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## Access to Justice for Refugees: How Legal Aid and Quality of Counsel Impact Fairness and Efficiency in Canada's Asylum System

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**ACCESS TO JUSTICE FOR REFUGEES:**

**HOW LEGAL AID AND  
QUALITY OF COUNSEL  
IMPACT FAIRNESS  
AND EFFICIENCY IN  
CANADA'S ASYLUM  
SYSTEM**

**CRAIG DAMIAN SMITH**

**SEAN REHAAG**

**TREVOR FARROW**



## ACCESS TO JUSTICE FOR REFUGEES:

# HOW LEGAL AID AND QUALITY OF COUNSEL IMPACT FAIRNESS AND EFFICIENCY IN CANADA'S ASYLUM SYSTEM

### About this Report

This report is a collaboration between the Centre for Refugee Studies at York University, Canadian Forum on Civil Justice at Osgoode Hall Law School, and the Canada Excellence Research Chair in Migration and Integration Program at Ryerson University.<sup>1</sup>

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**Canada Excellence  
Research Chair in  
Migration & Integration**

1. In August, 2021, Ryerson University announced a renaming process to address the legacy of its namesake, Egerton Ryerson, given his role as an architect of the residential school system: a central part of Canada's settler colonial project against the land's indigenous populations. For more information on the process please see: <https://www.ryerson.ca/next-chapter/>.

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# EXECUTIVE SUMMARY

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This report presents findings from a study exploring relationships between refugee legal aid, quality of counsel, the fairness and efficiency of asylum procedures, and access to justice for refugee claimants in Canada.

Legal scholars, jurists and legal associations across Canada have recognized an access to justice “crisis”. The crisis extends to refugee claimants, and is exacerbated by unique vulnerabilities and barriers to justice.

This report defines access to justice for refugee claimants in Canada as early and affordable access to high-quality legal representation to both prepare claims and appear before the Immigration and Refugee Board, without systemic or economic barriers; to fully participate in and understand the refugee status determination process; to obtain just and fair outcomes in a timely and efficient manner; and to have recourse for poor quality or abusive representation.

## The Problem

The majority of refugee claimants in Canada rely on legal aid for representation at the Immigration and Refugee Board (IRB). The IRB is an independent, administrative tribunal tasked with making refugee status determinations. It is supposed to function as a largely non-adversarial and inquisitorial environment, where claimants prepare their claims with the aid of counsel and typically appear at hearings represented by counsel.

IRB procedures can require significant legal knowledge. Claimants are often unfamiliar with procedures, face challenges related to cross-cultural and linguistic communication, and frequently struggle with the effects of trauma. Claimants must submit documents on tight deadlines, and compile evidence to support their personal narrative. Submissions completed without counsel or with low quality counsel risk omissions or contradictions, which can undermine credibility assessments – the key determination criteria for IRB decision-makers. The refugee system, legal aid, and access to justice are thus inextricably linked.

Asylum claims in Canada increased significantly from 16,592 in 2015, to 23,350 in 2016, to a high of 58,378 in 2019. The Federal Government responded with significant investments to increase IRB capacity – particularly by hiring more decision-makers and opening new hearing centres across Canada. These investments were not matched by commensurate long-term funding to increase the capacity of provincial legal aid plans. Neither federal nor provincial funding is immediately responsive to increased demand. As a result, increases in claims can mean overburdened legal aid systems.

In 2019, at the peak of the increase, the Government of Ontario cut all legal aid funding for refugee claimants in that province. The Federal Government provided a one-time top-up of \$26.8 million CAD to address the shortfall, and a subsequent renewal in the 2020-21 Federal budget. It remains unclear how funding allocations will play out in the future, and provincial legal aid plans are now reliant on funding which is not guaranteed, but reactive to crises. These were but the latest in a recurring pattern of crises. Similar cuts and regulatory changes by the Federal Government in 2012, and legal aid deficits in 2017, both specifically affected refugee claimants and raised alarms over deep cuts to services. In addition, some

provinces do not offer legal aid for immigration and refugee matters, or do not cover costs for the entirety of the asylum process, placing increased burdens on already stretched resources in Canada's most populous provinces.

## Research Design

In order to understand how access to legal aid affects access to justice for claimants, this study employed a multi-methods approach to collect data from stakeholder groups across Canada's asylum system. These included:

- An original online survey delivered to 370 IRB decision-makers;
- Fifteen semi-structured interviews with refugee claimants who experienced barriers to justice; and
- Three focus groups with lawyers, members of legal aid organizations and refugee law associations, Immigration Consultants, and front-line staff at NGOs and shelters.

This project also presents institutional data on legal aid expenditures, representation rates, appeal rates between represented and self-represented claimants.

## Findings

Findings show that refugee claimants in Canada experience significant barriers to justice, which often begin at the outset of their procedures and persist through the asylum process. Representation rates are currently higher than for other tribunals, though funding for legal aid remains precarious over the mid- and long-term. In that context, our most important finding is that quality of representation is an urgent and long-standing issue and that this issue currently has more significant impacts on efficiency, outcomes, and access to justice than the inability of claimants to secure counsel.

As further developed below, the study yielded specific findings related to:

- The importance of early access to high-quality counsel;
- The crucial but understudied role of civil society organizations;
- Impacts of legal aid funding on access to counsel;
- Connections between representation, outcomes, and efficiencies;
- Significant concerns around quality of representation; and
- Lack of effective oversight and accountability for abusive counsel.

## Policy Recommendations

A series of policy recommendations flow from these findings. Specifically, as further developed in the Conclusions and Policy Recommendations section of this report, recommendations include:

- Establishing adequate, stable and responsive legal aid funding;
- Facilitating early access to quality counsel and assistance with file and hearing preparation;
- Exploring service delivery models that rely more heavily on refugee legal aid clinics, combined with wraparound support services; and
- Ensuring oversight and improved reporting structures to address low-quality and abusive counsel.

Ce rapport présente les résultats d'une étude récente explorant les relations entre l'aide juridique aux réfugiés, la qualité des avocats, l'équité et l'efficacité des procédures d'octroi d'asile et l'accès à la justice pour les demandeurs du statut de réfugié au Canada.

Les spécialistes du droit, les juristes et les associations juridiques de tout le Canada ont reconnu l'existence d'une « crise » de l'accès à la justice. Cette crise s'étend aux demandeurs du statut de réfugié qui font face à des vulnérabilités et des obstacles supplémentaires spécifiques et uniques à la justice.

Le présent rapport définit l'accès à la justice pour les demandeurs du statut de réfugié au Canada comme étant l'accès rapide et abordable à une représentation juridique de haut calibre : pour préparer les demandes et comparaître devant la Commission de l'immigration et du statut de réfugié, sans obstacles systémiques ou économiques, pour participer pleinement au processus de détermination du statut de réfugié et de sa compréhension, et pour obtenir des résultats justes et équitables de manière rapide et efficace ainsi que d'un recours en cas de représentation par un avocat faisant preuve d'incompétence ou d'abus.

## Le problème

La majorité des demandeurs du statut de réfugié au Canada comptent sur l'aide juridique pour être représentés devant la Commission de l'immigration et du statut de réfugié (CISR). La CISR est un tribunal administratif indépendant et quasi-judiciaire chargé de déterminer le statut de réfugié. La Commission est censée fonctionner dans un environnement largement non contradictoire, où les demandeurs préparent leurs demandes et se présentent aux audiences généralement représentés par un avocat.

Les procédures de la CISR peuvent exiger des connaissances juridiques importantes. Les demandeurs sont souvent peu familiers avec les procédures, font face à des défis liés à la communication interculturelle et luttent fréquemment contre les effets des traumatismes subis. Les demandeurs doivent soumettre des documents dans des délais serrés et rassembler des preuves pour appuyer leur histoire personnelle. Les soumissions effectuées sans l'aide d'un avocat risquent de comporter des omissions ou des contradictions, ce qui peut nuire aux évaluations de la crédibilité, le principal critère de détermination des décideurs de la CISR. Le système des réfugiés, l'aide juridique et l'accès à la justice sont donc inextricablement liés.

Les demandes d'asile au Canada ont considérablement augmenté, passant de 16 592 en 2015 à 23 350 en 2016, pour atteindre un sommet de 58 378 en 2019. Le gouvernement fédéral a réagi en réalisant d'importants investissements pour augmenter la capacité de la CISR -- notamment en embauchant davantage de décideurs et en ouvrant de nouveaux centres d'audience à travers le Canada. Ces investissements n'ont pas été accompagnés d'un financement proportionnel pour l'aide juridique, qui est principalement financée par les provinces. Ni le financement fédéral ni le financement provincial ne sont immédiatement ajustés en fonction de l'augmentation de la demande. Par conséquent, l'accroissement des demandes peut entraîner une surcharge des systèmes d'aide juridique.

En 2019, au plus fort de la hausse, le gouvernement de l'Ontario a coupé tout le financement de l'aide juridique pour les demandeurs d'asile dans cette province. Le gouvernement fédéral a fourni un complément ponctuel de 26,8 millions de dollars canadiens pour combler le manque à gagner, mais on ne sait toujours pas comment se fera l'allocation des fonds à l'avenir. Ces crises ne sont que les plus récentes d'une série de crises récurrentes. Des coupes et des changements réglementaires similaires effectués par le gouvernement fédéral en 2012, et les déficits de l'aide juridique en 2017, ont tous deux touché spécifiquement les demandeurs d'asile et ont suscité des inquiétudes quant aux coupes sombres dans les services.

## Plan de recherche

Afin de comprendre comment l'accès à l'aide juridique affecte l'accès à la justice pour les demandeurs d'asile, cette étude a utilisé une approche multi-méthodes pour recueillir des données auprès de groupes d'intervenants dans le système d'octroi d'asile canadien. Ces méthodes comprennent:

- Un sondage original en ligne remis à 370 décideurs de la CISR;
- Quinze entrevues semi-structurées avec des demandeurs d'asile ayant fait face à des obstacles à la justice;
- Et trois groupes de discussion avec des avocats, des membres d'organismes d'aide juridique et d'associations de droit des réfugiés, des consultants en immigration et du personnel de première ligne dans des ONG et des refuges.

Ce projet présente également des données institutionnelles sur les dépenses d'aide juridique, les taux de représentation, les taux d'appel entre les demandeurs représentés et ceux qui se représentent eux-mêmes.

## Constatations

Les résultats montrent que les demandeurs d'asile au Canada sont confrontés à d'importants obstacles à la justice, qui commencent souvent dès le début de leur procédure et persistent tout au long du processus d'octroi d'asile. Les taux de représentation sont plus élevés que pour les autres tribunaux. Notre conclusion la plus importante est que la qualité de la représentation est actuellement une question plus urgente ayant des répercussions plus importantes sur l'efficacité, les résultats et l'accès à la justice que l'incapacité des demandeurs à obtenir un avocat.

Comme nous l'expliquons plus en détail ci-dessous, l'étude a permis de dégager des conclusions spécifiques sur les points suivants:

- L'importance d'un accès rapide à un avocat aux compétences élevées;
- Le rôle crucial mais peu étudié des organisations de la société civile;
- L'impact du financement de l'aide juridique sur l'accès à un avocat;
- Les liens entre la représentation, les résultats et l'efficacité;



- Les préoccupations importantes concernant la qualité de la représentation;
- Et le manque de surveillance et de responsabilité des avocats commettant des abus.

## Recommandations sur les politiques

Une série de recommandations sur les politiques découle de ces constats. Plus précisément, comme cela est développé dans la section Conclusions et recommandations des politiques du présent rapport, ces recommandations sont les suivantes:

- Établir un financement suffisant, stable et adapté de l'aide juridique;
- Faciliter l'accès précoce à un avocat compétent et à une assistance pour la préparation des dossiers et des audiences;
- Explorer des modèles de prestation de services qui s'appuient davantage sur les services d'aide juridique pour les réfugiés, combinés à des services de soutien généralistes;
- Et assurer une surveillance et des structures de rapport améliorées pour lutter contre les avocats peu compétents ou malhonnêtes.

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# 1. OBJECTIVES AND BACKGROUND

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This report examines relationships between publicly-funded legal aid, quality of legal counsel, and access to justice for refugee claimants.

The project's impetus was threefold. First, in 2019 the Government of Ontario cut all legal aid funding for refugee claimants, when asylum applications were at a record high. The cuts meant real-time repercussions on the mental health and wellbeing of claimants, and the functioning of legal aid clinics, shelters, and refugee-devoted NGOs. Advocacy from stakeholders across Canada's refugee system resulted in emergency funding from the Federal Government to cover the shortfall. It remains unclear how long that funding will last.

