In 2012, Canada’s refugee system underwent a significant transformation. Throughout the period of reform, refugee advocates, researchers and support workers expressed concern that the changes would individually and cumulatively exacerbate existing access to justice deficits for refugee claimants. Drawing on experience from the authors’ involvement with the University of Ottawa Refugee Assistance Project, as well as dedicated supplementary research, this paper begins by outlining a social context conception of access to justice and then explores how access to justice issues were considered as part of the refugee system reform process, including what deficits experts foresaw arising as a result of that reform. The paper then details institutional responses to the new system, before providing insights on the access to justice deficits experts indicated refugees were actually experiencing two years after implementation of key reforms. This analysis draws on a variety of primary and secondary sources, including an actual claimant file which is used to both explore key access to justice concerns and illustrate the vital importance of more in-depth study in this area.

Troubling Signs: Mapping Access to Justice in Canada’s Refugee System Reform

Emily Bates, Jennifer Bond & David Wiseman
statut de réfugié qui sert à explorer les préoccupations cruciales relatives à l'accès à la justice et à illustrer l'importance vitale de mener une étude plus approfondie de ces enjeux.
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Troubling Signs: Mapping Access to Justice in Canada’s Refugee System Reform

Emily Bates, Jennifer Bond & David Wiseman*

The Canadian refugee system has recently undergone a significant transformation. Over the past five years, nine pieces of government-sponsored legislation have been introduced in this area, resulting in major changes

* Jennifer Bond and David Wiseman are Assistant Professors at the University of Ottawa’s Faculty of Law. They are also co-founders and co-directors of the University of Ottawa’s Refugee Assistance Project (UORAP). Emily Bates is the UORAP’s Community Research Fellow and Director. We are grateful for support from the Law Foundation of Ontario, the Social Sciences and Humanities Research Council (SSHRC), and the University of Ottawa. We are also indebted to the UORAP’s other two founders Adam Dodek and Peter Showler, and to the many stakeholders mentioned in this paper who generously gave their time and expertise to this study. We also wish to acknowledge our partnership with the Immigration and Refugee Board (IRB), refugee counsel, and individual refugee claimants who, collectively, facilitated the data access that forms the core of the UORAP’s research and that is previewed in this paper. Excellent research and editorial assistance was provided by Annie Hussain, Mary Kapron, Jenny Prosser, Élaine Simon, and Stéphanie Moore, as well as by upper-year University of Ottawa law students registered in the UORAP’s research seminars. All errors and omissions are of course our own.

to the way refugee claimants are able to make and appeal their claims or access complementary forms of protection,\textsuperscript{2} are removed subsequent to an unsuccessful claim,\textsuperscript{3} and are treated during their time on Canadian territory.\textsuperscript{4} A cornerstone of the reforms is legislation that creates, for the first time, distinctions between claimants on the basis of country of origin\textsuperscript{5} or circumstance of arrival,\textsuperscript{6} and which imposes strict new timelines on all aspects of the refugee status determination (RSD) process.\textsuperscript{7}

\textit{Introduction}

Plan\textsuperscript{8}]; Bill C-51, An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts, 2nd Sess, 41st Parl, 2015; Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, 1st Sess, 41st Parl, 2012 (assented to 13 March 2012).

These bills included a ban on pursuing a refugee claim concurrently with an application for Humanitarian and Compassionate (H&C) consideration—a path to permanent residence based largely on establishment in Canada and hardship if removed (see Bill C-31, supra note 1, cl 13(3), amending the Immigration and Refugee Protection Act, SC 2001, c 27, s 25 [IRPA]). It also included a one- or three- year bar on applying for H&C consideration or accessing a Pre-Removal Risk Assessment (PRRA is a process that screens for certain risks before removal) after a failed refugee claim, depending on the category of claimant (Bill C-31, supra note 1, cl 13(3), amending IRPA, ibid, s 25, and cl 38, amending IRPA, ibid, s 112(2); Bill C-11, supra note 1, cl 15, amending IRPA, ibid, s 112(2)).

Bill C-43, “Faster Removal”, supra note 1; Bill C-31, supra note 1, cl 20, amending IRPA, supra note 2, s 48(2).


Bill C-11, supra note 1, cl 12, amending IRPA, supra note 2, s 109.1, cl 14.1, amending IRPA, supra note 2, adding s 111.1; Bill C-31, supra note 1, cl 36, amending IRPA, supra note 2, s 110, cl 38, amending IRPA, supra note 2, s 112, cl 58, amending IRPA, supra note 2, s 109.1, and cl 59, amending IRPA, supra note 2, ss 14.1, 111.1. This reform introduced the “Designated Country of Origin” scheme which stipulates that claimants from listed countries normally not expected to produce refugees would be subject to expedited processing, would have no access to an appeal, and would have limited access to other recourse mechanisms and alternate protection as compares to claimants from other countries. Countries are listed by the Minister of Citizenship and Immigration based on certain quantitative and qualitative criteria.

Bill C-31, supra note 1, cl 10, amending IRPA, supra note 2, adding s 20.1. The Designated Foreign National category allowed for the Minister of Public Safety to designate any group of two or more persons where it is suspected that human smuggling was a factor in its arrival or for reasons of administrative expediency.

Bill C-31, supra note 1, cl 15, amending IRPA, supra note 2, s 26. Most timelines were established in regulation (for a summary, see Canada, Social Affairs Division, Parliamentary Information and Research Service, “Legislative Summary of Bill C-31: An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Maritime
of these reforms was widely publicized, with the Canadian government portraying the sweeping changes as a necessary response to delays, backlogs, weaknesses, and inefficiencies that rendered the previous RSD process vulnerable to abuse by so-called “bogus” or “queue-jumping” refugee claimants who threatened to undermine the system’s integrity or pose a risk to national security. In the months prior to implementation of the new system, refugee advocates (many of whom also called for some changes to the status quo) expressed concern about the government’s proposals on a variety of grounds. Amongst these grounds was widespread agreement that many of the changes would make things worse for some of the world’s most vulnerable persons.

This paper draws on ongoing work by the University of Ottawa’s Refugee Assistance Project (UORAP) to map access to justice issues in Canada’s new RSD system. Specifically, it discusses the concept of access to justice and outlines a general framework for its application in the refugee

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9 See e.g. Canadian Association of Refugee Lawyers, Press Release, “Bill C-31: The Minister Says One Thing; His Bill Says Another” (22 March 2012), online: <www.carl-acaadr.ca>; Justice for Refugees and Immigrants Coalition, “Protect Refugees from Bill C-31” (March 2012), online: <ccrweb.ca>; Canadian Council for Refugees, Press Release, “Canada Rolls Back Refugee Protection: Bill C-31 receives Royal Assent” (29 June 2012), online: <ccrweb.ca>. The changes have also resulted in litigation (see e.g. Canadian Association of Refugee Lawyers, “Health Care for Refugees”, online: <www.carl-acaadr.ca>).

10 The UORAP is funded by the Law Foundation of Ontario and led by four professors at the University of Ottawa’s Faculty of Law: Jennifer Bond, David Wiseman, Adam Dodek, and Peter Showler. Emily Bates has been the full-time Director since 2012. The UORAP has both a programming stream and a research stream. The programming stream offers resources and training sessions to refugee support workers on certain key aspects of the new RSD system such that they are able to better support claimants as they gather evidence for their claim. The research stream aims to identify actual access to justice deficits in the new system. The research component of the UORAP’s work benefits from additional funding from the University of Ottawa and the Social Sciences and Humanities Research Council (SSHRC), as well as from a unique information sharing agreement with the Immigration and Refugee Board (IRB).
context, and then uses this framework to consider both the extent to which access to justice deficits were anticipated in the new RSD system and the extent to which experts perceive there to be deficits in the system now that it is operational. It also provides analysis of how access to justice considerations factored into the process of reform itself and documents the institutional implications of the recent changes. Cumulatively, the mapping undertaken in this paper reveals troubling signs that Canada’s new refugee system poses significant obstacles to the attainment of refugee access to justice.

The paper proceeds in six parts. Part I introduces a multi-dimensional conception of access to justice for application in relation to the RSD process, emphasizing the relevance and role of the social context of refugees. Part II explores the government’s failure to consider a variety of aspects of access to justice as part of the recent reform process. Part III shares views from the first of two community-based “environmental scans” undertaken within the refugee support and refugee law sectors. This first scan was conducted in the months immediately preceding introduction of the new RSD system and identified anticipatory access to justice deficits. Part IV explores some of the institutional implications of the RSD reforms by considering responses by, and impacts on, a variety of actors including the Immigration and Refugee Board (IRB), Citizenship and Immigration Canada (CIC), the Canada Border Services Agency (CBSA), provincial legal

11 To be clear, the purpose of this paper is not to compare the relative degree of (deficits in) refugee access to justice under the old and new systems. Rather, the purpose is to frame and map the access to justice issues appearing in the new system against the backdrop of the worries and warnings that were expressed by the refugee support and refugee law sectors as the new system was emerging. Future papers under this ongoing research will be well-suited to conduct an evidence-based assessment of the extent to which refugees can attain access to justice in the new system, and to assess the extent to which the new system conforms to specific legal standards that can be associated with or encompassed within access to justice, such as the guarantees of equality and of fundamental justice under the Canadian Charter of Rights and Freedoms or the administrative law standard of procedural fairness. This paper represents a foundational step in generating evidence relevant to the application and assessment of access to justice and other legal standards.

12 The term “refugee support sector” includes, on a national scale, housing organizations, settlement and social workers, refugee advocacy organizations, researchers, and NGOs of various sizes and mandates. The term “refugee law sector” includes, also on a national scale, legal aid agencies and their staff, lawyers providing representation and advice to refugee claimants, and community legal workers in clinics. Both sectors participated broadly in our environmental scans discussed below.
aid agencies, and the refugee support and non-profit refugee law sectors. Part V shares views from a second environmental scan that occurred two years after the reforms were introduced and which included identification of perceived access to justice deficits in the new system. Finally, Part VI contains a preliminary analysis of the access to justice dimensions of an actual claimant’s file. This analysis elaborates the particular impact of this individual’s social context on his ability to support his claim for refugee protection and illustrates the way various access to justice deficits may present themselves in this context. It also previews the UORAP’s ongoing research of the access to justice dimensions of a collection of case files decided under Canada’s new RSD process. Although it is that ongoing research, rather than this paper, which will ultimately grapple with the question of whether the new RSD process provides sufficient access to justice for refugees, this paper concludes with some reflections on the potential broader implications of the troubling signs for refugee access to justice that are appearing under the new system.

I. ACCESS TO JUSTICE IN THE REFUGEE CONTEXT

The concept of “access to justice” has been the subject of four decades of legal scholarship in Canada, and the persistence of access to justice deficits has now become a key issue in policy debates relating to the Canadian legal system. Although no firm consensus has emerged about the best definition of the term itself, a leading analysis identifies three basic dimensions to the concept: procedural access to justice (defined as an ability to invoke and participate in justice processes); substantive access to justice (defined as an ability to attain fair outcomes); and symbolic access.

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13 The term “non-profit refugee law sector” includes, on a national scale, legal advocacy organizations and private lawyers who deliver pro-bono legal services and training for the benefit of refugees, but does not include legal aid agencies, their clinics and staff, or private lawyers.


to justice (defined as being accorded respect and recognition by the system as a whole). The core applications of these three dimensions have traditionally centered on court procedures, but the scope of applicability has gradually expanded to a point where access to justice can now serve as a standard for “every institution where law is debated, created, found, organized, administered, interpreted and applied.”

In the specific context of refugee decision-making, the procedural dimension of access to justice includes, for example, being able to lodge a refugee claim and meaningfully participate in the IRB’s core decision-making process, as well as in any preliminary and appeal processes. Timely and effective assistance of legal counsel, as well as assistance from community support providers, is generally recognized to be crucial in this context, but many other procedural fairness issues also arise. Substantively, refugee access to justice requires fair legal rules for decisions on refugee status, as well as fairness in the application of those rules to individual claimants. Finally, for refugees to enjoy symbolic access to justice, they need to be accorded adequate respect and recognition in both the rhetorical and operational realities of the decision-making environment. Beyond the immediate arena of the RSD process, the procedural, substantive, and symbolic dimensions of access to justice can also be applied to the operation of the administrative and legislative processes of rule-making, policy-making, and law reform in relation to the Canadian refugee system, as well as to the operation of judicial supervision on constitutional or other grounds.

Deficits in access to justice arise where aspects of a legal system’s design and operation are unfair or exclusionary in one or more dimensions.

16 Macdonald, supra note 14 at 104–07.
17 Ibid at 23.
18 Other procedural fairness issues include treatment in interviews with border and immigration officials; grounds for detention; treatment and access to services while detained; treatment at a refugee hearing, including and challenges in understanding proceedings and adequately expressing oneself; official and actual access to recourse mechanisms and subsidiary protection mechanisms.
19 It is common to refer to perceived deficits in access to justice as “barriers” (see e.g. Macdonald, supra note 14 at 26–29). However, the barriers metaphor has been criticized for implying that a lack of access to justice will only be due to actively imposed governmental measures and that the justice system stands ready to provide access to justice once barriers are removed (see Ian Morrison & Janet Mosher, “Barriers to Access to Civil Justice for Disadvantaged Groups” in Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review (Toronto: Ontario Law Reform Commission, 1996) vol 2 at 637). The barriers framing, it is argued, tends to oversimplify both the causes of lack of access and the potential solutions. Rather than modify or replace the metaphor, we have elected to identify and explain the causes more directly in terms of understanding of social
This can include explicitly unfair or exclusionary rules (and rhetoric), as well as unfair or exclusionary impacts of ostensibly general or “neutral” rules and procedures. In either case, the unfairness and exclusion are often the result of a failure to acknowledge, comprehend, or accommodate the simultaneously diverse and distinct social contexts in which the justice system operates and needs to be accessed. This means that to minimize deficits, the system must be responsive to the multiplicity of identity attributes and circumstances that can affect the extent to which individuals or groups enjoy or achieve fairness and inclusion in society and social institutions. Consequently, if the substance, process, and rhetorical environment of Canada’s RSD system are not attuned to relevant aspects of the social context of the refugee claimants it engages (especially aspects of disadvantage and inequality), unfairness and exclusion may result.

While each individual refugee claimant will have his or her own particular social context, certain frequently shared circumstances, including the very fact of forced migration, permit some generalizations regarding common elements that may undermine a claimant’s ability to achieve access to justice if not adequately considered by the RSD system. For example, refugee claimants will almost always lack familiarity with Canada’s legal landscape and refugee claims process, and even individuals who have some familiarity with the international refugee definition will most often face novel procedures and processes when navigating their claim for protection. Many claimants will also face challenges due to limited knowledge of English or French, and language barriers may result in miscommunication and misunderstanding between claimants and decision-makers, officials, or legal counsel. While use of interpreters and

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20 This use of the concept of social context draws on the now over two decades of work on promoting an inclusive Canadian justice system in judicial education programs involving an array of individuals (including judges, lawyers, academics, and other experts) and entities (such as the National Judicial Institute). For a description of this work, see Justice Donna Hackett & Richard Devlin, “Constitutionalized Law Reform: Equality Rights and Social Context Education for Judges” (2005) 4 JL & Equality 157.

21 The inherent refugee experience of being “uprooted,” including their lack of familiarity with the culture and systems of the host country, can be understood as an element of the multi-faceted trauma that can characterize refugee experiences: See Miriam George, “A Theoretical Understanding of Refugee Trauma” (2010) 38:4 Clinical Social Work J 379 at 383.

translators can alleviate some of these difficulties, these services carry financial and time-related consequences and, even when available, may risk distorting or impoverishing the claimant’s message, thus jeopardizing full and meaningful participation in the decision-making process.\footnote{Ibid.}

Poverty can also be an important factor. When compared to many refugee-producing countries, the cost of living in Canada is very high, creating a particular burden for claimants, the vast majority of whom have extremely limited resources.\footnote{For example, the per capita GDP from 2010 to 2014 of the top five refugee source countries to Canada in 2013—China, Pakistan, Colombia, Syria, and Nigeria—ranged from $4,601.70 in Pakistan to $12,423.90 in Colombia, compared to Canada’s per capita GDP of $42,752.70 (adjusted for purchasing power parity; no data available for Syria). See World Bank, “GDP per capita, PPP (current international $”), online: <data.worldbank.org>; Government of Canada, “Top 10 Source Countries—Refugee Claims at All Offices (in Persons)” (modified 20 February 2015) Open Data website, online: <open.canada.ca>.}

The costs of acquiring legal assistance and covering related interpretation, translation, postage, and filing fees are added to already burdensome costs associated with forced flight and establishing a life in a new country.\footnote{For example, the per capita GDP from 2010 to 2014 of the top five refugee source countries to Canada in 2013—China, Pakistan, Colombia, Syria, and Nigeria—ranged from $4,601.70 in Pakistan to $12,423.90 in Colombia, compared to Canada’s per capita GDP of $42,752.70 (adjusted for purchasing power parity; no data available for Syria). See World Bank, “GDP per capita, PPP (current international $”), online: <data.worldbank.org>; Government of Canada, “Top 10 Source Countries—Refugee Claims at All Offices (in Persons)” (modified 20 February 2015) Open Data website, online: <open.canada.ca>.} Financial pressures may be further exacerbated by other socio-economic factors that create barriers to gainful employment, including low literacy and a lack of relevant skills. Further, the time-limited nature of work permits may place significant limitations on the quantity and nature of employment opportunities available.\footnote{Temporary work permits are available for refugee claimants while their claims are being processed (Immigration and Refugee Protection Regulations, SOR/2002-227, s 206(1)(a) [IRPR]), but the permits are identifiable as temporary, meaning employers looking for longer-term staff will frequently not hire individuals with this status. Claimants from certain countries must wait 180 days before they can apply for a work permit (IRPR, s 206(2)) and the processing time for work permits can mean a delay on the front-end before working is possible.}

Cultural differences are another important element of social context for many refugee claimants, as these may pose barriers to both understanding and meeting the expectations of the Canadian refugee system. For example, the culturally embedded way that a claimant expresses emotion may have an unfair negative impact on perceptions of claimant
credibility if social context is not properly considered. Cultural norms, including gender dynamics and perceptions of authority, may also lead to challenges in disclosing critical aspects of an individual’s claim. This element is frequently relevant where a refugee claimant has experienced sexual violence, for example, as strong cultural taboos and deeply embedded gender roles may favour non-disclosure despite the fact that this aspect of a claimant’s story may provide grounds for granting protection.

