first notes that the Board's assessment of the above passage is simply wrong; in his opinion, "there is no inconsistency. The uncle's information simply provides no basis upon which the Board might reasonably infer that the Applicant's evidence as to his companions fate was not the whole truth as he knew it" (4). If such analyses of cases are in any way typical, as Judge Mahoney suggested at the beginning, then there is very little hope for any applicant, no matter how strong the case, since rulings could be made based on clearly erroneous analyses. This is a critical point; discourse analysis, practised by the Refugee Appeal Board or the Federal Appeal Court, could be employed to simply justify prior decisions if the system is construed in such a way that all answers are known in advance. All documents contain areas of contradiction which could be either be called "human error" or "a sinister example of dishonesty," depending upon who is making the judgement. What Mahoney is making clear at this point is that discourse analysis practised by well-intentioned rational persons according to some objective criteria will reveal different results from discourse analysis undertaken for the sake of upholding a particular political practice or decision. As such, discourse analysis can never be severed from the context within which it is employed, and discourse analysis without constant interchange with questions of symbolic power, discursive hierarchies, and references to the broader social and political spectrum, has limited meaning or value.

In a dramatic passage, Judge Mahoney then notes that some of the testimony is indeed inconsistent, but that such inconsistencies should be overruled. Furthermore, he notes examples of inconsistencies which, according to the logic of the Board, could have been used against the claimant. This demonstrates that the Board is deficient even according to its own criteria:

> The Board next identified two inconsistencies which do, in fact, exist between the Applicant's evidence on the examination under oath and before the board. Referring to his detention after arrest, on the examination under oath he stated repeatedly that he had not been questioned at all. He told the Board that he had been questioned about 10 times. On the examination he also stated that he had not worked while in Nigeria. His evidence to the Board was that he had done "some little job" for money in construction there. He did offer an explanation of each inconsistency. The Board did not mention the explanations in its decision.

The Board, in its reasons, continued:

> *The applicant testified that the friend of his friends whom he met in Nigeria gave him $500.00 upon arrival in Brazil in order to secure an airline ticket and to obtain any other documentation necessary. However, at page 50 of the transcript of the hearing is transcribed the following testimony by the applicant:*

Q. What nationality was he?

A. He's a Nigerian.

Q. Okay. And what did he do for you?

A. So there he told me that – I explain everything to him and my friends also supported what I told him about myself, so this man, he feel sympathy for me and he said he can help me. But not financially, because he wasn't all that financially good. So the help he can give me is if I can travel with him from Lagos to Port Harcourt.

Judge Mahoney comments:

> The underlining is the board's. The person referred to in both instances is the cook. I fail to see any inconsistency in the fact that a seaman, who "wasn't all that financially good" before a voyage, is in funds upon its completion. (5)

The ruling from the Board, and Judge Mahoney's comments, speak for themselves. But in relation to the cases of Mr. B. and Mrs. V., consider the number of similar grey areas which could have been grounds for rejecting the claim; in this regard it is particularly interesting to have analyzed two *successful* claims, for even here the flaws of the system are unveiled. All of the little errors, slip-ups committed by the Counsel, and misunderstandings due to problems with the language previously noted, could have been grounds for dismissing a claim.

Judge Mahoney continues by citing the Board's reasons:

> The Board's reasons continue:
>
> *In relation to his association with the United Front for the Liberation of Ghana, the applicant made the following statement in his examination under oath at page 6:*
>
> Claimant: Those who have run away, due to some certain circumstances, like the Government is after them to arrest them or they are in trouble and have run away and are living in exile, for example in Togo or Nigeria, I run errands for this particular party that I am talking about, I send information to them. I bring information from them to that party.
>
> Yet during the course of the hearing the applicant informed the Board that he was arrested at the border in May of 1986 as he was bringing contraband literature, specifically the leaflets which were destined to dissidents in Ghana to overthrow the regime of Flight Lieutenant Jerry Rawlings.

Judge Mahoney comments:

> The Board appears, in finding an inconsistency in this regard, to have overlooked the Applicant's evidence, at p. 8 of the transcript of the examination under oath, where he described the package of pamphlets he was carrying when apprehended and his evidence commencing at p. 16 of the transcript of the Board's hearing, which described his earlier courier activities. Again, there is simply no inconsistency between the testimony at the examination and that before the Board. His evidence was essentially the same on both occasions.
>
> The Board then went on to conclude its review of the evidence.
>
> *The Board analyzed the entire evidence on record as well as the evidence adduced during the course of the hearing, and is of the opinion that the veracity of the events related by the applicant are of a dubious nature. There are too many facts which do not have a logical explanation. Dissidents belonging to the United Front for the Liberation of Ghana were operating in Togo and Nigeria as the applicant indicated; yet he was in these countries and the applicant felt he was too close to his own country and he had to go away. Some important details were omitted from the examination under oath which in the opinion of the Board are relevant to his credibility. The name of the soldier who helped him to escape was never mention ed at the examination under oath. The fact that the United Front for the Liberation of Ghana has a head office in the United States was never mentioned in the examination under oath. In light of the fact that the applicant has already received some indication from Ghana in the form of a letter from his uncle and would attempt to secure other documentation which support his position, but no such evidence has been forthcoming.* (5-6)

These comments are at times incomprehensible; however the implications are clear. In a case that ran one hundred and fifty seven pages, minor omissions and ostensibly insignificant contradictions are grounds for rejecting a claimant who clearly escaped after persecution from a country which Canadian officials consider to be dangerous. I will let Judge Mahoney comment at length since the weight of his remarks bears upon the cases of Mr. B. and Mrs. V., and upon the procedure of refugee determination:

> That last sentence is as it appears in the decision. I necessarily speculate on its intended meaning.
>
> The Board thinks that the Applicant might safely have stayed in Togo or in Nigeria. He did not think so and his reasons cannot be described as lacking in substance. The transcript of the Applicant's evidence on this examination under oath takes up some 28 pages of the record. The transcript of his evidence at the Board's hearing occupies 157 pages. In each, he answered the questions he was asked. It is totally unreasonable to find significant to the Applicant's credibility the failure to volunteer irrelevant information such as the name of the helping soldier and the location of ULG head office at the examination. Finally, how in reason can the failure to produce at a hearing in Canada documentation which someone else, in

another country, had given "some indication" would be forthcoming reflect adversely on the applicant's credibility? In my opinion, it cannot. My opinion would be the same as long as the documentation is outside Canada and the Applicant's control.

