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# Judicial Review of Refugee Determinations: The Luck of the Draw?

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# Judicial Review of Refugee Determinations: The Luck of the Draw?

*Sean Rehaag\**

*Judicial review is often the only way to correct errors made by the Immigration and Refugee Board in refugee determinations. Applicants must seek leave from the Federal Court, where a judge will decide if their case is suitable for judicial review. The stakes are high for refugee claimants confronting deportation to countries where they may face persecution, torture or death.*

*The author reviews over 23 000 applications for judicial review from 2005 to 2010, and finds troubling inconsistency in leave grant rates at the Federal Court. Over 36 per cent of judges deviated by more than 50 per cent from the average rate of granting leave, with twenty judges granting leave more than ten times as often as the judge with the lowest leave grant rate. This inconsistency continues at the judicial review stage. The author considers several external factors that could explain it, from the judge's political party of appointment to the impact of the Supreme Court of Canada's decision on standard of review in Dunsmuir. Ultimately, the author concludes that the outcome of a leave application hinges largely on which judge is assigned to decide the application, and that this poses an arbitrary barrier to access to justice for refugees.*

*The author considers various solutions to this problem, from abolishing the leave requirement to requiring written reasons or a panel of judges. At a minimum, he suggests that the test for leave should be clarified, as the limited jurisprudence has provided insufficient guidance to judges. Forthcoming reforms to the refugee determination system, including the introduction of the Refugee Appeal Division, will in his view increase rather than diminish the importance of fair and consistent judicial review of refugee determinations.*

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# **Introduction**

Refugee determinations are among the most important decisions Canadian administrative tribunals and courts are called upon to make. If errors in first-instance refugee determinations at the Immigration and Refugee Board (IRB) are not caught and corrected through judicial review, refugees may be deported to countries where they face persecution, torture or death. Refugee claimants who apply for judicial review should, therefore, be able to expect that the outcomes of their applications will hinge on the merits of the cases they put forward.

Drawing on a database of over 23 000 applications for judicial review involving refugee matters from 2005 to 2010 in the Federal Court, this study examines whether outcomes in these high-stakes applications turn on their merits or on which judge is assigned to decide the application.

Unfortunately, as this article reveals, outcomes at the Federal Court over the past five years all too often come down to the luck of the draw.

The article begins with an overview of Canada's existing refugee determination system, and the role of the Federal Court within that system. Then, after discussing the literature on Federal Court decision making in the refugee law context, it sets out the methodology and the findings of this study. Finally, the article concludes by offering a number of policy recommendations based on the findings of the study and in light of the major reforms to Canada's refugee determination system that are expected in the near future.

## I. Canada's Refugee Determination System and the Federal Court

For readers unfamiliar with Canada's existing refugee determination process, this section places Federal Court refugee law decision making in context. It provides an overview of first-instance refugee determinations at the IRB, sets out the processes followed and tests applied in the Federal Court at both the application for leave and the judicial review stages, discusses appeals to the Federal Court of Appeal and the Supreme Court of Canada, and outlines subsequent immigration procedures that unsuccessful refugee claimants may access before removal from Canada.

### *A. Refugee Decisions at the Immigration and Refugee Board*

Canada's inland refugee determination system<sup>1</sup>—which is expected to undergo significant revisions shortly<sup>2</sup>—gives the IRB's Refugee Protection Division (RPD) responsibility for first-instance decisions.<sup>3</sup> Refugee claimants whose cases are eligible for referral to the RPD<sup>4</sup> are entitled

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1. For an overview of the inland refugee determination process, see Martin Jones & Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) at 215–53.

2. See Part IV.D, below, for more on this topic.

3. *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 99–101, 170 [*IRPA*].

4. *Ibid*, s 100. There are limited grounds for ineligibility, including having made a prior refugee claim in Canada, having travelled to Canada via a designated safe third country and having been found inadmissible due to security concerns, violations of human rights or certain types of criminality (*ibid*, s 101).

to hearings<sup>5</sup> before RPD Members, who are quasi-judicial administrative decision-makers appointed for fixed terms.<sup>6</sup> The purpose of the hearing is to determine whether claimants meet the definitions of “convention refugees”<sup>7</sup> or “persons in need of protection”,<sup>8</sup> and to determine whether claimants who are covered by these definitions are nonetheless excluded from refugee protection on grounds related to criminality or violation of human rights.<sup>9</sup>

If the RPD Member denies the refugee claim, written reasons must be given after the hearing. Alternatively, if the RPD Member grants refugee protection, written reasons need only be given at the request of the claimant or the Minister of Citizenship and Immigration (the Minister).<sup>10</sup> In the case of a negative decision, the RPD Member may also declare the claim to have no credible basis if there was no credible or trustworthy evidence that could have justified granting refugee protection.<sup>11</sup> Such a declaration means that the claimant is not entitled to an automatic stay of a removal order pending the determination of any application for judicial review.

Since 2002, Canada’s immigration legislation has contained provisions allowing a claimant or the Minister to appeal an RPD decision on its merits to the Refugee Appeal Division (RAD) of the IRB,<sup>12</sup> but those provisions have not yet come into force.<sup>13</sup> The failure to implement the

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5. *Ibid*, s 170(b). The RPD may grant, but not deny, refugee protection without holding a hearing (*ibid*, s 170(f)). As a matter of constitutional law, refugee claimants in Canada are entitled to a hearing whenever credibility is at stake. See *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR (4th) 422.

6. *IRPA*, *supra* note 3, s 153. Only a small proportion of RPD Members have legal training (10% of the RPD’s complement are required to be lawyers with at least 5 years of experience) (*ibid*, s 153(4)).

7. *Ibid*, s 96.

8. *Ibid*, s 97.

9. *Ibid*, s 98.

10. *Ibid*, s 169. Written reasons must also be provided when refugee protection is granted in cases where exclusion due to criminality or violating human rights is at issue. *Refugee Protection Division Rules*, SOR/2002-228, r 61 [*RPD Rules*].

11. *IRPA*, *supra* note 3, s 107.

12. *Ibid*, ss 110–11.

13. See *ibid*, s 275; *Order Fixing June 28, 2002 as the Date of the Coming into Force of Certain Provisions of the Act*, SI/2002-97.

RAD has been sharply criticized by refugee advocates,<sup>14</sup> and is especially problematic in light of studies indicating that refugee determinations at the RPD appear to turn at least in part on extra-legal considerations.<sup>15</sup> Of particular importance are studies showing massive and unexplained variations in refugee claim grant rates from one RPD Member to another, even when factors such as the claimant's country of origin are taken into account.<sup>16</sup> Because the RAD is not available, there is no recourse within the IRB when a claimant believes the RPD erred in a refugee determination, whether because of extra-legal factors such as the assignment of the case to an RPD Member who seldom or never grants refugee protection,<sup>17</sup>

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14. See e.g. Amnesty International Canada, "Canada's Refugee Appeal Division: Amnesty's Issues and Concerns" (16 November 2007), online: Amnesty International <<http://www.amnesty.ca>>; Canadian Council for Refugees, "Refugee Appeal Division Backgrounder" (December 2006), online: Canadian Council for Refugees <<http://ccrweb.ca>> [CCR, "RAD"].

15. Extra-legal factors may include whether the claimant had experienced legal counsel, the adjudicator's gender and the political party that appointed the adjudicator. See e.g. Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49:1 Osgoode Hall LJ 71 [Rehaag, "Counsel"]; Sean Rehaag, "Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations" (2011) 23:2 CJWL 627 [Rehaag, "Gender"].

16. See Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39:2 Ottawa L Rev 335 [Rehaag, "Troubling"]. For more recent data on variations in grant rates at the RPD, see Sean Rehaag, "UPDATED 2011 Refugee Claim Data and IRB Member Recognition Rates" (6 August 2012), online: Canadian Council for Refugees <<http://ccrweb.ca>> [Rehaag, "Data"]. For media investigations of variations in refugee claim grant rates, see Marina Jiménez, "Refugee approval rates vary widely", *The Globe and Mail* (24 July 2004) A1, online: The Globe and Mail <<http://www.theglobeandmail.com>>; David McKie, "Fluctuations in refugee rulings trouble critics", *CBC News* (17 December 2009), online: CBC News <<http://www.cbc.ca>> .

17. One RPD Member, David McBean, denied refugee status in every case he heard from the time he was appointed to the IRB in 2008 until 2010. See Nicholas Keung, "Getting asylum the luck of the draw?", *Toronto Star* (4 March 2011) A1, online: Toronto Star <<http://www.thestar.com>> [Keung, "Luck"].

or because of more run-of-the-mill errors that are inevitable in any administrative decision-making process.<sup>18</sup>

### *B. Leave Decisions at the Federal Court*

Until the RAD is implemented, the only procedure available when a claimant (or the Minister) is unhappy with a first-instance RPD refugee determination is to apply for judicial review in the Federal Court.<sup>19</sup> Either party may begin the process of judicial review of an RPD decision by filing an application for leave with the Federal Court.<sup>20</sup> With a few exceptions—such as where the RPD declares a claim to have no credible basis—unsuccessful refugee claimants who apply for judicial review generally benefit from an automatic stay on removal, pending the determination of their application.<sup>21</sup>

The timelines for applications for leave are tight: the application must be filed within 15 days after the RPD sends written reasons.<sup>22</sup> The respondent has ten days to indicate opposition to the application by filing a notice to appear.<sup>23</sup> The application must be perfected within 30 days by filing an application record, which includes the decision under review, a

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18. While errors are inevitable in all administrative decision-making processes, several factors in the refugee determination process make them more likely. For example, refugee adjudicators must determine what is likely to happen in the future (that in the event that a refugee claimant is deported) in a foreign country—frequently a country that is unstable and about which little reliable information is available. Moreover, the key evidence is typically found in the testimony of the claimant, who may suffer from mental health challenges related to surviving traumatic experiences and who often experiences stress as a result of the high stakes and unfamiliarity of the hearing process. In addition, testimony is generally mediated by an interpreter, and interpretation errors may occur. For a discussion of these and other challenges in refugee determination, see CCR, “RAD”, *supra* note 14.

19. For an overview of the judicial review process, see Jones & Baglay, *supra* note 1 at 273–87. See also Federal Court, “Judicial Review (Immigration) Practice Guide” (May 2006), online: Federal Court <<http://www.fct-cf.gc.ca>>.

20. *IRPA*, *supra* note 3, s 72.

21. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 231 [*IRPA Regulations*].

22. *IRPA*, *supra* note 3, ss 72, 169(f); *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, s 5 [*FC Immigration Rules*]. Where there are “special reasons”, the Federal Court may extend the deadline, even after it has expired. *IRPA*, *supra* note 3, s 72(2)(c).

23. *FC Immigration Rules*, *supra* note 22, s 8.

memorandum of argument and supporting affidavits.<sup>24</sup> If the respondent wants to oppose the application for leave, the respondent then has 30 days to file a memorandum of argument and supporting affidavits,<sup>25</sup> and the applicant may file a reply within ten days.<sup>26</sup>

A single Federal Court judge (the leave judge) decides whether to grant leave in any given case. Applications are not screened before being assigned to a particular leave judge, so cases are effectively assigned at random. In other words, leave judges—unlike RPD Members who make first-instance refugee determinations—do not specialize in particular types of applications, or applications involving claimants from particular countries.<sup>27</sup>

Hearings on leave determinations are only held in exceptional circumstances,<sup>28</sup> so a leave judge usually decides whether to grant leave solely on the basis of a review of the court file. Reasons for granting or denying leave are not typically provided. When leave is denied, there is no further appeal.<sup>29</sup>

The test for when leave should be granted has not been established by legislation or the rules of the court. As Harrington J noted in *Hinton v Canada (Minister of Employment and Immigration)*, “[t]he parameters which should influence a judge’s discretion are not set out. There is very

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24. *Ibid*, s 10.

25. *Ibid*, s 11.

26. *Ibid*, s 12.

27. Jon B Gould, Colleen Sheppard & Johannes Wheeldon, “A Refugee from Justice? Disparate Treatment in the Federal Court of Canada” (2010) 32:4 Law & Pol’y 454 at 459; Ian Greene & Paul Shaffer, “Leave to Appeal and Leave to Commence Judicial Review in Canada’s Refugee-Determination System: Is the Process Fair?” (1992) 4:1 Int’l J Refugee L 71 at 79–81.

28. *IRPA*, *supra* note 3, s 72(2)(d).

29. *Ibid*, s 72(2)(e). It should be noted that applicants may bring a motion for reconsideration where the denial of leave is inconsistent with reasons provided (if reasons were provided), or where a matter that should have been dealt with in denying leave was overlooked or accidentally omitted. See *Federal Courts Rules*, SOR/98-106, s 397. Courts have, however, generally interpreted the scope for reconsideration quite narrowly—and it is, understandably, difficult to establish that the court overlooked or accidentally omitted considering a matter in denying leave when reasons are not typically provided. See e.g. *Boateng v Canada (Minister of Employment and Immigration)*, [1990] 112 NR 318, 11 Imm LR (2d) 9 (FCA); *Dan v Canada (Minister of Citizenship and Immigration)*, [2000] 189 FTR 301, 6 Imm LR (3d) 84 (see especially at para 17); *Key v Canada (Minister of Citizenship and Immigration)*, 2011 FC 92, [2011] FCJ no 403 (QL).



little guiding jurisprudence, which is not surprising given that reasons are usually not provided and that the decision cannot be appealed”.<sup>30</sup>

Although there is not much jurisprudence in this area, a handful of decisions do discuss the leave requirement, usually in cases where the test for leave is ancillary to other legal issues. The leading case is *Bains v Canada (Minister of Employment and Immigration)*,<sup>31</sup> where Mahoney J said, in rejecting a constitutional challenge to the leave requirement:

The only question to be considered in disposing of an application for leave . . . is whether or not a fairly arguable case is disclosed for the relief proposed to be sought if leave were to be granted. . . . [T]he requirement for leave is in reality the other side of the coin of the traditional jurisdiction to summarily terminate proceedings that disclose no reasonably arguable case.<sup>32</sup>

Similarly, in *Saleh v Canada (Minister of Employment and Immigration)*,<sup>33</sup> Teitelbaum J offered this analysis of the test for leave: “I am satisfied that on an application for leave one should grant such a request unless it is plain and obvious that the applicant would have no reasonable chance of succeeding”.<sup>34</sup>

More recently, in *Canadian Council for Refugees v Canada*,<sup>35</sup> Hughes J characterized the test for leave in these terms: “the standard for granting an Order permitting judicial review is low. The matter at that point is to be dealt with in a summary way. The standard on a leave application is whether or not a fairly arguable case is disclosed”.<sup>36</sup> In *Level v Canada (Minister of Citizenship and Immigration)*,<sup>37</sup> Russell J noted that “[w]hile the leave judge determines if there is a serious question to be tried, it is the judge on judicial review who has the opportunity to fully consider and weigh the merits of the application. . . . [O]n leave to commence an application, the merits of the parties’ arguments are not to be considered”.<sup>38</sup>

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30. 2008 FC 1007 at para 15, [2008] 333 FTR 288.

