

The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment

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This article examines the role of counsel in Canada's refugee determination process through an investigation of over 70,000 refugee decisions from 2005 to 2009. The article demonstrates that counsel is a key factor driving successful outcomes. The article also shows that legal aid programs are increasingly restrictive in funding legal representation for refugee claimants. The author argues that these restrictions put the lives of refugees at risk. The article also demonstrates that claimants represented by immigration consultants are less likely to succeed than claimants represented by lawyers. This, combined with evidence that the immigration consulting industry has not established adequate procedures to enforce standards of professional conduct, leads the author to argue that immigration consultants should not provide unsupervised representation to refugee claimants. In short, the author argues that counsel play an important role in the refugee determination process. Accordingly, measures should be taken to ensure that refugee claimants can access competent counsel while simultaneously ensuring that unqualified counsel do not play a role in life and death refugee decision making.

Le présent article examine, par le biais de l'examen de plus de 70 000 déterminations du statut de réfugié qui se sont déroulées de 2005 à 2009, le rôle du conseil dans le système de détermination du statut de réfugié du Canada. L'article démontre que le conseil exerce un

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rôle essentiel aux dénouements positifs. L'article démontre également que les programmes d'aide juridique sont de plus en plus restrictifs en ce qui concerne le financement de la représentation judiciaire des demandeurs d'asile. L'auteur estime que ces restrictions mettent la vie des réfugiés en péril. L'article démontre également que les demandeurs représentés par des consultants en immigration ont moins de chance de réussir que les demandeurs représentés par des avocats. L'auteur soutient aussi que le secteur des consultants en immigration n'a pas instauré de procédures adéquates pour faire respecter les normes de conduite professionnelle. Ces constatations mènent l'auteur à avancer que les consultants en immigration ne devraient pas fournir de représentation aux demandeurs d'asile sans surveillance. En résumé, l'auteur soutient que le conseil joue un rôle important dans le système de détermination du statut de réfugié. Par conséquent, des mesures devraient être prises pour s'assurer que les demandeurs d'asile puissent avoir accès aux services d'un avocat compétent, tout en s'assurant qu'un conseil non qualifié n'exerce aucun rôle lors de prise de décision de vie ou de mort concernant un réfugié.

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REFUGEE DETERMINATIONS INVOLVE life and death decisions. If adjudicators fail properly to accord refugee status to those who meet the refugee definition, claimants may be sent to countries where they face persecution, torture, or death. It is for this reason that the Supreme Court of Canada, in *Singh v Minister of Employment and Immigration*, held that refugee determinations—which engage constitutional rights to life, liberty, and security of the person—must comply

with robust procedural due process norms required by the principles of fundamental justice.¹

This article examines the role of counsel in Canada's refugee determination process in light of the importance of these determinations. One of the questions it considers is whether it is appropriate that Canada does not guarantee publicly funded legal counsel for all refugee claimants who lack the resources to hire counsel on their own. Another is whether it is appropriate to allow immigration consultants with no legal training to represent refugee claimants before the Immigration and Refugee Board (IRB), considering the potentially devastating consequences of erroneous refugee determinations.

The article seeks to answer these and other questions regarding the role of counsel in Canada's refugee determination process through an empirical analysis of the relation between types of counsel and refugee claim outcomes at the IRB from 2005 to 2009. The empirical analysis examines data obtained through access to information requests made to the IRB, as well as through similar requests to legal aid programs in the main host provinces for refugee claimants.

The article demonstrates that competent counsel is a key factor driving successful outcomes in refugee claims. The article also shows that provincial legal aid programs are increasingly restrictive in funding legal representation for refugee claimants who cannot afford counsel. The article argues that taken together, the increasing restrictions on legal aid put the lives of refugees at risk. Given the serious financial constraints faced by provincial legal aid programs, and because refugee determinations fall within federal jurisdiction, the article suggests that the federal government should transfer sufficient funds to provincial legal aid programs to guarantee representation for all refugee claimants who meet reasonable financial eligibility requirements. The article also demonstrates that refugee claimants represented by immigration consultants are less likely to succeed than refugee claimants represented by lawyers. Moreover, refugee claimants represented by immigration consultants are more likely to withdraw their claims or have their claims declared abandoned. As a result—and in light of evidence that the immigration consulting industry has not established adequate procedures to ensure that consultants adhere to standards of professional competence and professional conduct—the article contends that immigration consultants should not be authorized to provide unsupervised representation in Canada's refugee determination system.

In short, the article argues that counsel play an important role in the refugee determination process and that, accordingly, measures should be taken to ensure

1. [1985] 1 SCR 177 [*Singh*].

that refugee claimants can gain access to competent counsel and that unqualified counsel do not play a role in life and death refugee decision making.

I. THE CONTEXT: COUNSEL IN CANADA'S REFUGEE DETERMINATION SYSTEM

A. CANADA'S CURRENT REFUGEE DETERMINATION SYSTEM

Canada is a party to the *Convention Relating to the Status of Refugees*.² As such, subject to limited exceptions, Canada is obliged as a matter of international law to provide refugee protection to foreign nationals who have a well-founded fear of being persecuted abroad on account of their race, religion, nationality, political opinion, or membership in a particular social group.³

Canada's immigration legislation aspires to meet Canada's international obligations by adopting the international refugee definition and establishing procedures to accord refugee protection to those meeting that definition.⁴ In addition, the legislation includes those who face risks to their lives, risks of torture, or risks of cruel and unusual treatment or punishment under subsidiary grounds for protection.⁵ The legislation also sets out exclusions from refugee protection for persons who pose security risks or who have engaged in serious criminality or violations of human rights.⁶

In broad strokes, Canada's current refugee determination process operates as follows.⁷ When foreign nationals in Canada first apply for refugee protection, an immigration officer determines whether they are eligible to make refugee claims.⁸ The main grounds of ineligibility include: having already made unsuccessful refugee claims in Canada; having refugee status in other countries to which they can be safely returned; coming to Canada via a designated safe third country; and being inadmissible due to security concerns, serious criminality, or human rights violations.⁹ In most circumstances, unless claimants are found to

2. 28 July 1951, 189 UNTS 137 (accession by Canada 4 June 1969).

3. *Ibid*, art 1, as amended by *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967), art 1.

4. *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 3(2)(b), 96 [IRPA].

5. *Ibid*, s 97.

6. *Ibid*, s 98.

7. For an overview of the process see Sasha Baglay & Martin Jones, *Refugee Law* (Toronto: Irwin Law, 2007) at 215-53.

8. IRPA, *supra* note 4, ss 99-100.

9. For the full list of grounds of ineligibility see *ibid*, s 101.

be ineligible within three working days, they are deemed eligible.¹⁰ Due in part to these very tight timelines, almost all applicants are determined to be eligible, and their claims are referred to the IRB for determination.¹¹

The Refugee Protection Division (RPD) of the IRB is tasked with determining whether those who are eligible to make refugee claims in Canada meet the refugee definition or otherwise qualify for protection under the subsidiary grounds provision. At the same time, the RPD must determine whether claimants fall within the exclusions from refugee protection.¹² To make these determinations, the RPD requires claimants to submit a Personal Information Form (PIF) with extensive biographical details within twenty-eight days of having their claim referred.¹³ Included in this PIF is a section where claimants set out their reasons for seeking refugee protection in Canada in narrative form.¹⁴ In advance of their refugee hearings, claimants may submit documentary evidence supporting their claims, including evidence regarding conditions in their home countries.¹⁵ The RPD also maintains databases containing country condition information¹⁶ that may become part of the documentary record on the RPD's initiative, as can documents provided by representatives of the Minister of Citizenship and Immigration (the Minister).¹⁷

Several months¹⁸ after claims for refugee protection are initially made, the RPD holds hearings to determine whether claimants qualify for refugee protection.¹⁹ IRB members, who are appointed by the Governor-in-Council and who

10. *Ibid.*, s 100.

11. Canada, Department of Justice, *Representation for Immigrants and Refugee Claimants: Final Study Report* (Ottawa: Department of Justice, 2002) [DOJ, *Representation*] (paraphrasing Citizenship and Immigration Canada officials' assertion that "the threshold for eligibility to have a refugee claim determined by the RPD is so low that virtually every claim received is found eligible" at 22).

12. *IRPA*, *supra* note 4, ss 96-98, 107, 170.

13. *Refugee Protection Division Rules*, SOR/2002-228, ss 5-6 [*RPD Rules*].

14. Immigration and Refugee Board, "Personal Information Form," online: <http://www.irb.gc.ca/eng/tribunal/form/Documents/form189_e.pdf> at 9.

15. *RPD Rules*, *supra* note 13, ss 7, 29.

16. Immigration and Refugee Board, "Research Program," online: <<http://www.irb.gc.ca/Eng/resrec/respro/Pages/index.aspx>>.

17. All documents must be disclosed to the claimant in advance of the hearing. *RPD Rules*, *supra* note 13, s 29.

18. For fiscal year 2009-2010, the average processing time for refugee claims referred to the RPD was 19.2 months. Immigration and Refugee Board, *Performance Report for the Period Ending March 31, 2010* (Ottawa: Treasury Board of Canada Secretariat, 2010) at 16 [*IRB, 2009-2010 Performance Report*].

19. *IRPA*, *supra* note 4, s 170(b). It is also possible for the RPD to grant (but not refuse) refugee

serve on good behaviour for fixed terms, preside over RPD refugee hearings.²⁰ IRB members are not required to have legal training, and many do not.²¹ A representative of the Minister may also participate in the hearing.²² However, the Minister's representatives typically only participate where there is an issue of exclusion due to security concerns, criminality, or violations of human rights.²³ When the Minister is not represented, hearings are not adversarial, as no one argues the case against the claimant.²⁴ Moreover, hearings are meant to be informal and expeditious, and as such the RPD is not bound by technical rules of evidence.²⁵ The main purpose of these informal and typically non-adversarial hearings is to determine whether claimants are credible—in other words, to determine whether the narratives recounted in their PIFs are true.²⁶

Where IRB members determine that claimants do not qualify for refugee protection, reasons must be provided (in positive decisions, reasons need only be provided on request).²⁷ Within fifteen days of receiving the decision, both the claimant and the Minister may apply to the Federal Court for leave to judicially review an RPD refugee determination.²⁸ Leave is rarely granted, however.²⁹ Where leave is denied, no hearing is held, no reasons are provided, and there is no further appeal.³⁰ In cases where leave is granted, the grounds for judicial review are narrowly restricted to legal errors and procedural defects (whereas, as noted above, most cases turn on credibility determinations).³¹ Also, in cases

status without holding a hearing. See *RPD Rules*, *supra* note 13, s 19.

20. *IRPA*, *supra* note 4, s 153. For a discussion of the IRB appointment process, see Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 *Ottawa L Rev* 335 at 355-58 [Rehaag, "Troubling"].
21. Only 10 per cent of board members are required to be "members of at least five years standing at the bar of a province." *IRPA*, *supra* note 4, s 153(4).
22. *RPD Rules*, *supra* note 13, s 25.
23. Where the RPD is aware that such issues may arise at the hearing or where such an issue does arise at the hearing, the RPD must notify the Minister to give the Minister the opportunity to intervene (*ibid*, ss 23-24).
24. *Benitez v Canada (Minister of Citizenship and Immigration)*, (2006), [2007] 1 FCR 107 at paras 63-64.
25. *IRPA*, *supra* note 4, ss 162(2), 70(g).
26. Baglay & Jones, *supra* note 7 at 240.
27. *IRPA*, *supra* note 4, ss 169(d)-(e).
28. *Ibid*, s 72.
29. For example, in 2009 leave was granted in 582 out of 4,174 applications to judicially review refugee determinations (13.9 per cent). Federal Court of Canada, *Statistics: Activity Summary—January 1 to December 31, 2009*, online: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics_dec09>.
30. *IRPA*, *supra* note 4, s 72.
31. *Federal Courts Act*, RSC 1985, c F-7, s 18.1(4) (setting out the limited grounds of judicial review).

where leave is granted, it is not possible to appeal the judicial review decision to the Federal Court of Appeal or beyond unless the Federal Court judge issuing the judicial review decision certifies that the case raises a serious issue of general importance.³² Given all these restrictions, in the vast majority of cases the RPD's refugee determination is effectively final, and claimants who are unsuccessful at the RPD generally become vulnerable to removal from Canada.³³

B. UPCOMING REVISIONS TO CANADA'S REFUGEE DETERMINATION SYSTEM

The refugee determination system in Canada will undergo extensive revisions in the coming months.³⁴ The most significant changes under the revised refugee determination process³⁵ include:

- Rather than preparing a PIF with details of their claim, claimants will instead attend a pre-hearing interview with a civil servant at the RPD. The interviewer will gather information about the claim and will prepare a report about the alleged facts grounding the claim. Interviews will also be recorded. Interviews can occur as early as fifteen days after refugee claims are referred to the RPD.³⁶
- RPD hearings will be held before civil servants. Unlike under the current refugee determination system, these civil servants will not be Governor-in-Council appointees serving for fixed terms.³⁷
- It is anticipated that RPD hearings will be held for most claimants within ninety days. However, for claimants from countries designated by the Minister, hearings will occur within sixty days rather than ninety days.³⁸

32. *IRPA*, *supra* note 4, s 74(d).