I think it proper to infer that if there were any other grounds for disbelieving the Applicant, as the Board suggests, there were thought to be of less significance than those catalogued. Of those, it is apparent that the Board simply misconstrued the record in concluding that there was any discrepancy whatever in his evidence as to the fate of his companions, his earlier courier activities and his possession of contraband literature when apprehended. The Board based its decision as to his refugee claim on the finding that the Applicant was not credible. To the extent that it based that finding on the foregoing "inconsistencies," it based its decision on an erroneous finding of fact made without regard to the material before it. The finding of an inconsistency in the cook being in funds after the voyage and not "all that financially good" before one is so patently unreasonable as to fall into the same category. The failures to disclose the name of the assisting soldier, the location of ULG head office and to produce additional documentation, while correctly found as facts, cannot be rationally related to the Applicant's credibility. The Board erred in law in so relating them.

There remains the failure to stay in Togo or Nigeria, the related failure to claim to be a refugee there or in Brazil, and the discrepancies as to the questioning in custody and work in Nigeria. This is not a game of numbers but, it seems to me, when the Board has found numerous reasons for doubting a claimant's credibility and was patently wrong in selecting a significant majority of them, it must be clear to a reviewing authority that those remaining were properly considered. That is by no means clear here. Explanations which, to say the least, were not obviously implausible were offered and were simply not dealt with by the Board in its decision. (7-8)

Failure to account for the political framework which serves as the backdrop for this claim or for the relations of symbolic power which underwrite the affiliations between the various parties to the hearing would render a study in discourse analysis irresponsible or irrelevant.

The final discussion in the ruling by Judge Mahoney is purely legal; here he makes reference to other cases that have arisen out of appeals based on Section 28 of the Immigration Act, and then he draws his final conclusions.

The failure to take account of material evidence has been variously characterized by this Court in allowing S. 28 applications. In *Toro v. MEI [1981] 1 F.C. 652*, my brother Heald, of the Court, said:

It appears therefore that the Board, in making its decision, has not had regard to the totality of the evidence properly before it. It has therefore erred in law.

See also *Erarrazabal-Olmedo v. M.E.I.* [1982] 1 F.C. 125 at 126. In *Canadian Im. B. of C. v. Rifou*, [1986] 3 F.C. 486 at 497, Mr. Justice Stone stated:

In my view, a tribunal that has overlooked a piece of relevant evidence in arriving at a finding of fact and in deciding a matter on the basis of that finding has "based its decision in order on an erroneous finding of fact that it made... without regard to the material before it."

The other members of the Court, while writing separate reasons, concurred in his.

I would allow the s. 28 application, set aside the decision of the immigration Appeal Board dated Nov. 10, 1987 and signed November 27, and remit the matter for a full rehearing by a differently constituted panel. (8-9)

The individuals working in the determination system are often sincere, qualified and well-meaning; but the system within which they work, and the underlying principles that guide much of the legislation, is not geared towards compassionate rulings for suffering human beings. But although this study has brought to the fore flaws that lead to the production of refugees, flaws in the laws that created the system itself, flaws in the ways in which the claimant is asked to present the case, flaws in the procedure of the hearing, flaws in the interpretation, flaws in the transcription process, flaws in the adjudication and flaws in the appeal procedure, Judge Mahoney has demonstrated that compassion and intelligence can sometimes prevail. The obvious question is, how many refugee claimants whose claims were refused for similar reasons as those stated by the Board the Case of A-1265-87 were fortunate enough to find their way to the Federal Appeal Court? And how many benefitted from the kind of wisdom displayed by Judge Mahoney?

We are now in the realm of the Other; this document, which was evaluated by the Refugee Board, the Refugee Appeal Board and the Federal Court, has been assessed and re-assessed by three different bodies which have come up with two completely different conclusions. The claimant never had a say in any of these decisions, never had the right to defend himself against the minor points which could have cost him his claim for status (and therefore possibly his life). He was reduced from a human being to a narrative about his persecution in the country of origin, and this narrative has been passed to three different bodies who are trying to evaluate his "credibility." In fact, Kofi, like Mr. B. and Mrs. V., has come to be known through his transcript; the transcript has taken the place of the claimant during his quest for refugee status.

iv. The Emergence of the Diminished Other

As we approach the small end of the discursive funnel, as the number of limiting factors in the quest for adequate self-representation in Convention refugee hearings grows, the Constructed Other diminishes in size and importance, particularly in relation to the institution upon which its legal existence is predicated. This exercise in discourse analysis theory and practice brings us ever closer to the Federal Appeal Court case and Judge Mahoney's ruling, in particular his claim that the Appeal Board was simply using a set of rules which could be applied to any kind of discourse to demonstrate its fallaciousness in order to justify prior decisions. Judge Mahoney's own statement was that "the Board's reasons serve no purpose but to justify its prior decision."

What is becoming increasingly apparent is that the tactics of the Refugee Board to analyze discourse could be effectively used to undermine the Counsel's claim to status as a Counsel, or the S.I.O.'s status as Immigration official just as it has been used to undermine the claimants status as refugee. Again, the example Mahoney provides is ample evidence of this fact:

> The transcript of the Applicant's evidence on this examination under oath takes up some 28 pages of the record. The transcript of his evidence at the Board's hearing occupies 157 pages. In each, he answered the questions he was asked. It is totally unreasonable to find significant to the Applicant's credibility the failure to volunteer irrelevant information such as the name of the helping soldier and the location of ULG head office at the examination.

By gradually narrowing the funnel down to limit "irrelevant" detail, circumstantial evidence, information that does not pertain to the claim, discourse that is "unsayable" in our culture or untranslatable into our language, and so forth, the refugee claim system whittles down the claimant as Other to a small series of contradictions which justify a negative decision. For the testimony that is within the realm of discursive possibility, there remains the immanent danger of contradiction or omission, a danger which, as Steele noted earlier on, demonstrates that "the author is moral and like all human beings tells lies, distorts the facts, and leaves out information that would defame him or her" (262). But when faced with a necessarily antagonistic system, the reality of discursive practice becomes grounds for further persecution; as Mahoney stated in his ruling:

> It has been my impression, gained from the recent perusal of the records of a number of Ghanian claims of Convention refugee status before the Board, that it has been reaching for inconsistencies in claimants evidence to support findings of lack of credibility.

