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The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector

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The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector

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Les organismes d'autoréglementation qui encadrent les professionnels du droit au Canada contrôlent strictement l'offre des services juridiques. Les projets d'accès à la justice doivent donc toujours tenir compte des activités qui iraient à l'encontre de certaines restrictions. Il est par ailleurs difficile de respecter ces paramètres minutieusement car leurs limites ne sont pas claires. En offrant comme exemple un projet d'aide juridique aux réfugiés, le présent article souligne les défis que pose le manque de clarté entre « information juridique » et « services juridiques » aux initiatives d'accès à la justice. Nous concluons que cette incertitude entraîne divers coûts importants – y compris des dépenses financières, un fardeau en matière de ressources humaines et des limites inutiles freinant l'innovation dans le développement de programmes – dans un secteur qui a déjà grandement besoin de solutions créatives et abordables étant donné la crise persistante d'accès à la justice. Ultimement, le secteur sous-financé de l'accès à la justice n'est pas le seul à supporter ces coûts; les personnes défavorisées et l'ensemble de la société le font aussi.

The self-regulatory bodies that oversee legal professionals in Canada maintain strict control on the delivery of legal services, and access to justice projects must therefore always be conscious of activities that would violate certain restrictions. Careful adherence to these parameters is made difficult, however, by the lack of clarity about where the relevant boundaries are drawn. Using a project that provides legal assistance for refugees as a case study, this article highlights the challenges that the unclear distinction between "legal information" and "legal services" creates for access to justice initiatives. We conclude that the uncertainty can carry a variety of significant costs—including financial expense, human resource burdens, and unnecessary limits on program innovation—in a sector where affordable and creative solutions are desperately needed as a result of a persistent access to justice crisis. Ultimately, it is not merely the under-resourced access to justice sector that bears these costs, but rather disadvantaged individuals and society as a whole.

ACCESS TO JUSTICE IN CANADA'S LEGAL SYSTEM is a matter of significant concern, and an accumulating number of government-sponsored inquiries,[1] reports,[2] and academic studies[3] have

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1 See *e.g.* Leonard T Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia*, (Vancouver: Public Commission on Legal Aid, 2011), online: <lawsociety.bc.ca/docs/publications/reports/pcla_report_03_08_11_1_[1].pdf> [perma.cc/C768-BCTY]; The Honourable Coulter A Osborne, *Civil*

identified a deficit of access to justice as a critical issue requiring urgent action. A myriad of potential measures for moderating this deficit have been proposed,[4] and new initiatives are being developed and undertaken in a climate that encourages experimentation and innovation. The authors are involved in one such initiative—the University of Ottawa Refugee Assistance Project (UORAP)—which aims to assist refugee claimants as they prepare evidence for their refugee status determination hearings. Using our experience with the UORAP as a case study, this article highlights an issue of serious concern for a broad range of access to justice measures: the unclear distinction between legal information and legal services. In Canada, the self-regulatory bodies that oversee legal professionals maintain strict restrictions on the delivery of legal services and confine the practice of law to a narrow group comprised of professional licensees and other authorized individuals. Access to justice projects must be conscious of these restrictions in order to avoid violating unauthorized practice provisions, but the lack of clarity about the relevant boundaries makes doing so very difficult. Our experiences with the UORAP demonstrate that the resulting uncertainty can be extremely costly for the access to justice sector, which is already facing significant resource restrictions.

It is useful to note at the outset the key terminology that frames our discussion.[5] In this paper, we use the term "legal assistance" to broadly describe all forms of activities that assist with legal problems. This usage is our own, however, and the term "legal assistance" does not form part of the formal lexicon in this area. We also use two terms of art that are frequently presented in opposition to each other: "legal information" and "legal services." While there is no authoritative definition for "legal information," "legal services" is defined and tightly regulated by Ontario's *Law Society Act* (*LSA*).[6] More detail about the specific content of these two terms is provided in Part II below.

Justice Reform Project: Summary of Findings & Recommendations, (Toronto: Ontario Ministry of the Attorney General, 2007), online: <attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf> [perma.cc/MT73-KP6J].

[2] See *e.g.* Canadian Bar Association, *Futures: Transforming the Delivery of Legal Services in Canada*, (Ottawa: Canadian Bar Association, 2014), online: <cbafutures.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf> [perma.cc/JP8T-EE7S]; Canadian Bar Association Access to Justice Committee, *Equal Justice: Balancing the Scales*, (Ottawa: Canadian Bar Association, 2013), online: Canadian Bar Association <cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> [perma.cc/L6K9-YTS5] [CBA, "Equal Justice"]; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change*, (Toronto: Action Committee on Access to Justice in Civil and Family Matters, 2013), online: <cfcj-fcjc.org> [perma.cc/R222-C74S] [Action Committee, "Roadmap for Change"].

[3] See *e.g.* Julie Macfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report, (Kingsville, ON: Treasurer's Advisory Group on Access to Justice, 2013), online: <lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf> [perma.cc/5CVS-YHF9]; Canadian Forum on Civil Justice, The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems, online: Canadian Forum on Civil Justice <cfcj-fcjc.org/sites/default/files/ docs/2012/CURA_background_doc.pdf> [perma.cc/VP2U-A5FU].

[4] Examples of some proposed measures are provided in Part I below.

[5] These terms are explored in greater detail in Part III below.

[6] *Law Society Act*, RSO 1990, c L-8 [*Law Society Act*]. For the purposes of this paper, our focus is on Ontario since this was the jurisdiction that was most relevant to the UORAP. It bears noting that the issues we explore have relevance across Canadian provincial jurisdictions, although the precise terminology and nature of the restrictions may vary slightly form province to province. For other provincial frameworks, see British Columbia: *Legal Profession Act*, SBC 1998, c 9 [*BCLPA*]; Alberta: *Legal Profession Act*, RSA 2000, c L-8; Saskatchewan: *Legal Profession Act*, 1990, SS 1990-91, c L-10.1; Manitoba: *Legal Profession Act*, CCSM 2002, c L-107; Quebec: *An Act*

This paper proceeds in four main parts. We begin with a brief overview of both Canada's access to justice crisis and the current emphasis on using innovative delivery models, like the one exemplified by the UORAP, to mitigate concerns. In Part II, we explore the dichotomy between legal information and legal services and the related issue of enforcing prohibitions on unauthorized practice. In Part III, we explain the application of this distinction to the UORAP, including how it might have applied in the absence of a special exception uniquely available for projects in the refugee sector. Finally, in Part IV, we address the costs of the current uncertainty in this area for already under-resourced access to justice initiatives.

I. CANADA'S ACCESS TO JUSTICE CRISIS AND INNOVATIVE DELIVERY OF MEANINGFUL LEGAL ASSISTANCE

"Access to justice" is a concept that has long been the subject of academic scholarship[7] and that has now gained a central place in contemporary policy discussions regarding the operation of Canada's legal system.[8] While the precise content of this term continues to be debated,[9] we adopt an understanding of access to justice that involves three dimensions: a procedural dimension that is concerned with the ability to invoke and participate in justice processes, a substantive dimension that considers the ability to attain fair outcomes, and a symbolic dimension that deals with the respect and recognition accorded by the system as a whole.[10] Further, we understand this multi-dimensional conception of access to justice as applying not merely to court processes but also to the entirety of the multi-faceted justice system by which law and legal institutions are designed and operationalized. Finally, we also understand deficits in access to justice to arise when aspects of the design and operation of the justice system fail to adequately take into account differentiating and disadvantaging circumstances and social contexts of particular individuals or groups, such as low-income, minority-language, gender, sex, racialization, disability, and so on. Such failures lead people to experiences of substantive or procedural exclusion from, or marginalization within, the justice system.[11]

Studies examining access to justice over the last five decades have described many deficits in its attainment, as well as a corresponding variety of public and private initiatives taken to remove or mitigate these deficits.[12] Even amid ongoing uncertainty about the precise scope

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respecting the Barreau du Québec, CQLR c B-1; New Brunswick: *Law Society Act*, SNB 1996, c 89; Nova Scotia: *Legal Profession Act*, SNS 2004, c 28; Newfoundland: *Law Society Act*, 1999, SNL 1999, c L-9.1; Prince Edward Island: *Legal Profession Act*, RSPEI 1988, c L-6.1.

[7] See *e.g.* William Conklin, "Whither Justice? The Common Problematic of Five Models of 'Access to Justice'" (2001) 19 Windsor YB Access Just 297; Rebecca Sandefur, "Access to Civil Justice and Race, Class and Gender Inequality" (2008) 34 Ann Rev Soc 339; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46 Osgoode Hall LJ 773.

[8] CBA, "Equal Justice," *supra* note 2.

[9] See *e.g. ibid*; Roderick A Macdonald, "Access to Justice and Law Reform" (2001) 19 Windsor YB Access Just 317.

[10] For an elaboration of these dimensions of access to justice, see Bates, Bond, & Wiseman, "Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform" [forthcoming] [Bates, Bond & Wiseman].

[11] *Ibid*; see also: 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 Vol 2* (Toronto: Ontario Law Reform Commission, 1996) 636 [Morrison & Mosher].