33. For a discussion of removal procedures see generally Baglay & Jones, *supra* note 7 at 323-47.

34. *Balanced Refugee Reform Act*, SC 2010, c 8 (assented to 29 June 2010, not yet in force) [*Reform Act*].

35. In addition to changes to the refugee determination process, there are a number of other changes, the biggest of which includes new limits on requests for exemptions from immigration requirements on humanitarian and compassionate grounds (*ibid*, s 4, amending *IRPA*, *supra* note 4, s 25) and restrictions on pre-removal risk assessments (*ibid*, s 15, amending *IRPA*, *supra* note 4, s 112).

36. *Ibid*, s 11(2), amending *IRPA*, *supra* note 4, s 100(4).

37. *Ibid*, s 26, amending *IRPA*, *supra* note 4, s 169.1.

38. These targeted timelines are not contained in Bill C-11 but were announced by the government. Citizenship and Immigration Canada, "Backgrounder: Bill C-11: The *Balanced Refugee Reform Act*," online: <<http://www.cic.gc.ca/english/department/media/>

- The Minister may designate particular countries, parts of countries, and classes of nationals from particular countries. Designation may occur only where the number of claims for refugee protection by nationals of the country exceeds a number set by regulations and where the success rate of refugee claims for nationals of the country is lower than a percentage set by regulations. In other words, designation may only occur for countries that produce relatively large numbers of unsuccessful refugee claims. In addition, in designating countries, the Minister is required to take into account factors such as the human rights record of the country and the availability of state protection in the country.³⁹
- Where the RPD is of the view that a refugee claim is “clearly fraudulent” it may not only reject the claim but may also declare the claim to be “manifestly unfounded.”⁴⁰
- RPD refugee determinations can be appealed on questions of law or fact to a newly created Refugee Appeal Division of the IRB, whose members will be Governor-in-Council appointees serving for fixed terms. Appeals will be paper-based unless documentary evidence establishes that there is a serious issue of credibility at stake that is central to the determination and that would, if accepted, justify granting or refusing the claim for refugee protection. The government anticipates that appeals will be decided within 120 days (unless a hearing is held) for most claims and within 30 days (unless a hearing is held) for claimants whose claims were determined to be “manifestly unfounded” by the RPD or who are nationals of countries designated by the Minister.⁴¹

In summary, the revisions aim to dramatically speed up the refugee determination process, especially for claimants from designated countries and for claimants whose claims are found to be manifestly unfounded. At the same time, the revisions create a new level of appeal (in addition to judicial reviews to the Federal Court), which, in principle, may help to correct errors made by the RPD not only regarding issues of law but also regarding factual findings. In announcing that Parliament passed the revisions, the Minister, Jason Kenney, asserted:

backgrounders/2010/2010-06-29.asp> [CIC, “Reform”].

39. *Reform Act*, *supra* note 34, s 12, amending *IRPA*, *supra* note 4, s 109.1.

40. *Reform Act*, *supra* note 34, s 11.1, amending *IRPA*, *supra* note 4, s 107.1.

41. *Reform Act*, *supra* note 34, s 13, amending *IRPA*, *supra* note 4, s 110. See also CIC, “Reform,” *supra* note 38.

While Canada already has one of the most generous refugee systems in the world, these reforms [will] lead to faster protection for victims of torture and persecution, and faster removal of failed asylum claimants including those who try to abuse Canada's generosity... . Failed asylum claimants [will] have access to a new fact-based appeal at the Refugee Appeal Division, while taxpayers [will] save an estimated \$1.8 billion over 5 years because failed claimants [will] no longer be able to stay in Canada for years.⁴²

C. THE RIGHT TO COUNSEL UNDER CANADA'S IMMIGRATION LEGISLATION

Canada's immigration legislation—in both its current and soon to be implemented versions—provides that refugee claimants in proceedings before the IRB “may, at their own expense, be represented by a barrister or solicitor or other counsel.”⁴³ There are two key points to note about this provision. First, the provision does not provide refugee claimants with a right to publicly funded legal representation. Rather, it provides the right to counsel only at the claimants' expense. As discussed in detail in Part III(A), below, several provincial legal aid programs fund legal representation for some refugee claimants who cannot afford counsel. However, legal aid is not universally available for representation in refugee proceedings, and, as a result, many refugee claimants go unrepresented at their hearings.

Second, the provision leaves open the possibility that refugee claimants may be represented at the IRB by persons who are not lawyers. Regulations accompanying the legislation specify that non-lawyers may serve as counsel

42. Citizenship and Immigration Canada, News Release, “Balanced Refugee Reform Passes Final Hurdle in the Senate, Launches Summer Tour to Promote Refugee Resettlement” (29 June 2010) online: <<http://www.cic.gc.ca/english/department/media/releases/2010/2010-06-29a.asp>>.

43. *IRPA*, *supra* note 4, s 167. See also, *Reform Act*, *supra* note 34, s 23 (maintaining this right and adding that “proceedings” at which claimants have the right to self-funded counsel include the initial fifteen-day interview at the RPD). A strong argument can be made that the right to counsel at refugee hearings is required by s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See Baglay & Jones, *supra* note 7 at 254, citing *Mathon v Canada (MEI)* (1998), 38 Admin L Rev 193 at para 208 (FCTD), Pinard J. See also *Dehghani v Canada (Ministry of Employment and Immigration)*, [1993] 1 SCR 1053 at para 48 (“the right to counsel under s. 7 may apply in other cases besides those which are encompassed by s. 10(b), for example in cases involving the right to counsel at a [refugee] hearing”); *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 [*G (J)*] (holding that there is a right to counsel under s 7 of the *Charter* in complex proceedings where fundamental rights are at stake).

either if they are members in good standing of the Canadian Society of Immigration Consultants (CSIC) or if they do not charge fees.⁴⁴ As a result, some refugee claimants are represented at their refugee hearings either by immigration consultants or by unpaid representatives (such as family members, friends, or non-governmental organizations (NGOs) that assist claimants). However, as noted in more detail in Part III(B) below, representation by non-lawyers has proven controversial in the refugee law setting. With respect to immigration consultants, concerns have been raised about the inability of CSIC to ensure that its members provide quality representation and meet their professional obligations. With regard to unpaid representatives, there are similar concerns regarding quality of representation, and there is an additional concern that some purportedly unpaid representatives may in fact be charging fees for their services, thereby avoiding even the limited oversight offered by CSIC.

II. THE EFFECT OF COUNSEL ON REFUGEE CLAIM OUTCOMES

In this context, the present study investigates the effect of counsel on outcomes in refugee claims. It is hoped that this information will be of use in evaluating current trends in legal aid policies across Canada as well as in developing policies to regulate immigration consultants.

A. PREVIOUS STUDIES

There are no existing published empirical studies on the effect of counsel on refugee claim outcomes in Canada. However, an influential study canvassed the issue in the US refugee determination system.⁴⁵ In that study, Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Phillip G. Schrag examined over 78,000 asylum cases in US immigration courts to determine the extent to which certain biographical information about deciding judges—including gender, prior work experience, and political party of appointment—as well as claimant demographics influenced outcomes.⁴⁶ The authors of the study concluded that representation is a key driver of successful asylum applications in US immigration courts:

44. *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 2, 13.1 [*IRPA Regulations*].

45. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication” (2007) 60 *Stan L Rev* 295.

46. *Ibid* at 327.

[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case. Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel. The regression analyses confirmed that, with all other variables in the study held constant, represented asylum seekers were substantially more likely to win their case than those without representation.⁴⁷

The US study also found that quality of representation varied significantly. For example, whereas the success rate for represented claimants overall was 45.6 per cent, asylum applicants represented by Georgetown University's legal clinic were successful 89 per cent of the time, and asylum applicants represented on a pro bono basis by large law firms working with Human Rights First were successful 96 per cent of the time.⁴⁸ After examining how these programs select clients, the authors of the study attributed the dramatically higher success rates not to patterns in client selection but rather to the resources that not-for-profit counsel put into gathering documentary evidence and obtaining expert opinions on country conditions and on the physical and mental health of applicants.⁴⁹

While there are no existing comparable studies regarding first instance refugee decisions in Canada, a recent study found that representation plays a central role in the outcomes of applications for leave to have IRB decisions reviewed in Federal Court.⁵⁰ In that study, Jon B. Gould, Colleen Sheppard, and Johannes Wheeldon examined more than six hundred such applications filed in the Federal Court in 2003. The authors measured correlations between outcomes and several variables, including claimant demographics, judge demographics, and details regarding counsel. This analysis revealed that “[l]itigants who were represented by an attorney were much more likely to be granted leave than were the self-represented, and those claimants with an experienced law firm behind them were more likely to receive a favourable leave ruling.”⁵¹ The authors noted that the strong effect of counsel on outcomes in Federal Court leave applications raises serious questions regarding the fairness of Canada's refugee determination system:

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 when applicants appear before the FCC [Federal Court of Canada] seeking leave for

47. *Ibid* at 340 [citations omitted].

48. *Ibid* at 340-41.

49. *Ibid* at 341.

50. Jon B Gould, Colleen Sheppard & Johannes Wheeldon, “A Refugee from Justice? Disparate Treatment in the Federal Court of Canada” (2010) 32 *Law & Pol’y* 454.

51. *Ibid* at 468.

immigration or asylum cases. The odds are thirty-two times greater that a represented claimant will be granted leave over someone who appears by him-/herself or with a consultant... . Furthermore, women are more likely than men to go unrepresented before the FCC, which only exacerbates the disproportionate effects of these processes on litigants.⁵²

This last point regarding possible intersections between gender and the ability to secure counsel is especially noteworthy, as the study also found that female applicants are less likely to obtain leave than male applicants.⁵³ Unfortunately, this would appear to reflect a broader phenomenon whereby women confront disproportionate challenges securing counsel on a variety of legal issues that impact upon important rights and interests.⁵⁴

It must be said that the findings of both the US study and the Canadian Federal Court study are worrisome considering the stakes in refugee determinations. If counsel is an important factor affecting outcomes in both US asylum applications and Canadian Federal Court leave applications in immigration and refugee cases, then it stands to reason that counsel may have similar effects on refugee claim outcomes at Canada's RPD. The present study attempts to determine whether that is the case, and if so, what should be done about it.

B. METHODOLOGY

Empirical studies of first instance refugee determinations in Canada are methodologically challenging because refugee hearings are typically closed to the public.⁵⁵ Moreover, only a small fraction (around 0.1 per cent) of RPD refugee decisions are selected for publication by the IRB, which redacts the decisions to remove identifying information and translates the decisions into both official languages prior to publication.⁵⁶ In addition, this small pool of published decisions

52. *Ibid* at 475-76.

53. *Ibid* at 468-69.

54. See *e.g.* *G (J)*, *supra* note 43 at paras 113-15, L'Heureux-Dubé J concurring (noting that women face particular challenges accessing justice due to the feminization of poverty); Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and Understanding Legal Aid Priorities: a Paper Prepared for Legal Aid Ontario" (2010) 29 Windsor Rev Legal Soc Issues 149 at 213-14 (noting that the disproportionate allocation of legal aid to criminal law cases at the expense of areas such as family law results in women having less access to representation where key interests are at stake).

55. *IRPA*, *supra* note 4, s 166(c).

56. Published decisions are available on the IRB's website. Immigration and Refugee Board, "Reflex," online: <<http://www.irb-cisr.gc.ca/Eng/tribunal/decisions/Pages/index.aspx>>. From 1 April 2009 to 31 March 2010, 35 RPD decisions were published in Reflex. During this same period, the RPD finalized 28,500 cases. IRB, *2009-2010 Performance Report*, *supra* note 18 at 15.

is not representative of the full caseload at the RPD because decisions are selected for publication only when, in the IRB's view, they are particularly well-crafted in terms of stating the law, they raise an issue that is common to a number of cases, or they raise novel or unusual issues.⁵⁷ Also, as noted above, the RPD only issues reasons when it refuses refugee status or where the Minister or the claimant requests reasons in positive decisions.⁵⁸ As a result, published decisions will disproportionately be drawn from a pool of negative decisions.⁵⁹ Taken together, these limitations on published decisions mean that in order to gather representative samples of the full RPD caseload, empirical studies on first instance refugee decisions in Canada need to draw from data beyond published decisions.