The only hope for recuperation is, as is always the case in Administrative law, leniency or reasonableness. Yet the very construction of the system precludes any possibility that a system so construed could ever function; and by referring to the work on symbolic power by Bourdieu, the reasons for this become clear.

v. Language, Symbolic Power, and the Intentional Reduction of the Claimant as Other

In looking for traces of the social structure that particular discursive practices voice and therefore replicate, Bourdieu helps to describe the walls of the funnel, the materials and the *raison d'être* of the limiting structure. In doing so, he elaborates the degree to which the official language, the language against and through which the language of the Other will be measured, is inexorably bound to the interests of the ruling classes:

> The official language is bound up with the state, both in its genesis and in its social uses. It is in the process of state formation that the conditions are created for the constitution of a unified linguistic market, dominated by the official language. Obligatory on official occasions and in official places..., this state language becomes the theoretical norm against which all linguistic practices are objectively measured. Ignorance is no excuse; this linguistic law has its body of jurists – the grammarians – and its agents of regulation and imposition – the teachers – who are empowered *universally* to subject the linguistic performance of speaking subjects to examination and to the legal sanction of academic qualification. (*Language* 45)

Bourdieu's use of legal metaphors renders this initial observation even more pertinent here, as the discourse of the outsider is evaluated against the linguistic criteria set out by the jurists, the members of the Refugee Board. This is only the first step in his analysis, however; he then goes on to demonstrate how the process of communication becomes inexorably bound to issues other than transference of information, issues that can only be understood through reference to the interests of the official apparatus into which the discourse is uttered. His first postulate, therefore, is that language, unofficial or not, is seldom a means for communicating information; in fact, Bourdieu believes that "quite apart from the literary (and especially poetic) uses of language, it is rare in everyday life for language to function as a pure instrument of communication" (66). True in most realms, this statement is particularly applicable in the case of Convention refugee hearings where the claimant participates in the hearing simply in order to be accepted as a

refugee, and the other parties to the hearing participate as part of their daily obligations in their professional work. The routine nature of hearing these confessions recalls passages from George Konrád's novel *The Case Worker*:

> The questioner must proceed as delicately as a surgeon probing with his scalpel or a mother resting a soothing hand on her child's bellyache. In a calm, workaday voice he dwells on unlikely details, remarking from time to time: "Unfortunate... that wasn't nice of him...yes, I see...that was bad..." At the same time he tries to avoid the pitfalls of unguarded commiseration, expressing mild disapproval of the client's weakness, but also evincing professional scepticism. In the presence of routine cases he may show a certain boredom, while extreme cases arouse his scientific enthusiasm. The client vanishes behind his case, the official behind his function. (15)

The narrator describes the duty of receiving these confessions, the obligation to participate from afar in the misery, yet, as he says further on, the interrogations made him "think of a surgeon who sews up his incision without removing the tumour" (15).

Bourdieu describes in aptly theoretical terms this process of professionalization and the conditions necessary for adequate expression in the face of the state apparatus. His work arises out of an elaborate critique of Austin's work on Speech Acts and Chomsky's speculations concerning the "ideal speaker." As I hope to use his work to explain the forces that act to reduce the role of the refugee's discourse to one of reiterating and legitimizing the current system, Bourdieu has used Chomsky and Austin to elaborate a theory concerning the conditions of production and the symbolic value of discourse. He begins by stating that just as ordinary speakers do not have the option of all the words in a dictionary when they begin to communicate in a given language, neither do actual speakers have the capacity to generate unlimited sequences of grammatically correct sentences; instead, actual speakers model their speech to accord with the situation just as the actual speaker makes reference to the appropriate speech genre when articulating a given argument, demand or desire. Furthermore, the degree to which this speech will be deemed acceptable for the addressee depends upon the value of the speaker's discourse and its relation to the discursive marketplace:

> Utterances receive their value (and their sense) only in their relation to a market characterized by a particular law of price formation. The value of the utterance depends on the relation of power that is concretely established between the speakers' linguistic competencies, understood both as their capacity for production and as their capacity for appropriation and appreciation; it depends, in other words, on the capacity of the various agents involved in the exchange to impose the criteria of appreciation most favourable to their own products. (67)

This first description of Bourdieu's work is immediately applicable to the preceding discussion inasmuch as it helps to further delineate a reductive force active during the Convention refugee hearing. There is a prescriptive element here, that this observation would apply to all claimants no matter what there country of origin; however it has another role with respect to inter-cultural discourse inasmuch as it describes the disadvantage for non-native speakers. This returns us to the opening discussions of this study, to the issue of who is most disadvantaged by the system as presently construed. There is no doubt, according to Bourdieu, that persons who don't have practical competence in a language cannot compete in the marketplace of discursive practice because they cannot create the conditions necessary *to be listened to*:

> The competence adequate to produce sentences that are likely to be understood may be quite inadequate to produce sentences that are likely to be *listened to*, likely to be recognized as *acceptable* in all situations in which there is occasion to speak. Here again, social acceptability is not reducible to mere grammaticality. Speakers lacking the legitimate competence are *de facto* excluded from the social domains in which this competence is required, or are condemned to silence. What is rare, then, is not the capacity to speak, which, being part of our biological heritage, is universal and therefore essentially non-distinctive, but rather the competence necessary in order to speak the legitimate language which, depending on social inheritance, re-translates social distinctions into the specifically symbolic logic of differential deviations, or, in short, distinction. (55)

This leads to the work of Austin, to the ways in which Bourdieu uses and critique Speech Act theory, and to issues of performative utterances which in a sense are at the heart of legal procedure. A useful definition of the speech act, followed by a valid criticism thereof, is found in Foucault's *Archaeology of Knowledge*:

> [A speech act] is the operation that has been carried out by the formula itself, in its emergence: promise, order, decree, contract, agreement, observation. The speech act is not what took place just prior to the moment when the statement was made (in the author's thought or intentions); it is not what might have happened, after the event itself, in its wake, and the consequences that it gave rise to; it is what occurred by the very fact that a statement was made – and precisely this statement (and no other) in specific circumstances. (83)

Foucault then goes on to say that such a speech act also requires "a certain number of distinct formulas or separate sentences," and that "certain speech acts can be regarded as complete in their particular unity only if several statements have been made, each in its proper place" (83). This is a valid starting point for a critique of Austin's work; however Bourdieu goes further

than discussing just language in his appeal to the pre-ordained structures that dictate the circumstances that preclude the utterance of any statement that could end up as a speech act.