31. (1990), 47 Admin LR 317, 109 NR 239 (FCA).

32. *Ibid* at paras 1, 3.

33. [1989] FCJ No 825 (QL) (TD).

34. *Ibid*.

35. 2006 FC 1046, 299 FTR 114.

36. *Ibid* at para 20. See also *Sunarti v Canada (Minister of Citizenship and Immigration)*, 2011 FC 191 at para 14, 384 FTR 151.

37. 2010 FC 251, [2011] 3 FCR 60.

38. *Ibid* at para 58.

And finally, in *Mina v Canada (Minister of Citizenship and Immigration)*,<sup>39</sup> a rare case in which reasons were given for denying leave, Shore J said: “In an application for leave and for judicial review, a serious, arguable case with serious issues must be submitted”.<sup>40</sup>

The test for leave has therefore been variably described in the following terms: a reasonably arguable case; a fairly arguable case; a serious question to be tried; and whether it is plain and obvious that the applicant has no reasonable prospect of success. However formulated, the test is highly permissive: leave should be granted unless it is clear that the judicial review application has no reasonable chance of success, namely, where it is so obvious that the application must fail that a determination on the merits is unnecessary.

### *C. Judicial Review Decisions at the Federal Court*

In cases where leave is granted, a hearing will be scheduled between 30 and 90 days later.<sup>41</sup> The leave judge will also set timelines for filing further documents, including the tribunal record from the IRB, and further memoranda of argument from the parties.<sup>42</sup>

A Federal Court judge (JR judge), other than the leave judge, presides over the hearing. The JR judge must determine whether the applicant has established that the RPD committed a reviewable and material error. The Federal Court can overturn an RPD decision where the RPD (1) acted outside or beyond its jurisdiction; (2) breached principles of natural justice or procedural fairness; (3) erred in law; (4) made findings of fact that were perverse or capricious, or were made without due regard to the available evidence; (5) acted as a result of fraud or perjury; or (6) acted contrary to law.<sup>43</sup>

Judicial review is an administrative law process and is subject to Canadian administrative law norms, including norms on the level of deference courts must show administrative tribunals. The Federal Court is generally deferential toward findings of fact and of mixed fact and law

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39. 2010 FC 1182, [2010] FCJ no 1482 (QL).

40. *Ibid* at para 6.

41. *IRPA*, *supra* note 3, s 74(b).

42. *FC Immigration Rules*, *supra* note 22, r 15(1).

43. *Federal Courts Act*, RSC 1985, c F-7, s 18.1(4).

made by RPD Members. In reviewing such findings it applies a standard of “reasonableness”,<sup>44</sup> on which the question is not whether the JR judge would have made different findings but whether the findings that were made were reasonably open to the RPD Member and were adequately justified. As the Supreme Court put it in *Dunsmuir v New Brunswick*,<sup>45</sup>

[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.<sup>46</sup>

In immigration and refugee matters, the Federal Court applies the more exacting standard of “correctness” in some issues of law, including issues of jurisdiction and procedural fairness.<sup>47</sup> When using this standard of review, the JR judge essentially reconsiders the issue *de novo* and shows no deference to the RPD.<sup>48</sup>

Where the JR judge is of the view that (on the appropriate standard of review) the RPD Member committed a reviewable and material error, the judge typically sets aside the RPD decision and orders that the matter be referred back for redetermination by a different RPD Member. The JR judge can, however, provide more specific directions to the RPD, including a direction that the claimant be accorded refugee protection.<sup>49</sup> The JR judge usually gives written reasons for the judgment, although orders can be issued without reasons.

#### *D. Appeals to the Federal Court of Appeal and the Supreme Court of Canada*

In cases where leave has been granted, the decision of the JR judge on the merits may be subject to appeal to the Federal Court of Appeal, but on tightly limited grounds. A party may appeal only if the JR judge issuing

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44. *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46, [2009] 1 SCR 339.

45. 2008 SCC 9, [2008] 1 SCR 190.

46. *Ibid* at para 47.

47. *Khosa*, *supra* note 44 at paras 41–48.

48. *Dunsmuir*, *supra* note 45 at para 50.

49. *Federal Courts Act*, *supra* note 43, s 18.1(3).

the Federal Court decision certifies that the decision raises a “serious question of general importance . . . and states the question”.<sup>50</sup> Where a JR judge certifies a question and a party decides to proceed with an appeal, the Federal Court of Appeal is not limited to answering only the stated question but can reconsider all relevant issues.<sup>51</sup>

In a case where the leave judge denies leave, or where leave is granted but the JR judge does not certify questions for appeal, the decision is final and cannot be appealed.<sup>52</sup> Where a question is certified for appeal by the JR judge and the case proceeds to the Federal Court of Appeal, a further appeal to the Supreme Court of Canada is possible, but only with leave from the Supreme Court. Such leave is given only in rare cases that raise issues of public importance.<sup>53</sup>

#### *E. Subsequent Immigration Procedures*

Aside from appeals, unsuccessful refugee claimants may access subsequent immigration procedures, including Humanitarian and Compassionate applications (H&C applications) and Pre-Removal Risk Assessments (PRRAs).

An H&C application is a request that the Minister exercise discretion to make an exception from Canada’s regular immigration requirements on humanitarian grounds—on the grounds that the applicant would face “unusual, undeserved or disproportionate hardship” if required to leave Canada.<sup>54</sup> Usually the requested exception is that the applicant be given permanent residence in Canada, even though she does not qualify for any existing immigration program. While many unsuccessful refugee claimants make H&C applications, it should be noted that these applications do not provide refugees who allege that the RPD erroneously

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50. *IRPA*, *supra* note 3, s 74(d).

51. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 12, 174 DLR (4th) 193.

52. *IRPA*, *supra* note 3, ss 72(2)(e), 74(d).

53. *Supreme Court Act*, RSC 1985, c S-26, s 40.

54. *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11 at para 18, 340 FTR 29. See also *IRPA*, *supra* note 3, s 25.1; Citizenship and Immigration Canada, Operational Manuals, *IP5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca>>.

denied their claims with the opportunity to have their cases reassessed before they are removed from Canada. H&C applicants can be removed from the country pending determination of their applications. Moreover, since 2010, the Minister (when assessing an H&C application) has been prohibited from taking into account any risks to the claimant that could have been considered in the refugee determination process.<sup>55</sup>

PRRAs represent a final opportunity, before removal from Canada, for applicants to demonstrate that they face risks of persecution, risks to life, risks of torture or risks of cruel and unusual treatment.<sup>56</sup> Once again, however, this procedure does not provide an opportunity to correct errors made by the RPD. Applicants who made refugee claims may only present evidence which arose after the refugee hearing or which the claimant could not reasonably have presented at the hearing.<sup>57</sup> As a result, for unsuccessful refugee claimants, PRRAs are generally of no use unless something happens between the hearing and the PRRA decision<sup>58</sup> to enable a claimant to meet the criteria for refugee status—for example, if conditions in the claimant’s country have deteriorated.

Although immigration procedures are available, they do not provide individuals whose claims were erroneously denied by the RPD with a meaningful opportunity to show that they should not be deported from Canada to face persecution, torture or even death. As a result, the right of unsuccessful refugee claimants to access Federal Court judicial review of negative RPD determinations represents the sole opportunity for the Canadian legal system to catch mistakes in the refugee determination process.<sup>59</sup>

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55. *IRPA*, *supra* note 3, s 25(1.3).

56. *Ibid*, ss 112–14. See also Citizenship and Immigration Canada, Operational Manuals, *PP3: Pre-removal Risk Assessment* (2009), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca>>.

57. *IRPA*, *supra* note 3, s 113(a).

58. See e.g. *Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1187, [2007] FCJ no 1553 (QL) (“[t]he PRRA process is intended to assess new risk developments between the IRB hearing and the scheduled removal date” at para 37).

59. Unsuccessful refugee claimants may turn to international human rights bodies once all domestic remedies are exhausted. However, the decisions of these bodies are not, in most cases, binding either as a matter of international or domestic law. Moreover, non-citizens are frequently deported while decisions of international human rights bodies are pending. See e.g. *Ahani v Canada (Minister of Citizenship and Immigration)* (2002), 58 OR (3d) 107, 208 DLR (4th) 66 (CA); *Sogi v Canada (Minister of Citizenship and Immigration)*, 2006 FC

Against this background, let us now turn to an assessment of how well the judicial review process for unsuccessful refugee claimants actually works.

## II. Existing Empirical Studies

Several studies have offered empirical assessments of judicial review of refugee determinations in Canada. These studies are part of a growing body of empirical legal scholarship examining judicial decision making in Canada and elsewhere.<sup>60</sup> This wider scholarship demonstrates that outcomes in judicial processes may often turn on factors other than the merits of a case. Among the myriad of extra-legal factors that have been found to drive outcomes are the judge assigned to hear the case and the various aspects of that judge's identity such as gender, political party of appointment and political orientation.<sup>61</sup>

Of course, some variability in the approaches of different judges is to be expected, as they bring a variety of life experiences to the bench.<sup>62</sup> Indeed, some of the strongest arguments for increasing the demographic diversity of the judiciary invoke benefits to the courts—and the likelihood that they would at times come to different substantive conclusions—if currently unrepresented life experiences and perspectives were brought

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799, 158 ACWS (3d) 637; *Dadar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 382, 147 ACWS (3d) 277; *Mugesera c Kenney*, 2012 QCCS 116, 37 Admin LR (5th) 137.

60. For a review of empirical legal scholarship, see Michael Heise, "An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009" [2011:5] U Ill L Rev 1739. See also Peter Cane & Herbert M Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010).

61. See e.g. James Stribopoulos & Moin A Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario" (2007) 45:2 Osgoode Hall LJ 315; Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47:1 Osgoode Hall LJ 1; CL Ostberg & Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007); Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008); Cass R Sunstein et al, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Washington, DC: Brookings Institution Press, 2006).

62. Roderick A Macdonald & FR Scott, "Parametres of Politics in Judicial Appointments" (Quebec: Commission of Inquiry into the Appointment Process for Judges in Quebec, 2010).

onto the bench.<sup>63</sup> Nonetheless, the rule of law may be undermined if extra-legal factors come to play a central role in determining judicial outcomes.<sup>64</sup> When one looks at judicial reviews of refugee determinations, the question therefore is not whether outcomes will vary with the judge who hears the case—surely they will. Rather, the question is whether the degree of variability is within acceptable bounds, and if not, what can be done about it.<sup>65</sup>

### A. Greene

As discussed below, the leave requirement for unsuccessful refugee claimants who seek judicial review first came into effect in 1989 amid significant controversy.<sup>66</sup> Soon afterwards, Ian Greene undertook an empirical study of how refugee claimants fared in Federal Court applications for leave.<sup>67</sup> In an article published in 1992 setting out preliminary results, Greene explained why the study was done:

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63. See Justice Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28:1 Osgoode Hall LJ 507; The Honourable Sonia Sotomayor, “A Latina Judge’s Voice” (2002) 13:1 La Raza LJ 87.

64. Consistency in judicial decision making is often described as a key feature of the rule of law. Lon Fuller, for example, argued that applying the law as announced, and deciding cases according to promulgated norms rather than on an ad hoc basis, are constitutive features of legality. *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969). Many legal theorists from various traditions agree with Fuller on this point. See e.g. Ronald Dworkin, “Philosophy, Morality, and Law—Observations Prompted by Professor Fuller’s Novel Claim” (1964–1965) 113:5 U Pa L Rev 668 at 669; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, Mass: MIT Press, 1996) at 144; HLA Hart, *The Concept of Law*, 2d ed (Oxford: Oxford University Press, 1994) at 207; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 270–71.

65. Several US scholars have offered a meticulous and comprehensive analysis of whether variability across judges is excessive in the American refugee determination system, and of measures that could be taken to reduce this variability. See e.g. Jaya Ramji-Nogales, Andrew I Schoenholtz & Philip G Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York: New York University Press, 2009).

66. See *infra* notes 129–32 and accompanying text.

67. Greene & Shaffer, *supra* note 27. See also Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998) at 19–21 [Greene, “Final Appeal”].

A uniform and just application of the law is particularly important in cases of refugee determination because of the severe human consequences which may result if the law is misapplied. Further, failure to ensure that the law is consistently applied may violate guarantees of fundamental justice in Section 7 of the Canadian Charter of Rights and Freedoms and the right to a fair hearing in accordance with the principles of fundamental justice under Section 2(e) of the Canadian Bill of Rights.<sup>68</sup>

To test whether the new leave requirement posed barriers to a “uniform and just application of the law” in refugee determinations, the study reviewed court files in all applications for leave filed in 1990, leading to a dataset of 2 081 applications.<sup>69</sup> It found statistically significant correlations—at unusually high confidence levels—between individual leave judges and leave outcomes.<sup>70</sup> In fact, the variations in leave grant rates from one judge to another were described as “nothing short of astounding”.<sup>71</sup> For example, while the average leave grant rate for all cases reviewed was 25%,<sup>72</sup> Pratte J granted leave in only 14% of his cases (203 decisions), and Desjardins J granted leave in 48% of hers (188 decisions).<sup>73</sup>

Greene’s analysis also showed that patterns in the assignment of cases to particular judges did not appear to account for those variations.<sup>74</sup> Nonetheless, to further test whether the caseloads assigned to individual judges differed in some relevant way, Greene retained an expert in immigration law to conduct a blind review of 390 randomly selected case files to independently assess whether, in that expert’s view, leave should have been granted.<sup>75</sup> The purpose of this exercise was not to discern whether leave really ought to have been granted in each case, but whether the rates at which the expert would have granted leave varied for applications decided by different judges. It turned out that the

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68. Greene & Shaffer, *supra* note 27 at 75.

69. Greene, “Final Appeal”, *supra* note 67 at 19–21. In 1990, 2 341 applications for leave were filed. However, data could not be collected on 260 cases (*ibid* at 220, n 47).

70. Greene & Shaffer, *supra* note 27 at 78.

71. Greene, “Final Appeal”, *supra* note 67 at 20.

72. *Ibid* at 220, n 47.

73. *Ibid* at 20–21.

74. Greene & Shaffer, *supra* note 27 at 79–81. See also Greene, “Final Appeal”, *supra* note 67 at 19, n 44 and accompanying text.