These cuts were but the latest in a recurring pattern of funding and service cuts specifically targeting refugee claimants. In 2012, the Federal Government's changes to asylum regulations, coupled with deep legal aid funding cuts, meant provincial legal aid plans considered fundamental changes to service provision models and overall cuts to refugee services.<sup>2</sup> In 2017, Legal Aid Ontario and B.C.'s Legal Services Society warned they would slash support for claimants in the absence of additional funding for immigration and refugee legal aid services. Refugee lawyers and academics, however, warned that including threats to service cuts in budgetary disputes risked harming vulnerable claimants.<sup>3</sup>

Second, from 2017 to 2019 the lead author and a research team examined new asylum dynamics at Roxham Road on the New York / Québec border. Interviews with over three hundred refugee claimants in Hamilton, Montréal, Ottawa, and Toronto revealed dozens of experiences with problematic and often abusive lawyers, paralegals, translators, and Immigration Consultants. In some cases, private lawyers working under legal aid certificates (or legal aid "mandates" in Québec) pushed claimants for extra fees, often to the point where they felt extorted. In others, lawyers focusing on a single national group took on a high volume of cases and filed refugee claims which excluded their unique experiences in favour of virtually verbatim claims which they insisted would help their cases. Instead, they undermined their credibility.

Third, the Federal Government responded to the increase in refugee claims with hundreds of millions of dollars to bolster capacity at the Immigration and Refugee Board, which decides cases. These investments were not matched by proportionately increased funding for legal aid, despite the fact that the majority of claimants rely on it, and notwithstanding the fact that Canada's refugee system primarily depends on lawyers to file claims, compile and submit evidence, and prepare claimants for hearings.

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2. Taddese, Yamri. 2012. "Refugee Lawyers Alarmed at LAO Proposals," Law Times, 12 Nov. Online: <https://www.lawtimesnews.com/news/general/refugee-lawyers-alarmed-at-lao-proposals/259784>.

3. Robinson, Alex. 2017. "LAO Budget Woes Mean Squeeze on Services," Law Times, 4 July. Online: <https://www.lawtimesnews.com/news/general/lao-budget-woes-mean-squeeze-on-services/262616>; Rehaag, Sean. 2017. "Holding Refugees Hostage at Legal Aid Ontario," SLAW – Canada's Online Legal Magazine, 19 June. Online: <https://www.slaw.ca/2017/06/19/holding-refugees-hostage-at-legal-aid-ontario/>.

The Centre for Refugee Studies, Canadian Forum on Civil Justice, and CERC in Migration and Integration partnered with UNHCR Canada to explore these dynamics. We hope the project's findings will provide evidence to inform debates about how to improve access to justice for refugee claimants and the functioning of Canada's asylum system.

In the following report, we briefly explore definitions and metrics for access to justice, and apply them to the situation of refugee claimants in Canada. We explain recent asylum trends and the functioning of Canada's refugee status determination system, particularly how access to publicly-funded legal aid impacts fairness, efficiency, and outcomes. We then describe our multi-method approach to engage stakeholders across the refugee system, present our central findings around how access to high-quality counsel can impact refugee claimants' access to justice, and offer a series of policy recommendations derived from our findings.

## 2. LEGAL AID, ACCESS TO JUSTICE, AND CANADA'S REFUGEE SYSTEM

### DEFINING ACCESS TO JUSTICE

Legal scholars, jurists, lawyers, and legal associations across Canada have recognized a “crisis” in access to justice. This is particularly troubling given that access to justice is a fundamental right in democratic societies. Improving access to justice involves removing “the obstacles that prevent the law from doing what it was designed to do and from serving those it was meant to serve” (Moore & Perlmutter 2020: 69).

Access to justice can be understood in many different ways and may have different meanings depending on the context. Until relatively recently, it was often simply defined as access to legal services for certain types of legal disputes. This “legal categories approach” focuses on the importance of representation and services over information, procedural fairness, or recognition of specific vulnerabilities (Mossman, Schucher, & Schemeing 2010).

While this narrow understanding of access to justice remains relevant given the impact that the availability of representation may have on the outcomes of legal processes, many observers now use the term more broadly to engage with the myriad other barriers to justice beyond the simple question of access to legal representation (Farrow & Jacobs, 2020). These include how racialized status, sexual orientation and gender identity and expression, culture, language, and socioeconomic status may affect the ability to access services and to navigate legal procedures (Hughes 2013).

One broader understanding of access to justice would involve asking whether individuals have the capacity to identify and manage legal needs arising throughout legal processes, as well as physical and financial access to those processes (Dandurand & Jahn 2017; Moore and Farrow 2019).

**Although no firm consensus has emerged about the best definition of the term itself, a leading analysis identifies three basic dimensions to the concept: procedural access to justice (defined as an ability to invoke and participate in justice processes); substantive access to justice (defined as an ability to attain fair outcomes); and symbolic access to justice (defined as being accorded respect and recognition by the system as a whole). The core applications of these three dimensions have traditionally centered on court procedures, but the scope of applicability has gradually expanded to a point where access to justice can now serve as a standard for “every institution where law is debated, created, found, organized, administered, interpreted and applied” (Bates, Bond, and Wiseman 2015: 9-10).**

Another broader understanding of access to justice is increasingly used in the administrative law context, including in Canadian refugee law, where access to justice is sometimes understood as an element of procedural fairness. Thus, for example, some have argued that for the refugee determination process to be fair, people must have the ability to make a refugee claim, be assisted by legal representatives and community organizations, be able to participate actively, be treated with respect in the decision-making process, and receive fair outcomes (Barutciski 2012; Bates, Bond, and Wiseman 2015).

For the purposes of this study, we define access to justice for refugee claimants in Canada as early and affordable access to high-quality legal representation to both prepare claims and appear before the Immigration and Refugee Board, without systemic or economic barriers; to fully participate in and understand the refugee status determination process; to obtain just and fair outcomes in a timely and efficient manner; and to have recourse for poor quality or abusive representation by counsel.

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## MEASURING ACCESS TO JUSTICE

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There have been some attempts at measuring access to justice in Canada. In 2012 the Canadian Bar Association (CBA) launched its Equal Justice Initiative, publishing a series of benchmarks for ensuring access to justice for vulnerable people in Canadian society, including its Reaching Equal Justice report (2013) and analyses of global access to justice metrics (CBA 2014). Likewise, the Action Committee on Access to Justice in Civil and Family Matters' Roadmap to Change report (2013) tracked and promoted changes in thinking from procedural access and functioning of courts to a public-first framing of access to justice and a focus on outcomes over procedures. In 2015 the Association of Legal Aid Plans of Canada and a Working Group of the CBA's Access to Justice Committee began the National Legal Aid Benchmarks Project (CBA 2015). It established 31 targets for achieving access to justice by 2030. Importantly, the CBA's project contributes to growing evidence that legal aid reduces costs to social services and legal systems, illustrating the "social return on investment" from ensuring universal access to justice (Moore & Farrow 2019). Results of long-term research on barriers to justice and new ways of approaching access to justice from a public-first and social returns on investment are now available (see the recent volume edited by Farrow and Jacobs 2020).

Likewise, the Department of Justice developed an access to justice index (Government of Canada 2018), primarily from a review of existing indices, mainly the U.S. National Center for Access to Justice's Access to Civil Justice Index (2020). The index includes four metric categories: Access to administrative bodies (including physical and technological access), process (divided between procedural justice, access to representation, interpersonal relations, and access to information), cost (including service charges and intangible costs), and outcomes (see McDonald 2017).

This study identifies barriers for access to justice for refugee claimants relating to each of the four categories in the Department of Justice index and also considers a range of other procedural barriers outside the oversight of governmental or legal agencies.

The Immigration and Refugee Board (IRB) is an independent, quasi-judicial tribunal tasked with making refugee status determinations under the Immigration & Refugee Protection Act. Its stated mission is to “resolve immigration and refugee cases efficiently, fairly and in accordance with the law”, including principles of administrative justice, the Charter of Rights and Freedoms, and Canada’s obligations under international conventions.<sup>4</sup> The IRB divides operations between three regions: Western (BC, Alberta, Saskatchewan, Manitoba, Yukon, NWT); Central (Ontario, except Ottawa and Kingston); and Eastern (Québec, NB, NS, PEI, Newfoundland, Nunavut, and Ottawa & Kingston).

The IRB is Canada’s largest administrative tribunal, currently employing 370 decision-makers at the Refugee Protection Division (RPD), which hears first instances of refugee claims, and the Refugee Appeal Division (RAD), which hears appeals, mostly for negative RPD decisions. IRB decision-makers, known as Members, must determine whether claimants meet the 1951 Convention definition: “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.” Members must also determine whether claimants are Persons in Need of Protection, meaning that they face a risk to their lives, a risk of torture, or a risk of cruel and unusual treatment. If Members find that claimants meet either the 1951 Refugee Convention definition or the definition of Persons in Need of Protection, claimants receive refugee protection. While Members consider a wide range of factors in making their determinations, a key factor is their credibility assessment (Evans Cameron 2018). Credibility assessments are judgments about whether a claimant’s narrative is, on a balance of probabilities, truthful.

The IRB has come under considerable strain in recent years. In 2016, 23,350 people claimed refugee status in Canada. That number more than doubled to 47,425 in 2017, 55,388 in 2018, and 58,378 in 2019, before dropping to 18,500 in 2020. The latter decrease can be largely attributed to the closing of the U.S. / Canada land border and truncated international travel as a result of the COVID-19 pandemic. RPD figures from 2019-2021 include appeals referred back to the RPD. Historically, and as described in “Fig. 1: Total Represented and Self-Represented Claimants at the RPD, by Region”, the majority of claims are lodged in Ontario and Québec, and heard in the IRB’s Central and Eastern regions. While at the time of this report’s release the strain has been eased as a result of the decline in international mobility, funding shortfalls are a recurrent problem and should be addressed at a time when the strain on the system is low.

**Refugee claimants currently wait an average of two years from the time of filing their claim to a hearing at the Immigration and Refugee Board (IRB).**

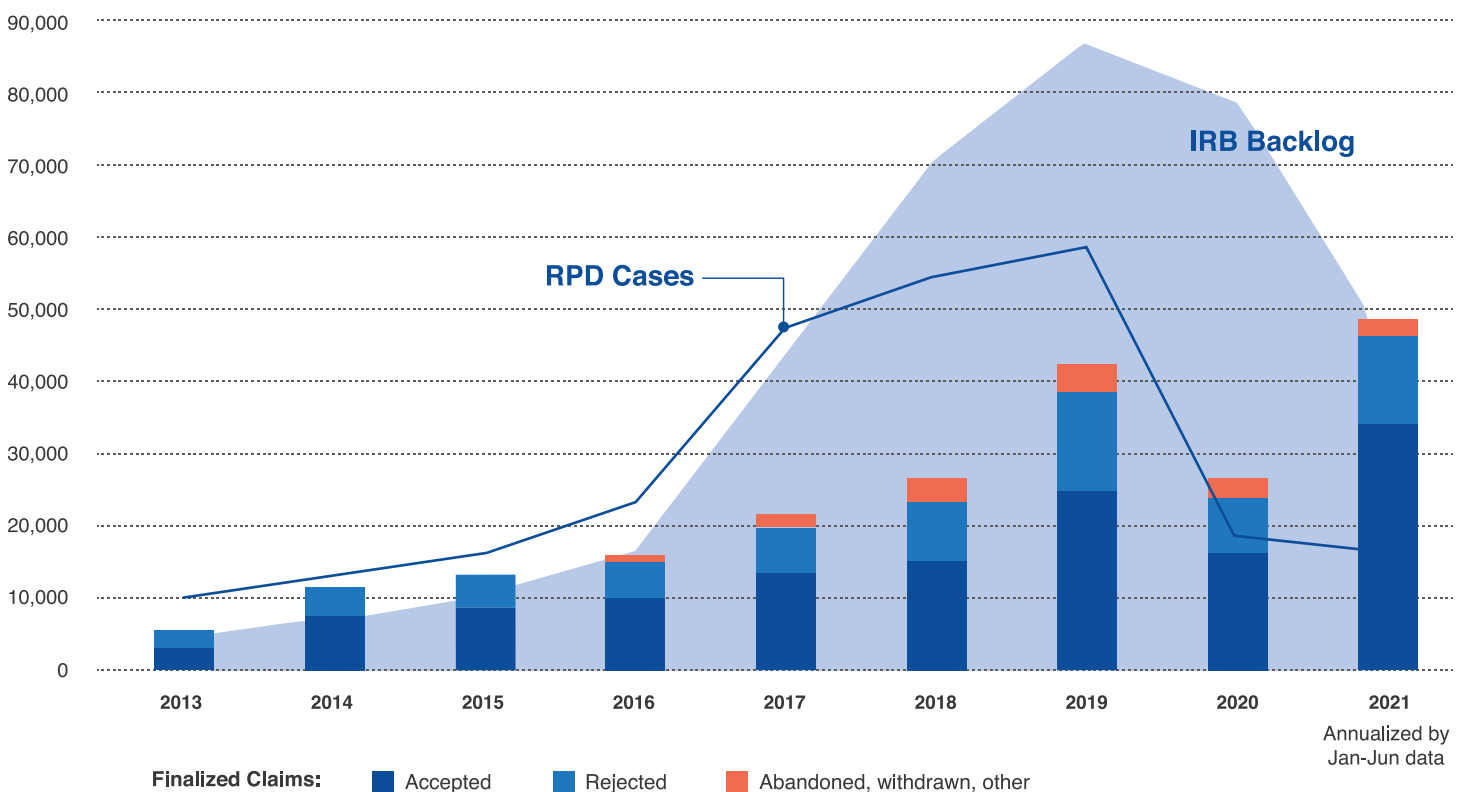
**IRB capacity almost doubled from 21,513 finalized claims in 2017, to 42,491 in 2019. At current rates it will finalize 46,000 to 48,000 claims in 2021.**

**The IRB’s case backlog more than doubled from 17,537 in 2016 to 43,250 in 2017. It peaked at 87,270 in 2019. At current rates the backlog will decrease to 47,106 by 2022, to between 47,000 to 58,000, depending on intake.**

4. IRB, 2021 “About the Board”: <https://irb.gc.ca/en/board/Pages/index.aspx>.

The increase in the number of claims was not initially matched by a proportionate increase in investments in the refugee determination process or in related services, such as emergency shelters and settlement organizations. This initial mismatch strained the reception capacities of major cities in Ontario and Québec and contributed to a two-year backlog for RPD hearings (Yeates 2018; Parliamentary Budget Office 2018). In January 2016, just over 17,500 cases were pending at the RPD. By the following year the backlog had increased to almost 47,000 as of November 2017. By November 2019, it had almost doubled to over 87,000 – the majority in Ontario and Québec. Finally, by the end of May 2020, the RPD backlog peaked at almost 93,000 claims. A 2019 report to Parliament found that if application rates remained constant, backlogs might have increased to five years by 2030 (Office of the Auditor General of Canada).