[12] For an overview of the "waves" in access to justice thinking and action over the past 50 years, see Macdonald, *supra* note 9. Macdonald acknowledges that the oft-used concept of "barriers" to justice is problematic in that it may

and content of the term, a consistent and prevailing theme is the persistence of a "crisis"[13] in access to justice and the need for much more concerted ameliorative action.[14] Current understandings of this crisis frame it as a multi-faceted problem that permeates many aspects of the justice system. The crisis is frequently linked with limited profile, resources, tools, and coordination on the part of key stakeholders and decision-makers.[15]

Limited access to legal representation is seen as a critical element of the access to justice crisis.[16] Despite years of concern, many members of the public remain unable to afford lawyers for a large range of legal matters, including transactional, benefit-claiming, and dispute resolution services. Lack of access to legal representation, and the access to justice deficits it can produce, have long been understood to exist for people living on low-income, and there is now increasing recognition that this shortfall exists for middle-income individuals as well.[17]

For the very poor, access to lawyers can sometimes be provided through public legal aid programs, but the funding for these initiatives has failed to keep pace with need, and the programs themselves are also frequently described as being in a state of "crisis."[18] Indeed, a lack of resources for legal aid services has led to extremely low financial eligibility criteria[19] and a

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presume that a society is ready and willing to recognize a justice claim and that realizing the claim is simply a matter of removing "barriers." This belies the possibility of a lack of recognition of the claim as one of justice. For further discussion see Morrison & Mosher, *supra* note 11 at 637; Patricia Hughes, "Advancing Access to Justice Through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31:1 Windsor YB Access Just 1. We use the term "deficits" in access to justice to better reflect the complexities of these issues and the roles of social context and exclusion. See also Bates, Bond, & Wiseman, *supra* note 10.

[13] Canadian Bar Association, *Canada's Crisis in Access to Justice: Submission to the United Nations Committee on Economic, Social and Cultural Rights* (Ottawa, Canadian Bar Association, 2006), online: <socialrightscura.ca /documents/CESCR-Submissions/canadianbarassociation.pdf> [perma.cc/ND4K-ELWN] [CBA, *Canada's Crisis*]. See also: Action Committee, "Roadmap for Change," *supra* note 2, which at 1 states that "[t]here is a serious access to justice problem in Canada" so "[m]ajor change is needed," and at 2–4 that "everyday legal problems" are pervasive, particularly for the poor and vulnerable; CBA, "Equal Justice," *supra* note 2 at 6 notes "we … need to convey the abysmal state of access to justice in Canada today. … We cannot shy away from the dramatic level of change required."

[14] See *e.g.* CBA, "Equal Justice," *supra* note 2; CBA, *Canada's Crisis*, *supra* note 13; Lorne Sossin, *Access to Administrative Justice and Other Worries* (2008) Report prepared for Future of Administrative Justice Symposium, online: <law.utoronto.ca/documents/conferences/adminjustice08_Sossin.pdf > [perma.cc/AP5N-3SJZ].

[15] CBA, "Equal Justice," *supra* note 2.

[16] See *e.g.* Michael Barutciski, *The Impact of the Lack of Legal Representation in the Canadian Asylum Process* (2012) Report prepared for the UNHCR, online: UNHCR <unhcr.ca/wp-content/uploads/2014/10/RPT-2012-06-legal_representation-e.pdf> [perma.cc/A42R-EPJ2]; John Frecker et al, *Representation for Immigrants and Refugee Claimants: Final Study Report* (2002) Report prepared for the Department of Justice, online: <canada.justice.gc.ca/eng/rp-pr/other-autre/ir/rr03_la16-rr03_aj16/rr03_la16.pdf> [perma.cc/U73B-JU4M].

[17] Michael J Trebilcock et al, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

[18] Jennifer Bond, "The Cost of Canada's Legal Aid Crisis: Breaching the Right to State-Funded Counsel within a Reasonable Time" (2012) 59:1 Crim LQ 28 at 28 [Bond, "Legal Aid Crisis"]. See also: Jennifer Bond, "Failure to Fund: The Links Between Canada's Legal Aid Crisis, Rowbotham Applications, & Unconstitutional Delay in the Provision of State-Funded Counsel," NJCL [forthcoming].

[19] See *e.g.* Legal Aid Ontario (LAO), *Am I eligible for a legal aid certificate?*, online: Legal Aid Ontario <legalaid.on.ca/en/getting/eligibility.asp> [perma.cc/T3CH-RV5Q], which states that a sole individual must have an income lower than $20,225 to be eligible for duty counsel or summary legal advice and must have an income lower than $12,135 to qualify for a no-fee legal aid certificate; Legal Aid Alberta, *Eligibility*, online: Legal Aid Alberta <legalaid.ab.ca/help/eligibility/Pages/default.aspx> [perma.cc/XT8V-RFPE], which states that an individual's net monthly income must be below $1,638 to be eligible for most services.

narrowing of the range of matters for which services are provided.[20] Moreover, it has become increasingly difficult for lawyers who are willing to provide services under legal aid certificates to make ends meet, leading to strikes and boycotts, and a general withdrawal of services.[21] It is clear that a critical measure for improving access to justice, particularly for people from disadvantaged and marginalized socio-economic groups, is a fundamental restructuring of, and reinvestment in, programs that offer subsidized or state-funded lawyers. In many circumstances, meaningful access to legal counsel is fundamental and irreplaceable.[22]

It has, however, also been widely recognized that in the absence of hugely significant increases in public funding for state-funded legal counsel, it may be necessary to explore more creative mechanisms for improving access to justice. While the use of such alternative models risks providing insufficient support and obscuring critical underlying issues relating to resource shortages, it may also be useful for addressing the fact that the full-service legal retainers lawyers commonly use are, in some cases, a disproportionate means for obtaining access to justice because they offer more services (and charge more fees) than are necessary.[23] In other circumstances, a lawyer would be the preferred option but, since unavailable, some help may be better than none.

The wide range of measures aimed at mitigating access to justice concerns can be loosely grouped into three categories of services:

i) *Accessible legal services*: A first category seeks to directly improve the affordability and proportionality of lawyers' services by establishing and enhancing measures that make lawyers more accessible. Examples of initiatives in this category are such lawyer-centric measures as collaborative lawyering, unbundling legal services, and extending duty-counsel services.

ii) *Alternative legal services*: A second category introduces or enhances access to regulated non-lawyer legal service providers. Examples of such alternative legal service providers are paralegals, community legal workers, and immigration consultants. The nature and scope of legal services provided by professionals in this category is contained in legislation, bylaws, and other regulations,[24] and these individuals are usually governed by regulatory bodies or professional associations

[20] Bond, "Legal Aid Crisis," *supra* note 18 at 29–30.

[21] *Ibid* at 30 notes a boycott of serious legal aid cases by Ontario criminal defence lawyers "with the aim of publically exposing the system's state of disrepair" and at 40 notes similar strategies were attempted in Nova Scotia, New Brunswick, and British Columbia.

[22] The general importance of legal counsel is reflected in the constitutional recognition of a right to state-funded legal representation to ensure trial fairness, in certain circumstances, under section 7 of the *Charter*. For an analysis of that right, focusing on the civil context, see Kate Kehoe and David Wiseman "Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases" (2012) 63 UNBLJ 163; and focusing on the criminal context, see Jennifer Bond "Failure to Fund: The Link between Canada's Legal Aid Crisis & Unconstitutional Delay in the Provision of State-Funded Legal Counsel" (2015) 35:1 NJCL 1.

[23] It should also be noted that some strains of access to justice scholarship call for a more general decentring of lawyers in favour of enhancing the legal empowerment and autonomy of citizens directly. See *e.g.* Macdonald, *supra* note 9.

[24] Government of Canada, *Backgrounder – Proposing a Regulatory Body to Govern Immigration Consultants*, online: Citizenship and Immigration Canada <cic.gc.ca/english/department/media/backgrounders/2011/2011-03-18.asp> [perma.cc/L4Y5-TQ8A].

responsible for setting guidelines and managing complaints and disciplinary proceedings.[25]

iii) *Legal support services*: A third category captures all initiatives that are delivered outside the scope of legal services regulation, often by people who are not legally trained. This frequently includes the community services sector, which encompasses a broad spectrum of governmental and non-governmental service providers. There is a very wide range of initiatives falling within this category, including self-help guides, drop-in centres, and web resources.[26]

While programs and initiatives in all three categories are being actively pursued in response to the access to justice crisis, there is currently a particular emphasis on expansion and improvement of legal support services.[27] It is this category that captures the most innovative methods of providing legal assistance and that may offer the best possibility for creative, affordable, and immediate responses to the deficit of access to justice—particularly given concerns about ongoing resources constraints. Investment in this area has resulted in a number of services, resources, and programs aimed at providing meaningful legal assistance without directly engaging legal service providers. For example, Legal Aid Ontario launched its LawFacts.ca website in 2011, providing interactive information on criminal and refugee law, and targeted resources for Aboriginal people and individuals with mental health issues.[28] Community Legal Education Ontario (CLEO) also launched its *Your Legal Rights* website in 2011, and the organization now offers regular training to help front-line workers use the website to assist clients with legal issues.[29] Jurisdictions beyond Ontario have been active as well, especially in British Columbia, with the establishment of a number of Justice Access Centres that are

[25] See *e.g.* The Law Society of Upper Canada, *Resources for Paralegals*, online: Law Society of Upper Canada <lsuc.on.ca/for-paralegals/resources-for-paralegals> [perma.cc/9YPS-3MAX]; Canadian Society of Immigration Consultants (CSIC), "Canadian Migration Institute," online: CSIC <cmi-icm.ca>.

[26] Much of the contemporary discussion of these programs and initiatives is framed around two service models—those that address "everyday legal problems" (*e.g.*, common civil legal problems in areas such as employment, debt, consumer protection, family breakdown, and wills and estates), and "early resolution" service models (*i.e.*, seeking resolution that minimizes the need to engage the formal justice system). There are good reasons to include a concern for both of these areas, but it is also important not to limit the discussion and initiatives to those concerns. This is especially so in relation to a lack of access to justice for refugees and other similarly situated people. Refugee claimants face significant access to justice deficits that require urgent attention, but a refugee claim is not an everyday legal problem and is not capable of early resolution.