The social context of refugees is also frequently imbued with issues relating to mental or physical health. This may stem from actual or feared harm, and consequences may include scars or wounds, disease, post-traumatic stress disorder, memory loss, difficulty expressing experiences coherently, and an inability to establish a trust relationship with counsel or other individuals. Further psychological effects stemming from experiences of flight and, in many cases, family separation, may exacerbate these and other issues.

It is also important to note that gender, disability, family status, sexual orientation, and other identity markers form critical elements of the relevant social context for many claimants due to the role they play in shaping experiences, perceptions, strengths, and vulnerabilities. These factors, and their intersections, are often essential when considering a claimant’s


realities in his or her country of origin, during flight, and throughout the claim process.  

An illustration of the multi-faceted social context facing many refugee claimants is provided by the case of “Antoine,” a refugee claimant whose file is included in the data set for the UORAP’s ongoing research on access to justice in Canada’s reformed refugee system. Antoine identified himself as a man in his early twenties from a central African country plagued by violent conflict and civil strife. His refugee claim in Canada was based on his fear of recruitment into rebel or state military groups, as well as fear of capture and punishment by militias who suspected him of carrying opposing allegiances. These fears engaged grounds of protection that included (imputed) political opinion, ethnicity, and membership in a particular social group. Antoine stated that both of his parents were deceased, and that his brother and sister had been abducted by rebel groups many years before he fled. He did not know their whereabouts or whether they were alive. Antoine had previously been abducted by a rebel group, but managed to escape captivity and flee to a neighbouring country. From there, he moved by shipping container to the USA and then clandestinely to Canada, where he made his refugee claim at an inland CIC office after living for two months without status. He was detained in a correctional centre for one week after he made his claim.

Antoine’s social context includes a number of characteristics that could affect his likelihood of fully accessing justice in Canada’s refugee


31 UORAP obtained claimant files for this research project using refugee counsel as trusted intermediaries. Counsel reached out to their clients on UORAP’s behalf to obtain written consent for both the lawyer and the IRB to release the full refugee file, including the audio recording of the hearing, to the UORAP research team. The claimant’s actual name and other personal details have been altered to protect identity and privacy.
system. For example, Antoine does not speak English and has only some basic French-language capacity. His native tongue is an African language for which there may be few interpreters and translators in Canada. Adequate communication with officials and legal counsel is therefore likely to be challenging, especially during detention. Antoine is also relatively young, comes from a country with a dysfunctional educational system (in which he had only a few years of education due to chronic displacement), and has experienced significant trauma both as a captive of a rebel group and over the course of his journey to Canada. Consequently, his capacity to adequately understand and participate in the RSD process is low. At the time of making his claim, Antoine was also destitute and had been living in shelters and on the street. He could not afford basic expenses relating to his everyday needs, let alone any expenses associated with his claim. Finally, Antoine lacks any support network in Canada and has no friends or family in his home country, factors which may undermine his ability to identify and gather evidence in either place and, importantly, to sustain himself emotionally during the difficult RSD process.

Antoine’s case illustrates the types of complexities to which Canada’s RSD process must be responsive. As this file demonstrates, refugee claimants are frequently characterized by a multifaceted social context of difference, disadvantage, and inequality that exposes them to heightened risk of unfairness and exclusion. This risk may be mitigated through the design and implementation of a decision-making system with the capacity to recognize and accommodate the specific social context of the claimants with whom it is engaged. A failure in this regard may lead to access to justice deficits in one or more of its procedural, substantive, and symbolic dimensions.

It is important to conclude this section by noting the fundamental importance of the issues that are at stake in the operation of Canada’s RSD process: by definition, refugees are individuals who face persecution, and an error in the decision-making process could lead to a return to serious harm, including torture and death. Antoine, for example, claimed that removal to his home country would expose him to re-capture by the rebels or informal conscription by the state’s military and, in either case,
a complete loss of freedom, a significant likelihood of abuse, and a real risk of serious injury or death. The access to justice dimensions of the decision-making process are particularly important where such severe interests are at stake.

In the final part of this paper, we will return to Antoine’s case and further explore the social context and access to justice dimensions of his situation. Below, we move on to consider the extent to which access to justice issues were considered during the recent reforms to Canada’s refugee system.

II. CONSIDERATION OF ACCESS TO JUSTICE IN REFUGEE SYSTEM REFORM

The potential for access to justice deficits in the refugee claims process is obvious given the complex social context of the majority of claimants. Indeed, concerns around access to justice for refugees were already prevalent when the recent reforms were introduced, meaning the major, system-wide transformation had the potential to serve an exacerbating or ameliorating effect. It is therefore salient to explore the extent to which these well-recognized issues were considered during the recent period of legislative reform.

Drawing on a series of related UORAP research studies probing this question, this section uses four specific sites to demonstrate that access to justice concerns were not meaningfully considered during design and implementation of Canada’s new RSD process. This absence is particularly troubling given the high risk of access to justice deficits, the extreme vulnerabilities of many claimants, and the significant interests at stake. Also troubling is that this absence occurred during a period of increased awareness around a “crisis” in access to justice, and amidst growing efforts to invest in innovative programs to ameliorate deficits.

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33 For a detailed overview of the legislative changes, see Béchard & Elgersma, supra note 7; Canada, Social Affairs Division, Parliamentary Information and Research Service, “Legislative Summary of Bill C-11: An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)”, by Daphne Keevil Harrold & Sandra Elgersma, Publication No 40-3-C11-E (Ottawa: Library of Parliament, 12 January 2011), online: <www.lop.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/c11-e.pdf> [Harrold & Elgersma].

34 For an overview of the elements of the “crisis” and potential ameliorative measures, including relationship to refugee access to justice and UORAP initiatives, see Jennifer Bond, David Wiseman & Emily Bates, “The Cost of Uncertainty: Navigating the Boundary Be-
begins with an overview of the relevant legislative history and resulting changes to the RSD process.

**A. Legislative history and key changes to the RSD system**

Canada’s RSD process is anchored in the 1951 United Nations (UN) *Convention Relating to the Status of Refugees* (*Refugee Convention*),\(^{35}\) the core tenets of which have been incorporated into Canadian law through the *Immigration and Refugee Protection Act*.\(^{36}\) Over the past 30 years the RSD process has evolved through a series of legislative changes\(^{37}\) and jurisprudence interpreting Canada’s obligations in light of the *Refugee Convention*, the *Canadian Charter of Rights and Freedoms* (*Charter*),\(^{38}\) and other relevant domestic and international commitments.

The most recent changes to Canada’s refugee system began with the *Balanced Refugee Reform Act* (*BRRA*) in 2010.\(^{39}\) This legislation was introduced by a minority government and was subjected to significant amendments during the initial legislative process, demonstrating the need for compromise between governing and opposition parties. Less than two months after the BRRA was passed into law, 492 Sri Lankan refugee claimants arrived

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\(^{35}\) *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [Refugee Convention]; *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) [Refugee Protocol]. At Article 1(a)(ii), the Refugee Convention provides the following refugee definition: “the term ‘refugee’ shall apply to any person who. . .owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.” The 1967 protocol removes temporal and geographic restrictions originally found in the Refugee Convention. Unless otherwise specified our reference to the Convention includes the Refugee Convention as modified by the Protocol.

\(^{36}\) See *IRPA*, supra note 2, s 96. Other tenets of the Refugee Convention are incorporated into the IRPA as well, including a prohibition on return to persecution (s 115) and provisions for exclusion from refugee status (s 98).

\(^{37}\) See e.g. *Immigration Act*, RSC 1985, c I-2; *IRPA*, supra note 2; *Bill C-11*, supra note 1; *Bill C-31*, supra note 1.


\(^{39}\) *Bill C-11*, supra note 1.
by boat to Canada’s west coast.40 The government responded with the introduction of Bill C-49—punitive legislation aimed at “group arrivals” that contained a clause enabling its retroactive application to the Sri Lankan claimants.41 An election was called before Bill C-49 was passed, but its contents were re-introduced as Bill C-4 under a strengthened majority government in June 2011.42 Eight months later the government tabled the Protecting Canada’s Immigration System Act (PCISA), an omnibus bill that incorporated the provisions of Bill C-4 and modified the not-yet-in-force BRRA.43 Many of these amendments were aimed at eliminating the moderating effect of compromises made before the government was in majority.

The PCISA received 11 days of substantive debate in the House of Commons and was the subject of study during 15 sittings of the House of Commons Citizenship and Immigration Committee (Immigration Committee) spread over eight days. The Committee passed minor amendments but left the bill largely unchanged.44 The government passed time allocation motions at all three stages of substantive parliamentary debate45 and the PCISA received Royal Assent on June 28, 2012. The majority of its reforms took effect in December 2012.

41 Bill C-49, supra note 1. This retroactivity also captured a smaller boat arrival of 76 Sri Lankan claimants in 2009. The term “group arrivals” was not defined in the legislation but was taken to carry an ordinary meaning of two or more people. See The Canadian Bar Association, Bill C-49, Preventing Human Smugglers from Abusing Canada’s Immigration System Act (November 2010) online: <www.cba.org/CMSPages/GetFile.aspx?guid=80742e73-b78a-40bf-b696-3e300ccc1f41>; House of Commons Debates, 40th Parl, 3rd Sess, No 106 (29 November 2010) at 6540 (Siobhan Coady).
42 Bill C-4, supra note 1.
43 Bill C-31, supra note 1.
44 A total of 13 amendments passed at Committee, many of which treated coming into force and coordination with other bills. They also included a shortening of the mandatory period of detention for Designated Foreign Nationals (see clause 25) and eliminated the sub-clause that would strip permanent residence status from refugees whose protected person status was the subject of cessation for that reason. See full list of amendments at: House of Commons, Standing Committee on Citizenship and Immigration, Third Report (May 2012) (Chair: David Tilson), Parliament of Canada, online: <www.parl.gc.ca>. See also Pierre-André Thériault, No Time to Explain: Access to Justice Issues in the Canadian Reformed Refugee Determination Procedure (LLM Thesis, University of Ottawa, 2014) [unpublished, on file with authors] at 39.
45 House of Commons Debates, 41st Parl, 1st Sess, No 106 (12 March 2012) at 6088 (Hon Peter Van Loan); House of Commons Debates, 41st Parl, 1st Sess, No 106 (29 May 2012) at 8443 (Hon Peter Van Loan).
The new legislation ushered in major changes to Canada’s refugee system, including a new claim form, new qualifications and appointment standards for first-instance decision-makers, the creation of the Refugee Appeal Division (RAD), new rules governing recourse measures for failed claims, and bars on applications for Humanitarian and Compassionate
(H&C) consideration and Pre-Removal Risk Assessments (PRRA). The new laws also provided for faster deportations, expanded definitions of terms relating to criminality, and swifter removal of permanent residence upon loss of protected status. Importantly, timelines were significantly tightened throughout the RSD process.

The legislation also created two new “categories” of refugee claimants and specified that these individuals would be subject to modified RSD processes. The first category encompasses claimants from designated countries of origin (DCO)—states that are presumed to be “safe” and thus less likely to produce refugees in need of protection.

Under the new system, it is no longer possible to lodge a refugee claim concurrently with an H&C application (Bill C-31, supra note 1, cl 13(3), amending IRPA, supra note 2, s 25). Ordinary claims that fail at the RPD or RAD must wait a year before applying for an H&C or PRRA (Bill C-31, supra note 1, cl 13(3), amending IRPA, supra note 2, s 25; Bill C-11, supra note 1, cl 15, amending IRPA, supra note 2, s 112(2)). The language governing removals was strengthened to stipulate that enforceable removal orders be executed “as soon as possible” rather than “as soon as is reasonably practicable” (see Bill C-31, supra note 1, cl 20, amending IRPA, supra note 2, s 117).

See Bill C-31, supra note 1, cls 41, 43, amending IRPA, supra note 2, s 117 and adding s 121.1.

Refugees whose protected status is stripped by way of cessation on one of four grounds automatically lose their permanent residence status as well. This change collapses what was formerly a two-step process and was followed by an increase in cessation proceedings of 400% in 2013 (see Andrea Woo, “‘Draconian’ Changes to Refugee Act put those with Protected Status on Edge”, The Globe and Mail (7 May 2014) online: <www.theglobeandmail.com>; Immigration and Refugee Board, “The Refugee Protection Division (RPD): Two Years of Experience with Refugee Reform” (Presentation delivered to the Consultative Committee on Practices and Procedures, November 2014) at slide 12 [IRB, “Two Years”] [unpublished, on file with authors]).

Initial hearing: The RPD is responsible for carrying out a live hearing for each refugee claim and rendering the first-instance decision. Chronic under-staffing of the RPD under the old system had created substantial backlogs and associated lengthy waiting times, which had reached upwards of 20 months in 2011 (see Immigration and Refugee Board of Canada, Departmental Performance Report, For the period ending March 31, 2011 (IRB: Ottawa, 2011) at 14, online: <www.tbs-sct.gc.ca/dpr-rmr/2010-2011/inst IRB/irb-eng.pdf>; Thériault, supra note 44 at 30–31.) Under the new system, ordinary claims were put under a mandatory 30- to 60- day timeline for the initial refugee hearing (see IRPR, supra note 26, s 159.9(1)). For the RAD, appellants have 15 days following a negative decision to file and perfect an appeal (see Bill C-31, supra note 1, cl 21, amending IRPA, supra note 2, s 53). The Basis of Claim (BOC) form must be submitted within 15 days for claimants lodging a refugee claim at a port of entry (see Bill C-31, supra note 1, cl 33, amending IRPA, supra note 2, s 16(2.1), and IRPR, supra note 26, s 159.8(2)), and at the time of eligibility screening for claimants making an inland claim (see Bill C-31, supra note 1, cl 33, amending IRPA, supra note 2, s 16(2.1), and IRPR, supra note 26, s 159.8(1)). This determination normally must meet a threshold of a certain number of claims per year combined with 60 to 75% of claims that are rejected, withdrawn, or abandoned; if there is a low number of claims but the Minister of Citizenship and Immigration believes the
from designated countries of origin face an accelerated timeline for the Refugee Protection Division (RPD) hearing, no access to the RAD, no automatic stay of removal when awaiting leave for judicial review at the Federal Court, and no eligibility for a PRRA for three years after the initial refugee decision.

The second new category comprises designated foreign nationals (DFNs)—members of a “group arrival” that the Minister of Public Safety has so designated, ostensibly on suspicion of human smuggling or for reasons of administrative expediency. DFNs face mandatory detention, reporting conditions, no access to the RAD, no automatic stay of removal when awaiting leave for judicial review at the Federal Court, and a five-year bar on any application for permanent residence, temporary residence, H&C consideration, travel document, or family sponsorship from source country has democratic institutions and fair judiciary. Bill C-31, supra note 1, cl 58, amending IRPA, supra note 2, s 109(1); Order Establishing Quantitative Thresholds for the Designation of Countries of Origin, (2012) C Gaz I, 3378.

30 days for inland claimants and 45 days for port-of-entry claimants, compared to 60 days for non-DCO claims (see IRPR, supra note 26, s 159.9).

Bill C-31, supra note 1, cl 38, amending IRPA, supra note 2, s 109. This provision was the subject of ongoing litigation at the time of writing, with the Federal Court having ruled it to be unconstitutional. See Z (Y) v Canada (Minister of Citizenship and Immigration), 2015 FC 892, 387 DLR (4th) 676.

For ordinary refugee claims that have been rejected, the deportation order is automatically put on hold, or “stayed,” if the claimant lodges an application seeking leave for judicial review. This stay is not available to DCOs. IRPR, supra note 26, s 231(2).

Bill C-31, supra note 1, cl 38, amending IRPA, supra note 2, s 109(3).

Ibid, cl 10, amending IRPA, supra note 2, s 201(1): “The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she (a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility—and any investigations concerning persons in the group—cannot be conducted in a timely manner; or (b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.” The term “group of persons” is not defined here or elsewhere in the IRPA. See also Jennifer Bond, “Failure to Report: The Manifestly Unconstitutional Human Smugglers Act” (2014) 51 Osgoode Hall LJ 377, for a critique of the designation process.