To this end, the present study used formal access to information requests⁶⁰ to obtain information on RPD decisions from the IRB's internal database. Two different databases were established through these requests. First, a database was created with information on all principal claimant⁶¹ refugee determinations from 2005 to 2009. The following information was obtained from the IRB for all principal claimant refugee determinations made by the RPD during this period: (1) IRB file number; (2) date of referral to the RPD; (3) name of counsel; (4) name of IRB member; (5) whether the case was categorized by the IRB as involving gender-related persecution; (6) gender of principal claimant; (7) country of persecution; (8) outcome; and (9) date of decision.⁶² Second, a database was created with information on all counsel who represented claimants before the RPD from 2005 to 2009. Where it was available, the following information was obtained from the IRB's database on counsel: (1) name; (2) firm; (3) city; (4) province; and (5) type (*i.e.*, consultant, lawyer, et cetera).⁶³

57. Immigration and Refugee Board, "About Reflex," online: <http://www.irbcisr.gc.ca:8080/ReFlex/About_Reflex.aspx#reflex03> at para 3.4 [IRB, "About Reflex"].

58. See text accompanying note 27.

59. The IRB indicates, however, that it attempts to publish "a balance of positive and negative decisions of the Refugee Protection Division, so as to make the positive decisions jurisprudence more readily accessible to decision-makers and staff." IRB, "About Reflex," *supra* note 57 at para 3.3.

60. *Access to Information Act*, RSC 1985, c A-1, s 4.

61. Refugee claimants are categorized by the IRB as either principal claimants or dependants. Focusing on principal claimants has the advantage of ensuring that data are counted only once for each RPD decision—which means that decisions are not weighted according to the number of dependants. There are, however, disadvantages to this approach as well. In particular, women and children are more frequently categorized as dependants, meaning that fewer women and children will be accounted for in studies that focus on principal claimants.

62. Letter from Debora Eisl, Director, Access to Information and Privacy, Immigration and Refugee Board to Sean Rehaag (13 October 2010) IRB File #: A-2010-00089 (on file with author).

63. Letter from Debora Eisl, Director, Access to Information and Privacy, Immigration and

The two databases were combined, requiring extensive consolidation of multiple name spellings for thousands of counsel. Information on counsel who were listed in the first database but not in the second was, wherever possible, obtained from online sources. Also, wherever possible, counsel type indicated by the IRB was verified (and sometimes corrected) using online directories of the relevant professional bodies.⁶⁴ Finally, counsel for each case was coded into four categories: (1) lawyer; (2) consultant; (3) none; and (4) other. It should be noted that the fourth category served as a residual category that included several different types of counsel other than individual lawyers and consultants including law firms, consulting firms, paralegals working for either type of firm, volunteers for NGOs, family and friends of claimants, and counsel for whom information could not be located.⁶⁵ The resulting combined database included 70,797 principal claimant RPD decisions and 1,770 counsel. An analysis was undertaken on the combined database.

Three aspects of the analysis bear particular emphasis. First, because some counsel specialize in claims from particular regions of the world, some variation in rate of success of refugee claims is to be expected (*e.g.*, counsel who specialized from 2005 to 2009 in claims from Mexico will understandably have lower grant rates than counsel who specialized in claims from Somalia during the same period). To account for this variability, the study calculated predicted grant rates for various subsets of cases (*e.g.*, all cases where claimants were represented by lawyers) using the yearly country of origin average grant rate for each case within that subset of cases. As a result, it was possible to determine, for example, whether a particular type of counsel had higher or lower success rates than would be predicted based on the countries of origin of the claimants represented by that type of counsel. It should be noted, however, that these predicted grant rates do not take into account several factors that likely affect outcomes. For example, previous research indicates that gender (both of claimants and adjudicators), the identity of adjudicators, the adjudicator's political party of appointment, the region of the country in which claims are made, and various other factors affect refugee claim outcomes.⁶⁶ It would be interesting to gather more comprehensive

Refugee Board to Sean Rehaag (3 November 2010) IRB File #: A-2010-00119 (on file with author).

64. The relevant professional bodies include the Canadian Society of Immigration Consultants and the law societies of all provinces and territories.

65. Because of the diversity of types of counsel in this residual category, statistics regarding counsel categorized as "other" should be interpreted with caution. See text accompanying note 70.

66. See *e.g.* Sean Rehaag, "Do Women Judges Really Make a Difference: An empirical analysis of

data and conduct sophisticated statistical analysis to examine the relative weight of these factors as well as to consider interactions between them. Such analysis, however, faces a number of methodological challenges given the very large number of variables—many of which cannot be assumed to be independent of one another—that would need to be taken into account. For the purposes of this study, to avoid these methodological challenges, a simplified approach was adopted, using yearly country of origin average grant rates as a main predictor of refugee claim outcomes, setting aside for the moment other possible predictors.

Second, throughout the study, grant rates and success rates (terms that are used interchangeably), as well as yearly country of origin averages, refer to the sum of positive decisions as a proportion of the sum of positive and negative decisions, excluding claims that are abandoned, withdrawn, or otherwise resolved. The reason for including only positive and negative decisions is that grant rates calculated as a proportion of all claims finalized can be significantly distorted where the RPD schedules few hearings on the merits for claimants from a particular country. The reason for the distortion is that over time, claims that are withdrawn or abandoned accumulate, overshadowing the few claims decided on the merits, thereby artificially reducing grant rates. To avoid these distortions, the present study calculates grant rates based only on cases decided on their merits. It should be noted that the United Nations High Commissioner for Refugees uses the same approach when reporting “recognition rates.”⁶⁷

Third, when comparing grant rates, the study reports relative risk, expressed in terms of per cent more likely to succeed. Mathematically, this is:

$$((\text{Grant Rate A} / \text{Grant Rate B}) - 1) \times 100$$

Thus, for example, if one group of claimants has a 50 per cent grant rate and a second group of claimants has a 40 per cent grant rate, the study would report that the first group of claimants is 25 per cent more likely to succeed than the second group of claimants, *i.e.* $((50/40) - 1) \times 100$. It should be noted that percentages in excess of 100 per cent will be reported. Some readers may prefer to think of such percentages in terms of times more likely, which can be determined by dividing the reported percentage by 100 (*e.g.*, 400 per cent more likely is four times more likely).

gender and outcomes in refugee determinations,” CJWL [forthcoming] [Rehaag, “Gender”]; Rehaag, “Troubling,” *supra* note 20; Gould, Sheppard & Wheeldon, *supra* note 50; Ramji-Nogales, Schoenholtz & Schrag, *supra* note 45.

67. See *e.g.* United Nations High Commissioner for Refugees, *UNHCR Statistical Yearbook 2009* (October 2010), online: <www.unhcr.org/statistics>.

TABLE 1: REFUGEE CLAIM OUTCOMES BY YEAR (2005–2009)

Year	Positive	Negative	Abandoned/ Withdrawn	Otherwise Resolved	Decisions	Abandoned/ Withdrawn Rate (%)	Grant Rate (%)*
2005	7,678	7,608	2,516	51	17,853	14.1	50.2
2006	6,127	5,490	1,853	64	13,534	13.7	52.7
2007	4,133	3,535	1,922	62	9,652	19.9	53.9
2008	5,138	4,198	2,796	77	12,209	22.9	55.0
2009	7,352	6,105	4,008	84	17,549	22.8	54.6
Total	30,428	26,936	13,095	338	70,797	18.5	53.0

* Excluding cases that are abandoned, withdrawn, or otherwise resolved

C. RESULTS

To provide context for the findings regarding the effect of counsel on outcomes, the first thing that should be noted is the overall trend in outcomes at the RPD during the period of the study. As Table 1 indicates, the proportion of refugee claims withdrawn or declared abandoned increased substantially from 2005 to 2009. The same period also saw a small increase in the grant rate.

1. COUNSEL TYPE

Table 2 summarizes the findings with regard to counsel type. As it indicates, although most refugee claimants from 2005 to 2009 were represented by lawyers, a significant (but much smaller) number were represented by consultants or un-categorized counsel or were not represented.

TABLE 2: REFUGEE CLAIM OUTCOMES BY COUNSEL TYPE (2005–2009)

Counsel Type	Decisions	Decisions (%)	Abandoned/ Withdrawn Rate (%)	Grant Rate (%)*	Predicted Grant Rate (%) ^b
Lawyer	56,029	79.1	12.7	57.0	55.5
Consultant	5,707	8.1	16.1	33.5	39.5
None	7,624	10.8	62.9	15.2	31.7
Other	1,190	1.7	18.1	52.9	56.1
Total	70,797	100.0	18.5	53.0	53.0

* Excluding cases that are abandoned, withdrawn, or otherwise resolved

^b Based on yearly country of origin grant rates, excluding cases that are abandoned, withdrawn, or otherwise resolved

Table 2 also shows that counsel type had significant effects on the likelihood that claimants withdrew their claims or had their claims declared abandoned. Indeed, unrepresented claimants were 395.3 per cent more likely to have their claims withdrawn or declared abandoned than claimants represented by lawyers. Similarly, claimants represented by consultants were 26.8 per cent more likely to have their claims withdrawn or declared abandoned than claimants represented by lawyers.

Moreover, in cases resulting in positive or negative decisions on the merits, claimants represented by lawyers were 70.1 per cent more likely to succeed than claimants represented by consultants and 275.0 per cent more likely to succeed than unrepresented claimants. However, in interpreting these differences in grant rates it should be noted that the predicted grant rates based on yearly country of origin averages were 40.5 per cent higher for claimants represented by lawyers compared to claimants represented by consultants and 75.1 per cent higher for claimants represented by lawyers relative to unrepresented claimants. In other words, claimants from countries with lower than average grant rates were disproportionately more likely to be represented by consultants or to be unrepresented. Nonetheless, the predicted grant rates based on country of origin averages for unrepresented claimants and for claimants represented by consultants were respectively 17.9 per cent and 108.6 per cent higher than the actual grant rates—meaning that unrepresented claimants and claimants represented by consultants are much less successful than would be predicted based on yearly country of origin averages.

2. COUNSEL TYPE AND COUNTRY OF ORIGIN YEARLY AVERAGES

Table 3 examines if the effect of counsel varies depending on whether claimants come from countries of origin with above average or below average yearly grant rates. As can be seen, regardless of whether claimants come from countries with high, low, or average grant rates, in cases resulting in positive or negative decisions represented claimants are more likely to succeed than are unrepresented claimants, and claimants represented by lawyers are more likely to succeed than claimants represented by consultants. However, while counsel has effects across the full range of yearly country of origin averages, these effects appear to be more pronounced at the lower and middle ranges than at the higher range of yearly country of origin averages. For example, claimants from countries with low yearly grant rates (*i.e.*, under 20 per cent) are 57.8 per cent more likely to succeed when they are represented by lawyers than when they are represented by consultants and are 343.8 per cent more likely to succeed than when they are unrepresented. Claimants from countries with average grant rates (*i.e.*, 40–60

TABLE 3: REFUGEE CLAIM OUTCOMES BY COUNTRY OF ORIGIN (COO), AVERAGE YEARLY GRANT RATES, AND COUNSEL TYPE (2005–2009)^a

COO Average Yearly Grant Rate (%)	Decisions	Decisions (%)	Grant Rate (%)	Predicted Grant Rate (%) ^b	Decisions	Decisions (%)	Grant Rate (%)	Predicted Grant Rate (%) ^b
	Lawyer				Consultant			
0-19	6,122	12.6	14.2	12.1	1,036	21.8	9.0	11.9
20-39	6,638	13.6	34.3	29.9	1,640	34.4	21.9	29.2
40-59	12,516	25.7	50.9	49.4	1,121	23.5	41.7	47.6
60-79	15,160	31.1	71.4	70.5	626	13.1	60.4	70.9
80-100	8,310	17.0	89.8	89.6	339	7.1	87.9	89.2
Total	48,746	100	57.0	55.5	4,762	100.0	33.5	39.5
	None				Other			
0-19	995	37.1	3.2	11.3	206	17.5	3.9	12.0
20-39	922	34.4	10.7	28.9	200	17.0	24.0	28.9
40-59	394	14.7	25.9	48.5	206	17.5	37.4	49.9
60-79	251	9.4	37.5	69.7	212	18.1	73.6	71.6
80-100	120	4.5	68.3	87.7	350	29.8	94.9	91.9
Total	2,682	100.0	15.2	31.7	1,174	100.0	52.9	56.1

^a Excluding cases that are abandoned, withdrawn, or otherwise resolved

^b Based on yearly country of origin grant rates, excluding cases that are abandoned, withdrawn, or otherwise resolved

per cent) do 22.1 per cent better when they are represented by lawyers than when they are represented by consultants, and do 96.5 per cent better when they are represented by lawyers than when they are unrepresented. Finally, claimants from countries with high yearly grant rates (*i.e.*, over 80 per cent), are 2.2 per cent and 31.5 per cent more likely to succeed when they are represented by lawyers than when they are represented by consultants or are unrepresented, respectively. In other words, representation matters, but it seems to matter more for claimants from countries with low and average yearly grant rates than for claimants from countries with high yearly grant rates.