[27] For instance, in 2013, the Law Society of Upper Canada's Treasurer's Advisory Group on Access to Justice identified "non-legal organizations [having] a vital role to play" as one of the 12 key themes in *Access to Justice Themes: Quotable Quotes* which formed a background paper to a symposium it hosted in that year; see online: LSUC <lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Quotable_quotes.pdf > [perma.cc/KST5-5ZVP]. Likewise, the Triage, Prevention and Referral Working Group of the Action Committee on Access to Justice recognizes these same organizations as a crucial component of the "early resolution services sector" in its *Final Report: Responding Early, Responding Well: Access to Justice Through the Early Resolution Services Sector* (Toronto: Canadian Forum on Civil Justice, 2013), online: <cfcj-fcjc.org/action-committee> [perma.cc/QNG5-R233].

[28] Legal Aid Ontario, *A Legal Information Resource for Legal Aid Ontario*, online: Legal Aid Ontario <lawfacts.ca>.

[29] Fiona MacCool, *CLEO Launches New Legal Information Website for Ontario: Your Legal Rights*, online: Your Legal Rights <yourlegalrights.on.ca/news/cleo-launches-new-legal-information-website-ontario-your-legal-rights> [perma.cc/7GWD-PS9T]; Community Legal Education Ontario, *Rights Here Rights Now*, online: Your Legal Rights <yourlegalrights.on.ca> [perma.cc/JZH2-YV3K].

expressly aimed at everyday legal problems in civil and family matters.[30] There are also a number of NGOs that provide support in many sectors by triaging legal questions, providing basic support with forms, and helping individuals to identify and self-manage their legal problems.[31]

The authors are intimately familiar with the establishment and execution of one project that seeks to address an access to justice deficit through a legal support services model. In 2010, Professors Jennifer Bond and David Wiseman (together with two other colleagues)[32] founded the UORAP, a multi-year, national initiative aimed at mitigating access to justice concerns in Canada's modified refugee status determination process. Emily Bates serves as the UORAP's Director and Community Research Fellow. Our experiences with the UORAP have prompted this paper, and we will use the project as a case study throughout. Here, we explain both the access to justice concerns that led to the UORAP's creation and the ways in which it exemplifies a legal support services response.

A. UORAP CASE STUDY: A LEGAL SUPPORT SERVICES RESPONSE TO ACCESS TO JUSTICE CONCERNS IN THE REFUGEE SECTOR

The UORAP was created in direct response to a major access to justice deficit facing refugee claimants. Canada historically receives an average of 27,000 such claimants each year,[33] and it is trite to note that their personal histories and social context attributes render the vast majority of these individuals unfamiliar with Canada's legal system and confronted with many cultural, linguistic, economic, and other circumstances of difference that pose challenges for their engagement with the refugee claims process. In addition, these individuals are frequently suffering from the effects of severe trauma[34] and some are detained while their claim for protection is being processed.[35] Most are unable to navigate the refugee system without some form of legal assistance, and the vast majority are unable to pay for the support they need. Meanwhile, the interests at stake in the refugee context are significant, and wrongly refused

[30] See Ministry of Justice, *Justice Access Centres*, online: Ministry of Justice <gov.bc.ca/gov/content/justice/about-bcs-justice-system/legal-help/jac> [perma.cc/Y5LH-8LAL].

[31] For instance, the FCJ Refugee Centre, described in Part III, below. See Connecting Ottawa, Interim Activity Report #4, July 2014, online: Connecting Ottawa <connectingottawa.com/sites/all/files/ACTIVITY%20REPORT%204_1.pdf> [perma.cc/4R5L-B7Y2] at 12.

[32] Our two other collaborators were Adam Dodek, then Assistant Professor of Law at the University of Ottawa and Peter Showler, then Director of the Refugee Forum and Adjunct Professor of Law at the University of Ottawa.

[33] IRB statistics available via the Canadian Council for Refugees (on file with authors). 2013 saw a significant dip in claims to just over 10,000. While this drop cannot be attributed to any single cause, contributing factors include the substantial changes to the refugee system and public pronouncements by government expressly deterring certain refugee source populations from travelling to Canada.

[34] See Janet Cleveland & Monica Ruiz-Casares, "Clinical Assessment of Asylum Seekers: Balancing Human Rights Protection, Patient Well-Being, and Professional Integrity" (2013) 13:7 Ame J Bioethics 13; Janet Cleveland, "The Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada: A Critical Overview" (2008) 25:2 Refuge 119.

[35] From 2004 to 2011, the number of detained refugees per year has ranged from 4,151 to 5,803. For more information, see Delphine Nakache, "The Human and Financial Cost of Detention of Asylum-Seekers in Canada" (2011) Study conducted for UNHCR, online: UNHCR <unhcr.ca/beta/wp-content/uploads/2014/10/RPT-2011-12-detention_assylum_seekers-e.pdf> [perma.cc/PK5F-N7KG].

claimants could be returned to face severe persecution, including torture or death. The decision-making system is thus imbued with a multitude of critical access to justice considerations.[36]

The refugee status determination process is the mechanism through which Canada's Immigration and Refugee Board (IRB) determines whether a particular claimant meets the legal definition of a "refugee."[37] This is a highly technical decision that involves consideration of both statutory and jurisprudential frameworks, as well as major findings of credibility.[38] The Supreme Court of Canada (SCC) has recognized that the refugee status determination process carries extreme significance for individual claimants, particularly since the consequence of a negative determination can be removal to a country where persecution may occur.[39] The Court has also stipulated that claimants must be given appropriate procedural protections throughout the refugee status determination process to ensure that constitutionally protected rights to life, liberty, and security of the person are upheld.[40]

In 2012, Canada's refugee status determination process underwent significant reform.[41] Changes included, *inter alia*, new intake forms and processes,[42] new first-level decision-makers,[43] a new appeal mechanism,[44] and significantly shorter timelines between lodging a claim and the refugee hearing itself.[45] The changes also introduced new refugee claimant "categories," with those arriving from certain countries (deemed "safe countries") or in certain circumstances (in a group that is "designated" according to a broad discretionary power) facing even shorter timelines, severely restricted access to appeal mechanisms, increased detention, and a variety of other punitive measures.[46]

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[36] Bates, Bond & Wiseman, *supra* note 10.

[37] Canada is a signatory to the 1951 Refugee Convention, which defines a refugee in Art 1. Canada has incorporated this definition into domestic legislation in section 96 of the *Immigration and Refugee Protection Act* (*IRPA*). *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (in force 22 April 1954), online: United Nations Humans Rights <ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx> [perma.cc/T3CN-VNTD] at Art 1A(2); *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[38] Frequently the most important evidence at a refugee hearing is the claimant's own testimony. As a result, findings of credibility are critical to the outcome of many cases. For discussion on the importance of credibility in the refugee context see *e.g.* Audrey Macklin, "Truth and Consequences: Credibility Determination in the Refugee Context" (1998) International Association of Refugee Law Judges Conference Journal 134; Hilary Evans Cameron, "Refugee Status Determinations and the Limits of Memory" (2010) 22:4 Int'l J Refugee L 469.

[39] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 22.

[40] *Ibid* at para 36.

[41] *Protecting Canada's Immigration System Act*, SC 2012, c 17 [*PCISA*]; *Balanced Refugee Reform Act*, SC 2010, c 8 [*BRRA*]. The *PCISA* was introduced on 16 February 2012 and received Royal Assent on 28 June 2012. The *BRRA* was introduced on 30 March 2010 and received Royal Assent on 29 June 29. For an overview of the reforms, including the lack of attention to their impact on legal needs and legal aid, see Jennifer Bond and David Wiseman, "Shortchanging Justice: The Arbitrary Relationship between Refugee System Reform and Federal Legal Aid Funding" (2014) 91:3 Can Bar Rev 583.

[42] Canadian Council for Refugees, *Overview of C-31 Refugee Determination Processes* (2013), online: Canadian Council for Refugees <ccrweb.ca/en/refugee-reform> [perma.cc/7LBW-NKM4].

[43] Immigration and Refugee Board of Canada, *Audit of the Refugee Protection Division Backlog Reduction Initiative* (2012), online: IRB <irb-cisr.gc.ca/Eng/transp/ReviewEval/Pages/AudVerRpdSprRed2012.aspx> [perma.cc/RP4Z-SXLV]; *BRRA*, *supra* note 41.

[44] *PCISA*, *supra* note 41 at clause 59.

[45] Amnesty International Canada, "Unbalanced Reforms: Recommendations with Respect to Bill C-31," Brief to the House of Commons, online: Amnesty International Canada <amnesty.ca/sites/amnesty/files/2012-05-31unbalancedreforms.pdf> [perma.cc/738W-7H3S] at 8.

[46] Library of Parliament, *Legislative Summary of Bill C-31* (2012), online: Parliament of Canada <lop.parl.gc.ca/

A variety of stakeholders in the refugee system, including legal aid providers, lawyers, advocates, and community organizations, recognized even before the new laws came into force that the proposed changes would threaten the ability of refugee claimants to obtain access to justice.[47] The UORAP was founded in an attempt to mitigate some of these concerns. While our application for funding explicitly recognized "that the preferred solution to many access to justice issues is legal representation and, in particular, that effective counsel is often critical in the refugee context,"[48] we hoped to at least ameliorate the situation of un- and under-represented claimants navigating the reformed system through the provision of some form of legal assistance.

Our original project was designed to assist refugee claimants with a proposed disclosure interview that was subsequently abandoned by legislators prior to being implemented.[49] Before modifying our proposal in response to this change, the UORAP team conducted an environmental scan to identify both the likely access to justice issues in the new system and what other organizations were already planning to do to address them. After consulting with over fifty stakeholders across the country, we determined that several aspects of the new claims process—including notably, but not exclusively, the accelerated timelines—were likely to create or exacerbate significant challenges in claimants' ability to acquire and present evidence that would be critical to establishing their claim for protection. We ultimately proposed a project that aimed to assist un- and under-represented claimants with identifying and gathering evidence for their hearing.

