SHORTCHANGING JUSTICE: THE ARBITRARY RELATIONSHIP BETWEEN REFUGEE SYSTEM REFORM AND FEDERAL LEGAL AID FUNDING

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Canada's system for processing refugee claims changed significantly in 2012 when the federal government implemented wide-ranging reforms. This article examines the extent to which the link between these reforms and the legal needs of refugee claimants were considered as part of either the legislative process or the intergovernmental legal aid funding agreements process. It concludes that no meaningful consideration occurred in either and that this renders the legal aid funding model arbitrary. This arbitrary approach is then situated in a historical context and shown to be the culmination of a federal refugee policy trajectory that is increasingly shortchanging access to justice for refugees.

Le système canadien de traitement des demandes d'asile a considérablement été modifié, en 2012, lorsque le gouvernement fédéral a mis en œuvre de vastes réformes. Le présent article analyse dans quelle mesure le lien entre ces réformes et les besoins juridiques des demandeurs d'asile a été pris en considération lors du processus législatif ou de la mise en place d'ententes intergouvernementales de financement de l'aide juridique. L'auteur constate, que dans les faits, ce lien n'a jamais été sérieusement considéré dans aucun des deux cas et qu'il est en est résulté un modèle de financement de l'aide juridique arbitraire. Cette approche arbitraire est ensuite replacée dans un contexte historique pour démontrer qu'elle s'avère l'aboutissement de l'orientation d'une politique fédérale en matière de protection des réfugiés qui, de plus en plus, limite l'accès à la justice pour les réfugiés.

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1. Introduction

The process through which Canada determines whether an individual seeking asylum in this country is a legal refugee – and thus entitled to protection – has recently undergone wide-scale reform. The current system includes a new process for launching a claim, new process distinctions and restrictions for different kinds of claims (and different categories of claimants), a new administrative appeal body, and new and tighter timelines throughout the entire process, including accelerated removal procedures when a claim is unsuccessful. Introduction of these revisions was a priority initiative of the federal government, which has primary constitutional responsibility for law-making in this area.

Refugee claimants attempting to navigate the newly-defined federal legal process are generally very poor, and rely heavily upon legal advice and representation offered through legal aid programs. Funding for these services is provided from both the federal and provincial levels of government and programs vary by jurisdiction. In this paper we argue that despite a prolonged period of activity in the legislative sphere to produce the new claims process, the federal government has given no meaningful consideration to the impact of the reforms on the need for refugee legal aid services and, correspondingly, the accessibility of justice for those seeking asylum.[1] In our view, this is indicative of an arbitrary legal aid funding model that risks exacerbating the ongoing access to justice crisis in this country.

Although the consequences of the failure to consider the impact of recent legislative reforms on access to justice for refugees will be felt across jurisdictions, our analysis will focus primarily on Ontario, the province that processes by far the highest number of refugee claimants each year and spends by far the most on legal aid programs designed to support asylum seekers.[2] The conclusions we draw in this piece are

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[1] We should note at the outset that we do not mean to imply with our analysis that access to justice is necessarily co-extensive with state-funded legal counsel as provided via legal aid. While providing legal representation is one of the most important means by which barriers to justice for refugees can be addressed, the provision of state-funded counsel alone does not necessarily guarantee access to justice for this extremely vulnerable group. Further, there are also other means, both within and beyond legal aid programs, by which access to justice can be improved for refugees. The focus of this paper is, however, access to state-funded legal aid services.

[2] See the annual overviews of immigration published by Citizenship and Immigration Canada, most recently Citizenship and Immigration Canada, *Immigration Overview: Temporary and Permanent Residents: 2011* (Ottawa: Minister of Public Works and Government Services, Canada, 2012) online: CIC <http://www.cic.gc.ca/english/resources/statistics/facts2011/index.asp> [*Immigration Overview*]. See the table entitled

illustrative of systemic issues, however, and can be applied equally to other jurisdictions and indeed beyond the refugee context.

It is important to note at the outset that our discussion about the impact of recent legislative reforms on legal aid systems is occurring amidst a much larger, multi-faceted debate. Access to justice has been consistently identified as a major issue in Canada and legal aid systems across the country are frequently regarded as being in an ongoing state of crisis. Chronic underfunding coupled with an increasing demand for state-funded counsel has led to ineffective and overwhelmed legal aid systems that are simply unable to meet the essential legal needs of thousands of poor and middle-class Canadians.[3] As gaps between supply and demand in legal aid continue to widen, vulnerable individuals facing unresolved legal problems are left to navigate complex processes on their own.[4] Many are simply unable to do so,[5] and the result is a "cascade of legal and social problems," including an exacerbation of vulnerability, social exclusion, and significant barriers to accessing justice.[6]

There are no signs of systemic improvement to the general crisis in legal aid, [7] although there are a variety of actors pushing for action. Major

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"Canada – Total Entries of humanitarian population by province and urban areas." Ontario processes approximately 60 per cent of the refugee caseload, with the next largest caseload in Quebec (approximately 20 per cent), followed by BC (approximately 8 per cent) and Alberta (approximately 4%). In terms of expenditure, Legal Aid Ontario has published information that puts its own expenditure on refugee legal aid at $19.37 million in 2010-2011, compared to $3.32 million in BC; see Legal Aid Ontario, *Consultation Paper on Meeting the Challenges of Delivering Refugee Legal Services* (Toronto: Legal Aid Ontario, 2012) at 6 and A-2, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/publications/downloads/refugee2012/Refugee2012.pdf> [LAO Consultation Paper].

3 Quantifying unmet legal needs is very difficult because many applicants simply do not apply. Researchers have used innovative research methods to address this, but gaps in our knowledge persist. See e.g. Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Ottawa: The Canadian Bar Association, 2010) at 37, online: The Canadian Bar Association <http://www.cba.org/CBA/Advocacy/legalAid/>.

4 *Ibid* at 32.

5 *Ibid* at 39.

6 See e.g. *ibid* at 38-40 citing Ab Currie, *The Unmet Need for Criminal Legal Aid: A Summary of Research Results* (Ottawa: Legal Aid Research Series, 2003), online: Department of Justice Canada <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la9-rr03_aj9/rr03_la9.pdf>.

7 There are some examples of one-off measures to address issues in the short-term. For example, the 2013 Ontario budget allocated an additional $30 million, over three years, to Legal Aid Ontario (LAO); see Ministry of Finance, *2013 Ontario Budget: Budget Papers* (Toronto: Queen's Printer for Ontario, 2013) at 100. It should be noted that these funds were earmarked in the Budget for purposes other than refugee legal aid.

reports in British Columbia and Ontario have determined, respectively, that the current legal aid landscape is "devastating"[8] and "compromises our commitment to the ideals of access to justice and the rule of law, which as a civilized, compassionate and prosperous society should be one of our most important shared common values or assets."[9] The country's most senior judges have also voiced concern, with Justice Thomas Cromwell of the Supreme Court of Canada stating that "our current situation falls far short of providing access to the knowledge, resources and services that allow people to deal effectively with … legal matters,"[10] and Chief Justice Beverley McLachlin commenting that "providing legal aid to low-income Canadians is an essential public service … it is not only the rich who need the law. Poor people need it too."[11] Meanwhile, the primary mechanism through which legal support is provided to the poor remains dramatically under-resourced, causing a Canadian Bar Association (CBA) spokesperson to note that "a decade of cutbacks and decades of neglect have left Canada's legal aid system in crisis."[12] The CBA, which has devoted significant resources to a multi-pronged legal aid campaign,[13] concludes bluntly that when "legal aid fails, justice fails."[14]

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[8] Leonard T Doust, *Foundation for Change: Report Of The Public Commission On Legal Aid In British Columbia* (Vancouver: Public Commission on Legal Aid, 2011) at 21, 30, online: Public Commission on Legal Aid <http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf>.

[9] Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ministry of the Attorney General, 2008) at 179, online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf>.

[10] Action Committee on Access to Justice in Civil and Family Matters, *Report of the Access to Legal Services Working Group* (May 2012) at 1, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf>.

[11] Chief Justice McLachlin cited in Karen Hindle and Philip Rosen, "Legal Aid in Canada" (Ottawa: Library of Parliament, 6 August 2004) at 24, online: Library of Parliament <http://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0438-e.pdf>.

[12] Susan McGrath, cited in Canadian Bar Association, News Release, "CBA to Appeal BC Supreme Court Decision on Constitutionality of Civil Aid," The Canadian Bar Association (5 October 2006), online: CBA <https://www.cba.org/cba/News/2006_Releases/2006-10-05_testcase.aspx>.

[13] Canadian Bar Association, *Legal Aid Campaign*, online: CBA <http://www.cba.org/CBA/Advocacy/legalaid/>.

[14] Canadian Bar Association, *Legal Aid in Canada*, online: CBA <http://www.cba.org/CBA/Advocacy/Additional_Information/Legal_Aid_in_Canada.aspx>. To its credit, the Canadian legal profession has begun to recognize the gravity of the concerns, with the Chief Justice of Canada establishing a National Action Committee on Access to Justice, chaired by Justice Cromwell, and the CBA holding a national summit on "Envisioning Equal Justice." Both initiatives have involved a diverse array of justice

Against this backdrop, recent failure by the federal government to even consider the implications of the reformed refugee system on the legal needs of vulnerable claimants is particularly troubling. Consistent with the general crisis described above, Legal Aid Ontario (LAO) stated, in a 2012 consultation paper relating to the provision of refugee legal aid services, that it "is facing significant and urgent financial pressures that must be addressed promptly and comprehensively."[15] The report goes on to note that the federal changes to the refugee system come "at a time of significant challenge and change for legal aid in Ontario. The legislation – coupled with rising costs, reduced funding, and the ongoing need for greater cost-effectiveness – has compelled LAO to reassess some of the basic assumptions about how refugee legal aid services are provided …."[16]

The preliminary results of the LAO "reassessment," and subsequent restructuring,[17] are extremely controversial and, in response, some refugee lawyers in the province have begun refusing legal aid cases.[18] Others operating in the context of community legal clinics note that it would be "irresponsible" for already under-resourced clinics to take on more refugee claimants without the capacity to do so.[19] Still others have publicly criticized LAO suggestions that refugee claimants may be able to benefit from enhanced internet resources or be represented by "unsupervised paralegals."[20] These and other concerns led the Refugee Lawyers

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system institutions and individuals and have generated a series of useful discussion papers attempting to define the problems and to identify solutions. For the National Action Committee, the papers are hosted by the Canadian Forum on Civil Justice, online: <http://www.cfcj-fcjc.org/collaborations>; for the CBA, see online: <http://www.cba.org/CBA/Access/main/project.aspx>.

15 LAO Consultation Paper, *supra* note 2 at 4.

16 *Ibid* at 1.

17 Plans for a modified refugee legal aid system are ongoing. Interim measures were introduced in January 2013; see Legal Aid Ontario, *Interim Measures*, online: LAO <http://www.legalaid.on.ca/en/news/newsarchive/1301-25_interimrefugeeprocess.asp>.

18 Nicholas Keung, "Ontario lawyers stop taking refugee clients on legal aid," *The Toronto Star* (7 September 2012) online: Toronto Star <http://www.thestar.com/news/canada/2012/09/07/ontario_lawyers_stop_taking_refugee_clients_on_legal_aid.htm>.

19 Inter-Clinic Immigration Working Group, cited in Nicholas Keung, "Legal Aid Ontario cutbacks could leave desperate refugees without lawyers at hearings," *The Toronto Star* (4 April 2013), online: Toronto Star <http://www.thestar.com/news/immigration/2013/04/04/legal_aid_ontario_cutbacks_could_leave_desperate_refugees_without_lawyers_at_hearings.html>.

20 Maureen Silcoff and Kristin Marshall, "Speakers Corner: LAO refugee changes amount to cutbacks," *Law Times News* (13 May 2013) online: Law Times News <http://www.lawtimesnews.com/201305132709/commentary/speakers-corner-lao-refugee-changes-amount-to-cutbacks>. This article was written in response to an earlier positive assessment of the changes by the LAO vice-president; see David McKillop, "LAO defends changes to refugee services," Editorial, *Law Times News* (15 April 2013)

Association of Ontario to launch the "Refugee Access to Justice Campaign" in early 2013. Supported by over 35 other refugee advocacy organizations,[21] the campaign urges the Ontario government to oppose the LAO changes; ensure adequate funding for refugees; and communicate with the federal government about the access to justice implications of the recent legislative changes.[22]

As we discuss below, the relationship between the new refugee system and refugee legal aid programs could have been contemplated by the federal government in either of two policy-making spheres – the federal legislative process or the intergovernmental legal aid funding agreements process. No meaningful consideration occurred in either. We conclude that this renders the legal aid funding model arbitrary, with troubling consequences for both refugee policy-making and access to justice in this country.[23]

Our analysis proceeds in four parts. Part 2 briefly describes the legal aid system that was providing support to asylum seekers in Ontario prior to recent changes to the refugee determination process. Part 3 introduces the *Balanced Refugee Reform Act* (*BRRA*)[24] and the *Protecting Canada's Immigration System Act* (*PCISA*),[25] and highlights some of the significant ways this omnibus legislation impacts the legal needs of those claiming asylum in Canada. Part 4 examines both how the access to justice implications of the reformed refugee system were considered during the

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online: Law Times News <http://www.legalaid.on.ca/en/news/newsarchive/1304-22_refugeeserviceseditorial.asp>.

21 A list of organizations that are publicly supporting the campaign is available on the website; see Refugee Access to Justice Campaign, *About*, online: <http://www.justiceaccess.ca/about-the-campaign.html>.

22 For more information about the campaign generally, see Refugee Access to Justice Campaign, *Home*, online: <http://www.justiceaccess.ca/>.

23 It should be noted that LAO has reported that claims for refugee certificates are down by 60 per cent in the first three months under the new system, as compared to the same calendar months in the preceding year. See Legal Aid Ontario, News Release, "Update on Legal Aid Ontario's delivery of refugee services," (17 May 2013), online: LAO <http://www.legalaid.on.ca/en/news/newsarchive/1305-17_refugeeservicesupdate.asp>. Refugee lawyers consulted by the authors about this reduction strongly believe that this is a temporary situation attributable to understandable caution on the part of would-be claimants (and any legal counsel they may have) in the face of the significant changes of the new system. Nevertheless, the significant reduction will likely mean that current funding will do a better job at providing access to justice than it otherwise might have been expected to, at least in the short-term. It is significant, however, that this is due to good luck, not good management, and is unlikely to last – and so our broader argument remains unaffected.

24 SC 2010, c 8 [*BRRA*].

25 SC 2012, c 17 [*PCISA*].

legislative process and how introduction of the new system informed the legal aid funding process. Our conclusion is that there was a failure to contemplate these links in both places. Finally, Part 5 situates the current approach to federal funding within a historical context and demonstrates that the funding model is becoming increasingly arbitrary. We ultimately note that this arbitrariness renders the crisis facing Canada's legal aid systems troublingly predictable.