3. LAWYERS' EXPERIENCE

Table 4 considers the relation between success rates and a lawyer's experience—measured in terms of the number of claims for which a particular lawyer served as

TABLE 4: REFUGEE CLAIM OUTCOMES BY LAWYER'S EXPERIENCE (2005–2009)^a

Lawyer's Experience (number of cases 2005-2009)	Decisions	Decisions (%)	Abandoned/Withdrawn Rate (%)	Grant Rate (%) ^b	Predicted Grant Rate (%) ^c
1	278	0.5	22.3	35.8	48.0
2–10	2,005	3.6	17.7	48.8	51.2
11–25	2,926	5.2	12.6	49.6	54.2
26–50	3,904	7.0	12.8	52.1	52.6
51–100	6,137	11.0	12.5	53.4	53.5
101–250	14,407	25.7	11.5	56.4	55.1
251+	26,372	47.1	12.9	60.6	57.1
Total	56,029	100.0	12.7	57.0	55.5

^a Excluding cases where claimants were not represented by lawyers

^b Excluding cases that are abandoned, withdrawn, or otherwise resolved

^c Based on yearly country of origin grant rates, excluding cases that are abandoned, withdrawn, or otherwise resolved

counsel during the period of the study—in cases where claimants are represented by lawyers.

Table 4 shows that there is a strong positive relation between grant rates and lawyers' experience. For example, lawyers who represented only one claimant during the period of the study had clients withdraw or have their claims declared abandoned 72.9 per cent more frequently than lawyers who represented 251 or more claimants. Similarly, in cases resulting in positive or negative decisions, clients of lawyers who represented 251 or more claimants were 69.3 per cent more likely to be successful than clients of lawyers who represented only one claimant. It should also be noted that these differences in success rates are not simply a result of the countries of origin of claimants represented by counsel with varying degrees of experience. Whereas clients of lawyers representing 251 or more claimants were 6.1 per cent more likely to be successful than predicted based on yearly country of origin averages, the predicted grant rates based on yearly country of origin averages for clients of lawyers representing only one claimant were 34.1 per cent higher than their actual grant rates. Therefore, it would appear that what matters at RPD hearings is not merely the ability of claimants to secure lawyers to serve as counsel, but also the ability to secure lawyers experienced in refugee law.⁶⁸

68. While the relation between experience of consultants and outcomes is not as clear as the

4. COUNSEL TYPE AND CLAIMANT GENDER

Table 5 breaks down the statistics regarding the relation between counsel and outcomes from Table 2 by the gender of principal claimants.

As can be seen in Table 5, male principal claimants were 14.1 per cent more likely to have their claims withdrawn or declared abandoned than female principal claimants. Moreover, in cases resulting in a positive or negative decision, female principal claimants were 17 per cent more likely to succeed in their claims. This difference in success rates cannot be attributed entirely to the claimant's country of origin. Indeed, in cases resulting in positive or negative decisions,

TABLE 5: REFUGEE CLAIM OUTCOMES BY COUNSEL TYPE AND CLAIMANT GENDER (2005-2009)^a

Counsel Type	Decisions	Decisions (%)	Abandoned/ Withdrawn Rate (%)	Grant Rate (%) ^b	Predicted Grant Rate (%) ^c
Female Principal Claimants					
Lawyer	20,939	80.9	12.1	61.7	55.4
Consultant	2,178	8.4	15.8	38.8	39.7
None	2,205	8.5	65.6	20.3	33.0
Other	569	2.2	13.9	62.0	60.1
Total	25,891	100.0	17.0	58.4	53.4
Male Principal Claimants					
Lawyer	35,067	78.1	13.1	54.2	55.5
Consultant	3,529	7.9	16.2	30.2	39.5
None	5,416	12.1	61.8	13.5	31.2
Other	868	1.9	20.9	46.4	53.3
Total	44,880	100.0	19.4	49.9	52.8

^a Excluding 26 cases where principal claimant gender was unspecified

^b Excluding cases that are abandoned, withdrawn, or otherwise resolved

^c Based on yearly country of origin grant rates, excluding cases that are abandoned, withdrawn, or otherwise resolved

relation between experience of lawyers and outcomes, the overall trend is similar. For example, during the period of the study, consultants who were involved in either only 1 case or 2-10 cases had success rates of 35.1 per cent (77 decisions) and 26.1 per cent (487 decisions), respectively. During the same period, consultants involved in either 101-250 or more than 250 cases had success rates of 37.4 per cent (1024 decisions) and 49.1 per cent (509 decisions), respectively.

female principal claimants were 9.4 per cent more likely to succeed than would be predicted based on yearly country of origin averages, whereas male principal claimants had predicted grant rates based on yearly country of origin averages that were 5.8 per cent higher than their actual grant rates.⁶⁹

In addition to these variations in grant rates, Table 5 also reveals that female claimants were 3.6 per cent more likely to be represented by lawyers and 6.3 per cent more likely to be represented by consultants than male principal claimants. At the same time, male principal claimants were 42.4 per cent more likely to be unrepresented than their female counterparts.

5. UNCATEGORIZED COUNSEL

The study's findings with regard to uncategorized counsel are difficult to interpret. That is because, as noted above in Part I(C), uncategorized counsel include diverse types of counsel, ranging from paralegals at law firms, to community legal workers at immigration law clinics, to friends and family of claimants, to persons for whom no information could be obtained.⁷⁰ Therefore, one should be cautious about drawing conclusions regarding grant rates or abandon/withdraw rates of such a mixed group of counsel.

Nonetheless, one interesting finding of the study with regard to uncategorized counsel relates to a small number of uncategorized counsel who represented a very large number of claimants over the period of the study. One in particular stands out: Hagos Beiene. Beiene is neither a consultant nor a lawyer, but he is listed as counsel in 376 cases from 2005 to 2009.⁷¹ Moreover, internet searches turned up immigration consulting businesses with various names for which he is listed as the proprietor or the contact person.⁷² Unfortunately, it was not possible to reach anyone at any of the phone numbers listed, which means that the basis upon which Beiene purported to serve as counsel in these cases could not be determined.⁷³

69. For a more detailed examination of the effect of gender on refugee claim outcomes, see Rehaag, "Gender," *supra* note 66.

70. See text accompanying note 65.

71. Beiene had a very high success rate in these decisions: 97.2 per cent. While this high success rate can partly be attributed to the countries of origin of the claimants he represented (Eritrea and Ethiopia), it should nonetheless be noted that Beiene outperformed the yearly country of origin average for the subset of claims he was involved with (89.4 per cent).

72. See *e.g.* "Hagos Paralegal Svc," online: Profile Canada <http://www.profilecanada.com/companydetail.cfm?company=596056_Hagos_Paralegal_Svc_Toronto_ON>; "Hagos Immigration & Paralegal," online: Business Net Pages <<http://www.businessnetpages.com/companypage.aspx/ontario/toronto/hagos-immigration-and-paralegal/854595/list>>.

73. For further details on Beiene, see Part III(B)(2), below.

While Beiene is something of an exceptional case, it is nonetheless significant that information about dozens of individuals who served as counsel to claimants during the five year period of the study, some of whom represented over ten claimants each, could not be located. Moreover, names used by consultants, either in the IRB's database or on websites associated with their consulting firms, often did not match names listed in the CSIC database (*e.g.*, given names were listed differently, given names and family names were reversed, et cetera). In addition, no qualifications could be confirmed in the directories of the relevant professional bodies for several counsel who held themselves out to be either lawyers or consultants in online sources.

6. SUMMARY OF FINDINGS

In summary, the study found that counsel is a major factor affecting outcomes in refugee determinations. Most claimants are represented by lawyers, but where claimants are unrepresented or, to a lesser extent, are represented by consultants, they are much more likely to have their cases withdrawn or declared abandoned than when they are represented by lawyers. Similarly, in cases decided on the merits, claimants represented by lawyers have a much greater likelihood of obtaining refugee protection. Moreover, these variations in success rates cannot be explained entirely by the countries of origin of claimants represented by different types of counsel.

Just as importantly, the study found that the effect of counsel on outcomes was similar in nature for claimants from countries with low, average, and high yearly grant rates: In virtually all cohorts, claimants are better off represented than unrepresented and are better off with lawyers than with consultants. However, while the overall trend was similar across the full range of countries of origin, representation seems to have a more significant impact on outcomes for claimants from countries with low or average yearly grant rates compared to claimants from countries with above average yearly grant rates.

In addition, the study found that where claimants are represented by lawyers, the level of experience of lawyers is an important factor in refugee claim outcomes: Lawyers who represented significant numbers of claimants during the period of the study had higher success rates than lawyers who represented a smaller number of claimants, a finding that cannot be entirely attributed to the countries of origin of clients represented by lawyers with varying levels of experience.

The study also sought to examine whether claimant gender impacted upon the ability of claimants to secure representation. On this issue, the study found

that female principal claimants are more likely to be represented at the RPD than male principal claimants, implying that female refugee claimants in Canada do not appear to face disproportionate hurdles in accessing legal counsel.

Finally, as far as uncategorized counsel go, the study found that a small number of counsel who are neither lawyers nor consultants represented many claimants—in one case as many as 376 claimants over five years. No information could be located about the basis on which these individuals purported to serve as counsel (*e.g.*, on a pro bono basis, as volunteers or staff of NGOs, et cetera).

III. IMPLICATIONS OF THE STUDY

The key finding of the study is that access to competent and qualified counsel—and especially to experienced lawyers—is a key determinant of outcomes in life and death refugee determinations across the full range of countries of origin (*i.e.*, countries with low, average, and high yearly grant rates).

This finding holds a number of implications. First, to the extent that some claimants are not able to access competent and qualified counsel, the fairness of the refugee determination process comes into question. To prevent such unfairness, it is essential that claimants who cannot afford counsel obtain publicly funded legal representation. Second, given the much lower success rates for claimants represented by immigration consultants, it may be time to re-evaluate whether immigration consultants are able to provide high quality representation. If not, the role of immigration consultants in the refugee determination process may need to be re-thought. Third, regardless of what is done regarding authorized immigration consultants, efforts must be made to ensure that unauthorized counsel are not participating in the refugee determination process. Let us explore each of these implications in turn.

A. PUBLICLY FUNDED LEGAL REPRESENTATION FOR REFUGEE CLAIMANTS

As noted above in Part I(C), Canada's immigration legislation does not accord refugee claimants the right to publicly funded legal representation. However, several Canadian provinces do offer legal aid to some refugee claimants. Unfortunately, legal aid is far from universally available, including in the four provinces where the vast majority of refugee claimants (99.1 per cent in 2009) reside: Ontario, Quebec, British Columbia, and Alberta.⁷⁴ Because the ability of refugee

74. Citizenship and Immigration Canada, *Canada Facts and Figures: Immigrant Overview: Permanent and Temporary Residents: 2009*, (Ottawa: Minister of Public Works and

claimants to access legal aid varies across provinces, it is worth examining each of the four provinces that host the vast majority of refugee claimants in Canada.

1. ONTARIO

Ontario hosts the majority of refugee claimants in Canada (58.8 per cent in 2009).⁷⁵ Currently, Legal Aid Ontario (LAO) coverage is available to fund legal representation at refugee hearings. This representation is, for the most part, provided by lawyers who are members of the private bar selected by refugee claimants who obtain LAO certificates.⁷⁶

To obtain LAO certificates, refugee claimants must first meet the prescribed financial eligibility requirements.⁷⁷ The test for financial eligibility is complex and takes into account factors such as income, assets, debts, housing costs, child care costs, and number of family members.⁷⁸ The test for financial eligibility is also very strict. For example, a single person with no assets or debts and with a gross annual income over \$11,000 is unlikely to qualify.⁷⁹ Similarly a family of three or more that has liquid assets in excess of \$2,000 will likely be ineligible.⁸⁰

Refugee claimants in Ontario who meet the financial eligibility requirements must also meet other conditions to obtain legal aid. These conditions include not having made previous refugee claims in Canada; not qualifying for permanent residence through family class sponsorship; and not having family members who are currently covered for legal aid for a refugee hearing.⁸¹

If these conditions are met, coverage will be determined based on the following factors. First, where claimants come from countries that are included on a "Country List" maintained by LAO, they will generally be provided

Government Services Canada, 2010) at 106 [CIC, *Overview*].