The UORAP secured core funding from the Law Foundation of Ontario's (LFO) Access to Justice Fund.[50] The project also benefits from partnerships with the Human Rights Research

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Content/LOP/LegislativeSummaries/41/1/c31-e.pdf> [perma.cc/N4ND-VFEK] at 2.2 (Designated Foreign Nationals) and 2.1.3 (Designated Countries of Origin). At the time of writing, the legislative provision barring access to the Refugee Appeal Division for claimants from Designated Countries of Origin—so-called "safe countries"—was the subject of ongoing litigation: in July 2015, the Federal Court of Canada ruled the relevant provision to be unconstitutional and of no force and effect, and certified a question of general importance regarding its constitutionality. See *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892. For an overview of the Designated Foreign National scheme see Jennifer Bond "Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act" (2014) 51:2 Osgoode Hall LJ at 377.

[47] For examples of critiques and concerns, see *e.g.* Canadian Association of Refugee Lawyers, Press Release, "CARL Responds To New Refugee Legislation, Bill C-31" (16 Feb 2012), online: CARL <carl-acaadr.ca/articles/45> [perma.cc/AA24-9CLU]; Canadian Council for Refugees, Media Release, "Unfair Policy Fails Refugees and Canadians: Parliament Hill press conference and demonstration on Bill C-31" (22 March 2012), online: CCR <ccrweb.ca/en/bulletin/12/03/21> [perma.cc/5JEN-QE6M]; Legal Aid Ontario, *Consultation Paper Meeting the Challenges of Delivering Refugee Legal Aid Services* (2012), online: LAO <legalaid.on.ca/en/publications/downloads/refugee2012/Refugee2012.pdf > [perma.cc/MT8G-PGDU].

[48] Refugee Assistance Project, Letter of Intent, unpublished, on file with authors.

[49] The original *BRRA* replaced the former Personal Information Form with a 3–4 hour disclosure interview with an immigration official within 15 days of the time of claim. At this interview "information about the claim [would] be collected from the claimant and the IRB official [would] also schedule a hearing of the claim before a public servant decision maker." See Immigration and Refugee Board, *Notices and Proposed regulations*, (2001) 145, online: IRB <gazette.gc.ca/rp-pr/p1/2011/2011-07-02/html/reg2-eng.html> [perma.cc/TSG5-C3WH] and *BRRA*, *supra* note 41, s 11(2). For further history of legislative reforms, see Bates, Bond & Wiseman, *supra* note 10.

[50] The LFO created the Access to Justice Fund in 2009 after receiving a $14.6 million cy-près award in *Cassano v Toronto-Dominion Bank*, (2009) 98 OR (3d) 543(ON SC). The funding application intake to which our project applied funded access to justice projects in 5 key areas: linguistic and rural access to justice, Aboriginal access to justice, self-help, family violence, and consumer rights. See The Law Foundation of Ontario, Access to Justice Fund and Cy-près, online: Law Foundation of Ontario <lawfoundation.on.ca/what-we-do/access-to-justice-fund-cy-pres/>

and Education Centre,[51] CLEO,[52] the Faculty of Law at the University of Ottawa,[53] the Canadian Council for Refugees,[54] and Kinbrace,[55] as well as from significant contributions from refugee lawyers, academics, and community workers.

The UORAP includes two programming streams.[56] First, we created plain-language written materials focused on helping claimants get relevant evidence before the IRB. Our materials consist of a simple "Hearing Preparation Form" (HPF) that uses check boxes and fill-in-the-blanks to help identify both the key elements of the claim for refugee protection and the various pieces of evidence that might be obtained to support each of these elements.[57] The HPF is accompanied by a "To Do List" that allows claimants to develop a plan for acquiring key pieces of evidence and four plain-language guides that are cross-referenced to various fields on the HPF.[58]

Our team recognized that even accessibly written self-help materials may be of limited use to refugee claimants as a result of a variety of factors (including literacy and language difference), so our second programming stream was the delivery of full-day training sessions to front-line community support workers. Our objective was to ensure that those individuals who were most likely to be in contact with claimants during the pre-hearing period—through reception houses, social work programs, cultural organizations, women's groups, et cetera—were familiar with our materials and able to both provide them to claimants and assist with their use. A benefit of this approach was that in many cases these community workers would also be able to assist with bridging cultural and linguistic gaps. Employing a train-the-trainer model, we used refugee lawyers from across Canada to deliver a custom-designed curriculum that eventually reached over three hundred community workers from a wide variety of organizations. In the vast majority of cases, these workers did not have any legal background, meaning that our model fit squarely within the legal support services category described above.

Since the initial UORAP materials were developed in *anticipation* of the new refugee system, the project also contained a monitoring phase such that the actual access to justice implications of the modified system could be identified and materials revised as needed. Finally, a modest portion of the budget also supported community outreach and education, a website, and other administrative activities.

[perma.cc/8XL2-QQ57]; Law Foundation of Ontario (2010), "Access to Justice Fund: Application Form and Instructions." On file with authors.

[51] The Human Rights Research and Education Centre, of the University of Ottawa, brings together educators, researchers and students from other disciplines to approach human rights issues from a multidisciplinary and interdisciplinary perspective, online: HRREC <cdp-hrc.uottawa.ca>.

[52] Community Legal Education Ontario provides legal rights education and information to help people understand how to exercise their legal rights, online: CLEO <cleo.on.ca/en/about/about-cleo> [CLEO Website].

[53] University of Ottawa, *Faculty of Law*, online: University of Ottawa <commonlaw.uottawa.ca/en>.

[54] The Canadian Council for Refugees is a national non-profit organization committed to the rights and protection of refugees and other vulnerable migrants in Canada, online: CCR <ccrweb.ca/en/about-ccr>.

[55] Kinbrace is committed to a refugee protection system and provides housing, orientation, accompaniment, and education, online: Kinbrace <kinbrace.ca>.

[56] The UORAP also has a monitoring stream and a communications stream. For more detail on the UORAP, see our website at <uorap.ca>.

[57] The HPF was translated into English and French and over 500 copies were distributed. It is also available for download from the UORAP website.

[58] For entire package of documents, see UORAP, *Hearing Preparation Kit* (2013), online: UORAP <ccrweb.ca/en/uorap/hearing-preparation-kit> [perma.cc/B43F-M9AW] [UORAP, "Hearing Preparation Kit"].

The UORAP training program has been widely seen as a success. Surveys of community support workers reveal that they benefited greatly from our training sessions[59] and that our materials have been integrated into local programs across the country that assist refugee claimants in a variety of ways.[60] Our approach of supplementing basic written materials with training for community workers has been recognized as a model for those seeking to mitigate access to justice concerns through the provision of legal assistance to vulnerable groups,[61] and we have secured new funding to expand our monitoring initiatives into a larger academic project focusing on access to justice and evidence in the new system.[62] Overall, the project has succeeded in supporting the provision of legal assistance through a legal support services response.

There have of course also been challenges, and this paper explores one of the most significant: how to ensure that a project specifically designed to assist those without access to full legal services does not inadvertently violate laws restricting who can provide certain forms of legal assistance. Specifically, our engagement of non-legally-trained community workers meant that the UORAP team had to grapple with the distinction between legal information and legal services. In doing so, we quickly discovered that the line between these concepts is not always easy to delineate—an issue we discuss in the section that follows.

II. THE DICHOTOMY BETWEEN LEGAL INFORMATION AND LEGAL SERVICES

As mentioned above, strict restrictions on who can provide certain forms of legal assistance make understanding the terms "legal information" and "legal services" critical for individuals and organizations engaged in the provision of any form of support for legal problems. While these two concepts can be clearly distinguished and applied in some circumstances, many projects are not easily categorized according to this dichotomy—which is simultaneously strictly applied and poorly defined. These complexities have particular relevance in the context of the access to justice crisis because of the emphasis on finding innovative ways to provide meaningful legal assistance to mitigate deficits, often via legal support service models that assist with the consumption of legal information. However, as this information becomes less static and general and more dynamic and contextualized—or, in other words, as it becomes more useful to an individual and more effective as an access to justice resource—it may also begin to take on

[59] For example, satisfaction ratings from training participant surveys averaged 9.4/10, indicating that they viewed the content conveyed in the training as relevant and useful to their work with refugee claimants. Survey summary on file with authors.

[60] Monitoring carried out by the UORAP team in May and June 2014 indicated that organizations across Canada have incorporated our materials into their service offerings, including using the To Do List as a way to coordinate and engage claimants with the evidence gathering process, making use of the Hearing Preparation Form to organize a claim and the evidence needed, and drawing from the Hearing Preparation Kit to answer questions from claimants.

[61] For reasons that we identify below regarding the risks associated with navigating the legal information/legal services distinction outside of the refugee context, we do not feel it is appropriate to name these organizations.

[62] Successful grant applications to the Social Sciences and Humanities Research Council's Insight Development Grant program and the joint University of Ottawa and Faculty of Law Research Development Program have provided $95,000 in additional research funding for this project. The funding will facilitate expansion of our data pool, which includes full claimant files, and will allow expansion of our research team in order to effectively analyze this data and produce both academic and community-oriented outputs.

some characteristics of legal services. The purported distinction between these two terms and the way the dichotomous relationship between them is monitored and enforced are explained in further detail immediately below. The implications for the access to justice sector are explored in Parts III and IV.