75. The review was “blind” in the sense that the expert was not informed of the outcome in the application or the identity of the judge who decided it. See Greene, “Final Appeal”, *supra* note 67 at 220, n 45.



expert's leave grant rate was consistent across cases assigned to different leave judges. This further supported the conclusion that variations in leave grant rates across judges related to how individual judges decided the applications, rather than to patterns in the cases assigned to them.<sup>76</sup> On the basis of the findings, Greene said that “[t]here is no escaping the conclusion that given the same law and the same kind of factual issues, some judges took a ‘strict’ approach to granting leave . . . while others took a more ‘liberal’ approach”.<sup>77</sup>

Where a judicial review application was heard and determined on the merits after leave had been granted, Greene went on to compare those final outcomes in cases where leave was granted by “strict” judges and by “liberal” judges, in an attempt to see “whether the ‘strict’ judges were better at screening out weak cases at the leave stage than the ‘liberal’ judges”.<sup>78</sup> Interestingly, however, no statistically significant correlation was found between rates of success on the merits (once leave was granted) and whether the leave judge had a high or low rate of granting leave.<sup>79</sup> This led the authors to conclude that “refugee applicants who were unfortunate enough to have their leave applications come before a ‘strict’ judge may have had less access to justice in the long run than those who were lucky enough to have their applications come before a more ‘liberal’ judge”.<sup>80</sup>

Greene and Shaffer argued that the study conclusively demonstrated that the leave requirement, as it was applied in 1990, limited access by refugee claimants to an effective and fair appeal process, in a way that arguably violated constitutional norms of procedural justice.<sup>81</sup> One way to address this concern, they suggested, was the adoption of a practice common in many appellate courts of deciding cases by panels of several judges, “to mitigate the effects of individual judicial predispositions”.<sup>82</sup> Another suggestion was for the court to modify the leave process so that when one judge refused to grant leave, the matter would be automatically

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76. *Ibid* at 19–20.

77. *Ibid* at 20.

78. *Ibid* at 21.

79. *Ibid*.

80. *Ibid* at 21.

81. Greene & Shaffer, *supra* note 27 at 82.

82. *Ibid*.

reviewed by a second judge who could either confirm the decision or grant leave.<sup>83</sup>

*B. Gould, Sheppard and Wheeldon*

Jon Gould, Colleen Sheppard and Johannes Wheeldon updated the Greene study with new data from 2003. They examined a sample of 617 court files in applications filed in 2003 for leave and judicial review involving immigration decisions.<sup>84</sup> Because they were interested in examining both leave decisions and decisions on the merits where leave was granted, they oversampled cases where leave was granted to ensure a sufficiently large pool of cases decided on the merits. This led to two groups of cases: 275 applications where leave was denied, and 342 applications where leave was granted. Various data points were collected for each application, including outcomes and demographic details of applicants, judges and counsel. A panel of five immigration law experts was also consulted to assess the “ideological reputation” of the judges whose decisions were under consideration.<sup>85</sup>

The study found that a variety of factors correlated with patterns in outcomes both at the leave stage and on the merits. These factors included the type of application (immigration applicant versus refugee applicant)<sup>86</sup> and the gender, age and country of origin of the applicant.<sup>87</sup> Applicants represented by lawyers were much more likely to be granted leave than

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83. Greene, “Final Appeal”, *supra* note 67 at 221, n 49.

84. *Supra* note 27 at 465.

85. *Ibid* at 465–67.

86. Unlike the prior study, this study examined applications for judicial review involving both immigration law and refugee law. Many aspects of the process for judicial review are similar in these two contexts. For example, leave is required for both. See *IRPA*, *supra* note 3, s 72. However, there are also important differences. For instance, in many immigration law applications for judicial review, there is no automatic stay on removal pending the determination of judicial review, whereas most refugee applicants benefit from automatic stays of removal. See *IRPA Regulations*, *supra* note 21, s 231. Similarly, in many immigration law applications, constitutional due process norms are attenuated, whereas in refugee law applications, robust constitutional due process norms are almost always engaged. Compare *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711, 90 DLR (4th) 289, with *Singh*, *supra* note 5.

87. Gould, Sheppard & Wheeldon, *supra* note 27 at 467–75.

unrepresented applicants.<sup>88</sup> In the authors' words, "these findings . . . are troubling. . . . A system designed to provide due process of law ought not to be tilted in favor of those who can hire an experienced lawyer, and yet that is exactly what is happening".<sup>89</sup> The personal characteristics of judges were also found to be important factors. For example, at the leave stage, "a judge's ideology had a significant, powerful effect . . . with liberal judges more likely than conservative judges to grant an applicant leave".<sup>90</sup> The same pattern was observed in decisions on the merits.<sup>91</sup> In addition, the authors found that: "Francophone judges [were] . . . more skeptical of the merits of immigration appeals, even when controlling for the fact that they [were] more conservative than their Anglophone colleagues".<sup>92</sup>

Gould, Sheppard and Wheeldon concluded that their findings reaffirmed the Greene study's central conclusion—namely, that outcomes hinged at least in part on extra-legal factors, including which judge was assigned to decide an application.<sup>93</sup> This underscored concerns they suggested about how the Federal Court treated immigration and asylum cases and raised "questions about the very legitimacy of Canada's immigration and refugee system".<sup>94</sup>

### *C. Butler*

A more recent investigative report by journalist Don Butler echoes some of the findings of the Gould, Sheppard and Wheeldon study.<sup>95</sup> Butler reviewed "480 immigration, refugee and citizenship decisions issued by the Federal Court between January and June 2011".<sup>96</sup> Cases were identified by searching reasons for decisions posted on the Federal Court's website for applications involving citizenship or immigration, and then by excluding decisions dealing only with procedural matters, such as costs

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88. *Ibid* at 471.

89. *Ibid* at 475.

90. *Ibid* at 477.

91. *Ibid*.

92. *Ibid* at 478.

93. *Ibid* at 481.

94. *Ibid* at 482.

95. Don Butler, "Would-be immigrants face uncertain justice", *Ottawa Citizen* (26 November 2011) A1, online: <<http://www.ottawacitizen.com>>.

96. *Ibid*.

awards.<sup>97</sup> Outcomes in the identified cases were then examined in light of which judge issued the decision, the judge's gender and political party of appointment, and whether the judge was from Quebec.<sup>98</sup>

Butler reported that there were significant differences in rates at which different judges overturned immigration decisions. For example, Blanchard J overturned such decisions in 14% of the seven cases identified, whereas Campbell J overturned them in 100% of the 16 cases identified. More generally, according to Butler, "outcomes appear to split on party lines", with judges appointed by Liberal Party prime ministers more likely to overturn immigration decisions than judges appointed by Progressive Conservative or Conservative party prime ministers. Male judges and judges from Quebec were less likely to grant judicial review than female judges and judges from the rest of Canada.<sup>99</sup>

#### *D. Need for a Further Study*

Because the Greene study examined all applications for leave in refugee cases filed in 1990, it provides compelling evidence that different judges were applying the leave requirement inconsistently. However, it is important to recall the context. The study examined leave decisions at a time when the leave requirement was a new and controversial procedure. It had only recently come into effect, and the criteria for granting leave had yet to be definitively established through case law. The strong association the study found between outcomes and judges could arguably be partly attributed to the novelty of the leave procedure.

The Gould, Sheppard and Wheeldon study does suggest that such inconsistencies between judges persisted in 2003, long after the Federal Court had developed substantial experience with the leave requirement. That study also helpfully examines a variety of other factors that may affect outcomes—especially claimant demographics and legal representation. At the same time, however, the study has some methodological limitations, most notably problems related to sample size and to the representativeness of the samples, given that cases granted leave were oversampled. Also,

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97. E-mail from Don Butler, reporter, *Ottawa Citizen*, to author (13 February 2012) (on file with author).

98. Butler, *supra* note 95.

99. *Ibid.*

the methodology of assessing the ideology of judges using a panel of experts is questionable. Judges who, in the experience of the panel, have more frequently denied applications are likely to be viewed as more “conservative” by such a panel, so what is actually being measured is not “ideology” but the judge’s past practice. Drawing conclusions about Francophone judges being more “skeptical” than their Anglophone counterparts is also problematic: how do we know, for example, whether these differences are attributable to the predilections of these two groups of judges or to patterns in the applications presented to the two groups? What if, for example, there is varying quality in terms of legal representation in Anglophone and Francophone communities—perhaps as a result of differing provincial legal aid policies in Quebec and Ontario?

Finally, the Butler study, while once again suggesting that variability across judges continues to be a concern, also has methodological limitations. Unlike the two earlier studies, Butler did not consult court files but examined online reasons for decisions. Because reasons are not typically provided for leave decisions, the study dealt only with decisions on the merits—and even then, only when reasons for decisions were issued, which, as noted above, is not always the case. Also, Butler calculated grant rates for individual judges based on small datasets, so the representativeness of the sample is questionable. Moreover, he did not consider whether there may be systemic factors that account to some extent for the variations in grant rates for judges from Quebec and the rest of Canada.<sup>100</sup>

### III. The Present Study

In my view, a new study was needed on whether, after more than two decades of judicial experience with the leave requirement, the troubling variability so compellingly established in the Greene study persists. To overcome some of the methodological limitations of the two more recent studies discussed above, the new study had to be based on a large dataset that covered all refugee applications filed over a significant period of time; had to track outcomes at both the leave and merits stages; and

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100. In addition to these methodological limitations, there are concerns about the accuracy of some of the data in the study. For instance, Barnes J’s political party of appointment was inaccurately reported, as was the number of cases he decided during the period of the study.

had to look at the degree to which outcomes vary from judge to judge. This is the study I have undertaken. To get a more complete picture of recent decision making at the Federal Court in judicial reviews of refugee determinations, I have examined all Federal Court cases involving judicial review of IRB refugee determinations over several years—both leave decisions and decisions on the merits.

### *A. Methodology*<sup>101</sup>

To gather the data for the study, a computer program<sup>102</sup> was written to obtain information from the Federal Court's online Court Index and Docket<sup>103</sup> for all immigration applications filed from 2005 to 2010.<sup>104</sup> The data gathered electronically includes: (1) court number; (2) style of cause; (3) date the application was filed; (4) office where the application was filed; and (5) the Court's categorization of the type and nature of the proceeding. This produced a database of 40 334 applications.

Then, because the study is only interested in applications for judicial review of refugee determinations, cases were filtered out where the Federal Court categorized them as involving matters other than refugee determinations.<sup>105</sup> It should be noted that a number of the cases categorized by the Federal Court as involving refugee determinations appeared to

101. I am grateful to Sarah L Boyd at Jackman and Associates for drawing my attention to this methodology.

102. The programming involved coding macros in Microsoft Excel to import data from the online docket into a spreadsheet.

103. Federal Court, "Court Files", online: Federal Court <<http://www.fct-cf.gc.ca>>.

104. The cases were identified using court numbers assigned by the Registrar. All immigration decisions were given a number in the format IMM-#-yy, where yy is the year the application was filed and # is the sequential order in which cases are filed in the year. The court numbers for the cases examined ranged from the first immigration application filed in 2005 (IMM-1-05) to the last immigration application filed in 2010 (IMM-7726-10).

105. Cases were filtered out unless they were categorized in the online docket as: "Imm-Appl. for leave & jud. review-IRB-Refugee". The other categories the Federal Court uses in the online docket are: "File cancelled-Immigration"; "Imm-Actions / Other (non-leave) proceedings"; "Imm-Appl. for leave & jud. review-Arising outside Canada"; "Imm-Appl. for leave & jud. review-IRB-Immigration Division"; "Imm-Appl. for leave & jud. review-IRB-Refugee"; "Imm-Appl. for leave & jud. review-IRB-Immigration Appeal Division"; "Imm-Appl. for leave & jud. review-Other Arising in Canada"; "Imm-Appl. for leave & jud. review-Pre-removal risk assessment"; "Imm-Certificate"; "s. 18.1 Application for Judicial Review" and "(blank)".

involve other matters (such as H&C applications and PRRAs). These cases were retained in the dataset.<sup>106</sup> In other words, the dataset includes all applications from 2005 to 2010 that the Federal Court categorized as involving refugee determinations, whether or not that categorization was accurate. This produced a database of 23 047 applications.

The next step in the study was for research assistants to manually review online court dockets for each of the 23 047 applications categorized as involving a refugee determination. In this review, research assistants coded information about each application, including (where available): (1) whether the government was the applicant; (2) whether the application was perfected; (3) whether the respondent opposed leave; (4) leave judge; (5) leave outcome; (6) date of leave outcome; (7) JR judge; (8) judicial review outcome; and (9) date of judicial review outcome. In a few cases, the outcome was not clear from the online docket, or appeared to be wrongly recorded. For those cases, where reasons for decisions were available in online legal databases, the reasons were consulted. Where reasons for decisions were not available, copies of the relevant court orders were obtained from the Federal Court Registry.

At the same time, other research assistants gathered data about Federal Court judges from online sources, including biographies on the Federal Court's website<sup>107</sup> and Orders-in-Council on the Privy Council Office's

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106. The cases were retained because no means could be devised to exclude them consistently. Two problems arose in this regard. First, the dockets contained inconsistent levels of detail—some described the type of application, but most did not. It seemed problematic to exclude cases where there was enough detail to demonstrate erroneous categorization, when other cases were also likely to have been erroneously categorized but such errors were not visible in the dockets because less detail was provided. Second, early attempts to have research assistants code whether cases involved matters other than RPD decisions show that this required relatively complex judgment calls that were difficult to standardize, leading to inconsistent results across coders. For example, an early docket entry might indicate that the case involved an H&C application, but a subsequent docket might suggest that the case involved an RPD decision. How should such cases be categorized? In the end, retaining all the cases categorized by the registrar as involving RPD decisions seemed preferable to inconsistently excluding cases, especially because the size of the dataset meant that the inclusion of occasionally improperly categorized cases seemed unlikely to significantly impact the results of the study.

107. Federal Court, *Judges and Prothonotaries*, online: Federal Court <<http://www.fct-cf.gc.ca>>.

website.<sup>108</sup> The data collected for each judge included: (1) gender; (2) date of appointment; and (3) political party of appointment.<sup>109</sup>

Data verification, including inter-coder checks, was undertaken to correct errors in coding throughout the process. When all the coding and data verification was complete, a random sample of 100 cases was reviewed, and no coding errors were detected in that review. It should be noted, however, that no attempt was made to measure the accuracy of the information in the online Federal Court dockets themselves.

### *B. Overview of the Dataset*

Table 1 provides an overview of outcomes in the 23 047 applications considered in this study. A few points are worth noting.

First, applications for judicial review in refugee determinations rarely succeed. Indeed, only 6.35% of all applications for judicial review involving refugee determinations from 2005 to 2010 ultimately succeeded.