75. *Ibid.*

76. Department of Justice, *An Analysis of Immigration and Refugee Law Services in Canada*, (22 April 2005), online <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la18-rr03_aj18/rr03_18.pdf> at 39-51 [DOJ, *Analysis*]. While most refugee claimants who obtain legal aid in Ontario employ the services of private lawyers, some claimants use the services of community legal clinics, as well as the Refugee Law Office (*ibid* at 42).

77. *Legal Aid Services Act, 1998*, SO 1998, c 26, s 16.

78. See generally Legal Aid Ontario, *Financial Eligibility Criteria for Certificates: Policies and Procedures Manual* (June 2010).

79. *Ibid* at 46 (noting that the basic allowance for single persons is \$427 per month and that the maximum shelter allowance is \$487 per month, which together amount to \$10,968 per year).

80. *Ibid* at 12.

81. Legal Aid Ontario, *Area Office Policy Manual: Chapter 5: Refugee and Immigration Law Coverage* (October 2009) at 5-3, 5-4.

certificates to cover their refugee hearings.⁸² These listed countries typically have extremely poor human rights records.⁸³ Second, where claimants express fears of listed types of persecution in specified countries, they will once again generally be provided legal aid certificates to cover their refugee hearings.⁸⁴ Listed types of persecution cover groups known to be targeted for persecution (*e.g.*, ethnic and religious minorities, sexual minorities, and women facing domestic violence) in countries that are otherwise regarded as generally compliant with human rights norms.⁸⁵ Third, where claimants do not fall into either of these two previous categories but meet the financial eligibility and other requirements, they will generally be provided opinion certificates. Opinion certificates pay private bar lawyers to prepare opinion letters assessing the merits of the claim and whether coverage should be provided. LAO then reviews the opinion letters and provides legal aid certificates only where, in its view, the refugee claim is meritorious.⁸⁶ According to LAO's policy manual for immigration and refugee issues, "[m]erit is established where the applicant can demonstrate a fear of persecutory treatment and where the country conditions support the applicant's subjective fear of return."⁸⁷

As Table 6 indicates, the number of applications for LAO certificates for refugee hearings has increased steadily in recent years. Between 2006 and 2009, the number of applications per year increased by 22.8 per cent. However, during the same period, the number of claimants provided full hearing coverage (with or without an opinion letter) increased by only 4.2 per cent. Similarly,

82. *Ibid.*

83. At the time of writing, the full list of countries included: Albania, Armenia, Azerbaijan, Belarus, Burundi, Cameroon, Chad, China, Colombia, Congo, Cuba, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Georgia, Guinea, Haiti, Iran, Iraq, Ivory Coast, Kazakhstan, Kenya, Kyrgyzstan, Liberia, Libya, Mauritania, Myanmar, Nepal, Palestine, Rwanda, Saudi Arabia, Sierra Leone, Somalia, Sri Lanka, Sudan, Syria, Togo, Uganda, Ukraine, Uzbekistan, Yemen, and Zimbabwe. *Ibid.* at Appendix 7.

84. *Ibid.* at 5-3, 5-4.

85. At the time of writing, the full list of types of persecution included: Bulgaria: Roma, sexual orientation, gender; Bangladesh: political (opposition to Bangladesh National Party), Christian, Hindu; Former Yugoslavia: Roma; Grenada: sexual orientation; Guatemala: sexual orientation; Jamaica: sexual orientation; Jordan: gender; Kuwait: stateless (Bedouin); Lebanon: gender; Mexico: sexual orientation, gender; Nigeria: religion (non-Muslim), sexual orientation, gender; Pakistan: domestic violence, sexual orientation, Ahmadi, Christian; Romania: Roma; Russia: religion, sexual orientation, gender; St. Kitts: sexual orientation; St. Lucia: sexual orientation; St. Vincent: sexual orientation; Trinidad & Tobago: sexual orientation; Turkey: religion (Alevi), Kurdish. *Ibid.* at Appendix 7.

86. *Ibid.* at 5-3, 5-4.

87. *Ibid.* at 5-2.

TABLE 6: REFUGEE HEARING COVERAGE AT LEGAL AID ONTARIO

Year	Refused Without Opinion	Full Hearing Coverage Without Opinion	Opinion Only	Opinion & Full Hearing Coverage	Total	Full Hearing Coverage Refusal Rate (%)
2006	247	5,518	732	2,210	8,707	11.2
2007	266	5,526	982	2,141	8,915	14.0
2008	315	6,217	1,402	2,424	10,358	16.6
2009	398	5,620	2,373	2,303	10,694	25.9
Total	1,226	22,881	5,489	9,078	38,674	17.4

SOURCE: Letter from Robert Ward, President/CEO, Legal Aid Ontario to Sean Rehaag (9 August 2010), LAO Access to Information Request # 10-008 (on file with author)

the refusal rate for full hearing coverage has increased every year from 2006 to 2009—more than doubling during this period. A growing number of refugee claimants in Ontario, therefore, either have coverage refused outright or, more frequently, obtain coverage only for the limited purposes of obtaining an opinion letter, with hearing coverage refused on the grounds that claimants have not established that their claims have merit. It is worth noting, moreover, that this last group of claimants meets LAO's financial eligibility requirements—that is to say, according to LAO's own tests, these individuals cannot afford privately funded legal representation at their refugee hearings, but they are nonetheless refused coverage. It is also worth noting that, as can be seen in Table 1, in Part II(C), above, this period saw a 3.6 per cent increase in IRB refugee claim grant rates. It would, therefore, appear that the decline in full hearing coverage at LAO did not coincide with an overall decline in the proportion of well-founded claims as determined by the IRB.

Two issues are worth noting with respect to these trends at LAO. First, an increasing proportion of LAO's refugee funding is being used to pay lawyers to prepare opinion letters, which does not provide refugee claimants with any meaningful assistance. In other words, significant resources are going into merit screening procedures. Ideally, these resources should instead be allocated towards providing actual legal assistance for refugee claimants.

Second, one possible interpretation of these trends is that LAO's screening process is not, in fact, a merit screening process. That is to say, LAO may not actually be applying the test that the policy manual specifies to determine whether claims meet the specified threshold to qualify for legal aid (*i.e.*, "where the applicant can demonstrate a fear of persecutory treatment and where the country

conditions support the applicant's subjective fear of return⁸⁸). Rather, it is possible that the screening process is being used to implement an informal quota system. Support for this view can be found in the fact that despite both the significant increase in the number of claimants seeking legal aid from 2006 to 2009 and the modest increase in grant rates at the IRB during this period, the total number of claimants provided with hearing coverage (both through the automatic coverage procedures and through the opinion letter process) has remained remarkably consistent. One might, therefore, contend that LAO is using merit screening to meet targeted quotas for providing assistance to a certain number of claimants by manipulating the country list, the types of persecution list, and the definition of "merit." Of course, it should also be acknowledged that there are other possible explanations for the trends. These explanations range from patterns in the country of origin mix of applicants in Ontario to trends among lawyers writing opinion letters to the increasingly unfriendly political environment regarding refugees in Canada to simple random error (*i.e.*, if you flip a coin enough times, it is likely that at some point you will get tails twenty times in a row). Moreover, it should also be acknowledged that even if LAO is using a quota system rather than a merit threshold system, this is not necessarily unreasonable given the reality of limited funding available to LAO. However, if this is the case, there should be an open discussion about what types of claims are priorities for legal aid funding and why.

2. QUEBEC

After Ontario, Quebec hosts the largest number of refugee claimants in Canada (29.7 per cent in 2009).⁸⁹ Refugee claimants residing in the province may be eligible for legal aid through the Commission des services juridiques (CSJ), typically in the form of funding legal representation for refugee hearings by lawyers who are members of the private bar selected by claimants.⁹⁰

To obtain legal aid in Quebec, refugee claimants must meet financial eligibility requirements. Factors taken into account include number of family members, income, liquid assets, property, and expenses such as child care, support payments, and tuition.⁹¹ Currently, maximum annual income levels range from \$13,007 for single persons to \$21,328 for families with two spouses and two

88. *Ibid.*

89. CIC, *Overview*, *supra* note 74 at 106.

90. See generally DOJ, *Analysis*, *supra* note 76 at 51-56.

91. *An Act respecting legal aid and the provision of certain other legal services*, RSQ 1996, c A-14, s 4.1 [*Legal aid act*]. See also *Regulation respecting legal aid*, c A-14, r 0.2, ss 6-25.

or more children, while maximum liquid assets range from \$2,500 for single persons to \$5,000 for families.⁹²

Where claimants meet the CSJ financial eligibility requirements, they are eligible for legal aid in administrative proceedings involving “matter[s] that threaten] or will in all likelihood threaten a person’s physical or mental safety, livelihood or ability to provide for his essential needs or those of his family”⁹³ or where “freedom of the person to whom legal aid would be granted is or is likely to be seriously restricted.”⁹⁴ Because refugee determinations involve such matters,⁹⁵ legal aid for refugee hearings is generally available.

TABLE 7: REFUGEE HEARING COVERAGE AT THE COMMISSION DES SERVICES JURIDIQUES (QC)

Year	Refused	Granted	Total	Hearing Coverage Refusal Rate (%)
2006–2007	82	3,701	3,784	2.2
2007–2008	127	5,688	5,815	2.2
2008–2009	139	5,899	6,038	2.3
2009–2010	298	5,052	5,350	5.6
Total	647	20,340	20,987	3.1

SOURCE: Letter from Yves Carrière, Secrétaire de la Commission, Commission des services juridiques to Sean Rehaag (26 October 2010) (on file with author).

Unlike in Ontario, CSJ has no systematic screening process for merit when considering applications for refugee claim hearing coverage. Still, in principle, at any stage in proceedings, legal aid may be refused or withdrawn where “the applicant cannot establish the probable existence of his right” or where “the case or remedy clearly has very little chance of succeeding.”⁹⁶ In practice, however, refusal on these grounds appears rare. Indeed, as Table 7 indicates, the refusal rate for refugee hearing coverage from fiscal year 2006–2007 to fiscal year 2009–2010 is only 3.1 per cent, a figure far below Ontario’s refusal rate of 17.4 per cent during approximately the same period.⁹⁷ Moreover, the Quebec figures are not broken down by reason for refusal (*e.g.*, financial versus merit), so even these

92. *Ibid.*, s 18.

93. *Legal aid act*, *supra* note 91, s 4.7(9).

94. *Ibid.*, s 4.7(8).

95. See *e.g. Singh*, *supra* note 1 (holding that refugee determinations engage a claimant’s right to life, liberty, and the security of the person).

96. *Legal aid act*, *supra* note 91, s 4.11.

97. See Table 6, in Part III(A)(1), above.

small numbers of refusals may be due to financial or other eligibility requirements rather than due to considerations of merit.

Still, despite the comparatively low refusal rates in Quebec, it is worth noting one troubling trend evident in Table 7: Refusal rates in refugee claim hearing coverage at the CSJ appear to be increasing, with the most recent financial year showing more than double the refusal rates of previous years.

3. BRITISH COLUMBIA

British Columbia hosts a much smaller proportion of claimants (5.4 per cent in 2009) than either Ontario or Quebec.⁹⁸ Refugee claimants in British Columbia may be eligible for legal aid coverage for their refugee hearings through the Legal Services Society (LSS). As with Ontario and Quebec, the most common form for such coverage is funding for representation by private lawyers.⁹⁹

Financial eligibility requirements for legal aid as currently set by the LSS include net household annual income maximums of \$17,040 for single persons or \$37,200 for families of four, with maximum personal property of \$2,000 for single persons or \$5,000 for families of four.¹⁰⁰ Historically, refugee claimants in British Columbia who met the financial eligibility requirements were entitled to coverage for legal assistance with their refugee hearings without having to go through a merit screening process.¹⁰¹ However, funding for the LSS was cut severely in 2002, which prompted the LSS to implement merit screening processes to reduce its refugee caseload.¹⁰²

The terms of the memorandum of understanding between the LSS and the Attorney General of British Columbia that was in effect at the time of writing explicitly authorize the LSS to use merit screening in determining which refugee claimants obtain legal aid: “[The LSS] will provide representation by a lawyer to eligible individuals in respect of ... proceedings before the Refugee Protection Division, as the [LSS] deems appropriate, having regard to merit and other relevant factors.”¹⁰³ Currently the LSS funds legal representation to assist with

98. CIC, *Overview*, *supra* note 74 at 106.

99. See generally DOJ, *Analysis*, *supra* note 76 at 15-22.

100. For the current financial eligibility requirements, see Legal Services Society, “Legal Aid Facts: Financial Eligibility” (April 2010), online: < http://www.lss.bc.ca/assets/media/factSheets/Financial_eligibility.pdf>.