A. LEGAL INFORMATION

Legal information is not defined in any Canadian statutes or regulations. This term is often associated with the related and equally ambiguous concept of "public legal education," and both are used to describe a very wide range of services and initiatives.[63] Significantly, both are also frequently defined and delineated specifically with regard to their binary relationship with "legal services" generally, and "legal advice," one type of legal service, in particular.[64] Indeed, it bears highlighting that the term "legal advice" is sometimes used as a proxy for the broader term "legal services," even though the latter term goes beyond "legal advice" to include a range of other activities.[65]

Common descriptions of legal information among access to justice actors show reliance on this dichotomy. CLEO, for example, contrasts legal information with legal advice in the following way:

> Legal information:
> - Is general information about the law that is not tailored to an individual's specific situation
> - Can help a person understand when a problem is a legal problem
> - Can discuss options and possible next steps, indicate when a person needs to get more help and advice, and how to find that help
>
> …
>
> Legal advice:
> - Interprets the law and applies legal rules and principles to a particular situation
> - Is specific to an individual's particular situation; people's situations and circumstances are different even when facing the "same" legal problem
> - Provides recommendations to a person about their options, based on an assessment of how the law applies to their specific situation and what the person wants to achieve[66]

The Canadian HIV/AIDS Legal Network summarizes the distinction in more simple terms, but again relies on contrasting definitions: "Legal information can help a client understand the law and his or her rights, but it is general. Legal advice is about a client's specific situation. It is meant to help a client decide what to do."[67] Yet another NGO refers to the distinction explicitly:

[63] See *e.g.* CLEO Website, *supra* note 52.
[64] *Ibid.*
[65] *Law Society Act*, *supra* note 6, s 1(6).
[66] Handout at CLEO workshop, "Helping Your Clients Find Good Legal Information," 17 September 2014, Ottawa. On file with authors.
[67] Canadian HIV/AIDS Legal Network, *Counselling in the Context of the Criminalization of HIV Non-Disclosure:*

"Legal information is distinguished from legal advice as it is the reiteration of legal fact. Legal information can be conveyed by a number of means [and] [t]here is no monopoly on who can provide legal information."[68] The key defining features of these and other operational definitions contrasting legal information and legal advice are, first, that legal information pertains to facts rather than analysis and, second, that legal information is general in nature rather than specific to a particular person or circumstance. There are no regulations that limit who can provide legal information or in what circumstances it can be made available.

B. LEGAL SERVICES

Unlike legal information, the provision of legal services is tightly regulated. Provincial legislation outlines the definition and places restrictions on who can provide legal services and in what circumstances. As noted above, in Ontario—the UORAP's home province—the *LSA* contains the relevant parameters and enforcement mechanisms.[69] It is important to note that similar legislation exists in all other Canadian provinces.[70]

The *LSA* specifies that legal services are provided where "the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person."[71] The *LSA* also enumerates a non-exhaustive list of examples, including: giving advice with respect to a person's legal interests; drafting, completing, or revising a document that affects the person's legal interests or rights on behalf of that person; and representing a person before an adjudicative body.[72]

The *LSA* (and associated bylaws) also restricts who can provide legal services and in what circumstances: the right to provide legal services is limited primarily to lawyers with an active licence to practice law in the province.[73] Other persons explicitly permitted to provide only certain legal services in certain circumstances include licensed paralegals;[74] law students and paralegal students; and a small number of other individuals in very specific and narrow circumstances.[75]

Legal Information vs. Legal Advice, online: <aidslaw.ca/site/wp-content/uploads/2014/02/Chapter4.1-ENG.pdf> [perma.cc/QP9Q-TCML].

[68] Aaron M Vanin, "Calgary Divorce Procedure & Legal Advice v. Legal Information" (Paper delivered at the Family Law for Legal Support Staff, Legal Education Society of Alberta, January 2010).

[69] Law Society Act, *supra* note 6.

[70] See list of statutes at *supra* note 6. It should be noted though that in some provinces, such as British Columbia, the prohibition on unauthorized practice of law only applies in contexts where legal services are delivered in expectation of a fee or other reward. See *BCLPA*, *supra* note 6, s 1(1).

[71] Law Society Act, supra note 6, s 1(5).

[72] *Ibid*, s 1(6).

[73] *Ibid*, s 26.1.

[74] *Law Society Act by-law* No 4, *Licensing* (1 May 2007), online: Law Society of Upper Canada <lsuc.on.ca/work area/downloadasset.aspx?id=2147485805> [perma.cc/26EM-DBKQ].

[75] For example, licensed paralegals may represent a person in small claims court, in the Ontario Court of Justice under the *Provincial Offences Act*, on minor summary conviction offenses, and before provincial administrative tribunals. In the course of this representation, they may give legal advice, draft documents, and negotiate on behalf of a person. Other than the limited circumstances outlined in the *LSA* bylaws, they may not provide legal advice without direct supervision of a lawyer. Law Society of Upper Canada, *Paralegal Frequently Asked Questions: Who Needs a Licence?*, online: <lsuc.on.ca/licensingprocessparalegal.aspx?id=2147491230> [perma.cc/E5NH-3AN6]. See also generally *ibid*.

C. ENFORCEMENT OF THE DICHOTOMY

The *LSA* also contains provisions that allow for sanctions to be issued against individuals who offer legal services without the appropriate authorization.[76] These provisions are referred to as the unauthorized practice provisions. In Ontario, the Law Society of Upper Canada (LSUC) is responsible for investigating, applying, and enforcing the unauthorized practice provisions. The LSUC is authorized to pursue illegal practitioners in order to prevent further unauthorized practice,[77] and has the power to, for example, issue cease and desist orders, order fines, and initiate court proceedings.[78]

Many unauthorized practice prosecutions in Ontario are against former licensees (disbarred or suspended) who continue to practice, or against non-licensees who advertise or act as legal "counsel," legal/law consultants, or lawyers for a fee.[79] In 2013, LSUC received 260 complaints for unauthorised provision of services (which represented 5% of all complaints).[80] There is no public evidence of any complaints against individuals or organizations offering free legal assistance, although low-level disciplinary actions such as cease and desist orders are not made public, and we are aware of at least one such letter sent to an NGO aiming to mitigate access to justice deficits.[81]

Below, we demonstrate the challenges associated with applying the legal information versus legal services dichotomy in the context of innovative programs in the legal support services sector.

III. APPLICATION OF THE DICHOTOMY TO ACCESS TO JUSTICE PROJECTS

The implications of the legal information and legal services dichotomy for access to justice projects are surprisingly under-studied, particularly given recent growth in the legal support services sector. As discussed above, this category of access to justice responses encourages creative methods for providing legal assistance and may, for that reason, complicate application of the traditional dichotomy. There is also a distinct lack of jurisprudence, regulation, and

[76] *Law Society Act*, *supra* note 6, ss 26.1–26.2.
[77] Law Society of Upper Canada, *Taking Action against Illegal Practitioners*, online: <lsuc.on.ca/with.aspx?id=2147486087> [LSUC, *Taking Action*]. See also *Law Society Act*, *supra* note 6 at s 26.3.
[78] LSUC, *Taking Action*, *supra* note 77. Upon a complaint of unauthorized practice, the Law Society of Upper Canada may do one or more of the following: "Send a cease and desist letter demanding that the person stop providing legal services they are not licensed to provide … Conduct an investigation … Ask the person to sign an undertaking (agreement) to cease the unauthorized activity … Initiate court proceedings … The Law Society can also prosecute illegal practice in provincial court or provincial offences court."
[79] *Ibid*, which includes a list of past matters.
[80] Law Society of Upper Canada, *2013 Annual Report* (Professional Regulation Division), online: <annualreport.lsuc.on.ca/2013/en/reports/full-report-PRD.pdf> [perma.cc/X8T3-4F2G]. Complaints also encompass misconduct, mishandling or misappropriation of financial resources, providing services despite conflict of interest, integrity issues, and client service issues.
[81] There is at least one instance in which the Law Society of Upper Canada refused to apply its regulatory powers to the benefit of a program offering free assistance with legal matters: see Susanne Bouclin, "Regulated Out of Existence: A Case Study of Ottawa's Ticket Defence Program" (2014) 11 JL & Equality 35.

guidelines exploring the boundaries of legal information and legal services, meaning there is very little guidance about how to interpret the *LSA*'s definitions in complex circumstances.

The result is understandable uncertainty about the intersection between innovative access to justice work and the risks associated with violating the *LSA*. In this section, we use the UORAP to demonstrate the challenges associated with ensuring that access to justice projects remain compliant with the relevant unauthorized practice provisions.

A. UORAP CASE STUDY: CHALLENGES WITH AVOIDING UNAUTHORIZED PRACTICE

The four University of Ottawa professors who founded the UORAP are lawyers. This means that from the outset we were more aware of the restrictions on the provision of legal services than many others working in the access to justice sector are likely to be. We were also ideally equipped to evaluate these issues and ensure our project was compliant with the relevant laws. Unfortunately, this proved to be a very difficult task.

1. EARLY ATTEMPTS TO EXERCISE CAUTION

The UORAP team very deliberately considered the application of unauthorized practice laws to our work. Although the entire purpose of our project was to provide meaningful legal assistance to vulnerable refugee claimants, we were conscious of the potential of a complaint to the LSUC if we crossed the line between legal information and legal services.[82] We were also aware that our use of both written materials and community workers who were unauthorized to practice law meant that our project was particularly susceptible to scrutiny.

With this in mind, we exercised deliberate caution with the language used in our written materials and training programs. Ultimately, our written materials also included an explicit disclaimer on each document specifying that our resources were to be used as information only and that no payment or consideration could be accepted for helping a claimant with the use of our forms.[83] Our training notes also reminded trainers—and instructed them to relay to community workers—that those using our materials are generally not legal representatives and cannot replace a lawyer.[84] Despite these precautions, the UORAP team became extremely concerned about the application of unauthorized practice laws to our project after learning that two employees of the FCJ Refugee Centre (FCJ)—one of the community organizations we were working with—had received cease and desist letters from the LSUC.