2. Ontario's Pre-Reform Legal Aid System for Refugee Claimants

Canada typically receives between 20,000 and 35,000 new refugee claims each year.[26] Claimants come from all over the world, and principal languages-of-claim include Hungarian, Chinese (Mandarin), Spanish, Tamil, Hindi, Arabic, Farsi, and Somali, in addition to French and English.[27] The refugee claims process is the mechanism through which the Immigration and Refugee Board (IRB) determines whether a particular claimant meets the legal definition of "refugee."[28] This is a highly technical decision that involves consideration of statutory and jurisprudential frameworks; application of international, domestic, and constitutional legal principles; as well as difficult, nuanced and, often, decisive findings of credibility. The Supreme Court of Canada has recognized that the refugee status determination process carries extreme significance for individual claimants, particularly since the consequence of a negative determination can be removal to a country where serious persecution is alleged to have occurred.[29] The Court has also stipulated

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[26] The Refugee Forum at the University of Ottawa's Human Rights Research and Education Centre has compiled a statistical report of claims from 1989 – 2011, based on information available in the annual reports of the Immigration and Refugee Board; see University of Ottawa Refugee Forum, *Refugee Statistics,* online: <http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/projects/documents/REFUGEESTATSCOMPREHENSIVE1999-2011.pdf>. The Immigration and Refugee Board processes close to 35,000 refugee claims each year (regardless of claim numbers), as a backlog of cases from earlier years is gradually being reduced; see Immigration and Refugee Board, *Annual Departmental Performance Reports of the Immigration and Refugee Board of Canada*, online: <http://www.irb-cisr.gc.ca/Eng/brdcom/publications/Pages/index.aspx>. The Performance Report for the 2011-2012 fiscal year put the backlog at 39,400 claims.

[27] Statistics for the top 10 refugee source countries for the period 1989-2011 are available at: University of Ottawa Refugee Forum, *Refugee Statistics,* online: <http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/projects/documents/REFUGEESTATSCOMPREHENSIVE1999-2011.pdf>.

[28] "Refugee" is a generic term that refers to claimants for different types of protection available under ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[29] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*].

that claimants must be given appropriate procedural protections throughout the complex and important status determination process to ensure that constitutionally protected rights to life, liberty, and security of the person are upheld. [30] It is trite to note that the vast majority of asylum seekers are unfamiliar with Canada's legal system and face many cultural and linguistic barriers, in addition to other vulnerabilities relating to experiences in their country of origin or in transit. Most are unable to navigate the refugee claim process without legal support.

In recognition of these major challenges, Canadian governments have historically provided some form of state-funded assistance for asylum seekers. The nature, cost, and availability of this support have, however, changed significantly over time. In the final section of this paper we touch on some of these shifts as part of our overall assessment of the current legal aid funding process. This present section confines itself to providing a snapshot of the legal aid services that were available in Ontario immediately prior to the recent changes to the refugee claims system. We also provide a brief summary of some of the major access to justice concerns associated with this model.

A) Pre-Reform Legal Aid for Refugee Claimants in Ontario

Provincial governments have taken primary responsibility for the delivery of refugee legal aid services in Canada since the mid-1990s.[31] The federal government is a partner in the provision of state-funded legal support, but has generally confined itself to a limited funding contribution,[32] meaning that provinces have also borne a significant proportion of the associated

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30 *Ibid* at para 64.

31 It is worth noting that the government of Ontario has not formally taken responsibility for providing refugee legal aid in the sense that it has not included refugee law in the matters it has specifically and statutorily mandated LAO to cover. The specific mandate for LAO is found in s 13(1) of the *Legal Services Act*, SO 1998, c 26 and refers only to criminal law, family law, clinic law and mental health law. Clinic law is defined to include legal matters relating to housing and shelter, as well as social assistance programs, human rights, health, employment and education. LAO provides refugee legal aid under the permission granted in s 13(2) to provide coverage in other civil law areas (with some exceptions, as enumerated in s 13(3)). It is likely that the decision not to include refugee law is directly linked to the fact the Federal government retains exclusive jurisdiction over immigration and refugee matters, and thus that the provincial government does not want to imply that it is acquiescing to taking full responsibility for legal aid coverage in an area for which it is not constitutionally responsible.

32 For further detail on legal aid funding formulas, see discussion in Part 5, below.

cost.[33] Consequently, it is the provinces that largely control these programs, and the breadth and depth of refugee legal aid services available across the country varies in accordance with the structure of each province's specific and unique legal aid system.

Refugee legal aid services have historically been provided in six provincial jurisdictions – British Columbia, Alberta, Manitoba, Ontario, Quebec, and Newfoundland and Labrador – and some form of state-funded support for claimants is ongoing in each of these provinces.[34] Significantly, this means that legal aid programs are available in the regions that collectively process over 90 per cent of the total national caseload. Indeed, Ontario alone accounts for approximately 60 per cent of total refugee claims.[35]

In the period immediately preceding the introduction of Canada's new refugee claims process, the refugee legal aid system in Ontario relied primarily on private bar lawyers working on certificates issued by LAO, an arms-length quasi-governmental corporation.[36] Under this model, private-bar legal aid certificates accounted for approximately 95 per cent of services provided,[37] and these were supplemented by staff lawyers in community legal clinics and at the Refugee Law Office (RLO). The majority of the work of RLO staff lawyers was also funded through the certificate system, although the non-certificate costs of the RLO and other clinics were still borne by LAO. For the 2011-2012 fiscal year (the latest year for which an LAO Annual Report is available), LAO spent approximately $21.87 million on immigration and refugee law certificates (the vast majority of which was allocated to refugee matters).[38] This

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[33] As discussed further in Part 5, the early-to-mid-1990s marked the end of the federally-funded designated counsel program and the repeal of the open-ended 50 per cent contribution of the federal government to provincial refugee legal aid costs.

[34] Austin Lawrence and Patricia de Long, *A Synthesis of the Issues and Implications Raised by the Immigration and Refugee Legal Aid Research* (Ottawa: Department of Justice, 2003) at 13.

[35] *Immigration Overview, supra* note 2; see table entitled "Canada – Total Entries of humanitarian population by province and urban areas."

[36] LAO was created in 1998 through introduction of the *Legal Aid Services Act*, *supra* note 31. For more information see Legal Aid Ontario, *About LAO*, online: <http://www.legalaid.on.ca/en/about/default.asp>.

[37] *Consultation Paper on Meeting the Challenges of Delivering Refugee Legal Services*, *supra* note 2 at 4.

[38] Legal Aid Ontario, *Annual Report 2011/2012* (Toronto: Legal Aid Ontario, 2013) at 26, online: LAO <http://www.legalaid.on.ca/en/publications/downloads/annualreport_2012.pdf>. It should be noted that the expenditure on refugee legal aid certificates may be slightly higher than this if this figure does not include certificates issued to the RLO [LAO 2012 Report]. The LAO financial statements in the report

represents just over 11 per cent of the $187.08 million the LAO spent on certificates across all types of legal matters during the same period.[39]

The availability of legal aid services in Ontario, whether through the certificate system or otherwise, has historically been subject to means testing, and this system has applied equally to refugee claimants. A sliding scale of financial cut-offs, increasing with family size, determines whether an applicant may qualify for either fully-subsidized legal aid certificate services or for partially-subsidized services requiring a financial contribution from the applicant. For example, to qualify for fully-subsidized counsel, a single applicant must earn less than $10,800 a year, while a family of four must have a combined annual income of less than $24,067.[40] Generally speaking, these cut-offs for full subsidy are roughly 20 per cent higher than the levels of social assistance payable for the applicable family size.[41] Partial subsidies, which require the applicant to contribute to the cost of the legal aid certificate, are also available, but only for clients with family incomes that do not exceed the applicable cut-offs by more than approximately 20 per cent. Both LAO eligibility cut-offs and Ontario social assistance rates are below the unofficial measure of poverty in Canada (which is Statistics Canada's Low Income Cut-off (LICO) calculation)[42] and LAO cut-offs are also well below annual earnings at

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include a line item for "Refugee Law Office" under the "Certificate Program" category with a reported expenditure of $1.17 million. This suggests that this was an expenditure on certificates issued to the RLO, but the descriptive part of the annual report states that total certificate expenditure was $187 million, which does not include this expenditure for the Refugee Law Office. In addition, LAO expenditure on refugee matters also includes the proportion of the funding provided to community and student clinics that can be attributed to refugee matters. More generally, definitive expenditure numbers can be hard to identify and may also lack some clarity. In October, 2012, Legal Aid Ontario released a *Consultation Paper on Meeting the Challenges of Delivering Refugee Legal Services* which put expenditure on immigration and refugee legal aid at $21.73 million for the 2011-12 fiscal year; see *supra* note 2 at 4.

39 LAO 2012 Report, *ibid*.

40 Current financial eligibility guidelines are published on the Legal Aid Ontario website; see Legal Aid Ontario, *Getting Legal Help*, online: LAO <http://www.legalaid.on.ca/en/getting/certificateservices.asp>. Note that the financial eligibility cut-offs for other types of services, including duty counsel and summary legal advice (both of which are more applicable to other substantive areas) are higher than those that are relevant to refugee claimants (e.g. $18,000 for a single person).

41 The Income Security Advocacy Centre (which is a specialty legal clinic funded by LAO) provides up-to-date figures on social assistance rates in Ontario via its resources page: Income Security Advocacy Centre, *Resources*, online: <http://www.incomesecurity.org/resources.html>.

42 These comparisons are addressed in a report released in 2012 by Department of Justice, Canada. The report was an evaluation of the first three years of the ongoing federal Legal Aid Program, that began in 2006 and devoted considerable attention to

minimum wage.[43] Since the vast majority of refugee claimants are extremely poor, however, meeting the LAO means test for legal aid services has often been less onerous for asylum seekers than it has been for other groups applying for state-funded legal support under the same criteria.[44]

Aside from the financial test, another series of threshold requirements have also been used by LAO to disqualify a number of categories of refugee claimants from receiving state-funded legal support. These include prior applicants; applicants who might have been able to utilize family sponsorship programs; and applicants whose family members were already receiving legal aid services.[45]

Once all of the above thresholds were met, the LAO conducted a merit assessment based on the applicant's specific circumstances. Refugee claimants from countries with extremely poor human rights records and (relatedly) a high rate of accepted claims at the IRB were generally, if not presumptively, provided with full services to prepare for their refugee hearing before the Refugee Protection Division (RPD) of the IRB.[46] A

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gathering and conveying data on the relative appropriateness of the financial eligibility cut-offs used by provincial legal aid plans. Comparison data was provided for both 1-person and 4-person families. The review reported that over the period 2001 to 2010, Ontario was the only province to not have increased its financial eligibility guidelines, of the group of four provinces that processed nearly all refugee claims. Meanwhile, over this same period, other financial measures had increased significantly: the consumer price index had increased by 19%; average hourly earnings had increased by 30%; and, the minimum wage had been increased by 50%. The report also compared the financial eligibility guidelines to the applicable Low Income Cut-offs (LICOs) in 2001 and 2010, finding that the guidelines were below the LICOs by a range of 21-43%, depending on family size, in 2001, and below by a range of 38-52% in 2010. For 2010, this was the widest and worst range of any of the provinces with more than 500,000 people. See Department of Justice, *Legal Aid Program Evaluation: Final Report* (Ottawa: Department of Justice, January 2012), online: Department of Justice Canada <http://www.justice.gc.ca/eng/pi/eval/rep-rap/12/lap-paj/lap-paj.pdf> at 31-32.

43 The current level of annual earnings at minimum wage is estimated by the Social Planning Network of Ontario to be $18,655; see Social Planning Network of Ontario, *Status of Poverty in Ontario*, online: Poverty Free Ontario <http://www.povertyfreeontario.ca/poverty-in-ontario/status-of-poverty-in-ontario/>.

44 LAO claims that for the year 2011-2012 it issued initial certificates to 90% of primary refugee claimants in Ontario; see McKillop, *supra* note 20.

45 Legal Aid Ontario, *Area Office Policy Manual: Chapter 5: Refugee and Immigration Law Coverage* (October 2009), cited in Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall LJ 71.

46 This is the first decision-making stage for regular refugee applicants. For an overview of the refugee claims process see Refugee Forum Report "Legal Aid for

further group of applicants – who were from countries with better human rights records but expressed fear of particular types of persecution within those countries – was also generally provided with full services to prepare for and appear at the hearing; this applied particularly to refugee claimants from groups known to be targeted in the particular country of origin – gay men from Russia, for example.

Under the old refugee determination system, preparation for the initial hearing was typically considered to require lawyer-client interviews, legal advice, assistance with completion of a written Personal Information Form (PIF), preparation for and participation in prehearing proceedings, legal and country condition research, and other evidence gathering and communications. Full-service certificates issued to claimants from one of the two groups mentioned above funded a maximum of sixteen hours of work for completion of as many of these pre-hearing tasks as were necessary, as well as for appearing at the hearing itself.[47]

All other applicants who passed both the means test and the threshold test typically only received an "Opinion Certificate" which provided funding for an initial three hours of legal work to prepare an opinion letter on the merits of the claimant's application for refugee status. If this opinion convinced the LAO that the applicant's case was sufficiently meritorious, full services for the hearing preparation work were provided on the same terms as above, less the three hours already funded for the initial opinion (therefore, a maximum of thirteen hours for the key preparatory tasks and hearing appearance).

The pre-reform refugee status determination system included legal proceedings other than the primary hearing and it was also possible to apply for an additional legal aid certificate for some other parts of the process. For example, although the old system offered no avenue for appeal on the merits, it was possible for failed claimants to apply for leave for judicial review by the Federal Court.[48] A fresh legal aid certificate was required for the judicial review application and additional certificates

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Refugee Claimants in Canada" (2012), online: University of Ottawa Refugee Assistance Project <http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/documents/ReportonLegalAidforRefugeeClaimantsRefugeeForumfinal.pdf> at 18-19 .

47 If a refugee applicant received an expedited hearing, the certificate funded eight hours of pre-hearing work, plus the time spent at the actual hearing. It should be noted that legal aid was also available, on similar terms, for an alternative fast-track process – the expedited interview.

48 It should be noted, however, that the Federal Court seldom granted leave for judicial review, a fact which likely impacted the ability of claimants to receive legal aid coverage for this process; see Rehaag, *supra* note 45 at 76.

could also be issued for assistance with appeals of Federal Court judicial review decisions. As well, applications for certificates could be made by detained refugees to seek IRB reviews of their detention or for applications to the Federal Court for stays of deportation; for submissions to the Minister of Citizenship and Immigration on humanitarian and compassionate (H&C) grounds consideration; or for a pre-removal risk assessment. The legal aid certificates available for each of these additional types of proceedings required that the LAO be freshly satisfied as to the merits of the application.[49] LAO does not report what proportion of its total refugee certificate expenditure relates to the different types of proceedings, so it is not possible to track success rates for obtaining coverage for particular processes.

As has been mentioned, Ontario's private bar lawyers working on certificates provided a significant portion of legal aid services in the pre-reform system, and they have been involved across the range of refugee matters described above. The staff lawyers at the RLO have played an important complementary role by targeting their certificate-based work at the less common situations where unique or more time-consuming legal and social research was required. In this way, the RLO has filled an important gap in the traditional provision of legal aid services.[50] LAO-funded community legal clinics (including student clinics) also provided an important additional avenue for legal aid services in refugee matters. Some of these centres have developed special programs that seek to serve niche needs of particular claimant groups.[51]

As well as providing regular legal services, private bar lawyers and legal aid staff lawyers have also contributed to access to justice for refugees through participation in public legal education. Perhaps most notably, Ontario's legal aid system includes Community Legal Education Ontario (CLEO), an organization which is largely funded by LAO and

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49 The variety of other proceedings and the applicable certificate allowances are summarized in the Refugee Forum Report, *supra* note 46 at 18-19.

