Refugee Reform and Access to Counsel in British Columbia

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July 2015
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THE LAW FOUNDATION OF BRITISH COLUMBIA

This report was produced with the generous support of the Law Foundation of British Columbia

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EXECUTIVE SUMMARY

Canada’s refugee determination system fundamentally changed in December 2012 as a result of the coming into force of the Balanced Refugee Reform Act (formerly Bill C-11) and the Protecting Canada’s Immigration System Act (formerly Bill C-31). The sweeping amendments were given Royal Assent only four months after the legislation was introduced and were implemented six months later, with limited time to digest the impact of the changes.

Refugee claimants are among the most vulnerable people attempting to navigate the legal system in Canada, and for whom the consequences of decisions are among the most significant – refugee decisions are often literally matters of life and death. The vulnerability of claimants, the serious consequences of the legal proceeding and the lack of an established right to a state-funded lawyer, make it critical that the first years of implementation of the redesigned system be closely monitored.

This report, based on focus groups and in-depth interviews with lawyers and service providers working with refugee claimants in British Columbia, considers the impact the legislative changes have had on refugee claimants’ access to legal counsel throughout the refugee determination process.

Access to counsel has deteriorated

Overall, we found that access to counsel has deteriorated. While the representation rates at refugee hearings may not depict a shift in access to counsel in the new system, we found that in British Columbia refugee reform has had an impact on the quality and choice of counsel, as well as on the ability of counsel to fully present their client’s case. The changes to the refugee determination system have had the most significant impact on the questions of who represents refugee claimants, and the manner in which those claimants are ultimately represented by their counsel.

- The compressed timelines that operate throughout the determination system put pressure on counsel and claimants, leading to those claimants with the most complex cases – who face extra time pressures – being the least likely to obtain experienced counsel to represent them.
- The mistakes of inexperienced counsel multiply in the new system, with little time for mentorship or to hone skills given the short timelines.
- With substantially compressed legislated timelines, rigidity in scheduling and limits on changing the date for hearings, claimants in many cases do not practically have an ability to exercise a choice in counsel. Even where claimants are dissatisfied with their counsel’s representation, changing counsel is difficult, if not impossible.
- There are severe limitations on how a lawyer can represent their clients in this new model. The shortened timelines make it difficult for even experienced counsel to prepare a claimant to testify and to collect documentary evidence in support of the case.
- As access to state-funded, experienced counsel deteriorates, under-funded NGOs and other community groups, often without legal training, have increasingly been left to take on claim-related tasks previously undertaken with the assistance of counsel.

Refugee reform has changed how claims are processed in Canada

Hearings in the new system take place much faster. While in the previous system a refugee claim from initiation to hearing may have taken a year to two years, hearings are now in many cases legislated to happen less than 30 days after initiation of a claim. Although a new level of appeal has been created at
the Refugee Appeal Division, large groups of claimants are barred from access and the timelines to file appeals are very short. Previously available applications following a rejection by the Refugee Protection Division have been curtailed, with legislative restrictions on when a person can make an application for humanitarian relief or benefit from any further assessment of their risk of return, in some cases for several years after a decision from the Board. Ultimately, the speed with which a person could be removed from Canada after they first make a refugee claim has been accelerated.

In addition to these sweeping changes, some claimants fare much worse under the new system. For the first time, Canada’s refugee determination system provides for different procedural protections and substantive rights to refugee claimants depending on the country from which they fled. The legislation allowed the creation of a list of “Designated Countries of Origin (DCOs)“, countries the Minister has decided unilaterally are “safe” and are presumed not to produce genuine refugees. For claimants from these countries, hearings happen faster, there is no right of appeal at the Refugee Appeal Division, and their removal is not automatically stayed pending a judicial review of the refugee decision at the Federal Court.¹ At the present time Mexico and Hungary are both designated countries, despite the large number of cases in which the Board has found individuals from those countries to be genuine refugees, pointing to significant human rights problems.

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¹ On July 23, 2015 Justice Boswell of the Federal Court found denying access to the Refugee Appeal Division for claimants from DCO countries to be unconstitutional as the scheme violated s.15, the equality provision, of the Charter. See Y.Z. and Canadian Association of Refugee Lawyers v. Minister of Citizenship and Immigration, 2015 FC 892. The effect of his judgment - giving DCO refugee claimants access to the Refugee Appeal Division - is to take place immediately. At the time of writing, the Federal Government has indicated they will be appealing the decision and filing a stay to stop the effect of the decision until the appeal is determined. This is a significant decision that may have an impact on the other procedural distinctions DCO claimants face, such as: faster timelines, longer delays in being able to access particular applications for relief, and no stay of their removals pending a judicial review of a negative refugee determination decision.
prepare, then the claimant’s access to the services of counsel has been reduced.

Disproportionately high levels of unrepresented claimants after reforms

British Columbia has traditionally had significantly higher rates of unrepresented claimants than the rest of the country, with approximately a quarter of claimants unrepresented at their refugee hearings. While this figure has remained fairly steady even after reforms to the refugee system, the number of unrepresented claimants must be understood in context. With a significant drop in the number of claims following refugee reform, one would have expected the level of unrepresented claimants to have dropped accordingly. There are legitimate reasons to be concerned that levels of unrepresented claimants will begin to rise in the region as, historically, legal aid resources have not kept pace with growing numbers of claimants.

The Immigration and Refugee Board does not currently record the number of unrepresented claimants at the time of filing the Basis of Claim, the initial form that sets out the reason a person is seeking asylum. Instead, if a claimant receives representation at any point during the refugee determination process, they are recorded as having representation even if they did not have legal counsel at an earlier stage. A significant concern in terms of a claimant’s ability to access legal representation is the point in the process when they are able to obtain representation.

Ability to obtain counsel most difficult at port of entry and for detained claimants

Claimants in detention were consistently identified as those who had the greatest difficulty accessing legal counsel. While detained claimants may eventually obtain legal representation for their refugee hearing, concerns were raised about their ability to meaningfully access counsel while detained, particularly while being interviewed by CBSA officers and completing the Basis of Claim forms within the required timelines.

Access to counsel at the port of entry is a problem that pre-dates the recent refugee reform. The new eligibility forms and the shortened timelines make lack of access to counsel at the port of entry even more problematic. The amount of information expected from claimants upon arrival is much more extensive than necessary to make an eligibility determination. The detailed forms create stress and delays and lead to further difficulties for claimants at the hearing stage where any inconsistencies in their statements at the port of entry may become crucial to their claim.

Quality and choice of counsel negatively impacted

Due to the newly compressed timelines claimants had less choice of counsel. Counsel of choice may not be available on the date scheduled for the hearing, and the ability to switch counsel once the process begins is very limited.

In the new system, given the tighter timelines, experienced counsel in British Columbia are much more selective about the types of cases they will take on. Making matters worse, claimants with the most complex cases may, as a result of the constraints of the new system, have the most difficulty in retaining experienced counsel.

Lawyers interviewed for this study focused much of their commentary on strategies for doing refugee work in the new system. These strategies included: being very selective of the types of cases that they would agree to take on; being careful about how they scheduled cases; taking on fewer refugee cases overall; and accepting fewer legal aid cases. The views of these lawyers are significant as the refugee bar in British Columbia is relatively small given the small percentage of refugee claims that are heard in the province.

All but one of the lawyers interviewed indicated that shortened timelines and/or the manner hearings were scheduled in the new system made them less willing to take on cases where the claimants were from DCO countries, where the claim was made at the port of entry, or where the claimant was detained. Two of the most
experienced lawyers interviewed, with over 20 years’ experience each, also indicated that they would be unwilling to take on an appeal to the Refugee Appeal Division (RAD) if they had not been counsel at the refugee hearing. They both took this position because of the extremely short timelines at the RAD.

Limitations on legal representation

Four areas in the new system were identified as limiting the way counsel could provide legal representation: shortened timelines; a claimant’s inability to access necessary social services; the increased number of forms requesting more information at the eligibility stage; and the rise in ministerial interventions in refugee cases.

Highly compressed timelines are the critical constraint in the new system. The other constraints identified are experienced as a limitation on counsel’s representation for the very reason that the contracted process deepens the impact of these other factors. Lawyers and service providers discussed the difficulties counsel had in being able to adequately represent their clients with so little time. The impacts were especially felt in being able to gather evidence, prepare their clients to be able to testify, and work with clients with severe trauma.
Recommendations

Based on our review and interviews with lawyers and service providers with experience under both the pre-reform and post-reform refugee determination system, we have made the following series of recommendations:

For the Legal Services Society of British Columbia (LSS):

1. LSS should operate a dedicated legal clinic for refugee claimants where staff lawyers would be mandated to take on cases that experienced counsel refuse or are unable to take on due to the compressed timelines including claimants from Designated Countries of Origin (DCOs), detained claimants, and port of entry claims.

2. LSS should provide funding for an initial consultation with a lawyer to review all immigration and refugee options with a potential refugee claimant before a Basis of Claim (BOC) referral is provided.

3. LSS should expand the scope of the current duty counsel program for detained claimants. Duty counsel should be available to attend abandonment hearings. Duty counsel should be responsible for meeting with all detained refugee claimants to ensure that they have secured legal aid counsel and are in the process of completing their BOC forms. Duty counsel should also be available to assist refugee claimants with making applications for extensions to file their BOC forms as well as applications to change the date and time of the hearing at the Board.

4. LSS should create a roster of available duty counsel lawyers who would be on a rotating call to provide legal advice to refugee claimants at the port of entry.

5. LSS should clarify policies on when a refugee claimant can change lawyers. Transparent policy and accessible information are needed so that refugee claimants understand that they can change lawyers under particular circumstances and how it can be done.

6. LSS should introduce screening and monitoring of its roster of lawyers for refugee claims. Lawyers with no previous experience with refugee claims should not be permitted to represent claimants. Prior to being placed on the roster a lawyer should be required to take mandatory seminars to ensure that the lawyer is competent to work on refugee cases. LSS should create a mentoring program to ensure that lawyers who are new to the panel have the ability to consult with more experienced counsel. Lawyers’ work should also be independently reviewed on a regular basis and those who cannot satisfy a review panel that they provide competent service should be restricted and have conditions placed on their participation in the roster, or removed entirely from the roster of lawyers able to take on refugee cases.

7. LSS should fund the reasonable costs of childcare for meetings with lawyers.

8. LSS’s financial eligibility requirement should not function as an “all or nothing” on-off switch at a certain level of income. It should be recognized that someone with an income slightly above the cut-off might be able to contribute in part to the costs of representation but that some support could still be provided on a sliding scale, in particular for disbursements such as translation and interpretation.
For Canada Border Services Agency (CBSA):

9. CBSA should facilitate early access by refugee claimants to counsel and refugee-serving non-governmental organizations (NGOs).

10. CBSA should facilitate access to counsel prior to and during security interviews.

11. CBSA should restrict questioning of refugee claimants to identity and security issues; questioning on the basis of their claim should be left to the Refugee Protection Division.

12. All interviews with refugee claimants should be recorded by the CBSA and copies of the recording should be provided to the refugee claimant automatically.

13. For refugee claimants in detention:
   a. CBSA should facilitate early access to NGOs, the Legal Services Society, interpreters, lawyers, trauma counseling, and face to face information about the refugee claim process.
   b. CBSA should increase access to counsel by increasing the number of counsel meeting rooms at the downtown Vancouver detention facility and through access to video conferencing. These meeting rooms should ensure that claimants can consult with counsel in private.
   c. CBSA should ensure that telephones are readily available and capable of free local calls and the use of international calling cards in detention. CBSA should ensure that claimants can make calls in a private setting. For persons in detention who do not have resources or family support CBSA should ensure that the lack of resources does not impede their ability to contact counsel and family members.
   d. An orientation kit in the correct language should be issued immediately to refugee claimants in detention. The orientation kit should remain with the detainee throughout their detention. The kit should include:
      • Instructions on how to access a lawyer;
      • Instructions on how to contact NGO groups;
      • Any approved pamphlets supplied by NGO groups;
      • Contact for a Detention Liaison Officer and a brief description of his or her duties;
      • International calling card (not limited to one) and instructions on how to call different countries; and
      • Notebook and pencil.

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2 Recommendation from the Coroner’s Inquest into the death of Lucia Vega Jimenez.
3 Ibid.
4 Ibid.
e. If a detainee asks to speak with counsel, CBSA officers should facilitate the communication by providing telephone numbers and, if appropriate, explaining how to dial the call.\(^5\)

f. To ensure that detainees can speak with counsel quickly, CBSA should adopt procedures and policies used by police and prison authorities and presume that an individual who identifies him or herself as legal representative is licenced by the appropriate regulatory body. If further information is needed, CBSA can ask for the caller’s name and the number of the legal practice; a quick call to the number will verify the representative’s identity.\(^6\)

g. To comply with the principle of proportionality, CBSA should take decisive steps to eliminate detention of refugee claimants in penal institutions.\(^7\)

h. In the event that CBSA has no alternative but to detain a refugee claimant in a provincial correctional facility, CBSA should work with provincial correctional facilities: (1) to ensure that refugee claimants are sent to the lowest security facilities; (2) to ensure that correctional services knows that immigration detainees are refugee claimants with no criminal background; (3) to ensure that refugee claimants are separated from the criminal population; (4) to establish standards for detention which are commensurate with the management of a non-criminal population, rather than standards established for the management of convicted offenders.\(^8\)

14. CBSA should reconsider their interpretation of the legislation that currently forces refugee claimants who have just been arrested to file their BOCs immediately upon making a claim in order to provide a more reasonable time frame. In the alternative, CBSA should advocate that the legislation be amended accordingly.

For Citizenship and Immigration Canada (CIC):

15. CIC should broaden the scope of CIC-funded settlement services to include refugee claimants.

16. CIC should provide stable funding to enhance the ability of organizations to provide support during the refugee claim process – including mental health support.

17. CIC should discontinue the use of the current eligibility forms required to be completed by refugee claimants and replace these forms with a single eligibility form tailored to refugee claimants. Refugee claimants should not be asked to consent to disclose their information to foreign governments in eligibility forms, as is currently the case.

For the Immigration and Refugee Board (IRB):

18. IRB should amend the *Refugee Protection Division Rules* on changing the date and time of the hearing to allow for a more flexible process.

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\(^5\) Recommendation from Nakache, D. “Human and Financial Cost of Detention of Asylum-Seekers in Canada”

\(^6\) Ibid.

\(^7\) Ibid.

\(^8\) Ibid.
19. IRB should apply the same level of flexible interpretation to refugee claimants applying to change the date of their hearing as is currently afforded to the Minister with respect to delays due to front end security screening.

20. IRB should provide refugee claimants with information on how to make an application to change the date of the hearing including a sample template.

21. IRB should publically report and maintain statistics on the rate of representation for claimants at the time of submission of their BOC forms as well as at hearings. IRB should also publically report and maintain statistics on the number of claimants detained at the time the BOC is submitted and at the time of the refugee hearing.

For the Government of British Columbia:

22. The Government of British Columbia should secure increased funding for the Legal Services Society, including funding for a refugee-focused legal clinic.

23. The Government of British Columbia should fund organizations and services devoted to refugee claimants developed under the previous funding arrangement with the Federal Government.

24. The Government of British Columbia should make a commitment to not impose a residency requirement on refugee claimants for social assistance or any other provincially funded social support.

25. The Government of British Columbia should recognize “implied status” under the **Immigration and Refugee Protection Act** as sufficient to extend access to provincial services, including coverage under the Medical Services Plan (rather than a strict requirement for a hard copy of a new work permit).

For the Federal Government

26. The Federal Government should amend the legislation to increase the timelines for filing BOC forms and scheduling hearings in order to provide a better balance between fairness and an efficient claim process.

27. The Federal Government should repeal the Designated Country of Origin list, or automatically remove countries from the list if a claim from that country has been successful in the previous five years.

28. The Federal Government should reconsider the interpretation of the legislation that currently forces the filing of basis of claim forms upon making a claim by individuals who have just been arrested in order to provide a more reasonable time frame, or amend the legislation accordingly.

29. The Federal Government should provide adequate funding to the Legal Services Society for representation by counsel in the refugee process.

30. The Federal Government should fully reinstate basic health care for refugee claimants under the **Interim Federal Health program**.

31. The Federal Government should reverse amendments to the **Federal-Provincial Fiscal Arrangements Act** which now allow provinces to impose a waiting period on refugee claimants who need social assistance.
METHODOLOGY

RESEARCH DESIGN

Literature Review
The research design process began with a literature review of research in Canada on the issue of access to counsel and refugee determination. In particular, we reviewed: the Department of Justice’s 2002 comprehensive study on access to counsel in immigration and refugee proceedings; Sean Rehaag’s 2011 study on the role of counsel in the refugee process; and a 2012 report from the United Nations High Commission for Refugees that considered the implication of refugee system reforms on access to justice. Parliamentary submissions on Bill C-31 as well as articles on the implications of refugee reform were also reviewed.