Members of a designated group who are 16 years or older face mandatory detention, with a first detention review at 2 weeks and subsequent reviews at 6 months (see Bill C-31, supra note 1, cl 81, amending IRPA, supra note 2, s 55(3.1)).

Upon release, the Minister may impose continued reporting conditions, a breach of which could carry immigration consequences (see Bill C-31, supra note 1, cl 32, amending IRPA, supra note 2, s 98.1).

Bill C-31, supra note 1, cl 36, amending IRPA, supra note 2, s 108.

Bill C-31, supra note 1, cl 10, amending IRPA, supra note 2, s 20.1.
the date of a positive RPD decision.66 These provisions were retroactive to 2009, allowing potential designation of arrivals on the MV Ocean Lady and MV Sun Sea.67

B. Consideration of access to justice during the legislative process

Members of the UORAP research team have conducted several dedicated studies exploring how access to justice was considered during the recent reform process. Specific areas of inquiry have included: i) whether proposed mandatory detention for DFNs is consistent with Canada’s human rights instruments and, if not, whether the government met its obligations to report the inconsistency; ii) whether the access to justice implications of faster timelines were considered during the reform process; iii) whether implications of the reforms on legal aid programs were considered during the reform process; and iv) the rhetorical discourse and political environment which accompanied the changes. Summaries of key conclusions from each of these in-depth studies are provided below, but we begin with a brief exploration of the refugee access to justice landscape that existed under the pre-reform system.

As Canada’s RSD system has evolved over a number of decades, the need to provide access to justice to refugees has been an ongoing concern of the refugee support and refugee law sectors, although it has received inconsistent attention in policy-making processes and reform initiatives.68 The decade preceding the most recent reforms began with an academic investigation that assessed the decision-making process of the IRB. This foundational study highlighted concerns with Board member understanding of the legal framework for conducting fair hearings and reaching reasoned decisions, as well as difficulties faced by Board members, lawyers, and other participants in relation to understanding and managing evi-

66 Bill C-31, supra note 1, cls 5, 10, 12, 13, 16, amending IRPA, supra note 2, s 31.1.
67 David McKie, “Canada OK’s Most Sri Lankan Refugee Claims” CBC News (30 September 2010) online: <www.cbc.ca> (the MV Sun Sea arrived on August 13, 2010 carrying 492 Tamil refugee claimants from Sri Lanka); The Canadian Press, “Tamil Hearings Begin Tuesday in Vancouver” CBC News (16 August 2010) online: <www.cbc.ca> (the MV Ocean Lady arrived on Canada’s west coast on October 17, 2009 carrying 76 Tamil refugee claimants from Sri Lanka).
dence on the psychological and cultural context of refugee claims and experiences, including vicarious traumatization and cultural insensitivity. Subsequent studies have focused on specific elements, including: lack of access to counsel; limited recourse for failed claims; decision-maker independence and bias; shortcomings with procedural safeguards for vulnerable claimants; interpretation of the role of expert psychological evidence in refugee hearings; degree of attention given to international human rights law in deciding refugee claims; evidentiary challenges; and, the crucial role that evidence or, more significantly, a lack of adequate evidence, plays as a basis for (negative) credibility findings. More generally, a common concern among many participants in the RSD system, including governmental actors, was the persistence of long delays in RSD

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72 Jacqueline Bonisteel, “Ministerial Influence at the Canadian Immigration and Refugee Board: The Case for Institutional Bias” (2010) 27:1 Refuge 103; Sean Rehaag, “2013 Refugee Claim Date and IRB Member Recognition Rates” (14 April 2014), online: Canadian Council of Refugees <ccrweb.ca>.


Many of these concerns are evident in the conclusions of four distinct studies undertaken by members of the UORAP research team.

1. **Compliance with Canada’s human rights instruments**

The Canadian government is legally required to vet all of its proposed legislation for inconsistencies with Canada’s *Charter* and *Bill of Rights* and a report must be tabled in the House of Commons where an inconsistency is found. This requirement is designed to ensure accountability in the face of Canada’s human rights instruments and therefore encourages both procedural and substantive access to justice.

In “Failure to Report: The Manifestly Unconstitutional Human Smuggling Act,” Jennifer Bond notes that no report of inconsistency was presented to the House of Commons during the recent RSD reform process despite the fact that tabled legislation contained provisions that were clearly in violation of the *Charter*. In particular, this study concluded that provisions requiring mandatory, unreviewable detention of all DFNs for 365 days ran contrary to recent and authoritative decisions by the Supreme Court of Canada and violated the *Charter* in a way that could not be justified. This conclusion was based on the fact that a substantially shorter period of unreviewable detention (120 days) had recently been found to be unconstitutional in the context of significant security concerns, making it virtually inconceivable that a much longer period of unreviewable detention would be upheld in the absence of any security (or identity) concerns at all. The constitutional violation was particularly egregious and obvious given that the relevant provisions applied equally to all men, women, and children in a designated group, and even experts generally supportive of the reforms opined that mandatory, long-term, unreviewable detention of children was clearly in violation of the *Charter*. In these circumstances, the lack of a government report indicating a

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79 *Department of Justice Act*, RSC 1985, c J-2, s 4.1.

80 *Supra* note 61.

81 *Ibid* at 404.


Charter inconsistency is concerning and indicates not only a government failure to consider the significant access to justice issues these provisions raised, but also the apparent failure of a mechanism designed to provide some degree of accountability.

This study went on to note that during passage of the new laws, the government regularly misrepresented the threshold with which bills are assessed (publicly stating that government lawyers vet for “consistency” with the Charter, when the actual standard being applied is “manifest unconstitutionality”),\(^8\) and used the existence of the secretive vetting process as a way of deflecting legitimate constitutional critiques without engaging in any substantive exchange on the relevant issues.\(^8\) While the government has never conceded that it deliberately introduced unconstitutional legislation or failed in its legal obligation to report an inconsistency with the Charter, it is noteworthy that the mandatory detention provisions were eventually amended.\(^8\) These amendments do not, of course, alter the fact that significant access to justice (and constitutional) issues were apparently ignored in the initial drafting, tabling, and defending of this legislation.

2. Impact of shorter timelines on access to justice

Accelerated processing times throughout the RSD process were a major objective of the recent reforms,\(^8\) and refugee experts expressed public concern that a singular preoccupation with restrictive timelines could impede refugee claimants’ ability to present complete and well-supported claims for protection.\(^8\) Under the reformed system claimants are given a maximum of 60 days between lodging their claim and the refugee hear-

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\(^8\) For more on the threshold, see Schmidt materials cited in Bond, supra note 61 at 419.

\(^8\) Ibid at 420.

\(^8\) As a result, the initial mandatory detention period shortened to 14 days, with 6-month reviews thereafter, and the requirement to mandatorily detain children was restricted to children aged 16 and over. IRPA, supra note 2, s 57(1).


\(^8\) See e.g. Canadian Association of Refugee Lawyers, Press Release, “CARL Responds to New Refugee Legislation, Bill C-31” (16 February 2012), online: <www.carl-acaadr.ca> [CARL]; Canadian Civil Liberties Association, “Preliminary Response to Bill C-31: Despite Strong, Reasonable Opposition, Government Proceeds with Anti-Refugee Bill” (16 February 2012) [on file with authors] [CCLA].
—a timeline that many commentators on the reform process said would be insufficient to obtain counsel, establish trust, gather, translate, and submit evidence and adequately prepare for the hearing. These concerns are directly relevant to both the procedural and substantive dimensions of access to justice for refugees.

In “No Time to Explain: Access to Justice Issues in the Canadian Reformed Refugee Status Determination Procedure,” UORAP graduate student Pierre-André Thériault explored the degree to which potential access to justice issues stemming from changes to the timelines were considered during the legislative process. He noted that while the government justified the accelerated timelines as necessary due to chronic backlog, “a number of opposition MPs mentioned that...the excessive backlog and delays at the IRB were not caused by a large number of ‘bogus’ claims, but by the government’s failure to appoint a sufficient number of decision-makers.”

Thériault found that during parliamentary debate, concerns about the accelerated process were raised at least 15 times by opposition parties, who worried that the short timelines would inhibit claimants’ ability to adequately tell their stories and prepare their claims, especially where language barriers and trauma are present. Particular concern was raised regarding LGBTQ claimants and for DCO claimants facing even tighter timelines. Further, a full 50 percent of all organizations that testified before committee raised concerns about the timelines, including a lawyer called as a government witness who was generally supportive of the reforms. She warned:

15 days, 30 days, 60 days, etc., is just completely unworkable. I’m telling you as an expert who has worked a lot in this system that it is set up to

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89 Bill C-31, supra note 1, cl 59, amending IRPA, supra note 2, s 99(3.1). See also Citizenship and Immigration Canada, “Backgrounder—Summary of Changes to Canada’s Refugee System in the Protecting Canada’s Immigration System Act” (Ottawa: CIC, 16 February 2012), online: <www.cic.gc.ca> [CIC, “Summary of Changes”].

90 CARL, supra note 88; CCLA, supra note 88.

91 Thériault, supra note 44 at 42, citing House of Commons Debates, 41st Parl, 1st Sess, No 99 (26 March 2012) at 6519 (Olivia Chow); House of Commons Debates, 41st Parl, 1st Sess, No 90 (6 March 2012) at 5880 (Kevin Lamoureux).

92 Thériault, supra note 44 at 40.

93 House of Commons Debates, 41st Parl, 1st Sess, No 99 (26 March 2012) at 6473 (Hon Irwin Cotler).

94 House of Commons Debates, 41st Parl, 1st Sess, No 98 (16 March 2012) at 6413 (Philip Toone); House of Commons Debates, 41st Parl, 1st Sess, No 90 (6 March 2012) at 5878 (Don Davies).

95 Thériault, supra note 44 at 43.
fail. . . . A competent counsel will make sure that the evidentiary rules are respected, that things are filed on time, that the proper evidence is collected in order to increase the quality of the decision-making for the decision-maker. With such a short timeline, you’re going to force decision-makers to make decisions under the worst possible conditions, and it’s not going to work.96

Thériault went on to examine government statements on the new legislation in the House of Commons and at committee, concluding that the government provided no direct response to concerns that the new timelines would create major access to justice deficits.97 Rather, it defended the accelerated timelines as necessary to deter abuse and noted in particular that the lengthier timelines contained in the unmodified BRRA had been insufficient to stem the rate of purportedly “bogus” claimants. The government did not acknowledge that the BRRA timelines were never implemented and had thus never been tested from either an efficiency or access to justice perspective.98

3. Impact of new RSD process on need for legal aid

Submitting a refugee claim is complicated and requires a significant amount of knowledge about the Canadian legal system. A lack of access to counsel has the potential to undermine meaningful participation and jeopardize decision-making fairness, thus putting both procedural and substantive access to justice at risk. In “Shortchanging Justice: The Arbitrary Relationship between Refugee System Reform and Federal Legal Aid Funding,” Jennifer Bond and David Wiseman found that there was no meaningful consideration of the link between refugee law reforms and the resulting changed legal needs of refugee claimants in either the legislative process or the intergovernmental legal aid funding agreements process.99

96 House of Commons, Standing Committee on Citizenship and Immigration (Evidence), 41st Parl, 1st Sess, No 37 (2 May 2012) at 1650 (Chantal Desloges).
97 Thériault’s methodology included review of the “transcript of the debates at the 1st, 2nd and 3rd reading and the report stage of the Bill C-31 legislative process in the House of Commons and the transcript of the meetings of the House of Commons Standing Committee on Citizenship and Immigration, as well as written briefs submitted to the committee. Senate proceedings were reviewed but were not included in Thériault’s analysis” (see Thériault, supra note 44 at 39–40, 42, 47).
98 Thériault, supra note 44 at 39. See also House of Commons Debates, 41st Parl, 1st Sess, No 94 (12 March 2012) at 6092 (Hon Jason Kenney); House of Commons Debates, 41st Parl, 1st Sess, No 126 (17 May 2012) 8304 (Peggy Nash).
99 Bond & Wiseman, supra note 68.
They further concluded that this both renders the legal aid funding model arbitrary and raises major access to justice concerns.

Provincial legal aid agencies play a central role in providing publicly funded lawyers to refugee claimants, who are often without the means to pay a private lawyer.\(^\text{100}\) Federal and provincial governments jointly fund provincial legal aid agencies, and while the precise coverage varies by jurisdiction, the three major refugee-hosting provinces have refugee and immigration law coverage of some kind.\(^\text{101}\) Bond and Wiseman’s study found that the need for legal aid funding to be reassessed to reflect changes in the new RSD system was raised on a number of occasions at the Immigration Committee during the course of its study on the proposed reforms. For example, refugee lawyer Raoul Boulakia spoke at length about the need to adequately resource legal aid, noting:

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 [Canada Border Services Agency] is going to get substantially more resources and the hearing system is going [to] 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 that out or ensure that the provinces will receive adequate funding or encouragement to continue with their legal aid funding.\(^\text{102}\)

Despite these concerns, the study concluded that “the federal government [gave] no meaningful consideration to the impact of the reforms on

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\(^\text{100}\) Inter-Clinic Immigration Working Group, “Refugee Law Services Reform: Feedback Response #8” (March 2013), Legal Aid Ontario, online: [www.legalaid.on.ca](http://www.legalaid.on.ca).


\(^\text{102}\) Bond & Wiseman, supra note 68 at 613–14; House of Commons, Standing Committee on Citizenship and Immigration, 40th Parl, 3rd Sess, No 15 (11 May 2010) at 3 (Raoul Boulakia).
the need for refugee legal aid services and, correspondingly, the accessibility of justice for those seeking asylum.”

4. **Rhetorical discourse surrounding the changes**

A heated national debate accompanied introduction of the recent refugee reforms, with several high profile government Members of Parliament, including the Minister of Citizenship and Immigration and the Minister of Public Safety, making regular appearances to publicly support the changes. Refugee-related issues were also central in the 2011 federal election, with the (now governing) Conservative Party of Canada running campaign ads that featured photos of the MV Sun Sea and accused opposition leaders of being “soft” on smugglers. Three UORAP studies have included work on the particular character and role of this discourse in framing and justifying the recent reforms: Emily Bates presented findings specifically focused on the rhetorical environment in “Overseas Resettlement and Inland Protection: Normalizing the Refugee Queue”; Jennifer Bond considered what the strong rhetoric indicated about the politicization of the reforms in “Failure to Report: The Manifestly Unconstitutional Human Smugglers Act”; and Pierre-André Thériault linked a discursive analysis to his work on timelines in “No Time to Explain: Access to Justice Issues in the Canadian Reformed Refugee Determination Procedure.”

Bates’s study focused specifically on how the discursive environment was framed, finding that the government successfully undermined the legitimacy of refugee claimants by invoking various manifestations of “queues” that were purportedly transgressed by individuals seeking protection in Canada. Bates found that throughout the reform process government spokespersons indicated that refugee claimants unfairly circumvented normal immigration procedures, overseas refugee resettle-

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103 Bond & Wiseman, supra note 68 at 584.
106 Bond, supra note 61.
107 Thériault, supra note 44.
108 The “immigration queue” included all immigration programs and advanced the idea that refugee claimants, and fraudulent claimants in particular, use the asylum system as a shortcut while others abide by the rules of the immigration system; see e.g. Citizenship and Immigration Canada, News Release, “Balanced Reforms Planned for Canada’s Asylum
ment procedures, and, paradoxically, asylum procedures. Bond’s study, meanwhile, noted that the rhetorical environment surrounding the human smuggling provisions in particular also villainized certain classes of refugee claimants by implying that they posed a threat to national security. Bond concluded that the government’s strategy of generating fear about asylum seekers, particularly those arriving by boat, was neither new nor without political calculation. Thériault’s study reached similar conclusions, finding that the use of these and other rhetorical mechanisms led to a “moral panic” that was used to justify an “othering” of refugee claimants and facilitate the introduction of extremely restrictive policies.

While the focus of each study was different, all of these works found that the government’s discourse surrounding introduction of the recent refugee reforms was accompanied by a symbolic attack on the legitimacy of asylum seekers generally framed in large part by constructed notions of “good refugees” and the associated need to prevent “bad,” “queue-jumping

109 The “refugee queue” comprised all Canadian refugee programs, including private and government sponsorship of overseas refugees, and advanced the idea that claimants should have applied for resettlement from overseas rather than arriving spontaneously in Canada to seek protection; see e.g. Citizenship and Immigration Canada, News Release, “Government of Canada Welcomes More Refugees Seeking Freedom from Persecution” (23 February 2011), online: Government of Canada <news.gc.ca> cited in Bates, supra note 105 at slide 9. In cases where the government paradoxically recognized the validity of the asylum system, the “asylum queue” advanced the idea that fraudulent claimants unfairly occupy space in the asylum system, causing undue delays for genuine refugees and undermining the validity of the system as a whole. See CIC, “Speaking Notes”, supra note 78, cited in Bates, supra note 105 at slide 10; see also Shauna Labman, “Queue the Rhetoric: Refugees, Resettlement and Reform” (2011) 62 UNBLJ 55, cited in Thériault, supra note 44 at 5.