50 Durhane Wong-Rieger, *Review of Refugee Law Office Mandate and Role within a Mixed Environment of Refugee Legal Aid Final Report* (Toronto: Legal Aid Ontario, November 2000), online: Refugee Law Office <http://www.legalaid.on.ca/en/publications/downloads/report_RLOreview_00nov.pdf>; Trebilcock, *supra* note 9.

51 For instance, Downtown Legal Services, at the University of Toronto Faculty of Law provides a program that assists limited numbers of claimants seeking stays of removal orders pending judicial review appeal proceedings. The clinic has also developed public legal education programs to reach more clients and service providers in relation to these types of matters.

specializes in public legal education. Among other things, CLEO produces materials and resources on immigration and refugee matters.[52]

It is also important to note that significant numbers of refugees are assisted or represented by immigration consultants, who are not lawyers and are paid privately for their services. In addition, some individuals (who may be members of non-legal community-based organizations, or simply friends, family or neighbours of refugee claimants) sometimes provide *pro bono* representation.[53] These individuals constitute a resource for refugees that supplements formal legal aid services, and representation by non-legally trained persons is expressly allowed under the *Immigration and Refugee Protection Act* (*IRPA*).[54] Unfortunately, there have been very serious concerns about the quality of services provided by paid immigration consultants for many years.[55] This and other critiques of the system that existed in Ontario before the recent reforms are discussed below.

B) Concerns about the Pre-reform Legal Aid System

The ability of refugee claimants to secure access to justice in Ontario was already a matter of significant concern before the recent reforms to the refugee claims process. These concerns related to both the overall state of the legal aid system in Ontario and the specific operation of that system in the refugee area.

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52 The refugee law resources of Community Legal Education Ontario (which is funded by LAO) are available online: Community Legal Education Ontario, *Refugee Rights in Ontario*, online: CLEO <http://refugee.cleo.on.ca/en/home>. LAO also provides legal information on refugee law on its LawFacts website: Legal Aid Ontario, *Refugee Law*, online: LAO <http://lawfacts.ca/refugee>.

53 Representation on this *pro bono* basis is discussed in Rehaag, *supra* note 45 at 91-92 and 112-15. A number of community-based non-governmental organizations and agencies provide settlement and other support to refugees. The services offered by some of these organizations includes legal information and also assistance with preparation of documents and for interviews, hearings and other steps in the refugee status-determination process.

54 *IRPA, supra* note 28.

55 Concerns about the quality and unregulated status of immigration consultants have been prevalent for many years. In response, the Immigration Consultants of Canada Regulatory Council was established in 2011 by regulation after changes to the *IRPA*; see *Regulations Designating a Body for the Purposes of Paragraph 91(2)(c) of the Immigration and Refugee Protection Act*, SOR/2011-142 . For more information on the new regime regulating consultants, see http://www.iccrc-crcic.ca/home.cfm. A study of the impact of different types of representation (including consultants) at refugee hearings is discussed below.

A comprehensive review of the overall Ontario legal aid system was conducted by Michael Trebilcock in 2008. Trebilcock's review confirmed the general concern that the financial eligibility cut-offs were "seriously out of step with current cost of living levels and unrelated to any overarching conception of basic needs or a more general and coherent conception of poverty to which various social programs (including legal aid) might be anchored."[56] Trebilcock traced this disconnect to cost-reduction measures introduced by both federal and provincial governments in the mid-1990s, which included the drastic 22 per cent reduction in the level of the cut-off for legal aid eligibility. In Trebilcock's opinion, the legal aid system in Ontario has "never fully recovered from the draconian cuts"[57] imposed throughout this period. For the system as a whole, this creates the concern that many low- and middle-income people with legal disputes in areas covered by Ontario legal aid are not financially eligible to receive state-funded support – despite the fact that they are also genuinely unable to afford a private lawyer. This gap clearly demonstrates that the legal aid financial eligibility threshold operates as a cost-reduction and resource-rationing tool that ultimately denies services not because applicants fail to demonstrate legitimate need, but rather because the system's resources are too limited.

As noted above, the inadequate financial threshold for qualification for legal aid is of less concern with regard to refugee claimants because they tend to be among the most financially disadvantaged. Deeper analysis, however, has revealed a similar rationing of legal aid services even for this extremely needy group. Specifically, analysis by Sean Rehaag of legal aid applications in Ontario between 2006 and 2009 has revealed that while the rate of threshold refusal of refugee legal aid certificates rose only slightly, albeit steadily, during this period, the rate of refusal of full certificates (with or without an opinion letter) rose steeply.[58] According to Rehaag, the number of refugee legal aid applications rose by 22.8 per cent during the period of study. Of these applications, the proportion of those refused at the threshold stage (that is, denied any assistance by legal aid) rose steadily, though only slightly, from 2.8 to 3 per cent – seemingly confirming the general view that the very low threshold eligibility is not a significant concern for asylum seekers.[59] Despite the nearly 23 per cent increase in

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56 Trebilcock, *supra* note 9 at 71-72.

57 *Ibid* at 71.

58 Rehaag, *supra* note 45 at 95-96.

59 LAO does not publicly report reasons for refusing coverage. Provincial legal aid services did provide some data on this to Statistics Canada, which reported that the majority of refusals of legal aid in Ontario (ranging from 50 per cent to almost 60 per cent over the period 2006 to 2011) are due to financial ineligibility; see Statistics Canada, *Legal Aid in Canada: Resource and Caseload Statistics 2010/11* (Ottawa: Minister of Public Works and Government Services, 2012) at 74.

applications, there was only a 4 per cent increase in approvals of full certificates, with or without an opinion letter. This means that *refusals* of full certificates rose from 11.2 per cent to 25.9 per cent. Significantly, the number of applications that were granted opinion certificates (and therefore met the financial eligibility test), but were ultimately refused full hearing certificates after the merit assessment, more than tripled. It is also relevant that over the same period, grants of refugee status at the IRB climbed 3.6 per cent, indicating that there was not a general decline in the presence of meritorious claimants in Canada.

Piecing all of this together, Rehaag argues that the LAO merit screening that occurred *after* the financial threshold for eligibility had been met appeared to have become as much of a rationing device as a substantive assessment.[60] In other words, while substantive consideration of the merits of cases was still taking place for the vast majority of refugee claimants, the decision to approve a full certificate appeared to be turning more on the level of available funding than on the chances of success before the IRB. The ultimate result was more applications from potentially meritorious claimants being rejected, and thus more vulnerable asylum seekers who faced a real risk of persecution having to navigate the complicated refugee determination system without any legal support.

A second major concern with regard to the refugee legal aid system in Ontario prior to the recent refugee system reforms was that both the number of hours available for lawyers to work on files and the hourly rate of compensation they received for this work (the tariff rate) were too low. As the Trebilcock review noted, the system as a whole had problems with hours and tariffs, and this was causing a decline in the numbers of lawyers willing to take legal aid certificates.[61] In a submission to the Trebilcock review, the Criminal Lawyers Association noted that the tariff rate, applicable to all legal aid matters, had only been raised by 10 per cent since 1987, while inflation over the intervening 20 years had accumulated to 60 per cent.[62] In relation to refugee legal aid more particularly, it should be noted that at the same time as the general financial eligibility levels were cut there was also a reduction in the total allowable hours per full coverage refugee legal aid certificate.[63] Subsequent national and provincial research

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60 Rehaag, *supra* note 45 at 96-97.

61 Trebilcock, *supra* note 9 at 73.

62 Criminal Lawyers Association, *Submission of the Criminal Lawyers Association to the Legal Aid Review 2007* at 7, online: CLA <http://www.criminallawyers.ca/resources/CLASubmissions.pdf>.

63 The authors have been unable to identify the exact change in maximum billable hours. One report states that the maximum hours available for preparation for a refugee hearing was reduced in both 1992 and 1996, from a maximum of 39 to 16 hours; see Wong-Rieger, *supra* note 50 at 10. It seems that there was a separate allowance for the

studies on various aspects of the refugee legal aid system noted that private bar refugee lawyers working on certificates, in Ontario and elsewhere, frequently reported that the number of total hours allowed by the certificates was inadequate and did not reflect the time that they actually needed to provide meaningful representation.[64] These lawyers commonly reported working more than the number of compensable hours in order to provide an appropriate level of service.[65]

These anecdotal studies were corroborated by more objective assessments of legal aid programs. One such study indicated that the time allotment allowed under legal aid certificates was insufficient, particularly as compared to the average time devoted by private lawyers to civil claims in general.[66] In recognition of these concerns, and prompted by a widespread and well-publicized legal aid boycott by the criminal bar,[67] the province agreed in 2012 to a seven-year staged increase in the common legal aid tariff.[68] This increase will apply equally to refugee legal aid

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hearing itself, and also that some of this reduction may be attributable to abandonment of the separate "credible basis" hearing. For more information on the refugee system during this period, see Part 5. More anecdotally, a recent online commentary on changes to refugee legal aid in Ontario suggests an overall reduction from 55 hours to 16 hours from the early to mid-1990s; see Edward Corrigan, "The crisis in funding legal support for refugees," *rabble.ca* (14 December 2012), online: Rabble <http://rabble.ca/news/2012/12/crisis-funding-legal-support-refugees>. Regardless of the precise number of hours which were cut, however, it is uncontested that there was a drastic reduction during this period.

64 Wong-Rieger, *ibid* at 10, 34. See also John Frecker *et al*, *Representation for Immigrants and Refugee Claimants: Final Study Report* (Ottawa: Department of Justice, 2002) at 75-8. There are also press releases and news reports of refugee lawyers protesting inadequate time allowances; see e.g. Canadian Bar Association, News Release, "Refugees Left Out in the Cold with Funding Cuts", (6 February 2004) online: CBA <http://www.cba.org/bc/public_media/news_2004/news_02_06_04.aspx>.

65 See Wong-Rieger, *ibid*. See also Frecker *et al*, *ibid*.

66 See Nancy Morgan, *Peril and Promise: Legal Aid and Securitized Asylum Policies* (LLM Thesis, University of British Columbia, 2007), online: UBC <https://circle.ubc.ca/handle/2429/31681> [unpublished].

67 See for example: Kirk Makin, "Ontario lawyers continue legal aid boycott," *The Globe and Mail* (9 September 2009) A7; Katherine Laidlaw, "Legal Aid boycott settled," *The National Post* (25 Jan 2010) A6. The boycott was ended when a memorandum of understanding (MOU) was signed between the CLA, LAO, and the Ministry of the Attorney General. The MOU committed the Ministry of the Attorney General to introduce new tariff rates that would rise steadily through to 2015.

68 The agreement to raise the tariff rate is described on the Legal Aid Ontario website; see Legal Aid Ontario, Media Release, "Responses to recent media enquiries," (4 July 2012), online: LAO <http://www.legalaid.on.ca/en/news/mediaenquiries/1207-04_lawyersweekly_org.asp>. The modified rate will remain below the level requested by

certificates. It is noteworthy that the increase in tariff was not accompanied by any increase in the number of hours allocated to each file.

The combination of a very low-income financial eligibility threshold, proportionately fewer legal aid certificates for hearings, and insufficient hours and remuneration for counsel can reasonably be expected to limit the willingness and ability of lawyers to provide adequate legal services to refugees via the state-funded system. As a result, these elements of Ontario's pre-reform legal aid program have been deeply worrying, particularly when coupled with the following academic analysis demonstrating that representation by a lawyer – as opposed to other forms of legal support – is a crucial aspect of ensuring access to justice for refugees.

In a comprehensive study of the statistical relationship between case outcomes and the type of representation available to refugee claimants, Rehaag concluded that representation by competent and qualified lawyers – and, even more so, experienced lawyers – is a major factor in successful outcomes for claimants.[69] At the same time, he raised serious concerns about the possible detrimental impact of immigration consultants, whose clients have significantly higher rates of withdrawal and abandonment of claims and also significantly lower rates of success (which are not accounted for by differences in the type of situations of their clients). As Rehaag notes, these findings may stem from a practice among immigration consultants of bringing forward unfounded claims, or from a lack of diligence or competence, or from some combination of both but, in any event, the results are troubling enough to raise serious concerns about the contribution of immigration consultants to access to justice for refugees.[70]

Rehaag's results in this work also suggest that similar concerns may be relevant to *pro bono* representatives, although not to the same extent – perhaps, as Rehaag points out, because some of the individuals are associated with community-based organizations and community legal clinics who attempt to provide quality assistance.[71] There are, however, acknowledged problems with monitoring and enforcing the prohibition on payment in these situations, as well as notorious cases of fraudulent independent representatives doing damage to their clients.[72] Rounding out

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the criminal bar. The CLA submission to the Trebilcock review is available online: <http://www.criminallawyers.ca/resources/CLASubmissions.pdf>.

69 See generally Rehaag, *supra* note 45.

70 *Ibid* at 109.

71 *Ibid* at 112 and n 144 therein.

72 A notorious example is described in the Hagos Beine decision of the Immigration and Refugee Board; see *Re Hagos Beine* (15 May 2010), online: Immigration and Refugee

the landscape of representation, it is important (but not surprising) to note that unrepresented claimants also achieved poor results.[73] The overall conclusions of Rehaag's analysis on the key role that lawyers play in determining the outcome of a refugee case casts into sharper relief the ongoing broader concerns with the adequacy of refugee legal aid.[74]

Significant access to justice concerns were clearly associated with the legal aid system in place in Ontario prior to the recent changes to the refugee claims process. In the next section we provide an overview of how that system has been revised and what the changes mean for the legal needs of asylum seekers.

3. System Overhaul and Impact on the Legal Needs of Claimants

As has been mentioned, Canada's refugee claims process has recently undergone a long-awaited and significant transformation. Modifying the system has been on the policy agenda of successive Canadian governments, and proposals for major change have been circulating informally, for many years. The issue became a political priority for the Conservative Party of Canada after the 2008 federal election and reform became imminent. Members of the opposition parties put pressure on government proposals, however, and the then-minority Conservative government was forced to consider major concessions to ensure support in the House of Commons.[75] A period of intense consultation and negotiation led to all parties contributing suggestions for the wide-reaching reforms. The result was the *Balanced Refugee Reform Act (BRRA*) – a transformative omnibus bill, which passed with the unanimous support of the House of Commons and received royal assent on June 29, 2010.

Board of Canada <http://www.irb-cisr.gc.ca/Eng/tribunal/decisions/beiene/Pages/Beiene.aspx>.

[73] Rehaag, *supra* note 45 at 88.

[74] Rehaag also questions the justifiability of the way LAO categorizes applicants' situations to structure approvals, given that applicants represented by lawyers have success across these categories. In addition, in a separate study Rehaag identified concerns about arbitrariness in the determination of judicial review appeals by the Federal Court; see Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1.

[75] In the Canadian parliamentary system, the party with the most elected representatives in the House of Commons is asked to form the government. If the governing party has less than half of the total seats in the House, it is a "minority government," and must rely upon the support of representatives from the opposition parties in order to pass legislation. The result is that much more debate and compromise generally occurs prior to the passage of any significant pieces of legislation.

