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IMMIGRATION AND REFUGEE LEGAL AID COST DRIVERS: FINAL REPORT

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Immigration and Refugee Legal Aid Cost Drivers

Final Report

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Executive Summary

This study identifies factors that drive immigration and refugee expenditures and outlines how these factors influence the cost to governments to provide these services. The study focuses upon legal aid for refugee claimants because the vast majority of cases, by volume and expenditure, fall into this category.

In his research, the author reviewed an extensive array of government reports, documents, and academic papers. He has also conducted targeted interviews and correspondence with key informants from provincial legal aid authorities and from the Immigration and Refugee Board (IRB). His analysis of this material was augmented by his years of personal observation and experience in refugee claims processing. [1]

Background

The most obvious legal aid cost driver is the level of demand for legal representation by people who cannot afford to retain counsel on their own account. Virtually, all refugee cases fall into this domain. Thus, there is a strong correlation between refugee claim volume and levels of coverage on the one hand and legal aid program costs on the other.

Legislative, procedural and jurisprudential developments all have the potential either to increase or to reduce legal aid costs. Where these changes simplify processes or clarify uncertainties in the law, they serve to reduce costs. On the other hand, when the changes create new uncertainty or impose new procedural requirements, they tend to increase the cost of legal representation.

Other factors, such as differences in tariff structures and modes for delivering legal aid services, and the nature of the proceedings involving immigrants and refugee claimants for which legal aid is required, also have an impact on legal aid costs, but to a lesser extent than does the sheer number of refugee claims.

Models For Service Delivery

Legal aid programs in Canada differ widely in the ways they provide legal aid services, and in the portion of such services that are delivered by salaried staff lawyers and by lawyers in private practice. Salary rates and the tariff rates for different services also vary widely among the different legal aid plans. The evidence, on balance, indicates that it generally costs less to deliver legal aid services through salaried lawyers than through lawyers who work on a fee for service basis.

[1] The author, John Frecker, was Deputy Chairperson of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB) from 1995 to 2001. At this time he planned and supervised implementation of a number of measures designed to increase CRDD productivity. He also directed the Law Reform Commission of Canada's research in administrative law from 1985 to 1992, during which time he authored a Report on the *Determination of Refugee Status in Canada* that informed amendments to the *Immigration Act* made in 1992.

In the area of immigration and refugee legal aid, evidence on the relative cost effectiveness of the two models is mixed. From published studies it is also difficult to determine which type of delivery method provides the highest quality legal representation. Both systems have advantages and disadvantages.

The main risks that have been identified with respect to staff-based legal aid programs are limitations on a client's right to choose counsel, low productivity, and concern that quality can be compromised due to structural pressures. There is also concern that administrative overhead tends to increase in staff offices that are not subject to competitive market forces, and that legal aid programs become more vulnerable to a withdrawal of services if staff have a monopoly over service delivery.

Supplier Induced Demand

In economic theory, when a person (called a "principal") relies on someone else (called an "agent") to deliver a service, there is a risk that the agent may provide less than the principal expects for a given price, or charge more than the principal intended to pay for the service provided. Economists describe this difference in the value of what the service is worth to the principal and the amount paid to the agent as an "agency cost". The difference arises because the principal and agent do not share the same information or objectives regarding what the principal expects.

Lawyers have an incentive to provide quality legal representation, but they also have an incentive to maximize their incomes. Clients rely almost completely on lawyers to identify what service is appropriate, and there is wide latitude as to what is the most appropriate course of action in many cases. In these circumstances, there is a possibility, that lawyers, when choosing between relatively equivalent options, will favour options that maximize their income over options that minimize cost to clients. This specific type of agency cost is called "supplier induced demand".

Supplier induced demand is often presented as the most significant limitation of the judicare model of service delivery. When tariffs have caps, there is an incentive for lawyers to maximize income by increasing the number of cases they handle and to work no more than the number of hours allowed on any individual case. To the extent that lawyers are expected to work beyond the cap without being paid, decline in the quality of service becomes a concern.