Second, given the low leave grant rate (14.44%), the success rate at the merits stage in cases where leave is granted (43.98%) is surprisingly high. Recall that the test for leave is supposed to be very permissive, namely, leave should be granted unless it is clear that there is no reasonable prospect that the application will succeed on the merits.<sup>110</sup> If only applications that clearly cannot succeed on the merits fail at the leave stage, and if the vast majority of applications do not pass that stage, one might expect success rates on the merits to be lower in cases where leave is granted. The combination of low leave-granting rates and high success rates once

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108. Privy Council Office, *Orders in Council Database*, online: Privy Council Office <<http://www.pco-bcp.gc.ca>>.

109. Political party of appointment was calculated based on the political party of the Prime Minister on the date of first appointment to the federal courts. Some judges had previously been appointed to other courts (including courts where judges are federally appointed), but those prior appointments were not used for the purpose of determining political party of appointment.

110. See text accompanying notes 31–41.



leave is granted may lead one to wonder whether leave is too often being withheld in cases where there is some modest prospect of success.<sup>111</sup>

Third, the vast majority of applications (99.42%) are made by claimants seeking to challenge negative refugee determinations, rather than by the Minister seeking to challenge positive refugee determinations. When the Minister does bring an application, however, it is much more likely to succeed. Applications by the Minister are 4.14 times as likely to be granted leave (58.65%) than are applications brought by unsuccessful refugee claimants (14.18%). While applications brought by the Minister are also more likely to succeed on judicial review after leave has been granted (62.82%) than applications brought by unsuccessful refugee claimants (43.53%), the difference is not as pronounced (1.44 times as likely to succeed). Still, overall, applications brought by the Minister from 2005 to 2010 were ultimately successful in overturning the refugee determination 36.84% of the time, whereas the equivalent figure for applications brought by unsuccessful claimants was only 6.18%.

Fourth, it is apparent that many applications for leave are never considered on their merits. For example, a significant proportion of applications (20.24%) are denied leave without having been perfected. This means that the applicant in those cases—almost always an unsuccessful refugee claimant—did not file an application record justifying the application, so the application was rejected without being considered by the leave judge. Similarly, in a few cases (2.15%) the application was withdrawn by the applicant before a leave decision was made, which again means that the application was never considered by a judge.<sup>112</sup>

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111. Some might respond that this reasoning presumes a normal distribution of likelihood of success across cases, whereas likelihood of success may in fact follow some other pattern. For example, even setting aside unperfected cases, perhaps there is a large proportion of clearly unfounded claims and a significant proportion of claims which have a good prospect of success, with very few in between. In such circumstances, low leave rates combined with high success rates in cases where leave is granted would not be unexpected. In my view, however, the findings reflected in Table 2 suggest that there are a large number of borderline cases—that is to say, cases where some judges would deny leave on the basis of no reasonable prospect of success, while others would disagree and grant leave. If such borderline cases were consistently granted leave, leave rates would be higher and (presumably) success rates on the merits where leave is granted would be lower.

112. The frequency of unperfected applications raises a question for future research: are the rates at which applications are unperfected or withdrawn influenced by whether the applicant had legal representation?

Finally, leave was granted unopposed in a small number of cases (1.81%), meaning that the respondent (usually the Minister) consented to the application, or indicated no opposition to leave being granted, or simply failed to file a memorandum of argument opposing leave. It should be noted that in a handful of cases, leave was denied despite the lack of opposition by the respondent.<sup>113</sup> In some cases, judicial review was granted at the merits stage on consent (9.22% of cases where leave was granted). Also, in some cases, the application was withdrawn after leave was given (4.27% of cases where leave was given)—although it is not clear that this means the application necessarily failed. For example, the application may have been withdrawn because the applicant was granted permanent residence in Canada through other immigration procedures, such as an H&C application.

Because the present study is mainly interested in how the leave requirement operates and whether outcomes vary from judge to judge, the remainder of the data presented focuses only on perfected applications (because all judges will similarly deny unperfected applications), on applications where the judge deciding the case is identified (which eliminates cases withdrawn before the leave determination and a few cases where the name of the judge was not indicated in the online court docket), and on applications brought by unsuccessful refugee claimants (because applications brought by the Minister are exceptional, and raise a different set of issues than applications brought by claimants).

### *C. Grant Rates for Leave Judges*

The most remarkable finding of the study is the enormous variation in the leave grant rates of judges in perfected applications brought by refugee claimants, which can be seen in Table 2. For example, Campbell J granted leave in 77.97% of the applications he decided, whereas Crampton J (now the Chief Justice) granted leave only 1.36% of the time. In other words,

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113. See e.g. *Bibi v Minister of Citizenship and Immigration* (10 October 2006), IMM-4043-06, online: Federal Court <<http://www.fct-cf.gc.ca>>; *Vasquez et al v Minister of Citizenship and Immigration* (07 April 2005), IMM-687-05, online: Federal Court <<http://www.fct-cf.gc.ca>>; *Mazunder v Minister of Citizenship and Immigration* (07 April 2005), IMM-3059-05, online: Federal Court <<http://www.fct-cf.gc.ca>>; *Rochester v Minister of Citizenship and Immigration* (26 July 2005), IMM-3062-05, online: Federal Court <<http://www.fct-cf.gc.ca>>.

though both judges decided over 200 applications, refugee claimants were an incredible 57.33 times as likely to obtain leave from Campbell J as from Crampton J. It should be noted that Campbell J was clearly an outlier, with a leave grant rate 2.31 times as high as anyone else (Shore J was second at 33.71%). Nonetheless, 20 judges had leave grant rates more than ten times as high as Crampton J, and six had rates more than ten times as high as Near J (2.50%), who had the second lowest leave grant rate.

In addition to the surprisingly large variations in leave grant rates between judges, it should also be noted that those rates follow a largely linear distribution (for the shape of the distribution, see Chart 1). Rather than most judges having leave grant rates near the average of 16.38% and only a few judges deviating substantially from that mean (which would be a standard distribution), a substantial proportion had rates that departed significantly from the average. Indeed, 36% of judges deviated by more than 50% from the average.<sup>114</sup>

Another key finding of the study is that the identity of the leave judge has a strong effect on the likelihood that an application will ultimately succeed (that the first instance refugee determination will be overturned on judicial review). Thus, for example, in 21.43% of the cases where Campbell J decided the leave applications, the refugee determination was ultimately overturned by the Federal Court, whereas the equivalent figure for Near J was 2.45%. Similarly, when Russell J was the leave judge, 15.60% of applications ultimately succeeded, but for Noël J the equivalent figure was only 2.97%. In fact, when the judge deciding leave was among those with the ten highest grant rates (deciding 50 or more applications), the ultimate success rate was 12.19%, while for those with the ten lowest grant rates, the ultimate success rate was 3.38%. In other words, applicants were 3.61 times as likely to succeed in overturning a first-instance refugee decision when leave was decided by a judge whose leave grant rate was in the top ten than when it was decided by one in the bottom ten.

Interestingly, although applicants generally did better when their applications were assigned to judges with higher leave grant rates, this

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114. Treating a deviation of more than 50% from the average as a criterion for identifying outliers in judicial decision making has been described in other studies as a “very tolerant standard of consistency” that some might argue “tolerates too much deviation”. See Jaya Ramji-Nogales, Andrew I Schoenholtz & Philip G Schrag, “Refugee Roulette: Disparities in Asylum Adjudication” (2007) 60:2 Stan L Rev 295 at 312–13.

was not always the case. For instance, Shore J's leave grant rate (33.71%) was 3.67 times as high as Layden-Stevenson J's (9.22%), but an applicant was actually more likely to succeed in overturning a first-instance refugee determination when Layden-Stevenson J decided leave (11.91%) than when Shore J decided leave (9.33%). Similarly, even though Zinn J (20.57%) was almost twice as likely to grant leave as Gibson J (10.81%), an application was slightly more likely to succeed when Gibson J was the leave judge (9.71%) than when Zinn J was the leave judge (8.47%). Some leave judges would therefore appear to be better than others at picking cases that will ultimately succeed on the merits.

#### *D. Grant Rates for Judicial Review Judges*

As can be seen in Table 3, there are also massive disparities in grant rates among judges who decide applications on the merits, after leave has been granted. In other words, the identity of the JR judge is also a key factor in the ultimate success of an application for judicial review (although it is, of course, a factor that only comes into play in the relatively few applications that succeed at the leave stage). Some JR judges grant judicial review on the merits in most of the applications they decide, such as Campbell J (92.31%) and Hansen J (72.97%). Others do so much less frequently, including Boivin J (7.89%) and Blais J (13.33%).

Some of the judges who are outliers when deciding leave are also outliers when they serve as JR judges deciding cases on their merits. This includes, at the high end, Campbell J (leave: 77.97%; JR: 92.31%) and O'Keefe J (leave: 25.91%; JR: 66.32%), and at the low end, Crampton J (leave: 1.36%; JR: 18.60%) and Boivin J (leave: 6.47%; JR 7.89%). Interestingly, however, this is not always the case. For example, Shore J has an unusually high leave grant rate (33.71%), and a below-average JR grant rate (33.81%). Similarly, Harrington J has an unusually low leave grant rate (6.18%), but only a slightly below-average JR grant rate (35.96%).

#### *E. Judge Demographics*

Table 4 breaks down results in applications, at both the leave stage and the JR stage, based on demographic characteristics of the deciding judge at

each stage. Specifically, it shows grant rates broken down by the political party that appointed the judge and by his or her gender.

There are differences, at both stages, between the grant rates of male and female judges, with male leave judges slightly more likely to grant leave (16.52%) as compared to female leave judges (15.85%), and female JR judges somewhat more likely to grant JR on the merits (42.88%) as compared to male JR judges (38.78%).<sup>115</sup> However, these differences are quite small—and it has to be kept in mind that the average grant rates are sensitive to outliers. For example, if Campbell J’s leave decisions are taken out of the analysis, the leave grant rates for male leave judges drops to 15.48%.

There are more substantial differences, again at both the leave stage and the JR stage, between grant rates of judges appointed by Liberal Party prime ministers (Liberal PMs) and by Progressive Conservative and Conservative Party prime ministers (Conservative PMs). Leave judges appointed by Liberal PMs were 1.60 times as likely to grant leave (17.64%) than their counterparts appointed by Conservative PMs (11.00%). Similarly, in cases where leave was granted, JR judges appointed by Liberal PMs were 1.46 times as likely to grant judicial review on the merits (42.69%) than JR judges appointed by Conservative PMs (29.14%).

It should be noted, however, that variations in grant rates among individual judges appointed by PMs from the same political party were more pronounced than variations between judges appointed by PMs from different parties. For example, the leave grant rates of Blais J (3.10%), Harrington J (6.18%), Shore J (33.71%) and Campbell J (77.97%) vary enormously even though they were all appointed by Liberal PMs.

#### *F. Factors Accounting for Variability*

While the variations in grant rates between judges are very large, a number of factors might partly account for these variations. For example, applications brought in one part of the country may be better founded than applications brought in other areas, so judges deciding applications from different parts of the country might justifiably have different grant

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115. It should also be noted that the Federal Court bench has not yet achieved gender parity. As Table 4 shows, 78.01% of perfected applications for leave were decided by male leave judges, and 81.59% of cases decided on the merits were heard by male JR judges.

rates. This might happen if there were differences in the quality of legal representation in various cities (maybe because of varying legal aid policies), or if first-instance decision-makers at the RPD in different cities were more or less likely to make reviewable errors.

As can be seen in Table 5, the city where an application is filed does seem to make an important difference (though the table does not explain why this would be the case). Most applications (92.93%) are filed in either Toronto or Montreal. Applicants were 1.42 times as likely to get leave in Toronto (17.73%) as in Montreal (12.52%). Similarly, in cases where leave was granted, applicants were 1.78 times as likely to succeed on the merits in Toronto (45.01%) as in Montreal (25.33%).

However, as Table 6 indicates, even when one looks at applications filed in only one city, variations in grant rates across judges remain. For example, in applications filed in Toronto, Finckenstein J (1.27%), Crampton J (1.64%) and Near J (2.17%) granted leave very infrequently, whereas Campbell J (78.61%), Shore J (41.22%) and Bedard J (36.36%) were much more likely to grant leave. It would therefore appear that the city where the application was filed cannot account for the massive variations in grant rates across judges.

Another factor that could potentially explain part of the variation in grant rates is the point in time when an application was filed. For example, over time, first-instance RPD decision makers might be more or less likely to commit reviewable errors. Or major changes in the law might have made the Federal Court more or less deferential toward administrative tribunals. During the period of the study, the Supreme Court decision in *Dunsmuir* significantly modified standards of review in administrative law,<sup>116</sup> so it may be that judges deciding cases mostly before or mostly after that decision would have different grant rates.

Table 7, however, shows that there is no consistent trend in grant rates—at either the leave or merits stages—over the period of the study. It would, therefore, seem that the point in time when a judge made his or her decisions does not account for variations in grant rates found in the study.

Table 8 provides further support for this conclusion. JR grant rates in cases where leave was granted were somewhat higher in applications filed before *Dunsmuir* (42.42%) than after (36.14%). But leave grant

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116. *Supra* note 45.

rates actually increased slightly (from 16.08% to 16.73%) in the period after *Dunsmuir*. These competing trends suggest that *Dunsmuir* likely did not have a straightforward or significant impact on the outcomes of applications.

We can thus reject the hypothesis that variations in grant rates can be explained by whether a judge decided most of his or her cases before or after *Dunsmuir*.

It appears, then, that neither the time nor location of the judicial review application accounts for the extreme variability in leave and JR grant rates across judges. Moreover, recall that cases are randomly assigned to leave judges without being screened on the merits by the registrar.<sup>117</sup> This means that, at least as between leave judges who decided large numbers of cases, it is unlikely that other factors which may affect the likelihood of success on individual applications (such as the identity of the RPD first-instance decision-maker or the quality of particular counsel) could account for variations in the rate at which those judges granted leave.

## IV. Discussion

The central finding of the study is that leave decisions hinge partly on which judge is assigned to decide the application. There were massive unexplained variations in leave grant rates; at the extremes, one particular judge was 50 times as likely to grant leave as another particular judge. It seems clear that some applications which could well succeed before most JR judges are prevented from reaching the merits stage by the fact that some leave judges are predisposed to deny leave. This is deeply troubling in light of the fact that leave decisions are the determinative step in the vast majority of applications (only 14.18% of applications get leave), and the fact that a large proportion of applications that pass the leave stage end up succeeding on the merits (43.98%), even though the leave requirement is supposed to screen out only clearly unfounded applications. Moreover, it should be recalled that leave determinations involve a process that is both opaque (in that reasons are not usually provided when leave is denied) and final (in that there is no appeal from a leave determination). And, of course, there are extreme stakes in this decision-making process:

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117. See Greene & Shaffer, *supra* note 27 and accompanying text.

if the Federal Court wrongly denies applications, the direct result is that refugees may, contrary to international refugee law, be sent back to countries where they face persecution, torture or death. In short, the key finding of the study is that the leave requirement, as currently applied, all too often poses an arbitrary and unfair barrier to access to justice for refugees, with potentially devastating consequences.