110 Bond, supra note 61 at 402.

refugees” from abusing Canada’s immigration processes.\textsuperscript{113} Using this imagery, the government’s language drew a stark distinction between “genuine” refugees on one hand, and “fraudulent,” “phony,” or “bogus” refugees and “illegal migrants,” “human smugglers,” and “foreign terrorists” on the other.\textsuperscript{114} This rhetoric pervaded House of Commons and parliamentary committee debates, and appeared frequently in the media,\textsuperscript{115} undermining the respect and recognition afforded to refugee claimants legally seeking protection in Canada, and thus, jeopardizing their symbolic access to justice. This in turn created fertile ground on which to pass reforms that eroded both procedural and substantive access to justice as well.

A variety of studies thus indicate that the government failed to consider the access to justice implications of its recent reforms. This lack of consideration is not reflective of a lack of issues, however, and on the eve of implementation the potential for major access to justice deficits in the new system was of significant concern for actors in the refugee support and refugee law sectors. The issues they anticipated and feared are discussed in the section below.

III. ANTICIPATED ACCESS TO JUSTICE CONCERNS

As various legislative proposals began to crystallize, the UORAP formed to help mitigate some of the access to justice deficits that were anticipated to arise in the new RSD system. The UORAP has both a programming stream and a research stream: the former trains refugee support workers

\textsuperscript{113} Bates, \textit{supra} note 105; Bond, \textit{supra} note 61; Thériault, \textit{supra} note 44.

\textsuperscript{114} See e.g. CIC, “Speaking Notes”, \textit{supra} note 78 (in which the Minister of Citizenship and Immigration uses the term “bogus” eight times). See also Bond, \textit{supra} note 61 at 406; Bates, \textit{supra} note 105; Thériault, \textit{supra} note 44 at 35. For another study of this rhetorical framing that focuses more particularly on Roma refugees, see Petra Molnar Diop, “The ‘Bogus’ Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada’s Bill C-31” (2014) 30:1 Refugee 67.

\textsuperscript{115} For example, the Minister of Citizenship and Immigration alone used the term “bogus” no fewer than six times in the parliamentary debate on the PCISA and BRRA; see e.g. \textit{House of Commons Debates}, 40th Parl, 3rd Sess, No 33 (26 April 2010) at 1946 (Hon Jason Kenney); \textit{House of Commons Debates}, 40th Parl, 3rd Sess, No 89 (28 October 2010) at 5486 (Hon Jason Kenney); \textit{House of Commons Debates}, 41st Parl, 1st Sess, No 97 (15 March 2012) at 6361 (Hon Jason Kenney). The Minister used “fraudulent” at least 16 times, see e.g. \textit{House of Commons Debates}, 41st Parl, 1st Sess, No 108 (23 April 2012) at 7047 (Hon Jason Kenney); used the term “bogus” frequently in the media; see e.g. Tamara Baluja, “Tories Unveil Bill to Thwart ‘Bogus’ Refugees”, \textit{The Globe and Mail} (16 February 2012), online: <www.theglobeandmail.com>; Louise Elliott & Laura Payton, “Refugee Reforms Include Fingerprints, No Appeals for Some”, \textit{CBC News} (15 February 2012), online: <www.cbc.ca>.
on certain aspects of the new RSD system such that they are able to better support claimants as they gather evidence for their claim, while the latter aims to identify actual access to justice deficits in the new system. As the UORAP was taking initial steps to specify the exact nature of the activities it would pursue in its programming stream, team leaders identified an expressed need within the refugee support and refugee law sectors for collaborative information-sharing about the likely implications of imminent changes to the RSD system.\textsuperscript{116} Responding to this need, the UORAP facilitated a semi-structured, community-based, “environmental scan” process that focused on sharing perspectives on access to justice deficits (and associated responses) in the new RSD system. This first environmental scan was conducted during the six months immediately preceding implementation of the new legislation (June to October 2012). A second scan occurred after the modified RSD process had been in place for two years (December 2014 to January 2015).\textsuperscript{117}

Each environmental scan was semi-structured in that a broad spectrum of refugee support and non-profit legal organizations from across the country were invited to respond to a wide-ranging and open-ended survey designed to facilitate information-sharing about access to justice concerns and potential responses. This survey was followed by an in-person meeting of organizational representatives and acknowledged experts from across Canada, selected from amongst those surveyed as well as from academia.\textsuperscript{118} Both the refugee support and refugee law sectors play

\textsuperscript{116} For definitions of these groups, see supra note 12.
\textsuperscript{117} The purpose of this scan was three-fold: first, the project aimed to provide analysis to facilitate information and resource sharing within the refugee support and refugee law sectors; second, the UORAP’s programming stream planned to use information gained through this scan to ensure its own access to justice response was aimed at a unique and pressing need; and third, the UORAP stored the feedback garnered to help identify avenues for its research stream, which focuses on access to justice in the reformed refugee system.
\textsuperscript{118} The first environmental scan, like the second, included two core elements. First was a broadly distributed national survey of the refugee support and non-profit refugee law sectors, including service organizations, advocacy organizations, academics, and other individuals working in these sectors. This online survey was comprised of both closed and open questions soliciting information about the nature of the organization’s or individual’s work in the refugee support or non-profit refugee law sector, as well as planned or actual responses to refugee reform. The potential participants were reached via targeted outreach to UORAP’s network, as well as outreach via partners with substantial nationwide networks. Notably, the latter included the Canadian Council for Refugees (CCR) listserv. The CCR has over 150 member organizations across Canada, capturing the vast majority of refugee-serving organizations in the country. The survey was open for a period of two weeks, from August 8, 2012, to August 22, 2012, with an initial notice and two
a critical role in assisting refugee claimants in many ways, including with the RSD process. While there is variance across the sectors in the precise nature of assistance provided (and, correspondingly, variance in the background and expertise of those delivering assistance), their collective experience working with claimants is significant. Indeed, it is frequently those on the front-line in these sectors—especially settlement support workers and legal advocates—who have the most intimate knowledge of their clients’ social contexts, and many have significant experience in identifying access to justice deficits and attempting to mitigate the risks of unfairness and exclusion at both individual and systemic levels. Experts from these sectors are thus able to provide a critical perspective on the ways the refugee system meets—or fails to meet—the needs of the individuals it is designed to protect. The goal of the UORAP process was to facilitate information sharing such that all actors within the refugee support and refugee law communities would be able to benefit from their collective expertise and, ultimately, maximize the effectiveness of their work in the reformed environment.  

At the meeting held for the first environmental scan, participants reflected on process-related concerns that they thought would likely be introduced or exacerbated by the pending reforms, rather than on access to justice issues in the refugee system writ large. Participants identified a myriad of potential new access to justice deficits, exchanged information about likely responses from support agencies, and identified resulting ser-

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Methodologically, the approach taken to environmental scan processes was deliberately oriented to eliciting the views of those individuals and organizations most closely associated with supporting and advocating for the rights of refugees within the Canadian refugee system, and thus most acutely attuned to the potential causes and impacts of access to justice deficits in the context of refugee reform.
vice gaps. Cumulatively, these discussions provided a thorough mapping of anticipatory access to justice concerns from the perspective of experts familiar with both refugee claimants and the claims system.120

Results of this first environmental scan were compiled by the UORAP and widely distributed within the refugee support and refugee law sectors to facilitate organizational planning. The report revealed that the scope of access to justice issues expected to arise in the reformed RSD process was vast. Specific concern was raised about how multiple challenges would intersect and compound one another, resulting in exacerbation of procedural and substantive access to justice deficits.121 In what follows we share, with permission from participants, the array of anticipatory concerns that were identified. These are organized around six issue clusters that emerged in both survey results and meeting discussions.

A. Systemic unfairness for certain classes of claimants

Pending introduction of the new DCO and DFN regimes caused participants particular concern. Experts working in the LGBTQ refugee community, for example, warned that some DCO countries, while seemingly safe for most people, may still pose a serious risk to LGBTQ individuals. They found the substantive assumptions underlying the regime to be deeply problematic and prejudicial.122 Similar concerns were expressed with regard to women who experienced violence and a series of other groups. It was also noted that the DCO designation would likely prejudice the claimant in several compounding ways—by imposing even more severe timelines, barring access to the RAD and the PRRA, and, perhaps most significantly, by creating an unstated presumption that the relevant country of origin is safe—therefore eroding access to an impartial and personalized status determination hearing.123 Participants stated that

120 It bears highlighting that the focus of this enquiry was constrained to issues that affected the RSD process itself, and did not extend to legislative changes that impacted refugee claimants in other ways, for example the 2012 cuts to refugee health coverage. See e.g. Citizenship and Immigration Canada, News Release, “Reform of the Interim Federal Health Program Ensures Fairness, Protects Public Health and Safety” (25 April 2012), online: Government of Canada <news.gc.ca>.

121 UORAP, “Environmental Scan 1”, supra note 118 at 11; UORAP, “Stakeholder Meeting”, supra note 118 at 2.


123 IRPA, supra note 2, ss 109.1, 110(2)(d.1), 111.1(2), 112(2)(b.1); UORAP, “Environmental Scan 1”, supra note 118 at 21–23.
while the proposed new timelines were likely to create major issues for all claimants, the even tighter timelines placed on DCOs were prohibitive.\textsuperscript{124}

For DFNs, disadvantages due to similar limits on access to the RAD and PRRA were seen as being compounded by the five-year bar on H&C applications, as well as restrictions on permanent residence applications, travel documents, and family sponsorship for accepted refugees.\textsuperscript{125} Participants expressed general opposition to delineating different categories of claimants and particular concern that the cumulative results of these categorizations were stigmatizing, substantively and procedurally unfair, and deliberately punitive.\textsuperscript{126}

\textbf{B. Structural changes in the claims process}

The reforms introduced a variety of new procedures across many aspects of the RSD process. Three related access to justice concerns were identified. The first was an inherently temporary one—namely, that given the breadth and scope of procedural changes to the refugee system, the chronically under-funded and under-resourced refugee support and refugee law sectors would have difficulty adapting in a timely manner.\textsuperscript{127} Participants anticipated that it would take a great deal of training and updating before their staff, resources, and services were able to adapt to the new system and effectively assist claimants within it. Numerous participants noted that there had been no increase in resource allocation (temporary or otherwise) to facilitate the significant transitions that were needed.\textsuperscript{128}

Second, participants remarked that the new Basis of Claim (BOC) did not explicitly accommodate a full narrative of the claimant’s story.\textsuperscript{129} For counsel, the inability to provide a full, chronological account of a claimant’s history was perceived as representing a major impediment to effectively proving well-founded fear of persecution on Refugee Convention grounds.\textsuperscript{130} It was also noted that the BOC appeared to be crafted with the

\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid; UORAP, “Environmental Scan 1”, supra note 118 at 19, 22.
\textsuperscript{126} UORAP, “Environmental Scan 1”, supra note 118 at 22–23.
\textsuperscript{127} Ibid at 8, 12.
\textsuperscript{128} Ibid.
\textsuperscript{129} Ibid. Whereas the Personal Information Form (PIF) under the old refugee system included a dedicated space for a full narrative, the BOC represented an attempt to break out claim elements without using a full narrative.
\textsuperscript{130} Immigration and Refugee Board of Canada, “Basis of Claim Form”, (Ottawa: IRB, November 2012), online: <www.irb-cisr.gc.ca/Eng/res/form/Documents/RpdSpr0201_e.pdf> [IRB, “BOC”].
ultimate goal of accommodating self-represented claimants, an objective that was criticized as inappropriate given the complex legal test and vital importance of the document.\textsuperscript{131}

Third, concerns were raised about changes that would transform IRB decision-makers from Governor-in-Council (GIC) appointees to public servants.\textsuperscript{132} While participants acknowledged that the GIC appointment process had long been criticized for both its opacity and its potential for partisanship and patronage, there was concern that the new system brought into question the perceived and actual independence of decision-makers.\textsuperscript{133}

**C. Truncated timelines in all aspects of the RSD process**

The refugee support community identified the systematic tightening of timelines throughout the new RSD process as the change that was most likely to impact all claimants in an adverse manner.\textsuperscript{134} Implications for claimants’ access to both procedural and substantive justice were discussed at length, with participants anticipating that claimants would have difficulty with the “ridiculously short” timelines at all stages of the RSD process.\textsuperscript{135} At the RPD stage, for example, particular concerns were raised about both acquisition of evidence and ability to retain and instruct counsel, particularly where translation or interpretation is required.\textsuperscript{136} Partici-

\textsuperscript{131} UORAP, “Environmental Scan 1”, \textit{supra} note 118 at 3.

\textsuperscript{132} IRPA, \textit{supra} note 2, s 169.1.


\textsuperscript{134} IRPA, \textit{supra} note 2, s 100; IRPR, \textit{supra} note 26, ss 159.8–159.9, 159.91–159.92; UORAP, “Environmental Scan 1”, \textit{supra} note 118 at 3; CARL, \textit{supra} note 88; Canadian Council for Refugees, “New refugee system— one year on” (9 December 2013), online: <ccrweb.ca/files/refugee-system-one-year-on.pdf>.

\textsuperscript{135} House of Commons, \textit{Standing Committee on Citizenship and Immigration}, 40th Parl, 3rd Sess, No 18 (25 May 2010) at 17 (Max Berger). Note that this was Berger’s characterization of the timelines before they were further shortened by the PCISA.

\textsuperscript{136} IRPA, \textit{supra} note 2, s 100; IRPR, \textit{supra} note 26, s 159.9; UORAP, “Environmental Scan 1”, \textit{supra} note 118 at 21.
pants also noted that the paper-based nature of the RAD\textsuperscript{137} made it critical that claimants be represented by competent counsel with adequate time to prepare submissions, and that this would be extremely difficult in some cases, especially if a claimant was changing counsel after the initial hearing. Concerns were also raised about the time it takes to produce and review transcripts from the RPD hearing and to obtain any relevant new evidence.\textsuperscript{138} Cumulatively, these issues led participants to fear that the RAD would be least effective for individuals who had been poorly represented at the initial hearing because there would simply not be enough time to change counsel and properly prepare a modified case.

D. Limited recourse for failed claimants

While the 2012 reforms contained implementation provisions for a long-awaited RAD,\textsuperscript{139} they also restricted access to several important mechanisms for certain “classes” of claimants, raising concerns about both inequalities in the system and, for some individuals, the lack of recourse in the face of a negative decision. Participants noted that an absence of measures for correcting errors in first-level decision-making increased the risk that refugees would be mistakenly returned to persecution, which in turn placed renewed emphasis on the import of the fairness of the initial hearing before the RPD.\textsuperscript{140}

More specifically, participants warned that the 12- or 36-month bar on accessing a PRRA or H&C would close off vital protection avenues for individuals who, despite an unsuccessful refugee claim, were in genuine

\textsuperscript{137} IRPA, \textit{supra} note 2, s 110(3); IRPR, \textit{supra} note 26, s 159.91.

\textsuperscript{138} UORAP, “Environmental Scan 1”, \textit{supra} note 118 at 21; UORAP, “Stakeholder Meeting”, \textit{supra} note 118.

\textsuperscript{139} See Harrold and Elgersma, \textit{supra} note 33. See also Canadian Council for Refugees, “Refugee Appeal Division”, online: <ccrweb.ca>; Canadian Council for Refugees, “Support the Implementation of the Refugee Appeal Division: Meeting with a Member of Parliament”, online: <ccrweb.ca/sites/ccrweb.ca/files/static-files/documents/meetingRADen.pdf>. For a pre-reform analysis of the important role that could be played by an administrative appeal process, see Stacey A Saufert, “Closing the Door to Refugees: The Denial of Due Process for Refugee Claimants in Canada” (2007) 70 Sask L Rev 27.

\textsuperscript{140} Bars on PRRA and H&C and the lack of an automatic stay of removal when seeking judicial review mean that a refugee claimant, whose claim fails on identity, for example, but whose hearing includes no meaningful assessment of risk, could be deported without any further assessment. Regarding bars on PRRA and H&C access, see \textit{Bill C-31, supra} note 1, cl 13(3), amending IRPA, \textit{supra} note 2, s 25(1.2); \textit{Bill C-11, supra} note 1, cl 15(2), amending IRPA, \textit{supra} note 2, s 112(2).
Participants also expected that measures intended to speed up deportations would result in individuals being removed from Canada before the bar on these mechanisms expired, meaning that the risks faced by certain individuals facing deportation would never be properly assessed by any aspect of the Canadian process. Specific opposition was also raised with regard to the accessibility and efficacy of H&Cs more generally. The reforms would prevent a claimant from pursuing a refugee claim and an H&C application concurrently, and participants speculated that many individuals would be required to choose between these options before legal aid counsel was in place, raising the spectre that they would lack guidance about the most strategic approach. It was also unknown at the time whether deportations would be stayed while an H&C application was ongoing, leading to serious doubt as to whether meaningful access to this mechanism would ever be available.

Finally, it was emphasized that certain failed claimants would only have recourse through an application for judicial review at the Federal Court—a mechanism that provides a remedy on very narrow grounds. Participants noted that the new system would prevent an automatic stay of removal for certain claimants while leave for judicial review was being sought. The additional time it would take for counsel (frequently legal aid counsel) to argue for individual stays in these cases was also noted with concern. Participants flagged that a lack of an automatic stay of removal while leave was sought would introduce a risk of deportation before a ruling was made on leave.