Consultations
Research design was assisted by individual consultations. Sean Rehaag, a Professor at Osgoode Hall Law School, discussed his research on Ontario’s legal aid system and was able to provide us with his data collection from the Immigration and Refugee Board (IRB; “the Board”). The University of Ottawa Refugee Assistance Program provided us with the data set headings scheme used by the Board and documents outlining the concerns of stakeholders in relation to pending changes to the refugee determination system. Kirby Huminuik, PhD Candidate in Counseling Psychology at the University of British Columbia, was helpful in identifying issues that vulnerable claimants have faced in refugee proceedings as well as some of the tools that other jurisdictions use to identify vulnerable claimants. A staff person at the Legal Services Society of British Columbia (LSS) was able to provide a general sense of some of the trends in the first months of implementation of the new system. The Ready Tours program provided us with the questions about the refugee process raised by claimants during orientation tours of the Board.

Focus Groups
Based on preliminary research and consultations, we developed a series of open-ended questions about issues participants were encountering throughout the new system from intake through to the appeal stage.

On February 27, 2014, a focus research group of 24 participants was held at the Multi-Agency Partners (MAP), a working group that meets monthly at the Canadian Red Cross. The group brings non-government organizations (NGOs), lawyers, academics, and government officials together to identify the needs of refugee claimants and coordinate knowledge and responses.

The focus group included:

- 15 participants from NGOs providing housing, support, and settlement services for refugee claimants
- 2 participants from NGOs providing health care support to refugee claimants
- 1 participant from Citizenship and Immigration Canada
- 1 participant from the Canada Border Services Agency
- 3 participants from the Ministry of Social Development and Social Innovation
- 1 participant from United Nations High Commission for Refugees

9 The authors gratefully acknowledge the assistance of Vicky Law who prepared an early research memorandum reviewing studies that examined access to justice issues in the immigration and refugee context.
10 John Frecker et al, Representation for Immigrants and Refugee Claimants: Final Study Report, Department of Justice Canada, October 2002.
On April 3, 2014, a focus group was held with eight lawyers with number of years of experience (year of call) ranging from 17 years to under one year.

**Interview Process**

Following the literature review, consultation, and focus group phase, we drafted a list of key issues which were then used to prepare guides for in-depth interviews, including open-ended questions for service providers and lawyers.

Fifteen interviews were conducted from August 2014 to January 2015. Interviews were approximately one hour in duration and participants were assured that personal information would not be disclosed without their permission. All interviews were audio recorded with interviewees’ consent.

Of the nine lawyers interviewed all had experience under both the old and the new refugee determination systems. Five had practiced refugee law (including articling) for three to five years while four had 15 to 32 years of experience. All the interviewees specialized in immigration and refugee law practice.

Of the six service providers interviewed, all had experience working with refugee claimants under both the old and the new system. Interviewees included a member of a volunteer-based community group and service providers from refugee health agencies, settlement agencies, and housing support groups. The interviews were transcribed with personal information redacted.

Drawing from our early research, consultations, and focus groups, we identified key issues to guide us in coding the data obtained from the interviews. Based on a review of the coded data, we created an outline to guide the writing of the report findings.

**Limitations:**

A major limitation of the study is that we did not interview refugee claimants. Two successful refugee claimants allowed us to refer to part of their experience in detention and at the port of entry in our report. We did not however interview claimants as part of this study. This means that the findings were limited to the experiences of lawyers and service providers who were mainly interacting with claimants who in fact ended up having counsel at some point in the process. Claimants who did not have counsel would generally not have had interactions with these groups. The timelines and process to remove rejected claimants is so fast that we concluded that it would be very difficult to locate unrepresented claimants who would be interested in participating in this type of study. A larger study with the support of the Board may be able to design research where unrepresented claimants could be interviewed at the end of their hearing process. Their view of the refugee process is of course critical and a needed perspective on this issue.

A second limitation of the study relates to the data that is currently being reported by the Board on the issue of access to counsel. The Board does not currently report on whether a claimant is represented at the time of submission of their Basis of Claim form. The question as to when a claimant obtains representation is a critical part of analyzing a claimant’s access to counsel in the refugee determination process and should be reported.

A third limitation relates to the fact that the year under investigation was a year of transition in the refugee determination system. Data collection in this context proved challenging for the Board and the Legal Services Society and interpretation of the data collected should be analyzed with care. In this context, open-ended interviews and qualitative methods were particularly helpful in indicating possible trends and areas where future data collection should be focused.
REFUGEES IN BC

THE REFUGEE DETERMINATION PROCESS

Refugee Definition

As a signatory to the 1951 United Nations Convention Relating to the Status of Refugees along with the 1967 Protocol, Canada has undertaken to protect refugees on its territory. Refugee claimants are further entitled to all of the constitutional guarantees available to everyone in Canada under the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada in Singh v. Canada (Minister of Employment and Immigration)13, made it clear that Canada’s obligations under the Charter and the Convention require that the determination of refugee status be done in a manner that respects the principles of procedural fairness and fundamental justice.

The Convention has a very specific definition of refugee, which has been codified in s. 96 of the Immigration and Refugee Protection Act (“IRPA”), and has some important restrictions. Perhaps the most significant for claimants in Canada is that the alleged persecution must have a connection (or nexus) to one of the five listed grounds of race, religion, nationality, membership in a particular social group, or political opinion. A claimant may well be able to demonstrate a legitimate fear to their life or safety in their country of origin, but if there is not a nexus to a Convention ground, they will not be granted protection as a Convention refugee. In some cases a nexus to explicitly listed grounds such as race or religion may be obvious on the face of the claim. The issue of nexus is not always so straightforward and requires a more in-depth understanding of the scope of the Convention grounds and appropriate way in which to frame the fear of persecution. For example, cases of persecution based on gender or sexual orientation require an understanding of the scope of “particular social group” as it has been interpreted in Canada. In other cases, a person may be at risk on the basis of a false perception by the agent of persecution that they are a political dissident or part of a religious minority. In such cases, although the person may not identify themselves as a dissident or a member of a minority, they may still face persecution on a Convention ground.

Canada is also a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, along with a number of other international human rights instruments, which in some ways provide a broader scope of protection than the Refugee Convention. Canada’s obligations under these instruments are codified in s.97 of IRPA. Although the scope of protection under s.97 is not restricted by requiring nexus to grounds in the Refugee Convention, a claimant must meet a higher test. Under s.96, a claimant need only show that there is a serious possibility of persecution, while risk under s.97 must be demonstrated on a balance of probabilities, which is to say it is more likely than not to occur.

The limitations set out in s.97(1)(b) of IRPA can also create significant impediments to individuals seeking Canada’s protection. For example, protection is not available for those who face a risk encountered generally by other individuals in the country of origin. The definition and scope of generalized risk has been the subject of a great deal of discussion in the Courts and before the Immigration and Refugee Board (IRB; “the Board”) over the past decade, and the law in this area is not settled. What is clear from the jurisprudence and practice before the Board is that particularization of risk can be crucial to success in many s.97 claims.14

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13 Singh v Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177.
14 See for example Correa v. Canada (Citizenship and Immigration), 2014 FC 252 (CanLII).
There are a number of legal issues that commonly arise in claims under both s.96 and s.97 of IRPA. Two of the most common are state protection and internal flight alternative. The issue of state protection addresses the question of whether or not the claimant could obtain protection from the authorities in their home country. In many cases, this will involve demonstrating that the claimant made reasonable efforts in the circumstances to seek protection from the authorities, or proving that such protection would not have been forthcoming in any event. As the claimant will face a presumption that a state can protect its own citizens, this can often be a significant hurdle. The claimant will also need to show that there is not a part of the country where it would be reasonable to flee and where they would not face persecution. The onus is on the claimant to demonstrate that they cannot obtain state protection and that there is no internal flight alternative.

Evidence to Establish Refugee Status

The onus is on the claimant to provide credible evidence with respect to each of the aspects of their claim. Proof of identity, both in terms of personal identity and elements relevant to the particular claim such as religious, professional or political affiliations are crucial in almost all cases. The claimant will also be expected to present documentary evidence such as police files, court records or medical records that corroborate the allegations of risk. The claimant will usually need to present evidence of conditions in their country of origin. All evidence must be presented at least ten days before the hearing and translated into English or French. In addition, the Board will also have before it any documents provided by the Minister and a copy of the current National Documentation Package compiled by the Board for the country in question.

Engaging with issues like state protection or internal flight alternative can be complex, often requiring a claimant to engage with detailed evidence on country conditions. While the claimant may have a lived experience of the corruption and unreliable nature of the authorities in their country of origin, the Board will often prefer the “objective” evidence contained in reports from various international and governmental organizations. The ability of a claimant to effectively review hundreds of pages of detailed country condition documentation is often very limited, even in cases where they can read English.

Despite the differences between s. 96 and 97, in most respects claims under both sections are dealt with in a very similar manner before the Refugee Protection Division. There is no distinction in the process of initiating claims or the resulting status should a claim be successful. In many cases, claimants will seek to have their claims assessed under both s.96 and s.97.

Initiating a Claim

A person in Canada must make a claim to an officer who will assess whether they are eligible to do so. Claims can either be made upon arrival at a port of entry or once a person is already inside Canada. Inland claims are either made to an immigration officer at a Citizenship and Immigration Canada (CIC) office or to a Canada Border Services Agency (CBSA) officer upon detention.

The officer to whom a claim is made will make a determination of eligibility, and either find the claim ineligible or, if found to be eligible, refer the claim to the Immigration and Refugee Board. An individual may be ineligible to make a claim for a number of reasons including if they have made a claim in the past, have been issued a removal order or are inadmissible on grounds of security or

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15 Rules 32 and 33 of the Refugee Protection Division Rules.
serious criminality. Claims cannot be made at a port of entry at a land border with the United States unless the individual falls into an exception in the Safe Third Country Agreement between Canada and the United States.

There are two sets of forms that must be provided in the course of initiating a refugee claim – the eligibility forms and the Basis of Claim form. The eligibility forms consist of a detailed set of forms including extensive biographical and background information about the claimant and their family members, including:

- Educational background
- Personal history for last 10 years (including employment, travels, addresses, etc.)
- Military history, government positions
- Membership in organizations
- Method and exact route of travel to Canada, details of how travel was facilitated
- History of arrests, detentions or interactions with police and authorities

The Basis of Claim form requires detailed information on the various elements of the claim. In addition to background information about departure from the country of origin and personal information, the form requests details on the elements of the claim in addition to aspects such as attempts to obtain state protection or possibilities for safe refuge within the country of origin. Omissions or inconsistencies between the information on the forms and other documentary evidence or oral testimony can have a negative impact on a claimant’s credibility.

Canada’s refugee determination system fundamentally changed in December 2012 as a result of the coming into force of the Balanced Refugee Reform Act (formerly Bill C-11) and the Protecting Canada’s Immigration System Act (formerly Bill C-31). Although the core aspects of refugee hearings and the criteria for protection have not changed, there have been a number of significant changes with respect to the procedure surrounding refugee claims. In addition to the significantly compressed timelines, the changes include greater restrictions on eligibility to make refugee claims, limitations on humanitarian relief mechanisms and faster removals after a negative decision. Different procedural protections and substantive rights are provided to refugee claimants depending on the Minister’s perception of the manner in which they arrived in Canada or the country from which they fled.

Designated Countries of Origin

One of the most fundamental changes under the new legislation is that claims are treated differently depending on the country against which a claim is being made. The Minister of Citizenship and Immigration (“the Minister”) may designate countries of origin based on an assessment of past acceptance levels and on the Minister’s own assessment of the country in question. As of May 31, 2013, 42 countries had been designated by order of the Minister. The list includes a number of countries such as Mexico and Hungary in which large numbers of people have legitimate fear of persecution or face a risk to their lives and safety.

Claimants who are nationals of designated countries face different timelines than other

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16 The threshold for ineligibility based on serious criminality was substantially lowered with the amendments in Protecting Canada’s Immigration System Act (formerly Bill C-31), and so a larger number of claimants will no longer have access to the refugee determination system at all.

17 IRPA s.109.1.

claimants, do not have access to appeal to the Refugee Appeal Division and do not benefit from a statutory stay of removal pending judicial review in Federal Court. The claimants may therefore be removed from Canada without any review of the negative decision, unless the Federal Court intervenes to stay the removal pending judicial review. Nationals of a designated country of origin are not able to apply for a work permit for six months after their claim has been referred to the Board, and the government has sought to limit their access to health care and other social services.

**Designated Foreign Nationals**

The new legislation also created the ability for the Minister to identify certain individuals as “designated foreign nationals” if they arrived in Canada in a group large enough to create administrative challenges or used human smugglers. As many refugees arrive in Canada using smugglers, the potential scope for the provisions is quite broad. The designation has devastating implications for the individual designated, including lengthy detention, loss of appeal rights and fewer protections against removal. In addition, even where a designated foreign national is found to be a genuine refugee, they cannot apply for permanent residence or seek reunification with family members for many years during which they will be subject to reporting and other mandatory conditions. While it would appear there have been some designations in Ontario and Quebec, there have not been any designated foreign nationals in British Columbia or the Western Region to date.

### Timelines and Scheduling

When making a claim at a port of entry, a claimant must fill out the eligibility forms at the airport. The claimant will have 15 days to complete the Basis of Claim form (BOC) and submit it to the Immigration and Refugee Board, and a date will also be set for an abandonment hearing should the form not be filed on time. If found eligible, a date for the claim to be heard before the Refugee Protection Division of the Board will be set within 45 days for a claimant from a designated country of origin or within 75 days for a claimant from any other country.

When making an inland claim, all the forms including the Basis of Claim form must be submitted at the time of making the claim. For claimants appearing at an inland office, the claim will not be taken by an officer until all the necessary forms have been completed to the satisfaction of an intake clerk. Once a claim is initiated, the officer must decide whether to find the claim ineligible, suspend the claim or refer the claim to the Board for determination. If the officer does not make a decision within three working days, the claim is deemed referred to the Board.

CBSA is currently taking the position that individuals who initiate claims after being arrested or detained inland are required to complete all the forms, including the Basis of Claim within the

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19 On July 23, 2015 Justice Boswell of the Federal Court found denying access to the Refugee Appeal Division for claimants from DCO countries to be unconstitutional as the scheme violated s.15, the equality provision, of the Charter. See Y.Z. and Canadian Association of Refugee Lawyers v. Minister of Citizenship and Immigration, 2015 FC 892. The effect of his judgment - giving DCO refugee claimants access to the Refugee Appeal Division - is to take place immediately. At the time of writing, the Federal Government has indicated they will be appealing the decision and filing a stay to stop the effect of the decision until the appeal is determined. This is a significant decision that may have an impact on the other procedural distinctions DCO claimants face, such as: faster timelines, longer delays in being able to access particular applications for relief, and no stay of their removals pending a judicial review of a negative refugee determination decision.


21 IRPA 100(3) deems a claim referred after three days, s.159 of the IRPR specifies that Saturdays and holidays are not counted.
three working days, and prior to a deemed referral. If found eligible, a hearing date will be set within 30 days for claimants from a designated country of origin, and within 60 days for others. The requirement to submit all the forms is particularly onerous for inland claimants who make a claim upon being detained. They will fill out all their forms, including the Basis of Claim form, upon making their claim in detention.

Refugee Protection Division Rule 3(3)(b) directs the officer referring a claim to consider counsel’s availability, if the claimant has retained counsel at the time of referral and the officer has been informed that counsel will be available to attend a hearing on one of the dates provided by the Division.

Change of Date and Time of Hearing

The timelines are set out in s.159.9 of the Immigration and Refugee Protection Regulations (“IRPR”) and are mandatory. The section sets out the situations in which there may not be compliance with the timelines:

(a) for reasons of fairness and natural justice;

(b) because of a pending investigation or inquiry relating to any of sections 34 to 37 of the Act; or

(c) because of operational limitations of the Refugee Protection Division.

The regulation directs that the hearing must be held as soon as feasible after the time limit. The Refugee Protection Division Rules confirm the very restricted scope for changing the date and time of a hearing under section (a) for reasons of fairness and natural justice. Other than changes made within five days of initiating a claim, a claimant may only seek a change of date in exceptional circumstances, such as to accommodate a vulnerable person or if there has been an emergency or other development outside the claimant’s control.

Front End Security Screening

While the Board appears to be taking a very restrictive view of timelines set out in s.159.9(1)(a) of IRPR, the Board’s interpretation of 159.9(1)(b) is much more liberal, and there is a broad policy of accommodating time for the Minister to engage in initial security screening. The Minister does not need to apply for more time, as the Board will not proceed with a hearing in the first six months if the Minister has not provided confirmation that front end security screening is complete:

In those cases where confirmation of security screening has not been received in time for the initially scheduled hearing, the IRB will remove the hearing from the schedule and set a new date and time for the hearing as soon as feasible upon confirmation of the security screening. […]

In those cases where confirmation of security screening has not been received at six (6) months from the date of referral, the RPD will normally proceed to schedule and hear the claim unless the CBSA files an application to change the date and time that is granted by the IRB.
In cases where a security investigation is ongoing, the Minister can seek further postponement of the hearing outside the six month window. Section 103 of IRPA also allows the Minister to suspend hearings if there are pending criminal charges or a claimant has been referred to the Immigration Division on certain security or criminality grounds. This policy is part of a broader pattern of asymmetrical application of timelines – strict timelines and criteria apply to the claimant while there is greater flexibility for the Board and the Minister.