Before moving on to the policy implications of that central finding, three other findings of the study are worth highlighting.

First, there is dramatic variability in grant rates among JR judges at the merits stage—from a minimum of 7.89% to a maximum of 92.31%. This variability demonstrates a remarkable lack of consensus on refugee law at the Federal Court.<sup>118</sup> To be sure, variability in grant rates at the merits stage has less of an impact on most claimants than variability at the leave stage, because most applications never reach the merits stage. Nonetheless, it is worth thinking further about whether the structure of judicial review in refugee matters needs to be revised to bring more consistency to decisions on the merits. In particular, one wonders whether restrictions on appeal rights in cases decided on the merits should be reconsidered. As noted earlier, a decision on the merits can only be appealed to the Federal Court of Appeal if the JR judge issuing that decision certifies a question for appeal. Perhaps consistency in decision making on the merits would be enhanced if, rather than a certification requirement, there was an appeal as of right or with leave of the Federal Court of Appeal.<sup>119</sup>

Second, the study shows that although an adjudicator's gender appeared to have some effect on outcomes, that effect was not consistent or straightforward: male judges were slightly more likely than female judges to grant leave, but less likely to grant judicial review on the merits. Moreover, the effects of a judge's gender are quite small. This finding is interesting, in part because a large-scale study of refugee determinations in the US found that adjudicator gender has a surprisingly large impact

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118. This is not a new phenomenon. For an analysis of the lack of consistency in the application of refugee law by the Federal Court in the early 1990s, see Mary C Hurley, "Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions Before the Federal Court of Canada" (1996) 41:2 McGill LJ 317.

119. For further discussion of the certification requirement, see Gerald P Heckman, "Unfinished Business: *Baker* and the Constitutionality of the Leave and Certification Requirements under the *Immigration Act*" (2002) 27:2 Queen's LJ 683 [Heckman, "*Baker*"]; Hurley, *supra* note 118.



on outcomes, with male immigration judges much less sympathetic to applicants than female immigration judges.<sup>120</sup> This finding suggests that one must be cautious about inferring differences in how men and women engage in judging or moral reasoning from studies that find gender difference in specific adjudicative settings. Such reasoning must explain why these differences are not apparent in other contexts.<sup>121</sup>

Third, the study indicates that judges appointed by Liberal PMs are more likely to grant leave and to grant judicial review than judges appointed by Conservative PMs—though there was much more variation between individual judges appointed by PMs from either party than between the two groups. This finding is, of course, not surprising. The current Conservative government has clearly indicated a desire for increased deference from the Federal Court on immigration and refugee matters. In fact, the current Minister, Jason Kenney, recently chided the Federal Court in these terms: “[S]eemingly on a whim, or perhaps in a fit of misguided magnanimity, a judge overturns the careful decisions of multiple levels of diligent, highly trained public servants, tribunals, and even other judges. . . . [S]uch decisions do serious harm to the overall immigration system and prevent it from doing more good for deserving immigrants. And they undermine public confidence in the government’s ability to enforce our laws as passed by Parliament, and therefore in the entire system. . . . We’ve made some necessary changes to the system . . . [b]ut we legislators are not an island, and we don’t act alone. We need the judiciary to understand the spirit of what we are trying to do”.<sup>122</sup>

In light of such comments, it seems unremarkable that Conservative PMs might seek to appoint judges who are seen as likely to share their policy preferences, and in particular are more likely to defer to refugee

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120. Ramji-Nogales, Schoenholtz & Schrag *supra* note 114 at 342ff.

121. For a further discussion of gender and adjudication in the refugee context, and the danger of generalizing from findings of gender differences in adjudication in specific settings, see Rehaag, “Gender”, *supra* note 15.

122. (Address delivered at the Faculty of Law, University of Western Ontario, 11 February 2011), online: Citizenship and Immigration Canada Media Centre <<http://www.cic.gc.ca/english/department/media>>.

decisions made by the IRB.<sup>123</sup> Still, once appointed, judges are independent, and they typically understand their role not as making policy choices but as fairly applying the law to the best of their ability, so their actual behaviour on the bench may be difficult to predict in advance. Indeed, the Minister's comments turned out to be highly controversial, in part because they showed little respect for judicial independence. As Audrey Macklin and Lorne Waldman put it:

[J]udges are supposed to be independent of government, and government is supposed to respect that independence. The executive appoints our judges. But once they're appointed, our democracy requires that they render their decisions free from government influence or pressure. . . . When Mr. Kenney publicly criticizes judges for interpreting the law in a manner that diverges from his own preferred outcome, he shows contempt for judicial independence.<sup>124</sup>

There is an important caution that one should take away from this. While the present study shows that inconsistent decision making in judicial review of refugee determinations is a serious problem, any attempt to deal with these inconsistencies needs to be respectful of judicial independence. For this reason it would in my view be a mistake to focus too heavily on the fact that judges appointed by different political parties may, on average, be more or less likely to decide in favour of applicants (especially given the variations between judges appointed by a particular political party). Absent exceptional circumstances, we should generally resist the temptation to argue that judges whose grant rates are higher or lower than average provoke a reasonable apprehension of bias and should recuse themselves from hearing applications for judicial review in the refugee

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123. Many would argue that this is a perfectly legitimate feature of representative democracy. See e.g. Macdonald & Scott, *supra* note 62 (“[o]nce a candidate has been certified as competent by the expert selection committee, it is not offensive to democratic constitutional theory for governments to appoint judges who are on the same general policy page as they are” at 38).

124. “When cabinet ministers attack judges, they attack democracy” *The Globe and Mail* (18 February 2011) A17, online: The Globe and Mail <<http://www.theglobeandmail.com>>. See also Letter from Rod Snow, President of the Canadian Bar Association, to Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism (22 February 2011), online: Canadian Bar Association <<http://www.cba.org>>; Richard Foot, “Chief Justice supports criticism of Kenney”, *National Post* (13 August 2011), online: National Post <<http://www.nationalpost.com>>.

law context, or that their decisions should be overturned on this basis.<sup>125</sup> Instead, we should focus on whether there are institutional impediments to consistent decision making in this area of judicial review—and if so, what might be done about it. I will now turn to a discussion of possible reforms to address these concerns.

### *A. Abolishing the Leave Requirement*

Perhaps the most obvious way to reduce arbitrary limits on access to justice for refugees would be to abolish the leave requirement.

This requirement has been controversial since it was first introduced in 1987 as part of a package of reforms to the refugee determination process.<sup>126</sup> Part of the reason for the controversy is that the leave requirement was (and is) an unprecedented limit on access to first-instance judicial review of administrative decision making in Canada. William Angus, then at Osgoode Hall Law School, testified before a parliamentary committee considering proposed legislation that included the leave requirement, and offered the following assessment:

I come finally to . . . the limitations placed on access to the courts. . . . I think that the courts are going to look very closely at these provisions and that Parliament, if these provisions pass in their present form, is not going to get away with it. . . .

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125. Courts have regularly held that statistical differences in outcomes are not sufficient on their own to ground a finding of reasonable apprehension of bias. See e.g. *Es-Sayyid v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59, 432 NR 261; *Jaroslav v Canada (Minister of Citizenship and Immigration)* 2011 FC 634 at paras 53–57, 390 FTR 248; *Dunova v Canada (Minister of Citizenship and Immigration)*, 2010 FC 438, [2010] FCJ No 511 (QL); *Zrig v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1043 at para 130, [2002] 1 FC 559. Judicial reluctance to find reasonable apprehension of bias based on mere statistics is understandable. However there are, in my view, exceptional circumstances where statistical evidence is so overwhelming that it meets the test for a reasonable apprehension of bias. See e.g. *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 60, [2003] 2 SCR 259. This might be the case where, for example, reliable evidence shows that a judge never—or almost never—grants particular types of applications, despite having decided a large number of them, and that other judges frequently grant those types of applications.

126. *An Act to amend the Immigration Act, 1976*, 2nd Sess, 33rd Parl, 1987, s 19 (assented to 21 July 1988). For a discussion of the broader revisions to the refugee determination system, see Law Reform Commission of Canada, *The Determination of Refugee Status in Canada: A Review of the Procedure* (Ottawa: Law Reform Commission of Canada, 1992).

I have not seen—there may be a precedent somewhere, but I have not seen it, and I think it is unprecedented—a situation where access to the courts, not by way of an appeal, which you only get by statute, but by way of judicial review. . . . I have not seen where the time-honoured, traditional remedies that have been present for centuries are limited whereby you have to get leave of a judge even to have your access to the traditional prerogative writs. . . . This is [a] most extraordinary provision, which might be appropriate for an authoritarian state, but is completely inappropriate for a democracy such as we have in Canada, in which we have a system for the rule of law.<sup>127</sup>

Others disagreed. John Frecker, then a commissioner at the Law Reform Commission of Canada, said to the same parliamentary committee:

[T]he pattern that is emerging—and it is as much of a trend problem as a gross caseload problem at this instant—in the immigration appeal area is that the court could be choked. One way the court can control that is by having a requirement that application to the court in the problem area . . . be by leave. . . . The question is does the court have, as a matter of fairness, to hear every appeal that is put to it? My answer [is] that there is no principle in law that says that a court has to, as a matter of fairness, hear every appeal from an administrative tribunal.<sup>128</sup>

The proponents of a leave requirement won the day, and the requirement was brought into effect in 1989.<sup>129</sup> However, the controversy did not end there.

Greene, relying on his empirical study of all leave decisions involving refugee matters in 1990, concluded that the leave requirement imposed arbitrary limits on access to judicial review: “applicants for leave . . . are denied fundamental justice . . . because they do not have an equal chance of convincing the judge that their application for leave ought to be granted”.<sup>130</sup> A few years later, Mary Hurley, in an article offering a qualitative assessment of inconsistencies in early Federal Court refugee jurisprudence, called the leave requirement “a genuine refugee’s black

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127. House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-55*, 33rd Parl, 2nd Sess, (4 September 1987) at 7:11.

128. House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-55*, 33rd Parl, 2nd Sess, (8 September 1987) at 8:155–56.

129. For a discussion of the introduction of the leave requirement and its institutional development during the 1990s, see Hurley, *supra* note 118 at 332–36.

130. Greene & Shaffer, *supra* note 27 at 82.

hole”<sup>131</sup> and “a lottery-like process”.<sup>132</sup> More recently, Gould, Sheppard and Wheeldon’s study of Federal Court decisions made in 2003—including leave decisions—echoed Greene’s results, finding that outcomes were influenced by “a number of extra legal, indeed inappropriate, factors”, and concluding that “the Canadian system of immigration and refugee determination has significant flaws”.<sup>133</sup>

The present study further confirms these findings, this time with a large dataset that covers the full Federal Court refugee law caseload over a five-year period. When preliminary results of this study were first released, Lorne Waldman and Audrey Macklin suggested that they raised serious concerns about the arbitrary application of the leave requirement:

[P]ublic confidence in the courts depends in part on our faith that judges make principled and reasoned decisions. The adage that justice not only be done, but seen to be done, underscores the importance of transparency in maintaining that confidence. The leave process is the opposite of transparent: apart from the requirement that the refugee claimant present an ‘arguable case’, there are no criteria, no process, and judges never issue reasons for refusing leave. No one except the judges knows what makes a case worthy of being heard, and the enormous statistical variation among judges suggests that they don’t agree among themselves anyway. Arbitrariness—even the appearance of arbitrariness—is antithetical to fairness. Access to justice for refugee claimants should not look like a lottery. It does a disservice to refugee claimants and, to the extent that it undermines confidence in the judiciary, does a disservice to the judiciary, too.<sup>134</sup>

It seems, then, that over the more than 20 years that the leave requirement has been in effect, no consistent practice has developed which would adequately address the critique that the process creates arbitrary limits on access to the court for refugees—a critique that has been repeatedly substantiated by empirical studies. It may simply be time to abolish the leave requirement.<sup>135</sup>

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131. *Supra* note 118 at 363.

132. *Ibid* at 364.

133. Greene, *supra* note 27 at 482.

134. “Access to justice should not look like a lottery”, *The Ottawa Citizen* (29 November 2011) A13, online: *Ottawa Citizen* <<http://www.ottawacitizen.com>>.

135. It should be noted that abolishing the leave requirement would not necessarily mean that frivolous applications for judicial review would proceed to a hearing, as procedures are available in the Federal Court for summary disposition of clearly unfounded applications, including motions to strike. See *Federal Courts Rules*, *supra* note 29, s 221.

Abolishing the leave requirement would have significant resource implications. The complement of Federal Court judges would need to be substantially expanded in order to hold a much larger number of hearings on the merits for applications for judicial review of refugee determinations in a timely manner. In addition, expenses for counsel would likely increase, both for the Department of Justice and for provincial legal aid programs. However, the same could be said about other changes that have improved the fairness of Canada's refugee determination system. For example, it was clear that the Supreme Court's decision in *Singh v Canada (Minister of Employment and Immigration)*,<sup>136</sup> which mandated oral hearings in refugee claims where credibility was at stake, would have similar kinds of resource implications, yet the Court did not hesitate to find that fairness in life-and-death decision-making processes should not be compromised by those considerations.<sup>137</sup>

Unfortunately, given the current Conservative government's focus on expediting the refugee determination process, it is highly unlikely that the leave requirement will be abolished through legislation in the near future.<sup>138</sup> As a result, the only way to remove it would be through constitutional litigation.

A constitutional challenge would, however, confront a number of hurdles. Most notably, the leave requirement has survived past constitutional challenges. The leading and oft-cited case is *Bains*.<sup>139</sup> In this five-paragraph decision from 1990, the Federal Court of Appeal set out the test for when leave should be granted, and noted that it was essentially the same as the test applied on a motion to strike (namely, that there was "no reasonably arguable case").<sup>140</sup> The Court then considered the constitutionality of the leave provision: "The requirement of leave does not deny refugee claimants access to the Court. The right to apply for leave is itself a right of access to the Court and, in our opinion, the requirement that leave be obtained before an appeal or application for judicial review may proceed does not impair rights guaranteed refugee

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136. *Supra* note 5.

137. *Ibid* at 218–21.

138. See *supra* notes 127–29 (and accompanying text).

139. *Bains*, *supra* note 31.