Evidence of the extent to which immigration and refugee legal aid arrangements under different tariffs are subject to supplier induced demand is limited. The prescribed time limits for services relating to immigration and refugee matters are so low that there is very limited opportunity for lawyers to maximize incomes by doing additional work. However, available evidence indicates that the average length of refugee hearings has been longer in Ontario and British Columbia, which pay for actual time spent in hearings, than in Quebec, which pays a fixed fee for each case. Also, utilization of the expedited process, in which manifestly well-founded claims can be determined without a hearing, has been lower in Ontario and British Columbia than in Quebec.

Alternative Options For Procuring Legal Services

Block contracting is an alternative to paying private practice lawyers for each individual case according to an established tariff. Legal aid authorities can have law firms bid competitively for blocks of cases or they can contract with firms to handle a specified number of cases of a particular type at an agreed total cost.

Block contracting of immigration and refugee cases does appear to offer some scope for improved efficiency in case management. To the extent that block contracts might enable counsel to concentrate on similar cases, and thereby to realize greater efficiencies in case preparation, they may also serve to reduce the overall cost of providing representation services. However, concerns about the possible erosion of quality of service and limitation of clients' choice of representation need to be addressed.

Another variant on the judicare model is franchising – where a limited number of lawyers or firms are granted a license to do legal aid work in a particular market. This system can have significant advantages in markets where legal aid work constitutes a significant portion of total available billings (as is the case in refugee law).

Given the limited experience with franchising in the Canadian legal aid context, it is difficult to assess possible effects using such a system might have on legal aid costs. One can assume that lawyers who are franchised as exclusive providers of immigration and refugee legal aid services would seek to maximize the return they receive from the franchise. Depending upon the arrangements under which they would be paid, they could be expected to maximize the hours billed on any given file or to maximize the number of tasks done for a flat fee. To maintain an appropriate level of competition needed to modulate price pressures, legal aid authorities would have to ensure that the number of lawyers being franchised is periodically adjusted to match fluctuations in total caseload.

By definition, clients for legal aid services are the least able to pay high legal fees. Three factors serve to keep rates paid for legal aid services below the prevailing rates in the private market. First, lawyers in private practice do not incur costs to collect accounts receivable from legal aid authorities. They do not have to write off any bad accounts on their legal aid billings. Second, many lawyers providing services to legal aid clients do so for altruistic reasons. They consciously accept substantially lower incomes than their colleagues in other areas of legal practice do because they have a deep ideological commitment to serve severely disadvantaged people in the community. Third, many lawyers in private practice are underemployed. Legal aid work provides income they are unable to earn from private clients. Thus, in some very important ways the markets for legal aid and other private clients are separate. They are further separated by career immobility arising from natural inertia and fear of the unknown.

Although it is reasonable to suppose that the increased use of paralegals to deliver immigration and refugee legal aid services has the potential to increase cost savings, current data is not strong enough to conclude how substantial such cost savings might be. Detailed analysis of the range of services that can be provided by paralegals and the probable cost of such services requires empirical research.

Assisted self-representation is a variant form of service delivery for people who do not qualify for legal aid. It combines public legal education with summary advice, and, in some cases, limited legal assistance. However, the possible effectiveness of assisted self-

representation in immigration and refugee legal aid is very limited because of substantial barriers related to language, literacy, and cultural experience.

Present legal aid tariffs provide limited scope for paying non-lawyers to provide services to immigrants and refugee claimants. With appropriate accountability and quality-control safeguards, paralegals and trained support workers affiliated with non-government organizations may be able to provide some representation services to immigrants and refugee claimants at a lower cost than lawyers can. Franchising arrangements could possibly facilitate the use of supervised paralegals and NGO workers to deliver some required services in relation to immigration and refugee matters. This could serve to reduce legal aid costs. However, careful evaluation of appropriately designed pilot projects is required before any definitive conclusion can be drawn in this regard.