**Refugee Appeal Division (RAD)**

In many cases referred to the Refugee Protection Division under the new system, the claimant or the Minister may appeal a decision on a refugee claim to the Refugee Appeal Division (RAD). There are a number of circumstances in which claimants will not have access to the RAD, including if they are from a designated country of origin, were found to have a manifestly unfounded claim or if they came to Canada under an exception to the Safe Third Country Agreement.²⁵

From the date of receiving the written reasons denying their refugee claim, the claimant has 15 days to file a notice with the Board and the appeal must be perfected by filing an Appellant’s Record²⁶ including transcripts, documentary evidence, and detailed submissions within 30 days after receipt of the decision. The procedure for requesting an extension of time requires a written application to the RAD, with any evidence set out in the form of an affidavit or statutory declaration.²⁷

New evidence may be presented in an appeal before the RAD. However, unless the evidence is being presented in response to evidence presented by the Minister, it must be evidence that the person could not reasonably have been expected in the circumstances to have presented at their refugee hearing. The claimant must make written submissions to the RAD on the merits of the appeal, as well as the reasons any new evidence should be considered or an oral hearing should be convened. The RAD is intended to primarily be a paper-based appeal, with hearings to be the exception.²⁸

The Minister can generally file documents at any time, is not limited in the types of evidence to be filed and, aside from the filing of Minister’s appeals, would not appear to be affected by many timelines.

**Denied Claims and Removal**

If the claim and appeal are denied, the claimant will face removal. At the time of initiating a refugee claim, the claimant is almost invariably issued a departure order conditional upon the outcome of the claim. The departure order comes into force if the claim is refused and all further steps have been exhausted, if the claim is abandoned, or if the claim is withdrawn.

For claims initiated under the new system, a claimant who has access to RAD must exhaust their right of appeal before proceeding to Federal Court. If the RAD were to deny the appeal, the decision can be judicially reviewed, and removal will be automatically stayed as long as the timelines for initiating judicial review were met. Claimants who are not eligible for RAD can pursue judicial review in the Federal Court of the decision of the Refugee Protection Division, but an application to Federal Court for a stay of removal will usually be required. A motion for a stay of removal at the Federal Court is a complex application that has to be done on an urgent basis. For claimants from a designated country of origin this means that removal after a negative decision at the Refugee Protection Division can come quickly as they have no access to appeal at the

²⁵ See IRPA s.110(2).
²⁶ RAD Rule 3.
²⁷ RAD Rules 6 and 37.
²⁸ The RAD must proceed without a hearing unless there is a serious issue of credibility central to the decision: IRPA s.110(3) and (6).
RAD and their removal is not automatically stayed while they are reviewing the decision at Federal Court.

**Pre-Removal Risk Assessment (PRRA)**

Individuals in Canada who are ineligible to make a refugee claim will generally be offered the opportunity to make a Pre-Removal Risk Assessment (PRRA). In most cases, removal will be stayed until a decision is made on the PRRA. The PRRA is overwhelmingly a paper-based process and generally does not involve a hearing where the claimant can give testimony about the risk they face upon return to their country of origin. Persons who are still in Canada after the prescribed period of time has elapsed since their claim was denied may also be offered the opportunity to make a PRRA application. While rates vary relative to country of origin, acceptance rates on PRRA applications are generally very low.
**Refugee Reform and Access to Counsel in British Columbia**

**Statistical Overview**

**Referrals to the Refugee Protection Division**

British Columbia has a small number of the total number of refugee claims filed in Canada every year. Taken as a percentage, British Columbia has historically had between four and seven percent of the total claims filed in Canada each year. The majority of claims are filed in Ontario, followed by the Quebec region.\(^{29}\)

On the national level the average monthly referrals of refugee claims to the Board during the 2013 - 2014 fiscal year (April 2013 to March 2014) were down 63 percent from the average monthly intake in the 2012 - 2013 fiscal year\(^{30}\). The national drop in levels of referrals was also reflected in the Western Region during that time period. The numbers of referrals in the Western Region between January 1 and August 31 was 1243 in 2012, and down 58 percent to 521 during the same time period in 2013 (45 percent of which were made in Vancouver). Comparative monthly statistics for this nine-month period in 2012 and 2013 for the Western Region are as follows:\(^{31}\)

| Refugee Claim Referrals to the Refugee Protection Division, Western Region, 2012 - 2013 |
|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Jan | Feb | Mar | Apr | May | Jun | Jul | Aug |
| 2012 | 159 | 190 | 181 | 140 | 166 | 154 | 138 | 115 |
| 2013 | 55  | 55  | 54  | 70  | 69  | 59  | 80  | 79  |

For the 2014 year, the number of refugee claims made substantially increased as compared to the 2013 year. Nationally, the number of referrals increased 24 percent from the 2013 year. However, this was still a drop of 33 percent from 2012. Similarly, in BC, the number of referrals increased 32 percent in 2014 as compared to the 2013 year, though this still represented a drop in the number of referrals to the Board by 24 percent from 2012.\(^{32}\)

While the numbers have not risen to pre-reform levels at this point, should there be a continuation of the upward trend the pressures on resources of legal aid systems, counsel, and service providers will significantly increase.

\(^{29}\) Citizenship and Immigration Canada (Research and Evaluation Branch) "Canada Facts and Figures: Immigration Overview - Permanent and Temporary Residents" (Ottawa, 2012) at p.102.

\(^{30}\) Consultative Committee on Practices and Procedures - Refugee Protection Division (RPD) Performance Highlights (Ottawa: November 2014).

\(^{31}\) Immigration and Refugee Board. "Nine Months following Legislative Change" Refugee Protection Division Western Region Consultative Committee Meeting October 10, 2013 (Presentation by Colleen Zuk, Coordinating Member, Western Region).

\(^{32}\) Email correspondence with Charles Lynch, Chief of Standards, Analysis and Monitoring Unit at the IRB, dated March 27, 2015.
Designated Countries of Origin (DCOs)

Claims from nationals of DCOs amount to approximately eight percent of the total of 10,475 claims referred in the first nine months of the new system. The top source countries were the non-designated countries of China, Pakistan, Colombia, Syria, Nigeria, Afghanistan, Haiti, Egypt, Democratic Republic of Congo, and Somalia. The proportion of claims from DCOs on a national level appears to have remained relatively constant into the second quarter of 2014, and the proportion appears to about the same for port of entry claims and those made inland.

Inland v. Port of Entry Referrals

Nationally, in the 2014 fiscal year, referrals from a port of entry made up 36 percent of total referrals while inland referrals made up 64 percent. Historically, the ratio of port of entry claims has been closer to 40 percent. The proportion in the Western Region appears to be even lower, with only 28 percent of referrals between January 1 and August 31, 2014, being made from a port of entry.

Finalized Claims

In the 2013-2014 fiscal year (April 2013-March 2014), there were 8,024 claims (including 5,464 principal claims) finalized on the national level. Approximately 56 percent of the claims during that period (4,501 total including 2,933 principal claims) resulted in positive decisions. Between April 1 and September 30, 2014, the Board finalized 5833 claims nationally (including 3817 principal claims) with an overall acceptance rate of 62 percent.

The acceptance rates appear higher than previous years. The overall acceptance rate for the period 2010 to 2012 was approximately 37 percent. It should be noted that there are a lower number of claims from countries that have historically had lower acceptance rates.

The national average processing time for claims under the new system finalized in the 2013 – 2014 fiscal year was approximately 3.5 months, while by the first two quarters of the 2014 fiscal year processing time had gone up to 4.3 months.

During the 2013 – 2014 fiscal year, there were 27,765 legacy claims (filed prior to the new system) pending and 13,063 legacy claims were finalized. By September 30, 2014, there were 11,424 (7,050 principal) legacy claims pending.

Legal Aid for Refugees in British Columbia

The legal aid system in British Columbia is managed by the Legal Services Society (LSS), with funding from the provincial and federal governments. The immigration tariff covers a range of immigration proceedings that could lead to removal to a country where a person faces a risk of persecution or there are other compelling reasons for not returning. Subject to screening for
merit and financial eligibility, cases covered by the immigration tariff include representation for:

- Refugee claims and Refugee Appeal Division appeals
- Admissibility hearings
- Appeals to the Immigration Appeal Division by long term permanent residents
- Judicial Review and stay of removal applications in Federal Court
- Pre-Removal Risk Assessments
- Refoulement as a Danger to the Public (IRPA s.115)
- Humanitarian and compassionate applications
- Cessation and Vacation hearings

The immigration tariff budget also funds an immigration duty counsel lawyer to represent persons detained pursuant to the IRPA at detention review hearings before the Immigration Division of the Board, and a telephone advice line for detained persons making refugee claims.

Funding Arrangement

Under the federal-provincial funding agreement in place in 2013-2014, the federal government transferred up to $900,000 each year to the province for immigration tariff expenditures in excess of $800,000. According to LSS, federal and provincial funding of $1.7 million was provided for the 2013-2014 fiscal year and a similar level of funding is available for 2014-2015. After the federal-provincial funding agreement expired in March 31, 2013, a new four-year agreement was signed ending March 31, 2017. However, the agreement does not set out specific levels of funding for immigration and refugee coverage after March 31, 2014. The funding formula used to allocate legal aid funding for immigration matters by the federal government is based on past volumes of refugee claims and other immigration matters. LSS continues to be concerned about long-term funding for immigration and refugee legal aid given the substantial variation in the number of cases.43

Lawyer and Disbursement Fees

Counsel is paid $83.90 per hour on the immigration tariff, with an additional five or ten percent depending on experience. The rate is not indexed to cost of living or inflation and has only been increased once since 1990, when the normal hourly rate was $80 per hour.44 The average hourly rate for private lawyers in general in the Western Region in 2014 would appear to have ranged from $203 to $415 per hour depending on experience.45 The tariff does not pay for time by paralegals, legal assistants, administrative staff or other non-lawyers working on refugee files, but does provide funding for disbursements such as interpreters, translations and medical reports although disbursements will often need to be approved in advance. The average total cost to LSS of a refugee claim under the new system in the 2013-2014 fiscal year was $2,062, including disbursements.46 The average of legal fees alone charged in private refugee cases in the Western Region in the same time period would appear to have been in the range of $4000.47

Eligibility Screening

The LSS screens cases for both financial eligibility and merit.

The financial threshold above which someone is ineligible for LSS funding is currently a net monthly income of $1,480 for a single person and

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43 Communication to authors from LSS-BC (January 20, 2015).
44 Legal Services Society “Making Justice Work” Report to the Minister of Justice and Attorney General (July 1, 2012).
45 Canadian Lawyer “2014 Legal Fees Survey” (June, 2014), p.33.
46 Communication to authors from LSS-BC (January 20, 2015).
$3,260 for a family of four. The financial eligibility threshold is applied in an “all or nothing” manner, in the sense that someone will either get full funding for counsel and disbursements or no funding at all. This approach creates very challenging situations for individuals just above the financial eligibility threshold, who may not be in a position to fully retain counsel even if they are in a position to contribute to the cost of retaining counsel.

The threshold set out in the LSS policy manual for merit screening in refugee cases is a “reasonable chance of success.” However, as Rehaag points out in his 2011 study, the level of merit required has historically fluctuated with funding levels:

> However, what counts as a reasonable chance of success appears to hinge largely on the financial resources available to the LSS. In 2009, for example, the LSS announced that it was “introducing stricter merit screening of immigration legal aid applications to ensure that spending remains within the available budget. This means that some cases that would have been covered in the past will not be covered after April 1, 2009.”

> Given this variability in what constitutes “merit,” it is perhaps not surprising that, as Table 8 indicates, the refusal rate in applications for legal aid for refugee hearing coverage has increased significantly in recent years. Indeed, from fiscal year 2006–2007 to fiscal year 2009–2010, the refusal rate has more than quadrupled.

### Legal Aid Coverage of Refugee Claims

Individuals initiating inland claims under the new system can apply for coverage prior to scheduling an interview with Citizenship and Immigration Canada. The LSS immigration tariff compensates counsel for 16 hours to do the following in relation to refugee claims:

- Interview the client and take instructions
- Complete the Basis of Claim (BOC)
- Attend interviews with the client and Citizenship and Immigration Canada or the Canada Border Services Agency
- Prepare for a hearing before the RPD
- Prepare and submit an opinion letter regarding the merit of funding an appeal or Judicial Review application

The tariff allows for an additional eight hours for a second adult claimant on the same claim, and an additional four hours for each subsequent adult on a joint claim. Counsel is compensated for the actual time of the refugee hearing.

### Duty Counsel

The LSS provides duty counsel for people in detention at the Canada Border Services Agency’s enforcement centre in Vancouver. Detainees are brought to the detention facility housed in the building with the Immigration and Refugee Board when they have meetings scheduled with a CBSA officer, if they have a hearing scheduled at the Board, or if they have just been arrested by an officer on

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immigration grounds. Duty counsel is available to provide summary advice to detainees and appear on their behalf at detention review hearings. The priority for duty counsel is to appear at scheduled 48 hour detention review hearings. Detainees do not need to meet financial eligibility requirements to receive duty counsel services.

The demand for duty counsel has remained relatively consistent over the past 3 years:

<table>
<thead>
<tr>
<th>Duty Counsel Demand</th>
<th>2011/12</th>
<th>2012/13</th>
<th>2013/14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immigration Duty Counsel Client Visits</td>
<td>1,196</td>
<td>1,308</td>
<td>1,153</td>
</tr>
</tbody>
</table>

The overall cost of the Duty Counsel program in the 2013 – 2014 fiscal year was $137,999. Including the administrative costs, this represents around 10 percent of the immigration budget for the Legal Services Society.

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51 LSS Annual Service Plan Report 2013/14.
ROLE OF COUNSEL IN REFUGEE PROCEEDINGS

Importance of Counsel in the Refugee Determination Process

All interviewees in this study agreed that legal counsel played a critical and necessary role throughout the refugee determination process. This was not surprising as it mirrors the findings of large scale studies on the need for counsel in the asylum process.

In 2002 the Department of Justice did an extensive study drawing on data from interviews with staff at Citizenship and Immigration Canada, service providers in the non-governmental (NGO) sector, lawyers, immigration consultants, legal aid managers, managers at the Immigration and Refugee Board, and refugee claimants. Approximately 72 percent of the respondents in the 2002 study thought that legal counsel was necessary in the preparation stage before the hearing; 99 percent felt representation was necessary for the hearing itself; and 90 percent of the respondents felt that legal representation was required for failed refugee claimants at some post-determination proceeding.

In 2011, Sean Rehaag looked at the question of whether legal representation is necessary by analyzing the data from refugee determination decisions over a four year period. He found that having legal counsel increased the likelihood of a successful claim and that lawyers with experience in refugee law were much more likely to have successful outcomes for their clients than lawyers with less experience, consultants, and unrepresented claimants. Claimants with representation from a lawyer were approximately 75 percent more likely to succeed than those who were unrepresented.

Right to Counsel in the Refugee Determination Process

The right for claimants to be represented by counsel at their own expense is specifically set out in the Immigration and Refugee Protection Act (IRPA) with respect to any proceedings before the Board. Refugee Protection Division Rule 3(4) directs the officer referring a claim to inform the claimant that they may, at their own expense, be represented by legal or other counsel. IRPA prohibits anyone from charging a fee to act as counsel in immigration proceedings unless the person is a lawyer, a member in good standing with a law society, or a consultant registered with the Immigration Consultants of Canada Regulatory Council.

The Federal Court has addressed the right to counsel in a number of cases in the immigration and refugee context. The issue is often raised as a matter of procedural fairness or natural justice when a person has not had the opportunity to retain counsel for their hearing. A helpful

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52 Portions of this section have been adapted from an article written by co-authors, Peter Edelmann and Lobat Sadrehashemi, “The Implications of Refugee Reform on Access to Justice”, The Verdict, Issue 138 (Fall 2013).

53 John Frecker et al, Representation for Immigrants and Refugee Claimants: Final Study Report, Department of Justice Canada, October 2002.

54 Only one respondent out of 104 felt that representation at the hearing was not necessary.


56 This figure used the “predicted grant rate” which means that the comparison between legal representation and no representation took into account the yearly country of origin average grant rate.

57 IRPA s.167(1).

58 IRPA s.91(1).
summary of the issues is provided by the Court in *Mervilus v. Canada*:

The following principles can therefore be drawn from the case law: although the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.\(^59\)

The Court has repeatedly found that a failure to adjourn or make other accommodations so that persons appearing before the Board can obtain counsel may result in breaches of procedural fairness. In *Madoui v. Canada*, Mr. Justice Russell commented on the role of counsel in immigration proceedings:

> I am not prepared to speculate as to what the outcome might have been had Mr. Si Ali been given enough time to prepare. [...] I am not prepared to conclude that there is so little need for lawyers in immigration hearings that the outcome could not have been any different had Mr. Si Ali been given more time to prepare.\(^60\)

The right to counsel at the eligibility stage is much less clear, and there have been a number of findings by the Federal Court which would seem to indicate that there may not be a constitutional right to counsel during an eligibility interview. The reasoning is generally based on the finding by the Supreme Court of Canada in *Dehghani*, which was a case dealing with secondary examination at the port of entry:

> The purpose of the port of entry interview was, as I have already observed, to aid in the processing of the appellant’s application for entry and to determine the appropriate procedures which should be invoked in order to deal with his application for Convention refugee status. The principles of fundamental justice do not include a right to counsel in these circumstances of routine information gathering.