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141 UORAP, “Environmental Scan 1”, supra note 118 at 22; UORAP, “Stakeholder Meeting”, supra note 118 at 10.
142 Recall that the language governing execution of a deportation order changed from “as soon as reasonably practicable” to “as soon as possible”, see IRPA, supra note 2, s 48(2).
143 IRPA, supra note 2, s 25(1.01).
144 UORAP, “Environmental Scan 1”, supra note 118 at 22.
146 See generally, supra note 50. For jurisdiction and grounds of judicial review see IRPA, supra note 2, s 72; Federal Courts Act, RSC 1985, c F-7, s 18.1(4). Grounds for review are summarized in Citizenship and Immigration Canada, ENF 09: Judicial Review, (Ottawa: CIC, 30 January 2006) at 9.
147 IRPR, supra note 26, s 231(2); CIC, “Summary of Changes”, supra note 89.
148 UORAP, “Environmental Scan 1”, supra note 118 at 18–19, 21; See IRPR, supra note 26, s 231(2); CIC, “Summary of Changes”, supra note 89.
E. Increased availability of detention

The spectre of prolonged periods of mandatory detention under the new system was identified as punitive and likely unconstitutional. Participants raised concerns about unfounded deprivations of liberty, increased risk of prolonged family separation, severe mental health implications, and financial deprivations. They also noted that during periods of detention, adequate access to counsel (and other assistance) can be significantly curtailed as a result of limited visiting hours, security clearance requirements, lengthy commutes, and difficulty establishing contact with a legal service provider. These limitations also have the potential to exert a significant, negative impact on BOC preparation, the evidence gathering process, general hearing preparation, and detention reviews. Participants also expressed doubt about the ability of legal aid agencies to respond to the legal needs of detained claimants, particularly given that it was anticipated that the number of people in detention would increase significantly as a result of the introduction of the DFN and DCO categories.

F. Exacerbation of resource constraints

Participants expected that the long-standing resource shortages that have characterized the refugee system for years would intensify under the new system. The combination of tighter timelines and new process components promised to further strain already-stretched legal aid funds and participants warned that it would most likely not be possible to provide legal support for all claimants in all parts of the system. The possibility of a dramatic increase in unrepresented claimants was a cause of grave concern.

149 IRPA, supra note 2, s 55(3.1).
150 UORAP, “Environmental Scan 1”, supra note 118 at 22; UORAP, “Stakeholder Meeting”, supra note 118 at 11.
151 UORAP, “Stakeholder Meeting”, ibid. There was concern that DCO claimants would be increasingly detained on grounds that their flight risk would be enhanced due to the prospect of imminent deportation.
152 Bond & Wiseman, supra note 68 at 585.
Participants also expected that other areas of the services sector would be strained. For example, it was suggested that the already limited availability of low-cost translation and interpretation services would be exacerbated, further inhibiting claimants’ ability to navigate the new system and, importantly, present all relevant evidence. The ad hoc and variable assistance provided by front-line workers from non-legal agencies was also identified as being in jeopardy, as a result of the complexity of the new system, the tightened timelines, and chronically constricted funding.

Access to justice considerations must inform the design and implementation of any effective, fair, and legitimate legal process. The first UORAP environmental scan revealed that in the months immediately preceding implementation of the recent reforms, there were significant concerns amongst those in the refugee support and refugee law sectors about the procedural, substantive, and symbolic dimensions of access to justice in the new refugee status determination process. As December 2012 grew closer, those on the frontlines of the system braced for the impact of the impending changes.

IV. INSTITUTIONAL IMPLICATIONS OF REFUGEE SYSTEM REFORM

The depth and scope of the 2012 refugee system reforms meant that decision-makers, government agencies, and service providers all had to undergo their own transformations to adjust to a modified operational environment. The result was, to varying degrees, structural reforms, re-framed priorities and mandates, and changes in resource allocation. This section considers these institutional implications by briefly examining changes at the IRB, CIC, the CBSA, provincial legal aid agencies, and within the refugee support and non-profit refugee law sectors. It is noteworthy that while many actors in the latter two groups were particularly motivated by access to justice concerns, responses across all stakeholders impacted the ultimate access to justice landscape, regardless of whether they deliberately engaged these issues. The institutional implications of

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154 UORAP, “Environmental Scan 1”, supra note 118 at 11–12, 21; Canadian Council for Refugees, Keeping the Door Open: NGOs and the New Refugee Claim Process (October 2014) at 3, online: <ccrweb.ca/sites/ccrweb.ca/files/ngo-claim-process-report.pdf> [CCR].

155 UORAP, “Environmental Scan 1”, supra note 118 at 7; Bond & Wiseman, supra note 68 at 596; CCR, supra note 154 at 6.
the reforms thus form a key part of understanding access to justice in the new system.

While a detailed discussion of the operational realities surrounding each stakeholder group is beyond the scope of our analysis, it is important to highlight one significant factor that has had a profound impact across the post-reform system—a radical decline in refugee claims. Over the last 20 years, Canada received an average of 27,000 refugee claims annually. Institutional actors preparing for refugee system reform thus assumed that while hesitancy about the new system might result in a slight drop in claims in early 2013, the overall claim rate would remain reasonably consistent. Instead, claims dropped precipitously, and in 2013 the total claim number was just over 10,000—a 50 percent decrease from 2012. Significantly, claims from DCOs were down 88 percent and only one group arrival triggered application of the DFN regime, meaning that two of the most scrutinized aspects of the reforms were used with far less frequency than predicted.

Three aspects of these figures are important to emphasize as part of our discussion regarding the institutional implications of the reforms. First, the drop in claims meant that all stakeholders benefited from less resource-strain than anticipated. This had particularly positive impacts on potential access to justice deficits, as institutional resource allotment per claimant was generally higher across all aspects of the system as a result of the decline in demand. Second, there are strong indications that these low claim numbers are a temporary phenomenon. Compared to the 10,000 claims in 2013, Canada received over 13,500 claims in 2014, an in-


158 Canada received 10,350 claims in 2013 as compared to 20,469 in 2012. CIC, “Claimants per Year”, supra note 156.

159 When compared to figures from the same countries for three years prior to the reforms. See Citizenship and Immigration Canada, News Release, “Protecting Canada’s Asylum System From Abuse” (10 October 2014), online: <news.gc.ca>.


161 CCR, supra note 154 at 12. This will also be discussed further below in each section.
crease which may indicate a gradual return to historical figures.\textsuperscript{162} Finally, programs or institutions that receive annual budget allocations on the basis of demand from the previous fiscal year may end up with a smaller overall budget and diminished per-claimant capacity, if claim totals eventually approach pre-reform levels.\textsuperscript{163}

The sudden decline in refugee claimants significantly affected the operational environment of each of the actors described below, and may have blunted, or at least delayed, some potentially detrimental impacts of the reforms. Institutional implications of the system changes were nonetheless unavoidable, however, and these are briefly canvassed here.

\textbf{A. The Immigration and Refugee Board}

The IRB is the administrative tribunal responsible for carrying out Canada’s RSD process, including rendering first-instance and appeal decisions on refugee claims.\textsuperscript{164} In the several years preceding refugee reform, the number of claims finalized by the IRB ranged from 15,000 to over 33,000 per year.\textsuperscript{165} Refugee protection activities represented approximately 70

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\textsuperscript{162} Immigration and Refugee Board, “Refugee Claims—Statistics, Trends and Projections” (27 August 2015), online: <www.irb-cisr.gc.ca>.

\textsuperscript{163} The reasons for the immediate decline in refugee claim numbers are complex and engage legislative reform, regulatory changes, and targeted communication policies on the part of the government; they will not be tackled here. Also in need of analysis is the fact that the overall success rate of refugee claims is higher under the reformed RSD system than the old system. Again, this investigation would need to engage rigorous analysis of many potentially influential factors, including the introduction of new decision-makers, new timelines, the drop in claim numbers (potentially influencing the availability of legal aid counsel in the largest refugee-receiving provinces), and so on. Investigation of both of these areas is ultimately of significant relevance to the access to justice character of the new system, but is both beyond the scope of this paper and premature at this juncture, when claim numbers and decision-rates remain in flux. See IRB, “Two Years”, supra note 54; Immigration and Refugee Board, “The Refugee Protection Division: Issues and Trends” (Presentation delivered at the Canadian Council for Refugees Spring Consultation 2015, May 2015) [unpublished, on file with authors] [IRB, “Issues and Trends”].

\textsuperscript{164} Refugee decisions must weigh written evidence and oral testimony presented by the claimant and any intervening Minister’s counsel at a live hearing, and often include major credibility findings. The IRB also adjudicates other immigration matters including admissibility, detention reviews, and cessation and vacation of protected status. See Immigration and Refugee Board, “About the Board” (31 March 2015), online: <www.irb-cisr.gc.ca>; Immigration and Refugee Board of Canada, Assessment of Credibility in Claims for Refugee Protection (9 September 2004), online: <www.irb-cisr.gc.ca>.

\textsuperscript{165} The number of claims finalized each year closely corresponded to the number of Board Members on the roster, which fluctuated between 75 and 125 during that period. See Immigration and Refugee Board, Performance Report for the Period Ending March 31, 2007 (Ot-
percent of all IRB program spending during this period,\textsuperscript{166} with an average expenditure of approximately $3,500 per claim.\textsuperscript{167}

The IRB described the 2012 reform as “one of the most significant transformations in its history.”\textsuperscript{168} Subsequent to passage of the BRRA in 2011, the IRB created a refugee system reform plan for its transition,\textsuperscript{169} which included the creation and administration of the RAD,\textsuperscript{170} new procedures for hiring RPD decision-makers,\textsuperscript{171} a plan for the closure of the Ottawa hearing room,\textsuperscript{172} and implementation of faster timelines and a slew of new procedures.\textsuperscript{173} As part of this planning, the IRB modelled around the need to clear a backlog of over 30,000 “legacy claims,”\textsuperscript{174} while simultaneously processing an expected intake of 21,500 new claims each year.\textsuperscript{175} It allocated $30.8 million—almost 20 percent of its operational budget—for refu-
gee system reform implementation.\textsuperscript{176} Recognizing that transition needs would be profound and continual, it also allocated significant ongoing funding for reform implementation.\textsuperscript{177}

By the end of fiscal year (FY) 2013–14, the IRB reported that average claim processing time had been reduced to approximately four months—well below the 20-month pre-reform average, but outside the timelines envisaged in the new regulations.\textsuperscript{178} Delays in the CBSA’s Front-End Security Screening processes were deemed largely responsible for this situation,\textsuperscript{179} which saw the IRB miss its timeline targets on a high percentage of cases in the first 18 months of the new system in particular.\textsuperscript{180} During this same period, however, the number of legacy claims in backlog was reduced by almost half.\textsuperscript{181} Training has been a core focus at the RPD, where 80 per cent of decision-makers are new,\textsuperscript{182} and at the RAD, where the process is new and the caseload is increasingly complex.\textsuperscript{183} Finally, as stipulated in the legislative reform, the IRB has been preparing to take on responsibility for PRRA determinations in the near future.\textsuperscript{184}

\textsuperscript{176} See Immigration and Refugee Board of Canada, 2013–14 Report on Plans and Priorities—Part III (Ottawa: IRB, 15 October 2015) at “Expenditure Profile”, online: <www.irb-cisr.gc.ca> [IRB, “RPP 2013–14”]. The IRB’s operational budget was $165 million in FY 2012–13. See Immigration and Refugee Board, 2012–2013 Financial Statements (Ottawa: IRB, 2013), online: <www.irb-cisr.gc.ca>. This allocation was made in addition to the standard funding for this activity stream, which was already over half of the operating budget in FY 2013.\textsuperscript{177} Allocations included $17.9 million for reform implementation in 2013–14, and $19.5 million in both of 2014–15 and 2015–16. IRB, “RPP 2013–14”, supra note 176 at “Expenditure Profile.”\textsuperscript{178} IRB, “PR 2014”, supra note 48 at 15.\textsuperscript{179} This is mandatory security screening for every claimant, which must be completed before the hearing can be carried out. See e.g. Canada Border Services Agency, Admissibility Screening and Supporting Intelligence Activities—Evaluation Study (Ottawa: CBSA, 20 November 2009), online: <www.cbsa-asfc.gc.ca>. The IRB noted, in 2014, that “initially, delays in receiving confirmation of Front-End Security Screening (FESS) caused significant hearing delays; by the end of the reporting period, the situation had improved, but lack of [FESS] continued to have an impact on RPD processing times” (see IRB, “PR 2014”, supra note 48 at 15).\textsuperscript{180} IRB, “PR 2014”, supra note 48 at 15.\textsuperscript{181} Backlog dropped from over 30,000 cases at the time of refugee system reform implementation to 15,200 cases by the end of the 2013–14 fiscal year. See CIC, “Refugee Programs”, supra note 174; IRB, “PR 2014”, supra note 48 at 7.\textsuperscript{182} IRB, “PR 2014”, supra note 48 at 7.\textsuperscript{183} Ibid at 17. The Chairperson notes that “cases became increasingly complex in nature in all divisions.”\textsuperscript{184} This will have budget implications for the IRB, and will be implemented on a date to be fixed by the Governor-in-Council. See Bill C-11, supra note 1 at cl 15(1), amending IRPA, supra note 2, s 112(1). See also Immigration and Refugee Board, Part III—Report on Plans
Like other stakeholders in the refugee sector, the IRB radically overestimated the number of claimants it would need to process in the post-reform system and benefited significantly from the sudden reduction in claimants. The IRB now estimates that annual refugee arrival numbers will rise to approximately 16,000 annually by 2015–16, and it has revised its operations on the basis of this figure.

B. Citizenship and Immigration Canada and the Canada Border Services Agency

Two different government agencies are responsible for supporting Canada’s immigration and refugee system, and each was impacted by the reforms. While publicly available information about the refugee-specific activities of these agencies is limited, some general information is available and is summarized below.

CIC is responsible for inland refugee intake and admissibility screening, PRRA determinations, and H&C applications. With the support of this department, the Minister of Citizenship and Immigration may also

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185 The IRB had planned for up to 21,500 claims per year through to 2015. IRB, “RPP 2012–13”, supra note 157 at 16.

186 The IRB projects numbers at 16,000 per year for the next three years (see Immigration and Refugee Board, “Refugee Claims—Statistics, Trends and Projections” (27 August 2015), online: <www.irb-cisr.gc.ca>). With regard to staffing, whereas the IRB had planned for a RAD staff of 170, it needed only 62 employees in 2013–14 and expects to need only 100 in the coming years (see IRB, “PR 2014”, supra note 48 at 17; IRB, “RPP 2015–16”, supra note 184 at 14). However, the estimates for the number of staff needed at the RPD have increased between forecasting done for 2012–13, where higher claim numbers were expected (see IRB, “RPP 2012–13”, supra note 157 at 14), and for 2015–16, when lower claim numbers are expected (see IRB, “RPP 2015–16”, supra note 184 at 11).

187 These agencies have broad mandates and information about their activities that engage refugee claimants and are often subsumed under broader activity reporting. See Citizenship and Immigration Canada, “Our Mandate” (30 June 2014), online: <www.cic.gc.ca>; Canada Border Services Agency, “What we do” (27 March 2012), online: <www.cbsa-asfc.gc.ca>.

188 For procedures, see Citizenship and Immigration Canada, “Procedures at Inland Offices Regarding In-Canada Claims for Refugee Protection” (2014), online: <www.cic.gc.ca>.

189 This function will be transferred to the IRB in the coming years (see Report on Plans and Priorities, supra note 184).

intervene in refugee claims.\textsuperscript{191} Between 2007 and 2011, CIC’s refugee protection programming stream comprised between five and eight percent of its annual expenses.\textsuperscript{192} CIC received over $17 million in funding to facilitate refugee system reform.\textsuperscript{193} Supported by these funds, the department undertook the \textit{Refugee Reform Project}\textsuperscript{194} to facilitate implementation of the new refugee system, which included taking on new areas of responsibility such as supporting DCO designation procedures\textsuperscript{195} and developing evaluation metrics to monitor the implementation of refugee reform.\textsuperscript{196} CIC also introduced new administrative forms, implemented a modified intake and scheduling procedure, adapted to new claimant categories and new eligibility criteria, and updated its informational materials for claimants.\textsuperscript{197}


\textsuperscript{193} This funding was allocated when Bill C-11 was passed but was carried through to the implementation of the reforms in 2012 (see Treasury Board of Canada Secretariat, \textit{Supplementary Estimates (B), 2010–11 For the Fiscal Year Ending March 31, 2011}, (Ottawa: TBCS, 2011) at 78, 122, online: <www.tbs-sct.gc.ca/est-pre/20102011/sups/B/docs/index-eng.pdf> [TBS, “Estimates 2011”]; Citizenship and Immigration Canada, \textit{Reports on Plans and Priorities (RPP) — Supplementary Tables}, (Ottawa: CIC, 2013), online: <www.cic.gc.ca>).


\textsuperscript{196} Observatory of Public Sector Information, “Metrics of Success”, online: <www.oecd.org>.