**FIG. 1: REFUGEE CLAIM & RPD STATISTICS 2013-2021**



\*2021 RPD rates and projected backlog annualized using available IRB data at time of writing (Jan-June).  
Source: <https://irb.gc.ca/en/statistics/protection/Pages/RPDStat2021.aspx>

In response, the Federal Government provided significant additional funding to the IRB, allowing for increased capacity through hiring new decision-makers and opening new hearing centres across Canada, which significantly increased annual decision rates. In 2016, the RPD finalized 15,761 cases (16,432 including Legacy Claims). By 2019, capacity had almost tripled to 42,491 cases (43,004 including Legacy Claims). Decision rates dropped dramatically in 2020 when the pandemic forced a shift to online hearings, though increased again significantly in 2021.

While this increased funding to the IRB has been crucial to maintaining Canada's refugee status determination system, increased decision-making capacity has not thus far been matched by proportionate or stable investments in legal aid.

Legal representation by high-quality counsel is integral to IRB efficiency and maintaining public trust in Canada's refugee system. Perhaps more importantly, representation significantly affects claimants' rights to a fair and efficient process. Procedural fairness and non-discrimination are core guarantees under the Canadian Charter of Rights and Freedoms, which applies to citizens and non-citizens alike, including refugee claimants. These aspects of administrative law are also crucial metrics for access to justice.

Provincial legal aid plans are mandated to ensure access to justice by providing government-funded representation for low-income individuals. Legal aid provision is divided between private lawyers who accept legal aid certificates, devoted community clinics, and legal aid lawyers such as at the Montreal Legal Aid Immigration Law Office, or the Refugee Law Office in Ontario – though systems vary between provinces. For example, the governments of Nova Scotia, New Brunswick, and Saskatchewan do not offer legal aid for refugee claimants.

Estimates suggest that more than 70% of refugee claimants rely on legal aid nationally (CBC 2019). Legal aid is particularly important given the context of flight from persecution. Claimants often arrive in Canada with few resources, and experience language barriers and unfamiliar procedures. Seeking refuge is made more complicated by short timeframes for filing claims and the need to submit complex corroborating evidence, including psychological and medical assessments and intimate life details, often from countries from which they have fled.

Legal aid budgets are not responsive to demand. In 2017 the CBA published a letter to the Minister of Justice, highlighting how lack of funding increases commensurate with an increase in the number of refugee claims meant legal aid plans in Ontario and British Columbia faced the possibility of suspending services for claimants.<sup>5</sup> Similar budget shortfalls occurred in Québec. The CBA noted legal aid shortfalls can lead to more self-represented claimants at the IRB, longer procedures and delays, and breaches of natural justice and administrative law.

Funding is made more complicated given that legal aid is largely a provincial competence, whereas the refugee determination system falls within federal jurisdiction. Differences in funding across provinces mean inconsistent access to justice depending on where claimants reside – for instance, the absence of funding for refugee legal aid in Saskatchewan, or that claimants must repay legal fees after a successful application in Alberta. As described in Table 1, legal aid expenditures also vary significantly between provinces. Relatively poor data makes it difficult to analyze efficiencies, but it is clear that the relationship between total expenditures and costs per certificate (legal aid “mandate” in Québec) likewise vary significantly, and

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**In FY2019-20, 5% of legal aid budgets nationally were allocated to immigration & refugee matters.**

**Nationally, expenditures for refugee and immigration legal aid increased from \$25 million CAD in FY2014-15, to over \$58 million CAD in FY2019-20.**

**In FY2019-20, Ontario accounted for 56.5% of all refugee legal aid certificates, & Québec accounted for 31.2%.**

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**We're just lurching from crisis to crisis [...] The government made a massive investment in the IRB over the last few years and didn't make the same sort of proactive investment in counsel [...] The IRB can't do its job without high-quality counsel in the seat.**

**- Legal Aid  
Ontario Representative**



TABLE 1: PROVINCIAL LEGAL AID EXPENDITURES AND I&amp;R CERTIFICATES

	2012-13				2013-14			
	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates
NL & Labrador	320,53	NA	NA	NA	24157	NA	NA	NA
Quebec	4,980,329	3,043	3	1,715	3,179,608	2,047	270	1,833
Ontario	21,315,000	NA	NA	NA	17,543,000	4,061	149	1,098
Manitoba	103,230	40	3	NA	121,077	50	4	NA
Alberta	NA	NA	NA	NA	521,709	NA	NA	NA
British Columbia	1,720,311	755	0	NA	1,965,505	368	14	NA

	2014-15				2015-16			
	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates
NL & Labrador	23323	7	NA	NA	15621	5	NA	NA
Quebec	3,810,350	1,664	388	1,872	3,766,458	1,641	448	2,441
Ontario	19,172,000	5,068	263	1,114	30,929,000	6,620	640	2008
Manitoba	129,325	47	3	NA	94,242	107	21	NA
Alberta	452,267	NA	NA	NA	745,169	NA	NA	NA
British Columbia	2,178,190	402	52	NA	2,147,780	404	38	NA

	2016-17				2017-18			
	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates
NL & Labrador	21,634	4	NA	NA	21,364	15	NA	NA
Quebec	3,540,014	2,390	464	2,768	5,065,253	9,465	569	2,665
Ontario	37,524,000	9,005	1,000	2,653	42,623,000	10,588	1,181	1,917
Manitoba	259,807	201	24	NA	625,405	583	136	NA
Alberta	780,142	NA	NA	NA	1,032,236	312	45	532
British Columbia	2,782,815	745	63	NA	3,402,538	1131	40	NA

	2018-19				2019-20			
	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates	I&R Expenditures (CAD)	RPD Certificates	RAD Certificates	Other I&R Certificates
NL & Labrador	17,919	8	NA	NA	51,658	15	NA	NA
Quebec	6,565,499	7,188	518	2,605	7,791,884	7,598	330	2,363
Ontario	43,012,000	13,304	1,058	1,819	43,199,084	13,781	561	1,160
Manitoba	481,634	484	62	NA	485,012	267	14	NA
Alberta	1,027,882	1,015	83	405	1,353,957	1048	66	157
British Columbia	3,920,459	1133	90	NA	5,363,354	1623	91	NA

"RPD" = Refugee Protection Division | "RAD" = Refugee Appeals Division

offer significantly less remuneration per case than other areas of law.

Jurisdictional competences also mean legal aid for refugee claimants is open to several layers of politicization, with impacts on interprovincial and federal politics. The most glaring recent example, occurred in April 2019 when the Government of Ontario cut LAO funding by \$133 million – 30% of LAO’s budget – with a specific direction not to allocate funds to refugee claims. Funding cuts were effective immediately. The timing coincided both with the Federal election and thousands of monthly refugee claims at Roxham Road on the New York / Québec border. Federal opposition parties had sought to make Roxham Road a ballot box issue, exacerbating a complex intergovernmental problem, and undermining norms of interprovincial responsibility-sharing (Spratt 2019; Paquet & Schertzer 2020). Regrettably, these tactics mirrored types of “burden-shifting” policies employed to influence electoral politics between and within other liberal democracies, particularly in Europe (see Thielemann 2018).

In this context, in the spring of 2019, LAO announced that it would no longer fund most new refugee law services beyond helping clients complete their Basis of Claim forms (Canadian Press 2019). Organizations including the Canadian Bar Association, Law Society of Ontario, Canadian Association of Refugee Lawyers, and Canadian Council for Refugees decried the decision as politicized and “punching down” at vulnerable claimants.

In August 2019, the Federal Government stepped in, and full services were immediately resumed. The 2020-21 Federal Budget devoted another \$26.8 million across all provinces. It remains unclear what will happen if these top-ups are not renewed in subsequent fiscal years, though future cuts would inevitably affect IRB efficiency and claimants’ access to justice. The current situation of funding as an emergency response is inadequate for building a resilient and fair asylum system.

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**“Immigration and refugee cases have increased in Ontario over the past few years. Vulnerable individuals will continue to have serious legal issues that, without legal aid, will be unsupported, causing a greater financial drain on the system, longer time to less reliable resolutions, and an overall deficit in the application of the principles of justice that we hold dear.”**

**-Former Supreme Court Chief Justice Beverly McLachlin (2019)**

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## **REPRESENTATION AND IRB FAIRNESS AND EFFICIENCY**

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The IRB is often held up as a global exemplar of a fair and efficient model for refugee status determination (Barutciski 2012). That reputation relies, in good measure, on the fact that claimants are represented by counsel in a predominantly non-adversarial process. Despite this positive reputation, research shows significant inconsistency in recognition rates among the same countries of origin and types of claims, suggesting that decision-maker bias, opinion, and expectations for evidence can be more consequential than the merits of a specific claim (Rehaag 2008; 2014; Colaiacovo 2013). This variation is evidence of what some have called “luck of the draw” (Rehaag 2012), or “refugee roulette” (Macklin 2009).<sup>6</sup>

5. CBA, 2 Oct, 2017. “Insufficient Funding for Immigration and Refugee Legal Aid Services across Canada: Impact on Right to Representation by a Lawyer.” <https://www.cba.org/CMSPages/GetFile.aspx?guid=eaea0bb9-2f10-46bc-8a7a-81626d2baec4>.

6. The IRB provided an explanatory note contextualizing research on variation and recognition rates. See: [https://refugeelab.ca/wp-content/uploads/2021/08/IRB\\_explanatory-note-member-decisions-RAD-RPD-E.pdf](https://refugeelab.ca/wp-content/uploads/2021/08/IRB_explanatory-note-member-decisions-RAD-RPD-E.pdf).

However, other research has revealed that variation is not solely the result of decision-maker subjectivity, but is often the result of lack of or quality of counsel – both in preparing a claim and in hearings (Tomkinson 2014; Liew et al. 2019).

The asylum process can require significant legal knowledge and claimants can be subject to intensive questioning by Members (Barutciski 2012; Liew et al 2019). Claimants are often unfamiliar with the process, face challenges related to cross-cultural communication, and frequently struggle with the effects of trauma, at times exacerbated by detention (Bond et al 2016). Most claimants are from lower socioeconomic brackets (Bond and Wiseman 2014). The refugee system, legal aid, and access to justice are therefore inextricably linked.

The pre-hearing phase is consequential. Claimants must submit a narrative Basis of Claim (BOC) form within fifteen days, which details their reason for flight. They must also compile evidence to prove, on the balance of probabilities, that their experience meets tests for refugee protection. BOC forms and evidence completed without the aid of counsel or with the aid of low-quality counsel risk omissions or contradictions, which may be found to undermine credibility. Lawyers commonly prepare by role-playing to familiarize claimants with procedures, by advising claimants on how to address IRB Members, and by addressing inconsistencies between BOC forms and secondary sources (CCR 2014).

IRB decision-makers must weigh a range of factors, including the level of detail (for instance, specific dates and times of events), discrepancies between testimony and available evidence, and corroborative evidence (IRB 2004). Each depends a good deal on access to counsel, the quality of counsel, and counsel's rapport with Members (Tomkinson 2018). Rehaag (2011) explored 70,000 decisions made between 2005 and 2009, and found that 57% of claimants were successful when represented by lawyers, whereas only 15.2% were successful when they were unrepresented. He also found lawyers' professional experience had a significant impact on outcomes. In spite of this evidence, it is difficult to establish scholarly consensus on the impact of legal aid on IRB outcomes. Rehaag's investigation remains the only comprehensive empirical Canadian study on the impact of representation on outcomes (Buhler and Korpan 2019).