The case turned in large part on the finding that a person in secondary immigration examination was not detained for the purposes of s.10(b) of the *Charter*; it should be underlined that the finding in *Dehghani* was based on the system that was in place at the time. Given the expanding scope of ineligibility and the significant impact of various findings made at the eligibility interview under the current system, the role of counsel at this stage may need to be revisited by the Courts.

In any event, even if there is not a s.10(b) *Charter* right to have counsel during an eligibility interview, the principles of procedural fairness will generally require officers to allow counsel to attend the eligibility interview if they are available and not disruptive of the process. Given the growing importance of the decisions made during the eligibility interview, the presence of counsel at the eligibility interview is further justified after the recent reforms. In practice, counsel is generally allowed to attend eligibility interviews when a claimant is initiating a claim inland with Citizenship and Immigration Canada, but access is less consistent when a claim is initiated at a port of entry, especially at the Vancouver International Airport.

**State-Funded Counsel**

Although the Federal Court and the Immigration and Refugee Board have recognized the important role of counsel in many of the proceedings before the Board, there has been no clearly articulated right to funding for counsel. The comments from the Court are generally helpful to claimants who have been able to access counsel. As for claimants who cannot afford counsel, the Federal Court has

\(^{59}\) *Mervilus v. Canada* (Minister of Citizenship and Immigration) 2004 FC 1206 at paragraph 25.

\(^{60}\) *Madoui v. Canada* (Citizenship and Immigration), 2010 FC 106 at paragraph 17.
not clearly articulated a right to state funding in the immigration or refugee context, more than a decade and a half after the Supreme Court of Canada’s decision in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (“J.G.”). *J.G.* was a case that dealt with the right to state funding for counsel in the context of child apprehension proceedings. The Court articulated three central criteria to consider in assessing whether counsel was necessary in a proceeding: i) the seriousness of the interests at stake; ii) the complexity of the hearing; and iii) the capacity of the individual concerned.

A full analysis of whether refugee claimants have a constitutional right to state-funded counsel in their refugee determination proceedings is beyond the scope of this report. However, in our view, there is a strong argument to be made that the *J.G.* criteria are met with respect to many refugee cases. Some of the issues to consider in applying these criteria to the refugee context include:

- **Seriousness of the interests at stake:**

  The question before a decision-maker at the Refugee Protection Division relates to whether a person will face persecution, torture, or risk to their life if they are returned to their country of nationality. The consequences of this determination for a claimant and their family is literally an issue of life or death. It is therefore not difficult to characterize refugee hearings as proceedings where the interests at stake are serious and of the highest order for the person concerned.

- **Complexity of the hearing:**

  The Immigration and Refugee Board is an administrative tribunal with less formal procedures than the courts. The rules of evidence are more relaxed and the hearing process is fairly informal. The rules governing our immigration system are, however, complex and the forms are not easy to understand. Claimants are questioned extensively about the credibility of their claim in a manner that is very similar to a cross examination. The process has become increasingly adversarial with the Minister intervening in more and more cases, particularly in the Western region.61

  The refugee definition is not simple and the onus is on claimants to demonstrate that they have a well-founded fear of persecution based on a set of enumerated grounds or that their life is at risk or they are at risk of torture or cruel and unusual treatment or punishment. In the most basic case this requires, at minimum, an assessment of the identity and credibility of the claimant, an evaluation of personal evidence offered in support of their claim, including the provision of medical and police records, research into the way in which the government in their home country offers protection to those in the claimant’s situation, and an assessment of whether the claimant could be safe if he or she moved to another part of the country. In some cases claimants will also face possible exclusion from refugee protection due to status in a third country, or because of the alleged commission of serious crimes. The application of the exclusion provisions is often complex and involve a substantial and changing body of law.

- **Capacity of the claimant:**

  Many refugee claimants have experienced severe trauma before arriving in Canada. Some have survived or witnessed torture, killing and other forms of inhumanity. Many live with mental or physical disabilities, often linked to past persecution in the form of injuries or psychological scars that manifest in conditions like post-traumatic stress disorder. These challenges make it incredibly difficult for some claimants to be able to tell their story in a coherent way and to remain engaged in the system without assistance. Collecting documents, filling out forms, and providing testimony at a hearing are very difficult for many claimants.

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61 Immigration and Refugee Board. “Nine Months following Legislative Change” Refugee Protection Division Western Region Consultative Committee Meeting October 10, 2013 (Presentation by Colleen Zuk, Coordinating Member, Western Region).
One of the most obvious and in many cases overwhelming barriers for claimants is the language of the system and the proceedings. All documents presented to the Board must be translated into English or French, and the Board will only provide very limited materials in a few other major languages. Simply trying to navigate the system to be able to initiate a claim requires a relatively sophisticated language level. Even with fluency in an official language and formal education, the requirements can be overwhelming.

Claimants also face a number of cultural barriers in attempting to navigate the legal system. The implicit understandings which underpin our legal system may not be shared by newcomers to Canada. In addition to explaining the legal process and providing advice about legal options, legal counsel often serve as a guide to Canadian norms of communication, attempting to ensure clients are properly understood in proceedings. For example, many claimants have a profound distrust of government authority. Cultural or social taboos may also be impediments to discussing certain forms of violence or persecution. Without guidance on what is expected of them at a hearing, many claimants may struggle to tell their story to a decision-maker.

Although J.G. set out criteria for state funding that on their face would clearly apply to a significant portion of refugee claims, the Federal Court and Federal Court of Appeal have left it to the provincial legal aid plans to decide what if any level of funding is required.

The level and scope of funding vary dramatically from province to province. Some provinces provide no funding at all, while others, such as British Columbia, ostensibly provide funding to a certain number of cases but at rates so low they invariably require a subsidy in time and commitment from counsel who accept such retainers to ensure adequate representation.\footnote{Interview with Service Provider #4.}

\footnote{A.B. v. Canada (Minister of Citizenship and Immigration), 2001 CanLII 22107 (F.C.A.).}

\footnote{For an overview of funding for refugee claims in the various provincial legal aid systems, see Sean Rehaag “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49 Osgoode Hall Law Journal.}
ACCESS TO COUNSEL

This report considers the concept of “access to counsel” to have a broad meaning that goes beyond the simple ability of a claimant to obtain legal representation at some point in their process. There are a number of indicators that, in combination, demonstrate whether claimants have meaningful access to counsel. The ability to obtain counsel at all is one indicator of access to counsel. Just as important is the timing of obtaining counsel. If counsel is retained too late to be able to work effectively on a claimant’s case, then access to counsel has not been meaningful. The quality of counsel is another indicator. Simply being able to retain a lawyer who has little or no experience in refugee law is not proper access to counsel in the context of a refugee claim with extremely high stakes for the claimant. A genuine choice of counsel is also part of access to counsel, as claimants should be able to select a lawyer to whom they are comfortable telling their often harrowing stories. Finally, the constraints imposed on how counsel can represent their clients, particularly the shortened timelines that make it difficult for lawyers to provide their best representation, is a factor in assessing access to counsel. If a claimant has a lawyer, but that lawyer is unable to advance the claimant’s case with his or her normal vigour due to an impractically short period of time to prepare, then the claimant’s access to the services of counsel has been reduced.

Concerns about unrepresented claimants have been raised in other studies, and on multiple occasions the Federal Court has commented on the heightened duty of fairness that the Immigration and Refugee Board must exercise when dealing with unrepresented claimants. The impact of not having counsel is notable not only in the rates at which refugee status is granted, but also in the numbers of claims that are withdrawn or abandoned.

The strict timelines under the new system are enforced at abandonment hearings which are scheduled at the time a claim is found to be eligible. In 2013, of the 44 abandonment hearings held in British Columbia, claimants were represented by counsel at only 16 (or 36 percent). The rate at which claims were declared abandoned was almost twice as high for unrepresented claimants (21 out of 28, or 75 percent) than those who had counsel (7 out of 16, or 44 percent).

With the significant drop in numbers of total claims under the new system, it would appear that a larger proportion of the claimants who do initiate claims are able to do so with the assistance of counsel. This is consistent with Rehaag’s findings in 2011, which indicated that legal aid plans were adjusting their merit screening procedures to accommodate budget restrictions, and so less stringent screening could be expected when numbers of claimants went down.

The proportion of unrepresented claimants nationally remained relatively consistent at 12 to 13 percent from 2009 to 2012. Nationally, the level of unrepresented claimants was 9 percent in 2013.
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and went down to 6 percent in the first two quarters of 2014.\(^{67}\)

The level of unrepresented claimants in the Western Region was substantially higher during the same period, ranging from 26 to 30 percent of finalized claims in the period from 2009 to 2012.\(^{68}\) However, the percentage of unrepresented claimants in the Western Region remained significantly higher than in other regions with respect to finalized claims:

| Unrepresented claimants as a percentage of finalized claims, 2013 |
|------------------------|---|---|---|---|
| Region | Q1 | Q2 | Q3 | Q4 |
| Eastern | 12% | 4% | 4% | 5% |
| Central | 13% | 5% | 7% | 4% |
| Western | 25% | 29% | 24% | 17% |
| National | 14% | 7% | 8% | 6% |

Although the numbers of unrepresented claimants have dropped in the region following the fall in total numbers of claimants, the decrease in the level of unrepresented claimants in the Western region does not correspond to the extreme fall in the levels of claims being made.\(^{69}\) There are legitimate reasons to be concerned that levels of unrepresented claimants will begin to rise in the region as resources at the Legal Services Society have not historically kept pace with growing numbers of claimants.

The Board does not currently record the number of unrepresented claimants at the time of filing the Basis of Claim form. Instead, if a claimant receives representation at any point during the refugee determination process, they are recorded as having representation even if they did not have legal counsel at the time of filing their Basis of Claim.\(^{70}\) A significant concern in terms of a claimant’s ability to access legal representation is the point in the process when they are able to obtain representation.

Legal Aid Coverage for Refugee Claims

In the 2013-2014 fiscal year, funding was approved for 82 percent of applications by refugee claimants (348 out of 424 applications), an approval rate that has continued over the first three quarters of the current fiscal year (299 out of 360 applications). The main source countries approved for funding include Afghanistan, Columbia, Honduras, China, Iran and Pakistan. The approval rate for appeals to the Refugee Appeal Division was somewhat lower, with only 61 percent of appellants being granted funding (14 out of 23 requests).

It would appear that in most cases, LSS currently has the ability to secure counsel relatively quickly for refugee matters, although this may change if the numbers of claims start to increase. In 2013, the average time to secure counsel was four working days, with a median of one working day.\(^{71}\) It should be noted however that four working days is still lengthy for port of entry claimants where the

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68 Email from IRB to Lobat Sadrehashemi (June 27, 2014) enclosing figures on self-represented PCISA claimants for the full 2013-14 fiscal year.
69 Refugee claim referrals in the Western Region dropped 58 percent in the 9 month period following reforms [Immigration and Refugee Board. “Nine Months following Legislative Change” Refugee Protection Division Western Region Consultative Committee Meeting October 10, 2013 (Presentation by Colleen Zuk, Coordinating Member, Western Region).]
70 Phone conversation between Lobat Sadrehashemi and Charles Lynch, Chief of Standards, Analysis and Monitoring Unit. The IRB may begin to publically report on the rate of representation at the time of the submission of the BOC; at the time of writing, there was no data available on this issue.
71 Data provided to Lobat Sadrehashemi by LSS, September 2014.
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timeline for filing the Basis of Claim form is 15 days after they arrive in Canada, and for claimants from designated countries who have their hearings scheduled 30 days after their Basis of Claim forms are filed. Moreover, LSS does not currently track the average and median time it was taking to secure counsel for port of entry claims, claimants from designated countries, or for claims made by detained claimants. It would be critical to track this data to understand whether there is any difference in being able to secure counsel for cases that are seen as more difficult due to the compressed timelines in the new system.

Special Problems in Accessing Counsel

Two groups of claimants were identified as having special problems in being able to access counsel at the front-end of the refugee determination process: claimants who are detained, and claimants who make their refugee claim at a port of entry.

Claimants in Detention

Claimants in detention were identified as those who had the most difficulties accessing legal counsel. While detained claimants may eventually obtain legal representation for their refugee hearing, concerns were raised about their ability to meaningfully access counsel while detained, particularly while being interviewed by CBSA officers and completing the Basis of Claim forms within the required timelines.

A common ground for the detention of refugee claimants is the lack of adequate documentation establishing their identity. Many claimants arrive in Canada with false documentation. International law and our refugee protection legislation recognize this reality for asylum seekers who by the very nature of the legal claim they are making are often in no position to arrive with proper identity documentation. Many claimants would not be able to escape persecution and come to Canada without relying on false identity documents to travel to Canada. Once they make their claim in Canada they have to demonstrate their real identity to immigration authorities. Many of these claimants have identity documents in their home countries, but it takes time before these documents can be sent to Canada. Sometimes the CBSA requires that the documents be verified in Canada through a documentation verification process further delaying a claimant’s release. Detention is reviewed by the Immigration Division after 48 hours and at subsequent detention reviews. However, it is rare for the Board to release a claimant while the Minister is taking reasonable steps to ascertain identity or to investigate inadmissibility.

It is difficult to know the number of refugee claimants who are detained. Currently neither the Board nor the CBSA maintain public statistics on the number of people detained who have made a refugee claim that has not yet been decided. Current statistics group claimants whose claims have been denied with those who have just made a refugee claim. Given that participants in the study repeatedly identified being detained as a significant barrier to accessing legal representation, it is critical to know how many refugee claimants are being detained upon making their claim for protection. In a 2011 report

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72 Email communication between Lobat Sadrehashemi and LSS, January 2015.
73 The Immigration Division can also continue the detention of a claimant if it is satisfied that: (a) they are a danger to the public; (b) they are unlikely to appear for further proceedings under the Act; and (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality. These grounds are less commonly used for detaining refugee claimants.
74 Article 31(1) of the Convention on the Status of Refugees; IRPA s. 133.
75 We requested this information in IRB Access to Information Act request A-2014-00350. Through our conversations with the IRB Standards, Analysis and Monitoring Unit we understand that the IRB may be publically reporting on the number of claimants who are detained at the time of filing the BOC as well as at the time of their refugee hearing. At the time of writing this information was not reported.
examining immigration detention in Canada, Delphine Nakache identified this issue as a significant one, recommending that “when compiling and releasing public statistics on immigration detention, CBSA should make a distinction between asylum seekers and failed refugees...”

The detention experience of refugee claimants in British Columbia is unique for a number of reasons. For the first 72 hours of their detention, immigration detainees are most often held at the Vancouver International Airport, in a holding centre repeatedly criticized for not meeting international standards for detention facilities. The Coroner’s Inquest into the death of Lucia Vegas Jimenez in September of 2014 (“Coroner’s Inquest”) recommended that this facility be shut down. It is only in the last few months, after the recommendations from the Coroner’s Inquest were released that access by counsel to the holding centre at the airport is allowed as a matter of policy. The facility, however, remains open with no confirmed plans by CBSA for its closing. Unlike Ontario and Quebec, which have dedicated immigration detention facilities, immigrant detainees in British Columbia are held in provincial jails, alongside pretrial detainees or convicted offenders serving sentences. This practice has also been heavily criticized.

Unlike Ontario and Quebec, British Columbia has a duty counsel program funded by the Legal Services Society. Duty counsel represent those detained for immigration reasons at a review before the Immigration Division 48 hours after detention. Duty counsel generally are not able to represent detainees at subsequent detention reviews. Most often duty counsel meet the person they are representing shortly before the proceeding; meeting with a detainee claimant half an hour prior to their detention review is not at all unusual. Duty counsel is very busy attending to multiple hearings in the day, giving priority to completing scheduled 48 hour detention reviews.

Unlike in Ontario and Quebec, there are no refugee-serving organizations in British Columbia dedicated to assisting refugee claimants in detention, nor are there regular lawyer visits with claimants who are detained. It is not part of duty counsel’s mandate to visit detainees in the detention facilities. The Red Cross runs a monitoring program of immigration detention in British Columbia. The program has been criticized, however, as the strict Memorandum of Understanding with the CBSA forbids the Red Cross from disclosing to anyone other than CBSA the problems they document in immigration detention.

Concerns about detained claimants being able to meaningfully access counsel in detention certainly did not begin with refugee reform. Many of these concerns were documented prior to the changes to the refugee determination system. That being said, participants repeatedly emphasized that the shortened timelines and rigidity around extensions of time exacerbated the impact of lack of access to counsel for claimants in detention. In particular, the following three issues were noted as having a graver impact on detained claimants in the new system: i) lack of timely information about the refugee process and access to counsel; ii) being subjected to multiple interviews with CBSA without any advice or representation from...

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77 Ibid.
78 Legal counsel in BC were sent a notification from CBSA in December 2014 stating that they were now permitted to attend the holding facility to meet with their clients.
80 Lawyer interview #5.
counsel; and iii) limited time to complete the Basis of Claim form.