The refugee claims system prescribed by the *BRRA* was, however, subject to further modification before most of the new legislation even came into force. In February 2012, an emboldened majority Conservative government introduced new changes through the *Protecting Canada's Immigration System Act (PCISA),* another large piece of omnibus legislation. The *PCISA* amended the *Immigration and Refugee Protection Act* (*IRPA*), the *Marine Transportation Security Act*,[76] and the *BRRA* itself, and effectively eliminated many of the compromises that were negotiated with opposition parties during the period of minority government. The *PCISA* received royal assent on June 28, 2012 and the modified *BRRA* began coming into force one day later.[77]

Together, these two pieces of legislation, and the modified regulations and new rules which accompanied their introduction,[78] have completely overhauled Canada's refugee system. Changes include a new mechanism for launching a claim for protection,[79] new rules about what kinds of claims can be launched and when;[80] and a new administrative appeal body.[81] For the first time, the system also provides for differentiated

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[76] SC 1994, c 40.

[77] Both the *PCISA* and the *BRRA* contain provisions that stipulate different coming into force dates (or give different instructions for dates to be set by order of the Governor in Council) for different provisions; see *PCISA*, *supra* note 25 at s 85, and *BRRA*, supra note 24 at s 42. Section 42(1) of the BRRA stipulates that the majority of that Act will come into force no later than two years after the date the bill received royal assent. This meant that June 29, 2012 was the latest possible date the *BRRA* could begin coming into force (without amendment to the coming into force provisions). Many of the provisions which triggered the most significant changes to the refugee claims process came into effect on December 15, 2012.

[78] Many details of the new system are located in the *Refugee Protection Division Rules,* SOR/2012-256 [RPD Rules] and the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules]. These rules are authorized under s 161(1) of the *IRPA,* and many amendments were necessary to operationalize and implement the many changes contained in the *BRRA* and the *PCISA.* These amendments came into force on December 15, 2012. The *Immigration and Refugee Protection Regulations*, SOR/2002-227, were also modified to assist with implementation of the new legislation.

[79] The new Basis of Claim Form (BOC) has replaced the old Personal Information Form (PIF). Details about the BOC are contained in ss 6-9 of the RPD Rules.

[80] For example, the recent changes place new limitations on applications on the basis of humanitarian and compassionate grounds (H&C), including a restriction that prohibits an H&C application for individuals who have a pending refugee claim. For an overview of these changes see e.g. Citizenship and Immigration Canada, *Humanitarian and compassionate grounds*, online: <http://www.cic.gc.ca/english/refugees/inside/h-and-c.asp>.

[81] Although the Refugee Appeal Division was introduced with the *IRPA* in 2002, the relevant provisions were never implemented, much to the dismay of the refugee advocacy community, who noted that the RAD was included as a trade-off for other

processes designed to categorize refugee claimants according to their country of origin[82] or circumstance of arrival,[83] and set outs rules specifying that certain categories of claimants will be subjected to one or more of detention, restricted travel, delays in seeking permanent residence, a lack of recourse when a negative protection decision is rendered, or even more abbreviated timelines for processing their claims.[84] There are also

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changes and was part of the "whole package" that was passed by Parliament. The RAD that came into existence as part of the new legislation is governed by the RAD rules and will be based on paper appeals, except in exceptional circumstances requiring an oral hearing. Many claimants will not have access to the RAD, including those from Designated Countries of Origin (DCO) or Designated Foreign Nationals (DFN); more information on DCO and DFN is provided in notes 85 and 86, *infra*, respectively. For a summary of restrictions on accessing the RAD, see Citizenship and Immigration Canada, *Refugee Appeal Division*, online: CIC <http://www.cic.gc.ca/english/refugees/reform-rad.asp>.

82 The modified *IRPA* gives the Minister the authority to designate certain countries of origin (DCO); see *BRRA*, *supra* note 24 at s 12; *IRPA*, *supra* note 28 at s 109.1. The stated objective of the DCO regime is to "deter abuse of the refugee system by people who come from countries generally considered safe;" see Citizenship and Immigration Canada, *Designated Countries of Origin*, online: CIC <http://www.cic.gc.ca/english/refugees/reform-safe.asp>.). In practice, individuals from a DCO who make a claim for asylum in Canada lose a significant number of procedural protections to which they would otherwise be entitled and are subjected to even more accelerated timelines. Critics note that the designation process allows the asylum system to become politicized while simultaneously denying claimants adequate time to seek legal advice and prepare their claim; see e.g. Michelle Zilio, "Kenney's new refugee rules a 'travesty', say lawyers," *iPolitics* (14 December 2012), online: iPolitics <http://www.ipolitics.ca/2012/12/14/kenneys-new-refugee-rules-a-travesty-say-lawyers/>). At the time of writing, 37 countries have been designated, including many European countries, South Korea and Mexico.

83 The new process includes introduction of a special regime for "designated foreign nationals" (DFNs). DFNs are so designated whenever the Minister declares a group of asylum seekers to be "irregular." The size of the group required for such a designation is undefined, and the criteria are also vague: the Minister has broad discretion to designate a group where he a) is of the opinion that investigating or establishing the identity of any member(s) of the group cannot be conducted in a timely fashion; or b) has reasonable grounds to suspect that an individual has profited from assisting the group to reach Canada without complying with "normal" processes, including acquiring necessary visas and other documentation. It is significant that the DFN regime was introduced as a direct response to the arrival of the MV Sun Sea, a ship carrying 492 Sri Lankan Tamils. For more information on DFNs, see Canadian Association of Refugee Lawyers, *Designated Foreign Nationals Regime*, online: CARL <http://carl-acaadr.ca/our-work/issues/DFNR>.

84 For more information on the consequences of the new categorizations, see Canadian Association of Refugee Lawyers, *Designated Countries of Origin*, online: CARL <http://carl-acaadr.ca/our-work/issues/DCO#Primer> and Canadian Association of Refugee Lawyers, *Designated Foreign Nationals Regime, supra* note 83.

new rules about loss of refugee and permanent resident status, appeals for ministerial relief, and deportation and removal orders.[85] In short, the *BRRA* and the *PCISA* have radically altered nearly every aspect of Canada's refugee system, from the moment of arrival to the moment of either acceptance or deportation.

Although it is too early in the post-implementation period to discern exactly how the new refugee claims process will impact the legal needs of claimants, it is clear that the radically altered landscape will have significant implications for both asylum seekers and their counsel – whether privately or publically funded. In turn, legal aid services will be operating in an entirely new environment and thus the nature and form of assistance required to mitigate barriers to accessing justice will need to be reassessed. For example, implementation of the Refugee Appeal Division (RAD) entails that, under the new system, two levels of administrative decision-makers will need to consider certain files before any application for judicial review is submitted to the Federal Court. Such a change raises questions about who will assist with this additional step in the process for the many claimants who are unable to pay for their own lawyers.

Similarly, many claimants will be affected by new laws restricting access to a pre-removal risk assessment (PRRA). Bars on PRRA applications are now generally in place for twelve months from the date a decision is rendered by the RPD (or RAD). Individuals from designated countries of origin are subject to a 36-month PRRA bar. Since the PRRA is the only mechanism that allows the risk a claimant faces if returned to his or her country of origin to be assessed in close proximity to actual deportation, these bars raise serious concerns, and possibly a variety of constitutional issues. As a result, it can be expected that many claimants facing a PRRA bar will now require legal assistance to put forward a complicated stay application, or alternatively an application for an exception to the PRRA bar on the basis of changed country conditions or perhaps a constitutional challenge to the bar itself. Such applications are the only way to ensure that the risk these individuals face can be properly assessed and is obviously critical for ensuring that individuals are not returned to horrific circumstances. It is unclear, however, how the legal aid system ought to respond to this new reality in the refugee system. Similar issues are likely to arise with regard to new restrictions on applications for relief based on H&C grounds, including a 12-month bar for all cases that do not raise issues involving the best interest of a child or a threat to life

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[85] For more information about the process generally, including the consequences of a negative finding, see Citizenship and Immigration Canada, *Backgrounder – Summary of Changes to Canada's Refugee System*, online: CIC <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-06-29b.asp>.

by a medical condition that cannot be treated in the country of origin. Both the PRRA and H&C bars contribute to a new and complicated landscape in which legal assistance is likely to be essential for many claimants.

The new refugee claims system also contains much more rapid timelines in all parts of the process. For example, individuals making a refugee claim at a port of entry must now submit a Basis of Claim form (BOC) within fifteen days of arrival, whereas the old system required that the PIF be submitted within 28 days of arrival. The BOC records essential information about the grounds on which refugee status is being sought and, like its predecessor the PIF, should be completed with the assistance of counsel to ensure that all relevant aspects of the claimant's narrative are accurately transmitted to the IRB. A failure to complete the BOC correctly or completely can be the basis for erroneous decision-making or false negative findings of credibility, with the result that genuine refugees may be denied status and returned to face persecution. Further, amending the BOC to correct errors after its initial submission is complicated and will also require the assistance of counsel in almost all cases. As a result of the fifteen-day rule for submission of the BOC (and a number of other significant changes to timelines), the existing process for assessing legal aid certificates will need to be revisited to ensure that state-funded lawyers are both in place and familiar with their client's case before submission deadlines expire or appearances occur. This creates a huge administrative challenge for the legal aid system.

Less obvious ramifications of the new claims process also need to be considered. For example, under the pre-reform system many claimants did not file for judicial review of a failed claim until 18 to 24 months after their arrival in Canada. In the interim, one or more family members frequently found some form of (low) paying work, allowing a graduated retainer system, in which the asylum seeker paid some or all of the legal fees over time, to be put in place for judicial reviews or other non-preliminary phases in the process. Under the new expedited timelines, however, some stay of proceedings and judicial review applications will likely need to be filed within 60 to 90 days of the claimant's arrival in Canada, meaning that there will be a significant decrease in the availability of private funding to support the retention of counsel for these steps. In addition, the mandatory detention regime for designated foreign nationals may require that the legal needs of more individuals need to be met while they are in state-custody. This adds complexities associated with counsel traveling and gaining access to immigration holding centres and provincial jails (under very tight timelines), as well as the potential need to address a variety of legal issues related to the detention itself in addition to the underlying claim for refugee status.

Substantive changes introduced by the *BRRA* and the *PCISA* are also relevant. Canada's new refugee system introduces a number of novel complexities that the majority of asylum seekers will need help to navigate, including, for example, how to challenge designation into one of the new categories. The existence of many constitutionally-suspect provisions in both the *BRRA* and the *PCISA* also means that the rights of asylum seekers to raise a myriad of potential *Charter* violations may need to be assessed.

The cumulative result of these changes to the legal needs of refugee claimants will have a significant impact on the already-strained legal aid systems in Ontario and other provinces. The introduction of entirely new stages to the claims process, expedited timelines, novel complexities, and less time to accumulate any private funding, are among the many new factors that will affect the environment in which refugee legal aid systems operate. In the section that follows, we explore the degree to which the access to justice implications of these significant changes were formally considered by the federal government.

4. Absence of Consideration

This section examines both the legislative process that led to passage of Canada's new refugee claims system and the legal aid funding process that led to determinations about what resources will be allocated to help claimants in Ontario navigate this new system. Our conclusion is that the impact of the new refugee system on the legal needs of claimants – and the associated potential for new barriers for accessing justice – was not meaningfully considered in either process.

A) Legislative Process

Canada's legislative process begins long before the government formally introduces bills in the House of Commons.[86] Frequently, months or even years of direct or indirect dialogue on particular policy options precede the technical processes for approving a new law. The government must then delineate which policy options it wishes to prioritize and implement and, of these, which must be introduced through legislation. To facilitate these decisions, federal civil servants review policy objectives and advise the government about whether new laws are needed in order for particular

[86] Government bills are those bills introduced and sponsored by a minister, whereas any elected member of Parliament can introduce private member's bill. A government bill presumably carries the support of the executive branch and its passage is much more likely than a private member's bill, particularly where there is a majority-government.

programs to be implemented. If legislation is deemed required, the government department responsible for sponsoring the initiative will prepare a memorandum to Cabinet seeking approval in principle for introduction of the legislation. This memorandum is reviewed by a committee and eventually ratified by Cabinet as a whole. Ratification is accompanied with authorization for the Department of Justice to begin the drafting process.[87]

Drafts of government bills may of course be subjected to significant internal processes before the text is tabled for Parliamentary consideration. For example, drafts are vetted for compliance with the *Canadian Charter of Rights and Freedoms* and other human rights instruments;[88] sponsoring ministers are consulted to ensure underlying policy objectives are suitably represented as the draft begins to take form; caucus discusses strategy around a variety of details including when certain pieces of legislation should be introduced and in what form; and the Government House Leader reviews the draft to make sure it is consistent with past Cabinet decisions.[89] The amount of time devoted to each of these processes, and the degree of public dialogue that occurs while the internal steps are underway, varies significantly and may depend on a variety of factors, including, for example, government and opposition strategy around the relevant policy and whether the legislation is in response to a specific event or forms part of the government's long–term legislative agenda.[90]

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87 Public consultation with stakeholders may occur at any time during the legislative process, including prior to the drafting of the memorandum to Cabinet. In addition, the sponsoring department will frequently host interdepartmental consultations on drafts of the memo before preparing a final version for submission.

88 Section 4.1 of the *Department of Justice Act*, RSC 1985, c J-2 requires that all bills be vetted to ensure they are not inconsistent with the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Where such an inconsistency exists, it must be reported to the House of Commons through a special report. For commentary on the intersection between this requirement and the new refugee process, see Jennifer Bond, "Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act" (2014) 51:2 Osgoode Hall LJ (forthcoming); draft available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205764>.

89 Bills involving expenditures must also receive a royal recommendation from either the Governor General or a deputy of the Governor General. For detail on the legislative drafting process, see Government of Canada Privy Council Office, *A Guide to the Making of Federal Acts and Regulations* 2nd ed, online: <http://www.pco-bcp.gc.ca/docs/information/publications/legislation/pdf-eng.pdf>.

90 This section draws primarily on information provided from "The Legislative Process: From Government Policy to Proclamation" PRB 08-64-E (17 May 2012), online: The Library of Parliament <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0864-e.pdf> at The Cabinet Stage ["The Legislative Process"].

Despite these initial variations, Canada's legislative process mandates that all government bills be carried through a series of prescribed stages once presented to the House of Commons. In particular, every bill must be introduced with notice and through a motion, and each must receive three readings before it can pass through the House and be considered by the Senate.[91] In addition, every bill must be sent to a specialized committee that has the mandate to study the bill in detail and, where necessary, propose amendments. This committee also has the ability to conduct witness hearings as part of its deliberations. It then submits a report that is the subject of further consideration in the House of Commons. Traditionally, a bill is introduced but not debated at first reading, is debated in principle and voted through to committee for detailed consideration in second reading, and is the subject of debate on the committee report before a final vote after third reading. A bill that is approved by a majority in the House of Commons is then sent to the Senate with a request that it be passed there. The Senate process is thus triggered, and follows a very similar (though frequently expedited) series of steps. Once both the Senate and the House of Commons have approved the government's bill, it receives royal assent by the Governor General and becomes law.[92] In February 1994, new rules were adopted to give the House more flexibility in the passing of legislation. As a result, the traditional process described above may be slightly modified with regard to the order in which the various stages of the traditional approach occur. Nonetheless, every government bill must still be considered in each of the steps described above.[93]

A number of factors can influence the amount of time it takes for a bill to pass through the legislative process. These factors include the length and complexity of the bill, the particulars of the parliamentary calendar into

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[91] Bills can also be introduced first in the Senate, in which case the process is reversed: the proposed legislation must pass three readings in the Senate, then it must pass three readings in the House before finally receiving royal assent.