In order for a speech act to work, each party must be secure in his or her position vis-à-vis the utterance; for "symbolic imposition," the quality of an utterance that allows it the full force needed to carry out its tasks, "can function only if there is a convergence of social conditions which are altogether distinct from the strictly linguistic logic of discourse" (72). This is the critical point, the point at which linguistic efficacy fades, at which convincing rhetorical speech is rendered illegible, and at which valid cases are struck down for reasons unrelated to those stated in the Convention, the Act, the laws, the statutes, the jurisprudence. Bourdieu writes:

> Only a hopeless soldier (or a 'pure' linguist) could imagine that it was possible to give his captain an order. The performative utterance implies an overt claim to possess such or such power, a claim that is more or less recognized and therefore more or less sanctioned socially. This claim to act on the social world through words, i.e. magically, is more or less crazy or reasonable depending on whether it is more or less based on the objectivity of the social world. (75)

To demonstrate the inconsistencies in the procedure, the process, the ruling and the appeal is to demonstrate the lack of objectivity in the social world in which these cases will be judged. The Other as Convention refugee claimant is too profoundly reduced during the process to carry the necessary weight to be heard, and the apparatus as Convention refugee Board is too politically motivated, too biased, and too unknowable to hear what is being uttered within its own walls.

vi. Acting Performatively: The Decision-Making Body

It is clear that the parties to the hearing are continuously reminded of their role and their status in a hearing. It is true that each speaker sits at the same level at a table, and that each speaker has his or her own microphone. Yet there is never any question about the authority of individual speakers, whether it be the Counsel, the S.I.O., or even the interpreter; in fact the hearing further legitimizes their respective positions because it allows them to carry out their roles with a degree of self-certainty by permitting each professional speaker (the Counsel, interpreter and S.I.O.) to "authorize what it designates at the same time as it expresses it" (129). For Bourdieu, "the

veritable miracle produced by acts of institution lies undoubtedly in the fact that they manage to make consecrated individuals believe that their existence is justified, that their existence serves some purpose" (126).

The claimant is always the complementary class to this distinguished class, he is always reduced to what Bourdieu calls "the lowest Being" (the opposite of Bakhtin's "whole human being"); and the S.I.O., despite his/her supposed lack of power, is nonetheless called upon like Konrád's case workers to listen to the "threadbare histories" of the claimants as though they could rule upon them, judge their validity, or make them surface:

> Who am I, I sometimes ask myself, that I should question them so, that they should tell me their threadbare histories? Who do they take me for that they should bring me things to repair that would have made even the Galilean craftsman raise his arms to high heaven? Where did this drab serial of misfortune begin? With the statistical accidents of their cellular systems? With the mistaken ideas that were drummed into them? At what remote phase of their past? And when I say that something is bad, compared to what is it bad? Minute air bubbles immured in limestone: such are the neglected opportunities of the free will. But even if my power of action is only one such bubble, there in that diminished cavity I must huddle and render judgment. (Konrád 90)

Despite all of the rhetoric, the hearing always sounds like a criminal proceeding, and the method of questioning, in which the same questions are asked over and over again as though there was a lingering doubt, reinforces the status of each speaker just as their respective uniforms do. Bourdieu reminds us that

> the practical evaluation of the symbolic relation of power that determines the criteria of evaluation prevailing in the market concerned takes into account the specifically linguistic properties of discourse only in so far as they express the social authority and social competence of those who utter them. They do so in the same way as other non-linguistic properties such as ... aristocratic and academic dress; institutional attributes like the priest's pulpit, the professor's platform, the orator's rostrum and microphone, all of which place the legitimate speaker in a pre-eminent position and structure the interaction through the spatial structure which they impose on it; and finally, the very composition of the group in which the exchange occurs. (*Language* 70)

The decision-making power resides in the transcription of the tape that is recorded during the hearing by a machine that is controlled by the S.I.O. The ruling body, if you will the God of refugee claims is elsewhere, ethereal. The claimant in 1987 never saw the decisionmakers, and they never saw him, but everyone knew that they exist because, as in any legal discourse, "there is a set of agents and institutions which guarantee that the sentence will be

executed" (Bourdieu *Language* 75). Unfortunately, what emerges from these hearings and the analysis thereof is that even if they would have been present, the basic methods for decisonmaking would have remained flawed.

vii. Acting Performatively: The Senior Immigration Officer

> Very little of what I see happens to me. I have never been paralysed, crippled, deaf-mute, or blind, mine shafts have never collapsed on top of me, I have never fallen from scaffolding, no chemicals have exploded in my hands, no press has ever crushed me, no transmission belt carried off half my arm, no streetcar wheel amputated my foot, I have never had heart trouble or suspicious symptoms calling for histological analysis, no shock electrodes have been applied to my temples, thus far no peacetime death has started out in my direction. My family life is orderly, my mother is not confined to the chronic diseases ward or my father to a padded cell, my wife is not in jail. My loved ones do not sleep with axes under their pillows, nobody pushes me from behind when I lean out the window, nobody throws knives at me or puts dynamite in my cigarette, nobody pours lye in my wine, nobody denounces me to the police. I have not been shut up in a mental hospital or been thrown out of my home. (Konrád 104)

I have discussed at some length these unusual characters called Senior Immigration Officers (the S.I.O.s), frequently comparing them to the case worker who is also employed in a department that determines the fate of vulnerable human beings. The system which demands that personnel listen to tales of human suffering every day of the week is a ruthless one, and we can only speculate about the psychological barriers that the S.I.O. must erect in order to face each claimant. The S.I.O. was a confessee, the person who, like the priest, had no power other than that which has been conferred by God; the power over the ceremony, the power of speech, and the right to listen and ask questions. He was also the very opposite of the priest, for he had no vested interest in the institution beyond his paycheque, apparently little or no knowledge about the plight of refugees, – in short a man like the case worker in Konrád's novel:

> [A]n overworked, indifferently paid civil servant, neither old nor young, ranking somewhere in the middle of the established order of power and prestige, a law-abiding family man with his fantasies; a man whose job it is to concern himself with people and consequently to weigh conventions against reality, legal principles against society, expectations against human limitations; a man who would like to forget both those he supervises and those who supervise him. (143-4)

The institution that made decisions in the refugee claimant's case, whether present during the claim or not, is everywhere and nowhere; it defines the conditions to be fulfilled in order for an utterance to be effective, but it is not responsive to the speech of the claimant or responsible for the claimant does or does not utter during the hearing. And as Judge Mahoney has clearly shown, even the proper utterances cannot assure that the conditions for acceptance will ever be met.

viii. Jürgen Habermas and Pierre Bourdieu: Communicative Competence in a Tightly Regulated Hearing

The question of conventions which permit a particular discourse to be accepted is not fully elaborated by Austin even though it is central to any consideration if how the Convention refugee process works. It is on these grounds that Bourdieu wishes to dispute Austin's "speech act" theory; and it is also the basis of his quarrel with Habermas' use of Austin's theories. Habermas has written extensively on issues of communicative competence, the rational motivating forces that dictate or underline communication, and communicative action. However his theories emphasize a kind of rationality and intention that underwrite communication, suggesting that it would be possible, in an effort to elaborate a "universal pragmatics," to "identify and reconstruct universal conditions of possible understanding." Suggesting that "the type of action aimed at reaching understanding to be fundamental," he writes:

> I start from the assumption (without undertaking to demonstrate it here) that other forms of social action – for example, conflict, competition, strategic action in general – are derivatives of action oriented to reaching understanding. Furthermore, as language is the specific medium of understanding at the sociocultural stage of evolution, I want to go a step further and single out explicit speech actions from other forms of communicative action. (*Communication* 1)

Bourdieu, on the other hand, wishes to emphasize the more pragmatic institutional issues as well as the fictitious nature of a rational communicative exchange within an ideal speech situation. Commenting upon Habermas's position, John Thompson writes:

> Habermas argues that, in exchanging speech acts, individuals are implicity raising certain 'validity claims,' such as truth and correctness; and that some of these validity claims can only be redeemed or made good in an 'ideal speech situation,' that is, a communicative situation in which participants are motivated to accept or reject a problematic claim on the basis of reasons or grounds alone. (Thompson 8)

The reason why I turn to Habermas's work in light of my previous discussion of Bourdieu is to emphasize the degree to which this manifestly disadvantaged speaker is even further disadvantaged as Other because he faces an absent and, even worse (because of what it implies for post-1989 decisions) a self-interested party who can make arbitrary and unfounded rulings. There is no doubt that if persons could decide to sit down to effect true *communication*, and if they could decide that there is a paradigm within which both their respective viewpoints could be heard, then there may very well be what Habermas optimistically called "communication and the evolution of society" (the title of one of his major works). The fact is that the reduction of the refugee as Other thus described could considered yet another process that confirms and upholds the power of a ruling class more concerned with its own interests to recognize the inhumanity of its actions. Some of these interests can only be uncovered through reference to the discourse of adjudicative bodies, and only be described through study of the relationship between the discourse and the broader social context.

8. Conclusion: The Destruction of the Self

> No, that I cannot tolerate; no, really I can't! It isn't bobok that worries me (so that's what bobok turned out to be!).
>
> Debauchery in such a place, the debauching of the last aspirations, depravity in crumbling and decaying corpses – not sparing event he last moments of consciousness! Those moments are granted, bestowed upon them, and... But above all, above all, in such a place! No, that I cannot tolerate....
>
> I shall visit other classes of graves, I shall listen everywhere. That's it, one must listen everywhere, not only at one place, in order to form an understanding. Perhaps one may stumble on some consolation as well.
>
> But I shall certainly go back to those ones. They promised to relate their autobiographies and various stories. Ugh! But I shall go, I shall certainly go; it's a matter of conscience!
>
> I shall take this to the *Citizen*: the portrait of one of the editors there has been exhibited too. Perhaps he'll print it. (Dostoevsky, "Bobok" 181)

Applying methodologies and theoretical studies from discourse analysis theory to authentic materials transcribed in the context of administrative procedure allows one to measure the distance between an oft-utopian realm of unfettered dialogue, and the real world of cost-effectiveness, political ambitions, and pragmatic problem-solving adequate for the short term. One goal of this book was to study 1987 Convention refugee hearings from a discursive standpoint, and in the process attempt to show that administrators of the refugee claimant procedure could not fulfil the obligations to which the government voluntarily ascribed because the nature of the process that was implemented to carry out these obligations was fundamentally unsound. A number of sources of conflict have been revealed which virtually assure miscarriages of "justice" (even if "justice" is defined according to formulations made by our own lawmakers), and a number of examples have been invoked to demonstrate that certain oft-cited theories are inappropriate for studies of the discourse of administrative hearings.

Ultimately, however, the question is one of political expediency versus long-term goals. Even though some of the blatant flaws in the determination system have since been rectified, the conclusions of this research could

nonetheless be employed to modify the contemporary system in the long and short terms in order to relieve the suffering of human beings around the world. In the long term, the issue is relatively simple; all persons should have the right to free movement; anything short of this is aberrant and unacceptable. In the short term, re-defining the "refugee" to include persons who are persecuted on economic grounds would render the system more equitable and would eliminate the intrinsic hypocrisy of the present categories. Refugees are an international phenomenon and the responsibility for their plight is of international concern; obviously, one country cannot be expected to accept all displaced persons. Canada has been amongst the world leaders in terms of liberal refugee adjudication and in humanitarian intervention; nonetheless, certain procedural aspects of the current system require change. Allowing free access to Canadian territory for potential refugees would allow us to assist those *truly* in need, rather than those who are needy *and* well-connected enough to make the (often long) trip here. Granting status to all of the claimants in Canada presently awaiting decisions and diverting the money from handling this "backlog" to improving the conditions of future claimants would be beneficial. Automatically issuing Canadian visas to family members of claimants to lessen their suffering during and after the process would be a humanitarian gesture directed towards persons who have suffered enough. Raising the qualification standards for persons who work within the system would ensure a more equal treatment of claimants.

The reference to discourse theory has shown as well that certain of discourse analysis approaches are rendered inoperable by the constraints imposed upon speaking persons in particular contexts; if all persons were given the opportunity to speak out, we may in fact create the conditions in which our ability for self-expression could expand without limit (Chomsky) or where true creative dialogue could emerge from the contact of self and other (Bakhtin), or where a universal pragmatics could be elaborated to establish modes of rational communication amongst different subjects (Habermas). Regrettably, the contemporary political situation is such that few persons in need are ever *heard* (even if given the chance to speak), and most persons who appeal to administrative systems for assistance find themselves talking at cross-purposes with officials who have profoundly different concerns and validity criteria than their own. This bleak description is well -articulated by François Lyotard, in particular in his work called *Le Différend*. I will tentatively conclude on this note because his viewpoint represents a further obstacle to adequate resolution of this international crisis.

The concept of the *différend* is as commonplace in discourse as it is simple to grasp; "as distinguished from litigation, a différend would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for

lack of a rule of judgment applicable to both arguments" (xi). This is the situation in most Convention refugee hearings, in which the refusal to admit a claimant could be legitimated in light of certain economic and socio-political realities, and in which the position of the claimant is, simultaneously but by a different logic, equally legitimate; as Lyotard writes, "one side's legitimacy does not imply the other's lack of legitimacy." the problem arises when the dispute must be settled according to a criteria to which both parties will be subjected; "[A]pplying a single rule of judgment to both in order to settle their differences as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule)" (xi).

The problem for Lyotard is that there is no transcendent or universal authority to which the parties could defer in such cases; God is dead and the Enlightenment notion of Reason has few followers amongst the enfranchised. For Lyotard, the upshot of this newfound liberation from the court of metaphysical appeal is that the settling of conflicts must necessarily lead to the injury of one or both parties. Liberation according to this viewpoint leads to relativism; every claimant is right according to a given paradigm (which must be articulated), and all claimants have an equally invalid case since there exists no common criteria for evaluation of the claim. Language is simply the "object of an idea," the common ground only to the extent that it provides the formal apparatus for linking opposing viewpoints on the same subject.