The critical need for access to counsel for refugee claimants is coloured by the reality that many claimants come to Canada traumatized. As one service provider who works with LGBT claimants explained, detention coupled with the stress of flight and trauma of persecution, makes navigating the refugee process by oneself extremely difficult:

Anyone under detention access to counsel is extremely challenging particularly anyone who is detained and also dealing with you know any of the psychological impacts of trauma. We’ve had a couple of people who were in detention in deep, deep depression, they had to be on sort of active suicide watch for weeks afterwards.

So very concerned under those circumstances you know and these are situations where there was not a prior mental illness before leaving their home country. This is something where it’s a combination of having fled, there was a traumatic event there that is still quite alive and then they end up in detention feeling like they’ve utterly disappeared. 83

Lack of Timely Information about the Refugee Process and Access to Counsel

Despite the existence of a duty counsel program in British Columbia, service providers and lawyers noted that detained claimants frequently had poor access to information about the refugee process and how to access counsel. As noted above, duty counsel’s interaction with detained claimants is quite limited. Moreover, detainees often do not meet with duty counsel until two or three days after the time of their detention and the initiation of their refugee claim. For example, if a person arrives on Thursday, makes a refugee claim and is detained for lack of identity documents, it is not unusual for their detention review to be held the following Monday or Tuesday. This would leave them with only nine days to file their Basis of Claim form including their narrative explaining the reasons for their asylum claim. One lawyer interviewee explained that despite there being security personnel and duty counsel available to claimants, many claimants did not receive information on accessing legal aid:

Even though Duty Counsel are there, lots of them are not able to get access to the Duty Counsel sometimes. And the sort of security agencies in charge of those detention centres do not put a conscious effort to assist these guys in making phone calls or contacting Legal Aid. 84

Some NGOs report that they were sometimes the only source of information for detainees about the refugee process and obtaining counsel, noting a connection between poor detention conditions and lack of access to counsel. It was noted that detainees often have the most questions during the orientation tours hosted by the Ready Tours program due to their isolation, lack of interpreters, and inconsistent dissemination of information for those in immigration detention. 85

Another lawyer described the plight of detained claimants and access to counsel in this way:

...when you’re in detention everything is so difficult. Any kind of communication with the outside world is difficult. And unless we have meaningful instructions in many languages in all of the detention centres, and you know, responsible people on the other end of the phone line, it’s just difficult. 86

Interviews with CBSA in Detention

Inadequate access to counsel for interviews with CBSA with detained claimants has been a problem that has plagued the refugee determination system
for some time. With the shortened timelines and expanded scope of ineligibility in the new system, the consequences of being interviewed without counsel by CBSA are more severe. These interviews form part of the record at the claimant’s refugee hearing. Once the claimant has counsel for their hearing, there is less time for that counsel to be able to review the interview records with the claimant and prepare the claimant for the problems and potential contradictions arising from the notes taken by an officer during an interview.

Some claimants request to be able to speak to a lawyer before they are interviewed by CBSA. These claimants are often given a phone number to legal aid. There have been noted problems with this service, including difficulties accessing the number as it sometimes goes to voicemail and detainees have inconsistent access to the phone when they are detained. Others noted that it was difficult for claimants to necessarily trust the person on the phone line to disclose details of their claim. Refugee claimants are sometimes disclosing very personal details for the first time; they are fearful of the consequences of this disclosure and may not necessarily trust that the person on the other end of the phone line is there to assist them. Moreover, unlike criminal law phone advice which normally consists of informing people of their “right to remain silent,” refugee phone advice is very much dependent on the facts. They do not have the “right to remain silent”; in fact they are obligated to answer the questions that are put to them truthfully.

A number of service providers were particularly concerned about detained claimants not being able to get legal advice prior to or during multiple interviews with CBSA:

"Yes, we’ve had a couple clients recently who’ve had access, problems accessing lawyers while in detention. And it’s caused huge problems for them in terms of their claim because they’ve been interviewed. We have one client who’s been interviewed 10 times in detention by the CBSA. And then that information has been, I say used against them because I believe that, the condition that this client was in mentally I think that’s, I would say that’s coercive, that was coercively, how do you say it, the information was obtained under coercive circumstances."

Completing the Basis of Claim in detention

In British Columbia, under the old system, it was common for claimants to be able to obtain an extension of time to file their Personal Information Forms (PIFs) with the Board if they could not complete it within the 28 days as was required. In the new system, requesting extensions for filing the Basis of Claim does not appear to be at all a regular practice. A service provider with a high caseload of assisting claimants at the front-end of the determination process wondered if it was even possible to make such a request.

A person who makes a claim at the port of entry has 15 days to complete the Basis of Claim. If that claimant is detained, the timeline remains the same. As noted above, while in detention, a claimant may not have access to in-person legal counsel until after they have been in detention for several days. The concern at the forefront of the detainee’s mind is normally about how to be released from detention – this is the primary concern and the reason for duty counsel’s involvement with them. At the same time that they are attempting to collect identity documents from their home country, they are expected to try to fill out multiple forms about their personal history and set out in detail the reasons why they are

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87 MAP service provider focus group meeting.
88 Service provider interview #6.
89 Ibid.
90 Ibid.
91 MAP service provider focus group meeting.
seeking asylum in Canada. These forms must be filled out in English or French.

A number of participants noted that detained claimants were completing their Basis of Claim form when they were brought from the detention facility to the Board for their detention review hearings. Meetings were set up with interpreters who would sit with the claimants in the meeting rooms to complete the forms:

There are many, many challenges. First of all they have to complete a whole set of forms, often by themselves. Excuse me, they’re often just done with them, in a room, in a CBSA detention interview room, with an interpreter that may or may not be licensed and will have no legal knowledge. Claimants that are traumatized and in detention may not know what information is relevant to a refugee claim and there are many problems in terms of the detailed questioning on dates and times and all their family members. All those details often – if a counsel comes on after a detained claimant has completed their forms, they have to redo the whole set of them later.92

... My impression for the people that we’ve worked with that have had to complete the BOC while being detained is that they weren’t adequately completed or they were incomplete. I think because of the timeline in which they’re supposed to complete them in and also not having counsel to work with them on it. So what we’ve seen is that an amendment has to be filed by the lawyer afterwards....93

A claimant describes the difficult situation he faced completing the Basis of Claim form while detained under time pressure from the interpreter, whose role in these situations was quite blurred as she was not simply interpreting the claimant’s responses but giving advice on how to complete the forms:

When I was detained I did not have the assistance of a lawyer in completing my Basis of Claim and other forms for my claim. I completed these forms with an interpreter provided to me by CBSA. The interpreter seemed very suspicious of my claim and seemed to judge me for my [redacted] conviction. I did not feel comfortable with her and did not feel like she properly understood the basis of my claim. She was also adding suggestions for my claim which I did not properly understand.94

This Basis of Claim form had to be later amended when they obtained counsel for their hearing.

For claimants who made a claim inland after they have been arrested or detained, there is extreme time pressure. CBSA is currently taking the position that individuals who initiate claims after being arrested or detained inland are required to complete all the forms, including the Basis of Claim form within three working days.95 This of course makes it very difficult for inland detained claimants to access counsel able to represent them under this type of time pressure. The insistence on providing a completed Basis of Claim form and other forms at the eligibility stage in these cases is difficult to understand, as CBSA officers routinely make decisions about eligibility at the port of entry without having a copy of the Basis of Claim.

92 Lawyer interview #6.
93 MAP service provider focus group meeting.
94 From the amended BOC of claimant # 1.
95 The basis for this interpretation appears to be the combination of IRPR s.159.8 (1) which says that a person who makes a claim for refugee protection inside Canada other than at a port of entry must provide an officer with the documents and information referred to in s.99(3.1) not later than the day on which the officer determines the eligibility of their claim under IRPA s.100(1). The RPD Rule 7 specifies that the Basis of Claim must be provided to the officer referred to in IRPA s.99(3.1).
CORONER’S INQUEST RECOMMENDATIONS RELATING TO ACCESS TO COUNSEL IN DETENTION

In December 2013, Lucía Vega Jiménez was taken into CBSA custody after being stopped on transit for an unpaid fare. She did not have status in Canada, and was detained. She was not released at any of her detention reviews, and was held in the Alouette provincial correctional facility. While it was clear to medical staff that she required mental health assistance, it was not provided to her. She was given an opportunity to request to stay in Canada based on a Pre-Removal Risk Assessment (PRRA), but she did not complete the application by the deadline. CBSA quickly took action to remove her once the deadline passed, and she was transferred to the Immigration Holding Centre at Vancouver International Airport where she committed suicide.

The Coroner’s jury made a number of recommendations that relate to access to counsel for detainees. The jury recommended the closing of the Vancouver International Airport Immigration Holding centre and the creation of a new holding centre which would include an onsite courtroom for immigration hearings. Detainees would be able to access: legal counsel, medical services, NGOs, spiritual and family visits; readily available telephones capable of free local calls and the use of international calling cards; and internet use.

In the interim, the jury recommended that detainees be allowed access to legal counsel and NGOs at the Vancouver International Airport Immigration Holding Centre. Detainees should be allowed access to readily available telephones capable of free local calls as well as the use of international calling cards.

In the first day of immigration detention, the jury made the following recommendations:

- “If there is any doubt about a detainee’s ability to understand English a translator must be obtained immediately.”
- “An orientation kit in the correct language must be issued immediately. The kit should include:
  - Instructions on how to access a lawyer
  - Instructions on how to contact NGO groups
  - Any approved pamphlets supplied by NGO groups
  - Contact for a Detention Liaison Officer and a brief description of his or her duties
  - International calling card (not limited to one) and instructions on how to call different countries
  - Notebook and pencil
- The orientation kit should remain with the detainee throughout their detention.”

The Jury further recommended:

- “CBSA should offer seminars by the [detention liaison officers] to NGO representatives to help them understand their roles and resources when helping detainees.”
- “CBSA should aid NGOs in obtaining any necessary security clearances needed to gain access to detainees in CBSA care or Corrections care.”
- “An improvement committee consisting of NGOs and [detention liaison officers] to discuss current concerns and recommendations should be created. This committee should meet quarterly.”
- “CBSA should establish and be responsible for the appointment calendar of each detainee. Any other interested parties must notify the CBSA of any detainee appointments. This will ensure that CBSA has control over any scheduling conflicts.”
- “Detainees in the corrections system must have access to their own money.”
- The jury also recommended to BC corrections that “Immigration detainees need to be given access to regular non-inmate phones and/or internet to facilitate international communication. Timing of such communication should take into consideration the time zone of the country being called.”


Claimants Initiating Refugee Claims at Port of Entry

Another place where claimants typically have no access to counsel is at the port of entry when they first make a refugee claim. Claimants who make their refugee claims at the port of entry (airport or land border) normally have their eligibility determined at the time they make a claim. During the course of an eligibility interview with an immigration officer – at the port of entry this is usually a uniformed and armed CBSA officer – there are a number of forms that must be completed. Because it takes place almost immediately after they arrive in Canada, claimants are not likely to have had any legal advice before this interview. At this stage, they are expected to provide a detailed personal history - including addresses for the last ten years, previous travel, education, and work history - as well as the details of their claim. These forms and notes from this interview are part of their record that will be before the Board member who will be deciding their refugee claim. Inconsistencies or omissions in these forms and interviews and later statements will have to be explained by the claimant and can
be the source of a negative credibility finding by the Board.

One claimant explains the conditions she experienced when she was interviewed at the port of entry (Vancouver International Airport) about her refugee claim:

We were taken to a large room with many dividers where there were other people and families...

My children and I remained in the interview room except for breaks to the washroom for most of the day. We ate breakfast, lunch and dinner in the same area where I was being interviewed. There was a portion of the day where the officer was asking me questions directly about my claim and the route I took to come to Canada; part of the day the officer was asking background information while filling out forms. By the time I signed the forms, my children and I had been in the room for many hours.

I felt very tired and uncomfortable during the interview. I did not have a clear idea of what the purpose of the interview was – I remember feeling like I wanted to get the interview done so that I could sleep and my children could sleep.

All of my [redacted] children were present throughout the whole interview. I was preoccupied with how my children were coping. I felt that they were very tired and needed sleep. At some points during the interview I was also worried that my children would hear details that I believed would be very frightening for them to hear. I did not imagine that I would be forced to tell my story in front of my children. […]

The interpretation was provided over the telephone. It was not easy to always hear the interpreter. I did not feel comfortable with the interpretation that was being provided. The interpreter would sometimes cut me off […] . At some point I stated that I wanted another interpreter. Again the interpreter told me something like – “be quiet.” I have no way to know whether my request for another interpreter was interpreted to the officer. 96

In general refugee claimants who are interviewed at the port of entry are not considered to be “detained” for the purposes of the interview. If the interview is not completed, and the person is held overnight, this has been found to be detention and the person’s s. 10(b) Charter right to counsel is triggered. 97

Prior to refugee reform, claimants who made their refugee claims at a port of entry were required to complete the eligibility process very soon after they arrived and, like claimants now, were very unlikely to have had legal advice prior to completing this eligibility process. The problem of lack of access to counsel for claimants who claim asylum at the port of entry is aggravated in the new system for three reasons: i) there are more eligibility forms to complete and therefore more questions for the claimant to answer upon arrival; ii) the scope for being found ineligible to make a claim has expanded; and iii) the shortened timelines mean that claimants will be less prepared to address any inconsistencies between their statements upon arrival and at the time of the hearing, which for some claimants is 45 days after they arrived.

The new eligibility forms completed at the time of making a claim are more extensive than the forms prior to the reforms. The form that was previously used, IMM 5611 “Claim for Refugee Protection in Canada” was a form tailored to collect information to make an eligibility determination. New forms include generic forms used for all permanent 96 Redacted statutory declaration of claimant #2 filed with her appeal to the RAD.
97 Immigration examinations that do not end in one day have been found to constitute detention. See for example: Chen v. Canada (Minister of Citizenship and Immigration), 2006 FC 901; Chevez v. Canada (Minister of Citizenship and Immigration), 2007 FC 709; Rebmann v. Canada 2005 FC 310; Dragosin v. Canada (Minister of Citizenship and Immigration), 2003 FCT 81.
These forms capture a broader scope of information. For example, instead of simply requesting the last country of permanent residence, the new forms require additional information: “During the past five years have you lived in any country other than your country of citizenship or current country of residence for more than 6 months? If yes, country? Status? From/to.” Instead of asking a person’s marital status, the new forms require the claimant, at the eligibility stage, to provide details about their marital and common law relationships in the last five years, including the name, date of birth of their partners and the length of relationships. Claimants are not only asked about the identity and travel documents they used to travel to Canada but rather they are now asked what documents they could obtain to “support your claim” such as “proof of membership in political organizations, medical reports, police documents, business records.” Also at the time of eligibility, claimants are asked to sign multiple consents allowing for release of personal information, including information sharing with foreign governments.

A number of lawyer participants explain the problem with having claimants complete these types of extensive forms with CBSA officers when they make a claim upon arrival:

Also I think for people who arrive at port of entry and they’re forced to complete all the forms there they’re not going to have the benefit really of legal counsel. So this is a problem because a lot turns on the basis of claim forms and the other forms that are completed at the outset.

So there would be a large group of people who initiate claims at the border or at the airport and who are required to fill out forms without the assistance of counsel. This could be a problem. If they’re not going to allow the person time to necessarily contact legal aid under those circumstances because strictly speaking they’re not legally detained.99 ... 

Interviewee: if someone claims at the port of entry, they’re extensively interviewed without counsel and then those notes are filed in their claim and used to impugn the credibility when they finally do get counsel so that’s a problem. Or that people are claiming even inland on their own without counsel.

Interviewee: They’re filling in all the intake forms. Everything except the BOC. It’s filled at the port of entry. So that allows for more opportunity or inconsistency.

Interviewer: And are officers at the port of entry, in your experience, asking about the substantive nature of the claim?

Interviewee: Yes, absolutely.

Interviewer: Okay. And was that the case under the old system?

Interviewee: Yes, often under the old system it was the case, but under the new system, to my understanding, that because all these other forms have to be filled out, there’s much more substantive information that’s gathered from the claimant. It’s not, here’s your pass, come back. It’s we need you to fill out these 15 pages of forms so that allows for more opportunity for inconsistency or credibility concerns down the road. And it would be very rare that someone would have counsel at a port of entry.

So I think having counsel engaged would allow people to organize their thoughts or to communicate with someone that maybe their thoughts are disorganized because of the long flight. And also the intimidation factor.

Especially coming from countries where the police and authorities are a source of persecution or at the very least, a source of corruption and not a source of protection, that being forced to give their story to people in

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98 The new forms include: Generic Application Form for Canada; Additional Dependents/Declaration; Schedule A – Background/declaration; and Schedule 12 – Additional Information – Refugee Claimants Inside Canada.

99 Lawyer interview #4.
police-like uniforms and to provide that level of detail, I just don’t think that many are prepared to do it. So having counsel allows to have an intermediary who can assist.

Interviewer: And do you find your clients at the port of entry understand the importance of the details or how important the details will become at later stages in the process?