140. *Ibid* at para 3.

claimants under either s. 7 or s. 15 of the *Canadian Charter of Rights and Freedoms*".<sup>141</sup>

The Federal Court of Appeal revisited the matter in 2001 in *Krishnapillai v Canada (Minister of Citizenship and Immigration)*, a case which involved an appeal of a successful motion to strike a statement of claim challenging the constitutionality of the leave requirement.<sup>142</sup> In that case, the Court held that the matter had already been largely decided in *Bains*.<sup>143</sup> The only constitutional issue that it found had not already been explicitly resolved in *Bains* was whether the "failure to impose an obligation to give reasons when denying leave" was unconstitutional.<sup>144</sup> The Court's reasons were succinct: "That neither the Court nor counsel seemed to be concerned with [the] practice [of denying leave without giving reasons] is hardly surprising. It was then settled law that judicial decisions are not subject to the requirement of giving formal reasons and in my view nothing which was said in *Baker* at paragraph 35 ff. with respect to the requirement that in certain circumstances reasons be provided for administrative decisions, leads to the import of such a requirement with respect to judicial decisions denying leave to seek judicial review. The attack on the constitutionality of the leave requirement prescribed by section 82.1 of the *Immigration Act* has no chance of success".<sup>145</sup>

These brief passages from *Bains* and *Krishnapillai*, which constitute the totality of the jurisprudence on the subject, hardly represent a full judicial analysis of the constitutionality of the leave requirement. The more recent of these two cases is more than ten years old, and the Supreme Court has never decided the issue. In addition, even assuming that *Bains* and *Krishnapillai* are still correct and that the leave requirement does not, in principle, violate constitutional norms, an argument can be made that the arbitrary application of the leave requirement by the Federal Court does violate constitutional norms, and in particular, the right not to be deprived of life, liberty or security of the person except in accordance

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141. *Ibid* at para 4.

142. [2002] 3 FC 74 at para 24ff, 2001 FCA 378.

143. *Ibid*.

144. The Court did look, in somewhat more detail (i.e. 13 paragraphs), at the question of whether the leave requirement complies with international refugee law. The Court found that it did. (*ibid* at paras 20–33).

145. *Ibid* at paras 35–36 [footnotes omitted].

with a process that complies with the principles of fundamental justice.<sup>146</sup> In my view, advocates for refugees should seriously consider a new constitutional challenge to the leave requirement, given the importance of the matter to both individual refugee claimants and to Canada's refugee determination process, the brevity and age of the existing jurisprudence and the substantial empirical evidence that the Federal Court has been applying the leave requirement arbitrarily.<sup>147</sup>

### *B. Reforming the Leave Requirement*

In the alternative, if the leave requirement is not abolished, there are institutional reforms that would be worth considering in order to enhance consistency in leave decisions.

One such reform would be for leave judges to issue reasons when denying leave. This would have at least three advantages. First, it would enhance transparency and would assure parties that their arguments had been fully considered.<sup>148</sup> Second, it would establish an extensive jurisprudence on when leave should be denied, allowing more comprehensive and coherent

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146. *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. There are many different directions that such a fundamental justice argument could take, and it is beyond the scope of this article to explore those in detail.

147. In addition to litigation surrounding constitutional due process norms, it would be worth considering constitutional equality norms and international norms on access to independent courts. For excellent discussions, see Heckman, "Baker", *supra* note 119; Gerald P Heckman, *Prospects for Narrowing the Gap Between Domestic and International Institutional and Procedural Safeguards in Canadian, American and Australian Refugee Protection Decisionmaking* (PhD Thesis, Osgoode Hall Law School, 2008) [unpublished]; Gerald P Heckman, "Canada's Refugee Status Determination System and the International Norm of Independence" (2009) 25:2 *Refugee* 79.

148. *R v REM*, 2008 SCC 51, [2008] 3 SCR 3, ("[r]easons tell the parties affected by the decision why the decision was made [ . . . and reasons] provide accountability of the judicial decision; justice is not only done, but is seen to be done" at para 11). See also Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 *Harv L Rev* 353 ("[b]y and large it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions. Without such opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments" at 388).



standards to be developed through precedent.<sup>149</sup> Third, the act of writing reasons itself can enhance consistency by disciplining judicial reasoning.<sup>150</sup>

However, giving reasons would only serve those purposes if the reasons engaged meaningfully with the arguments presented by the applicant and the respondent. Because the Court must decide a very large number of leave applications, and because some leave judges may doubt the utility of reasons where there is no appeal, there is a real risk that only cursory reasons would be given. It is also questionable whether limited resources should be put into issuing thousands of reasons for denying leave each year, rather than putting those same resources into deciding more applications on the merits.

A more promising option for institutional reform would be to have leave decisions made by more than one judge. This could take at least two forms. First, leave could be decided by panels of two judges, either of whom could grant leave but both of whom would need to agree in order to deny leave—if one judge thought that there was a reasonably arguable case, the applicant should not be denied the right to proceed to a full hearing, because it would not be clear and obvious that the application had no prospect of success. Having two judges make leave decisions together on a panel would not only enhance consistency by reducing the number of applications where leave is denied because of the predispositions of a single judge, but it would also provide regular forums for Federal Court judges to discuss and develop shared understandings about when leave should be granted.<sup>151</sup>

Alternatively, an additional judge could reconsider an application for leave, but only where the first leave judge denied leave. Therefore, once again, one judge alone could grant leave but it would take two judges to deny leave. In this model, the second judge could approach the application for leave on a *de novo* basis—ideally without knowing that it had already

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149. See *R v REM*, *supra* note 148 (“reasons are a fundamental means of developing the law uniformly, by providing guidance to future courts in accordance with the principle of stare decisis” at para 12).

150. *Ibid* (“reasons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge’s attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law”).

151. For an argument that dialogue among judges with multiple perspectives can improve judicial decision making, see Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42:1 McGill LJ 91.

been considered by a first judge. This reform could be undertaken as either a permanent policy or a pilot project. If it was a pilot project, data could be gathered by the Federal Court about how often leave was granted by a second judge, and how often applications where leave was granted by a second judge went on to succeed on the merits. If it turned out that few applications succeeded on the merits after leave had been denied by a first leave judge and granted by a second one, the court could discontinue the pilot project. If, on the other hand, a significant number of such applications did succeed on the merits, the pilot project would be continued.<sup>152</sup>

Both of these institutional reforms would require additional resources for the Federal Court. The second of the above reforms has the advantage, however, that review of an application by a second judge would not be needed unless the first judge had denied leave. Moreover, if the second reform was run as a pilot project, it would only need to continue for so long as the evidence established that it was necessary in order to enhance consistency in leave determinations. If the Federal Court eventually developed more consistent practices, the pilot project could be abandoned, which would facilitate evidence-based resource allocation.

### *C. Clarifying the Test for Leave*

As explained above, the test for when leave should be granted is whether the applicant has made out a reasonably arguable case—or, inversely, whether it is clear and obvious that the application has no prospect of success.<sup>153</sup> However, this study shows that there is little consensus in the Federal Court on how to actually apply the test. Therefore, even in the absence of any major reform of the process for applying for leave, the test for granting leave should be clarified to give leave judges more guidance, which would hopefully reduce inconsistent decision making.

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152. I am grateful for the helpful suggestions on this proposed pilot project offered by Audrey Macklin, Hadayt Nazami, Barbara Jackman, Andrew Brouwer, Lorne Waldman, Mitchell Goldberg, Donald Galloway, Pia Zambelli and Aviva Basman. I hasten to add that by listing them here I do not mean to suggest that they necessarily agree with the proposed pilot project as I have outlined it.

153. See text accompanying notes 31–41.

It would be particularly helpful, in my view, if appellate courts were to offer an extended analysis of the test for leave. Any such analysis should be attentive to the following considerations:<sup>154</sup>

- Judicial review in refugee law engages constitutional rights to life, liberty and security of the person;
- if the court gets a decision wrong, a refugee may be deported to face persecution, torture or death;
- the process must therefore comply with the principles of fundamental justice, and judges deciding leave should keep these stakes foremost in mind; and
- the leave requirement should not be used as an instrument of docket control.

Applicants for refugee status are entitled to full hearings on the merits, except where a full hearing would serve no useful purpose because an application is so clearly without merit that it has no reasonable prospect of success. The mere fact that an application is likely—or even very likely—to fail on the merits is not sufficient reason to deny leave. Leave should only be denied in the clearest of cases.

Leave judges should be mindful that there is substantial disagreement within the court on refugee law matters, and that they do not know who the JR judge would be if leave is granted. When evaluating whether an application has any reasonable prospect of success, a leave judge should not consider whether the applicant would have any reasonable prospect for success on the merits if she were the JR judge. What the leave judge should consider is whether the application will have any reasonable prospect of success before any judge on the court.

Applications for leave should be read generously, and applicants should be given the benefit of the doubt. Although the applicant bears the burden of proof, leave judges should be sensitive to challenges relating to access to justice and to the difficulties many applicants face in terms of securing competent counsel—especially at a time when legal aid programs across Canada are under increasing financial pressure. Where applicants are unrepresented or appear to be represented by substandard counsel, leave judges should be especially careful to consider whether the record

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154. I am grateful to Lorne Waldman for suggesting a number of these principles.

discloses a reasonably arguable case, even if the applicant's memorandum of argument does not clearly make out such a case.

These principles are admittedly pitched at a high level of abstraction. In clarifying the test for leave, it may be appropriate to define more precisely the specific circumstances in which leave should be granted. One way the court could attempt to develop a more detailed test for leave would be to encourage leave judges to issue reasons in a range of cases, both where leave is denied and where it is granted. As these reasoned decisions accumulated, various criteria would likely emerge, and those criteria could perhaps be consolidated in an appellate decision. To further this process, other stakeholders<sup>155</sup> could propose guidelines for leave determination, in the hope of persuading the court to adopt their suggestions. Such a dialogue between judges, courts and other stakeholders might bring more clarity to a test that currently brings arbitrary results.

#### *D. Implications of Announced Reforms to the Refugee Determination System*<sup>156</sup>

While this study has assessed the Federal Court leave requirement under the refugee determination system as it now stands, it is important to note that major changes to that system are expected in the near future.

In June 2010, the then-minority Conservative government passed the *Balanced Refugee Reform Act (BRRA)*,<sup>157</sup> which substantially reforms the refugee determination system.<sup>158</sup> Mere days before most *BRRA* provisions would have come into effect,<sup>159</sup> however, the current majority

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155. Stakeholders might include organizations such as the Canadian Association of Refugee Lawyers, the Canadian Council for Refugees, the Canadian Bar Association's National Immigration Law Section, the Barreau du Québec's Comité en droit de l'immigration et de la citoyenneté, the Refugee Forum, the Refugee Lawyers Association of Ontario, the Refugee Law Office, provincial legal aid programs, and legal clinics across Canada.

156. Citations in this section of the paper are up to date as of 15 August 2012.

157. SC 2010, c 8.

158. For a discussion of the *BRRA* reforms, see Rehaag, "Counsel", *supra* note 15 at 77–79; Erin C Roth, "Is the Proposed *Balanced Refugee Reform Act* Balanced?" (2010) 86 Imm LR (3d) 168; David Matas, "Balancing" (2010) 88 Imm LR (3d) 212.

159. Some provisions came into effect immediately on royal assent, but the majority of the provisions, including those that reformed the refugee determination process, were to come into effect two years after royal assent (unless an earlier date was fixed by order of the Governor in Council). See *BRRA*, *supra* note 157, s 42.

Conservative government passed the *Protecting Canada's Immigration System Act (PCISA)*,<sup>160</sup> which significantly revises the unimplemented *BARRA* reforms.<sup>161</sup> At the time of writing, most of the combined *BARRA* and *PCISA* reforms are not yet in force and there is no legislative deadline for that to happen.<sup>162</sup> In addition, to fully implement *BARRA* and *PCISA*, regulations and rules of procedure at the IRB will need to be revised—another task that has not yet been completed.<sup>163</sup> Therefore, the precise content of the reforms to the refugee determination system is still in flux.

That said, for the purposes of assessing the Federal Court judicial review process, the following are some of the more salient changes expected to the refugee determination system from the combined *BARRA* and *PCISA* reforms:<sup>164</sup>

- The Minister will have the power to differentiate between classes of refugee claimants, and varying refugee determination procedures will apply to the different classes. For example, the Minister has the discretionary authority to:
  - Designate foreign nationals, including refugee claimants, as irregular arrivals if they come to Canada in a group and if the Minister believes that examinations cannot be conducted in a timely manner or reasonably suspects that they arrived in connection with certain types of human smuggling;<sup>165</sup> and

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160. SC 2012, c 17.

161. Confusingly, *PCISA* does not replace *BARRA* but instead modifies it. Both acts, in turn, modify other legislation, including *IRPA*. To add to the complexity, one needs to consider the coming into force and transitional provisions in all three acts.

162. *PCISA*, *supra* note 160, s 85.

163. Draft versions of the rules of procedure and some of the relevant regulations have been published but these are not necessarily the final versions, and further regulatory changes will be necessary. See *Refugee Appeal Division Rules*, Canadian Gazette, Vol 146, No 32 (11 August 2012); *Refugee Protection Division Rules*, Canadian Gazette, Vol 146, No 32 (11 August 2012); *Regulations Amending the Immigration and Refugee Protection Regulations [Processing Timelines]*, Canadian Gazette, Vol 146, No 31 (4 August 2012) [*Draft Revised Regulations*].

164. For a more comprehensive outline of the reforms, see Julie Bécharde & Sandra Elgersma, “Legislative Summary of Bill C-31” (Ottawa: Library of Parliament, 2012), online: Parliament of Canada <<http://www.parl.gc.ca>>.

165. *PCISA*, *supra* note 160, s 20.

- designate countries of origin for which success rates in refugee claims fall below a certain threshold, or if a country produces only a small number of claims, if the Minister is of the view that the country meets certain minimal standards of rights protection.<sup>166</sup>
- First-instance RPD refugee determinations will be made by civil servants, rather than governor-in-council appointees serving for fixed terms, as is currently the case.<sup>167</sup>
- RPD members will be required to declare a refugee claim to be manifestly unfounded if the claim is clearly fraudulent.<sup>168</sup> This is in addition to the existing power to declare a claim to have no credible basis if there is no credible or trustworthy evidence supporting it.<sup>169</sup>

Timelines will also be dramatically expedited. Claimants will have to submit Basis of Claim forms either when they make refugee claims (in the case of inland claimants) or within 15 days of having their claim referred to the IRB (in the case of claims made at the port of entry).<sup>170</sup> This replaces the current practice whereby all claimants must complete a Personal Information Form within 28 days after a claim is referred to the IRB.<sup>171</sup> In addition, RPD hearings will be scheduled within 60 days of referral for regular claimants, within 30 days for inland claimants from designated countries, and within 45 days for port of entry claimants from designated countries.<sup>172</sup> Under the existing system, in contrast, hearings are generally not held for several months (and sometimes years) after referral.<sup>173</sup>

Under the new reforms, some claimants will get access to an appeal on the merits to the RAD,<sup>174</sup> which will be staffed by governor-in-council

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166. *Ibid*, s 58.