Unique Drivers

The more immigrants and refugee claimants there are who require legal aid, the greater will be the cost of providing the required services. Since legal aid mainly covers refugee claims cases, the primary cost driver is the number of refugee claims made in Canada. Over the past four years the number of refugee claims has increased significantly.

The global population of refugees and internally displaced persons currently exceeds 18 million. In addition to this, there are many people who do not fit the legal definition of Convention refugee who migrate to countries like Canada to escape from intolerable conditions in their home countries. A combination of conditions in countries of origin and links with Canada influences the number of refugee claims that are made in Canada, as opposed to other developed countries.

The boundary between refugees and so-called economic migrants is often very thin. But the fact that the boundary is so thin makes it possible for prospective immigrants, particularly those from countries with poor human rights records, to use the refugee determination process as an alternative avenue for admission.

In 2000, over 90% of immigrants and refugees landed in Canada settled in Ontario, Quebec and British Columbia. The overwhelming concentration of refugee claimants in these three provinces has forced them to bear most of the legal aid costs in the immigration and refugee area.

Over the years, refugee claims made in Canada have represented between 4% and 8% of all claims made in the seventeen countries comprising Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC)[2]. Major shifts in claim intake in other countries have had very little impact on the number of refugee claims made in Canada.

It is sometimes hypothesized that Canada's liberal interpretation of the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol* to that Convention result in a higher number of claims being made in Canada. Review of the available data does not support this

[2] In addition to Canada, the member countries of the IGC are: Australia Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom, and the United States.

hypothesis. Canada's liberal interpretation of the *Convention* has not resulted in an increased volume of claims.

The presence of an anchor community of nationals from particular source countries may be a significant factor attracting individuals from these source countries to choose Canada as an asylum destination. Individuals seeking to be united with relatives who have already settled in Canada, but who do not qualify for landing in Canada through the regular immigration process, may be using the refugee determination process as an alternative entry channel.

Faced with significant restrictions on legal immigration, migrants are increasingly turning to migration agents and smugglers to assist them in gaining access to Canada. Ironically, the very measures that governments are taking to curtail illegal migration generally may be forcing asylum seekers to avail themselves of the services of smugglers since it is becoming increasingly difficult to gain entry without such professional assistance.

The activities of illegal smugglers may lead to more false asylum claims and to increased use of fraudulent identity documents. The Canadian enforcement response, including increased detention of undocumented refugee claimants and increased interventions by Minister's representatives at RPD hearings, may lead to longer, more adversarial hearings. This could also increase legal aid cost. But if such enforcement initiatives deter refugee claims, legal aid costs could decline.

Bilateral And Multilateral Agreements And "Safe Third Country" Provisions

The *Dublin Convention* and *Schengen Agreement* are agreements that coordinate immigration policy in Europe to encourage asylum claims to be made in the first member state entered while also ensuring the free movement of people across the borders of member states. These European agreements do not appear to have had any effect on the volume of refugee claims in Canada.

Canada has entered into a "safe third country" agreement with the United States. The underlying logic of this provision is that genuine refugees should reasonably be expected to claim asylum in the first safe country in which they arrive after leaving their home country. CIC predicts that the agreement will significantly reduce refugee claims volumes, which could significantly reduce legal aid costs.

However, there may also be legal aid costs associated with this agreement. More claimants may travel by smuggler, destroying travel documents to hide their route, and procedural arguments related to which country has responsibility will arise. Also, until precedent is set, costly cases challenging the fairness of certain asylum policies in the United States, particularly with regard to detention of asylum seekers, are likely to arise.

Implications Of Mass Arrivals Of Refugee Claimants

Organized mass arrivals of asylum seekers, such as the arrival in 1999 of four boatloads of migrants from China who claimed refugee status, attract considerable media attention. The impact of such exceptional events on legal aid costs depends on how Canadian immigration authorities respond. If the claimants are dealt with in the ordinary course the primary cost implication is related to the number of claimants involved who require legal aid. However, if the government responds with special measures, such as they did in British Columbia where the

claimants were detained in provincial jails distant from Vancouver, money has to be found to cover the added legal aid costs associated with periodic detention review hearings and the added costs associated with providing legal representation to persons who are being held in secure detention facilities.