Interviewee: No, I do not think that they understand and I don’t think that’s properly communicated to them. I often here oh, that was just an estimate or that was just a guess, that was to the best of my recollection, I was so tired and a lot of that isn’t captured in the forms. There’s nowhere for them to write I’m really tired, this is an estimate on the basis of my recollection and I’d have to really check my resume if you wanted a detailed lettering of where I’ve been working for the past 20 years. They’re filling it out to the best of their ability and that’s often really compromised by the situation they’re in.

Access to counsel at the port of entry is a problem that pre-dates refugee reform. The new eligibility forms and the shortened timelines make it so lack of access to counsel at the port of entry is even more detrimental for claimants. The amount of information that is expected from claimants upon arrival is too extensive and not necessary in order to make the eligibility determination. This in turn leads to further difficulties for claimants at the hearing stage where they have less time to address inconsistencies in their statements at the port of entry.

**Quality and Choice of Counsel**

For access to counsel to be meaningful, it is not enough to only examine whether or not a claimant finds legal representation, however inexperienced or lacking in knowledge of the refugee determination system the lawyer may be. Lawyers need to be competent in an area of practice in order to be able to represent the client’s interests. The question of who represents refugee claimants in the new system is an important one.

Based on the interviews and focus groups conducted, it appears that in British Columbia experienced counsel are much more selective of the types of cases they will take in the new system. Making matters worse, claimants with the most complex cases may, as a result of the constraints of the new system, have the most difficulty in retaining experienced counsel.

One lawyer interviewee describes this complexity in measuring refugees’ access to counsel:

> There’s a big difference between someone being able to find a lawyer to assist with their case and a situation where the lawyer has adequate time, adequate resources and enough experience in the legal area to adequately help them with their case and I think that’s the situation that we’re seeing under the new refugee system that people will often have representation but it’s rushed or it’s not as competent because many people in the city aren’t taking legal aid claims at this point. So it’s not a question if someone has a lawyer, yes or no, it’s the question of what is the quality of that representation can be under the restrictions of the new system.

All of the lawyer interviewees could be identified as experienced refugee lawyers in Vancouver. They had practiced for at least three years in the refugee law area, with four of the nine interviewees practicing refugee law for over 15 years. These lawyers all devoted the majority of their legal practice to refugee and immigration law issues. All lawyer interviewees were active members of the refugee bar in Vancouver, participating in continuing legal education programs in refugee law.

The lawyers focused much of their commentary on their strategies to do refugee work in the new system. These strategies included: being very selective of the types of cases that they would agree

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100 Lawyer interview #1.
101 Ibid.
to take on; being careful about how they scheduled cases; taking on fewer refugee cases overall; and accepting fewer legal aid cases. The views of these lawyers is significant as the refugee bar in British Columbia is relatively small given the small percentage of refugee claims that are heard in the province.

All but one of the lawyers interviewed indicated that shortened timelines and/or the manner hearings were scheduled in the new system made them less willing to take on cases where the claimants were from DCO countries, where the claim was made at the port of entry, or where the claimant was detained.102 Two of the most experienced lawyers interviewed, with over 20 years’ experience each, also indicated that they would be unwilling to take on a Refugee Appeal Division (RAD) case if they had not been the initial counsel at the refugee hearing. They both took this position because of the extremely short timelines at the RAD stage.103

The service providers had a number of comments about the added dangers of inexperienced lawyers taking on refugee cases in the new system where the timelines were so compressed. There is no time for mentorship of these lawyers, nor is there time for claimants to decide to switch counsel if they feel their representation is inadequate.

**Factors Limiting Access to Quality Legal Representation**

Participants identified a number of factors contributing to the likelihood that experienced lawyers would not take a refugee case in the new system, including shortened timelines, low legal aid pay for an intensive period of work, and problems with scheduling.

**Shortened Timelines**

The new refugee determination system is characterized by a shortened process for all claimants. As previously discussed, some claimants are subject to even more contracted timelines, including: claimants who make claims at a port of entry (15 days to file their Basis of Claim forms, whether or not they are detained); inland detainees (for those who make a claim after they are arrested or detained, CBSA allows only three days to complete eligibility and Basis of Claim forms); and claimants from DCO countries (hearings are scheduled 30 days after their Basis of Claim forms are filed). Lawyer interviewees suggested that they were more selective about taking on these types of claimants who have to contend with an even shorter process.

One lawyer describes the difficulty in taking on detainee cases when the Basis of Claim is due 15 days after they arrive. For inland detainee claimants the timelines are even worse.

*Definitely. I think there are very few counsel who would take a case in detention, and that’s ... 15-day is the maximum time. If by the time they decided to make a claim and then they’ve managed to meet up with legal aid, legal aid has approved funding, legal aid has found counsel, sets up a meet, that’s often eaten far into the 15-day. It’s not like they arrive at the port of entry, legal aid processes it and you’re appointed as the lawyer on day one. So you’re often close to the 15 days before that happens.*

Another lawyer who has practiced for many years describes her reluctance to take on cases in the new system:

*Well I’m pretty quick to turn away claimants. So, you know, I might be available on the date of your hearing, but I don’t have time to prepare. And I feel badly because I think often they, you know, who knows what’s going to...*
happen. And I don’t think we’re getting the same good quality of evidence as we might have in the past. You know, what can you sort of cobble together in a short period of time?105

A service provider interviewee echoes these sentiments, understanding that experienced lawyers will tend not to take cases where they do not feel like they can do a good job:

And more and more lawyers got involved because there was more time. If a lawyer only has one day to do it then they don’t want to do it because they want to do a good job, and they can’t have time to do a good job. So why would they want to take it, right? 206

A number of lawyers discuss the strategy of taking on the cases of claimants who make inland claims where they have had the opportunity to work with the would-be claimant to prepare the Basis of Claim forms and eligibility forms before they initiate the claim. In this way, the lawyer has much more control over preparation of the claim and the timing of the process. Once the claim is filed, the timelines begin to run. Lawyers could assist inland claimants in preparing their evidence beforehand so that the preparation for the hearing is not as intensive once the claim is filed. (See “Pre-Claim Limbo”)

So for inland claims which is the vast majority at my practice, I generally advise people to prepare everything in advance of going in including obtaining documents and supporting evidence from their home country. So in order to ensure what they’re putting in their BOC is consistent with the evidence that will be provided at the hearing.

[...]

So that’s a separate issue because that means that people are often here in a precarious situation where they can’t access a work permit, they can’t access social assistance because they haven’t made their refugee claim yet, but I don’t want them to make their refugee claim yet because I want to make sure that their narrative is consistent with the documentary evidence we’re going to be providing to the board.107

... When claimants are making an inland claim and they come to me beforehand, then it’s easier for me to manage. You know, figure out what’s a good time for them to go in.108

Another lawyer describes being unwilling to take on a DCO claim if it was not inland. Again, this is a strategy to avoid the timelines that are too restrictive for these claimants:

I haven’t done a DCO claim, unfortunately. I haven’t done a Mexican claim since the new system, so with even tighter timelines, like 30 days, I can’t even imagine, and I’m not even sure I would even agree to take one on unless it was inland. I don’t think I’ll ever take one on at port of entry because I don’t have any experience to say how flexible the board would be in asking for an extension of time to complete the BOC or to postpone the hearing on a DCO claim.109

The irony of this approach is that it is in fact the claimants contending with the most restrictive timelines and/or conditions that will need lawyers with the most experience. If the lawyers with the most experience do not feel like they can adequately prepare these types of claims, it begs the question as to what happens to these claimants when they have less experienced counsel.

105 Lawyer interview #5.
106 Service provider interview #5.
107 Lawyer interview #1.
108 Lawyer interview #5.
109 Lawyer interview #8.
**PRE-CLAIM LIMBO**

Given compressed timelines once a claim is initiated and the risk of longer periods of detention if a claim is initiated without proper identification, some people now delay making their claim to focus on preparing forms and obtaining identity and other documents from their home country. During this pre-eligibility “limbo” period, people are unable to access income assistance, work permits, healthcare or other social programs and may be without status and fearful of arrest. They may be entirely dependent on material and other forms of support from friends, NGOs or community and religious organizations. In these circumstances, some service providers reported increased tension between lawyers who want to prepare as much as possible prior to initiating the inland claim, out-of-status claimants who struggle without funds and fear arrest, and NGOs who step in to provide essential social supports with very little or no funding.

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Low Legal Aid Pay for Intensive Period of Work

The work in the new system happens over a shorter period of time. Where in the old system a case from beginning (filing the claim) to the end (decision at the Refugee Protection Division) may have run 18 months, in the new system this timeline would be two to three months. This means that the work to be done by counsel has to be done over a very intensive period of time. Lawyers in the focus group and who were interviewed one-on-one described the difficulty of taking on legal aid cases where the work has to be done so quickly. The work on a case is so intensive that once a lawyer takes it on, it has to take primary importance, making the lawyer less able to take other cases that are financially more viable for their practice.

Lawyers doing refugee claims in the new system are in fact being paid less. Under the old system, lawyers were paid for 20 hours of work for completing both the Personal Information Form (“PIF”), a form that was similar to the Basis of Claim form, and for preparation of the hearing itself. In the new system the referral is for 16 hours.

As one lawyer describes, even if one were to set aside the restriction in the new system, low legal aid rates will still make it hard to find experienced lawyers willing to take on certain refugee cases:

> Well, I think the limited hours and the lower tariff on legal aid means that many competent refugee lawyers will only take a limited number of legal aid clients or won’t take any legal aid clients. So that means claimants have a more difficult time finding competent legal representation when many of the lawyers in the city, and I include myself, will only take on limited numbers of legal aid claimants. So the timelines are a factor, detention is a factor, the difficulty in accessing clients in detention is a factor. And then even if all of that were solved somehow, the fact that legal aid pays for such a limited amount of representation at such a low tariff means that they’re going to have trouble finding competent counsel.

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### Scheduling of Hearings

A third factor that impedes experienced lawyers from taking on refugee cases in the new system relates to the manner in which hearings are scheduled. Claimants are provided with a date for the hearing when they file their eligibility forms. For port of entry claimants, this happens as soon as they arrive. For inland claimants it happens when they file their claim. Dates for hearings in the new system are generally not set with a lawyer’s schedule in mind except for some inland cases where the lawyer is able to provide available dates at the time the claimant initiates their claim.

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10 In the old model the lawyer would be issued two referrals; one referral was for the PIF, and a second referral would be issued for the hearing if the case was determined to merit representation.

11 Lawyer interview #1.
Two issues were identified by lawyers who were interviewed. The first was just not being available on the day that the hearing is already scheduled and being reluctant to take it on due to the rigidity in deciding applications to change the date of the hearing. One lawyer stated:

(...) especially for claimants who made a claim at the port of entry and walk out with a hearing date. By the time they get to Legal Aid and get counsel, it’s often really – well, Legal Aid will call me and I’ll say, “Sorry, I’m not available,” you know, in that week. And it makes it really hard. I don’t know how much trouble Legal Aid is having in placing things with counsel. But I know that I’ve turned down quite a few cases because I wasn’t available on the prescribed date.112

Rule 54(5) of the Refugee Protection Division Rules provides that if at the time a hearing is scheduled the claimant was not able to provide the available dates of their counsel, the claimant can make an application to change the date of the hearing. The Refugee Protection Division must allow the application if it is made in writing no later than 5 days after the hearing date was fixed by the officer, and counsel provides three available dates within the timeframe required to hold the hearing in the Immigration and Refugee Protection Regulations.113

This is very restrictive provision. It only assists claimants who retain counsel within 5 days after a hearing is fixed and are able to make a written application within 5 days after the hearing date is fixed. Practically this means that counsel really has to be retained within 4 days after the hearing date is fixed. The claimant also has to find counsel who is able to provide three alternative dates for the hearing to take place within the timelines. For DCO claimants this is no later than 30 days after the claim is made, and for other claimants no later than 60 days after initiating the claim.

While a lawyer may be available on the day set for the hearing, a second scheduling issue identified by interviewees arises when their schedule does not allow time for the intensive preparation they will need to do for the month or two before the hearing. A lawyer describes what she has to do when she decides whether to take on a new refugee client:

...everything has to be moved out. So before we take a client, or before I take a new client, I basically have to check my availability for the next 30 to 60 days to make sure I have enough time in my schedule that I can accommodate them.

[...] That makes me less likely to take on refugee claimants.

It definitely makes that process more difficult. It makes me less likely to be willing to take clients who are doing refugee claims because of the short timelines and the amount of work that’s compacted into a short amount of time.114

112 Lawyer interview #5.
113 Section 159.9 of IRPR.
114 Lawyer interview #1.
CHANGING THE DATE FOR A HEARING

The timelines set out in the Immigration and Refugee Protection Regulations for providing the forms and fixing hearing dates are mandatory. The only circumstances where a hearing date can be changed are for reasons of fairness and natural justice, because of a pending investigation or inquiry relating to criminality or an inadmissibility, or because of operational limitations of the Refugee Protection Division.\(^{115}\)

Rule 54 of the Refugee Protection Division Rules ("the Rules") sets out the circumstances in which a claimant can make an application to change the date of the hearing. The Rules provide that the application must be denied unless a) there are exceptional circumstances relating to a vulnerable claimant, or b) there was an emergency outside of the claimant’s control and they have acted diligently.

The application either has to be made at the hearing itself or in writing three days prior to the hearing date. In the application, the claimant has to provide three alternate dates no later than 10 days after the original date that has been set. Practically this would mean that counsel would have to be available for three of the five to eight working days after the hearing date.

A number of lawyers interviewed had applied to change the date of the hearing and had their applications approved. These lawyers expressed concern at how an unrepresented claimant could make this type of application given the complex criteria:

> Yeah, so I have applied to change the date a few times. And I’m not sure the date would have been changed if I hadn’t written a lengthy letter that addressed the criteria in the RPD rules. And I can’t imagine that most claimants understand that an adjournment or postponement will be granted or denied based on RPD rules. How do they know what the rules are? How do they know what information’s relevant? How do they articulate all of this in a language that’s not their own?\(^{216}\)

> They need assistance due to the new rules of the RPD which have really limited the amount of time that they’re allowing for any change of dates, and the procedures are quite structured. And so without legal assistance, often claimants that are unrepresented may not be able to even change their date and they may lose – they may have their case declared abandoned due to the very strict timelines.\(^{117}\)

These concerns are borne out by the data in British Columbia where very few unrepresented claimants have made an application to change the date of the hearing. In the 2013 calendar year, there were 118 applications to change the date of a hearing by claimants with representation by counsel, of which 80 (or 68 percent) were granted. During the same time period, only six such applications were made by claimants with no representative, of which half (3) were granted.\(^{118}\)

In the 2013 – 2014 fiscal year, just under half (5,350; 46 percent) of the 11,600 hearings scheduled nationally resulted in a change of date and time. Almost half of those (47 percent) were as a result of pending front-end security screening, with another 17 percent as a result of operational limitations at the Board.\(^{119}\) The ratios are consistent with the numbers provided for the Western Region for portions of the same time period.\(^{120}\) It should be noted that while delays in front-end security screening almost inevitably result in hearings outside the legislated timelines, many of the changes of date and time by claimants will result in hearings that are still within the timelines as one of the requirements of requesting a change of date is to provide alternate dates within the timelines.

Therefore, when looking at compliance with the legislated timelines, there is much less allowance to claimants bringing hearings outside the legislated timelines. By the first two quarters of the current fiscal year, the number of hearings proceeding on their originally scheduled dates had dropped to 71 percent despite 98 percent of claims being scheduled within the legislated timelines.\(^{121}\) Delays in front-end security screening and operational limitations accounted for almost two thirds of hearings outside the timelines.\(^{122}\)

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113 Section 159.9 of IRPR.
114 Lawyer interview #5.
115 Lawyer interview #7.
116 Immigration and Refugee Board response to Access to Information Act request A-2014-00350 “For all RPD principal claimant refugee claims in the IRB’s database where the claimant is in British Columbia and the claim was referred to, or decided by, the RPD from January 1, 2013 to January 1, 2014”. 
118 Immigration and Refugee Board. “Nine Months following Legislative Change” Refugee Protection Division Western Region Consultative Committee Meeting October 10, 2013 (Presentation by Colleen Zuk, Coordinating Member, Western Region).
121 Ibid.

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Danger of Inexperience in the New System

Service providers had a number of comments about the increase in problems with inexperienced lawyers taking on refugee work. The consequences of inexperience were described as being more dangerous in the new system, with less time to correct mistakes and less time for inexperienced lawyers to learn the system. Moreover, due to the tight timelines it was more difficult in the new system for a claimant to switch lawyers if he or she was unhappy with the quality of representation.