167. *Ibid*, s 48.

168. *Ibid*, s 57.

169. *IRPA*, *supra* note 3, s 107.

170. *Draft Revised Regulations*, *supra* note 163, s 1 (modifying *IRPA Regulations*, *supra* note 21, s 159.8).

171. *RPD Rules*, *supra* note 10, r 6.

172. *Draft Revised Regulations*, *supra* note 163, s 1 (modifying *IRPA Regulations*, *supra* note 21, s 159.9).

173. In July 2012, the government estimated average processing times prior to RPD hearings at 19 months. See Citizenship and Immigration Canada, “Backgrounder—Summary of Changes to Canada’s Refugee System” (29 June 2012), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca>> [CIC, “Backgrounder”].

174. *PCISA*, *supra* note 160, s 36.

appointees.<sup>175</sup> However, timelines for appeals will be extremely tight, with only 15 days to file and perfect an application.<sup>176</sup> Moreover, there will be no access to the RAD for any of the following:

- Claimants designated as irregular arrivals;
- claimants from designated countries of origin;
- claimants whose refugee claims were declared to be manifestly unfounded;
- claimants whose refugee claims were declared to have no credible basis;
- claimants who came by land from the United States and were admitted to Canada because they fell within an exception to the Safe Third Country Agreement;
- claimants whose claims have been abandoned or withdrawn;
- claimants whose previously successful refugee claims were vacated by the RPD due to fraud; or
- claimants who previously secured refugee protection, but whose status was removed by the RPD due to cessation procedures.<sup>177</sup>

Unsuccessful refugee claimants will be able to apply to the Federal Court for leave for judicial review of RAD decisions, or of RPD decisions in the case of claimants who are not entitled to access the RAD.<sup>178</sup> The

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175. *IRPA*, *supra* note 3, s 159.

176. *Draft Revised Regulations*, *supra* note 163, s 1 (modifying *IRPA Regulations*, *supra* note 21, s 159.91).

177. *PCISA*, *supra* note 160, s 36. Accordign to section 108(1) of *IRPA*, refugees can have their refugee status removed through cessation procedures where:

- (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;
- (b) the person has voluntarily re-acquired their nationality;
- (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
- (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
- (e) the reasons for which the person sought refugee protection have ceased to exist.

For a discussion of loss of status through cessation, see Jones & Baglay, *supra* note 1 at 250–52.

178. *IRPA*, *supra* note 3, s 72.

process for these applications, and the standards to be applied, will generally remain as they are now. One exception is that most classes of refugee claimants who are not entitled to access the RAD will no longer benefit from an automatic stay of removal pending judicial review.<sup>179</sup>

Access to alternative procedures through which refugee claimants may seek to remain in Canada will be further restricted. For example, unsuccessful refugee claimants will be prohibited from accessing H&C applications or PRRAs for at least one year. For claimants from designated countries, the restriction on PRRAs lasts for three years, and for claimants designated as irregular arrivals, the restriction on H&C applications lasts for five years.<sup>180</sup> Meanwhile, removal of unsuccessful refugee claimants will have to occur “as soon as possible”.<sup>181</sup>

With regard to these expected reforms, it should be noted that advocates for refugees have long called for the implementation of an appeal on the merits of the RAD, partly because of limitations in the Federal Court judicial review process.<sup>182</sup> If the RAD is in fact brought into existence through the combined *BRRA* and *PCISA* reforms, some might argue that resorting to Federal Court judicial review will no longer be the only means to catch errors made by a single adjudicator, because the RAD will at least in some cases be able to do that. This might arguably lead some to conclude that consistency in Federal Court decision making in this area (and the troubling findings of the present study) will become less important.

In my view, however, the opposite conclusion is warranted for several reasons. First, there are concerns about the new cohort of civil servant RPD members who will be making first instance refugee determinations. If the transition is handled properly, this change presents an opportunity to enhance professionalism and consistency in decision making at the

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179. This will require a modification of *IRPA Regulations*, *supra* note 21, s 231. For the announced intention to make this revision, see CIC, “Background”, *supra* note 173.

180. *PCISA*, *supra* note 160, ss 13, 38. These provisions have already come into effect. See *IRPA*, *supra* note 3, ss 25, 112.

181. *PCISA*, *supra* note 160, s 20.

182. See note 15 and accompanying text. See also Hurley, *supra* note 118 at 380–86.



RPD.<sup>183</sup> If it is handled incorrectly, the independence of the IRB as a whole may be compromised. That would be a serious matter, given how vigorously the current government makes known its doubts about the *bona fides* of whole groups of refugee claimants.<sup>184</sup> Moreover, regardless of how well the transition is handled, there will inevitably be a long period of learning and adjustment for new decision makers, at both the RPD and RAD levels, and more errors will be made during that period.

Second, the expedited timelines will likely lead to more errors in refugee adjudication. Errors resulting from unreasonably short time limits will disproportionately affect the most vulnerable claimants, including LGBTQ claimants, gender-based claimants and those who have suffered torture or severe trauma. These types of claimants need the most time to retain and instruct counsel, to prepare their applications and to prepare for their refugee hearings.<sup>185</sup>

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183. The existing system whereby RPD members are governor-in-council appointees has long been criticized, both for the quality of appointees and the frequent use of appointments for political patronage. For a summary of some of the critiques, see Rehaag, “Troubling”, *supra* note 16 at 355–58.

184. See e.g. Clark Campbell, “Minister calls for overhaul of Canada’s refugee system”, *The Globe and Mail* (15 July 2009) A1, online: [The Globe and Mail <http://www.theglobeandmail.com>](http://www.theglobeandmail.com); Nicholas Keung, “Czech Roma to sue board for ‘biases,’ lawyer says”, *Toronto Star* (17 July 2009) A12, online: [The Star <http://www.thestar.com>](http://www.thestar.com); Jason Kenney, “Canada’s commitment to refugees: Celebrating successes and reflecting on the challenges ahead” (Speaking Notes, 27 November 2008), online: [Citizenship and Immigration Canada Media Centre <http://www.cic.gc.ca/english/department/media>](http://www.cic.gc.ca/english/department/media).

185. As Peter Showler, former Chair of the IRB, testifying before the Parliamentary committee considering these reforms, stated: “In regard to the [revised] refugee claim process itself, I must say candidly that the time limits are simply too short and will undermine its fairness and its efficiency”. House of Commons, Evidence at the Standing Committee on Citizenship and Immigration, 41st Parl, 1st Sess (30 April 2012) (Peter Showler) at 1540. See also Canadian Bar Association, National Immigration Law Section, “Bill C-31: *Protecting Canada’s Immigration System Act*” (April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration at 2–4, 16–19, 22–23, online: [The Canadian Bar Association <http://www.cba.org>](http://www.cba.org) [CBA, “Bill C-31 Brief”]; Canadian Council for Refugees, “Bill C31—Diminishing Refugee Protection” (April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration at 9, online: [Canadian Council for Refugees <http://ccrweb.ca>](http://ccrweb.ca); Canadian Association of Refugee Lawyers, “Fair Refugee Outcomes Depend on Fair Processes” (April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration at 2–3 (on file with author) [CARL, “Bill C-31 Brief”]; Refugee Forum, “Fast, Fair and Efficient Refugee Decisions: Are they possible?” (April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration

Third, and in my view most importantly, while the implementation of an appeal on the merits to the RAD is a positive step, the limits on access to the RAD under the *BRRRA/PCISA* reforms are extremely worrisome. Depending on which countries are selected as designated countries of origin, large numbers of refugee claimants may not have access to the RAD.<sup>186</sup> Worse yet, RPD members will be able to insulate their decisions from review by the RAD simply by declaring claims to be manifestly unfounded or to have no credible basis. There is evidence that some RPD members with unusually low refugee claim grant rates are also much more likely to make these sorts of declarations.<sup>187</sup>

Taken together, the expected *BRRRA/PCISA* reforms do, in my view, offer important opportunities to improve the refugee determination process. However some of the limitations of these reforms (especially the extremely tight timelines and restrictions on access to an appeal) indicate that striving for access to a fair and consistent decision-making process for Federal Court review of IRB refugee determinations remains at least as pressing as ever.

## Conclusion

This study, using a comprehensive dataset of over 23 000 cases from 2005 to 2010, demonstrates that outcomes in applications for judicial review in the refugee law context all too often hinge on who decides

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at 4–8 (on file with author) [Refugee Forum, “Bill C-31 Brief”]; Canadian Civil Liberties Association, “Bill C-31: An Unjustified Assault on the Rights of People in Danger” (30 April 2012), Brief submitted to the Standing Committee on Citizenship and Immigration at 7, online: Canadian Civil Liberties Association <<http://ccla.org>> [CCLA, “Bill C-31 Brief”].

186. CBA, “Bill C-31 Brief”, *supra* note 185 at 19–21; CARL, “Bill C-31 Brief”, *supra* note 185 at 4–5; Refugee Forum, “Bill C-31 Brief”, *supra* note 185 at 8–10; CCLA, “Bill C-31 Brief”, *supra* note 185 at 7.

187. For example, RPD Member David McBean, who had a 0% refugee claim grant rate from 2008 to 2010, was much more likely than his colleagues to declare claims to have no credible basis. See Keung, “Luck”, *supra* note 17 at A1; Nicholas Keung, “Widowed, wounded, no refuge; federal judge blasts ruling by refugee board member with zero acceptance rate”, *Toronto Star* (9 March 2011) A1, online “The Star” <<http://www.thestar.com>>. Data on refugee claim grant rates (including “no credible basis rates”) for all RPD members from 2006 to 2011 is available via links at Rehaag, “Data”, *supra* note 16.

the case. The study also shows that the leave requirement, at least as it has been applied in recent years, creates an arbitrary limit on access to justice for refugees. These findings confirm earlier empirical research, with every major study over the past 20 years coming to essentially the same conclusion: the process is unfair and needs to be reformed. While there are reasons to be concerned about consistency and fairness at both the leave stage and the merits stage of judicial review, inconsistency at the leave stage affects far more applicants, and the decision-making process at the leave stage lacks even the modest accountability and transparency found at the merits stage. As a result, this article has set out a number of possible reforms, including eliminating the leave requirement, reforming the procedures through which leave is decided, and clarifying the test for leave.

I would like to end by emphasizing a point made earlier: it goes without saying that all judicial decision making inevitably involves some degree of variability across judges. Judges are human beings, and we want them to be human beings. We want them to be more than machines applying algorithms. The purpose of this study was not merely to show that who decides an application matters, and that in borderline cases an applicant might succeed before one judge but fail before another; its purpose was to see whether the processes followed and the tests applied in applications for judicial review of refugee determinations ensure an acceptable level of consistency and fairness. In my view, the data shows that the level of variability at the leave stage is too high, and that the status quo is unsustainable—both in terms of the processes followed and the tests applied. Reform is urgently needed, especially in light of the anticipated changes to Canada’s refugee determination system.

# Appendix

**Table 1: Overview: Outcomes by Applicant Type (All Cases)**

Leave Outcomes								
Applicant Type	Denied (Not Perfected)	Denied (Perfected)	Granted (Un-Opposed)	Granted (Opposed)	Withdrawn	Pending	Total	Leave Grant Rate (%)
Minister	2	12	14	64	34	7	133	58.65
Claimant	4 666	14 535	404	2 846	462	1	22 914	14.18
<b>Total</b>	<b>4 668</b>	<b>14 547</b>	<b>418</b>	<b>2 910</b>	<b>496</b>	<b>8</b>	<b>23 047</b>	<b>14.44</b>

Judicial Review Outcomes (Where Leave Was Granted)								
Applicant Type	Denied	Granted (Un-Opposed)	Granted (Opposed)	Withdrawn	Pending	Total (Leave Granted)	JR Grant Rate (Leave Granted) (%)	JR Grant Rate (All Cases) (%)
Minister	24	2	47	5	0	78	62.82	36.84
Claimant	1 697	305	1 110	137	2	3 251	43.53	6.18
<b>Total</b>	<b>1 721</b>	<b>307</b>	<b>1 157</b>	<b>142</b>	<b>2</b>	<b>3 329</b>	<b>43.98</b>	<b>6.35</b>