> A phrase, even the most ordinary one, is constituted according to a set of rules (its regimen). There are a number of phrase regimes: reasoning, knowing, describing, recounting, questioning, showing, ordering, etc. Phrases from heterogeneous regimens cannot be translated from one into the other. They can be linked one onto the other in accordance with an end fixed by a genre of discourse. For example, dialogue links an ostension (showing) or a definition (describing) onto a question; at stake is the two parties coming to an agreement about the sense of a referent. Genres of discourse supply rules for linking together heterogeneous phrases, rules that are proper for attaining certain goals: to know, to teach, to be just, to seduce, to justify, to evaluate, to rouse emotion, to oversee.... There is no "language" in general, except as the object of an Idea. (xii)

The problems posed by such a viewpoint are monumental; the loss of a criteria for problem resolution does not, according to Lyotard, open up new and libertarian possibilities, it simply encourages the growth and proliferation of incompatible points of view represented in language. Bakhtin as previously described would indeed agree that the structure of a hearing could limit or impede the possibility for direct auto-representation in language; however his conclusions, rather than being a source of paralysis, are cause for hope and

motivation for monumental change inasmuch as they celebrate the creative and open-ended possibilities that attempts at divulging create for both the speaker and the Other.

It is indeed the case, as Lyotard suggests, that persons with opposing truth touchstones speak at cross-purposes, and it would be utopian to imagine that within the present structure of our society that we could work through our differences with rational discussion (Habermas) or creative dialogue (Bakhtin). However a description of the discursive realm that is accurate in its pessimism should not become a reason for inaction. The reasons for this are set out in the very fabric of this study; the cases described in this study are not fictions, they are the narratives recounted by real persons who continue to live among us. It does take a kind of leap of faith, a belief that things could and should be better, to discount Lyotard's pessimism and look beyond theories describing the impossibility of problem resolution.

This should be reason enough to pursue other avenues. So too should the disconcerting thought that though some elements of the determination process in Canada have improved since 1987, and though the Canadian system remains one of the most sympathetic ones in the world, the overall situation for Convention refugees has in fact deteriorated due to ongoing upheaval in the former Soviet bloc, the former Yugoslavia, Ethiopia, Somalia, Rwanda, Pakistan, India, Peru etc. etc., as well as an unnerving legitimation of a frightening xenophobic Right in Italy, France, the UK, Canada, the U.S., etc. etc. – trends which are clearly proven to be intrinsic to the present international economic structure.

Writing this study I became obsessed with the Canadian refugee policy of 1987, and despite my pessimism, was sometimes able to convince myself that things had improved as a result of, for example, the Supreme Court ruling on the Singh case. In fact, recent reports of wrongdoings, such as the *Hathaway Report*, confirm the kinds of fears that concerned persons have speculated about for a long time. But rather than providing an update on the current situation (which is amply described by Hathaway, Roy, and elsewhere),[26] I will simply conclude with reference to a single media report which will provide an haunting sense of *déjà vu* to persons who have read this study. Just as using passages from fiction helps to condense and narrate what is otherwise so difficult to describe, putting a real name to a tragic narrative helps drive home the degree to which refugee issues are not well-reflected in statistics or broad conclusions.

A January 1992 article by Nantha Kumbor called "Process A Sham" described a claim made by the Nigerian journalist Onise Osunbor describes many of the same problems described in this study. Kumar writes that Osunbor "fears he will be executed if he is deported to his homeland, and is shocked

at Canada's refugee determination process." Kumar cites Osunbor: It's a sham.... They were more interested in trying to find contradictions in my testimony then trying to help me establish my claim to refugee status" (8). The case involves intimidation and physical abuse, as well as a serious charge of his having shared accommodations with a military officer who had been involved with an attempted coup that had been organized by Christian military officers on April 24, 1990. Osunbor describes his persecution at the hands of the military:

> They put me on a table and whipped me mercilessly with a cable. They wanted to know the whereabouts of my roommate, Lt. Okhaifoh.... My back felt like it was on fire and I was dripping with blood, but I told them I didn't know anything. The then pointed their guns at me and pointed to a hearse waiting nearby saying I would be in it if I didn't talk.

He was detained in a cell for ten weeks, and even after his release he was harassed by the authorities (he had, in fact, been involved with the coup). He finally decided to leave Nigeria and, equipped with newspaper clippings of his arrest and reports from Amnesty International, he made a claim for status in Canada:

> I thought it was a process to find out if a person had a genuine cause of persecution in his or her country. With that assumption, I went in with confidence and assurance, but it turned out to be very confrontational.... I told the hearing that I was in charge of getting drinks and set up the music for the party. The only role I would play in the coup would be to mobilize the people, but no matter how small your part is, the punishment is death.

The ruling from the refugee board stated that Osunbor failed to

> demonstrate that he had suffered persecution because of his race or religion nor that there is a reasonable chance that he would in the future.
>
> If indeed his presence at the party is of any significance, he has already been in prison, extensively questioned and released without charge. Why then should he continue to fear on that account?

Osunbor concludes:

> I hope someone will be accountable if I do get sent back and face a firing squad. I am not trying to whip up sentiments, but I want it to be on the record.

Even if some of the amendments mentioned earlier on were effected, there is no guarantee that at some time in the not-so-distant future, powerful interests will not once again exert their influence by passing legislation allowing the return of people like Osunbor to countries of origin. As long as the power structure emerges from a review unscathed, then the present obstacles to human justice will remain. The system of existing power relations creates the *différend* that Lyotard describes, and despite our best intentions, we cannot wish it away. Furthermore, reforms to the system cannot simply include reforms to the system of admittance because the First World is directly responsible for the *production* of refugees through its intervention in the Third and Developing Worlds. As long as these interests continue to exist, the kind of upheaval that leads to refugee production will continue; so even valiant attempts to liberalize the Canadian refugee claim system are doomed to be dismantled, or are bound to be ineffective in the face of a pool of refugees which worldwide runs to the tens and maybe into the hundreds of millions of persons.

If we really wish to contribute to lessening the suffering of persons, we must work in the short term to save the lives of individuals; but in the long term, we must work towards the elimination of those systemic abhorrences which create refugees in the first place.

Montréal, August 1994

Notes

1. See my "The Construction of the Other and the Destruction of the Self: Efficacious Discursive Practice in the Convention Refugee Hearing."

2. Robert F. Barsky, *Why Canada? Why Quebec? Assessing the Convention refugee's choice of host country in 1992*, a report for the Institut national de recherche scientifique, MAIICC (Québec) and CESAC (Canada), 1994; *Le motif et le moment du départ des revendicateurs de statut de réfugié arrivés au Québec en 1992* (1995) and *Les femmes (arrivés en 1992) en tant que revendicatrices du statut de réfugié*, MAIICC, 1995.