A participant in the focus group described how inexperienced lawyers in the new system are far more dangerous:

I think the thing I would stress is that in the new system, wrong footing to begin with there is just no way to turn it around before the hearing and that could be devastating.\(^{123}\)

A number of service providers wondered about the screening process at the Legal Services Society and how a claimant could trust that a lawyer assigned to them was experienced in refugee law matters.\(^{124}\) In fact, there is no screening of lawyers for experience before they become part of the pool of lawyers available to take on refugee cases. A lawyer simply has to indicate that they are willing to take on refugee cases. There is no initial screening of whether they have any experience to do this type of work; nor is there an evaluation of the work that they have done in order to assess whether they should continue to be assigned to claimants as a lawyer. Legal Aid Ontario (LAO) has recently introduced a very stringent process for lawyers to qualify to be on the roster of lawyers eligible to accept referrals for refugee cases. In addition, LAO requires certain professional development educational requirements, and ongoing monitoring of the quality of counsel’s work in these cases. (See "Lawyer screening at Legal Aid Ontario")

Some service providers indicated that it was difficult to have the Legal Services Society approve a change of counsel. Others indicated that switching counsel was risky for claimants when there was so little time to prepare in the first place for the hearing. A lawyer describes the problem:

Well, I’ll speak from my experience, and in certain instances I can say, yes, they do, and I think I’ve had one experience where claimants have prepared a BOC and they want to switch. They’re unhappy with their representation and so they want to switch for very legitimate reasons, and that’s a very difficult thing for them to do; it’s very risky for them to do because of the timelines in the system, so by the time Legal Aid decides whether or not their claim to switch has merit and authorize it, they’ve probably lost a week or two of preparation time, which can be, you know, really lethal in a claim like that. That’s a really difficult thing.\(^{125}\)

Quality of counsel is a critical element in relation to claimants’ access to counsel. The qualitative interviews with service providers and lawyers involved in refugee practice in British Columbia reveal that refugee reform has had an impact on the quality of counsel for certain types of claims as well as a claimant’s ability to choose counsel.

\(^{123}\) MAP service provider focus group meeting.

\(^{124}\) Service provider interviews #1, #2 and #6.

\(^{125}\) Lawyer interview #8.
Refugee Reform and Access to Counsel in British Columbia

**LAWYER SCREENING AT LEGAL AID ONTARIO**

In 2014, Legal Aid Ontario toughened its 10-year-old competency standards for lawyers to be eligible to join the “panel” of lawyers practicing refugee and immigration law on legal aid certificates (known in British Columbia as referrals). The organization adopted two standards: a general practice standard covering first instance work, and an appellate standard for the Refugee Appeal Division and Federal Court work. These standards apply to private lawyers and staff lawyers at legal aid clinics.

To be considered eligible to receive legal aid certificates in refugee and immigration law, lawyers must first demonstrate their competence in the area based on experience, quality of work (through LAO review of samples of a lawyer’s written submissions at the tribunal or appellate level and evidentiary records), and potentially contacting a lawyer’s references. Lawyers must continually demonstrate competence to remain on the panel of lawyers eligible for work, and must satisfy an annual professional development requirement in refugee and immigration law. Lawyers must comply with *Quality Service Expectations* for refugee and immigration law, as well as the refugee and immigration *Best Practices Guide*. Legal Aid Ontario will review lawyer compliance with standards in an ongoing way, and may impose conditions on or remove lawyers from the panel where it reasonably concludes that the lawyer does not meet the standards. Lawyers are members of the panel for three years, and must re-apply and demonstrate continued competence in order to renew their membership.126

**LIMITATIONS ON COUNSEL’S REPRESENTATION**

In thinking about access to counsel, we have already considered i) if claimants can obtain counsel; ii) when in the process they are able to obtain legal representation; and iii) who is it that represents them. The final question is how these claimants are represented and in particular, constraints imposed on how counsel is able to represent clients.

The manner in which claimants are represented is of course a critical issue. As this lawyer explains the fundamental issue relates to whether Canada is living up to its obligations under the *Refugee Convention*:

> Well I think that the short timelines and inadequate legal aid means that many counsel end up taking short cuts. It’s inevitable. And you can’t fault them, but it means that Canada’s not really living up to its obligations to fully canvass whether somebody is at risk in their country of origin. Because if counsel doesn’t have enough time to prepare the case, and the claimant isn’t adequately prepped, then we’re likely to miss — you know, make mistakes. Deny claims that should be accepted.127

There were four areas in the new system that were identified as limiting the way counsel could provide legal representation: the shortened timelines; a claimant’s ability to access necessary social services; the number of forms required at the eligibility stage; and an increase in Ministerial interventions in refugee cases.

**Timeline Issues**

The timelines are really the critical constraint in the new system. The other constraints identified are experienced as a limitation on counsel’s representation for the very reason that the contracted process deepens the impact of these other factors. Lawyers and service providers discussed the difficulties counsel had in being able to adequately represent their clients with so little time. The impacts were especially felt in being able to gather evidence, prepare their clients to be able

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127 Lawyer interview #5.
to testify, and work with clients with severe trauma.

Evidence gathering: A number of lawyers identified the difficulties related to collecting supportive documentation as a major limitation in how they could present their clients’ cases:

Cases are won or lost with preparation and if you have a situation where young woman from the eastern part of the Democratic Republic of Congo has fled her country, was basically smuggled here with the assistance of let’s say a religious organization. Or even was trafficked here by her abuser and managed to escape.

How the hell is somebody like that going to be able to get the evidence that they need, even evidence regarding identity in the short timeframe, 60 days. If somebody’s from a DCO country, I imagine it’s even shorter, isn’t it?

Another lawyer discussed the impact of the lack of supporting documentation on credibility findings by decision-makers:

[...] because of the short span of time nowadays between the making of the claim and the hearing, I think lots of refugee claimants do not come prepared in the sense that they don’t bring documentation with them. Or rather, they do not even know what kind of documentation is required.

And then, because there’s such a short gap between the applying and then sort of getting a date for your hearing that it becomes very difficult for counsel to assist or get these claimants to provide the counsel with these documents, especially when they’re in detention and it’s so difficult for them to get hold of their families in their countries and get those documents. So that’s a huge issue.

And then it becomes very difficult to pursue such claims, because I’ve had cases where members are just dealing with or sort of determining cases purely on credibility and lack of evidence. And so it becomes a big problem.

Preparing for the hearing: The shortage of time to prepare claimants to testify was another issue identified by lawyers and service providers. By and large refugee claimants have never testified before. Most are terrified of appearing before a decision-maker and speaking about deeply personal incidents they may have never shared with anyone previously. Developing a rapport with a lawyer takes time; it takes time to be able to share one’s story and to prepare to give oral evidence at a hearing. For clients who have experienced trauma, this is made all the more difficult within a shortened timeframe. One lawyer describes the extreme stress claimants with trauma face when timelines are compressed:

In terms of trauma, clients, traumatized clients, I think that the new system unfairly impacts them. Whether or not you make a vulnerable person application for them, one of the best ways for them to be in a much better place, come their hearing, is just having a longer time in Canada, to meet people, to get counseling, to get work, all of those things can help them to normalize their lives, and they don’t have that opportunity right now. It’s just stress from the beginning to 60 days, and that’s the last thing a traumatized person needs is more stress, more stress in their lives and that kind of thing. They can’t focus, they can’t balance that and they can’t process stress. So they’re hugely vulnerable in the system.

Traumatized claimants: One service provider explained how compressed timelines have undermined the mental health of claimants:

[S]ometimes the hearing preparation with the lawyer triggers symptoms, you know most refugee claimants are not sleeping well while
they wait for their hearing anyway, but having a very intense hearing preparation interview can then spike anxiety symptoms to the point where somebody becomes destabilized and that may be happening only a few days or a week before their hearing.

Whereas before there was more time, lawyers could work kind of almost titrate the hearing preparation and make some decisions of, “Okay we don’t have to deal with the tough stuff today, we’ll save that for the next time” and they could pace it so that okay then it’ll be a week or two or more before your actual hearing.

It’s giving them the time to build some safety and trust with that lawyer, you know so people felt more comfortable with their lawyers. Yeah I’m very concerned about the way trauma symptoms show up in the hearing, it’s one of the ways that this tight timeline can exacerbate that.132

Meaningful access to counsel in the new system has depended in large part on whether or not an NGO was involved early in the claim process. In the context of compressed timelines, NGOs increasingly perform a kind of legal ‘triage’ at the point of first contact: getting people quickly connected to lawyers with the appropriate country or profile experience, negotiating with other organizations for basic social and health support in the period before eligibility, navigating Legal Aid, assisting people to provide information and get documents for their lawyers, advocating for access to dwindling social and health services, and attempting to fill the gaps when claimants end up with an inexperienced lawyer.

Service providers have juggled their traditional supportive work with strategies to obtain meaningful access to counsel for claimants under the new system. Service providers described how the demands of the new system have forced NGOs to re-orient their services to prioritize access to counsel:

We’ve actually restructured it, our whole programming to focus on the front end. Really connecting refugee claimants into the protection system, not just the refugee protection system but at every stage, everything needs to happen, really crisply at the front end in order to make things work well for people. So, yeah, definitely we’ve ramped up, spent a lot more time at the front end on the legal stuff.133

In the first year of the new refugee determination system, NGOs clearly played a critical role in facilitating and enhancing claimant’s access to counsel. Forms of collaboration such as the Refugee Lawyers Group and the Multi-Agency Partnership (MAP) that allow for communication between NGOs and lawyers around emerging issues will likely play an important role in identifying and addressing further access gaps in the new system.

Difficulties accessing work permits: Once claimants are found eligible to make a claim, they can apply for a work permit. Claimants who complete medical examinations and demonstrate they are unable to support themselves without work are eligible to apply for authorization to work.134 Under the previous system, claimants were often able to become self-supporting within a few months of initiating their claim. While the refugee determination process was lengthy, claimants often obtained open work permits and paid privately for counsel.

Accessing Social Services

In the midst of shortened timelines there were severe challenges for claimants in being able to access social services during the time that they were making their claims. In particular, the restrictions on claimants’ ability to access work permits, the cuts to refugee health care coverage and the funding crisis in the NGO sector for organizations that serve claimants, were all identified as having negative impacts on a counsel’s ability to represent claimants.

132 Service provider interview #5.
133 Service provider interview #3
134 IRPR, s.206.
Processing time for an initial work permit varies but in 2013 claimants could expect to wait at least two to three months.\textsuperscript{135} As a result, claimants often did not receive work permits before their claim was determined. For claimants in detention, the process for applying for a work permit may be delayed even further.\textsuperscript{136} Under the new system, work permits cannot be issued to claimants from DCOs until at least 180 days after they are found eligible to make a claim or until their claim is accepted.\textsuperscript{137}

Claimants in British Columbia are currently eligible for income assistance through the Employment and Assistance program.\textsuperscript{138} Even if claimants are able to access legal aid, economic insecurity can impede claimants’ ability to work with their counsel. Service providers and refugee lawyers reported that the lack of housing, childcare, and transportation as well as food insecurity and untreated health conditions seriously undermine a claimant’s ability to attend to the detail-oriented, time consuming, and often psychologically difficult tasks of preparing forms, obtaining documents (including translations they must pay for themselves), and preparing for a hearing.

\textbf{Refugee healthcare crisis:} Refugee claimants in British Columbia who do not otherwise have health insurance or means to pay privately are entitled to coverage through the Interim Federal Health (IFH) Program funded by CIC until they become eligible for the provincial Medical Services Plan. Refugee claimants who are (1) holders of work or study permits valid for a period of 6 or more months and (2) physically present in British Columbia for at least 6 months are deemed to be “residents” under the Medical Services Plan and qualify for provincial health coverage\textsuperscript{139}. Shortened timelines under the new refugee determination system have meant, in practice, claimants rely on IFH coverage as they do not meet residency requirements for provincial coverage.

In 2012, the federal government made significant cuts to the IFH program which left refugee claimants, especially from designated countries, with severely limited health care coverage in the first year of the new refugee protection system.\textsuperscript{140} Unlike several other provinces, the government of British Columbia did not step in to provide temporary health programs leaving claimants to pay out of pocket or reliant on free refugee healthcare programs provided by a handful of NGOs. In July 2014, the Federal Court ordered the reinstatement of basic health care for refugee claimants under IFH. This decision has been appealed by the federal government and full coverage has yet to be restored to 2012 levels.\textsuperscript{141}
For claimants who are able to access the provincial plan, coverage interruptions can be an issue. Claimants must be in possession of a valid work permit in order to maintain provincial coverage. If claimants apply to extend their work permit prior to its expiry, they are deemed to have “implied status” and are authorized to continue working until a decision is made on the extension application. The Medical Services Plan, however, does not recognize implied status for the purpose of residency and claimants lose healthcare coverage until they receive a hard copy of their extended work permit – a process which can take several months.

The federal repatriation of settlement services in early 2014 created particular problems for refugee mental health as the federal government refused to fund mental health programs for refugees, viewing health as a provincial responsibility not a settlement issue. As such, funding for Vancouver Association for Survivors of Torture (VAST), the largest organization providing refugee mental health services in British Columbia, remains insecure while Bridge Clinic’s trauma program has now ended.

In the wake of IFH cuts, service providers report system-wide confusion over what is covered for claimants and situations where claimants were unable to access emergency medical care due to coverage issues. At the same time, lengthy work permit processing times have meant that claimants are often not in a position to pay out of pocket for medical care or experienced interrupted provincial coverage. Meanwhile, free refugee health programs – and, in particular, mental health assistance which was never covered under IFH – came under increased pressure with federal-provincial financial restructuring just as compressed timelines under the new system increased the urgency of psychological assessment and treatment for vulnerable claimants.

Funding crisis for claimant-serving organizations: An October 2014 report by the Canadian Council for Refugees surveyed the role of NGOs in the first year of the new determination system and concluded:

In helping refugees negotiate the determination process, and survive in their first months in Canada, NGOs help Canada to meet its legal and moral obligations to protect refugees. Nevertheless, most of this work receives no government funding and the financial situation of many NGOs is precarious at best.

This conclusion is borne out in British Columbia where critical supports for refugee claimants were built up over a 15-year period through federal-provincial immigration cooperation agreements in which devolution of federal funding enabled the provincial government to develop innovative services, some accessible to refugee claimants. In 2012, the federal government announced it would repatriate immigration and integration services, cutting funding to provincial programs

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142 By operation of IRPR 186(u), claimants who apply to extend their work authorization prior to its expiry date are authorized to work until a decision is made on their application.
143 Current processing time for a work permit application is 46 (online) to 74 days. http://www.cic.gc.ca/english/information/times/temp.asp
144 Service providers note that a measure of reduced access to healthcare including primary care for refugee claimants is reflected in the fact that they have received “far fewer” claimant referrals from health authorities than in the past.
145 For example, a service provider described how one claimant’s IFH coverage ended on the hearing date. The claimant suffered a medical crisis as a result of the stress of the hearing but was unable to call an ambulance because their coverage had ended. The service provider continued to advocate for IFH coverage for the claimant.
and refusing new CIC funding to NGOs that serve refugee claimants. As a result, claimant-serving NGOs, already “stretched” with the impacts of the new system, were thrown into crisis in March 2014 when federal funding was phased out from these programs. One service provider summed up the situation:

All of the organizations have been pretty significantly gutted by cuts and so the people that are left are stretched. They’re all people, at least the ones that I’m working with, they’re all people who have been doing this for years and the commitment is there, the expertise, the knowledge is there. People have really scrambled to come together and work together on this to try and help claimants through. But you know there are just not enough people doing the work.

While the province has since stepped in with short-term funding for some organizations (VAST and SOS), long-term funding for NGOs who increasingly facilitate and enhance claimants’ access to counsel remains insecure.

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REFUGEE APPEAL DIVISION (RAD)

The national data available after the 2013 – 2014 fiscal year indicates that the number of appeals filed to the RAD began with low numbers then grew steadily. By the end of September 2014, 2,979 total appeals had been filed, with 2,101 appeals finalized, leaving 878 pending appeals at that time. Of the appeals filed in 2013, 53 percent were in the Central region, 35 percent in the Eastern region and 12 percent in the Western region, proportions that remained relatively consistent into the first two quarters of 2014.

Nationally, for the period from January 2013 to March 2014, 79 percent of appeals were dismissed (47 percent confirmed the decision from the RPD; 20 percent were dismissed for lack of jurisdiction and 12 percent of appeals were not perfected) and an additional 3 percent were withdrawn or abandoned. Of the 17 percent of appeals that were allowed, 12.5 percent were referred back to RPD while the RAD substituted its own decision in the other 4.5 percent of decisions.

In the first year of operation, there were 25 appeals filed by the Minister, representing about 3 percent of total appeals. Of the 20 appeals by the Minister decided during that timeframe, 13 (65 percent) were allowed.

As of March 2014, only six oral hearings had been scheduled, and two of the appeals in question were ultimately abandoned before the hearing.

Of the 1102 appeals filed nationally in 2013, 71 (about 6 percent) were filed by appellants who did not have counsel, while 91 of the appeals perfected (about 8 percent of appeals filed) were by appellants without counsel. The number of unrepresented appellants appears to be rising, as in the period from January 2013 to March 2014, appellants were unrepresented in close to 10 percent of appeals, while about 78 percent of appellants were represented by lawyers and 11 percent by immigration consultants.

The timelines involved with filing an appeal to the RAD are incredibly short. From the date of receiving the written reasons denying their refugee claim, the claimant has 15 days to file a notice with the Board and the appeal must be perfected, meaning all the new evidence and arguments on the errors in the first decision filed with the Board, within 30 days.