The FCJ is a registered charity that has been a pillar in Canada's refugee support community for over 20 years. The centre offers "temporary accommodation to women and

[82] Our primary funder, the LFO, was also aware of this potential issue, as were the lawyers we used to assist in drafting the written materials.

[83] The disclaimer on the UORAP's Hearing Preparation Kit reads: "This Kit and its contents are intended as general legal information to assist refugee claimants and those assisting them to prepare for their refugee hearing without compensation." As will be discussed below, the reference to "no payment" is important in relation to application of the refugee sector exemption. See UORAP, "Hearing Preparation Kit," *supra* note 58.

[84] UORAP's Trainer Notes state at page 4: "NB: This training is not intended to equip community workers to represent or give legal advice to refugee claimants. … The training may help community workers to understand the legal issues present in a claim, but it is not intended to assist community workers in representing claimants." On file with authors.

children refugee claimants, workshops on various aspects of the refugee/immigration process, and information/assistance and referrals to all uprooted people."[85] The FCJ's co-directors have been recognized with numerous awards for their work assisting vulnerable people[86] and the organization is seen as a model in the community. The centre's website notes that services may include "assistance with paperwork, translation and interpretation, accompaniment [to hearings], [and] referral to immigration lawyers."[87] Operating with a volunteer Board of Directors, nine full and part time staff, and many volunteers, the FCJ has impacted the lives of thousands of refugee claimants. It is widely seen as an access to justice success story.

In 2012, the LSUC cease and desist letters alleged that FCJ employees were violating unauthorized practice provisions and ordered them to stop their activities immediately:

> The Law Society of Upper Canada … has received information alleging your involvement in the provision of legal services without a licence.
>
> The allegation is that you are assisting refugee claimants with their legal matters and that you advertise this service on the website of your organization.
>
> …
>
> A search of Law Society records confirms that a licence has not been issued to you nor have you applied for a licence. Therefore, you are not authorized to provide legal services or to advertise the provision of legal services and you must ***cease and desist*** from such activities immediately [emphasis in original].[88]

Feeling that a significant aspect of the FCJ's core mandate was in jeopardy, the organization went into crisis management mode as it prepared its response to the LSUC's letter.[89] The FCJ soon discovered that the laws surrounding the provision of legal services and legal information are unclear. After a split opinion among the lawyers on its Board of Directors about the accuracy of the LSUC's allegations, the organization sought letters from various legal experts in the field, including Peter Showler, then Director of the Refugee Forum and former Chair of the IRB. In his letter in support of the FCJ, Showler emphasized the disastrous effect that closing programs like theirs would have on the already "desperate" access to justice situation facing refugee claimants, noting:

> [a]t this point, the development of such programs [as the FCJ's] is choiceless. We would very much prefer that all claimants were represented by lawyers funded by legal aid. That option is not available [as a result of a lack of funding]. The only

[85] FCJ Refugee Centre, *Our Organization*, online: <fcjrefugeecentre.org/about-us/our-organization-2/> [perma.cc/P38U-MM4D]. For a description of the FCJ's primary services see their website: FCJ Refugee Centre, *Programs*, online: <fcjrefugeecentre.org/about-us/programs/> [perma.cc/EW6J-XHPC].

[86] For biographies of the co-directors at FCJ see their website: FCJ Refugee Centre, *Our Staff*, online: <fcjrefugeecentre.org/about-us/staff/> [perma.cc/6A32-NTZR].

[87] FCJ Refugee Centre, *About Us*, online: <fcjrefugeecentre.org/about-us/> [perma.cc/N6HJ-M56C].

[88] Letter from LSUC to FCJ employee (13 December 2012) on file with authors [LSUC-FCJ Correspondence].

[89] This section benefited from a telephone interview with Francisco Rico-Martinez, co-director of FCJ (16 July 2014).

> alternative is to give no assistance to unrepresented refugees who have no idea of how to prove their claim or prevent hasty removal. And that certainly is not acceptable.[90]

Showler is also one of the four founders of the UORAP, and he made our team aware of FCJ's situation. We became immediately concerned that the LSUC's letters regarding the FCJ could have implications for our project as well. Despite the fact that all of our executive members are lawyers and law professors, we felt the need to seek a formal legal opinion about whether any aspect of our project contravened unauthorized practice laws—whether in our quest to fill a major access to justice gap for refugee claimants we had inadvertently crossed the line between legal information and legal services. Five thousand dollars later we had our answer and ten thousand dollars later the FCJ had theirs: independent legal opinions sought separately by each organization confirmed that unauthorized practice laws were not violated by our respective projects.[91] However, as the remainder of this section demonstrates, the reasoning behind these conclusions was far from reassuring for those of us concerned about the broader access to justice crisis in this country.

2. EXCEPTIONAL PROTECTION IN THE REFUGEE SECTOR

The *Immigration and Refugee Protection Act* (*IRPA*) explicitly allows non-lawyers to represent or advise refugee claimants as long as there is no fee charged for these services. Section 167(1) of the *IRPA* states that a refugee claimant "may, at their own expense, be represented by legal or other counsel."[92] The term "other counsel" has been interpreted to include family, friends, church groups, non-governmental organizations, and charitable organizations.[93] Significantly, representatives who do not offer legal services "for consideration" are not subject to the portions of the *IRPA* requiring that representatives be (a) in good standing with a law society, (b) students working under the supervision of an individual in good standing with a law society, or (c) in good standing with another body that is designated by regulation or is working subject to a special agreement with the Federal Government.[94] The net result of these provisions is that "other counsel" working for free to represent refugee claimants are specifically allowed by the federally-enacted *IRPA*.

As discussed above, the *LSA*'s unauthorized practice laws appear to be more restrictive. In particular, they completely prohibit the provision of legal services—broadly defined—by non-lawyers or non-paralegals and do not draw a distinction between services offered for a fee and services offered for free.

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[90] Letter from Showler to FCJ (11 January 2013) on file with authors.

[91] The $10,000 figure for the FCJ includes funded research carried out by the co-director on this topic.

[92] *IRPA*, *supra* note 37, s 167(1).

[93] Citizenship and Immigration Canada, *Form IMM 5476*, online: <cic.gc.ca/english/pdf/kits/forms/IMM5476E.pdf> [perma.cc/US5E-LK27] at number 6.

[94] *IRPA*, *supra* note 37, s 91(1). Section 91(1) provides that no person shall "represent or advise a person *for consideration*" [emphasis added] unless they are subject of one of the exceptions listed in the provision. In addition to lawyers (s 91(2)) and supervised students-at-law (s 91(3)), immigration consultants (non-lawyers who represent refugee claimants for a fee) are contemplated in s 91(5), which allows the Minister to designate "a body whose members in good standing may represent or advise a person for consideration." Immigration consultants are regulated by the Immigration Consultants of Canada Regulatory Council, online: <iccrc-crcic.ca/AboutUs.cfm> [perma.cc/N3HS-T4C9].

This apparent conflict between the provincial *LSA* and the federal *IRPA* is not an isolated occurrence. In 2001, the SCC considered a conflict between provisions of the federal legislation that predated the *IRPA* (the *Immigration Act*)[95] and provisions of British Columbia's *Legal Profession Act* (*LPA*),[96] that province's version of the *LSA.* In *Law Society of British Columbia v Mangat,*[97] the Court held that where such a conflict exists, the paramountcy doctrine provides that the federal legislation prevails.[98] As a result, *LPA* restrictions on the provision of legal services by non-lawyer immigration consultants were subordinate to provisions in the *Immigration Act* that specifically allowed for such representation to occur.[99] There have been a number of cases since *Mangat* touching on the paramountcy of federal legislation in the immigration and refugee context. In each case, *Mangat* has been applied and the federal legislation has prevailed.[100]

The independent legal opinion obtained by the UORAP confirmed our team's view that our project was unlikely to be in violation of unauthorized practice provisions as a result of the protection we received under the *IRPA.* That statute's framework for the provision of legal services to refugee claimants trumps any provincial laws to the contrary. As a result, the UORAP-trained refugee support workers (and the FCJ, who eventually received similar legal advice regarding their programs) were able to continue offering legal assistance to refugee claimants without being concerned about potential unauthorized practice violations.

While this conclusion was extremely helpful for our particular project, the broader implications of UORAP's experiences are unsettling. In an environment where creative access to justice projects are being encouraged across a wide variety of sectors, we are left to wonder what the legal conclusions would have been if we were facilitating the provision of legal assistance to un- and under-represented individuals from another vulnerable group—perhaps battered women seeking to leave their partners, low-income individuals appearing before landlord and tenant boards to keep their housing, or individuals with disabilities appealing a social assistance decision. In the absence of federal legislation that specifically contemplates assistance by people other than legal service providers, projects in these and many other areas appear very susceptible to scrutiny by law societies on the basis that they may violate unauthorized practice provisions,

[95] *Immigration Act*, SC 1976–77, c 52, s 1.
[96] *BCLPA*, *supra* note 6.
[97] 2001 SCC 67 [*Mangat*].
[98] *Ibid*. Sections 91 and 92 of the Canadian Constitution divide powers between the provincial and federal governments. The paramountcy doctrine provides that where a subject matter is in pith and substance within both provincial and federal jurisdiction and where validly enacted provincial and federal legislation dealing with the subject matter conflict, the federal law prevails and the provincial law is inoperative to the extent of the incompatibility. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the laws are actually incompatible, either by showing that it is impossible to comply with both laws at once or that applying the provincial law would frustrate the purpose of the federal law. See *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39.
[99] *Ibid*, particularly at paras 23, 72, 76. The Court held that both provincial and federal legislation was a valid exercise of provincial property and civil rights powers and federal naturalization and aliens powers, and that both had to be read harmoniously where possible, but where there was a conflict, the federal legislation would prevail. Since this was a clear conflict, paramountcy doctrine required the federal *Immigration Act* to prevail.
[100] See *e.g. Law Society of Upper Canada v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1489 at para 1; *Chinese Business Chamber of Canada v. Canada*, 2005 FC 142 at para 14; *Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243 at para 16; *Canadian Society of Immigration Consultants v. Canada (Citizenship and Immigration)*, 2011 FC 1435 at para 91.

but the results of this scrutiny are unpredictable given the ambiguous dichotomy upon which they are predicated.