3. In this respect the present study confirms general assumptions made by thinkers such as Noam Chomsky, Edward S. Herman, Michael Clare, Cynthia Arnson, Seymour Melman, Jim Merod, as well as observations made with regards to refugees issue by Mark Gibney and Sergio Aguayo *et al.*

4. I use the term in a non-linguistic fashion, with reference to the work of, for example, Marc Angenot. See my article "Discourse analysis."

5. See Michael Holquist's "From Body-Talk to Biography" and my "Re-Vitalising the Memory Through Narrative."

6. I have attempted a narratological analysis of these hearings in "Narratology and the Convention Refugee Claim."

7. Primo Levi, *The Reawakening*, translated by Stuart Woolf, NY, Collier Books, 1987, p.119. For descriptions of suffering and the inadequacies of bureaucracies to deal with human affairs, I will often rely upon literary references and in particular citations from novels. For some reason, the *whole human being*, in all of his/her glory and in all of his/her sorrow is often rendered more significantly in a few lines of fiction than in whole treatises from the domain of science or social science. This is a mysterious and wonderful phenomenon, which I have explored in "Literary Knowledge: Marc Angenot and Noam Chomsky."

8. See for example V.C. Bickley, "Language as the Bridge," *Cultures in Contact*, Ed. S. Bochner, Oxford, Pergamon P, 1982, pp. 99-125; P. Bohannan, "The Differing Realms of the Law," *The Ethnography of Law*, supplement to *American Anthropologist*, 67(2): 33-42; B. Danet, "Language in the Courtroom," *Language, Social Psychological Perspectives*, ed. H. Giles *et al.*, Oxford, Pergamon P, pp. 367-376; C. Geertz, *Local Knowledge*, NY, Basic Books, 1983 and *The Interpretation of Cultures*, NY, Basic Books, 1973; W.B. Gudykunst and Young Yun Kim, *Communicating With Strangers*, Reading MA, Addison Wesley, 1984; K. Oberg, "Culture Shock: Adjustment to New Culture Environments," *Practical Anthropology*, 7:177-82; M. Parkinson, "Language Behaviour and Courtroom Success," paper presented at the International Conference on Language and Social Psychology, University of Bristol, England, July 1979; L. Pospisil, *Anthropology of Law*, NY, Harper and Row, 1971; and K.R. Scherer, "Voice and Speech Correlates of Perceived Social Influence in Simulated Juries," *Language and Social Psychology*, eds. H. Giles and R.N. St. Clair, Oxford, Basil Blackwell, 1979, pp. 88-120.

9. A distinction is made here between *translator* and *interpreter* to draw attention to the fact that the persons who is charged with rendering the hearing from a language other than French or English for the purposes of the Canadian Convention refugee hearing bears the burden of both literal translation and interpretation as well as the interpretation of the overall

sense of the phrases, gestures and concepts articulated during the hearing. These processes are subject to varying *interpretations* since there exists a margin within which various meanings can be proposed.

10. Se my *The Construction Through Discourse of the Productive Other: The Case of the Canadian Convention Refugee Hearing*, PhD dissertation, McGill University, 1992, chapter 4.

11. Kälin seems to have had similar experiences in Switzerland. He states that "the cultural relativity of words, notions and concepts, and, even more importantly, the lack of consciousness of these differences in perception, are major sources of misunderstandings in cross-cultural communication. The problem certainly affects the asylum procedure: Too often officials assume that the way they think is also the way the asylum-seeker thinks.... This may result in serious misunderstandings and even contribute to the denial of asylum for genuine refugees who, while doing their best to give all the requested information, fail because their counterpart misinterprets their statements" (234)

12. On "monologism" and "heteroglossia" see the works of M.M. Bakhtin, in particular, *Speech Genres and Other Late Essays*, eds. and int. Caryl Emerson and Michael Holquist, trans. Vern W. McGee, Austin, University of Texas Press, 1986, and Robert F. Barsky & Michael Holquist, *Bakhtin and Otherness*.

13. Ernst Mayr identifies the following characteristics as being identifiable with the category of "the living:" complexity and organization, chemical uniqueness, quality, uniqueness and variability, possession of a genetic program, historical nature, natural selection and indeterminacy. See pp. 53ff.

14. I have attempted to show one way in which Bakhtin's work, published in *Art and Answerability*, can be read as a vibrant, living text which emphasizes the vital elements of human experience in "Making Love With [Bakhtin]."

15. There are a vast number of legal precedents that would have been operative during the initial hearing; the complexity of the issue is amply reflected in the precedents cited by Cantin:

> In *Ferrow v. M.E.I.* and *Gill v. M.E.I.*, Thurlow, C.J., and Heald, J., respectively, were of the view that the adjudicator should not decide which of the two orders should be made. Thurlow, C.J., in Ferrow v. M.E.I. at p. 688, further stated that on the basis of this point of view, "[...] the determination has no legal significance and will have none until it is implemented, if ever, by the making of a deportation order". Thus, the adjudicator's determination is not a "decision" open to review under s. 28 of the Federal Court Act. A contrary approach was taken by Pratte, J. in *Ergul v. M.E.I.* where the ration of his judgement was to the effect that the adjudicator must, before adjourning the inquiry for redetermination of a claim to Convention refugee status, decide whether in the circumstances of the case a deportation order or a departure notice should issue (see the characterization of the *Ergul v. M.E.I.* decision by Heald, J. in *Gill v. M.E.I.*). However, both Thurlow, C.J. and Heald, J. declined to follow *Ergul v. M.E.I.* in *Ferrow v. M.E.I.* and *Gill v. M.E.I.*, respectively. Even Pratte, J. in *Vakili v. M.E.I.* cast doubt on the validity of his decision in *Ergul v. M.E.I.* and stated that it might be necessary one day to declare that it would not be followed. In practice, both *Ferrow v. M.E.I.* and *Gill v. M.E.I.* are followed by adjudicators.

In short, the validity of this initial inquiry, despite its importance in determining the eligibility of the claimant, has not been fully established in the precedents cited.

16. Roger Cantin, citing Muldoon J., notes that in *Grewal, Narinder, Singh v. M.E.I.* the question of whether the Trial Division of the Federal Court has jurisdiction "to deal with claims concerning the conduct of the examination under oath after an application for redetermination of a claim to the Board and an application for review of the Board's decision to the Federal Court of Appeal were dismissed" (17 n. 46). Furthermore, "although Muldoon, J., later considered the substantive grounds of the claimant's application for writs of certiorari and prohibition to quash the Minister's decision that he was not a Convention Refugee and to prohibit continuation of the inquiry, his main finding was of *res judicata*. The ruling appears on p. 9 of Muldoon's report:

> Since the Appeal division adjudged unanimously that neither the Minister's determination of this applicant's status, nor the Board's disposition of his application for redetermination, was vitiated by the alleged irregularities in the conduct of the examination under oath, it appears that the applicant's present application for *certiorari* and prohibition is indeed foreclosed.