**Table 2: Outcomes by Judge Deciding Leave (Perfected Cases Only)†**

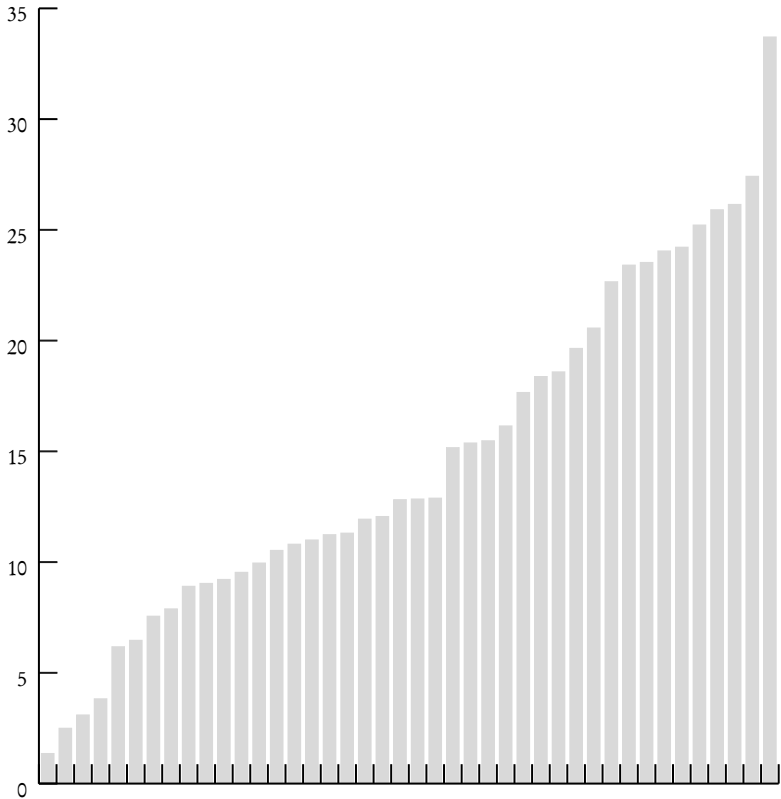
Leave Judge	Denied	Granted (Un-Opposed)	Granted (Opposed)	Total	Grant Rate (%)*	Denied	Granted (Un-Opposed)	Granted (Opposed)	Withdrawn	Pending	Total (Leave Granted)	JR Grant Rate (Leave Granted) (%)	JR Grant Rate (All Leave Cases) (%)
Campbell	50	11	177	238	77.97	131	9	42	6	0	188	27.13	21.43
Shore	832	21	423	1,276	33.71	301	28	91	24	0	444	26.80	9.33
Blanchard	278	6	105	389	27.42	60	11	35	5	0	111	41.44	11.83
Simpson	96	2	34	132	26.15	14	6	14	2	0	36	55.56	15.15
O'Keefe	266	13	93	372	25.91	51	7	45	3	0	106	49.06	13.98
MacTavish	347	18	117	482	25.22	60	8	62	5	0	135	51.85	14.52
Russell	266	8	85	359	24.22	36	13	43	1	0	93	60.22	15.60
Barnes	180	8	57	245	24.05	29	4	26	6	0	65	46.15	12.24
Mainville	78	5	24	107	23.53	17	3	8	1	0	29	37.93	10.28
Martineau	579	15	177	771	23.41	109	12	66	4	1	192	40.63	10.12
Hansen	256	19	75	350	22.66	46	11	30	7	0	94	43.62	11.71
Zinn	139	2	36	177	20.57	23	2	13	0	0	38	39.47	8.47
Heneghan	364	15	89	468	19.65	44	5	51	4	0	104	53.85	11.97
de Montigny	683	13	156	852	18.59	99	13	51	6	0	169	37.87	7.51
Mandamin	111	2	25	138	18.38	10	5	12	0	0	27	62.96	12.32
O'Reilly	387	11	83	481	17.66	37	10	35	12	0	94	47.87	9.36
Bédard	109	1	21	131	16.15	13	1	6	2	0	22	31.82	5.34
Dawson	262	20	48	330	15.48	23	7	33	5	0	68	58.82	12.12
Mosley	754	13	137	904	15.38	70	10	63	7	0	150	48.67	8.08
Gauthier	274	8	49	331	15.17	31	5	20	1	0	57	43.86	7.55
Scott	13	2	2	17	13.33	1	1	1	1	0	4	50.00	11.76
Beaudry	622	7	92	721	12.89	61	8	26	4	0	99	34.34	4.72
Pinard	312	8	46	366	12.85	29	11	14	0	0	54	46.30	6.83
Phelan	238	12	35	285	12.82	26	7	14	1	0	48	43.75	7.37
Kelen	693	21	95	809	12.06	48	13	50	5	0	116	54.31	7.79
Rennie	59	0	8	67	11.94	4	0	3	1	0	8	37.50	4.48
Tremblay-Lamer	690	17	88	795	11.31	53	13	33	6	0	105	43.81	5.79
Tettlebaum	300	8	38	346	11.24	27	4	14	1	0	46	39.13	5.20
Lemieux	736	14	91	841	11.00	48	8	46	3	0	105	51.43	6.42
Gibson	264	13	32	309	10.81	15	9	21	0	0	45	66.67	9.71

	Leave Judge Denied	Granted (Un- Opposed)	Granted (Opposed)	Total	Leave Grant Rate (%)*	Denied	Granted (Un- Opposed)	Granted (Opposed)	Withdrawn	Pending	Total (Leave Granted)	JR Grant Rate (Leave Granted) (%)	JR Grant Rate (All Cases) (%)
Rouleau	119	3	14	136	10.53	8	2	6	1	0	17	47.06	5.88
Hughes	217	15	24	256	9.96	15	12	9	3	0	39	53.85	8.20
Frenette	237	2	25	264	9.54	17	2	8	0	0	27	37.04	3.79
Layden-	266	26	27	319	9.22	11	9	29	4	0	53	71.70	11.91
Stevenson													
Lutfy	171	1	17	189	9.04	11	0	7	0	0	18	38.89	3.70
Snider	511	12	50	573	8.91	21	10	30	0	1	62	64.52	6.98
LaGacé	70	0	6	76	7.89	3	1	1	1	0	6	33.33	2.63
MacKay	12	0	1	13	7.69	0	0	1	0	0	1	100.00	7.69
Noël	648	7	53	708	7.56	38	5	16	1	0	60	35.00	2.97
Boivin	159	2	11	172	6.47	10	0	1	2	0	13	7.69	0.58
Harrington	729	9	48	786	6.18	26	13	17	1	0	57	52.63	3.82
Finckenstein	201	0	8	209	3.83	4	1	3	0	0	8	50.00	1.91
Blais	344	5	11	360	3.10	8	2	5	1	0	16	43.75	1.94
Near	390	8	10	408	2.50	8	4	6	0	0	18	55.56	2.45
Crampton	217	1	3	221	1.36	1	0	3	0	0	4	75.00	1.36
Huggessen	1	0	0	1	0.00	0	0	0	0	0	0	n/a	0.00
Strayer	3	0	0	3	0.00	0	0	0	0	0	0	n/a	0.00
Total	14,533	404	2,846	17,783	16.38	1,697	305	1,110	137	2	3,251	43.53	7.96

† Excluding cases where the Minister was the applicant and cases where the leave judge was not identified.

\* Excluding cases granted unopposed.

**Chart 1: Leave Granted Rates (%) for Judges Deciding 50+ Cases (Perfectured Cases Only, Excluding Campbell J)**



**Table 3: Judicial Review Outcomes by Judge (Where Leave Granted)<sup>†</sup>**

JR Judge	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total (Leave Granted)	Rate (Leave Granted) (%) <sup>*</sup>
Campbell	9	5	108	122	92.31
Hansen	10	7	27	44	72.97
O'Keefe	32	7	63	102	66.32
Mandamin	24	6	37	67	60.66
Dawson	23	4	30	57	56.60
Russell	44	4	52	100	54.17
Mactavish	32	3	35	70	52.24
MacKay	1	0	1	2	50.00
O'Reilly	46	4	43	93	48.31
Lemieux	34	9	31	74	47.69
Scott	12	0	10	22	45.45
Heneghan	33	8	27	68	45.00
Blanchard	18	4	14	36	43.75
Barnes	47	6	36	89	43.37
Layden-Stevenson	17	3	13	33	43.33
Simpson	8	4	6	18	42.86
Strayer	4	0	3	7	42.86
Mainville	11	0	8	19	42.11
Phelan	65	3	47	115	41.96
Gauthier	30	4	19	53	38.78
Kelen	45	5	27	77	37.50
Hughes	54	93	32	179	37.21
Lutfy	22	3	13	38	37.14
Zinn	34	5	20	59	37.04
Rouleau	14	1	8	23	36.36
Harrington	57	10	32	99	35.96
Snider	74	13	39	126	34.51
Finckenstein	19	0	10	29	34.48
Shore	92	20	47	159	33.81
Mosley	47	7	24	78	33.80
Noël	46	7	23	76	33.33
Teitlebaum	27	5	13	45	32.50
Rennie	19	1	9	29	32.14
Martineau	51	4	23	78	31.08
Tremblay-Lamer	51	7	21	79	29.17
Beaudry	99	5	40	144	28.78
Frenette	25	2	10	37	28.57
de Montigny	69	9	27	105	28.13
Bédard	19	0	6	25	24.00
Pinard	76	3	23	102	23.23
Lagacé	53	2	13	68	19.70
Near	34	1	8	43	19.05
Gibson	64	8	15	87	18.99
Crampton	35	2	8	45	18.60
Tannenbaum	10	0	2	12	16.67
Blais	26	6	4	36	13.33
Boivin	35	3	3	41	7.89
Aalto	0	1	0	1	n/a
Lafrenière	0	1	0	1	n/a
<b>Total</b>	<b>1 697</b>	<b>305</b>	<b>1 110</b>	<b>3 112</b>	<b>39.54</b>

<sup>†</sup> Excluding cases where the Minister was the applicant and cases where the leave judge was not identified.

<sup>\*</sup> Excluding cases granted unopposed.



**Table 4: Outcomes by Demographics of Judges**

Leave Outcomes (Perfectured Cases Only) <sup>†</sup>					
Leave Judge	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total	Leave Grant Rate (%) <sup>*</sup>
Female	3 175	138	598	3 911	15.85
Male	11 358	266	2 248	13 872	16.52
Liberal Party Appointee	11 589	339	2 482	14 410	17.64
Conservative Party Appointee	2 944	65	364	3 373	11.00
<b>Total</b>	<b>14 533</b>	<b>404</b>	<b>2 846</b>	<b>17 783</b>	<b>16.38</b>

JR Outcomes (Where Leave Granted) <sup>†</sup>					
JR Judge	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total (Leave Granted)	JR Grant Rate (Leave Granted) (%) <sup>*</sup>
Female	297	53	223	573	42.88
Male	1 400	252	887	2 539	38.78
Liberal Party Appointee	1 235	258	920	2 413	42.69
Conservative Party Appointee	462	47	190	699	29.14
<b>Total</b>	<b>1 697</b>	<b>305</b>	<b>1 110</b>	<b>3 112</b>	<b>39.54</b>

**Table 5: Outcomes by City Where Application Filed**

Leave Outcomes (Perfectured Cases Only) <sup>†</sup>					
City	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total	Leave Grant Rate (%) <sup>*</sup>
Montreal	5 667	23	811	6 501	12.52
Toronto	7 982	322	1 720	10 024	17.73
Other	884	59	315	1 258	26.27
<b>Total</b>	<b>14 533</b>	<b>404</b>	<b>2 846</b>	<b>17 783</b>	<b>16.38</b>

JR Outcomes (Where Leave Granted) <sup>†</sup>					
City	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total (Leave Granted)	JR Grant Rate (Leave Granted) (%) <sup>*</sup>
Montreal	560	51	190	801	25.33
Toronto	965	194	790	1 949	45.01
Other	172	60	130	362	43.05
<b>Total</b>	<b>1 697</b>	<b>305</b>	<b>1 110</b>	<b>3 112</b>	<b>39.54</b>

<sup>†</sup> Excluding cases where the Minister was the applicant and cases where the leave judge (leave outcomes) or JR judge (JR outcomes) was not identified.

<sup>\*</sup> Excluding cases granted unopposed.

**Table 6: Leave Outcomes by Judge Deciding Leave in Application Filed in Toronto (Perfected Cases Only)†**

JR Judge	Denied	Granted (Un-Opposed)	Granted (Opposed)	Total	Rate (Leave Granted) (%)*
Campbell	40	9	147	196	78.61
Shore	251	12	176	439	41.22
Bedard	14	1	8	23	36.36
Blanchard	93	2	47	142	33.57
Martineau	180	9	87	276	32.58
Mainville	32	3	15	50	31.91
Montigny	172	10	62	244	26.50
O’Keefe	233	11	80	324	25.56
Russell	235	7	79	321	25.16
Barnes	155	5	51	211	24.76
Mactavish	320	17	101	438	23.99
Simpson	83	2	26	111	23.85
Hansen	237	15	64	316	21.26
Heneghan	322	14	77	413	19.30
Gauthier	113	5	27	145	19.29
Lagacé	22	0	5	27	18.52
Zinn	121	1	27	149	18.24
O’Reilly	351	7	74	432	17.41
Mandamin	91	1	19	111	17.27
Mosley	377	10	69	456	15.47
Beaudry	186	6	34	226	15.45
Tremblay-Lamer	208	9	36	253	14.75
Dawson	243	19	41	303	14.44
Scott	12	2	2	16	14.29
Lemieux	242	13	40	295	14.18
Pinard	103	5	17	125	14.17
Teitlebaum	108	8	17	133	13.60
Rennie	57	0	8	65	12.31
Frenette	43	1	6	50	12.24
Phelan	196	9	25	230	11.31
Kelen	633	17	80	730	11.22
Gibson	237	13	26	276	9.89
Rouleau	78	3	8	89	9.30
Hughes	196	14	20	230	9.26
Lutfy	69	1	7	77	9.21
MacKay	11	0	1	12	8.33
Snider	446	11	39	496	8.04
Noël	199	6	17	222	7.87
Harrington	296	7	22	325	6.92
Layden-Stevenson	233	23	17	273	6.80
Boivin	72	1	2	75	2.70
Blais	113	4	3	120	2.59
Near	360	8	8	376	2.17
Crampton	120	1	2	123	1.64
Finckenstein	78	0	1	79	1.27
Hugessen	1	0	0	1	0.00
<b>Total</b>	<b>7 982</b>	<b>322</b>	<b>1 720</b>	<b>10 024</b>	<b>17.73</b>

† Excluding cases where the Minister was the applicant and cases where the leave judge was not identified.

\* Excluding cases granted unopposed.

**Table 7: Outcomes by Year Application Filed**

Leave Outcomes (Perfected Cases Only) <sup>†</sup>					
Year	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total	Leave Grant Rate (%) <sup>*</sup>
2005	3 496	89	619	4 204	15.04
2006	2 499	88	465	3 052	15.69
2007	1 571	58	368	1 997	18.98
2008	1 796	56	346	2 198	16.15
2009	2 318	58	435	2 811	15.80
2010	2 853	55	613	3 521	17.69
<b>Total</b>	<b>14 533</b>	<b>404</b>	<b>2 846</b>	<b>17 783</b>	<b>16.38</b>

JR Outcomes (Where Leave Granted) <sup>†</sup>					
Year	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total (Leave Granted)	JR Grant Rate (Leave Granted) (%) <sup>*</sup>
2005	372	54	250	676	40.19
2006	251	59	221	531	46.82
2007	223	39	144	406	39.24
2008	210	49	123	382	36.94
2009	257	52	168	477	39.53
2010	384	52	204	640	34.69
<b>Total</b>	<b>1 697</b>	<b>305</b>	<b>1 110</b>	<b>3 112</b>	<b>39.54</b>

**Table 8: Outcomes for Applications Filed Before and After *Dunsmuir***

Leave Outcomes (Perfected Cases Only) <sup>†</sup>					
Application Filed Before/ After <i>Dunsmuir</i>	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total	Leave Grant Rate (%) <sup>*</sup>
<b>Before</b>	7 906	245	1 515	9 666	16.08
<b>After</b>	6 627	159	1 331	8 117	16.73
<b>Total</b>	<b>14 533</b>	<b>404</b>	<b>2 846</b>	<b>17 783</b>	<b>16.38</b>

JR Outcomes (Where Leave Granted) <sup>†</sup>					
Application Filed Before/ After <i>Dunsmuir</i>	Denied	Granted (Un- Opposed)	Granted (Opposed)	Total (Leave Granted)	JR Grant Rate (Leave Granted) (%) <sup>*</sup>
<b>Before</b>	877	160	646	1 683	42.42
<b>After</b>	820	145	464	1 429	36.14
<b>Total</b>	<b>1 697</b>	<b>305</b>	<b>1 110</b>	<b>3 112</b>	<b>39.54</b>

† Excluding cases where the Minister was the applicant and cases where the leave judge (leave outcomes) or JR judge (JR outcomes) was not identified.

\* Excluding cases granted unopposed.