\textsuperscript{197} CIC, “Processing Refugee Claims”, \textit{supra} note 191.
partment also introduced a *Ministerial Reviews and Interventions Pilot* project in 2012 with the goal of enhancing capacity for ministerial interventions.\(^\text{198}\)

While public evaluation of the CIC’s *Refugee Reform Project* will not be released until 2016,\(^\text{199}\) some preliminary information is available.\(^\text{200}\) For example, a recent CIC report indicates that the vast majority of eligibility assessments are being processed on schedule, meaning that this mandatory process is not currently a barrier to achieving the overall tight timelines.\(^\text{201}\) CIC is also monitoring country conditions to facilitate implementation of the DCO regime.\(^\text{202}\) The department continues to prepare for the transfer of the PRRA process to the IRB, and in the meantime has seen an increase in the number of PRRA-related court cases to which the Minister of Citizenship and Immigration, supported by CIC, must respond.\(^\text{203}\) Since the implementation of the new system, the proportion of CIC’s budget devoted to its refugee programs each year has fallen to three percent or less.\(^\text{204}\)

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\(^\text{198}\) Citizenship and Immigration Canada, *Reports on Plans and Priorities (RPP) — Supplementary Tables*, (Ottawa: CIC, 2014) at “Refugee Reform Project”, online: <www.cic.gc.ca> [CIC, “RPP 2014–15”]. A review of this pilot project is slated for March 2016 (see Citizenship and Immigration Canada, *Reports on Plans and Priorities (RPP) — Supplementary Tables*, (Ottawa: CIC, 2015) at “Refugee Reform Project”, online <www.ci.gc.ca>). Generally, “CIC intervenes in cases involving credibility or program integrity issues, while CBSA is responsible for cases involving criminality or security issues. CBSA is also responsible for cases that involve both credibility/program integrity issues and criminality/security issues (hybrid cases), and any detained cases (currently or in the past), regardless of grounds” (see CIC, “Processing Refugee Claims”, *supra* note 191).


\(^\text{201}\) More than 97 percent were processed within three days (see Citizenship and Immigration Canada, *Departmental Performance Report for the Period Ending March 31, 2014*, (Ottawa: CIC, 2014) at 46, online: <www.cic.gc.ca/English/pdf/pub/dpr-2014.pdf> [CIC, “PR 2014”].

\(^\text{202}\) *Ibid.* 37 countries had been listed at time of writing (see full list at Citizenship and Immigration Canada, “Designated Countries of Origin”, (10 October 2014), online: <www.cic.gc.ca>.

\(^\text{203}\) CIC attributes this increase to the fact that the legislation is new, and it expects it to decrease in volume over time (see CIC, “PR 2014”, *supra* note 201 at 47).

The CBSA is responsible for intake and eligibility determinations at ports of entry, detention, and removals. In addition, the CBSA supports the Minister of Public Safety’s interventions in refugee claims at the IRB and may instigate proceedings to remove refugee status via cessation and vacation. Reporting on the CBSA’s activity areas encompasses broad client groups, and an indication of the proportion of the agency’s budget dedicated to refugee programs is not publicly available.

The CBSA received approximately $8.5 million in dedicated funding to implement refugee system reform. The agency hired 100 new enforcement officers to speed up removals of failed claimants and reduce its backlog of removal cases and implemented the Assisted Voluntary Return


206 The Minister of Public Safety may intervene in “cases that involve both credibility/program integrity issues and criminality/security issues (hybrid cases), and any detained cases (currently or in the past), regardless of grounds” (see CIC, “Processing Refugee Claims”, supra note 191). Cessation and vacation are processes by which protected person or refugee status are removed. Refugee status may be removed via vacation if it “was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter” (see IRPA, supra note 2, s 109(1)). Grounds for cessation of refugee status include “the following circumstances: (a) the person has voluntarily reaveled themself of the protection of their country of nationality; (b) the person has voluntarily reacquired their nationality; (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality; (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or (e) the reasons for which the person sought refugee protection have ceased to exist.” (See IRPA, supra note 2, s 108). Both determinations are subject to a hearing and decision at the IRB. Whereas there has historically been no automatic removal of permanent residence following a cessation determination, Bill C-31 stipulated that cessation pursuant to subsections (a) to (d) of IRPA, s 108 would result in immediate loss of permanent residence and inadmissibility to Canada. See Bill C-31, supra note 1 at cls 18–19, amending IRPA, supra note 2, adding ss 40.1(2), 46(1).


and Reintegration (AVRR) pilot project to encourage the return of low-risk failed claimants.\textsuperscript{209} The CBSA also aimed to facilitate the achievement of faster overall timelines by trying to expedite its Front-End Security Screening process for all adult claimants as well as eligibility assessments of refugee claimants who present their claim at a port of entry.\textsuperscript{210} The agency noted that in the post-reform environment it would continue to pursue ministerial interventions and to support CIC in doing so via its \textit{Hearings Program}.\textsuperscript{211} Finally, in 2013 the CBSA issued an operational bulletin stating that it would set a target of 875 cessation or vacation applications (to strip status) that year,\textsuperscript{212} a sharp increase from the average of less than 40 cessation applications and an average of just over 100 vacation applications per year from 2009 to 2012.\textsuperscript{213}

While comprehensive reporting on the CBSA’s implementation of refugee system reform has not yet been released,\textsuperscript{214} some early indications of its activities are available. For example, the CBSA has reported some success with its intensified removals program, noting that it “removed almost 14,000 failed refugee claimants and other inadmissible persons from Canada” in 2013–14.\textsuperscript{215} In contrast, its AVRR pilot program led to just over 3,000 removals before it was discontinued due to limited effectiveness and high cost per removal.\textsuperscript{216} The CBSA’s ability to carry out Front-End Security Screening within the timelines of the new system has fallen short in the period since implementation of the new system, and in 2014 the IRB reported that over 20 percent of hearings were subject to a change in date.

\begin{thebibliography}{99}
\item [209] Canada Border Services Agency, \textit{Audit of the Refugee Reform Initiative} (19 June 2013) at 2, online: <www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2013/rri-irsoa-eng.pdf> [CBSA, “RRI Audit”]. This pilot will not be continued.
\item [210] \textit{Ibid} at 7; see also IRB, “PR 2014”, \textit{supra} note 178.
\item [211] CBSA, “RPP 2012–13”, \textit{supra} note 208 at 33.
\item [213] Woo, \textit{supra} note 54. The actual number of proceedings commenced was in fact much lower than the target, but still many times higher than the number before refugee system reform (see IRB, “Two Years”, \textit{supra} note 54 at slides 12, 13).
\item [214] An early audit of CBSA’s readiness for implementation of the refugee system reform was published in June 2013, but had little to say about actual implementation. See CBSA, “RRI Audit”, \textit{supra} note 209.
\item [215] CBSA, “PR 2014”, \textit{supra} note 205 at 1.
\end{thebibliography}
as a result of delays in this process.\textsuperscript{217} Cessation and vacation proceedings have also increased five-fold between 2012–13 and 2014–15,\textsuperscript{218} but the funding for this enhanced programming appears to subside in 2016–17.\textsuperscript{219} The CBSA has noted that increases in its total expenditures in recent years have been in part due to implementation of the new refugee system.\textsuperscript{220}

\section*{C. Legal Aid}

As discussed above, a detailed UORAP study concluded that there was no coordinated effort between the federal government and provincial legal aid agencies to address potential implications of the 2012 reforms.

Instead, individual programs were required to identify and respond to changes that would have critical impacts for their operations. These ad hoc responses, combined with existing diversity between provincial legal aid agencies, meant that approaches varied significantly between jurisdictions. In this section, we explore briefly the institutional implications for legal aid programs in the three provinces responsible for processing the vast majority of Canada’s refugee claims: British Columbia, Ontario, and Quebec.\textsuperscript{221}

British Columbia’s Legal Services Society (LSS) provides legal support\textsuperscript{222} to refugee claimants at various stages of the claims process via a tariff con-
tract program and duty counsel. All tariff contract services are subject to merit and financial eligibility screening. In the years immediately preceding the 2012 reforms, immigration and refugee services represented approximately four percent of all tariff contracts issued, and between two and three percent of the LSS’s overall annual expenses.

In anticipation of the new system, the LSS “revamped its services for refugees, provided training for staff, and consulted with immigration lawyers on the best ways to serve clients.” It subsequently amended its tariff contracts to include the RAD, “bundled” its screening process for the
BOC form and RPD stages, and produced plain-language informational materials for refugee claimants. Despite these adaptations, the LSS expressed concern about its ability to meet claimant needs in the new system, noting that “no provision [had] been made for cost increases as a result of the changes to immigration legislation or other justice reform initiatives.” As a result of the decline in claimant numbers, the number of immigration tariff contracts the LSS issued dropped by 18 percent from 2012 to 2013, and by a further 25 percent in the following year. In FY 2013–14, the LSS issued fewer than half as many tariff contracts as it had issued in FY 2009–10. Despite the drop in number of tariff contracts issued, the LSS expenditure on immigration services was comparable between FYs ending in 2010 and 2014. This may be due in part to a significant number of extra fee requests from counsel facing ministerial interventions, multiple hearings, or other refugee claim complications, as well as a rise in pressure on the program’s budget for appeals before the RAD and non-RSD services.

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229 LSS, “Electronic Communication”, supra note 222. LSS had previously undertaken merit and financial screening for the initial refugee forms, and a separate screening for the refugee hearing, each of which was eligible for a 10-hour legal aid tariff. Under the tighter timelines of the new system this was combined into a 16-hour tariff for both.


233 This drop was not due to a declining rate of approval for tariff applications. In fact, it was accompanied by an even steeper decline in the number of tariff applications, meaning that while the number of tariffs ultimately issued went down, the percentage of applications approved actually went up. See LSS, “Service Plan Report 2013”, supra note 225 at 46; LSS, “Speaking Notes”, supra note 224. Approval rates are: 2009, 70%; 2010, 61%; 2011, 61%; 2012, 64%; 2013, 72%; 2014, 74% (these percentages were calculated using data from LSS, “Service Plan Report 2014”, supra note 225 at 48; LSS, “Service Plan Report 2011”, supra note 225 at 43). LSS has indicated that the approval rate for tariffs for refugee claims at the RPD level was 83% in 2014 (see LSS, “Speaking Notes”, supra note 224).

234 Overall expenditure for immigration services was $1,935,316 or 2.4% of total expenses in FY ending 2010, and was $1,965,505 or 2.4% of total expenses in FY ending 2014. Percentages calculated using total immigration expenses over total expenses each year. For FY ending 2010 see LSS, “Service Plan Report 2013”, supra note 225 at 28; for FY ending in 2014 see LSS, “Service Plan Report 2014”, supra note 225 at 32.

235 LSS, “Electronic Communication”, supra note 222. Extra fee requests are assessed on a case by case basis and may be granted in cases of Ministerial intervention, clients in detention, multiple hearings, vulnerable person applications, dual nationality requiring
Legal Aid Ontario (LAO) covers a range of legal services for refugee claimants provided through a certificate program, community legal clinics, student legal aid services societies, and three specialized refugee and immigration law staff offices. Claimants must pass financial and merit screening to qualify for support. In the years before the recent reforms, immigration and refugee services represented approximately 11 percent of LAO’s certificate program. When combined with the operation of its largest specialized refugee law staff office, the Refugee Law Office (RLO), this represents between six and seven percent of LAO’s overall client services budget.

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236 This includes BOC preparation, representation at the RPD for the initial decision, cessation and vacation, written appeals to the RAD, applications for Judicial Review at the Federal Court, applications for stays of removal, PRRA preparation, and others. See Legal Aid Ontario, “Services for Refugee Claimants”, online: <www.legalaid.on.ca>.

237 See Legal Aid Ontario, “Types of Help”, online: <www.legalaid.on.ca>. All lawyers offering refugee services must belong to Legal Aid Ontario’s immigration and refugee law panel, a body regulated and governed by LAO which sets and monitors compliance with service standards. As of September 2014 there were 668 Ontario lawyers on LAO’s refugee panel. See Legal Aid Ontario, “Refugee Law Panel Standards” (2015), online: <www.legalaid.on.ca>.

238 These are the Refugee Law Office, LAO’s largest specialized refugee legal clinic (which provided 780 assists in 2012–13, see Legal Aid Ontario, 2012/2013 Annual Report (Toronto: LAO, 2013), online: <www.legalaid.on.ca/en/publications/downloads/annualreport_2013.pdf> [LAO, “2013 Annual Report”]), the Hamilton Refugee Clinic, and the LAO Ottawa District Office, which has an Immigration Section and provides some duty counsel services (see Legal Aid Ontario, “Refugee and Immigration Staff Lawyers in Ottawa” (2014) [on file with authors]). For a full list of legal clinics see Legal Aid Ontario, “Community Legal Clinics”, online: <www.legalaid.on.ca>. These clinics use their own eligibility criteria, see e.g. Legal Aid Ontario, “Am I Eligible for Legal Aid?”, online: <www.legalaid.on.ca>. LAO also provides summary legal advice by phone on immigration matters (see LAO, “2013 Annual Report”).

239 As of November April 1, 2015, LAO implemented the second of three annual 6% financial eligibility increases for all of its certificate and duty counsel services. Legal Aid Ontario, “Am I Eligible for Legal Aid?”, online: <www.legalaid.on.ca>.


241 Ibid.
In anticipation of the 2012 reforms, LAO launched an extensive consultation process with a discussion paper outlining key challenges and potential revisions to service models, including greater use of duty counsel, clinics, paralegals, self-help materials, unbundling, and telephone advice. Interim measures introduced in December 2012 preceded proposed reforms to the full services model and a follow-up consultation was held in early 2013. Key changes included “unbundling” the certificates for the BOC and the RSD hearing, pilot testing RAD services, and differentiating between DCO and non-DCO claimants in LAO merit screening.

Following implementation of the reforms, LAO saw a 38 percent drop in refugee and immigration certificates, and by early 2014 these represented only six percent of the overall certificate program. This significant drop was accompanied by only a modest decrease in actual refugee and immigration certificate expenditures, with the cost of those certificates making up almost 11 percent of the total. Expenditures on refugee certificates and RLO operations reached over six percent of LAO’s overall client services budget, just as they did in the pre-reform environment.

In addition to its revised services model, LAO recently introduced strengthened Refugee Law Quality Standards that will be applicable to all

242 Legal Aid Ontario, Consultation Paper: Meeting the Challenges of Delivering Refugee Legal Aid Services, (Toronto: LAO, 2012), online: <www.legalaid.on.ca/en/publications/downloads/refugee2012/Refugee2012.pdf> [LAO, “Consultation Paper”]. This was also done in the context of broader modernization and efforts to stem rising costs overall (see Legal Aid Ontario, “Refugee Law Services Consultations”, online: <www.legalaid.on.ca> [LAO, “Service Consultations”]; LAO held 13 consultation meetings between November 5 and December 10, with clinics, community organizations, and private lawyers).

243 Legal Aid Ontario, “Interim Changes to LAO’s Refugee Law Services After Mid-December” (11 December 2012), online: <legalaid.on.ca>.

244 LAO, “Service Consultations”, supra note 242.

245 Ibid. Whereas the legal aid certificate for the Personal Information Form (PIF) and hearing had been joined until September 2012, under the interim measures, the BOC and hearing were on separate certificates in an approach known as “unbundling” (see LAO, “Consultation Paper”, supra note 242).

246 This involves a new merit assessment screening as well as a new set of certificates on a fixed budget of $500,000 (Electronic Communication with Legal Aid Ontario Representative, 16 November 2014).

247 LAO, “Service Consultations”, supra note 242. Stakeholder responses are online at Legal Aid Ontario, “Refugee Law Services Feedback” (February 2013), online: <www.legalaid.on.ca>.


249 This drop was accompanied by only a modest decrease in proportion of budget spent on immigration certificates (see LAO, “2013 Annual Report”, supra note 238 at 23).
legal-aid funded lawyers (in an effort to increase quality and accountability of counsel), completed a review of the RLO’s efficiency, updated its LawFacts website, and revised its application and eligibility processes to meet tight timelines (including at the judicial review stage). In response to stakeholder feedback about the realities of preparing a refugee claim in the new RSD system, the agency has also recently redistributed the hours available via BOC and RPD certificates. In addition, LAO recently expanded access to judicial and alternative remedies by improving the tariff for stay motions in Federal Court and for requests for humanitarian and compassionate consideration.

La Commission des services juridiques (CSJ) provides legal aid in Quebec via legal aid tariffs that provide private lawyers with a flat rate of payment for services at most stages of the refugee claim process. The CSJ also funds three staff lawyers and a director at its immigration office in Montreal. Individuals must meet stringent financial eligibility and merit


252 Ibid at 10.

253 Ibid at 11, 15.

254 Under the change, the overall number of hours remains constant, but a larger proportion is given to the BOC stage (see Legal Aid Ontario, “Refugee and Immigration Services: Private Bar Services”, online: <www.legalaid.on.ca>).

255 Commission des services juridiques, “Nouveaux Services», online: <www.csj.qc.ca>.

256 This is similar to the tariff/certificate systems in British Columbia and Ontario, but it provides a flat rate per service rather than an hourly rate. This includes the BOC, RAD, RPD, Judicial Review, detention reviews, permanent residence applications, etc. Note that services are broken down into broad categories with a single rate of pay per category (e.g. “all services up until a final decision”, see Agreement between the Minister of Justice and the Barreau du Québec respecting the tariff of fees and expenses of advocates under the legal aid plan and the dispute settlement procedure, (19 March 2013) V, CQLR 2013, c A-14, r 5.1, s 130, online: <www2.publicationsduquebec.gouv.qc.ca> [2013 Quebec Tariff Agreement]).

screening in order to qualify for legal aid.\footnote{258} In the years prior to implementation of the 2012 reforms, clients with immigration cases comprised between two and three percent of the CSJ’s clientele.\footnote{259} Publicly available financial data for the CSJ does not provide information about the proportion of the budget dedicated to immigration issues.\footnote{260}

In early 2013, the Quebec government updated its agreement on legal aid tariffs, which includes services in immigration law.\footnote{261} However, the negotiation of this update occurred before refugee system reform implementation, and although the process of refugee reform had been underway for some time, changes to the refugee system do not appear to have been taken into account as the Minister of Justice and Barreau du Québec negotiated immigration tariffs. The immigration and refugee tariffs remained largely unchanged under the new agreement.\footnote{261} While the RAD has been incorporated in practice into the provision that covers the Immigration Appeal Division, no other tariffs were added or amended, and

\footnote{258} CSJ, “Services”, supra note 101. Individuals who do not meet the financial eligibility may still receive some contribution to their legal fees.