In the section that follows, we explore the potential outcome of such scrutiny to an actual access to justice initiative by applying the unauthorized practice provisions to the UORAP model for providing legal assistance. Our goal with this exercise is to demonstrate the challenges that our project structure faces given the traditional dichotomy between legal information and legal services. It is important to note that we are able to use our own project to illustrate these issues precisely because it benefits from the refugee-sector exemption described above: the insulating effect of the *IRPA* gives us the ability to publicly expose these uncertainties in a tangible way without jeopardizing our access to justice work by inviting unauthorized practice-related scrutiny. Clearly, this candour is not possible for the many legal support services initiatives that are not protected by explicit federal legislation. For these programs, the issues we identify in our exemplification below carry real rather than hypothetical consequences.

3. CHALLENGES WITH CHARACTERIZING THE UORAP MODEL AS LEGAL INFORMATION OR LEGAL SERVICES

It is useful to consider application of the legal information versus legal services dichotomy to two central aspects of UORAP's programming activities: the plain-language written materials themselves and the use of these materials by non-legally trained community workers assisting refugees to prepare for their hearings.

The potential that UORAP's written materials could infringe on the territory of legal services was raised internally during the drafting process. In particular, the UORAP team discussed the need to avoid having content that appears to be too tailored to a particular claimant and situation, since this might be perceived as being legal advice. Specific concern surrounded our frequent use of the term "you," especially where it was accompanied with somewhat prescriptive language. An example of a typical passage raising these issues is as follows:

> **A valid passport is the best document for identification**. If you do not have a passport and cannot get one, try to get the most reliable document available. A government-issued document is better, preferably one issued by the national government. Here are some documents that can help you to prove your identity and nationality:
>
> - Birth certificate,
> - National identity card,
> - Residence card;
> - Certificate of baptism;
> - School certificate or diploma
> - Driver's licence […] [emphasis in original].[101]

As this excerpt from our Hearing Preparation Kit makes clear, the UORAP materials are specifically designed to provide as much individualized, comprehensible instruction as is possible using a generic written form. Our ultimate objective was, in fact, to make the materials

[101] UORAP, "Hearing Preparation Kit," *supra* note 58 at 5.

feel as personalized as possible for each claimant and we deliberately chose both language and an adaptable form structure to assist with that objective. These attempts to tailor the materials to an individual claimant's needs did, however, mean that our materials may have acquired some of the characteristics typically associated with legal advice because the claimant was able to use a series of sequential check boxes and directive language to, in a sense, "receive instructions" that were directly applicable to his or her specific situation. Nonetheless, the UORAP team ultimately concluded that these factors were unlikely to convert our written materials from legal information to legal services.[102]

The UORAP's use of non-legally trained community workers to support these written materials also raised questions about potential conflict with unauthorized practice provisions. Once again, our choices in this regard were very deliberate and represented a specific effort to employ an innovative and cost-effective response to an access to justice concern. Recognizing that a variety of social context factors typical of many refugee claimants (including but not limited to differences in language and literacy) would make even the best written materials difficult for a refugee claimant to use alone, the UORAP team developed a custom curriculum that was delivered to over three hundred non-legally-trained community workers so that they could understand and use our forms when working with claimants. Our vision was that by providing these individuals with basic information on the legal elements of a refugee claim, and guidance on the types of evidence that could be used to prove these elements, we would increase the capacity of front-line workers to use our written materials to meaningfully assist with preparation for a refugee hearing. We also aimed to ensure that our training would facilitate community-worker engagement either as a supplement to legal services provided by counsel or as a mitigating factor for unrepresented claimants, since it was unknown whether legal aid services would be able to fund adequate representation in the new system.[103]

While the UORAP team felt confident in the potential effectiveness of our model, a concern for us was whether we were facilitating non-legally trained individuals to provide legal services rather than merely legal information. The UORAP program was deliberately designed to enable refugee support workers to provide a measure of individualized assistance by narrowing the focus of the legal information that they would provide according to the specific circumstances of each claimant. Thus, while the information itself was static, there was selection involved in its delivery. Further, assistance in developing a list of evidence that might be helpful for a particular individual was clearly tailored, though not necessarily legal in nature. Ultimately, our training programs aimed to give non-legally trained workers enough legal information to help claimants identify what evidence would support *their individual claims* for protection. This model creates clear challenges for the traditional dichotomy between legal information and legal services.

It is important to note that while it is clearly the individualization in the use of UORAP materials that creates challenges for the distinction between the generality of legal information and the specificity of legal advice, there is frequently at least some element of individualization

[102] Our conclusion on the term "you" appears to be reinforced by the fact that LSUC itself uses "you" in its recently released pamphlet on handling everyday legal problems. See The Law Society of Upper Canada, *Handling Everyday Legal Problems: Information to Help You Make Good Choices*, online: <lsuc.on.ca/faq.aspx?id=1034> [perma.cc/9UHD-EEYT].

[103] For the first two years after implementation of refugee reform, numbers of refugee claimants dropped to the lowest levels since the establishment of the IRB. As a consequence, provincial legal aid budgets and capacity were able to provide at least some coverage for most claimants. See Bates, Bond & Wiseman, *supra* note 10.

even in the provision of very general legal information, making this factor alone an imperfect tool for assessing the relevant boundary. It is, for example, common for providers of legal information to perform some sort of initial triage (using questions on a website or through an interview with a non-legally trained staff person or through some other mechanism) to determine, at a minimum, which specific areas of law are likely applicable to a particular person or set of circumstances. Simply assessing that a person has a problem to which a particular informational guide may be relevant is presumably not legal advice, even though it does involve some individualized assessment. Once it is recognized that there is frequently at least some element of specificity in both legal advice *and* legal information, the distinction between the two becomes a matter of degree rather than kind—which makes models like the one employed by the UORAP very difficult to assess according to a dichotomy which insists on strict boundaries rather than gradients.

This is not to suggest, of course, that extreme examples are difficult to identify and analyze. Working with a lawyer to draft a Basis of Claim (BOC) form for a refugee application is, for example, clearly distinguishable from reading self-help materials that describe the information required in the BOC. But what if a refugee claimant needs help understanding the information required in a certain part of the BOC, where in the BOC she should record a particular fact, or the meaning of challenging BOC terminology in her non-native language? What if she is not literate and needs help coherently recording her narrative? While drafting legal documents is generally identified as a legal service that is restricted to lawyers, it is not necessarily clear whether that extends to assistance with filling out forms and, if it does, what kinds of "assistance" with these forms are of a sufficient quality and nature that they should be considered legal services.

A further complexity is the lack of clarity around whether there needs to be a close relationship between the substance of the assistance and the core components of the legal issue, or whether all forms of advice that relate in any way to the underlying legal concern may be deemed legal services. For example, a key component of a refugee claim is establishing risk in the claimant's country of origin. While it may be reasonably clear that recommendations relating to the type of risk that should be emphasized in the claim may constitute legal services, it is less obvious how to categorize suggestions relating to, for example, particular country events that may help demonstrate the risk, particular organizations that may provide evidence on the risk, or even particular websites that may give generally relevant country of origin information. It may seem intuitive that as the advice becomes increasingly removed from the core issues it loses its "legal" character, but where this line is drawn is far from clear.

The reality is that it is easier to place access to justice projects like the UORAP on a spectrum between full-scale individual legal services and completely static legal information than it is to place them in a binary category. However, since unauthorized practice provisions are based on enforcing a strict boundary between legal services and legal information, such a distinction must be delineated despite its opacity.

There is a noticeable deficit of resources to assist with this challenging delineation. Legal regulators, while anxious to prevent and prohibit the unauthorized practice of law, have not provided any meaningful public guidance on the critical distinction between legal information and legal services,[104] and the issue has not been meaningfully considered in relevant case law.[105]

[104] A search of the public websites of Canada's law societies yielded no meaningful results.

There is also a surprising lack of scholarship[106] or other publicly available resources. As a result, each individual or organization that provides legal assistance must grapple with the challenging questions identified above in a relative vacuum of interpretive guidance. In the section that follows, we discuss the consequences of this lack of clarity for projects aimed at mitigating the access to justice crisis.

IV. BEARING THE COST OF UNCERTAINTY

Lack of clarity regarding the distinction between legal information and legal services can have tangible effects on access to justice projects aiming to provide meaningful legal assistance—both where an actual unauthorized practice complaint is registered and where it is not. It seems self-evident that as the number of projects using a legal support services model increases, so too will scrutiny by the relevant law societies charged with monitoring and categorizing various forms of legal assistance. As a result, some of these access to justice initiatives may be the subject of unauthorized practice complaints on the basis that they are providing legal services without appropriate authorization. The LSUC's letters to employees of the FCJ Refugee Centre provide an example of such an occurrence, and while that specific situation was eventually resolved through reliance on the refugee sector exception in the *IRPA*, similar centres operating in other contexts would be far more vulnerable if a comparable order was issued against them. As discussed above, the FCJ employees were informed that they must "***cease and desist*** from [their] activities immediately."[107] This language makes it clear that application of the strict dichotomy between legal information and legal services in the access to justice sector may ultimately result in the closing down of certain initiatives.

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[105] While there are a significant number of cases that involve enforcement of prohibitions on the unauthorized practise of law, most involve activity that clearly constitutes the provision of legal services, such as drafting statements of claim or other legal documents, or appearing before adjudicative bodies. As such, these cases generally do not explore the coherence of the boundary of legal services.