Given this context, legal aid cuts could lead to significant knock-on effects. More claimants might proceed without representation, or engage low-quality representation through under-prepared or over-worked private lawyers, paralegals, or Immigration Consultants outside of legal aid (Parliament of Canada 2017). Inadequate written materials and preparation may result in longer or adjourned hearings as RPD Members seek to provide some measure of procedural fairness. As discussed in detail below, although no causal relationship is established through this study, self-represented or poorly represented claimants are more likely to receive negative decisions, leading to more appeals and higher costs to individuals and the system.

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**“Access to justice is a foundational component of the rule of law and fundamental human rights issues for all members of our society, which includes refugees, immigrants, and those with precarious status. With respect to refugees [...] the consequences of immigration actions and government decisions can be dire. A refugee who cannot rely on prompt and effective legal representation is at risk for arbitrary deportation to a terrifying future filled with torture or even death.**

**-Barbara Jo Caruso, Chair of CBA Immigration Law Section.**

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Quality of counsel concerns can also be raised to the RAD or through judicial review. These are time-consuming and increase workloads as decisions are overturned and sent back for redetermination. Higher successful appeal rates could, over time, prompt the Federal Court to be less deferential towards IRB decision-making, on the theory that past errors suggest careful scrutiny is needed over IRB decisions. If this results in more cases being closely looked at not only by the RAD but also by the Federal Court, the system will experience further delays. Ultimately, legal aid shortfalls may compromise the rule of law and procedural justice (Bond 2012). Finally, perceived inefficiencies risk eroding public trust in the refugee status determination system (Environics 2019).

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### 3. UNDERSTANDING ACCESS TO JUSTICE FOR REFUGEE CLAIMANTS: A STAKEHOLDER APPROACH

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The previous sections illustrated that access to justice, including access to publicly-funded, high-quality legal counsel, is integral to the functioning of Canada's refugee status determination system, particularly to the fairness and efficiency at the Immigration and Refugee Board. They also illustrated that funding for refugee legal aid has not kept up with investments in procedural and administrative aspects of Canada's refugee status determination system, nor has it increased apace with demand for services. Yet there is relatively little research on how these dynamics interact, nor on how they affect various stakeholders, including refugee claimants.

In order to address these issues, this project employed a multi-methods approach to collect data from stakeholder groups across Canada's asylum system. Data collection was comprised of semi-structured interviews with refugee claimants; focus groups with lawyers and members of legal aid organizations, Immigration Consultants, and front-line staff at NGOs and shelters; and surveys with IRB Members. This project also uses quantitative data on legal aid funding, representation rates, and appeals. Data collection ran concurrently from February to August 2021.

The scope of the project did not allow for financial analysis exploring quantitative relationships between legal aid funding and impacts on or efficiencies in the asylum system or broader social services. It was conducted and completed during the COVID-19 pandemic, which impacted methodological options and choices.

## Interviews

We conducted 15 original semi-structured interviews with refugee claimants in British Columbia, Alberta, Ontario, and Québec who experienced barriers accessing justice. Recruitment did not seek a representative sample, but specifically to develop a deeper understanding of how claimants experienced barriers to justice. We recruited by disseminating posters in several languages to shelters, community organizations, legal clinics, and service providers including food banks and medical clinics. We also posted on social media. Recruitment asked for participants who experienced barriers stemming from:

- Negative interactions with lawyers, consultants, IRB Members, or the CBSA;
- Poor quality representation or exploitation by counsel;
- Changes to legal aid funding or financial ineligibility;
- Changes to IRPA diverting claims to the PRRA-only stream; and / or
- Other barriers around lack of access to legal aid.

Interviews lasted from sixty to ninety minutes over Zoom, in participants' language of choice. We interviewed claimants in Vancouver, Calgary, Hamilton, Toronto, and Montréal. The format allowed participants to relate narratives at their own pace. Our overarching goal was to consider claimants as key stakeholders with unique perspectives. Each interview ended by soliciting policy recommendations to improve access to justice. Participants received a \$50 CAD honorarium.

## Focus Groups

Second, we conducted three, 90-minute focus groups with refugee lawyers and representatives of refugee law organizations and committees, immigration consultants, representatives from provincial legal aid plans, and staff at frontline community organizations and shelters across Canada (with a total of seventeen expert participants).<sup>7</sup> We used a method known as "structured eavesdropping" to encourage peer-to-peer conversation comparing opinions, perspectives, and experiences. Focus groups began with a high-level discussion around functional definitions of access to justice for refugee claimants, followed by differences among service provision. We then presented anonymized scenarios derived from semi-structured interviews, and asked participants to reflect on points of intervention and policy changes that would have addressed access to justice concerns.

## Survey

Third, we delivered an online survey to all RPD and RAD Members. This project is unique insofar as the IRB was a partner in, rather than the object of, academic research. Surveys were delivered in English and French, and transmitted to Members by relevant Deputy Chairs. We received 158 responses (88 RPD, 70 RAD) – 43% of potential respondents.

The survey used five-point Likert scales, which asked respondents to note the degree to which they agreed or disagreed with statements, frequency of experiences, and whether these were associated with relationships between claimants and counsel (e.g., "strongly disagree, disagree, agree, strongly agree, N/A"). It was comprised of thirty questions and multiple sub-questions, and included one open text field for respondents to highlight issues not included in the survey.

7. Focus group participants included representatives from Alberta, Manitoba, Ontario, and Québec legal aid plans; the Canadian Association for Refugee Lawyers, Refugee Lawyers Association of Ontario, Canadian Bar Association's Immigration Law Section, and Legal Aid Ontario's Refugee Law Office; and several legal clinics and frontline organizations across Canada, including in provinces with no funding for refugee legal aid.

# 4. FINDINGS

## THE VALUE OF EARLY ACCESS TO COUNSEL AND HEARING PREPARATION

Qualitative data illustrates how early access to information about refugee procedures and legal services can be crucial determinants in access to justice. NGOs, including shelters and community organizations, play an indispensable and understudied role in this aspect of Canada's refugee system. A significant part of that role is helping claimants understand and navigate systems, access services, and connect with trusted counsel. For example, NGOs across Canada provide mock hearing programs and courses to prepare claimants for their experience at the IRB – these include the Ready Tours across several Canadian cities, and Refugee Hearing Program and Mock Hearing Program for LGBTQ+ claimants in Toronto.<sup>8</sup> These programs are not universally available, and often depend on short-term municipal, provincial, and federal grants.

Community organizations very often intervene in cases where claimants are ineligible for or unaware of legal aid, made vulnerable by poor representation, or face various types of abuse. Several stakeholders framed their role as “damage control” or catching claimants who have “fallen through the cracks”. Throughout focus groups and informal conversations, stakeholders stressed the importance (and lamented the absence) of “wraparound” support beginning at the earliest stages to provide reliable guidance about the refugee claims process, and help claimants when they begin to face barriers, rather than to address these barriers after the fact.

For claimants who qualify for legal aid, there are often additional challenges finding quality counsel to take on their case. While in some cases they are paired with duty counsel working in devoted legal-aid clinics, many claimants in Ontario, Québec, and British Columbia are simply provided with a list of lawyers' names and contact information, and work their way down that list until they receive a response (see Teklu 2020: 12-13).

This form of referral presents a particular burden for those who require language interpretation. Legal aid policies mean it is difficult to change counsel once a lawyer accepts a legal aid certificate.<sup>9</sup> As a support worker from a Toronto organization related:

Some clients we help out have been unfortunately tethered to counsel that hasn't provided the best support, and above all don't communicate with them. They don't

### Refugee Claimants' Options for Representation

- **Privately paid lawyers**
- **Lawyers who accept legal aid certificates**
- **Government-funded legal clinics and legal aid staff offices**
- **Pro-bono lawyers**
- **Supervised students-at-law**
- **Immigration consultants**
- **Paralegals (and notaries in Quebec)**
- **Unpaid representatives (family, friends, volunteer organizations, etc)**

8. For more information please see: <https://refugeclaim.ca/en/ready-tours/>; <https://www.matthewhouserhp.com/>; <https://www.the519.org/programs/mock-hearing-program>.

9. As with other aspects of refugee legal aid, the situation differs across provinces. In Québec, there are no regulatory barriers to changing counsel when represented by a private lawyer working under a legal aid mandate. However, if the client chooses to be represented by a staff lawyer at a refugee legal aid office, the lawyer is generally assigned. If a claimant is represented by a staff lawyer and wishes to change lawyers, they will generally be required to seek out a private lawyer who accepts legal aid mandates.

tell them what needs to be provided [or] give any updates on the process. [Claimants] are forced to rush and provide evidence on time; and they're left feeling uncertain even before the hearing itself. All too often they're not fully prepared. That's where we often have to step in.<sup>10</sup>

The situation is made more stressful given short timelines for submitting documentation after a claim is registered. Six of fifteen claimants reported how choice of poor-quality counsel reverberated through their claim process, which they often associated with negative decisions at the IRB. One claimant based in Vancouver explained how their lawyer and interpreter were criminally charged for filing false claims and forging documents, and removed from the legal aid list:

It was a challenge to find a lawyer at first, but I didn't have any difficulties through the process, preparing my claim and all that. But [...] last year we were informed that [the lawyer] has been [suspended] and that within 21 days we have to tell them the name of a new lawyer who will represent on my hearing date. And if I won't be having a lawyer they will assume I will be representing myself.

It was a hectic time. You feel so confused and you don't know what to do. You lock yourself up all day trying to call people. You're unable to eat well, you're so destabilized. That's the word, yeah, destabilized.<sup>11</sup>

The claimant was able to find a new lawyer at the eleventh hour through support from a community organization.

Claimants also recounted having emails and calls ignored, appointments cancelled, and often settling on the first lawyer who responded, despite negative experiences. They also recounted cases where private lawyers who accepted legal aid certificates did not meet with them beyond an initial appointment, even in the lead-up to hearings. However, focus group participants took pains to illustrate ways in which these dynamics are often driven, in part, by funding models which mean lawyers who represent claimants often work far outside of the prescribed tariffs – and thus need to take on a higher volume of cases.

A claimant living in Montréal recounted a particularly negative experience:

First, I called a lawyer who cancelled our appointment. So, I went back to the list from legal aid. But days were passing. After a few days finally I got one lawyer to answer [...] They told me I could make an appointment with their temporary replacement. But that lawyer, I haven't heard from in over a year. I sent her information pertaining to my case, all these evidences and [a BOC] we wrote together, and then there was

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**“My first thought when I look at the term “access to justice”? In this context it's trying to match up a legal representative to a refugee as quickly as possible, as early in the process as possible, to give them the most information at the earliest possible point [...] because if you can't do that it becomes about damage control.”**

**-Director at  
Manitoba Legal Aid**

10. Focus Group, 17 May, 2021

11. Online Interview (Vancouver), 3 March, 2021

12. Online Interview (Montreal), 12 May, 2021

no response. To this day, no response. Her last email said she's on sabbatical. She never filed my claim. I switched lawyers again and this is the one who will represent me, but so much time was wasted. At the end we had two days to do the [BOC].<sup>12</sup>

IRB survey respondents highlighted similar dynamics. As an RPD Member wrote:

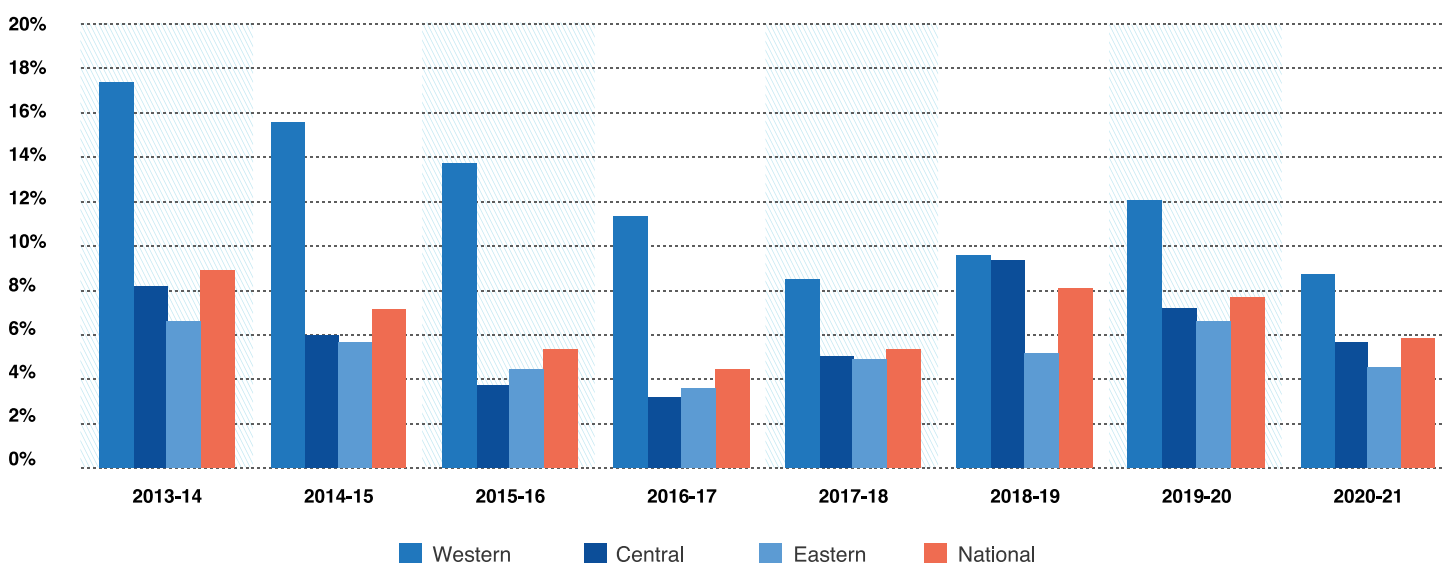
Often, counsel appear not to be engaging with their clients in a manner that would prepare them for obvious and commonly considered questions. It can be surprising that counsel would not have already listened to the client's story, asked them about any gaps or inconsistencies, and resolved them prior to the hearing. It often seems that they haven't spoken to their client since filing their BOC, and in some cases it seems they've never met in person.