101. See generally DOJ, *Analysis*, *supra* note 76 at 17.

102. For a discussion of the massive extent of the cuts, and the consequences to service delivery, see Legal Services Society, “Annual Service Plan Report: 2002/2003” (2003), online: <http://www.lss.bc.ca/assets/aboutUs/reports/annualReports/annualServicePlanReport_2002.pdf>.

103. Memorandum of Understanding between the Attorney General and the Legal Services

TABLE 8: REFUGEE HEARING COVERAGE AT THE LEGAL SERVICES SOCIETY (BC)

Year	Refused	Granted	Total	Hearing Coverage Refusal Rate (%)
2006–2007	81	870	951	8.5
2007–2008	135	1,077	1,212	11.1
2008–2009	400	1,372	1,772	22.6
2009–2010	564	1,017	1,581	35.7
Total	1,180	4,336	5,516	21.4

SOURCE: Letter from Gen Handley, Communications Assistant, Legal Services Society to Sean Rehaag (9 November 2010) LSS Request for Information File # 2009/2010:014 (on file with author).

refugee hearings where claimants have “a reasonable chance to succeed.”¹⁰⁴ However, what counts as a reasonable chance of success appears to hinge largely on the financial resources available to the LSS. In 2009, for example, the LSS announced that it was “introducing stricter merit screening of immigration legal aid applications to ensure that spending remains within the available budget. This means that some cases that would have been covered in the past will not be covered after April 1, 2009.”¹⁰⁵

Given this variability in what constitutes “merit,” it is perhaps not surprising that, as Table 8 indicates, the refusal rate in applications for legal aid for refugee hearing coverage has increased significantly in recent years. Indeed, from fiscal year 2006–2007 to fiscal year 2009–2010, the refusal rate has more than quadrupled.

4. ALBERTA

Alberta hosts almost as many refugee claimants as British Columbia (5.2 per cent in 2009) and significantly more than any of the remaining provinces.¹⁰⁶ Limited legal aid is available to assist refugee claimants in Alberta through Legal Aid Alberta (LAA). Historically, most legal aid services in Alberta were provided to refugee claimants on a certificate basis by private lawyers.¹⁰⁷ However, representation is

Society (13 September 2005), s 8.1.

104. Legal Services Society, “Legal Aid Facts: Immigration Law Services” (April 2010), online: <http://www.lss.bc.ca/assets/media/factSheets/Immigration_law_services.pdf> at 1.

105. Legal Services Society, “Backgrounder: Service and operational changes at the Legal Services Society” (25 February 2009), online: <http://www.lss.bc.ca/assets/media/newsReleases/backgrounderServiceStaff_ChangesFeb25.pdf> at 3.

106. CIC, *Overview*, *supra* note 74 at 106.

107. DOJ, *Analysis*, *supra* note 76 at 26-27.

now provided largely through a mix of specialized staff at Legal Services Centres run by LAA (who assist with the early stages of the claim and frequently serve as counsel for refugee hearings) and member of the private bar (who generally serve as counsel only at the hearing and only where staff are unavailable).¹⁰⁸

The test for financial eligibility for legal aid in Alberta has recently become more stringent. Prior to 6 April 2010, single individuals generally met the financial eligibility requirement where their net annual income was below \$21,000, while the similar figure for a family of four was \$40,000.¹⁰⁹ As of 6 April 2010, however, the test has changed such that single individuals must have a net annual income of less than \$14,700 and families of four must have a net annual income of less than \$30,096.¹¹⁰ In other words, the maximum annual net income has been cut approximately 30 per cent.

Where refugee claimants meet financial eligibility criteria, they must still meet substantive conditions to obtain LAA funded counsel to represent them at hearings. As of 6 April 2010, these substantive conditions have become more restrictive as well.¹¹¹ The reason for the restrictions is that LAA must reduce its caseload because it has capped annual expenditures on immigration and refugee matters to the amount that is transferred for such purposes from the federal government—effectively cutting the total amount spent on immigration and refugee matters by LAA almost in half.¹¹²

The first substantive condition is that representation for refugee hearings is only available where, in the view of LAA, it is reasonable for the matter to proceed, which means, among other things, that the case will be likely to succeed and that the importance of the case justifies the cost of legal representation.¹¹³ While this substantive condition has been in place for some time, LAA has announced that

108. Legal Aid Alberta, “Restructuring Immigration & Refugee Service Delivery” (March 2010) at 2 [LAA, “Restructuring”].

109. Legal Aid Alberta, “2010 Annual Report” (26 May 2010), online: <<http://www.legalaid.ab.ca/about/Documents/LAA%202010%20Annual%20Report.pdf>> at 21.

110. Legal Aid Alberta, “2011 Annual Report” (31 May 2011), online: <<http://www.legalaid.ab.ca/media/Documents/AR.2011-%20FINAL%20VERSION%20w%20Cover.pdf>> at 29.

111. LAA, “Restructuring,” *supra* note 108 at 1-3.

112. *Ibid* at 1.

113. *Ibid* at 2. See also Legal Aid Alberta, “Legal Aid Society Rules” (1 April 2004), online: <<http://www.legalaid.ab.ca/lawyers/Documents/LASARules2004.pdf>>, s 36:

The Legal Aid Society may provide legal services ... in respect of any civil matter where ... a reasonable person of modest means would commence or defend the action ... and ... in the opinion of the Legal Aid Society (a) the legal cost ... is reasonable when compared to the relief sought ... (b) the matter has merit or a likelihood of success ... and (c) where circumstances ... warrant coverage.

TABLE 9: REFUGEE HEARING COVERAGE AT LEGAL AID ALBERTA

Year	Refused	Granted	Total	Hearing Coverage Refusal Rate (%)
2006	51	277	328	15.5
2007	53	314	367	14.4
2008	122	628	750	16.3
2009	94	671	765	12.3
Total	320	1,890	2,210	14.5

SOURCE: Letter from Katherine Weaver, Vice President, Policy, Research, and Stakeholder Relations to Sean Rehaag (13 December 2010) (on file with author).

as of 6 April 2010 it plans to apply the test more strictly: “A tougher screening policy [will] be implemented, identifying those countries from which successful claims are more likely.”¹¹⁴

The second substantive condition is that representation for refugee hearings is not available where clients are able to self-represent. LAA acknowledges that most refugee claimants are not in a position to reasonably self-represent.¹¹⁵ However, LAA nonetheless notes that with respect to this part of the test, as of 6 April 2010, “hearing representation will not be the default service mode.”¹¹⁶

As Table 9 indicates, from 2006 to 2009, certificate refusal rates for refugee matters did not change significantly, despite a large increase in the number of applications. However, two points are worth noting regarding refusal rates in Alberta.

First, the refusal rates do not actually reflect the number of claimants who sought legal aid for their refugee hearings but were denied LAA certificates. That is because there is an informal financial eligibility and merit screening process at LAA before applications for certificates are made. Katherine Weaver, Vice President, Policy, Research, and Stakeholder Relations at LAA describes this screening process as follows:

From April 2003 to March 2010, Legal Aid Alberta’s Immigration Services Program ... provided the initial intake services for all immigration and refugee clients in the Calgary Region. During the intake process, they would attempt to weed out those clients whose potential refugee claims had no merit to proceed, thereby reducing the number of applications for and refusals of certificates. ... There would also have been situations where it was clear that potential refugee claimants would not meet financial eligibility guidelines.¹¹⁷

114. LAA, “Restructuring,” *supra* note 108 at 2.

115. *Ibid.*

116. *Ibid.*

117. Email from Katherine Weaver, Vice President, Policy, Research, and Stakeholder Relations to

In other words, informal pre-application screening processes resulted in claimants being effectively denied LAA certificates for refugee hearings at rates that are not captured by the statistics in Table 9.

The second point to note is that due to the substantial cuts to LAA's expenditures on refugee coverage that came into effect in 2010, the number of refugee claimants who will be unable to access LAA certificates—whether due to formal or informal screening processes—will surely increase.

5. CONCLUSIONS FROM THE OVERVIEW OF MAJOR LEGAL AID PROGRAMS

A clear trend is evident in this review of legal aid coverage available for refugee claimants in the four provinces where the vast majority of refugee claimants in Canada reside. Financial eligibility tests are extremely restrictive and in some cases are becoming increasingly so. Moreover, even where refugee claimants demonstrate that they cannot afford counsel according to these strict tests, they may nonetheless be denied legal aid coverage on the basis of what purports to be merit screening. The precise tests and procedures for determining what constitutes merit vary across provinces. However, it would appear that legal aid programs may not in fact be applying true merit tests where claims that meet a certain evidentiary threshold in terms of risk of persecution obtain funding. Rather, merit screening seems to be used in many cases as a kind of quota system, whereby the standard of merit shifts depending on the level of resources that provincial legal aid programs are prepared to put into immigration and refugee matters. Indeed, the overall trend is that several provinces are adopting increasingly restrictive standards of merit in order to reduce refugee law expenditures.

This pattern is deeply troubling in light of the major finding of the present study, namely that representation is a key driver of outcomes in refugee determinations. As noted at the beginning of this article, because of the life and death stakes involved, the refugee determination process must comply with the principles of fundamental justice as a matter of constitutional law. If, as the study has shown, access to qualified and competent lawyers is a major factor in claimants successfully navigating the refugee determination process, then the legal aid merit screening processes for refugee claimants who cannot afford counsel must in turn comply with the principles of fundamental justice. To the extent that the standard of merit shifts depending on the financial priorities of legal aid programs, existing merit screening processes likely breach these principles. Moreover, even if the

standard of merit was fixed at a reasonable level, the processes for determining whether claimants meet this standard would themselves need to be procedurally robust, with sufficient safeguards to catch errors. The problem, of course, is that establishing such procedurally robust processes requires substantial resources—resources which would be better put into providing legal assistance to claimants, rather than into administering screening processes.

Another worrisome pattern in light of the present study is the increasing reliance on country of origin in determining whether claims have merit for the purposes of legal aid eligibility. Country of origin may be an attractive criterion for legal aid programs because it can be applied consistently without needing to go through time-consuming and expensive assessments of the substance of refugee claims. However, as this study establishes, qualified and competent representation matters across the full range of countries—and, indeed, representation appears to have stronger impacts on claimants from countries with low yearly grant rates than on claimants from countries with high yearly grant rates. To put the matter bluntly, this study suggests that legal aid policies that screen out claimants from countries with low yearly grant rates put the lives of refugees (*i.e.*, those who do in fact meet the refugee definition) from those countries at risk in order to save the expense of paying either for robust merit screening processes or for legal representation for claimants who do not meet the refugee definition.

If it is not acceptable to use country of origin as a replacement for substantive merit screening processes, and if substantive merit screening processes cannot be sufficiently procedurally robust without unduly diverting resources from providing legal assistance to refugees, then what should be done? This question becomes all the more pressing in light of the impending revisions to the refugee determination process. As noted in Part I(B), above, these revisions dramatically expedite the refugee determination process, making the timelines for substantive merit screening more challenging. Moreover, the revisions also implement a new appeal, which will increase demand on legal aid programs for refugee matters.¹¹⁸

In my view, in light of the findings of this study and of the impending reforms to the refugee determination system, the only appropriate course of action is for the federal government to transfer adequate funds to provincial legal aid programs in order for them to provide legal aid for all refugee claimants who meet reasonable financial eligibility requirements. Absent such adequate funding, only those who can afford counsel—or who are lucky enough to get through

118. For discussions of the impact of the impending reforms on the ability of refugee claimants to secure counsel, see generally David Matas, “Balancing” (2010) 88 Imm LR (3d) 212; Erin C Roth, “Is the Proposed *Balanced Refugee Reform Act* Balanced?” (2010) 86 Imm LR (3d) 168.

arbitrary and increasingly restrictive “merit” screening processes—will be able to fully access a fair refugee determination system.

B. NON-LAWYER REPRESENTATIVES

In addition to the challenges posed by the failure of Canada’s immigration legislation to guarantee publicly funded legal representation for refugee claimants who cannot afford counsel, the legislation poses further challenges by virtue of allowing claimants to be represented at their hearings by “a barrister or solicitor or *other counsel*.”¹¹⁹ Two types of “other counsel” are authorized to represent refugee claimants before the IRB: immigration consultants and pro bono representatives. Both have proven controversial, and the present study offers further reasons to be concerned about the role of such counsel in the refugee determination process.