[92] Though a bill receives royal assent, it may not immediately become active law. Acts generally specify when some or all of their provisions will come into force – either immediately upon royal assent or at a later date. The date a piece of legislation actually begins to apply is known as the "coming into force date."

[93] For helpful and more detailed descriptions of the legislative process see e.g. Neil Craik *et al*, eds, *Public Law: Cases, Materials, and Commentary*, 2d ed (Toronto: Emond Montgomery Publications, 2011) at 227-33; "The Legislative Process," *supra* note 90 at The Cabinet Stage; Parliament of Canada, *Legislative Process*, online: Parliament of Canada Compendium – House of Commons Procedure <http://www.parl.gc.ca/About/House/compendium/web-content/c_g_legislativeprocess-e.htm>. For details about the House of Commons procedure associated with each stage, see the authoritative Audrey O'Brien and Marc Bosc, eds, *The House of Commons Procedure and Practice,* 2d ed (Ottawa: House of Commons, 2009).

which the bill is being introduced,[94] and the way the bill features in the political strategies of both the government and opposition parties. Under urgent or extraordinary circumstances, and with the cooperation of a majority of the House of Commons, a bill can be passed through all three readings in a single day, while on some occasions a single piece of legislation may remain in the process for months or even years before eventually becoming law.

Both the *BRRA* and the *PCISA* underwent relatively typical legislative processes and each passed through the traditional ordering of the various legislative stages. The former was introduced to the House of Commons on March 30, 2010 as Bill C-11 and received royal assent on June 29 the same year,[95] while the latter was introduced on February 16, 2012 as Bill C-31 and received royal assent approximately four months later, on June 28.[96] Parliamentary and Senate committees considered each bill for a combined eleven days,[97] and both were debated for several days in the House and Senate chambers.[98] The *BRRA* and the *PCISA* were also the subject of a significant amount of government and public commentary during the multiple months they were in the legislative process, and experts offered opinion in the media and testified before relevant committees about the implications the new laws would have on a variety of interests.

In an attempt to discern the degree to which the impacts on legal aid were considered during the legislative process that led to Canada's new refugee claims process, we have examined the text of bills C-11 and C-31; *Hansard* from relevant debates in both the House of Commons and the Senate; and committee records for both Parliamentary and Senate committees, including testimony and written briefs. Our analysis of each of these is provided below.

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94 Government bills may be considered each day during Government Orders and in whatever sequence the Government chooses; see Craik *et al*, *ibid* at 227.

95 For details on the legislative history of Bill C-11, see Parliament of Canada, *LEGISinfo – House Government Bill C-11*, online: LEGISinfo <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=4383517>.

96 For details on the legislative history of Bill C-31, see Parliament of Canada, *LEGISinfo – House Government Bill C-31*, online: LEGISinfo <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5383493>.

97 The *BRRA* was considered by the Standing Committee on Citizenship and Immigration for nine days and by the Standing Senate Committee on Social Affairs, Science and Technology for two days, while the *PCISA* was considered by these same committees for eight and three days respectively.

98 The *BRRA* was debated for ten days in Chamber (six in the House and four in the Senate) while the *PCISA* was debated for nineteen (thirteen in the House and six in the Senate).

1) Legislative Text

Neither the *BRRA* nor the *PCISA* contain any reference to the provision of legal aid services. In fact, while both acts confirm that a refugee claimant is entitled to counsel[99] for "any proceeding" before the IRB, each also specifies that this entitlement is exclusively for representation at the claimant's "own expense."[100] Identical language was found in the unmodified *IRPA* and these sections do not introduce any substantive change to an asylum seeker's right to be represented during the refugee claims process.

It is nonetheless significant to note that section 23 of the unmodified *BRRA* specifically acknowledged that that bill contained changes that would have resulted in a new procedural step for which claimants would have required legal support. In particular, the original *BRRA* specified that claimants would have been entitled to counsel during a proposed information gathering interview, thus clarifying that "any proceeding" before the IRB included that new phase in the claims process; such a clarification was not needed with respect to other new steps because it is absolutely clear that they would fall under "any proceeding" before the Board. While the interview phase of the refugee claims process was subsequently abandoned through an amendment introduced in the *PCISA*, this provision of the original *BRRA* is noteworthy because it indicates explicit government awareness that the new claims process it proposed – and passed into law – contained additional steps for which counsel would be required. Given that this awareness is so clearly evidenced in the text of the Act itself, one might anticipate seeing in the legislative record corresponding consideration of the impacts this change would have on claimants who were unable to pay for this additional legal representation, or on the legal aid programs which provide access to state-funded counsel. The following review indicates that such consideration did not occur.

2) Debate in Parliament

Hansard records reveal that the implications of the new refugee claims process for legal aid programs were almost entirely ignored in both the House of Commons and the Senate.

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99 Both the *BRRA* and the *PCISA* refer to a right "to be represented by legal or other counsel;" see *BRRA*, *supra* note 24 at s 23; *PCISA*, *supra* note 25 at s 63. This mirrors language in the current *IRPA*, which likewise allows representation by "a barrister or solicitor or other counsel," and enables representation by, *inter alia,* immigration consultants; see *IRPA*, *supra* note 28 at 167.

100 Identical language appears in *IRPA, ibid*, s 167(1); *BRRA*, *ibid*, s 23; *PCISA*, *ibid,* s 63.

The *BRRA* was debated in Parliament for a total of ten days. During that time, 40 different speakers addressed the new legislation in either the House of Commons or the Senate.[101] The transcript reveals that of these, seven speakers in the House of Commons and zero speakers in the Senate mentioned legal aid. Further, of the relevant statements in the House, four were made in the context of comments about the need to provide legal aid as a way of addressing concerns about incompetent immigration consultants[102] – an issue that was not dealt with in the *BRRA*[103] and which was presented by these speakers in the absence of any statement drawing a link between incompetent consultants, the new claims process, and the legal needs of claimants.[104] The three remaining references to legal aid were brief. The most substantive of these came from New Democratic Party (NDP) MP Olivia Chow who stated:

> On the flip side, we must provide legal aid for proper representation. Refugees often come to Canada penniless…when they come to Canada they often do not have money for a court system, so we must provide legal aid to some of the most desperate people…[105]

At a subsequent sitting, Chow continued, this time linking the new expedited timelines and a lack of legal aid with concerns about immigration consultants:

> … even though the minister promised many times that there would be action, Bill C-11 does not address the problem of unscrupulous immigration consultants. When a person has a hearing within eight days and tries to get legal aid, say in Ontario, the person cannot get legal aid that quickly. We asked some of the people who came to my office why they did not try to retain someone who knows the immigration and refugee law. They said that it takes a long time to get legal aid. Some refugees do not

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[101] The *Hansard* record indicates that the *BRRA* was addressed by 37 MPs and three senators.

[102] See Bill Siksay, *House of Commons Debates*, 40th Parl, 3rd Sess, No 33 (26 April 2010) at 1335; Don Davies, *House of Commons Debates*, 40th Parl, 3rd Sess, No 36 (29 April 2010) at 1115; Libby Davies, *House of Commons Debates*, 40th Parl, 3rd Sess, No 36 (29 April 2010) at 1115; Meghan Leslie, *House of Commons Debates*, 40th Parl, 3rd Sess, No 36 (29 April 2010) at 1215.

[103] The issue of immigration consultants was addressed in subsequent legislation: see *An Act to amend the Immigration and Refugee Protection Act*, SC 2011, c 8.

[104] A more nuanced position is that if legal aid programs are unable to meet the increased legal needs created by the new system, more claimants will resort to immigration consultants for assistance. The four statements referred to here did not draw these links, but instead mentioned only the need to deal with the issue of ineffective consultants through the provision of increased legal aid.

[105] *House of Commons Debates*, 40th Parl, 3rd Sess, No 34 (27 April 2010) at 1625.

> have the funding to do so. It would probably drive more claimants to unscrupulous consultants.[106]

The only other references to legal aid came from Liberal MP Maurizio Bevilacqua, who noted that "review of the timelines and possible further legal aid support will be required,"[107] and NDP MP Linda Duncan who suggested that "duty counsel would be a very good idea, particularly at the initial period so that the claimants are aware of the fact that they may be able to apply for legal aid…it would be unfortunate if they lost their claim simply because they did not fully understand the process."[108]

Similar gaps are evident in the *Hansard* record surrounding passage of the *PCISA*. The *PCISA* was debated in Parliament for nineteen days and was addressed by 138 speakers.[109] No references to legal aid were made during debate in the House of Commons and only one occurred in the Senate. There, Liberal Senator Jane Cordy noted that the new system would change time limits such that "a claimant will have fifteen days to find a competent lawyer, or, in most cases, get legal aid approval, have their lawyer arrange for an interpreter in many cases, have the lawyer understand the case, and then draft and deliver a well-written account of the refugee claim."[110] She went on to note that this "daunting task" may lead to many unrepresented claimants. Senator Cordy ultimately called for 30 days rather than fifteen days to file the written claim such that the process could "begin on the right foot."[111]

It is significant that while both the *BRRA* and the *PCISA* introduced a number of entirely new procedural steps with obvious consequences on the legal needs of claimants, only the effect of the expedited timelines was acknowledged by the very small number of speakers who mentioned legal aid at all. Absent were any comments on the many other ways the new legislation would affect legal aid services; any suggestions for amendments that would have provided for legal aid services as part of the new bills; any calls for a study or more information on the bills' respective impacts on legal aid services; or even any questions seeking government explanation about whether it had considered the legal aid implications of the new system prior to introduction of the reforms.

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106 *House of Commons Debates*, 40th Parl, 3rd Sess,,No 34 (27 April 2010) at 1635.

107 *House of Commons Debates*, 40th Parl, 3rd Sess, No 33 (26 April 2010) at 1240.

108 *Debates of the Senate*, 41st Parl, 1st Sess, No 97 (26 June 2012) at 1120.

109 The *Hansard* record indicates that the *PCISA* was addressed by 127 MPs and eleven senators.

110 *Debates of the Senate, supra* note 108 at 1640 (Hon Jane Cordy).

111 *Ibid*.

3) Consideration by Committees

Both the *BRRA* and the *PCISA* were considered by the House Standing Committee on Citizenship and Immigration (CIMM) and the Senate Standing Committee on Social Affairs, Science and Technology (SOCI). In each instance, witnesses were invited to provide expert oral testimony and a written brief. It is significant that a number of experts drew attention to the impact of the reforms on legal aid and strongly recommended that this factor be addressed prior to passage of the legislation.

Several individuals also commented specifically on the need for legal aid funding levels to be reassessed. For example, during debate on the *BRRA,* Richard Kurland, a refugee lawyer and policy analyst, noted in testimony before the CIMM, "Currently, there's no way, based on existing legal aid compensation in this country to the refugee bar, that [the proposed expedited timelines are] going to fly."[112] Lorne Waldman, a leading refugee lawyer and president of the Canadian Association of Refugee Lawyers, made a similar comment during testimony before the SOCI, adding that "the key issue that emerges…is the need to ensure that refugee claimants have adequate legal representation."[113] He went on to observe that while the legislation did not address this need, major changes to the system had in the past been coupled with increased funding for legal aid. He "urged" the Senate to "note the need to ensure that legal aid is made available to refugee claimants."[114] The most comprehensive comment on this issue during debate on the *BRRA* came from Raoul Boulakia, another refugee lawyer and former president of the Refugee Lawyers Association. During testimony before the CIMM, Boulakia made extensive commentary on the need to address resourcing for legal aid, and what follows is an excerpt from his longer remarks:

> … In Ontario last year, about half of the funding for legal aid came from the federal contribution. Legal Aid Ontario is concerned about the cost implications of Bill C-11. Just today, they told me that they're coming up with cost estimates of what they believe Bill C-11 will imply for them, and they seem to believe that costs could go up by 50% from last year's totals.
>
> … This new system is clearly going to impose some new costs. Also, the CBSA [Canada Boarder Services Agency] is going to get substantially more resources and the hearing system is going get more resources, which is going to lead to more need for representation on the other side, and I am concerned that the bill does not balance

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112 Richard Kurland, *Standing Committee on Citizenship and Immigration Evidence*, 40th Parl, 3rd Sess, Meeting 16 (13 May 2010) at 1535.

113 Lorne Waldman, *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology Evidence*, 40th Parl, 3rd Sess, No 11 (22 June 2010).

114 *Ibid*.

> that out or ensure that the provinces will receive adequate funding or encouragement to continue with their legal aid funding. A multi-year commitment would be helpful to give greater stability to our provincial legal aid plans.[115]

It is noteworthy that NDP committee member Olivia Chow stated during consideration of the *BRRA* that the NDP would be "pushing for" certain recommendations and amendments, including "mak[ing] sure the provinces have enough funding for legal aid, so that the claimants would be properly represented."[116] Reference to an amendment relating to legal aid does not occur elsewhere in the committee transcript, however, and mention of legal aid is absent in the CIMM report back to Parliament recommending that the *BRRA* be passed.

The issue was nonetheless discussed again several months later during the CIMM's consideration of the *PCISA*. An exchange between NDP MP Jinny Sims and Carole Dahan, Director of the RLO at LAO is particularly noteworthy:

> Ms. Sims:
> Ms. Dahan, I know you're with Legal Aid Ontario, and I know the budgets are being cut or have been cut considerably.
> Under this new refugee claim system, there is probably going to be a need for more legal representation, not only at the hearing before the Refugee Protection Division, but also before the Refugee Appeal Division.
> How will Legal Aid Ontario address this problem of a decreasing budget and refugees' greater need for competent legal representation?
>
> Ms. Dahan:
> Thank you. That's a very good question, and it's a question legal aid is still struggling with.
> … Now, although we've been told our budget is going to remain the same,[117] we're going to be asked to do more. As you alluded to, there's an additional layer in this process, the Refugee Appeal Division, which did not exist previously and which we have not been given any new funding for. It means that legal aid is going to have to

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115 See *Standing Committee on Citizenship and Immigration Evidence*, 40th Parl, 3rd Sess, Meeting 15 (11 May 2010) at 1825.

116 See *Standing Committee on Citizenship and Immigration Evidence*, 40th Parl, 3rd Sess, Meeting 16 (13 May 2010) at 1555.

117 Dahan's statement that the LAO budget will remain constant should be put into context. As will be discussed below, a LAO report released in October 2012 indicated that the LAO has been facing "significant budget pressures" over the past few years and anticipates that it will continue to do so for the "foreseeable future." The report also notes that the federal government's funding for refugee legal aid decreased by $2.65M (28%) in 2011-2012.

> do a lot more and be a lot more creative in the delivery of services using the same amount of money.[118]

While several experts testifying about the *PCISA* before the CIMM and the SOCI reiterated concerns about the impact the new legislation would have on already under-resourced legal aid providers,[119] Jennifer Irish, Director of Asylum Policy Program Development for Citizenship and Immigration Canada, confirmed that there would be no increase in legal aid as a result of the changes in the system:

> Senator Munson:
> Briefly, would there be an increase to the legal aid component? I do not think there is a whole lot of money there.
>
> Ms. Irish:
> No, there would be no decrease to the legal aid program.
>
> Senator Munson:
> Increase?
>
> Ms. Irish:
> No, there will not be an increase…We will be running the system with the same legal aid as now.[120]

Experts appearing before House of Commons or Senate Committees to discuss the new legislation were also given an opportunity to submit written briefs. The relevant committee considers these briefs and has discretionary power to decide whether to make them public. Only the expert written briefs submitted to the CIMM in relation to the *BRRA* are available as part of the committee record. A review of these briefs reveals that 30 per cent of them (15 of 49) discuss legal aid.[121] Seven of these

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[118] See *Standing Committee on Citizenship and Immigration*, Evidence, 41st Parl, 1st Sess, No 37 (2 May 2012) at 1600.