## LEGAL AID FUNDING AND AVAILABILITY OF REPRESENTATION

Relationships between legal aid funding and representation rates are not straightforward, and complicated by differences between provinces and the multi-stage claim process. While representation rates vary between fiscal years and regions, national average rates since FY2013-2014 for all new system claims at the RPD are high, at 94%. The lowest national rate of representation was 91% in FY2013-14, which was significantly depressed by low representation in the Western region at 83%.

This difference in representation rates may be partly attributable to the inconsistent availability of and approaches to legal aid for immigration and refugee matters between jurisdictions.

**FIG. 2: PERCENTAGE OF SELF-REPRESENTED CLAIMANTS AT THE RPD  
FY2013-14 TO FY2020-21 NEW SYSTEM CLAIMS**



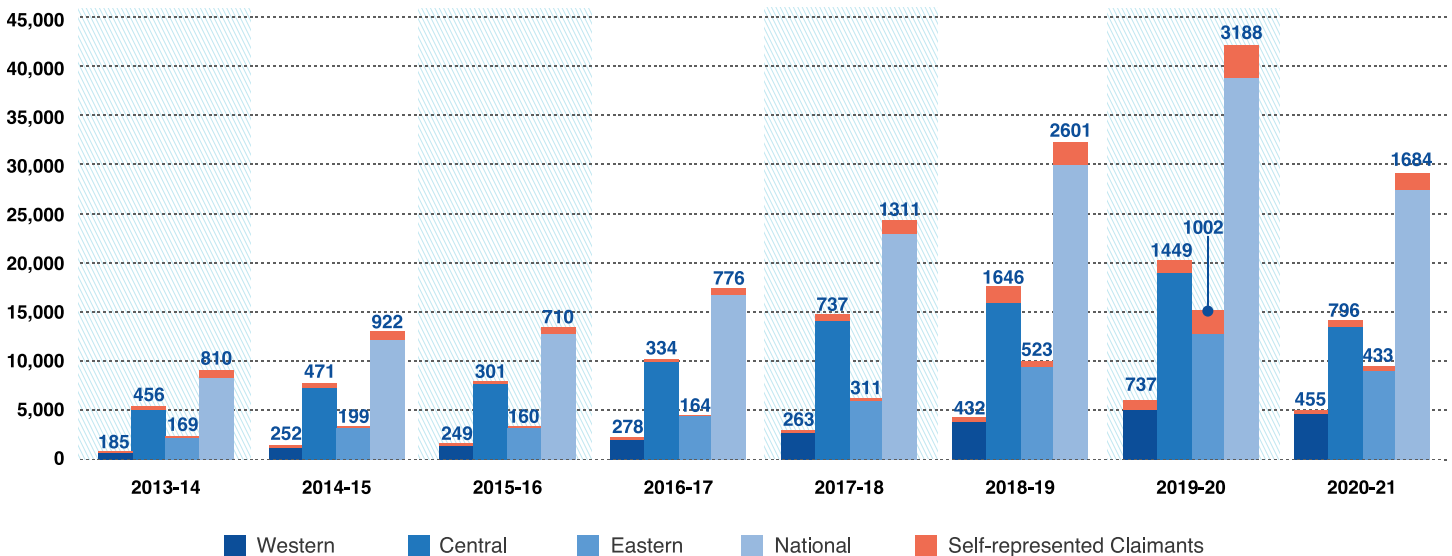
National and regional averages, however, obscure total numbers of self-represented claimants, particularly since post-2016 figures began appearing in data. As described in "Fig.3", below, higher claim rates correlate with more claimants appearing self-represented. Unfortunately, the IRB does not maintain data on whether claimants or appellants are represented by private or publicly-funded counsel, though their data disaggregates between representation by lawyers, immigration consultants, or pro-bono representatives without legal training.



Likewise, provincial legal aid data can be difficult to compare because the data is generally not sufficiently granular to verify that reporting methods are similar. For example, there may be varying practices in when a certificate or expenditure is counted, in aggregating immigration and refugee expenditures or refugee certificates between stages of the asylum process, in breaking out data on certificates for the RPD or RAD or are for single cases of families, and in whether reported yearly expenditures include administrative costs or simply the cost of certificates.<sup>13</sup> As such, we hesitate to suggest direct relationships between legal aid funding for claimants, representation, and IRB decision rates.<sup>14</sup> As described in “Table 1.” above, overall provincial legal aid expenditures have increased year on year where the majority of claims are registered. We note the available data shows the average cost per certificate for representation at the RPD or RAD have diverged significantly between provinces in real dollar terms, particularly between Ontario and Québec. We also note that overall expenditures lag behind changes in claim rates per province.

Discussions with stakeholders across regions noted that higher claim rates stretch available resources, and that legal aid lawyers, clinics, and private lawyers who accept legal aid certificates have less capacity to take on new clients. In turn, claimants are pushed to prepare claims and appear self-represented, or opt for potentially less capable private lawyers who do not focus on immigration and refugee matters, and Immigration Consultants with less training and specialization in preparing files and appearing before the IRB.

**FIG. 3: REPRESENTED AND SELF-REPRESENTED CLAIMANTS AT THE RPD  
FY2013-14 TO FY2020-21 NEW SYSTEM CLAIMS**



Likewise, while national legal aid expenditures have increased annually, they have declined when calculated against inflation and demand. Federal contributions to legal aid in Ontario, for example, shrunk from \$3.98 to \$3.22 per capita between FY2002-2003 and FY2014-2015 when adjusted for inflation (Zemans and Amaral 2018). LAO, which covers the highest number of claimants, faced a budget shortfall of over \$70 million in 2020, despite federal top-ups.

Unstable and inflexible funding has significant impacts on legal aid capacity. Stakeholders reported that funding insecurity and lack of responsiveness to demand meant a significant degree of insecurity around

13. This study relies on data transmitted by provincial legal aid plans (in the cases of BC, Manitoba, Ontario, and NL and Labrador), and provincial justice ministries (in the cases of Alberta and Québec).

14. Future peer-reviewed papers will attempt to obtain comparable data from provincial ministries and national departments.

financial and logistical planning. Participants in focus groups noted specifically that:

At one or two occasions over the past ten years or so we had situations when funding for Legal Aid generally was under threat from a budgetary priority point of view. And I think if that is to continue it could actually threaten everything we are talking about. Without stable funding all these discussions about early interventions and access to justice become kind of moot. We built the system on that assumption that counsel is present throughout the process.

The 2019 funding cuts in Ontario were mentioned repeatedly as an example of the impacts on access to justice. As a lawyer representing a large legal clinic described:

I want to emphasize how profoundly destabilizing funding can be. We recently had an experience [in Ontario] when the incoming provincial government cut Legal Aid funding and specifically directed that no funds ought to be spent on refugee and immigration services. Were it not for the federal government covering that gap... At the time we were having serious discussions within the clinic as to whether or not we could continue providing refugee and immigration services at all. I don't know where to start when it comes to the effects that would have on access to justice for vulnerable claimants.<sup>15</sup>

Claimants must meet both merit-based and financial eligibility requirements. According to representatives from provincial legal aid plans, rejection on merit assessments has become increasingly rare since 2012/13. Financial eligibility requirements, however, are a consistent and complicated issue. Even under stable funding conditions, eligibility models mean claimants often find themselves without support as their case progresses given timelines around initial claims, employment eligibility, and long hearing delays. While most are eligible for initial phases, many become ineligible for their RPD hearing, and even more in the event of an appeal.

BOC forms are submitted before claimants receive work permits or earn taxable income. Backlogs mean they often work for a year or more before hearings, and even minimal income can render them ineligible for legal aid. In Ontario, where most claimants reside, eligibility for individuals is capped at \$18,795 gross (before tax) annual income, and up to \$50,803 for a household of five or more. These figures are below the Federal \$21,899 Low-Income Cut-Off for single adults, slightly higher than the \$47,148 for families of five, and lower than the upper caps of \$52,298 for families of six and \$57,429 for households of seven or more.<sup>16</sup> The annual average cost of living in Ontario for a single person in a rental property is over \$42,000. This is not simply a problem for refugee claimants. Indeed, a significant part of the access to justice crisis in

**With respect to the federal government's responsibility: The funding is key. We're just lurching from crisis to crisis. Like it's literally been five, maybe six years now, that we've been midway through the fiscal year and still had no idea what our budget was. And having even something basic like indexing according to the number of claimants, for example, would be a huge step in the right direction. The government made a massive investment in the IRB over the last few years and didn't make the same sort of proactive multi-year investment in counsel [...] The IRB can't do its job without high-quality counsel in the seat.**

**-LAO Representative**

15. Focus Group, 17 May, 2021.

Canada is due to the fact that while a large proportion of Canadians will require representation every year, one has to be very poor or quite wealthy to engage counsel and access procedures. The majority of Canadians fall between these two extremes (see Trebilock, Duggan, & Sossin 2012). From an access to justice perspective, claimants whose income is under the poverty line, yet above the financial eligibility cut-off, may have to choose between paying for counsel or appearing self-represented.

## CASE STUDY

**A 43-year-old claimant Mexico was eligible for legal aid for her RPD hearing, but their claim was rejected. Both the claimant and her husband work full time, minimum wage jobs. Community organization staff explained they needed to re-apply for an appeal.**

**“I tried to apply for Legal Aid again. They asked deep questions about my money. How much I’m earning; how much is my husband earning [...] everything about my bank [accounts]. They told me ‘We are allowed to check how much you have. Do you have savings?’ So finally, I say ‘Yes, I have some savings. Maybe like \$4000’. And they asked ‘Why?’ Why I have savings? You have to understand my situation, I’m a mother. I have to do some saving because I know in any moment Canada can [reject my claim] and what am I going to do? I have to go back Mexico in the middle of the pandemic! In the middle of all this situation.**

**I’m working really, really hard to have some savings. And I tell the truth. And they said ‘you are not allowed legal aid because you have money in the bank and your family has income.’ And then I learned [from staff at an NGO] that my chance at appeal is so low because we’re from Mexico. And so, my choice is to use up all my savings or give up and go back to the cartels. And that is my big [conflict]. And probably one day soon I’ll say ‘No, you know what, let’s go back.’”<sup>17</sup>**

High costs mean a real possibility of becoming destitute in order to pay legal fees. These criteria also incentivize taking under-the-table jobs which can render claimants vulnerable to abusive or unsafe working conditions, and a lower likelihood of seeking redress or protection.

Finally, variation in support between provinces means some regions face a higher and more sustained demand on services. For example, the absence of legal aid throughout Atlantic Canada and in Saskatchewan means claimants are incentivized to remain where resources are already stretched. Some evidence suggests variation results in venue-shopping for refugee claimants, undermining responsibility-sharing between

16. Statistics Canada. 2021. “LICOs before and after tax by community size and family size, in current dollars”. <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110024101>.