\footnote{261} 2013 Quebec Tariff Agreement, supra note 256. See also \textit{Loi sur l’aide juridique et sur la prestation de certaines autres services juridiques}, CQLR 2013, c A-14, online: \textless www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=1&file=59201.pdf \textgreater .

\footnote{262} Minor changes included adding an amount for H&C additional work, which had previously been provided on application (see 2013 Quebec Tariff Agreement, supra note 256, s 128) and a slight increase in tariff for judicial review hearings (see 2013 Quebec Tariff Agreement, supra note 256, s 138). See also Electronic Communication with AQAADI Representative, 27 April 2015.
new terminology (including the “Basis of Claim” form) is not reflected in key documents.\textsuperscript{263} Overall, publicly available information and consultation with the refugee law sector in Quebec\textsuperscript{264} suggests that the CSJ did not further alter its service model or rate of service provision in response to the new refugee system.

D. Refugee support sector and non-profit refugee law sector\textsuperscript{265}

The refugee support and non-profit refugee law sectors are comprised of a heterogeneous group of organizations and individuals connected by a common commitment to supporting refugee claimants by providing free or subsidized services and/or advocating for systemic changes to assist claimants.\textsuperscript{266} Although the majority of these organizations do not have claim assistance as their core mandate, they are often front-line service providers who in practice assist claimants with all of their most pressing needs, including, frequently, the need for support as they navigate Canada’s RSD processes. Many in these sectors are thus intimately familiar with both the circumstances and processes facing actual refugee claimants.

In the months leading up to implementation of the 2012 reforms, these sectors focused significant energy on understanding and preparing for changes in the system. Content at annual national conferences and

\begin{itemize}
\item \textsuperscript{263} 2013 Quebec Tariff Agreement, supra note 256. Compare Regulation to ratify the Agreement between the Minister of Justice and the Barreau du Québec respecting the conditions of practice, the procedure for the settlement of disputes and the tariff of fees of advocates under the legal aid plan entered into on 4 April 2008, CQLR c A-14, r 6, online: <www2.publicationsduquebec.gouv.qc.ca> [2008 Quebec Tariff Agreement]; Communication with representative of CSJ, October 2015.
\item \textsuperscript{264} AQAADI, “Access to Justice”, supra note 257; 2008 Quebec Tariff Agreement, supra note 263; 2013 Quebec Tariff Agreement, supra note 256.
\item \textsuperscript{265} Recall that the first environmental scan included a broadly distributed survey of the refugee support and non-profit refugee law sectors, including service organizations, advocacy organizations, academics, and other individuals working in these sectors, soliciting information about the nature of the organization’s or individual’s work in the refugee support or non-profit refugee law sector as well as responses to refugee reform. Information in this section stems from that activity. Note that while the scan captured a significant portion of these sectors, it is not exhaustive, and it can be expected that some service responses are not captured here. See UORAP, “Environmental Scan 1”, supra note 118.
\item \textsuperscript{266} For a summary of organizations included in the first environmental scan, see UORAP, “Environmental Scan 1”, ibid at Appendix A. For summary definitions of these sectors see supra notes 12 and 13.
\end{itemize}
regional community meetings shifted focus to refugee system reform, and multiple additional information sessions, workshops, webinars, and other information-sharing activities were carried out. Organizations across Canada implemented plans to adapt their long-standing services to the modified demands of the new system.

In anticipation of an overwhelmed legal system that would not be able to sufficiently meet the demand for services under the new RSD process, many of the initial changes in these sectors reflected an increased focus on the need to offer more support during the initial stages of the claim process, and organizations enhanced their capacity to offer legal referrals, legal information, and even in some cases in-house legal advice. There was also a renewed emphasis on the use of non-legal professionals for the provision of some assistance with the RSD process, including “research, form-filling and translation of documents, identifying supporting evidence and analyzing ministerial interventions.” In addition, a highly successful Vancouver-based program aimed at familiarizing claimants with refugee hearing rooms and IRB procedures was expanded to Toronto and Montreal, and mock hearings became a more common practice amongst many NGOs. Written guides, including the UORAP’s Hearing

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268 See e.g. extensive informational materials made available by the CCR at Canadian Council for Refugees, “CCR Library”, online: <ccrweb.ca>.


270 Ibid. UORAP, “Environmental Scan 1”, supra note 118 at 4, 6; for example, some organizations partner with counsel who provide pro bono advice and services on a weekly basis, offer workshops for claimants, and provide referrals to legal services.

271 CCR, “NGO Report”, supra note 161 at 12; UORAP, “Environmental Scan 1”, supra note 118 at 7. This may include staff members, trained volunteers, and peer support groups.

272 UORAP, “Environmental Scan 1”, supra note 118 at 7.


274 Ibid.
Preparation Kit\textsuperscript{275} were supplemented by training sessions\textsuperscript{276} and a wide variety of information dissemination activities.\textsuperscript{277}

A dramatic increase in advocacy activities in these sectors also coincided with the reform process, including engagement in, and instigation of, public debate on key issues,\textsuperscript{278} participation in the parliamentary process,\textsuperscript{279} and initiation of direct court challenges to new laws.\textsuperscript{280} A number of academic- and practitioner-led research initiatives continued or were launched,\textsuperscript{281} and NGOs participated in ongoing consultations to monitor the impact of the new system on refugees.\textsuperscript{282}

Despite the substantial drop in claims since the implementation of the 2012 reforms, the refugee support and non-profit refugee law sectors have


\textsuperscript{277} These activities included, for example “[c]reating and/or distributing information for refugee claimants, refugee support workers, and others, which relates to the refugee claim process, changes in policy, new legislation, or other topics related to settling in Canada; public legal education in various forms, including information sessions, public workshops, conferences, panel discussions, etc; written materials, orientation packages for claimants, country reports, support documents for lawyers, etc; reports to government and policy papers for public consumption; one-on-one information sessions with support workers; and academic and organizational research products” (UORAP, “Environmental Scan 1”, supra note 118 at 4, 8).

\textsuperscript{278} These activities included “public awareness campaigns at the local, provincial, and/or national levels--including through editorials, op-eds, multi-media projects, etc” (UORAP, “Environmental Scan 1”, supra note 118 at 9).

\textsuperscript{279} Ibid at 25. For a partial list of witnesses appearing for study of Bill C-31 at the House of Commons Standing Committee on Citizenship and Immigration, see Thériault, supra note 44 at 43.


\textsuperscript{281} These activities included: tracking deported claimants, detention of claimants, healthcare access, conditions in countries of origin, impacts of the designated country of origin scheme, experiences of LGBT asylum seekers and those from a from sexual- and gender-based violence background, and identifying public legal education needs (UORAP, “Environmental Scan 1”, supra note 118 at 10).

faced significant and at times unexpected strains.\textsuperscript{283} Many of these can be traced to the tighter timelines under the new system, which require NGOs to intensify their services and often stretch capacity despite low claim numbers.\textsuperscript{284} For example, some NGOs have felt it necessary to pay for translation of documents and transportation to meetings and hearings because an increasing number of indigent claimants are unable to cover these expenses. They report that under the pre-reform system less aggressive timelines meant that many claimants were able to find work or another source of income before their RPD hearing, and were thus less reliant on outside support.\textsuperscript{285} A pervasive lack of resources has led to concerns about the ongoing sustainability of a number of organizations, which are facing both funding pressures and staff fatigue.\textsuperscript{286}

The depth and scope of the 2012 refugee system reforms carried significant implications for key institutional actors. Cumulatively, these implications, and responses to them, shaped the post-reform RSD environment. The section that follows discusses the access to justice deficits that were reported in that system two years after its implementation.

\section*{V. ACTUAL ACCESS TO JUSTICE CONCERNS}

In December 2014 and January 2015, the UORAP facilitated a second environmental scan process that again saw experts from the refugee support and refugee law sectors exchanging information and perspectives through both a survey and an in-person meeting. The aim of this process was to share experiences with access to justice deficits that had actually materialized since implementation of the reformed RSD process. As with the first environmental scan, the focus was exclusively on concerns that were introduced or exacerbated since the reforms. Significantly, the perceived access to justice deficits that were identified can once again be grouped around six thematic clusters, most of which mirror those that emerged in the first environmental scan. It is, however, noteworthy that in many cases the detail within these clusters varies from the anticipated concerns that were originally identified.\textsuperscript{287} With permission of participants we share

\begin{footnotesize}
\textsuperscript{283} UORAP, “Environmental Scan 2”, \textit{supra} note 282; CCR, “NGO Report”, \textit{supra} note 161.
\textsuperscript{284} CCR, “NGO Report”, \textit{supra} note 161 at 11, 13.
\textsuperscript{285} Ibid at 13, 15.
\textsuperscript{286} Ibid at 16.
\textsuperscript{287} One issue raised but that will not be discussed is an apparent increase in governmental efforts to remove refugee status from recognized refugees using cessation. It was noted that IRB data shows that cessation applications increased by 400\% in the first year of the new
below the views expressed by experts in the refugee support and refugee law sector about access to justice deficits in Canada’s new RSD process.\textsuperscript{288}

\textbf{A. Systemic unfairness for certain classes of claimants}

The number of DCO and DFN claimants under the new system has been significantly lower than expected.\textsuperscript{289} Nevertheless, participants raised concerns about the ongoing availability of these categorizations and noted that the DCO regime is currently the subject of a constitutional challenge.\textsuperscript{290} Participants also noted that the extremely truncated timelines for DCO hearings create challenges in gathering evidence and preparing argument.\textsuperscript{291} Some noted that experienced refugee counsel are refusing these cases due to time restrictions, and there was general concern that the disadvantage facing some DCO claimants is exacerbated by inferior

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\textsuperscript{288} UORAP, “Environmental Scan 2”, \textit{supra} note 282. The methodology of this second environmental scan mirrored the first. It included a broadly distributed online survey of the refugee support and non-profit refugee law sectors. This survey was open from December 8, 2014 to January 12, 2015 with an initial notice and two reminder emails to the pool of potential participants. The pool of participants included UORAP’s network of over 300 trainees, multiple stakeholder organizations, and counsel partners, as well as outreach via partners with substantial nationwide networks. The stakeholder meeting was held on January 23, 2015 and gathered 22 experts from across the refugee support and refugee law sectors. This included UORAP representatives as well as delegates from umbrella NGO organizations, national advocacy organizations, legal aid agencies, private lawyers, academics, and others. This meeting lasted one half day and included semi-structured, guided discussion about access to justice issues under refugee reform.

\textsuperscript{289} See \textit{supra} notes 56 and 61 and their accompanying texts for descriptions of these two categories, respectively. At the time of writing, only one group arrival had triggered application of the DFN regime, with limited public information about the consequences for those designated (including use of mandatory detention, processing, and claim outcomes; see CBC, “Smuggling”, \textit{supra} note 160). Concerns about future use of the designation remain an ongoing concern among our participants.

\textsuperscript{290} The challenge is led by the Canadian Association of Refugee Lawyers that alleges “the DCO regime violates section 7 of the Charter because it is overly broad and grossly disproportionate because the criteria for designation have allowed for the designation of countries such as Mexico, Hungary, and Croatia where claimants are in fact at risk of persecution” and “the DCO regime discriminates against refugee claimants on the basis of their national origin and therefore contravenes s. 15 of the Charter”, Jared Will, “DCO Challenge: Federal Court” in Canadian Association of Refugee Lawyers, \textit{CARL Quarterly} (April 2015) 3:1 at 3, online: <carl-acaadr.ca/sites/default/files/CARL%20Quarterly%20Volume%203%20Issue%201%20-%20April%202015%20final.pdf>.

\textsuperscript{291} CCR, “NGO Report”, \textit{supra} note 161 at 5.
legal representation. The lack of DFN cases was viewed with some relief, although it was widely anticipated that another boat arrival would immediately result in wide-scale (and unfair) designation. Participants also expressed concern about the many procedural bars that limit recourse for failed DCO and DFN claimants. These are discussed in more detail below.

**B. Truncated timelines in all aspects of RSD process**

As predicted, the tighter timelines under the new system have led to a number of access to justice deficits. Participants noted that individuals already in Canada are in some cases delaying their claim in order to retain counsel, obtain evidence, and complete other preparatory steps before triggering the aggressive timelines by filing the BOC. Concerns were raised that this strategy leaves vulnerable people with no legal status, and unable to access health care and other vital social services. It was also noted that delays in filing for protection could be used in the RSD process as a basis for questioning a claimant’s subjective fear, a substantive determination that has the potential to defeat a claim for protection.

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292 Julianna Beaudoin, Jennifer Danch & Sean Rehaag, “No Refuge: Hungarian Romani Refugee Claimants in Canada” (2015) 11:3 Osgoode Hall LJ 45–48, online: <papers.ssrn.com>. Rehaag’s study provides an evidentiary basis for concerns that for Hungarian Roma claimants in particular, a small number of lawyers who take on a high volume of claims provide very low quality representation. Indeed, in a recent disciplinary proceeding at the Law Society of Upper Canada, a lawyer who had represented over 500 Roma claimants between 2008 and 2012 with a success rate of only 1 per cent pleaded guilty to professional misconduct. At the time of writing the lawyer had not yet been sentenced; two of the other highest-volume counsel were also subject of LSUC proceedings (see Law Society of Upper Canada v Hohots, LCN15/15 (Order Summary), online: ONLSHP <lawsoctytribunal.ca/OrderAndReasons/Hohots%20(2015-05-11).pdf>; Maureen Brosnahan, “Roma Family Whose Lawyer Mishandled Claim Want Case Reassessed”, CBC News (17 April 2015), online: <www.cbc.ca>.

293 See also CCR, “NGO Report”, supra note 161 at 8.


295 As part of the test in Canada’s RSD system, claimants must demonstrate that they have a well-founded fear that has two elements: objective—that is, grounded in factual circumstances of the case, and subjective—that this, “the existence of the fear of persecution in the mind of the refugee” (see Canada (AG) v Ward, [1993] 2 SCR 689, 103 DLR (4th) 1). Subjective fear has been closely linked to credibility; factors including delay in fleeing harm and delay in claiming can cause doubt as to subjective fear. See e.g. Assadi v Canada (Minister of Citizenship and Immigration) (25 March 1997), [1997] 2 FC 0, IMM-2683-96 (FCTD); Parmar v Canada (Minister of Citizenship and Immigration), [1997] 139 FTR 203, 75 ACWS (3d) 923 (FC); see also Immigration and Refugee Board of Canada, Interpretation
Participants reported that legal aid agencies are processing certificates and tariffs expeditiously under the new system, but this was attributed in large part to the radical decrease in demand.\textsuperscript{296} Even with speedy legal aid processing, the tight BOC timeline is reportedly a problem for many claimants, with some finding it difficult to obtain counsel, complete all forms, and cover basic settlement needs within a very truncated period.\textsuperscript{297} The haste involved in this phase of the process raised concern about the accuracy of the BOC and the potential that omissions and inconsistencies may be used against the claimant in the hearing or require additional counsel resources to correct.\textsuperscript{298} It was further noted that these issues are likely to intensify if claim rates return to normal levels as a result of the fact that processing times at legal aid would likely increase.

The truncated timelines were also seen to create further problems in the RPD process after filing the BOC because they limit the time available to meet with counsel and support services, and affect claimants’ ability to gather evidence.\textsuperscript{299} For the RAD, participants reported that the timeline for filing the appeal is often too short to produce high-quality submissions, especially if there is a change of counsel from the RPD. Extensions of time for these submissions also appear to be granted inconsistently, creating additional implications for both fairness and quality.

There were also concerns that the impact of the timelines on other institutional actors may have an adverse effect on claimants’ fair access to the RSD process. For example, participants reported that an inability on the part of the CBSA to complete its Front-End Security Screening process under the tighter timelines results in many last-minute adjournments,\textsuperscript{300} as do constraints on the availability of IRB members or Minister’s counsel. Participants noted that last-minute hearing delays can create significant psychological stress for claimants, create extra work for lawyers and other service providers, and have resource implications for legal aid programs,

\begin{flushleft}
\textsuperscript{296} See e.g. LAO, 2013 Annual Report, supra note 238 at 23.
\textsuperscript{297} See CCR, Refugee Hearing Report, supra note 294 at 5.
\textsuperscript{298} Ibid.
\textsuperscript{299} CCR, NGO Report, supra note 161 at 5–6; CCR, Refugee Hearing Report, supra note 294 at 2–3.
\textsuperscript{300} See IRB, “Performance Highlights”, supra note 217; see also IRB, “Two Years”, supra note 54 at slide 9 (statistics presented by the IRB via its Consultative Committee on Practices and Procedures in June 2014 show Front-End Security Screening delays dropped from over 20% in 2013 to 9% in 2014).
\end{flushleft}
which are sometimes asked to fund additional counsel work to facilitate a second round of hearing preparation.  