[119] See e.g. Peter Showler (June 18 2012) and Andrew Wlodyka (June 19 2012).

[120] It is unclear from this exchange whether Irish was basing her answer on a discussion of this issue within the Department or whether it is based on an absence of any relevant discussion. As will be discussed in the following section, there is no indication that the Department of Justice civil servants or the Minister responsible for policy-making on refugee legal aid ever considered whether there was a need to increase legal aid.

[121] The following briefs on Bill C-11 were consulted: Amnesty International, "Fast and Efficient but not Fair Recommendations with respect to Bill C-11" (11 May 2010); Barreau du Québec, "Bill C-11 – An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act" (7 May 2010); Raoul Boulakia, "Bill C-11 Submissions to the Standing Committee on Citizenship and Immigration"; National Citizenship and Immigration Law Section, Canadian Bar Association, "*Bill C-11 Balanced*

recommend in explicit terms that passage of the new refugee system must be accompanied with a federal commitment to increase legal aid funding and three devote significant space to detailed analysis of the legal aid funding formula and the impact the overhauled claims process could be expected to have on demand for legal services.[122]

Despite the fact that both of the committees considering the *BRRA* and the *PCISA* received expert testimony drawing explicit attention to the link between the new refugee claims process and access to justice for asylum seekers, none of the committee reports recommending passage of these two bills contained any mention of the legal aid system.

Overall, our review of the legislative process reveals that no meaningful consideration was given to the impacts of the new refugee claims system on the legal needs of claimants who are unable to pay for their own counsel. To the contrary, broad access to justice issues were almost completely absent from this process, despite the fact that numerous experts attempted to draw attention to the obvious links between the new system and legal aid programs. But the legislative process is not the only way for the federal government to formulate policy on the provision of

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Refugee Reform Act" (May 2010); Canadian Council for Refugees, "Protecting rights in a fair and efficient refugee determination system Submission on Bill C-11" (5 May 2010); Canadian Arab Federation, "Submission On Bill C-11 Presented to The Standing Committee on Citizenship and Immigration" (27 May 2010); Le Centre justice et foi, "Beyond Control – The Right to Refugee Protection: A Question of Justice" (May 2010); Mennonite Central Committee of Canada, "Written Submission on Bill C-11" (27 May 2010); Mennonite Coalition for Refugee Support, "Bill C-11: Has struck a reasonable balance between fast and fair, but dangers abound" (14 May 2010); Mennonite New Life Centre of Toronto, "Brief to the Standing Committee on Citizenship and Immigration" (May 2010); UNHCR, "Brief relating to Bill C-11, An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act" (25 May 2010); The Refugee Lawyers Association of Ontario, "Imbalanced and Unfair to the Most Vulnerable" (10 May 2010); Romero House, "Submission on Bill C-11 to the Standing Committee on Citizenship and Immigration" (20 May 2010); Peter Showler, "Removing the Devils in the Details: Comments on Bill C-11"; Lorne Waldman, "Why do we Need Refugee Reform"; all accessible online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4564195&Language=E&Mode=1&Parl=40&Ses=3>.

[122] See Raoul Boulakia, "Bill C-11 Submissions to the Standing Committee on Citizenship and Immigration," online: <http://www.parl.gc.ca/Content/HOC/Committee/403/CIMM/WebDoc/Boulakia,%20Raoul%20E.pdf>; The Refugee Lawyers Association of Ontario, "Imbalanced and Unfair to the Most Vulnerable" (10 May 2010), online: <http://www.parl.gc.ca/Content/HOC/Committee/403/CIMM/WebDoc/Refugee%20Lawyers%20Assoc%20of%20ON%20E.pdf>; Peter Showler, "Removing the Devils in the Details: Comments on Bill C-11," online: <http://www.parl.gc.ca/Content/HOC/Committee/403/CIMM/WebDoc/Showler,%20Peter%20E.pdf>

state-funded counsel. In particular, legal aid is funded through intergovernmental agreements between the federal government and the provinces and territories. As we next explore, the process of intergovernmental consultation and negotiation can thus provide complementary or alternative means for considering the links between legislative reform and legal aid programming.

B) Legal Aid Funding Process

Canada's federalist system has long involved fiscal transfers and arrangements between the federal, provincial and territorial governments. The scope and content of these arrangements have varied significantly over time but have included coordination of taxation and revenue collection, as well as cost-sharing of expenditures related to health care, social assistance, and legal aid. Many such intergovernmental agreements are entered into and implemented under the authority granted to the federal Minister of Finance by the *Federal-Provincial Fiscal Arrangements Act*.[123] The ultimate constitutional grounding for such agreements is a combination of the power that has been granted explicitly to the federal government over specific areas and the implied constitutional spending power, which has enabled the federal government to become involved in areas that lie ostensibly within exclusive provincial control.[124] On this basis, it has been accepted that the federal government is entitled to attach conditions to its cost-sharing contributions in order to advance its own policy objectives in the relevant area.[125]

These funding arrangements can of course have a very direct effect on the scope and content of various programs. Well-known historical examples are the intergovernmental agreements entered into under the

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123 RSC 1985, c F-8.

124 *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3. The division of powers between the federal and provincial governments of Canada is primarily set out in ss 91 and 92. The constitutional text purports to give exclusive powers over some subject matters to the federal government and exclusive powers over a different set of subject matters to the provinces. In actuality, there is significant overlap between the subject matters, creating some complexities. In addition, the attempt at exclusivity has then been further undermined by judicial recognition of a federal spending power that is not restricted by the areas of exclusive federal jurisdiction. See, generally, Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) ch 5 ("Federalism") and ch 6 ("Financial Arrangements"), especially ch 6.8(a).

125 Hogg, *ibid*, refers to *Re Canada Assistance Plan*, [1991] 2 SCR 525 as confirming the constitutionality of federal spending in areas or with conditions outside federal jurisdiction.

enabling framework of the *Canada Assistance Plan Act* (*CAP Act*).[126] The *CAP Act* enabled the federal Minister of Finance to enter into intergovernmental agreements that provided a formula for cost-sharing for social assistance and other programs (including civil legal aid) but also framed national standards in this area.[127] Often, the responsibility for negotiating, implementing, and monitoring the terms of intergovernmental agreements lies with the relevant group of counterpart ministers from the federal, provincial, and territorial governments.

Several areas of constitutional responsibility are relevant to the provision of legal aid services. Importantly, the provinces have responsibility for the general administration of justice,[128] while the federal government has responsibility for criminal justice and procedure.[129] With respect to legal aid for refugee claimants in particular, it is noteworthy that the federal government also has responsibility for issues relating to immigrants and refugees.[130] As a result of these many jurisdictional overlaps, legal aid services have historically been of importance to both levels of government.[131]

The current intergovernmental agreement process relating to the scope and content of cost-sharing for refugee legal aid dates to 1996. In the aftermath of the dismantling of the *CAP Act*,[132] the Federal-Provincial-Territorial Ministers Responsible for Justice and Public Safety reached a 5-year cost-sharing agreement that predominantly covered criminal legal

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126 RSC 1985, c C-1 [*CAP Act*] existed for some three decades up to the mid-1990s. For an overview of the *Canada Assistance Plan Act* and the nature of the agreements entered into under it (as well as the Social Union Framework Agreement that superseded it), see Barbara Cameron, "Accounting for Rights and Money in the Canadian Social Union" in Margot Young *et al*, eds, *Poverty: Rights, Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) ch 8.

127 The national standards were the terms that provinces had to agree to abide by in order to be eligible for the federal cost-sharing. This included, for instance, agreeing to provide financial or other assistance to a person in need in an amount or manner that takes into account the person's available income and budgetary requirements. See *CAP Act*, *supra* note 126 at s 6.

128 *Constitution Act*, *supra* note 124, s 92(14).

129 *Ibid*, s 91(27).

130 "Naturalization and Aliens," *ibid*, s 91(25).

131 It is worth reiterating here that although the Government of Ontario has provided refugee legal aid for decades, it has not included it within the specifically enumerated subject matters that LAO must cover; see discussion above at note 31.This may be an indication that the government believes that refugee stat us determination is properly the responsibility of the federal government.

132 For a discussion of the dismantling and transition to new arrangements, see e.g. Cameron, *supra* note 126; Lorne Sossin, "Salvaging the Welfare State: The Prospects for Judicial Review of the Canada Health & Social Transfer" (1998) 21 Dal LJ 141.

aid costs but also included funding for immigration and refugee legal aid.[133] In addition, this agreement established the Federal-Provincial-Territorial Permanent Working Group on Legal Aid (FPT PWG on Legal Aid), which was to be "a forum for negotiations of contribution agreements, as well as policy and legal discussions related to legal aid."[134] The FPT PWG on Legal Aid includes federal and provincial government officials, as well as representatives of provincial legal aid plans and related entities.

In the latter stages of this initial five-year agreement, the level of funding was supplemented by an interim and overlapping Legal Aid Program agreement (2001-03 LAP), which covered the 2001-2002 and 2002-2003 fiscal years. By virtue of the 2001-03 LAP, the federal contribution to immigration and refugee legal aid was raised from approximately $10 million to $11.5 million for 2002-2003. This funding was shared across six provinces – Newfoundland and Labrador, Quebec, Ontario, Manitoba, Alberta and British Columbia.[135] The 2001-03 LAP was succeeded by the three-year Legal Aid Renewal Strategy (LARS), under which the federal contribution to the immigration and refugee envelope remained $11.5 million.[136] When the LARS expired in 2006, a more general and open-ended Legal Aid Program (2006 ongoing LAP) was established. This too has seen periodic renewals of the $11.5 million federal contribution.[137]

In response to significant spikes in refugee numbers, but in the absence of any legislative or procedural change, the federal government also provided a one-year addition to its contribution of $6 million in 2009-2010 and $4.75 million in 2010-2011.[138] Most recently, in April 2012, a two-year renewal of the funding agreement affecting immigration and

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133 See Department of Justice Canada, *Department of Justice Legal Aid Program* (Technical Report) (Ottawa: Department of Justice Canada, Evaluation Division, 2001), online: <http://publications.gc.ca/collections/collection_2007/jus/J3-6-2001-1E.pdf>.

134 Department of Justice, *Legal Aid Program Evaluation: Final Report*, *supra* note 42 at 7, citing Department of Justice, *Programs Branch – Legal Aid Program* (30 March 2011), online: Department of Justice Canada <http://www.justice.gc.ca/eng/pi/pb-dgp/arr-ente/lap-paj.html>.

135 Department of Justice, *The federal legal aid renewal strategy formative evaluation* (Technical Report). (Ottawa: Department of Justice Canada, 2006) at 11, online: <http://publications.gc.ca/collections/collection_2007/jus/J2-332-2006E.pdf>.

136 *Ibid*.

137 Department of Justice, *Legal Aid Program Evaluation: Final Report*, *supra* note 42 at 11.

138 *Ibid*.

refugee legal aid was announced.[139] This new funding agreement is therefore applicable to the new refugee claims system. The renewal continues to limit the federal contribution to refugee legal aid programs to $11.5 million.[140]

It is clear that the introduction of the new refugee claims system has not been coupled with any increase in the federal contribution to refugee legal aid. More significantly from a procedural perspective, there is no indication that the new system was in any way considered when federal funding was renewed in April 2012. This absence of consideration is strongly suggested by the freezing of the federal contribution itself and, as will be discussed, is reinforced by the apparent lack of mention of the new system at the relevant intergovernmental meetings. Unfortunately, this most recent failure to consider refugee legal aid policy issues appears to be the continuation of a worsening trend, as revealed by the federal Department of Justice's formal reviews of the relevant preceding legal aid agreements. The following discussion of the absence of consideration of relevant issues in this sphere begins with those reviews.

The first review occurred in relation to the LARS (2003-2006) and subsequently in relation to the first three years under the 2006 ongoing LAP.[141] The reviews provide useful insight – from the perspective of the various stakeholders whose opinions were sought – into some of the challenges facing immigration and refugee legal aid for the relevant periods. Identified stakeholders included members of the FTP PWG on Legal Aid, representatives of provincial legal aid plans, representatives of the Department of Justice, and representatives from other federal departments and agencies, including Citizenship and Immigration Canada and the IRB. Unfortunately, while legal professionals (Crown prosecutors and defence lawyers) within the criminal justice system were also interviewed, no such outreach was done in relation to immigration and refugee matters. As a result, the perspective of refugee lawyers (including those working on legal aid certificates) is not included in these reports.

Nonetheless, two common aspects of the Department of Justice reviews are particularly worth noting. The first relates to the formula used to share the total available federal funding envelope among the relevant

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139 See Department of Justice, News Release, "Government of Canada Announces Renewal and Legal Aid Program and Aboriginal Justice Strategy" (30 April 2012) online: DOJ <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32738.html>.

140 *Ibid*.

141 See Department of Justice, *The Federal Legal Aid Renewal Strategy Formative Evaluation*, *supra* note 135; and Department of Justice, *Legal Aid Program Evaluation: Final Report*, *supra* note 42.

provinces. For some time the formula has allocated funding on the basis of the relevant (and relative) caseload numbers from the preceding year. Both reviews acknowledged that immigration and refugee numbers can be quite volatile from year to year and that the backward looking formula can make meeting actual needs difficult. A recommendation to review the funding formula was made in the 2006 review of the LARS and accepted by departmental management.[142] There is no indication that this funding practice changed, however, and the same problem was reported in the 2012 review of the LAP.[143] Despite these ongoing concerns about the formula itself, it must be acknowledged that the federal government did provide additional funding in response to a dramatic actual increase in refugee arrivals in two recent years.

The second common aspect of the reviews is in relation to the need for the FPT PWG on Legal Aid to provide a forum for addressing policy matters. The 2006 review found that provinces strongly preferred longer-term agreements of, for example, five years.[144] Two reasons were given for this preference. First, longer-term agreements enabled better planning, with known funding levels. Second, and especially important for present purposes, the provinces preferred a longer-term agreement so that the regular FPT PWG on Legal Aid meetings would not be so continually dominated by negotiations on funding levels and could instead provide a forum for addressing legal aid policy issues.[145] To this end, the 2006 review recommended that all future agreements have five-year durations – a recommendation which was accepted by the Department of Justice but has never been implemented. Indeed, the funding renewals under the 2006 ongoing LAP have all been for less than three years, with the most recent being a two-year renewal.

The 2012 review did not reiterate the recommendation for longer-term agreements, but it did put even greater emphasis on concerns about the lack of opportunity to address policy issues in the existing process. More specifically, it was reported that few respondents thought that the FPT PWG on Legal Aid spent sufficient time addressing policy issues and, further, that its meetings ought to provide a forum for identifying and

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142 See Department of Justice, *The Federal Legal Aid Renewal Strategy Formative Evaluation*, *ibid* at 14.