17. Online Interview (Toronto), 18 March, 2021.

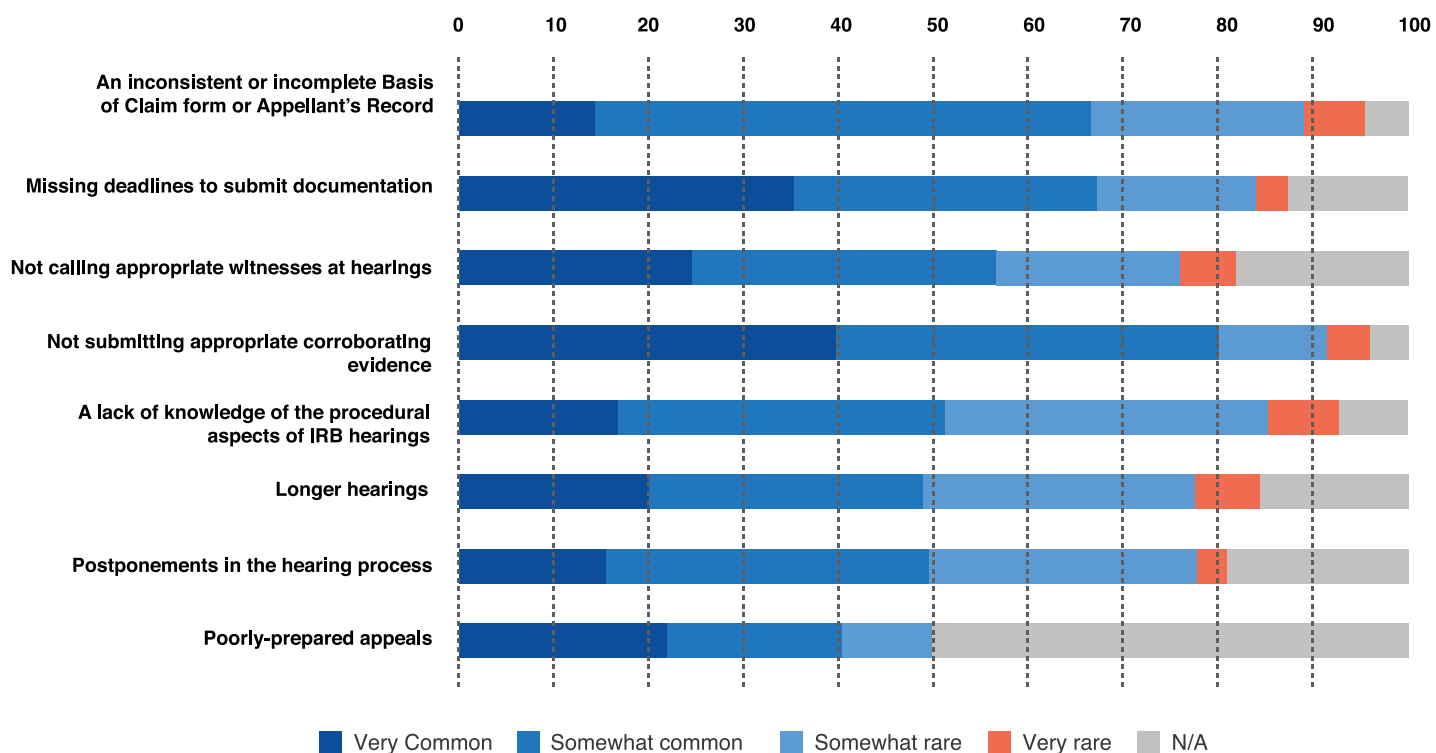
provinces. Over time this can erode the refugee determination process. To use a comparative example, variation in asylum and reception conditions throughout Europe has been found to instigate politicization and a “race-to-the-bottom” of national systems (Gottwald 2014; Thielemann 2018).

Evidence from interviews suggests claimants made decisions based on the availability of legal aid. Several moved between provinces based on rumours around availability and quality of legal aid, and in particular, left Québec because of language barriers when accessing counsel. Stakeholders we spoke to in Atlantic provinces related that they receive far fewer claimants given the lack of resources. A front-line support worker from Alberta told us: “Sometimes we have an influx of claimants from other provinces coming to Alberta because of the threat that they may not be able to receive [legal aid]. We see people who have made claims in other provinces, but because they feel that they may not receive representation, they make their way over here.”<sup>18</sup>

## IMPACTS OF REPRESENTATION ON IRB EFFICIENCY

Our research findings showed that representation by counsel significantly affects IRB efficiency. 81% of Member respondents strongly or somewhat agreed with the statement “I can do my job more efficiently when claimants / appellants are represented by counsel.” Only 3.2% strongly disagreed with the statement. The majority reported a lack of representation or poor representation resulted in longer hearings, postponements in the hearing process, missed deadlines, or inappropriate or incomplete evidence. 80% of RAD Members strongly or somewhat agreed that the lack of or poor representation meant poorly-prepared appeals.

**FIG. 4: IRB MEMBER OPINIONS  
RESULTS OF ABSENCE OF / POOR REPRESENTATION**



18. Focus Group, 7 May, 2021.

However, relationships between representation and appeals are less straightforward than hypothesized at the outset of the project. As described in Table 2, with the exception of FY2019-20 and FY2020-21, represented claimants have been significantly more likely to appeal negative decisions – on average more than one and half times as likely.<sup>19</sup> However, by the time the large increase of asylum claims from 2016 and 2017 began working their way through the asylum system, appeal rates were relatively equal, though far larger for represented claimants in absolute terms. Appeal rates for represented claimants increased significantly from 21% in FY2013-14 to a high of 29% in FY2018-19 and FY2019-20, despite relatively consistent positive decision rates. Likewise, the total number of appeals for both represented and self-represented claimants has increased significantly given higher overall claim and RPD decision rates.

**Over 80% of IRB Members agreed that they could do their jobs more efficiently when claimants were represented by counsel.**

**Likewise, over 80% agreed that “The IRB process is more efficient when claimants are represented by counsel whose focus is exclusively immigration and refugee law.”**

**While only 22.8% of IRB Members agreed that absence of counsel was a significant issue in their region, 89.1% agreed that low-quality counsel was.**

**TABLE 2:  
NATIONAL APPEAL RATES OF FINALIZED RPD CLAIMS  
FY2013-14 TO FY2020-21 NEW SYSTEM CLAIMS**

	2013-14	2014-15	2015-16	2016-17
<b>Represented</b>	8,571	12,340	12,939	16,891
RAD Appeals Total	1,812	2,559	2,938	4,211
RAD Appeals %	21%	21%	23%	25%
<b>Unrepresented</b>	810	922	710	776
RAD Appeals Total	93	149	133	148
RAD Appeals %	11%	16%	19%	19%

	2017-18	2018-19	2019-20	2020-21
<b>Represented</b>	23,192	29,944	38,940	27,614
RAD Appeals Total	6,332	8,827	11,240	6,171
RAD Appeals %	27%	29%	29%	22%
<b>Unrepresented</b>	1,311	2,601	3,188	1,684
RAD Appeals Total	251	458	862	388
RAD Appeals %	19%	18%	27%	23%

19. More granular data on appeals, including data on countries of origin, positive decision rates, and appeal outcomes will be explored in future academic research papers.

Yet this data masks complex underlying dynamics around the appeals process. Interviews with stakeholders, particularly lawyers, suggest that self-represented claimants are more likely to abandon the process altogether after a negative first decision. Likewise, claims considered abandoned because of missed deadlines for filing documentation are not eligible for appeal. As survey results illustrate, Members find that self-represented or poor represented claimants frequently miss deadlines. Most consequentially, appellants must submit written legal arguments, which are complex and require specialized knowledge on case law, administrative law, and IRB procedures. RAD Notices of Appeal must be filed within fifteen days of an RPD decision, with full submissions filed within forty-five days. They must directly challenge the RPD decision rather than reframing or bolstering an initial claim, though in some instances, appeals can include new evidence.<sup>20</sup>

**If the claimant is poorly represented in the RPD process, I often feel like my hands are tied at the RAD. For example, if the claimant had supportive documents or evidence that could have corroborated their testimony and narrative at the time of the RPD decision, but didn't submit them, it's rare I can admit such evidence on appeal. This can sometimes severely hamstring a claimant.**

**-Refugee Appeal Division Member**

## THE CRUCIAL IMPORTANCE OF QUALITY COUNSEL

One major finding, supported by all stakeholders in the refugee claim process, is that quality of representation is a significant and long-standing issue in terms of impacts on efficiency, outcomes, and access to justice. While only 22.8% of IRB Members agreed (4.4% strongly, 18.4% somewhat) that absence of counsel was a significant issue in their region, 89.1% agreed (41.8% strongly, 37.3% somewhat) that low-quality counsel was. As one RPD Member described:

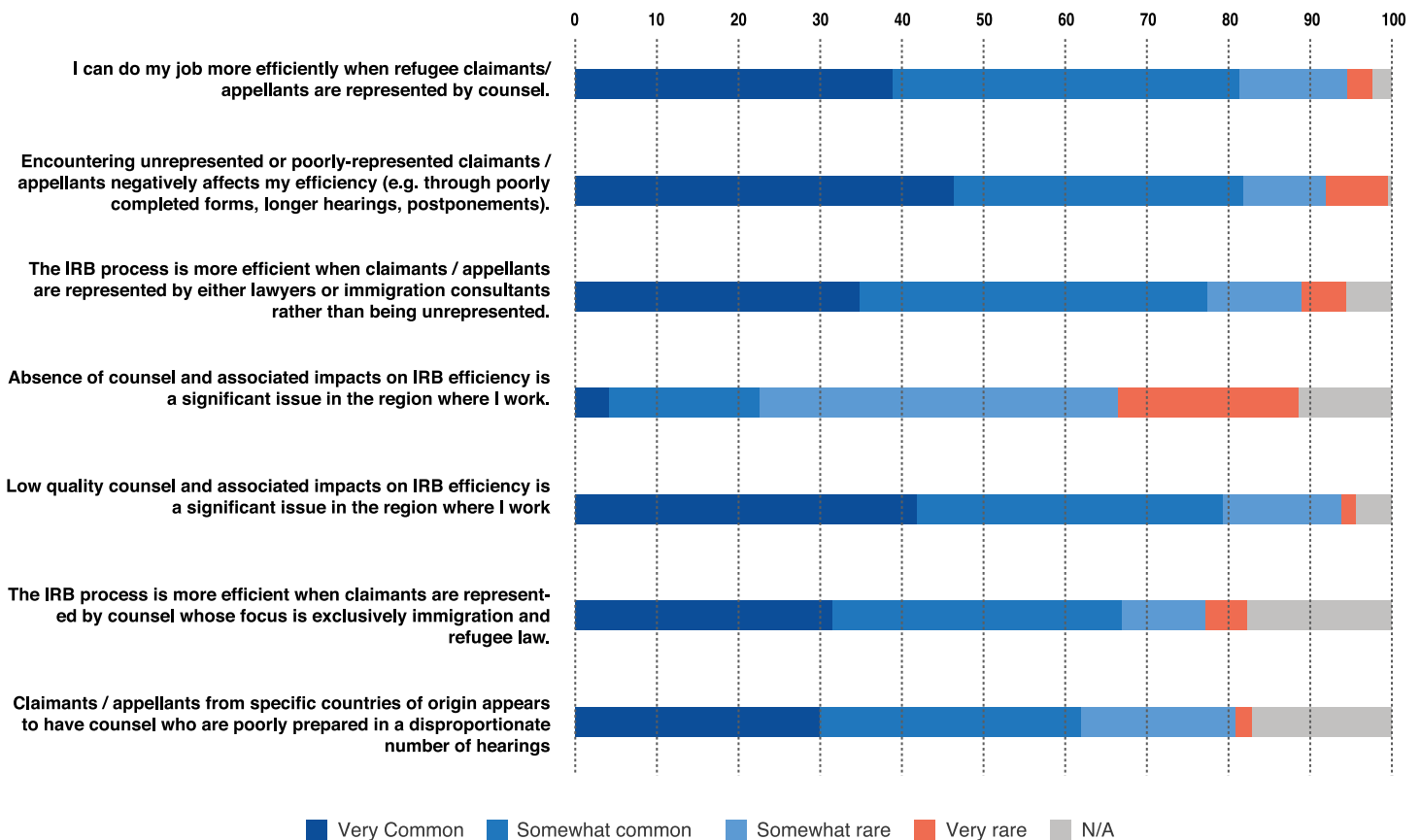
If a claimant is entirely unrepresented, then I assume, from the beginning, that I may need to take a significant amount of time at the hearing to understand their story. I assume that their [BOC] may focus on irrelevant things, or fail to include very important things. I assume that they would not submit corroborating evidence because they would not understand the importance of doing so. I assume I will need to explain procedural aspects at the beginning of the hearing. I am able to adjust my approach with the understanding that no one has prepared the claimant for what is to come.

[Inadequate counsel] can take a number of forms. For example, counsel may focus strongly on particular aspects [...] but entirely neglect the "heart" of the issue, which will be legally determinative. Counsel may waste (or try to waste) a significant amount of time on irrelevant issues. Counsel maybe belligerent or argumentative about minor issues (thankfully, this is rare). Counsel may [...] encourage the claimant to lead me to believe the case rests on a particular nexus (for example, their religion) while entirely neglecting other possible claims (for example, gender or political opinion).

[...] In practice, the two issues play out differently. Although a hearing for an unrepresented claimant will usually take longer, I don't need to worry about being pointed in the wrong direction from the very beginning.

20. See IRB "Appellant's Guide": <https://irb.gc.ca/en/refugee-appeals/Pages/RefAppGuide.aspx>.

**“FIG. 5: IRB MEMBER OPINIONS:  
IMPACTS OF COUNSEL ON EFFICIENCY”**



Interviews and focus groups supported survey results. Several participants related that some low-quality private lawyers who accept legal aid certificates have been a long-running issue across provinces. The most common types of lawyers which focus groups, survey respondents, and claimant participants raised concerns about were lawyers not working as staff at devoted refugee legal-aid offices, lawyers who did not focus predominantly on immigration and refugee law, and refugee-focused lawyers who accepted high volumes of claims, particularly those who focused their practice on specific national communities. It should also be stressed, however, that the research methods asked specifically about low-quality representation and impacts on access to justice. Research participants in focus groups stressed that the majority of counsel are devoted to providing high-quality representation and accept lower remuneration for their labour than in other fields of law. Participants also recognized that many high-quality counsel work at firms practicing in multiple legal fields.