Finally, it is noteworthy that the second UORAP environmental scan revealed the possibility of regional disparities regarding the circumstances under which a claimant’s request for a change in hearing date or late submission of evidence is granted. Consequently, participants reported differing views on the degree to which relief from the impact of the strict timelines is available under the new system. This inconsistency is once again concerning from the perspective of system fairness and quality.

C. Limited recourse for failed claimants

Participants expressed concern about legislative bars that prevent many claimants from accessing the RAD, noting that this creates a significant inequity within the RSD process and a heightened risk that errors in first-instance decision-making will not be corrected. The one-year PRRA and H&C bars for all claimants were also identified as creating a major access to justice deficit in the new system, and participants noted that a primary consequence of bars on these measures is a heightened possibility of refoulement to significant harm.

Judicial review was raised as an important recourse measure that remains available, in principle, to all claimants. However, it was observed that individuals in some jurisdictions are adversely affected by legal aid requirements that counsel complete the first stage of representation (an opinion on the merits of the judicial review) without guarantee of pay. It

302 See Immigration and Refugee Board, Refugee Protection Division Rules, SOR/2012 256, s 54 (this applies both in advance of the hearing and once the hearing has begun).
303 IRPA, supra note 2, s 110(2); this includes DFNs, DCOs, claimants determined to have no credible basis or be manifestly unfounded, and exceptions to the Safe Third Country Agreement (claimants who are allowed to lodge their claim at the Canada-US border despite a general ban).
304 See supra note 51 (for discussion on the PRRA bar).
305 Refugee Convention, supra note 35; Refugee Protocol, supra note 35; the Refugee Convention states that no country shall “expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”
306 See Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38:1 Queen’s LJ 1 (in practice, the leave rate for judicial review is very low); See supra note 50 (details about the judicial review process).
307 LAO, Consultation Paper, supra note 242 at 7 (LAO had previously changed the way it issues judicial review certificates, requiring applications to be initiated without coverage
was noted that, in these circumstances, it can be difficult to find a lawyer willing to take some cases, and the out-of-pocket cost associated with this critical step can thus inhibit access to the judicial review process. This carries particularly troubling implications for claimants who are barred from the RAD and are thus only able to seek recourse from a negative decision through judicial review. In other jurisdictions, low legal aid tariffs throughout the judicial review process were also noted with concern.\textsuperscript{308}

Finally, participants noted that since some claimants—namely those barred access to the RAD—are denied an automatic stay while awaiting a decision on a judicial review application, a further consequence of the new system is an increase in motions to stay deportation orders pending applications for judicial review. This, in turn, results in a significant cost that is frequently borne by legal aid agencies.

\textbf{D. Detention-related issues}

While participants did not note any significant increase in the number of claimants in detention under the new system, a major concern arose regarding new procedures for filing a claim while detained. In particular, participants noted that while detained claimants in the pre-reform system had 28 days to file their initial forms, the practice in the new system requires that inland claimants who make their claim on arrest must file the BOC within three days. This extremely tight timeline creates obvious challenges for accessing counsel, arranging interpretation, and receiving supplementary support, and participants raised specific concern that the CBSA routinely requires detainees to fill in the BOC on this tight timeline, regardless of whether they have secured counsel or adequate interpretation.\textsuperscript{309}

\textsuperscript{308} 2013 \textit{Quebec Tariff Agreement}, \textit{supra} note 256, s 134 (while this is one of the higher tariffs it is considerably lower than Ontario’s rate, which covers a total of 27 hours at a rate of $109.14 to $136.43/hour for non-complex cases); See Legal Aid Ontario, “Tariff & Billing” (2015), online: <legalaid.on.ca>; LAO, “Judicial Review”.

In this context, participants reiterated that the BOC carries founda-
tional importance in a refugee claim. Further, correcting initial errors
or omissions can be difficult (particularly on short timelines) and in-
consistencies can lead to credibility concerns that have the potential to
undermine the entire claim. Participants felt that forcing unrepresented
persons to file BOCs constituted a major threat to access to justice. It was
also noted that these concerns are exacerbated by the ongoing difficulties
that many counsel and frontline support agencies face in gaining access to
detention facilities in a timely manner.\footnote{310}

\textbf{E. Resource constraints}

Participants noted that ongoing resource constraints intersect with time
constraints and new procedural steps to cause serious access to justice
issues throughout the reformed RSD process.\footnote{311} For example, the cost and
time needed for translations and interpretation was seen as particularly
problematic under the new system, as the availability of volunteers has
become much more restricted as a result of the tight timelines.\footnote{312} In addi-
tion, participants expressed concern about specific resource-allocation
decisions that have been made by legal aid programs, and noted that the
effects of the 2012 reforms on an already under-funded legal aid system
are likely to become much more pronounced if claim numbers return to
pre-reform levels.\footnote{313}

\textbf{F. Increased use of Ministerial interventions}

Participants identified a rise in Ministerial interventions before the RPD
and a perceived loosening of the standard by which the Minister decides
to intervene.\footnote{314} Ministerial interventions generally involve evidentiary

\footnote{310} CCR, NGO Report, supra note 161 at 11–12.
\footnote{311} For more detail on this under-resourcing, see Bond & Wiseman, supra note 68 at 605–06.
\footnote{312} CCR, Refugee Hearing Report, supra note 294 at 12; CCR, NGO Report, supra note 161 at 3, 6, 13, 15.
\footnote{313} AQAADI, “Access to Justice”, supra note 257 (this included pervasive critique of CSJ Que-
bec's tariffs); LAO, “Judicial Review”, supra note 307 (no funding of deferral of removal
requests or Judicial Review notice from LAO); LSS, “Electronic Communication”, supra
note 222 (and significant pressure on appeals in BC).
\footnote{314} CIC, RPP 2014–15, supra note 198 (this cannot be concretely confirmed using publicly
available information, but a pilot project to increase capacity for ministerial interventions
was introduced in 2012); see IRB, “Two Years”, supra note 54 at slide 10 for statistics (early
statistics indicate that ministerial interventions are now occurring in 20% of cases, up
submissions by the Minister (either in written or *viva voce* form) with the objective of contesting some aspect of the claimant’s submissions.\textsuperscript{315} Claimants may respond to Ministerial interventions, but doing so frequently increases preparation time for counsel and psychological stress for claimants. In addition to their potential to restrict access to protection, increasing Ministerial interventions raised participant concerns that the RSD process is becoming more adversarial and “anti-refugee.”

The second environmental scan thus revealed that from the perspective of individuals in the refugee support and refugee law sectors, many of the access to justice deficits that were anticipated to arise in the post-reform environment are now perceived to have materialized. In the final section of this paper we approach identification of access to justice deficits in the new system from a different perspective—through analysis of an actual claimant case file.

### VI. ACCESS TO JUSTICE IN ANTOINE’S CASE

While the foregoing analysis provides initial and informal identification of certain access to justice deficits from the perspective of actors in the refugee support and refugee law sectors, a separate and ongoing UORAP study seeks to conduct a more multi-faceted and rigorous analysis using actual claimant files. In particular, this multi-year research project draws on a valuable data pool of full refugee claimant files (including hearing audio) obtained through a unique information-sharing agreement with the IRB (and with consent of claimants and counsel). The UORAP research team is currently conducting detailed analysis of these files using a custom-designed analytical framework that aims to identify and probe access to justice deficits, with a particular focus on issues relating to evidence.\textsuperscript{316} Outcomes of that research will be available in 2016, but an initial qualitative review of select cases indicates that this study may corroborate some of the access to justice issues raised by participants in the second environmental scan. For current purposes, a preliminary assessment of one of these cases serves to both underscore the relevance of social con-

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\textsuperscript{315} CIC, ENF 24, *supra* note 191 at 6.

\textsuperscript{316} See UORAP, *Hearing Preparation Kit, supra* note 275 (this focus is consistent with the UORAP’s programming activities, which provided written materials and full-day training to front-line refugee support workers with the ultimate aim of equipping them to assist with evidence identification and evidence gathering).
text to the RSD process and illustrate the way various access to justice deficits appear in an actual claim. Given the important personal interests at stake in the RSD process, it also seems apposite to conclude this paper with a reminder that access to justice deficits in the refugee system raise more than merely academic concerns—as Antoine’s narrative exemplifies, these issues exert very real pressures on a decision-making process that frequently engages questions of life and death.

A. Antoine’s Case

It will be recalled that Antoine identified himself as a man in his early 20s from a central African country plagued by violent conflict and civil strife. His refugee claim was based on fear of recruitment into, or punishment at the hands of, military groups active in the civil war, and engaged several grounds for claiming refugee protection: persecution on the basis of (imputed) political opinion, ethnicity, and membership in a particular social group. Antoine claimed that after the death of his parents, and the abduction of his siblings by rebel groups, he too had been abducted by rebels. Managing to escape captivity, he first fled to a neighbouring country and from there journeyed by shipping container to the US and then clandestinely to Canada, where he made his refugee claim at an inland CIC office after living for two months without status. He was represented by a legal aid-funded lawyer and his claim was heard under Canada’s reformed refugee system.

As is typical of refugee claims, Antoine’s case illustrates the significant interests that are at stake in the RSD process. Antoine claimed that deportation to his home country would expose him to re-capture by the rebels or informal state military conscription and, in either case, complete loss of freedom, significant likelihood of abuse, and tangible risk of serious injury or death. The RSD process was tasked with determining both the credibility of these claims and whether the risks Antoine faced met the legal definition of a refugee.

Like many refugee claimants, Antoine’s social context includes a number of characteristics that could affect his capacity to adequately participate in the RSD process and, in turn, his likelihood of fully accessing

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317 The claimant’s actual name and other personal details have been altered or obscured to protect his identity and privacy.
318 *IRPA, supra note 2, s 96* (recall that the refugee definition is contained here); See also *Refugee Convention, supra* note 35, art 1(A).
procedural and substantive justice in Canada’s refugee system. Antoine’s ability to communicate with counsel and officials, and to understand and participate in the RSD process, would likely be constrained by the fact that his native tongue was an African language and that he had only basic capacity in French, and none in English. Additionally, Antoine was relatively young, came from a country with inadequate social and educational systems, and had experienced significant trauma while in captivity and during flight. He lacked any support network in Canada or in his home country and, at the time of his claim, he was destitute and had been living in shelters and on the street.

A major issue in Antoine’s case centered around his identity and, in particular, the sufficiency of the evidence he provided to prove either identity or membership in an ethnic group that was vulnerable to forced recruitment. Analysis of Antoine’s file reveals that a number of features of his social context likely contributed to these evidentiary challenges, as briefly described below.

First, Antoine was fleeing a country that is known to have an unreliable system for issuing identity documents (let alone re-issuing them). At the time he was born, it was registering very few births formally, and Antoine claimed to have never been issued a birth certificate. His country’s international communications infrastructure is also inadequate and deteriorated, making contact with the relevant agencies particularly difficult from outside the country. Obtaining proof of identity and ethnicity from a remote country like Canada is therefore inherently challenging. One avenue suggested in the IRB’s National Documentation Package319 for his country is to seek verification from a village chief. However, Antoine had been displaced as a young child and by the time of his claim could no longer be sure who the chief was or how to contact him. He also had no family in his home country on whom he could rely to investigate this question. Counsel submitted that, in the context of civil strife and the poor administrative system in Antoine’s home country, there was simply no possibility of successfully pursuing that avenue within the accelerated 60-day timeline. Suggestions on the part of the decision-maker that he request identity documents from the state itself belie the fact that he feared state military conscription and was thus not in a position to rely on or communicate with his home country in this way.

319 See Immigration and Refugee Board, “National Documentation Packages” (2014), online: <www.irb-cisr.gc.ca> (National Documentation Packages contain country information and are maintained by the IRB for the assistance of decision-makers).
Personal communication difficulties within Canada also posed a significant hurdle for Antoine. An interpreter was necessary for both communication with counsel and hearing participation, but in each case this could only be arranged via telephone as a result of limits on interpreter availability. In the critical preparatory period, the need for translation also slowed the process of working with counsel to prepare the claim, especially during the seven days when Antoine was in detention on identity-related issues. At the hearing, although communication was possible, the interpreter did not speak the same dialect as Antoine and there were significant sound quality problems. The file reveals that the cumulative results of these systemic and personal communication barriers generated both challenges for obtaining proof of identity and ethnicity, and impediments to effective communication with key actors within the RSD system, including the decision-maker.

These difficulties may have been compounded by Antoine’s immature and under-developed communication skills and mental capacity. Counsel and others interacting with Antoine noted a naïve and simplistic world view, confusion about dates and sequences of events, and a mental capacity below what might be expected for his age. The causes were suspected to lie not merely in his modest educational background but also in his traumatic experiences before and during flight, potential re-traumatization during detention in Canada, and the possibility of an undiagnosed mental condition. All told, these factors could have rendered his testimony less sympathetic and believable. It is noteworthy that despite these observations, the file does not contain independent medical evidence on either diminished mental capacity or trauma, which may reflect a scarcity of time or financial resources.

Antoine’s poverty also impacted his engagement with the RSD system. For example, he was unable to purchase the passport-sized photographs required for his application forms because of the associated cost, potentially raising yet another identity-related concern. Affidavit evidence from a relative and from a Canadian settlement worker originally from Antoine’s home country were eventually presented as verification of his identity and ethnicity, but these types of evidence are vulnerable to being regarded as weak and unpersuasive.

Antoine’s refugee hearing was heard by the IRB in April 2014. A more detailed analysis of his case—including the outcome—will be provided in the UORAP’s larger access to justice study, where it forms part of a 40-case data set that is being closely analyzed from an access to justice per-
spective. For present purposes, it is sufficient to note the significant role that social context played in his engagement with Canada’s RSD process. Also noteworthy is the fact that many of the access to justice issues identified in the UORAP’s environmental scans appear to manifest themselves in this narrative.

Finally, it is important to highlight the fact that Antoine’s case is only available for scrutiny due to the UORAP’s unique, confined, and consent-based information sharing agreement with the IRB. For a variety of reasons, including most notably claimant privacy, only a very small selection of IRB decisions are ever publicly reported, and these tend to be decisions containing important legal analysis rather than complicated social context or major access to justice deficits. The result is that cases like Antoine’s are generally not available for public scrutiny, raising an overarching access to justice consideration in the form of an absence of mechanisms for system accountability. When this absence is combined with the potential deficits in procedural and substantive dimensions of access to justice in individual cases, the overall operation of the RSD process may fail to accord refugees the respect and recognition demanded by the symbolic dimension of access to justice.

VII. CONCLUSION

The significant changes made to Canada’s refugee system in 2012 carry implications for the ability of refugee claimants to attain procedural, substantive, and symbolic access to justice as they seek protection in Canada. This paper provides important context for understanding refugee access to justice and undertakes a survey of the access to justice landscape since the implementation of these reforms. Despite targeted responses to the changes on the part of institutions, organizations, and individuals across

320 This arrangement also relies heavily on collaboration with counsel, who reach out to their claimants on UORAP’s behalf.

321 Immigration and Refugee Board of Canada, “Persuasive Decisions” (2015), online: <www.irb-cisr.gc.ca> (“Persuasive decisions are decisions that have been identified by a division head...as being of persuasive value in developing the jurisprudence of a particular division. These decisions are well written, provide clear, complete and concise reasons with respect to the particular element that is considered to have persuasive value, and consider all of the relevant issues in a case. Accordingly, members are encouraged to rely upon persuasive decisions in the interests of consistency and effective decision-making. This consistency also helps parties and counsel prepare for proceedings before the IRB, and may encourage early resolution without a hearing, where appropriate”).
the refugee sector, analysis of the access to justice landscape two years after implementation reveals areas of significant concern among actors most engaged with access to justice in the refugee system. Amongst these are systemic unfairness for DFO and DFN classes of claimants; the detrimental impact of truncated timelines, particularly as related to accessing counsel, obtaining evidence from home and host countries, and accessing adequate translation and interpretation; limited recourse for failed claimants; difficulties associated with detention; exacerbation of resource constraints in the refugee support sector; and increased adversarialism and procedural burdens associated with increased Ministerial interventions. Some of these concerns were anticipated by experts in the refugee support and refugee law sectors and some have materialized unexpectedly. Ultimately, the detrimental impacts on refugee claimants of each of these aspects of Canada’s new RSD system can be understood as producing deficits in refugee access to justice.

One way to understand the root cause of these deficits is a failure of the refugee status determination system, in both design and operation, to acknowledge and respond to the distinctive and disadvantaging social context factors that characterize the situation of many refugee claimants. On the basis of the conception of the relationship between access to justice and social context adopted and developed in this paper, there is a clear potential for access to justice deficits to materialize in a system designed to serve individuals whose social context often already includes intersecting vulnerabilities. Unfortunately, the perceptions of individuals and organizations in the refugee support and refugee law sectors, as well as the UORAP’s preliminary analysis of real cases like Antoine’s, indicate that this potential is indeed materializing. These troubling signs of access to justice deficits in the refugee system are extremely concerning as a matter of principle. They become even more alarming when the significant interests that are at stake in refugee proceedings are considered.