[106] A search for Canadian scholarship or other commentary *analyzing* the coherence of the dichotomy between legal information and legal services yielded no results. There are some Canadian sources that *refer* to the role of the dichotomy in the context of enforcement of prohibitions on the unauthorized practice of law (see *e.g.* Joan Brockman, "Money for Nothing, Advice for Free: The Law Society of British Columbia's Enforcement Actions Against the Unauthorized Practice of Law" (2010) 29:2 Windsor Rev Legal Soc Issues 1) and in the context of mapping the availability of assistance for legal issues (see *e.g.* Mary Stratton, *Alberta Legal Services Mapping Project: An Overview of Findings from the Eleven Judicial Districts* (Edmonton: Canadian Forum on Civil Justice, 2011), online: <cfcj-fcjc.org/sites/default/files/docs/2011/mapping-final-en.pdf> [perma.cc/42HN-5WTS]). A limited discussion of the ambiguity of the dichotomy exists in Canadian commentary on the dilemma facing librarians when asked questions about finding and understanding legal reference materials (see Michael E Rice, "Reference Service versus Unauthorized Legal Practice – Implications for the Canadian Reference Librarian" (1990) 10:1/2 Leg Ref Serv Q 41). A search of American materials yielded few results. There is a similar debate about the risks faced by legal librarians, including differing views on how to manage those risks (see *e.g.* Yvette Brown, "From the Reference Desk to the Jail House: Unauthorized Practice of Law and Librarians" (1994) 13:4 Leg Ref Serv Q 31; Madison Mosley Jr, "The Authorized Practice of Legal Reference Service" (1995) 87:1 Law Libr J 203). There is also some discussion of the dichotomy in relation to the scope of assistance that can be provided by American court clerks (see *e.g.* John M Greacen, "No Legal Advice from Court Personnel: What Does That Mean?" (1995) 34:1 Judges Journal 10). The difficulty in defining the dichotomy is addressed in a study of the challenges posed to the work of advocates for domestic violence survivors (Suzanne J Schmitz, "What's the Harm? Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law" (2004) 10:2 Wm & Mary J Women & L 295).

[107] LSUC-FCJ Correspondence, *supra* note 88.

Given the severe consequences for non-compliance and the lack of definitional clarity in this area, it is not surprising that many service providers wishing to protect themselves against potential unauthorized practice complaints may feel obliged to seek expert guidance to help resolve the uncertainty. In practice, this means that organizations in already underfunded sectors must devote precious financial and human resources to figuring out how to properly characterize their initiatives to ensure compliance with the relevant statutory frameworks. This process can be incredibly costly. In the case of the FCJ and the UORAP, both organizations devoted many hours to discussing these issues and thousands of dollars on outside legal research and opinions—despite the fact that both of these groups operate in the "exempted" refugee sector where a clear legal conclusion was relatively easy to obtain. Of course, the "easy" resolution in our case was facilitated precisely by the fact that the underlying questions about legal information and legal services could simply be avoided. It is reasonable to conclude that in the absence of the refugee sector exception, the financial and human costs would have been significantly higher for both organizations because a clear opinion on the status of the actual projects would have been needed.

It is also clear that additional costs would be incurred in the event that an organization reached the conclusion (through the assistance of outside counsel or otherwise) that a governing body alleging violations of the unauthorized practice provisions was wrong in its assessment. In such circumstances, there would be costs associated with defending the relevant program against potential disciplinary proceedings, which have the potential to include a full court hearing. Other issues aside, it is ironic to imagine an under-resourced NGO incurring significant legal expenses in order to defend a project aimed at making justice more accessible.

In addition to the pure financial and human resources costs of these preventative activities, navigating this uncertain area risks other potential consequences as well. In the case of the FCJ Refugee Centre, for example, the LSUC's letter triggered a major organizational distraction, ultimately fracturing the Board of Directors and requiring FCJ to call on several external experts to devote their valuable time to provide letters and legal analysis in support of the FCJ's position. While the situation was eventually resolved in favour of the NGO, the stressful process itself caused the loss of dozens of organizational hours that could have been spent supporting refugee claimants and, from the perspective of FCJ's management, resulted in two Board Members opting not to renew their terms. Further, despite a finding of no wrongdoing on the part of FCJ and no inappropriate content in its materials or website, LSUC strongly encouraged alteration of the FCJ website to guard against any future complaints. The organization has since implemented these recommendations.

The potential chilling effect these types of events may have on other access to justice projects is also significant, particularly given the lack of clarity and guidance available to organizations seeking to comply with unauthorized practice provisions. Given the anxiety that the UORAP team experienced around this issue *despite* our own legal training and the project's position within the insulated refugee sector, it is easy to conclude that other more vulnerable organizations would feel even more concerned. The result is that service providers in the access to justice sector are likely to respond to uncertainty on these issues by favouring a very cautious approach[108]—a position that has the potential to stifle innovative opportunities for addressing the

[108] A cautious approach is already admitted by Canadian court staff who have reported anxiety about crossing the line: see Hannah Bahmanpour & Dr. Julie Macfarlane, "What Court Staff Told Us: A Summary from the National Self-Represented Litigants Study 2011-2012" (Windsor: National Self-Represented Litigants Project, 2013),

access to justice crisis through the provision of meaningful legal assistance in new and creative ways.

It is significant that each of the costs mentioned above are currently borne by actors in the access to justice sector themselves, and, further, that these costs are occurring during a time of prolonged crisis and resource scarcity. These actors are ill equipped to either absorb these costs or resolve the uncertainty that creates them. Further, the chilling effect discussed above is particularly troubling given the pervasive need for *more* creative projects aimed at mitigating access to justice deficits, not fewer.

In our view, it is incumbent on regulators and lawmakers to assume leadership in this area and to help provide clarity, as the current ad hoc approach places an unreasonable burden on those with the least amount of power to offer a systemic response to the current state of confusion. A comprehensive and considered response is needed because the underlying objectives of the prohibition on unauthorized practise cannot be recklessly discarded to address the concerns identified in this article. Indeed, we recognize that a key public policy objective of the regulatory regime in the legal services industry is to ensure "consumer protection" through competent provision of services.[109] The relationship between consumer protection and access to justice is, however, double-edged. On the one hand, incompetently provided legal services may undermine a consumer's ability to access justice, and ensuring quality provision of legal services should be regarded as a critical contribution to a fair and accessible system—it does not benefit the vulnerable to allow incompetence.[110] On the other hand, blunt regulation may both limit the availability of legal assistance and, as we have demonstrated here, create risks for projects aimed at mitigating access to justice deficits, thus creating or exacerbating the concerns.

It is clear that a balance must be struck and, in the midst of a broader access to justice crisis that is demanding new and innovative programs, the current approach to defining and policing the strict, dichotomous boundary between legal services and legal information may be having a counter-productive impact. Given the complexity and importance of these issues, it is regulators and lawmakers who are best placed to absorb the costs of conducting a detailed policy analysis and developing a new, consumer-focused approach across the legal services sector. The costs of navigating the current uncertainty should not, and cannot, be borne by individual actors within the under-resourced access to justice sector itself, and the ultimate consequence of a failure to reimagine these boundaries is yet another obstacle to the delivery of accessible justice in this country.

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online: <representingyourselfcanada.com/2014/03/16/what-court-staff-told-us/> [perma.cc/62VN-689D]. A number of articles aimed at legal reference librarians likewise counsel a cautious approach: see also *supra* note 106. Some Canadian scholarship has discussed the chilling effect and negative impact on access to justice of unauthorized practice prosecutions: see Jula Hughes, "Community-based Access to Justice – Building a Responsive Justice System in New Brunswick" (2012) 63 UNBLJ 68 and Brockman, *supra* note 106.

[109] See Michael J Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alb L Rev 215.

[110] Concerns surrounding the competence of both legal and non-legal representation of refugees have been the subject of significant debate. Recently, related issues have led to a new regulatory regime for immigration consultants as well as findings of incompetence against a prominent refugee lawyer by the Law Society of Upper Canada. See Immigration Consultants Regulatory Council at <www.iccrc-crcic.ca/AboutUs.cfm> and *Law Society of Upper Canada v. Hohots*, 2015 ONLSTH 72. See also Sean Rehaag "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall LJ 71.

V. CONCLUSION

A broad array of stakeholders is currently grappling with the urgent need to address Canada's ongoing access to justice crisis. As part of efforts to mitigate access to justice deficits in an under-resourced environment, significant focus is on forms of legal assistance that do not rely exclusively on legally trained, heavily regulated professionals, and a variety of creative legal support services are being created as a result. The UORAP is one such initiative and we have been encouraged by its reported utility for front-line workers who are helping to mitigate access to justice deficits facing refugee claimants. It is not clear, however, that our model for delivering legal assistance does not encroach on the boundary between legal information and legal services in a way that violates unauthorized practice restrictions.

Fortunately, our project was insulated from these concerns as a result of an explicit exemption contained in the federally-enacted *IRPA*, so this uncertainty did not prevent us from continuing our work. Further, our immunity from unauthorized practice concerns has allowed us to use this paper to share our experiences navigating the complexities associated with the dichotomy between legal information and legal services. We are conscious of the unique protection from which our project benefits and are concerned about the impact the lack of clarity in this area has on important access to justice initiatives operating in other sectors.

The Canadian justice system urgently requires innovative approaches to the provision of legal assistance. In order to be effective and make efficient use of limited resources, those crafting and executing important initiatives in this area must have clearly-defined parameters for their work. The continued threat of unauthorized practice violations creates an atmosphere in which risk-averse funders and service providers will inevitably resort to more traditional approaches rather than experiment with the new models that are desperately needed. As a result, it is not only the under-resourced service providers who bear the cost of this uncertainty—it is the entire justice system as well.