1. IMMIGRATION CONSULTANTS

The regulation of the legal profession—and the monopoly on the provision of legal services accorded to members of the legal profession—is a matter that generally falls within provincial jurisdiction in Canada.¹²⁰ However, federal immigration legislation has long authorized counsel other than barristers and solicitors to represent persons before the IRB.¹²¹

In the 2001 decision *Law Society of British Columbia v Mangat*,¹²² the Supreme Court of Canada upheld the constitutionality of federal legislation authorizing representation at the IRB by counsel other than members of provincial law societies.¹²³ Specifically, the Court held that it was open to the federal government to determine who could serve as counsel at the IRB because the operation of this tribunal falls within the federal government’s jurisdiction over aliens and naturalization.¹²⁴ Moreover, to the extent that the federal legislation conflicted with provincial legislation restricting the provision of legal services to qualified members of the legal profession, the Court held that federal

119. *IRPA*, *supra* note 4, s 167 [emphasis added].

120. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 92(13) (according jurisdiction over property and civil rights to the provinces), s 92(14) (according jurisdiction over the administration of justice to the provinces). See also *e.g. Law Society Act*, RSO 1990, c L.8, s 26.1 (limiting the practice of law and the provision of legal services in Ontario to licencees of the Law Society of Upper Canada).

121. See *e.g. Immigration Act*, RSC 1985, c I-2 (repealed), s 69.1; *IRPA*, *supra* note 4, s 167.

122. [2001] 3 SCR 113.

123. *Ibid.*

124. *Ibid* at paras 33-37.

legislation prevailed by virtue of the paramountcy doctrine.¹²⁵ In coming to this holding, Justice Gonthier, writing for the Court, also noted that

[n]on-lawyers may provide a very useful service to people who are subject to IRB proceedings. It may be difficult to find lawyers who are fluent in other languages, as well as familiar with different cultures. The provisions of the *Immigration Act* itself call for proceedings to be as informal and expeditious as the circumstances and fairness permit. . . . The possibility to choose to be represented by a non-lawyer may be conducive to informality and expeditiousness.¹²⁶

Shortly after this decision, the federal government created the Advisory Committee on Regulating Immigration Consultants (Advisory Committee) to report on the conditions under which non-lawyer counsel should continue to be authorized to represent persons in proceedings before the IRB.¹²⁷ As noted by the Advisory Committee,

Over the years various attempts have been made to address the problem of how, and by whom, Immigration Consultants should be regulated. Until now, these efforts have been unsuccessful. This has led to a situation where there are no set standards for the levels of education, the quality of services, or the accountability necessary to offer one's services as an immigration consultant.

The fact that certain consultants have abused the trust that their clients have placed in them has been detrimental to the profession as a whole.¹²⁸

In 2003, the Advisory Committee issued its recommendations, which included limiting paid representation at the IRB to lawyers and licensed immigration consultants; allowing representation at the IRB by other persons who do not charge fees; and creating a self-regulatory body for the regulation and licensing of immigration consultants.¹²⁹

The following year, the federal government followed up on these recommendations by amending the regulations accompanying Canada's immigration legislation. The relevant portions of the regulations read:

2 ... "authorized representative" means a member in good standing of a bar of a province, the *Chambre des notaires du Québec* or the Canadian Society of Immigration Consultants...

...

125. *Ibid* at paras 51-74.

126. *Ibid* at para 60 [citations omitted].

127. *Report of the Advisory Committee on Regulating Immigration Consultants* (Ottawa: Minister of Public Works and Government Services, 2003).

128. *Ibid* at 5.

129. *Ibid* at 1-2.

13.1 ... no person who is not an authorized representative may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.¹³⁰

The CSIC (Canadian Society of Immigration Consultants) then established rules to determine who could become members, which include the following requirements: (1) Graduating from an accredited program of study (approximately 4 months) for immigration consultants offered by a number of community colleges; (2) Completing a pre-admission course offered by CSIC; (3) Passing a language proficiency test; (4) Passing a full membership exam; (5) Demonstrating good character (*i.e.*, no criminal record, no recent bankruptcy, etc.); and (6) Obtaining errors and omission insurance.¹³¹ Moreover, to continue to practice as immigration consultants, CSIC members are required to keep their membership in good standing, which requires maintaining errors and omissions insurance and abiding by the CSIC *Rules of Professional Conduct*.¹³²

130. *IRPA Regulations*, *supra* note 44, ss 2, 13.1, as amended by *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-59. It is worth noting that the federal government's decision to establish a self-regulating immigration consulting industry was subject to further constitutional litigation. *Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)* (2008), [2009] 2 FCR 466 (CA), leave to appeal to SCC refused, [2008] SCCA No 403 (QL). In upholding the constitutionality of regulations authorizing CSIC members to represent applicants before the IRB, the Federal Court of Appeal noted (*ibid* at paras 4-6) [citations omitted]:

No administrative scheme in Canada has a more profound impact upon the lives of individuals than that governing immigration and the determination of refugee status. In order to increase access to the process, it is acknowledged that lawyers should not enjoy a monopoly in advising and representing individuals before administrative decision makers in immigration and refugee matters.

Although legal aid is available in some proceedings, immigration consultants have a valuable role to play in assisting individuals of limited means to negotiate this complex legal and administrative scheme. Further, the fact that a consultant is of the same ethnic background as the client, and can communicate with the client in her own language, can be both reassuring to the individual caught up in the immigration system, and helpful to the decision maker.

However, it is also recognized that consultants too often have been incompetent and have preyed unscrupulously upon clients. Some form of regulation has long been thought essential to protect the vulnerable, to assist decision makers, and to maintain confidence in Canada's immigration system.

131. Canadian Society of Immigration Consultants, "CSIC Membership," online: <https://www.csic-scci.ca/content/how_to_become_a_member>.

132. Canadian Society of Immigration Consultants, "Rules of Professional Conduct," online: <https://www.csic-scci.ca/content/professional_conduct>.

Unfortunately, while the CSIC was established to address some of the earlier criticisms levelled against unregulated immigration consultants, there remain grave concerns about the industry. A 2008 report of the Parliamentary Standing Committee on Citizenship and Immigration, for example, indicates that “[d]espite the establishment of CSIC, complaints from the public and from within the profession about unacceptable practices by immigration consultants have continued.”¹³³ Similarly the report notes that there are “various ways in which rogue immigration consultants avoid federal regulation.”¹³⁴

In response to these concerns, the Minister tabled the *Cracking Down on Crooked Consultants Act* in Parliament in June 2010.¹³⁵ At the time of writing, the bill (with a less provocative title) has received royal assent, but its provisions have not yet come into force.¹³⁶ Among other things, the bill seeks to authorize the government to share information with regulatory bodies for the purposes of disciplinary proceedings for violations of rules of professional conduct.¹³⁷ According to the Minister, the bill was tabled due to concerns that

[c]rooked immigration consultants victimize people who dream of immigrating to Canada... . Worse still, there is evidence that these individuals encourage prospective immigrants to lie on their immigration applications, to concoct bogus stories about persecution when making refugee claims, or to enter into sham marriages with Canadian citizens and permanent residents. This undermines the integrity and fairness of Canada’s immigration system.¹³⁸

At the same time as the bill was tabled, the Minister issued a notice¹³⁹ that the government intends to identify a new governing body for immigration consultants to “address a lack of public confidence in the regulation of immigration consultants.”¹⁴⁰ It would appear, then, that the government’s efforts to establish

133. House of Commons, Standing Committee on Citizenship and Immigration, *Regulating Immigration Consultants* (June 2008) at 1 (Chair: Norman Doyle).

134. *Ibid* at 5.

135. Bill C-35, *Cracking Down on Crooked Consultants Act*, 3rd Sess, 40th Parl, 2010 (first reading 8 June 2010) [*Crooked Consultants I*].

136. *An Act to amend the Immigration and Refugee Protection Act*, SC 2011, c 8 (assented to 23 March 2011, not yet in force) [*Crooked Consultants II*].

137. *Ibid*, s 4. See also *Crooked Consultants I*, *supra* note 135, cl 5.

138. Citizenship and Immigration Canada, News Release, “Minister Kenney introduces legislation to crack down on crooked immigration consultants” (8 June 2010) online: <<http://www.cic.gc.ca/english/department/media/releases/2010/2010-06-08.asp>> [emphasis added] [Kenney, “Crooked Consultants”].

139. Notice requesting comments on a proposal to establish a public selection process with the objective of identifying a governing body for recognition as the regulator of immigration consultants (Citizenship and Immigration Canada), (2010) C Gaz I, 1502.

140. Kenney, “Crooked Consultants,” *supra* note 138.

a functioning self-regulating profession of immigration consultants have not yet been successful and that unprofessional practices by licensed consultants continue to pose serious problems.

The present study provides further reasons to be concerned about immigration consultants. Specifically, clients of consultants are much more likely to withdraw or have their refugee claims declared abandoned than are clients of lawyers. Moreover, immigration consultants have significantly lower refugee claim success rates than lawyers, and these lower rates are not fully attributable to the countries of origin of their respective clients.

There are two ways to interpret these differences between immigration consultants and lawyers. First, it may be that consultants are more likely than lawyers to bring forward unfounded claims. One possible explanation is that lawyers may be more skilled at estimating whether a claim is likely to succeed, and as a result they may be more likely to properly advise clients to pursue other immigration options instead of making futile refugee claims. Another possible reason is that individuals who know that they are not likely to obtain refugee status but who wish to make claims for other reasons (such as delaying removal for several months) may be more likely to employ consultants than lawyers. This might make sense given that such claimants would not be concerned about the quality of representation and would likely want to minimize the cost of representation. Or perhaps claimants with weak claims are more likely to seek the services of immigration consultants simply because they were unable to obtain legal aid to pay for lawyers due to the merit screening processes used by some legal aid programs (though this would not account for why claimants who come from countries for which legal aid is generally available—*i.e.*, countries with very high grant rates—are more successful with lawyers than with consultants). Regardless of the reason, if consultants bring forward unfounded refugee claims more frequently than lawyers, this would presumably be of some concern to the current Conservative federal government, which never misses an occasion to decry so-called “bogus” refugee claims.¹⁴¹

Second, it may be that consultants are not, in fact, more likely than lawyers to bring forward unfounded refugee claims, but rather that they are less likely to

141. See *e.g.* Citizenship and Immigration Canada, “Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism *Cracking Down on Crooked Consultants*” (8 June 2010) online: <<http://www.cic.gc.ca/english/department/media/speeches/2010/2010-06-08.asp>> (“there have been many reports of crooked immigration consultants coaching people to make bogus refugee claims, one of the reasons for our broken asylum system”) [Kenney, “Cracking Down”].

fully pursue those claims and less likely to succeed with those claims irrespective of their merits. On this reading, some claimants who meet the refugee definition may not be recognized as such because of the errors or omissions of immigration consultants—and had these claimants been represented by lawyers instead of consultants, they would have been more likely to obtain refugee protection. An alternative reading of the same phenomenon would be that some lawyers manipulate the refugee determination process and that individuals who do not meet the refugee definition are nonetheless able to obtain refugee protection when they are represented by skilled lawyers. And indeed, this view arguably informs some recent government policies that seek to minimize the role of lawyers in the refugee determination process.¹⁴² However, it must be borne in mind that, as noted at the outset of this article, refugees must be provided with access to a fair and procedurally robust refugee determination process as a matter of Canadian constitutional law. That is because where claimants meet the refugee definition but are not recognized as such due to flaws in the refugee determination process, the likely result is that the claimants in question will be deported to countries where they may face persecution, torture, or even death—thereby putting at risk their rights to life, liberty, and security of the person. Some may be of the view that it would be more expedient if refugee claimants were not represented, because fewer claimants would be accorded refugee protection. However, if, in fact, outcomes in the refugee determination process hinge not on the merits of the claim but instead on whether claimants are able to obtain legal representation (and if publicly funded legal representation is not available to all those who cannot afford lawyers), then the refugee determination process is neither fair nor procedurally robust.

Regardless of which of these explanations—or combination of them—is accurate, the difference in outcomes demonstrated in this study points to the need to reconsider the role of immigration consultants in the refugee determination process. In my view, professional and competent immigration consultants can, in principle, participate helpfully in the refugee determination

142. Consider, for example, reverse order questioning at refugee hearings, whereby rather than beginning refugee hearings by allowing counsel to ask questions of claimants to present their stories, IRB members (or Refugee Protection Officers) instead begin by asking questions about problematic aspects of the claim. Immigration and Refugee Board, *Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* (effective 1 December 2003) s 3.2. Or consider that the revised refugee determination process replaces the refugee claimant's written narrative, currently prepared by counsel, with a transcript of an interview of the claimant by a civil servant. See text accompanying note 36.

process, increasing access to representation at the IRB by claimants who might not otherwise be able to afford counsel. And indeed, there are many examples of extremely well qualified and conscientious immigration consultants who have long provided excellent representation before the RPD. However, the present study raises concerns regarding the quality of representation currently provided by immigration consultants overall. At the same time, as noted, the immigration consulting industry has lost the confidence of the public, and even in the best case scenario it will take time to regain that confidence. Moreover, during the transition to the reformed refugee determination process over the next several years, competent representation at the IRB will be more important than ever, especially considering that a new cohort of civil servants will be making first instance refugee determinations, few of whom will be lawyers and most of whom will not have prior experience in refugee law. Taken together, in my view, immigration consultants should not currently be offering unsupervised representation in life and death refugee claims, particularly at a time when the refugee determination system is undergoing a major overhaul. Rather, until such time as the immigration consultant industry establishes a successful track record of ensuring that consultants provide professional and quality representation (a period of time to be measured in years, not months), the role of immigration consultants in the refugee determination process should be limited to scenarios where they are supervised by lawyers.