143 Department of Justice, *Legal Aid Program Evaluation: Final Report*, *supra* note 42 at 61. An additional problem repeated in both reviews was that the immigration and refugee funding did not really belong in an agreement that dealt predominantly with criminal legal aid.

144 See Department of Justice, *The Federal Legal Aid Renewal Strategy Formative Evaluation*, *supra* note 135 at 13.

145 *Ibid* at 43-47.

discussing key cost drivers for legal aid demand and expenditure.[146] This included specific mention of recent criminal justice reform measures and, in the refugee context, introduction of the *BRRA*. In relation to the latter, the 2012 review found:

> Some key informants expressed interest in increasing consultations at the FPT PWG [on Legal Aid] with CIC [Citizenship and Immigration Canada] so that the effects of upcoming legislation and regulations on demand for I&R [Immigration and Refugee] legal aid can be considered. An example of this type of legislation is the Balanced Refugee Reform Act, which will come into effect in early 2012.[147]

As the 2012 evaluation was conducted between September 2010 and April 2011, this finding reveals that it had not been possible to address the *BRRA* through the FPT PWG on Legal Aid process even eight months before its intended coming into force.[148] No public information is available concerning the work of the FPT PWG after the end date of the period covered by the 2012 review (April 2011), making it impossible to determine definitively whether the FPT PWG on Legal Aid has given consideration to the access to justice implications of the modified *BRRA* in the intervening period.[149]

The workings of the regular meetings of the Federal-Provincial-Territorial Ministers Responsible for Justice and Public Safety (FPT-MRJPS), to which the FPT PWG on Legal Aid is ultimately accountable, are somewhat more transparent in that they usually result in joint press releases summarizing discussions. Since the 2012 review, there have been two meetings of the FPT-MRJPS addressing general matters, including legal aid (in January 2012 and November 2012 respectively).[150] We have analyzed summaries from each of these meetings for any evidence that the

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[146] Department of Justice, *Legal Aid Program Evaluation: Final Report*, *supra* note 42 at 46, 59.

[147] *Ibid* at 42.

[148] As we now know, of course, the *BRRA* was subsequently amended by the *PCISA*, and many of its major changes began taking effect in late 2012.

[149] It is worth noting that the 2012 Evaluation Report indicates that some discussions may have been planned. It states:

Given the upcoming changes to the refugee system under the *Balanced Refugee Reform Act*, the LAP [Legal Aid Program] and CIC [Department of Citizenship and Immigration Canada] will review and revise the I&R [Immigration and Refugee] funding approach, in collaboration with the PWG [Permanent Working Group], for approval by FPT [Federal-Provincial-Territorial] Deputy Ministers and FPT Ministers.

Department of Justice, *Legal Aid Program Evaluation: Final Report*, *supra* note 42 at 61-2.

[150] Interestingly, there has also been one meeting addressing a specific initiative, the Victims Bill of Rights (in April 2013).

new refugee system was being considered by those responsible for legal aid funding policy.

The press release for the January 2012 FPT-MRJPS meeting did not identify refugee system reform as an item that received specific stand-alone attention, although the meeting did include consideration of two more general items that were potentially relevant.[151] The first was "Federal Legislative Reform Items." Although the meeting summary refers only to the criminal justice reforms of Bill C-10,[152] it does reveal concern on the part of the provinces and territories about the potential impacts of federal criminal justice reforms on the demand for resources within the legal aid system:

> *Federal Legislative Reform Items* Ministers discussed the implementation of Bill C-10 and acknowledged that many of the reforms in Bill C-10 have been the subject of previous discussions over the past several years, in which several jurisdictions have expressed support for these reforms. … In addition, provincial and territorial ministers noted that their concerns focus primarily on the elements of C-10 which may result in additional pressures on the justice system, including the need for increased funding.[153]

The omission of any mention of the federal legislative reforms relating to the refugee system is consistent with a conclusion that it was likely not discussed at the January meeting. As reviewed in the preceding section, it was some six months prior to this meeting that the federal government, fresh off winning a majority mandate in the election, made clear its intention to revise the *BRRA*. It was just over two weeks after this meeting that the *PCISA* (Bill C-31) was introduced to Parliament.

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[151] Canadian Intergovernmental Conference Secretariat, Press Release, "Federal/Provincial/Territorial Ministers Discuss Key Justice and Public Safety Issues Facing Canadians" (26 January 2012) online: <http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=1701>.

[152] Bill C-10 was subsequently adopted and passed into law as *Safe Streets and Communities Act*, SC 2012, c 1. The Act came into force at a staggered interval, with the entire Act in force by February 28, 2013. The Act was an omnibus bill designed to swiftly implement nine other separate bills of the previous minority government that had died on the order table. It was introduced within the early days of the new majority government. See generally Laura Barnett *et al*, "Legislative Summary of Bill C-10," *Library of Parliament Research Publications*, 5 October 2011, online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C10&Parl=41&Ses=1&Language=E&Mode=1>.

[153] Canadian Intergovernmental Conference Secretariat, Press Release, *supra* note 151. Significantly, our own review of the legislative process relating to Bill C-10 revealed a lack of attention to potential implications for legal aid in the criminal sphere similar to the inattention to legal aid in the refugee sphere discussed herein.

The other general item mentioned in the press release of the January meeting that is potentially relevant to refugee system reform was "Legal Aid." For this item, there is at the end of the summary some explicit, albeit limited, mention of refugee legal aid:

> *Legal Aid* Ministers affirmed their commitment to a responsive, fair, efficient and accessible justice system which includes access to legal aid and referenced the common statement of principles approved in October 2010. Provincial and territorial ministers asked the federal Minister of Justice for continued and enhanced federal funding support for criminal legal aid to address the continued pressures faced by all legal aid programs. They asked for early confirmation of the level of federal funding given that existing agreements expire at the end of March 2012. *Provincial and territorial ministers also noted the need for renewed and enhanced funding for immigration and refugee legal aid for those jurisdictions offering such services*.[154]

There is no indication that this discussion of need in relation to refugee legal aid was tied in any way to a consideration of the impending system reforms.

By the time of the November meeting of the FPT-MRJPS, the *PCISA* had been passed by Parliament and received royal assent. At that time, it was widely understood that major reforms to the refugee claims system would be in place by December 2012. The press release relating to this meeting, however, contains no reference to refugee system reform or refugee legal aid at all, and impending federal law reform is no longer identified as a discussion item.[155] "Legal Aid" is again included, but the summary of the legal aid discussion refers only to the ongoing plea of the provinces and territories for longer-term funding agreements and enhanced federal contributions. The press release also mentions a collective acknowledgement of the "current budgetary context" and a desire to retain the federal government's funding commitment, which had been renewed the preceding April.

In sum then, there is no evidence that the new refugee system has been considered as part of the legal aid funding process. Available documents indicate that the potential implications of the reforms on access to justice for refugees in general, and refugee legal aid more particularly, were given no meaningful attention in the applicable intergovernmental agreement processes. Further, maintaining a federal funding freeze that has been in

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154 *Ibid* [emphasis added].

155 Canadian Intergovernmental Conference Secretariat, Press Release, "Federal/Provincial/Territorial Ministers Conclude Productive Meeting on Justice and Public Safety" (6 November 2012) online: <http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=1908>.

place for 10 years, in the face of significant system reforms and without even considering the impact of those reforms on legal aid costs, reveals a fundamental flaw in the refugee legal aid policy-making system.

5. Increasingly Arbitrary

In order to more fully appreciate the arbitrariness of the current relationship between legislative changes to the refugee system and legal aid funding, it is useful to briefly situate the recent experience in a historical context. In our view, such a contextualization demonstrates that funding for legal aid systems is becoming increasingly detached from the environmental realities that are created by relevant legislative reform. As a result, the system is becoming increasingly arbitrary.

It is significant to note at the outset of our historical review that federal funding for legal aid in general and for refugee legal aid more particularly has steadily declined. A system originally implicitly premised on "supply meeting demand" has shifted to a system with capped federal contributions, regardless of the actual needs of claimants. At the time of peak demand for refugee legal aid certificates in Ontario, in 1992-1993, the federal government contributed over 50 per cent of the cost of state-funded and legal aid counsel in Ontario.[156] By 2011-2012, LAO reports that the federal contribution had fallen to 31 per cent of the costs of refugee legal aid in Ontario. As will be demonstrated below, this decline in the federal funding contribution has been accompanied by a decline in the attention given by the federal government to refugee legal aid policy.

The recent history of refugee system reform in Canada can be divided into four periods, each defined by differing approaches to the relationship between legislated system reform and refugee legal aid and access to justice. During the first period, which spans from the introduction of the *Immigration Act*[157] in the mid-1970s to the transition to an oral hearings system in the late 1980s, the modest demand for refugee legal aid appears to have been adequately met without the need for much concerted policy attention. In this period, the situation of supply meeting demand was

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156 The term "state-funded" counsel in this context refers to the designated counsel program, which was entirely funded by the federal government. When the cost of this program is added to the federal government's 50 per cent cost-sharing for Ontario legal aid, the total federal contribution to the cost of counsel under the then system was over 50 per cent. For the expenditure figures and other program details, see John McCamus *et al*, *Ontario Legal Aid Review* (Toronto: Ministry of the Attorney General, 1997) at ch 12, online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch12.asp>.

157 RSC 1985, c I-2.

perhaps more an implicit understanding about the relationship between the refugee system and refugee legal aid than an explicit approach, and we label it accordingly. The second period extends from the reorientation of the system to oral hearings to the dismantling of the Canada Assistance Plan, in the mid-1990s. This period involved significant reform of the refugee system and federal policy-making that included explicit contemplation of refugee access to justice. We thus label this the "integrated" approach. We also note that throughout this period, legal aid was generally provided on an "as-needed" or "open-ended" basis. During the third period, which begins after the dismantling of the Canada Assistance Plan and extends through design and implementation of the *IRPA* in the early 2000s, consideration of refugee legal aid was de-integrated from policy-making relating to the refugee status determination system, but nonetheless continued on a "parallel track" (with both tracks giving some consideration to broader access to justice issues). Significantly, this period also marked the transition from an "open-ended" to a "cost-controlled" legal aid model. Since the mid-2000s, however, the parallel track system has largely broken down, resulting in the current period in which there appears to be virtually no meaningful consideration of refugee legal aid by the federal government in any forum. The historical trajectory of these developments will now be briefly reviewed.[158]

A) The First Period: Supply Meets Demand as an Implicit Approach to Refugee Legal Aid

The roots of the contemporary immigration and refugee system in Canada lie in the *Immigration Act*, which came into force in 1978. This significant piece of legislation was the product of over five years of policy-making activity, including consultations between the federal and provincial governments, a green paper, public and stakeholder consultations and a full legislative process. Under the *Immigration Act*, new refugee claimants had their status determined by the Minister on the basis of a written claim and a transcript of an under-oath examination by an immigration officer. These documents were first reviewed by a Refugee Status Advisory Committee, which made recommendations to the Minister about the appropriate outcome for each case. Under this system, appeals from decisions of the Minister could be lodged with the Immigration Appeal Board (IAB). The IAB had jurisdiction to order a hearing if it determined, again on the basis of only documentary submissions, that there were reasonable grounds to believe that a claim to a redetermination of status was likely to be established. The governing legislation allowed claimants to have legal

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158 Our review of the legislative and policy activity relating to Canada's refugee system draws on Martin Jones and Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007).

counsel present during the initial examination by the immigration officer and at any redetermination hearing. In both cases, counsel was at the claimant's own expense.

During this period, legal aid in Ontario was funded through cost-sharing arrangements between the provincial and federal government and administered by the Law Society of Upper Canada. At this time, the Ontario legal aid system operated on an "open-ended" basis – that is, there was no cap on expenditures or certificates and the program aimed to meet the level of actual need.[159] The cost-sharing arrangements consisted of two main components: an agreement on Legal Aid in Criminal Matters, whereby the federal government agreed to contribute 50 per cent of the costs of criminal legal aid in each province;[160] and the *CAP Act* agreements. The latter provided a cost-sharing arrangement for civil legal aid and it was through this mechanism that provinces could elect to fund immigration and refugee legal aid services.[161]

The legal aid system in place in Ontario in the early 1980s used a "mixed" delivery model (similar to that in place today), consisting of private lawyers working on certificate funding, "staff" lawyers working in upwards of 50 community legal clinics, and staff duty counsel. Legal aid services were available for refugee matters but the costs were relatively modest, in the "tens of thousands of dollars".[162] These low costs appear to be attributable to a combination of the relatively low numbers of claimants and the predominantly paper-based nature of the refugee claims process.

At this point, the access to justice needs of refugees in respect of the provision of legal aid services does not appear to have been a significant concern. This may be due in part to the combination of the open-ended nature of the provision of legal aid, the relatively low numbers of refugees,

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[159] Ontario Legal Aid Review Panel, *Report of the Ontario Legal Aid Review* (Toronto: Government of Ontario, 1996) at ch 2, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/>.

[160] Canadian Bar Association, *A Short History of Federal Funding for Legal Aid*, online: CBA <http://www.cba.org/cba/advocacy/legalaid/history.aspx>; Doust, *supra* note 8 at 6, 40.

[161] See brief description of these arrangements in Department of Justice Canada, *Department of Justice Legal Aid Program* (Technical Report), *supra* note 133 at 3-4.

[162] See McCamus *et al*, *supra* note 156, ch 12:

> In the early 1980s, the number of inland refugee claimants in Canada numbered 5,000-7,000 per year. The numbers steadily grew, and *Singh v. Minister of Employment and Immigration* in 1985 imposed a *Charter of Rights and Freedoms* entitlement to an oral refugee-determination hearing. With the oral hearing came a heightened demand for legal representation, and the annual cost to the Plan rose from tens of thousands of dollars to $1.2 million by 1989.

and the paper-based system. Together, these factors may demonstrate an implicit understanding that the legal aid system had sufficient resources available to meet the relatively modest demand for refugee legal aid. Further, a more pressing access to justice issue was dominating the attention of advocates: the lack of oral hearings. It was recognition and resolution of this concern that eventually led to an explicitly integrated approach to legal aid policy-making.

B) The Second Period: The Integrated Policy-making Approach to Refugee Legal Aid

By the early 1980s the refugee status determination system began to experience a dramatic increase in claims by individual asylum seekers, as the pattern of refugee entry moved beyond the managed resettlement of specific groups that had characterized the system to that point. Paralleling this development was a growing concern, expressed in part in government ordered reviews and reports, over the general lack of meaningful participation for claimants in the refugee determination process (or, in the language of the newly-enacted *Charter*, an absence of "fundamental justice"). This concern arose primarily from the absence of oral hearings and the related necessity for important credibility issues to be determined entirely through a paper record. Ultimately, the process was held to be unconstitutional by the Supreme Court of Canada in its 1985 decision in *Singh v Minister of Employment and Immigration*.[163] In response, the federal government implemented interim measures that both fast-tracked the favourable processing of an existing backlog of claims and prioritized the design and implementation of longer-term reforms. These reforms, introduced in 1989, established a two-stage process: first, a "credible basis hearing" to determine whether the claim to refugee status was credible; and, where the outcome was positive, a status determination hearing.[164]

Predictably, the increased number of individual refugee claimants combined with the new orientation towards oral hearings led to an increased need for legal representation.[165] In recognition of this need, the federal government established, as part of its system reform, a "designated counsel program," which funded all legal representation relating to the

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163 *Supra* note 29.