Claimant participants related narratives of counsel who underprepared for hearings, missed deadlines for filing evidence, and in two cases took overly and unnecessarily adversarial stance with Members. Claimant participants who hired private lawyers were surprised at their lack of familiarity with the IRB, including submitting evidence that does not meet the IRB’s submission protocols.<sup>21</sup> Over 80% of RPD Members who responded agreed that “The IRB process is more efficient when claimants are represented by counsel whose focus is exclusively immigration and refugee law.” Likewise, focus group participants reflecting on survey findings noted that IRB Members would likely prefer to engage with self-represented claimants than those represented by poor-quality counsel.

21. IRB guidelines on gathering and submitting evidence: <https://www.irb-cisr.gc.ca/en/applying-refugee-protection/Pages/index3.aspx>.

When asked about policy recommendations, some focus group participants suggested the problem could be ameliorated by significant funding and regulatory changes to ensure all claimants were represented by specialized refugee legal aid offices. Others cautioned that doing so would significantly decrease overall capacity if private lawyers were unable to accept legal aid certificates, and that regulatory changes to oversight might better ensure higher-quality representation. There is some precedent for these types of initiatives. In 2015, LAO launched a program to improve standards of admission to its Immigration and Refugee Panel by removing all existing lawyers and requiring a new standards-based application process – resulting in a reduction of the panel from 680 lawyers in July 2015 to 291 in March 2016 (Teklu 2020: 14).<sup>22</sup>

## CASE STUDY

**A 38-year-old claimant was a practicing lawyer in Ecuador before arriving in Canada. He was eligible for legal aid and matched with a junior lawyer who spoke no Spanish. A translator became the lawyer’s de-facto representative, often taking meetings alone. The claimant provided his own 30-page document, in Spanish, detailing his reasons for flight. The BOC submitted to the RPD was less than ten pages.**

**“The lawyer said ‘Don’t worry because the hearing is the place to flesh these things out, you’ll be able to speak and give the particulars.’ I thought things were going well. I was satisfied because the story was clear and I had letters from my psychiatrist, evidence about my injuries, letters from colleagues. At the hearing I began telling everything [about experiences of abuse based on sexual orientation], up to the point I left the country because of police attacks. There were a lot of details that I had told the translator, but that the lawyer didn’t know about and weren’t included in the BOC.**

**The [IRB Member] began looking upset and questioning in a way that made me feel attacked. ‘Stop. Why aren’t these details included? You’re giving us details that aren’t part of your BOC.’ And I kept turning to my lawyer and she looked nervous too, flipping through the evidence. That’s when I started feeling things were going negatively [...] I felt that the experience started changing. So, I focused on an incident where I was attacked with [weapons]. The reason I left. I thought that would be the focus of the Member’s questions. But instead, they focused on the details that were missing, asking ‘Why are you making this claim? Why is this the first time I’m hearing about this?’**

22. 435 of 680 empaneled lawyers applied to the new system. Of those, 168 were removed, including those formally removed for not meeting standards, and those who resigned after not passing an initial evaluation, or failure to respond to further information, leaving 267 from the pre-2015 panel. Evaluation of the Immigration and Refugee Panel Standards Implementation: Final Report. p49

23. See also: LAO, December 2016. Evaluation of the Immigration and Refugee Panel Standards Implementation: Executive Summary. <https://www-legacy.legalaid.on.ca/en/publications/execsummary-refugee-panel-standards-evaluation-2016-12.asp>.



**The whole hearing became not about what was in the BOC, but what the lawyer had left out.**

**When I read the [negative decision letter] I started laughing. I don't know if it was nervous laughter, compulsive laughter... my reaction was just that I couldn't believe. The decision didn't focus on my PTSD or the attacks, but on things like I'm a young man, I could have gotten a new job in Ecuador, I could have moved to another city. But I didn't come here for work. I had a job, a good job, I was a lawyer for seven years. I was kind of 'elite' I guess you would say. But because I was gay, I was beaten by police and had no protection. But my lawyer didn't focus on that."**

**The claimant hired a Spanish-speaking private lawyer to file an appeal, who told him the RPD Member had high rejection rates for people from Latin America, which his previous lawyer working through a legal aid certificate had not been prepared for.**

However, LAO reported that the process incurred significant administrative and financial burdens and was not sustainable over time.<sup>23</sup> Stakeholders from legal aid plans reported that some private bar lawyers – or their staff including junior lawyers, paralegals, and Immigration Consultants – often seemed disinterested in clients' cases, and that low-quality counsel is an enduring problem. While they noted provincial law societies exercised official oversight over low-quality counsel, overstretched capacity at law societies and within legal aid plans, combined with the fact that the onus was often on claimants to report poor representation meant redress was rare in practice.

## **THE HIDDEN PROBLEM OF ABUSIVE COUNSEL**

While it must be emphasized that our findings should not be taken to impugn the motives or capacity of the majority of counsel who represent refugee claimants, our research also revealed cases of problematic lawyers systematically abusing clients. We present these findings in the interest of highlighting a persistent and particularly pernicious barrier to justice with significant impacts on vulnerable individuals and public perception of both refugees and Canada's asylum system.

Low legal aid fees incentivize some lawyers to take on a high volume of cases, leading to poor representation and neglect of individual claimants. In other cases, lawyers who accept legal aid certificates charge claimants for services that should be covered by those fees, or suggest additional fees outside of the legal aid structure. In the most problematic cases, lawyers have developed business models based on squeezing money from claimants, often with the collusion of translators, other professionals. In the most extreme cases, this includes working with collaborators in countries of origin.

The most common experience of abusive counsel involved private lawyers giving little to no attention to legal aid files because they are not lucrative. As a claimant from Tanzania described:

My lawyer didn't have time for me, he kept telling me 'Oh, you know you're just being sponsored by government' and 'you know, this money of yours from Legal Aid, it's very little money, if I'm working with people like you, I won't even be able to pay for my bills.' It was very disheartening. The way he treated me felt...made me feel so worthless. Like he kept reminding me 'Oh, you're sponsored by the government. The government is paying for you. Do you know how much Legal Aid is paying us?' I told him I don't know. It's my first time in such a country."<sup>24</sup>

We spoke with a 36-year-old single mother from the Democratic Republic of Congo. She originally stayed at a shelter in Toronto, where she was matched with a novice lawyer accepting legal aid certificates. The lawyer offered an initial meeting for preparing her BOC, which the participant described as "very short and tense". The participant followed up after a month, and the lawyer reacted by telling her to "stop wasting his time" and to wait until she received a hearing date from the IRB. They did not return calls or emails for over six months, during which time the claimant's visa and passport expired. Shelter staff intervened, and discovered the lawyer had never submitted her BOC, yet had filed a legal aid certificate. The IRB considered her claim abandoned, leaving her without status in Canada. The Canadian Border Services Agency gave notice that they would enforce a removal (deportation) order. When shelter staff contacted the lawyer again, he asked: "You know most of these claimants from the Congo are liars anyway, right?" The participant's removal was stayed through a Pre-Removal Risk Assessment (PRRA), filed by pro-bono lawyers who she was connected to by a refugee shelter, and she is now a Canadian citizen. PRRA applications have a success rate of around 2-3%.<sup>25</sup>

Participants who work with claimants in Hamilton, London, Toronto, and Montréal noted experiences of private lawyers working under a legal aid certificate charging extra fees for office tasks and submitting documents, which should be covered by legal aid fees. In two cases, we heard of private lawyers not working under legal aid in London and Montréal pressing clients to provide translation work for co-nationals to cover costs – one of whom was subsequently sanctioned. However, it must be noted that participants in focus groups took pains to point to the intersection between abusive counsel and inadequate legal aid funding. For example, LAO pays an average of \$2,500 CAD per claim, with hourly tariffs and add-ons for more complex cases. Tariffs in Québec are significantly lower at roughly \$1,000 CAD per claim, with add-ons only in the case of additional family members on applications. As described in "Table 1" above, the average cost per legal aid certificate varies significantly across provinces. Preparing claims can often take up significantly more resources, which often go unremunerated, incentivizing abusive practices.

Our findings suggest abusive lawyers advance their own agendas by taking advantage of claimants' lack of knowledge, the limited availability of other lawyers who are willing to accept legal aid certificates, and emergency situations such as the 2019 funding cuts in Ontario. A Director from LAO noted how these dynamics intersect:

People like us, working in the field, we read a new press release, or pick up the phone and ask a colleague. We can wade through the news easily. But someone who's going through the asylum process is a different story. Especially to the extent that claimants are likely to be victims of exploitation, there's people who are happy to have the message be that there's no legal aid, right? So now they can start charging money to assist this client.

24. Online interview (Toronto), 25 March, 2021.

25. In 2016 the Government of Canada published an assessment of the PRRA program. See: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/removal-risk-assessment-program/prra.html>. It must be noted, however, that these statistics represent claimants who have progressed through the stages of the asylum process, and so are not representative of first-instance decisions now undertaken as a result of changes to IRPA in 2019.

Stakeholders, claimants, and IRB Members also noted instances of abuse are often concentrated in specific national or linguistic communities, which are also nationalities with the highest volume of claims in recent years. Our survey asked Members to what extent they agreed with the statement that “Claimants from particular countries of origin appear to experience greater challenges accessing high-quality counsel.” 62% strongly or somewhat agreed (though 17.1% declined to answer). Over 70% of those who answered agreed with the statement. If they agreed, Members were asked to list up to three countries for which this was the case – the top five countries listed were Nigeria (47), Haiti (22), India (18), Mexico (18), and Pakistan (10). Likewise, 25.3% and 37.3% respectively agreed it was “very” and “somewhat common” to “encounter a BOC narrative that is strikingly similar to those of other claimants / appellants from the same country of origin”. Only 7% considered it “very rare”.

However, this finding requires significant qualification from a public interest perspective. Strikingly similar claims should not be read as evidence that claimants do not have a well-founded fear of persecution, but rather that they are often represented by counsel who process a high volume of claims from specific communities, and who therefore, often submit BOCs which potentially recycle portions of narratives. While strikingly similar narratives undermine claimants’ credibility, they do not equate to a lack of need for protection, and the RPD hearing process means Members should be able to understand and make decisions on the merits of a specific case.

Lawyers sometimes submit what IRB Members referred to as “boilerplate submissions”, and “bombard” the IRB with documentation which serve to undermine, rather than bolster, credibility assessments. One RPD Member noted the effects on IRB efficiency and access to justice:

You get the sense they are running a factory. [For example]: a Punjabi farmer wants to stay. Somehow, they end up making a refugee claim, the claims have the same fact pattern, you look at these poor people who are making hopeless claims. Counsel throws everything into the mix: politics, farmer strikes, COVID - all of this has to be addressed in the reasons. It takes forever to deal with it all. The claimants are, undoubtedly, paying a lot of money for a claim that should not have been filed in the first place.

## CASE STUDY

**A participant from Uganda was not eligible for legal aid, and could not find a lawyer to help prepare their claim. They faced looming deadlines, and approached members of their community for advice.**

**“I talked to people from my community and they’re like ‘There’s this new Ugandan lawyer, he’s just graduated. I think he can be good because he doesn’t have so many clients.’ Even the little money I had saved for my children, I paid it all to him and my kids are back in Uganda suffering. He ate my money and he didn’t do anything.**

**When I go and meet him, he made me sign a contract [and said] ‘I’m not on Legal Aid so you have to pay me by cash.’ I trusted him because he was from my country, and I was so desperate so I said yes. He said ‘My retainer and everything will cost you \$4500**

and I need my money today, now.' I told him 'I don't have the money right now but I can make a deposit.' I started paying him that day, I think I paid him \$1500 [...] He told me to collect [evidence] and 'Go to a psychologist to make you a report about abuse' and I told him 'I have a psychiatrist I'm seeing.' He said 'I don't like that psychiatrist, I've told you go to this one, he makes the right reports for IRB.' He charged me \$500 cash. So already that was \$5000. Later I also got affidavits in handwriting [because] my husband and my cousins were writing for me from Uganda and he says 'I don't like these affidavits so I'm going to call someone to write them for you. You have to pay then your husband will sign.' And I was running out of time, I had to submit things [...] So, I had to look for \$600 to pay to get the affidavit. And then he's like 'You need to send things to Uganda to have them notarized.' So, he connects me to a contact in Uganda and it's around \$500 or \$600 more but he takes the money. So more than \$6000, just like that. And more every week for photocopies and meetings. It was all about money and I'm trying to get justice. All I wanted was to at least get justice."