17. In *Khodr v. M.E.I.* the Board ordered a re-examination of the claimant because this obligation was not fulfilled by the S.I.O. For inexperience or errors in procedure, see *Garcia v. M.E.I.*

18. It should be noted that although the definition is derived from the Geneva Convention and Protocol Relating to the Status of Refugees, the remainder of the provisions of this Convention are not incorporated into the act and therefore are not considered a part of domestic Canadian law; as such, the provisions of this Convention cannot be used to confer any additional rights to persons claiming refugee status in Canada or to deny claimants of rights guaranteed under s. 2 of the Immigration Act. For precedents, see *Re Vincent v. M.E.I.*, *M.E.I. v. Fuentes*, *Re Naredo and M.E.I.*, and *Sleiman v. M.E.I.*. The Convention may, however, be used to support evidence or to allow for clarification or interpretation where required; see *Rajudeen v. M.E.I.*.

Cantin notes that J. Pigeon, in *Ernewein v. M.E.I.* (dissenting, Beetz and Pratte, JJ., concurring)

> approved the presumption that the Crown will not break international treaties; he expressed grave doubts that the Board could properly disregard the provisions of the *Geneva Convention and Protocol*. The majority of the Supreme Court of Canada made no comment on this point. (p.29 n. 78)

19. This problem of "safe third country" clauses in some ways underwrites my *Why Canada? Why Québec?...* (*op. cit.*) and is discussed as well in numerous works including Amnesty International,*Europe: Harmonization of asylum policy: Accelerated procedures for "manifestly unfounded" asylum claims and the "safe country" concept*, Brussels: Amnesty International (November), 1992; K. Hailbronner, "The concept of 'Safe country' and expeditious asylum procedures: a western European perspective", *International Journal of Refugee Law*, 5.1 (1993): 31-65 and UNHCR *Background note on the safe country concept and refugee status* (submitted by the High Commissioner) 3 July, 1991.

20. The question of authorship with regards to Bakhtin is irrelevant to the present discussion since the underlying principles concerning legal and confessional are ostensibly consistent.from one (disputed or non-disputed) text to another.

21. See Michael D. Bristol, *Carnival and Theatre: Plebian Culture and the Structure of Authority in Renaissance England*, NY; London, 1985 and my review article of Michael Gardiner's *The Dialogics of Critique: M.M. Bakhtin and the Theory of Ideology* in *Slavic Review*, (Spring 1994): 306-308.

22. This is set out according to the *Immigration Act*, 1976, *supra*, note 1, ss. 45(2), (3); failure to comply with this regulation may lead to the claimant entitlement to another declaration under oath pursuant to s. 70(2) of the Act, as in the case of *Singh (Cheema) and Jagdishar v. M.E.I.*

23. See *The Refugee Status Determination Process*, which states that: "Although, in fact, the RSAC [Refugee Status Advisory Committee] effectively decides the vast majority of refugee claims, in law it merely advises the Minister. It is the Minister who is authorized by the Immigration Act to make the determination of refugee status." (51)

24. That this system of in camera determination based on potentially unknown evidence or information is "unfair" is, I think, clear. A pilot project, described by Susan Davis in a speech to the Immigration Appeal Board on April 11, 1984, was initiated in Toronto and Montreal in 1983 in order to evaluate another system of determination. According to this procedure, a member of the Refugee Status Advisory Committee was permitted to attend the examination under oath, and then, with the permission of the refugee claimant, further question him or her after the hearing. The goal of this experiment was to determine the efficacy of allowing this member, along with the Chairman of the Committee, to render the decision in the place of the Minister. The upshot of this experiment are described in Cantin n. 51 p. 19:

> In *Ayiku and Wilson and M.E.I.* (F.T.T.D., no. T-2835-84), Strayer, J., February 14, 1985, the claimants, whose examinations were being held in Winnipeg, sought mandamus to require that their examinations be redone with a member of the Refugee Status Advisory Committee present. Strayer, J., found, *inter alia*, that neither s. 45 of the Act nor the common law obligation of fairness required an "oral hearing" by a Committee member despite the pilot projects in Toronto and Montreal. However, Strayer, J., made this comment at p. 3 of his reasons: "Conceivably it might be arguable after April 17, 1985, when section 15 of the *Canadian Charter of Rights and Freedoms* comes into effect guaranteeing equality 'before and under the law' and 'equal benefit of the law', that this kind of regional disparity though hallowed by tradition is constitutionally impermissible."

25. In a syndicated Canadian Press news story published on page A7 of *The Montreal Gazette* on March 7, 1992, it was reported that two members of the refugee board, Naomi Goldie and Ralph Snow (a survivor of the Nazi Holocaust), were fired from their $83,900 per year jobs "for snickering during an Iranian man's story of torture" (A7). The incident occurred as the claimant "described how authorities placed hot boiled eggs in his armpits, beat him as he hung upside down, subjected his genitals to electrical shocks and burned him with cigarettes." Although no explanation for this particular incident was provided, the article does note that Gordon Fairweather, the board's chairman, "said that members have been under such an onerous hearing load in the three years since the board was set up that the Clarke Institute of Psychiatry in Toronto has been consulted about stress management."

26. Recent works discussing issues raised in this study include Amnesty International *Les sanctions aux transporteurs. Des difficultés d'accès au territoire*, Paris (20 November, 1991) and *Women in the Front Line: Human Rights Violations Against Women*, New York: Amnesty International Publications, 1991; Martin S. Forbes, *Refugee Women*, London; Atlantic High-

lands, Zed Books, 1991; James C. Hathaway (Leanne MacMillan, Assistant), *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*, Immigration and Refugee Board, 1993; G. Loescher, *Beyond Charity: International Cooperation and the Global Refugee Problem*, NY; Oxford, Oxford University Press, 1993. J. Mayotte, *Disposable People: The Plight of Refugees*, New York: Orbis Books, 1992; United Nations High Commissioner for Refugees, *The State of the World's Refugees: The Challenge of Protection*, Middlesex, Penguin, 1993.

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Khan versus Minister of Employment and Immigration (1984) (Immigration Appeal Board 84-1269) (CLIC no. 73.6, April 17, 1985).

Khodr versus Minister of Employment and Immigration (1980) (Immigration Appeal Board 80-1023) (CLIC no. 17.10, July 21, 1980).

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