164 The reforms to the refugee system were enacted via Bill C-55 of 1989, which amended the *Immigration Act*, *supra* note 157. For discussion, see Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at ch 10.

165 By 1989 the Ontario Legal Aid Plan was spending $1.2 million on refugee legal aid, a dramatic increase from the "tens of thousands" spent annually in the previous period; see McCamus *et al*, *supra* note 156.

credible basis hearing.[166] Funding for the IRB hearing occurred through the existing cost-sharing arrangements with provinces. Overall, the cost of legal aid for refugees climbed significantly in the later 1980s and early 1990s, although the Ontario legal aid system retained its open-ended, demand-meeting quality throughout this period.[167] It is important to note that consideration of refugee access to justice was at this stage integrated into refugee system reform, as evidenced by the federal government's proactive approach to both recognizing and addressing the consequences of its legislative agenda on the legal aid system.

The rising cost of refugee legal aid under the new system was indicative of a continuing rise in overall legal aid costs throughout this period, however, and this soon became the spur for de-integration. From 1985 to 1995, the total cost of all legal aid in Ontario rose from just under $70 million to almost $350 million.[168] The costs of legal aid became a significant concern for governments at all levels and in 1990 the federal government began capping its contributions for both criminal and civil legal aid.[169] Refugee legal aid was partially insulated from these changes, however, as a result of the dedicated federal funding program that continued to be associated with the designated counsel program.

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[166] This is not to suggest that the designated counsel program went without criticism. In particular, it was criticized for limiting choice of counsel and also for failing to weed out less competent counsel; see Larry Gold, "Immigration Law and Policy," in Steven Globerman, ed, *The Immigration Dilemma* (Vancouver: The Fraser Institute, 1992), online: The Fraser Institute <www.fraserinstitute.org>; and "Canada's New Refugee Law: A Four Month Report Card," 3:1 Refugee Update (June 1989), online: York University Libraries <http://pi.library.yorku.ca/dspace/>.

[167] The Ontario Legal Aid Plan spent $1.2 million on the 1450 refugee legal aid certificates issued in 1989, the last year of the old system. A year later, the first year under the new system, the Ontario Legal Aid Plan spent $5.8 million on 8535 certificates. By 1992-1993, the peak demand year, Ontario Legal Aid expended $23.3 million on 26,000 certificates. The cost of the designated counsel program under the new system, borne entirely by the federal government, rose from $1.6 million to $7 million over this period. It is worth noting, however that, given the cost-sharing arrangements applicable to Ontario's expenditures, the federal government actually paid for half of the Ontario costs. These certificate costs do not include the costs associated with other legal aid delivery methods, via the community clinics and duty counsel, for which data is not readily available; see McCamus *et al*, *supra* note 156.

[168] Frederick Zemans and Patrick Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (North York, ON: York University Centre for Public Law and Public Policy, 1997) at 21.

[169] The first step was a two-year freeze on the federal contribution to criminal legal aid. This was followed by a limitation on increases in the federal contribution to 1 percent for the next few years. In Ontario, increases in the federal contribution to civil legal aid were likewise capped at 5 percent per year; see *ibid* at 96.

A 1992 report by the Law Reform Commission of Canada, however, recommended a variety of changes to the refugee system and some of these were incorporated into a bundle of reforms enacted in 1993.[170] Changes to the system at this time included elimination of the credible basis hearing and, with it, the designated counsel program and its associated federal funding.

The Commission's Report also noted that "[m]ost provincial plans provide legal aid for refugee claimants at the Refugee Division hearing virtually as of right"[171] and referred to its own preliminary study drawing attention to "the substantial costs of legal aid and designated counsel schemes."[172] In this context, the Commission devoted some attention to the question of whether it was necessary for lawyers to be the primary providers of assistance throughout the refugee claims process. According to the report, better use could be made of community members and non-governmental organizations in the pre-hearing stages, even if lawyers could be regarded as essential for formal hearings.[173] Major changes to the legal aid system appeared to be imminent.

The period of integrated policy-making moved closer to closure when a newly elected Liberal government began significant fiscal reforms that included scrapping the Canada Assistance Plan and re-capping federal contributions to legal aid and other social programs.[174] As successive federal governments set about firmly dismantling the fiscal arrangements that had once supported open-ended legal aid, they also moved towards a period that saw refugee access to justice issues de-integrated from system reform and moved to a parallel track.

C) The Third Period: The Parallel Track Approach to Refugee Legal Aid

In Ontario, the overall rising costs of legal aid, coupled with the capping of the federal contribution, prompted the provincial government to switch, for the first time, to a fixed annual allocation to the Law Society of Upper

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170 Law Reform Commission of Canada, *The Determination of Refugee Status in Canada: A Review of the Procedure* (Ottawa: Law Reform Commission of Canada, March 1992).

171 *Ibid* at 154.

172 *Ibid* at 153.

173 *Ibid* at 153-58.

174 The Canada Assistance Plan was replaced by the Social Union Framework Agreement and that, in turn, was replaced by the Canada Health and Social Transfer (which was later split into the Canada Health Transfer and the Canada Social Transfer).

Canada for legal aid funding.[175] This immediately required a reduction in legal aid program costs by the Law Society, and the total number of certificates issued under the Legal Aid Plan was reduced, including for refugee matters. Soon afterwards, maximum billable hours under refugee certificates were also reduced.[176] As mentioned earlier, the final main cost-reduction measure was to reduce, by a drastic 22 per cent, the level of the income-eligibility cut-off for legal aid.[177]

This sea-change in the framework for provision of legal aid in Ontario led to a government sponsored review of the system. In 1997, the Ontario Legal Aid Review (often referred to as "the McCamus Report") recommended that responsibility for the administration and delivery of legal aid in Ontario be transferred from the Law Society to an independent statutory agency. That recommendation was acted upon and LAO was established by statute in 1998. Working within a fixed annual budget, LAO continued to fund certificates for refugee matters, but by this time the criteria used to determine financial eligibility had already become devices for rationing services.[178]

By the late 1990s then, the system within which refugee legal aid was provided had been fundamentally reshaped. Cost-control was now at least as significant an organizing principal as meeting legal needs. Moreover, the entire intergovernmental framework for legal aid funding had now been established as a distinct process of negotiation and implementation of fixed-period, fixed-funding arrangements. As a new round of refugee policy review began, it became clearer that consideration of refugee legal aid had effectively been moved out of the overall policy-making sphere and into the parallel track of intergovernmental agreements.

The new round of refugee policy review began with a consultation process and report by the Immigration Legislative Review Advisory Group (ILRAG).[179] The ILRAG report made a number of recommendations for improving the refugee protection system and included some brief references to the need for intergovernmental cooperation and consultation

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175 For a helpful overview of the changes during this period (and their causes), see McCamus *et al*, *supra* note 156.

176 For more on this reduction, see discussion in Part 2 above.

177 For more on eligibility cut-offs, see generally Part 2 above. Nevertheless, the Legal Aid Plan did find a way to launch the RLO as a three-year pilot project, in 1994.

178 For more on use of eligibility criteria as a means of rationing, see generally Part 2 above.

179 Immigration Legislative Review Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Citizenship and Immigration Canada, 1997).

on legal aid and other needs of refugees.[180] The ILRAG report was subject to more consultations and feedback before the Ministry of Citizenship and Immigration released its white paper,[181] in 1999, on immigration and refugee reform proposals. It is noteworthy that this paper did not consider concerns related to legal aid. The white paper became the basis for the new *IRPA*, a bill that was introduced in April 2000 but, due to an intervening election, did not ultimately receive royal assent until late 2001. In the meantime, the House Standing Committee on Citizenship and Immigration tabled a report on refugee protection and border security that devoted significant attention to the refugee status determination hearing process. Again, it gave no consideration to legal aid issues.[182]

Despite the departure from the integrated approach that had accompanied the post-*Singh* system reforms, there are still some indications that the links between refugee reform and access to justice were considered to a limited extent by the federal government during this third period – albeit through now discrete, parallel tracts.

First, an interim intergovernmental funding agreement – 2001-03 LAP, discussed above – was put in place to correspond with implementation of the *IRPA*. For the 2002-2003 fiscal year, that agreement saw the federal government's specific national contribution to immigration and refugee legal aid rise from $10 million to $11.5 million.

Second, the 2001-03 LAP also included resources for the development of the LARS, which included funding for research on immigration and refugee legal aid. This research sought to describe the scope of relevant

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[180] *Ibid* at 85, where the ILRAG follows up on an earlier discussion of the need for a collaborative approach between governments and other stakeholders by recommending the establishment of a Protection Advisory Committee in order to ensure close coordination on policy matters such as legal aid and social benefits.

[181] Department of Citizenship and Immigration Canada, White Paper, "Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation" (January 1999).

[182] House of Commons Standing Committee on Citizenship and Immigration, *Refugee Protection and Border Security: Striking a Balance* (Ottawa: Parliament of Canada, 2000). The same Standing Committee was then charged with reporting on the proposed regulations under the newly enacted IRPA but this did not raise the issue of legal aid. See House of Commons Standing Committee on Citizenship and Immigration, *Building a Nation: Regulations under the Immigration and Protection Act* (Ottawa: Public Works and Government Services Canada, 2002). It is also worth noting that following enactment of the *IRPA*, the refugee policy-making process devoted some attention to the ongoing issue of immigration consultants. In 2003 the responsible Minister announced that only immigration consultants in good standing with a newly established Canadian Society of Immigration Consultants could appear before the IRB.

refugee legal aid services and also to identify refugee system legal needs and cost drivers. The research ultimately concluded that refugees needed assistance throughout the refugee claims process, and that lawyers were generally regarded as necessary to both ensure fair hearings and help with overall system efficiencies.[183] On the issue of cost drivers, the report concluded that legal aid plans had "little control over the factors affecting the cost of service provision"[184] and, therefore, that any reduction in the cost of immigration and refugee legal aid "would require either reducing the level or quality of services provided or making use of alternative service delivery mechanisms."[185] Significantly, the report also specifically identified the introduction of the *IRPA* and the new elements of the refugee claims process as primary cost drivers of the legal aid system that needed to be considered.[186]

Finally, it is noteworthy that research undertaken as part of the 2001-03 LAP actually did inform the development of the subsequent LARS, thus ensuring that the systemic factors the research had identified were at least contemplated during development of the legal aid model.[187]

Thus, while it is clear that the relationship between federal legal aid strategy and federal legislative reform was becoming more tenuous during this period, some attempts to link the increasingly distinct spheres remained. It appears, however, that over the course of the LARS, the connections of the parallel track approach to considering refugee legal aid began to come undone. As we noted in the previous section, the LARS evaluation report expressed dissatisfaction with the short-term nature of the inter-governmental funding arrangements, the unwillingness of the federal government to provide more funding, and the general lack of opportunity to address policy issues as part of this process. As the LARS concluded and the 2006 ongoing LAP was implemented, these problems

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183 Austin Lawrence and Patricia de Long, *A Synthesis of the Issues and Implications Raised by the Immigration and Refugee Legal Aid Research* (Ottawa: Department of Justice, 2003) at 31. The report did, however, note at 29-30 that some needs might be able to be met by service providers other than lawyers.

184 *Ibid* at 23.

185 *Ibid* at 23.

186 *Ibid* at 24.

187 This is also the conclusion reached by the 2006 review of the LARS which notes, for instance, that following through on the suggestion that alternative service delivery mechanisms should be explored, the LARS include a 3-year resource allocation for pilot projects for legal aid innovation. This fund was available for projects in the areas of immigration and refugee law, family law and poverty law and was allocated a funding envelope that rose from just over $0.6 million to just under $1 million over the three years. See Department of Justice, *The Federal Legal Aid Renewal Strategy Formative Evaluation* (Technical Report), *supra* note 135 at 15, 17 and 39-41.

escalated and federal policy-making on refugee matters entered the fourth period, in which the parallel track appears to have broken down almost entirely.

D) The Fourth (and Current) Period: The Arbitrary Approach to Refugee Legal Aid

The breakdown of the parallel track approach is largely detailed in Part 5 of this paper, where we document the complete failure to consider the impact of Canada's new refugee claims process on the legal needs of refugees and, correspondingly, on the legal aid system which meets those needs. It is our conclusion that this failure renders the system arbitrary, since there is no longer a link between the support the refugee claims system demands and the support available. Further, while the federal government has twice responded to spikes in refugee arrivals with one-off, after-the-fact top-ups to its legal aid contribution, those responses do not show a sustained awareness of the various ways the *system itself* impacts on the need for legal aid services.[188] Nor does it reflect any link between the increasingly distinct legislative and legal aid spheres.

6. Conclusion

Since late 2012, LAO has been grappling with how best to arrange its services for asylum seekers in response to the radically altered new refugee claims system.[189] Interim measures have been put in place,[190] but these have been met with criticism from refugee lawyers,[191] who claim the changes will exacerbate the access to justice issues already facing this incredibly vulnerable group. With continuing financial pressures and no new funding flowing, LAO's efforts may inevitably fall short.

The federal government is a key contributor to provincial legal aid programs, including LAO. It also has exclusive constitutional responsibility

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[188] It should be noted, however, that the federal government has devoted some attention in the legislative policy-making process to the broader access to justice issues posed by immigration consultants. As previously mentioned, this has led to the establishment of a regulatory body. The Immigration Consultants of Canada Regulatory Council was established in 2011 by SOR/2011-142, *supra* note 55, passed following amendments to the *IRPA, supra* note 28.

[189] See Legal Aid Ontario, *Consultation Paper: Meeting the Challenges of Delivering Refugee Legal Aid Services*, online: LAO <http://www.legalaid.on.ca/en/publications/downloads/refugee2012/Refugee2012.pdf>.

[190] Legal Aid Ontario, News Release, "Interim changes to LAO's refugee law services after mid-December" (11 December 2012) online: <http://www.legalaid.on.ca/en/news/newsarchive/1212-11_refugeeinterim.asp>; see also McKillop, *supra* note 20.

[191] *Speakers Corner*, *supra* note 20.

for immigration and refugee matters. Nonetheless, it has failed to even consider the implications of its own new laws for either the legal needs of claimants or the state-funded programs mandated to meet these needs when individuals are unable to pay. As this paper has documented, both the legislative process and the legal aid funding process provide opportunities for these links to be drawn. They were not. The result is a legal aid funding process that is increasingly arbitrary and, for the first time, entirely disconnected from the social and legal realities in which it operates. In shortchanging legal aid services in this way, the federal government is ultimately shortchanging justice for refugee claimants.

The broader consequences of this failure are troubling. Addressing access to justice issues is routinely identified as a priority in Canada, and legal aid programs are facing an ongoing state of crisis. Artificially separating these concerns from the broader policy and legislative processes to which they naturally attach can only exacerbate these challenges. Further, the absence of any attempt to consider the implications of legislative change on the legal aid system makes it clear that the federal contribution to these programs is arbitrary. This not only renders the existing resource crisis predictable, but also very susceptible to constitutional challenge – particularly in areas over which the federal government holds exclusive law-making power, such as immigration and refugee matters.[192] A modified approach is urgently required. Until the access to justice implications of new legislation are properly considered, the legal rights of thousands will continue to be in jeopardy.

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[192] The constitutional dimensions of the arbitrary approach to legal aid funding will be further explored in a second piece by the authors on this topic.