I acknowledge that some might feel that such a proposal goes too far. After all, this study demonstrates that although claimants succeed more often when they are represented by lawyers rather than consultants, they are nonetheless significantly better off with consultants than unrepresented. As a result, some might argue for a transitional program, whereby until such time as legal aid programs across Canada ensure that all refugee claimants can obtain representation by lawyers, immigration consultants should be allowed to continue participating in the refugee determination process unsupervised.

In my view, however, this would be the wrong approach given both the extremely serious consequences of errors in refugee adjudication and the upcoming changes to the refugee determination process. A preferable approach would be for the government to first adequately fund legal aid to provide competent and qualified representation for refugee claimants. Only then should it reconsider whether the immigration consulting industry has established a sufficient track record of ensuring competence and professionalism such that consultants should be allowed to provide unsupervised representation for refugees (possibly funded through legal aid). In the meantime, consultants could continue to participate in

the refugee determination process—thereby decreasing the cost of representation—but only under the supervision of a lawyer.

2. PRO BONO REPRESENTATIVES

As noted above in Part I(C), the regulations accompanying Canada's current immigration legislation restrict paid counsel in immigration matters to lawyers and immigration consultants. However, there is no similar restriction on unpaid representatives.¹⁴³

Given the increasing restrictions on legal aid, the decision to allow individuals to be represented by non-lawyers and non-immigration consultants on a pro bono basis is understandable: Some assistance—even if not provided by lawyers or immigration consultants—may be better than nothing. Moreover, some NGOs offer high quality assistance with immigration and refugee applications without necessarily having lawyers or immigration consultants perform all these services directly.¹⁴⁴ Similarly, some immigration law clinics employ paralegals and community legal workers to assist with immigration and/or refugee applications.¹⁴⁵

While there are good reasons to continue to allow this practice, the rule exempting pro bono representatives from the requirement that counsel in immigration and refugee matters must be lawyers or immigration consultants is vulnerable to abuse. In particular, it is difficult to ensure that non-lawyers and non-immigration consultants that purport to offer pro bono representation are doing so free of charge. In fact, there is evidence that at least some unauthorized representatives are likely charging fees in contravention of the regulations.

In 2008, the IRB developed a policy for dealing with unauthorized paid representatives.¹⁴⁶ This policy allows the IRB to review the files of persons suspected of being unauthorized paid representatives, to hold a hearing to determine whether these suspicions are well-founded, and, if they prove well-founded, to prohibit the person concerned from serving as a representative in further IRB proceedings.¹⁴⁷

143. *IRPA Regulations*, *supra* note 44, s 13.1.

144. Examples of highly regarded NGOs that use volunteers to assist with immigration and/or refugee applications include the FCJ Refugee Centre and the Halifax Refugee Clinic.

145. DOJ, *Analysis*, *supra* note 76 at 5; DOJ, *Representation*, *supra* note 11 at 5.

146. Immigration and Refugee Board, *Policy for Handling IRB Complaints Regarding Unauthorized, Paid Representatives* (28 March 2008), online: <http://www.irb.gc.ca/Eng/brdcom/references/pol/pol/Pages/paid_remun.aspx>.

147. *Ibid.*, s 5.6.

This process has recently been followed in the *Beiene Decision*.¹⁴⁸ According to the IRB, between 2004 and 2010, Hagos Beiene represented over four hundred applicants in IRB proceedings, mostly in refugee determinations. During this period, Mr. Beiene was neither a qualified lawyer nor a licensed immigration consultant. According to internet records, Mr. Beiene maintained two businesses: Hagos Paralegal Services and Hagos Immigration and Paralegal Services. Also, he was widely known in the refugee advocacy community—and by IRB staff—for meeting with clients and conducting other business meetings near the reception area of the IRB’s Toronto office.¹⁴⁹ Because of the large number of cases for which Mr. Beiene served as a representative, and due to concerns regarding his unusual business practices, the IRB reviewed his files. Following this review, Mr. Beiene was asked to provide evidence—in the form of income tax and other business records—that he was not charging fees. However, Mr. Beiene declined to respond to this request. He also declined to respond to repeated requests to inform the IRB as to whether he wished to participate in an oral hearing to make representations in response to the allegations made against him.¹⁵⁰

On 15 May 2010, the IRB issued a decision prohibiting Mr. Beiene from “representing and appearing on behalf of any person in any proceeding before all Divisions of the Board.”¹⁵¹ The IRB also noted that the prohibition would remain in effect until such time as Mr. Beiene becomes a member of a bar of a province or a licensed immigration consultant or until such time as he “furnishes proof that satisfies the Board that he is not charging a fee for his services.”¹⁵² Although ultimately the IRB did prohibit Mr. Beiene from continuing to represent persons in IRB proceedings, this case nonetheless demonstrates the scope of the problem: It is remarkable that Mr. Beiene was permitted to represent over four hundred persons despite the fact that IRB staff suspected—or should have suspected—that he was unlawfully charging fees for his services.

What this case—and the fact that this is currently the only reported decision of its kind¹⁵³—demonstrates is that the regulations purporting to protect individuals

148. (15 May 2010), RPD 15.7, online: <<http://www.irb.gc.ca/Eng/tribunal/decisions/beiene/Documents/BEIENE3a.pdf>>.

149. *Ibid* at paras 1-5.

150. *Ibid* at paras 7-11.

151. *Ibid* at para 24.

152. *Ibid*.

153. The only other case citing the *Policy for Handling IRB Complaints Regarding Unauthorized, Paid Representatives* is *Domantay v Canada (Minister of Citizenship and Immigration)*, [2008] FC 755 (TD). In this decision, the court refused an application for judicial review of an Immigration Appeal Division decision where the applicant did not know that his paid

appearing before the IRB by ensuring that their representatives are qualified and maintain sound business practices (including maintaining insurance and abiding by codes of professional conduct) do not appear to be effective in preventing unauthorized representatives from serving as paid counsel in immigration and refugee matters.

The government's recent legislative attempt at "Cracking Down on Crooked Consultants"¹⁵⁴ aims to deal with this problem.¹⁵⁵ If declared into force, the legislation would make it an offence to directly or indirectly represent or advise people for a fee in connection with immigration and refugee applications and proceedings without being a lawyer or a licensed immigration consultant.¹⁵⁶ The possible penalties would include fines of up to \$100,000 and imprisonment for up to two years.¹⁵⁷

In my view, while this aspect of the legislation is a step in the right direction, the prohibition against non-consultants and non-lawyers charging fees will be difficult to enforce in its present form. Specifically, unless the victims of unauthorized consultants are provided with protection against removal from Canada, they are unlikely to come forward with complaints. Moreover, while criminal sanctions may well deter some "crooked consultants" from offering their services, it is also predictable that—as with many enforcement mechanisms in the unlawful migration sector—other "crooked consultants" will respond by continuing to provide their services, but taking more strenuous measures (*e.g.*, holding passports or threatening family members) to prevent clients from reporting them to the authorities, thereby increasing the vulnerabilities faced by migrants who will, nonetheless, continue to use their services.

In this respect, it is telling that in the comments by the Minister noted above in Part III(B)(1),¹⁵⁸ the possibility that "crooked consultants" might assist refu-

counsel was an unauthorized representative and where the IRB failed to take measures to prevent the unauthorized representative from serving as counsel. In this decision the court noted that "there is a duty incumbent on the Board to verify that those individuals representing clients with whom it has dealings are authorized representatives pursuant to the Regulations, or that they are not receiving a fee for their services" (*ibid* at para 19).

However, the court went on to hold that the IRB could not be blamed in this case because the applicant accepted his paid representative (a non-lawyer and non-immigration consultant who worked for an immigration consultant) and that it is "not the obligation of the Board to police the applicant's right to counsel" (*ibid* at para 26).

154. *Crooked Consultants I*, *supra* note 135 and *Crooked Consultants II*, *supra* note 136.

155. See *e.g.* Kenney, "Cracking Down," *supra* note 141; Kenney, "Crooked Consultants," *supra* note 138.

156. *Crooked Consultants II*, *supra* note 136, s 1.

157. *Ibid.*

158. See text accompanying note 138.

gee claimants to “concoct bogus stories” was presented as “worse still” than the possibility that “[c]rooked immigration consultants victimize people who dream of immigrating to Canada.”¹⁵⁹ In light of the key finding of this study—that competent and qualified counsel is a key driver of successful outcomes in refugee claims—these comments by the Minister reflect a poor understanding of the serious consequences for refugees of being represented by unauthorized counsel. One might have hoped that the Minister—who is, after all, responsible for ensuring that Canada meets its obligations under international refugee law—would instead view the possibility that “crooked consultants” may cause individuals who meet the refugee definition not to be accorded refugee protection as at least as serious a problem as the possibility that some “crooked consultants” may put forward false claims.

IV. CONCLUSION

In recent years there has been a great deal of public discussion about Canada’s refugee determination system, much of it framed in response to the arrival in British Columbia of two ships of asylum seekers from Sri Lanka in 2009 and 2010.¹⁶⁰ In these discussions, government actors have frequently spoken of the need to get tough on human smugglers,¹⁶¹ “bogus refugees,”¹⁶² and “queue jumpers.”¹⁶³ Largely as a result of the perception that the current refugee determination system is vulnerable to abuse, a series of legislative reforms have been proposed, including the legislation passed by Parliament that will overhaul the refugee determination process in the coming months. Unfortunately, lost in much of the debate over the vulnerability of the refugee determination system to abuse is a discussion of Canada’s commitment to providing protection to those who meet the refugee definition and of the ongoing procedural flaws in the system that strives to determine who meets that definition. The present empirical study of the effect of counsel on refugee claim outcomes highlights one of those flaws:

159. Kenney, “Crooked Consultants,” *supra* note 138.

160. See *e.g.* Sunny Dhillon, “Canadians ‘hardening,’ Toews says,” *The Globe & Mail* (20 January 2011) S2.

161. See *e.g.* Ian Bailey & Gloria Galloway, “Kenney insists on smuggling crackdown,” *The Globe & Mail* (22 October 2010) A9.

162. See *e.g.* Kenney, “Cracking Down,” *supra* note 141.

163. See *e.g.* Citizenship and Immigration Canada, “Remarks by the Honourable Jason Kenney, P.C., M.P., Minister of Citizenship, Immigration and Multiculturalism on a balanced refugee reform” (30 March 2010), online: <<http://www.cic.gc.ca/english/department/media/speeches/2010/2010-03-30.asp>> [*sic*].

Outcomes in the refugee determination process hinge in part on whether claimants are represented by experienced lawyers.

This central finding must be understood in light of what this article has demonstrated regarding the provincial legal aid programs that are supposed to ensure that claimants can obtain such representation, namely that legal aid programs are becoming increasingly restrictive and that merit screening processes are sometimes applied in an arbitrary fashion. The result is that some people who meet the refugee definition are likely not being recognized as such because they cannot afford qualified counsel, a problem that is only going to be exacerbated when the reforms to the refugee determination process come into effect in the coming months. This not only places the lives of refugees at risk, but may also leave Canada in breach of our obligations under international refugee law. To prevent these risks and to ensure that Canada meets its international legal obligations, the federal government should transfer adequate funds to provincial legal aid programs to ensure that all refugee claimants who meet reasonable financial eligibility requirements are provided with counsel.

At the same time, the government should not miss the opportunity posed by the recent spate of legislative reforms in the refugee law context to reconsider the role of immigration consultants in the refugee determination process. The study has shown not only that consultants are more likely to bring forward claims that are later withdrawn or declared abandoned and are less likely than lawyers to be successful in refugee claims decided on the merits, but also that the immigration consulting industry has lost the confidence of the public. Until such time as this confidence is regained and the immigration consulting industry establishes a solid track record of ensuring that consultants meet standards of professional conduct (and that unqualified consultants are no longer operating), immigration consultants should not provide unsupervised representation in high stakes refugee determinations.

The present study has shown the importance of competent and qualified counsel in life and death refugee claim determinations. It is incumbent upon the federal government to ensure that refugee claimants are represented by competent and qualified counsel in order to ensure the fairness of the refugee determination process.