Eight of the nine lawyers interviewed commented that it would be extremely difficult if not impossible for an unrepresented claimant to prepare an appeal to the Refugee Appeal Division on their own. The difficulties in being able to file an appeal at the RAD were also discussed during the focus group with lawyer participants. Two issues identified as limiting counsel’s ability to effectively represent claimants at the RAD were, i) the extremely short timelines for filing, and ii) the inadequate funding from the Legal Services Society for these appeals.

A lawyer explains the extensive amount of work involved in taking on a RAD appeal:

> I think the challenges are being able to evaluate the evidence and prepare the submissions and prepare new evidence and the timeline is exceptionally difficult, if not impossible especially because you’re doing it without transcripts from the RPD. The limitations on new evidence means that it’s hard to represent someone who maybe didn’t have the best representation at the RPD. It’s hard to put forward a full case at the RAD because of the limitations on new evidence. It’s hard for clients to find counsel who are willing to do it given all those limitations. And there are new rules on if you are alleging incompetence of counsel to inform prior counsel and they have a right to respond so that’s an added level of work.

Lawyers indicated that they would be very reluctant to take on a RAD case if they had not been counsel at the first hearing given these significant restrictions.

Currently, the Legal Services Society funds lawyers for 10 hours of preparation for a RAD case. A number of lawyers commented that this level of remuneration is too low for the amount of work that is involved in these cases.

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151 Consultative Committee on Practices and Procedures - Refugee Appeal Division Performance Highlights (Ottawa: November 2014).
152 Consultative Committee on Practices and Procedures - Refugee Appeal Division Performance Highlights (Ottawa: June 2014).
154 Consultative Committee on Practices and Procedures - Refugee Appeal Division Performance Highlights (Ottawa: June 2014).
155 Presentation by Douglas Fortney (Assistant Deputy Chairperson, Refugee Appeal Division) to the Canadian Bar Association (BC Branch) Immigration Law Conference (Feb. 2014).
156 Ibid.
157 Consultative Committee on Practices and Procedures - Refugee Appeal Division Performance Highlights (Ottawa: June 2014).
158 Immigration and Refugee Board response to Access to Information Act request A-2014-00350
159 Consultative Committee on Practices and Procedures - Refugee Appeal Division Performance Highlights (Ottawa: June 2014).
160 Lawyer interview #1.
161 Lawyer interviews #5, #7.
Time-Consuming New Forms at Eligibility

Lawyers and service providers repeatedly raised their concerns with the increased number of forms at the eligibility stage. Participants felt that the forms were ill suited to refugee claimants and added a great deal of time to the process which was frustrating given the already compressed process for refugees. The old eligibility form IMM 5611 was tailored to collect information to make an eligibility determination for refugee claimants. The new forms are generic immigration forms that are required for permanent resident applications. As this lawyer explains many of the questions are ill-suited to the refugee determination process:

Okay well all the forms are really annoying, having to fill out so many forms. And the forms are nonsensical because they’re designed for people who are applying as permanent residents, and often the questions they ask don’t make – they’re not related, they’re not relevant.

And it seems to me to be a real waste of everyone’s time, including CIC’s time because if and when the claimants are accepted under the RPD process or the RAD, they then have to fill out the same forms again. So what are they trying to accomplish? And what happens if there are inconsistencies, if the forms’ completed in haste at the port of entry? So I hate all of the forms that we have to fill out at the beginning.

Another lawyer shares his frustration with the multiple forms where the same information is repeatedly asked, making it more time-consuming to fill out and ensure accuracy of all forms:

There is so much work in those forms now, under the new regime. The streamline process turned one form into five, which ask many similar questions in different formats. These questions are incredibly important, some are very, very detailed, and will be cross checked with any statements they make anywhere else. So, it is a lot of work to ensure all the details are provided as accurately as possible and it’s almost impossible to do when the client is in detention.

Lawyers identified that additional forms were a further limitation on their ability to represent their clients. In a climate of speedy processing, claimants have to complete more forms. As one lawyer noted, “less time and more work.”

Increase in Ministerial Interventions at Refugee Hearings

The Immigration and Refugee Protection Act clearly sets out the right of the Minister to intervene in any proceedings before the Refugee Protection Division to present evidence, question witnesses and make representations. The Minister must provide notice of the intention to intervene at least 10 days in advance of a hearing, and to specify the reasons and nature of the intervention. The RPD Rules require the Board to notify the Minister if there is a possibility that exclusion under Article 1 E or F of the Convention or issues relating to the integrity of the Canadian refugee protection system may arise from the claim either before or during a hearing. Rule 27(3) specifies that circumstances in which such issues may arise include those in which there is information that the claimant submitted false documents or may be misrepresenting or withholding material facts, or in circumstances where there is “a substantial change to the basis of the claim from that indicated in the Basis of Claim Form first provided to the Division.”

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162 Lawyer interview #5.
163 Lawyer interview #8.
164 Lawyer interview #2.
165 IRPA s.170(e).
166 RPD Rule 29.
167 RPD Rules 26 and 27.
Although the Minister was previously able to intervene in the refugee determination process, the proportion of cases in which the Minister is intervening appears to have increased significantly. On a national level, there were Ministerial interventions in about 3 percent (687 of 21,776) of principal claims finalized in the 2011-2012 fiscal year. In the 2013-2014 fiscal year, the number of principal claims in which the Minister intervened had risen to 20 percent of the claims finalized, a number that remained consistent in the period from April 1 to September 30, 2014. The proportion of interventions in the Western region is substantially higher than the national average, as the Minister intervened in 45 percent (187 of 411) of principal claims referred under the new system between April 1 and August 31, 2013.

Ministerial interventions have a significant impact on the nature of a refugee hearing. Not only does the process become adversarial, but the Minister’s counsel are very familiar with refugee law, the scope of country documentation and the rules of evidence and decision-making before the Board. The non-adversarial nature of normal refugee hearings was described by Sean Rehaag in 2011 in a context where interventions were quite rare:

\textit{However, the Minister’s representatives typically only participate where there is an issue of exclusion due to security concerns, criminality, or violations of human rights. When the Minister is not represented, hearings are not adversarial, as no one argues the case against the claimant. Moreover, hearings are meant to be informal and expeditious, and as such the RPD is not bound by technical rules of evidence. The main purpose of these informal and typically non-adversarial hearings is to determine whether claimants are credible—in other words, to determine whether the narratives recounted in their PIFs are true.}

The context of Ministerial interventions has now changed substantially and nationally only 18 percent of interventions are related to exclusion, while the vast majority are related to concerns around the claimant’s credibility. Ministerial interventions have a very clear impact on length and complexity of the process, with clear indications that claims take longer to decide and hearings are longer when there is an intervention:

<table>
<thead>
<tr>
<th>Impact of Ministerial Intervention on Refugee Claims</th>
<th>No Intervention</th>
<th>Intervention</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of claims with one or more changes of date</td>
<td>49</td>
<td>71</td>
</tr>
<tr>
<td>% of claims with two or more changes of date</td>
<td>18</td>
<td>35</td>
</tr>
<tr>
<td>% of claims requiring 2 or more sittings</td>
<td>20</td>
<td>39</td>
</tr>
<tr>
<td>Sitting time (minutes)</td>
<td>192</td>
<td>225</td>
</tr>
<tr>
<td>Length of process (days)</td>
<td>106</td>
<td>134</td>
</tr>
</tbody>
</table>

168 Immigration and Refugee Board. "Nine Months following Legislative Change" Refugee Protection Division Western Region Consultative Committee Meeting October 10, 2013 (Presentation by Colleen Zuk, Coordinating Member, Western Region).
170 Consultative Committee on Practices and Procedures - Refugee Protection Division (RPD) Performance Highlights (Ottawa: November 2014).
171 Immigration and Refugee Board. "Nine Months following Legislative Change" Refugee Protection Division Western Region Consultative Committee Meeting October 10, 2013 (Presentation by Colleen Zuk, Coordinating Member, Western Region).
174 Ibid.
The increase in Ministerial interventions clearly has an impact on the ability of counsel to represent their clients. The increase of these interventions coupled with compressed timelines puts an added pressure on counsel’s ability to represent claimants. The substantial increase in Ministerial interventions is reflective of a fundamental shift in the focus of the refugee determination system to focus on so-called “bogus” refugees rather than on legitimate refugees. The increasingly hostile and adversarial nature of the process makes the reality for unrepresented claimants even more problematic than during previous studies of the role of counsel in Canada’s refugee system.
RECOMMENDATIONS

FOR THE LEGAL SERVICES SOCIETY OF BRITISH COLUMBIA (LSS):

1. LSS should operate a dedicated legal clinic for refugee claimants where staff lawyers would be mandated to take on cases that experienced counsel refuse or are unable to take on due to the compressed timelines including claimants from Designated Countries of Origin (DCOs), detained claimants, and port of entry claims.

2. LSS should provide funding for an initial consultation with a lawyer to review all immigration and refugee options with a potential refugee claimant before a Basis of Claim (BOC) referral is provided.

3. LSS should expand the scope of the current duty counsel program for detained claimants. Duty counsel should be available to attend abandonment hearings. Duty counsel should be responsible for meeting with all detained refugee claimants to ensure that they have secured legal aid counsel and are in the process of completing their BOC forms. Duty counsel should also be available to assist refugee claimants with making applications for extensions to file their BOC forms as well as applications to change the date and time of the hearing at the Board.

4. LSS should create a roster of available duty counsel lawyers who would be on a rotating call to provide legal advice to refugee claimants at the port of entry.

5. LSS should clarify policies on when a refugee claimant can change lawyers. Transparent policy and accessible information are needed so that refugee claimants understand that they can change lawyers under particular circumstances and how it can be done.

6. LSS should introduce screening and monitoring of its roster of lawyers for refugee claims. Lawyers with no previous experience with refugee claims should not be permitted to represent claimants. Prior to being placed on the roster a lawyer should be required to take mandatory seminars to ensure that the lawyer is competent to work on refugee cases. LSS should create a mentoring program to ensure that lawyers who are new to the panel have the ability to consult with more experienced counsel. Lawyers’ work should also be independently reviewed on a regular basis and those who cannot satisfy a review panel that they provide competent service should be restricted and have conditions placed on their participation in the roster, or removed entirely from the roster of lawyers able to take on refugee cases.

7. LSS should fund the reasonable costs of childcare for meetings with lawyers.

8. LSS’s financial eligibility requirement should not function as an “all or nothing” on-off switch at a certain level of income. It should be recognized that someone with an income slightly above the cut-off might be able to contribute in part to the costs of representation but that some support could still be provided on a sliding scale, in particular for disbursements such as translation and interpretation.
FOR CANADA BORDER SERVICES AGENCY (CBSA):

9. CBSA should facilitate early access by refugee claimants to counsel and refugee-serving non-governmental organizations (NGOs).

10. CBSA should facilitate access to counsel prior to and during security interviews.

11. CBSA should restrict questioning of refugee claimants to identity and security issues; questioning on the basis of their claim should be left to the Refugee Protection Division.

12. All interviews with refugee claimants should be recorded by the CBSA and copies of the recording should be provided to the refugee claimant automatically.

13. For refugee claimants in detention:
   a. CBSA should facilitate early access to NGOs, the Legal Services Society, interpreters, lawyers, trauma counseling, and face to face information about the refugee claim process.
   b. CBSA should increase access to counsel by increasing the number of counsel meeting rooms at the downtown Vancouver detention facility and through access to video conferencing. These meeting rooms should ensure that claimants can consult with counsel in private.
   c. CBSA should ensure that telephones are readily available and capable of free local calls and the use of international calling cards in detention. CBSA should ensure that claimants can make calls in a private setting. For persons in detention who do not have resources or family support CBSA should ensure that the lack of resources does not impede their ability to contact counsel and family members.
   d. An orientation kit in the correct language should be issued immediately to refugee claimants in detention. The orientation kit should remain with the detainee throughout their detention. The kit should include:
      - Instructions on how to access a lawyer;
      - Instructions on how to contact NGO groups;
      - Any approved pamphlets supplied by NGO groups;
      - Contact for a Detention Liaison Officer and a brief description of his or her duties;
      - International calling card (not limited to one) and instructions on how to call different countries; and
      - Notebook and pencil.

175 Recommendation from the Coroner’s Inquest into the death of Lucia Vega Jimenez.
176 Ibid.
177 Ibid.
e. If a detainee asks to speak with counsel, CBSA officers should facilitate the communication by providing telephone numbers and, if appropriate, explaining how to dial the call.\textsuperscript{178}

f. To ensure that detainees can speak with counsel quickly, CBSA should adopt procedures and policies used by police and prison authorities and presume that an individual who identifies him or herself as legal representative is licenced by the appropriate regulatory body. If further information is needed, CBSA can ask for the caller’s name and the number of the legal practice; a quick call to the number will verify the representative’s identity.\textsuperscript{179}

g. To comply with the principle of proportionality, CBSA should take decisive steps to eliminate detention of refugee claimants in penal institutions.\textsuperscript{180}

h. In the event that CBSA has no alternative but to detain a refugee claimant in a provincial correctional facility, CBSA should work with provincial correctional facilities: (1) to ensure that refugee claimants are sent to the lowest security facilities; (2) to ensure that correctional services knows that immigration detainees are refugee claimants with no criminal background; (3) to ensure that refugee claimants are separated from the criminal population; (4) to establish standards for detention which are commensurate with the management of a non-criminal population, rather than standards established for the management of convicted offenders.\textsuperscript{181}

14. CBSA should reconsider their interpretation of the legislation that currently forces refugee claimants who have just been arrested to file their BOCs immediately upon making a claim in order to provide a more reasonable time frame. In the alternative, CBSA should advocate that the legislation be amended accordingly.

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**FOR CITIZENSHIP AND IMMIGRATION CANADA (CIC):**

15. CIC should broaden the scope of CIC-funded settlement services to include refugee claimants.

16. CIC should provide stable funding to enhance the ability of organizations to provide support during the refugee claim process – including mental health support.

17. CIC should discontinue the use of the current eligibility forms required to be completed by refugee claimants and replace these forms with a single eligibility form tailored to refugee claimants. Refugee claimants should not be asked to consent to disclose their information to foreign governments in eligibility forms, as is currently the case.

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\textsuperscript{178} Recommendation from Nakache, D. “Human and Financial Cost of Detention of Asylum-Seekers in Canada”

\textsuperscript{179} Ibid.

\textsuperscript{180} Ibid.

\textsuperscript{181} Ibid.
**For the Immigration and Refugee Board (IRB):**

18. IRB should amend the *Refugee Protection Division Rules* on changing the date and time of the hearing to allow for a more flexible process.

19. IRB should apply the same level of flexible interpretation to refugee claimants applying to change the date of their hearing as is currently afforded to the Minister with respect to delays due to front end security screening.

20. IRB should provide refugee claimants with information on how to make an application to change the date of the hearing including a sample template.

21. IRB should publically report and maintain statistics on the rate of representation for claimants at the time of submission of their BOC forms as well as at hearings. IRB should also publically report and maintain statistics on the number of claimants detained at the time the BOC is submitted and at the time of the refugee hearing.

**For the Government of British Columbia:**

22. The Government of British Columbia should secure increased funding for the Legal Services Society, including funding for a refugee-focused legal clinic.

23. The Government of British Columbia should fund organizations and services devoted to refugee claimants developed under the previous funding arrangement with the Federal Government.

24. The Government of British Columbia should make a commitment to not impose a residency requirement on refugee claimants for social assistance or any other provincially funded social support.

25. The Government of British Columbia should recognize “implied status” under the *Immigration and Refugee Protection Act* as sufficient to extend access to provincial services, including coverage under the Medical Services Plan (rather than a strict requirement for a hard copy of a new work permit).

**For the Federal Government**

26. The Federal Government should amend the legislation to increase the timelines for filing BOC forms and scheduling hearings in order to provide a better balance between fairness and an efficient claim process.

27. The Federal Government should repeal the Designated Country of Origin list, or automatically remove countries from the list if a claim from that country has been successful in the previous five years.

28. The Federal Government should reconsider the interpretation of the legislation that currently forces the filing of basis of claim forms upon making a claim by individuals who have just been arrested in order to provide a more reasonable time frame, or amend the legislation accordingly.
29. The Federal Government should provide adequate funding to the Legal Services Society for representation by counsel in the refugee process.

30. The Federal Government should fully reinstate basic health care for refugee claimants under the Interim Federal Health program.

31. The Federal Government should reverse amendments to the *Federal-Provincial Fiscal Arrangements Act* which now allow provinces to impose a waiting period on refugee claimants who need social assistance.
GLOSSARY:

BOC - Basis of Claim form
CBSA - Canada Border Services Agency
CIC - Citizenship and Immigration Canada
DCO - Designated Country of Origin
IRB - Immigration and Refugee Board
IRPA - Immigration and Refugee Protection Act
IRPR – Immigration and Refugee Protection Regulations
LSS - Legal Services Society of British Columbia
MAP – Multi-Agency Partners
NGO - non-governmental organization
PRRA - Pre-Removal Risk Assessment
RAD - Refugee Appeal Division
RPD - Refugee Protection Division
This report was produced with the generous support of the Law Foundation of British Columbia