**The participant did not anticipate the significant extra expenses, and felt like they were stuck in a position where they were forced to exhaust their savings under tight timelines. Problems with the lawyer persisted, including demands to borrow money from other community members, and disclosing the claimant's HIV status to members of her community without her consent. The IRB eventually suspended her hearing given the lawyer's poor submissions, hostility toward the claimant, and hostility toward the RPD Member. They were granted a de novo hearing, and their financial situation means they are now eligible for legal aid for her new filing.**

Lack of access to services and reliable information mean some communities are particularly vulnerable to predatory practices. A lawyer directing a legal clinic in Toronto described "very uncomfortable" relationships between private lawyers and interpreters who work with the same communities, noting:

[There are] individuals within a certain community that act as shepherds initially for refugee claimants. And they, through community contacts, get connected with recent arrivals [...] and have initial counselling sessions or try and shape what it is that a particular refugee claimant is going to say and suggests what would increase their chances of being successful. These figures usually have very unethical business relationships with lawyers that are funded by LAO [...] they sit and interview a claimant to draw out their narrative and crystalize that into a BOC. I can think of two or three [current] cases where claims were unsuccessful because the interpreter chose not to interpret key aspects of the narrative or massage it in such a way that it raised credibility issues. And the lawyer was just complicit in all of this. The lawyer sat back and uncritically wrote down everything that was being said [...] There's an issue of competence.<sup>26</sup>

26. Online Focus Group, 7 May 2021.

While instances of abusive or grossly incompetent counsel are relatively rare, they are important to emphasize given that they can have outsized influence on policy, undermine public trust, and contribute to damaging narratives of “bogus” claims for entire groups. For example, Rehaag’s (2015) study on abusive counsel representing Hungarian Roma claimants from 2008 to 2012 found positive decisions were higher when lawyers worked on fewer claims. Claimants represented by counsel who worked on ten or fewer of these cases succeeded at a rate of 2.9 times higher than those who had been involved in 20 or more. A small group of three lawyers were responsible for 34.2% of cases involved just three lawyers. Eight lawyers were responsible for 52.5% of all cases. Years later, several of these lawyers ended up being disciplined for providing incompetent counsel. But the damage both to hundreds of individual refugee claimants and to the refugee determination system as a whole was done: sensationalized accounts of “bogus” Roma claimants, based on these small number of cases and problematic lawyers, were mobilized to pass legislation which undermined the rights of all asylum seekers from designated countries (see Molnar 2014).

While the process of filing complaints for poor-quality representation arises across Canada’s legal systems, it is particularly troubling for immigration and refugee law. Refugee claimants are in structurally vulnerable positions, and often facing overlapping stressors, including the prospect of deportation. As a member of the Canadian Association of Refugee Lawyers explained: “The idea that someone going through the asylum process [...] is going to launch an appeal to a law society or bar association is frankly a fantasy [...] there’s functionally no recourse and I think [abusive lawyers] know this and take advantage of it.”<sup>27</sup> To return to the case of Roma claimants: three of the six highest volume lawyers were subject to disciplinary proceedings. But even these cases, with an abundance of evidence, took years to wind their way through disciplinary proceedings, and only one who refused to cooperate was disbarred. The majority of affected claimants were deported in the meantime.

In the worst cases, according to statements we received from front-line personnel, some lawyers appear to be complicit in international schemes to recruit and extort claimants. According to research participants, these claimants are promised permanent residency for significant fees and then forced into the asylum stream on arrival. These reports appear to be consistent with previous media attention regarding allegations about fraudulent and abusive practices (see Stevenson 2021). However, claimants who were approached for more information declined to participate in the study.

**Obviously, the Law Society is the one that regulates lawyers so we could just say ‘Clients should just make complaints to the Law Society.’ We found over the last 30 years that doesn’t work. Clients don’t make complaints to the Law Society. Clients don’t make complaints to Legal Aid. The complaints we tend to get come from new counsel who’ve taken on a file and they’re basically saying ‘We need to make this complaint in order to have your appeal be successful.’ The complaints we get [...] tend to be super serious but they’re few and far between. Sometimes an NGO might assist a client [...] but even then, we’re talking maybe six per year. It’s so small. And these situations happen all the time.**

**-LAO Representative**

27. Online Focus Group, 17 May 2021.

## 5. CONCLUSIONS & POLICY RECOMMENDATIONS

This project's central conclusion is that early and consistent access to reliable, publicly-funded legal representation can significantly improve access to justice for refugee claimants in Canada. In turn, access to justice for claimants will contribute to better overall outcomes, including fairness, efficiency, and upholding principles of natural justice underpinning administrative law. Investments in both the quantity and quality of available legal aid could have outsized positive returns, including fewer instances of unnecessary appeals, RPD reconsiderations, and judicial review. Fewer negative decisions resulting from self-representation or low-quality representation would also mean a significant decrease in the number of applications to stay on humanitarian and compassionate grounds or pre-removal risk assessments, not to mention the incredibly high (and socially damaging) cost of enforcing removal orders. In effect, investments at the early stages could be considered an insurance policy for the refuge system as a whole.

Recurring funding crises exacerbate inefficiencies and barriers to justice in complex ways. Quantitative data on funding and representation rates across the country illustrates that more capacity for legal aid plans correlates with higher rates of representation before the RPD. Indeed, while the overall percentage of self-represented claimants remains relatively constant from year to year, the total number of self-represented claimants increases dramatically in absolute terms when there are large increases in claims without proportionately increased investments in legal aid.

Qualitative data from the project suggests that lack of early access to high-quality counsel increases the likelihood of self-represented or poorly-represented claimants, and exposure to abusive counsel. From a purely economic perspective, we make the qualified inference that ensuring access to justice would contribute to social returns on investment by improving efficiency at the IRB and reducing demand on social services, particularly the reliance on NGOs and CSOs to engage in "damage control" or catch claimants who "fall through the cracks" of the system as a result of poor-quality or self-representation.

While our data collection and methods do not allow for financial analysis on relationships between the costs of increased funding for legal aid and IRB efficiency returns, we hope this study will contribute to the growing body of comparative international and Canadian research on access to justice investments and positive returns on overall state expenditures, better economic performance among immigrant populations, and lower costs to address adverse effects of barriers to justice (see Citizens Advice Bureau 2010; Smith, Thayer, & Garwold 2013; Moore & Farrow 2019). We can claim with some confidence that the Federal Government's investments in IRB capacity are undermined by a lack of commensurate investment in legal aid for claimants given the growing overall number of self-represented claimants and appeal rates. Indeed, high-quality representation and IRB capacity are two sides of the same coin for maintaining the integrity of Canada's asylum system.

It must be noted that while the vast majority of refugee lawyers provide high-quality representation and are generally not overly profit-driven, the lack of accountability for low-quality or abusive counsel creates serious problems and might also undermine new investments in legal aid. The actions of a few unethical counsel erode public trust in the asylum system. Claimants, who are often victims of exploitation, are scapegoated as "bogus" or "queue jumpers" if they come from national groups with low recognition rates. This politicization misses the fundamental point that the IRB's purpose is to decide the merit of cases.

While stable and appropriate levels of funding for legal aid are essential, financial investments alone will not eliminate the problem of low-quality or abusive counsel. In addition to such investments, there is also an urgent need for measures directed at encouraging high quality counsel and directing claimants to high quality counsel, while also detecting and sanctioning incompetent and abusive counsel.

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## ENSURE STABLE AND FLEXIBLE LEGAL AID FUNDING

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- **The Federal Government** should provide a stable, forward-looking funding stream to cover the full cost of refugee law services for provincial Legal Aid Plans. Additional funding should be earmarked to be responsive to significant increases in demand for services, and should be adjustable to reflect significant increases in refugee claims mid-fiscal year. Ongoing funding should also be subject to Legal Aid Plans demonstrating the effectiveness of quality of counsel oversight for funded refugee law services, with extra financial and administrative resources to cover this time and cost-intensive exercise.
- **Legal Aid Plans** should reconsider funding eligibility benchmarks for refugee claimants which are specifically tied to Federal Low-Income Cut-Off levels, in addition to considerations for claimants who begin working during the process and drop out of eligibility, yet are still financially vulnerable and unable to cover the cost of private lawyers. The **Federal Government** should consider partnering with provinces to provide commensurate funding increases. Doing so would likely significantly increase returns on investment at the IRB.
- **The Treasury Board of Canada Secretariate, Department of Finance & Department of Justice** should consider a quantitative audit exploring relationships between legal aid expenditures, IRB efficiency, and the financial and social costs of poor-quality and self-representation. The audit should consider investment in legal aid and increased likelihood of positive decisions at the IRB against the costs of appeal procedures to the point of removal orders, and costs of enforcing removal orders.

Moreover, more complete and disaggregated data on whether claimants are supported by legal aid at different stages of their claim would enable research on relationships between representation and access to justice throughout the asylum process.

- **Legal Aid Plans** should reconsider protocols for connecting eligible claimants with counsel. Notwithstanding the reported high quality of most counsel, in some provinces, presenting lists of lawyers without some form of vetting puts claimants in a disadvantaged position given the absence of information about the quality or specialization of counsel. Lawyers presented as options to claimants should be regularly assessed for the quality of services that they provide in order to continue being listed. Programs to directly assist claimants in securing counsel from lawyers on the vetted list should be considered, including mechanisms to provide additional information about the types of cases individual lawyers are inclined to accept.

In collaboration with **Law Societies**, **Legal Aid Plans** should make claimants aware of their rights in general in regards to what they are entitled to when being served by legal aid, and when encountering problematic counsel. They should publish clear indications of whether lawyers have been the subject of past complaints.

- **Provincial and Federal Governments** should provide long-term funding for hearing preparation and mock hearing programs in all major cities with large claimant populations, including for claimants pushed to PRRA-only streams after the 2019 changes to IRPA. These should be developed in collaboration with existing successful models. NGOs, shelters, and legal clinics are well-placed to provide and facilitate such training. A devoted funding stream through **IRCC's** Service Delivery Innovation grants should be considered.

Hearing preparation programs should include expectations with regards to lawyers and other counsel, and a clear set of actions for recourse if responsibilities and ethical duties are not met.

- **Private Law Firms** – and especially mid- to large-sized firms – should consider bolstering the ranks of refugee lawyers by signing on to the Global Refugee Forum's Legal Community Pledge to provide more pro-bono support for claimants who are ineligible for legal aid, particularly in provinces that do not fund refugee legal aid and at later stages of the process where many claimants are ineligible for legal aid. They should develop a streamlined referral process in collaboration with **Legal Aid Plans**.<sup>28</sup>

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28. UNHCR. 8 June, 2021. "Global Legal Community Steps up for Refugees amid Pandemic, providing 165,000 hours of free legal aid." <https://www.unhcr.org/news/press/2021/6/60bf8ad34/global-legal-community-steps-refugees-amid-pandemic-providing-165000-hours.html>.



- **Law Societies, Legal Aid Plans, and Provincial Governments** should explore possible structural changes to the refugee legal aid model, particularly the potential for developing models of “one-stop”, devoted refugee legal aid offices which would handle a larger proportion of asylum claims. A first step would be exploring comparative international examples and the functioning and efficiency of legal aid clinics in Canada as a model for scaling. These offices could be readily paired with NGOs and community groups to provide wraparound support for claimants.
- **Law Societies, Legal Aid Plans, and the IRB** should enter discussions to establish a clear and standardized reporting structure for problem counsel. Each stakeholder should have the capacity to report individuals. Stakeholders should also enter discussions about opportunities for further data sharing, including ways of doing so that respect privacy concerns. The **IRB**, in particular, should have a clear process for raising concerns about counsel not only with the Law Societies but also with Legal Aid Plans.<sup>29</sup>

Refugee claimants should be considered as key stakeholders, and provided with a clear, well-publicized, and low-barrier system with facilities for language interpretation for reporting problem counsel.

While investigative procedures and sanctions for professional misconduct are well-established, they are time-consuming and prohibitive for refugee claimants. A reporting system with clear thresholds around types and frequency of complaints could immediately exclude lawyers from filing legal aid certificates or eligibility to represent claims at the IRB while under investigation.

- **Law Societies and Legal Aid Plans** should, as an addition to an effective complaints-based system for problem counsel, explore opportunities for non-complaints-based oversight, such as random quality of counsel audits (perhaps triggered by volume) for lawyers working with vulnerable populations as a condition for continued empanelment. Quality control might also include a hard cap for the number of cases taken up in a given year or limiting the number of open cases, rather than current caps based on billing hours.<sup>30</sup>
- **Legal Aid Plans** should offer more flexible and streamlined options for changing counsel in the event of justified complaints.<sup>31</sup> The **IRB** should automatically extend deadlines for filings and appearances at the IRB in the event of complaints or a problematic quality of counsel audit, unless there is serious reason to believe that the process is being used abusively.

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29. See IRB's Policy on Disclosing Information Regarding the Conduct of Authorized Representatives to Regulatory Bodies: <https://irb.gc.ca/en/legal-policy/policies/pages/PolCondRep.aspx>

30. For example, see LAOs "Legal Aid Service Rules" 60(3): "A roster member shall not be paid in a fiscal year more than the dollar value equivalent of 2,350 hours of services provided by the roster member multiplied by the member's tier rate...". [https://www.legalaid.on.ca/wp-content/uploads/Legal-Aid-Services-Act-2020\\_Rules-EN.pdf](https://www.legalaid.on.ca/wp-content/uploads/Legal-Aid-Services-Act-2020_Rules-EN.pdf).

31. As noted above, in Québec there are no regulatory barriers to the number of times a claimant can change lawyers working under a legal aid mandate.

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