Domestic Considerations

Immigrants who are trying to enter Canada will naturally gravitate to the refugee determination process as a path of access if the barriers to regular immigration are inordinately high. This may occur because family reunification is difficult or because Canadian consular services are difficult to access in the home countries. Many of these individuals have valid refugee claims, but they would be just as happy to come to Canada through regular immigration channels if that were a practical and accessible option. If more of these cases could be handled through regular immigration channels there would be some costs savings to legal aid plans.

The factors that draw individuals to claim refugee status in Canada operate independently of the factors governing overseas selection of refugees. Therefore, measures to increase overseas selection of refugees for resettlement in Canada are unlikely to reduce the number of refugee claims made in Canada. Increased resettlement of refugees selected overseas may, in fact, attract additional inland refugee claims from relatives of the persons who are selected from overseas.

Although they currently account for less than 1% of legal aid expenditures, the frequency of “danger opinions", where the Minister of Immigration or the Solicitor General jointly certify that a claimant is inadmissible to Canada as a security risk, and the litigation cost associated with such opinions may rise as a result of post-September 11th enforcement activities. This could become a new cost driver for legal aid, should the use of danger certificates increase significantly or should tariff allowances be increased with respect to more complex cases.

Legal aid coverage for immigration inquiries before the Adjudication Division of the IRB, which is the first step in removal proceedings, is available in only four provinces (which do not include Ontario). Eligibility for coverage is subject to a merits test. Per case costs are low, as are current volumes. Though removals are becoming more common, immigration inquiries still represent a very small portion of total costs and are not driving costs in any significant way.

Refugee claimants are initially interviewed by CIC officials to gather information needed to facilitate security checks and eligibility determinations. The Supreme Court determined in 1991 that these interviews are not analogous to a hearing, so there is no right to counsel at the interviews. No legal aid plans in Canada currently provide coverage for point-of-entry interviews. However, many refugee advocates argue that the nature of these interviews has changed since that Supreme Court decision was rendered as the interviews have become more structured, rigorous and important to downstream decision making. Should legal aid be required at this stage it could be a very large additional cost, perhaps requiring the implementation of duty counsel systems supported by paralegals. However, the possibility of legal aid being extended at this stage is not imminent, so this is not a cost driver at this time.

Specific Challenges

Expenditures for translation and interpretation services represent over 16% of legal aid expenditures on immigration and refugee matters in British Columbia and Ontario. This is a significantly higher portion than in other areas covered by legal aid, such as criminal and family law. Required expenditures for expert assessments and reports from medical doctors and psychologists' are also a significant cost driver in relation to immigration and refugee legal aid, though not as significant as the cost for interpretation and translation services.

Most refugee claimants are totally unfamiliar with the Canadian legal system. Refugee claimants who are victims of torture, gross sexual abuse, or other extreme trauma often have great difficulty relating their experiences. Lawyers must often work through interpreters when communicating with refugee claimant clients. All of these factors make it necessary for lawyers to spend more time preparing refugee claimants for hearings than is required when dealing with other clients. However, case preparation time is limited under all immigration and refugee legal aid tariffs. Legal aid authorities rarely pay lawyers for required work beyond the specified time limit. Therefore, the extra time that lawyers must spend on case preparation does not have a significant impact on immigration and refugee legal aid costs.

Canada recognizes that persecution based upon gender falls within the 1951 Convention Relating to the Status of Refugees. Although "gender-based claims" are more readily accepted in Canada than in many other IGC countries, the number of gender-related claims received in Canada is still very small. Therefore, the relatively expansive Canadian approach on gender-related claims is not a significant legal aid cost driver.

Procedural Requirements

The RPD has authority to determine manifestly well-founded refugee claims without holding a formal hearing. Legal aid costs can be considerably lower for cases dealt with through this expedited process than they are for cases determined in regular hearings. Therefore, increased use of the expedited process offers a significant way to achieve legal aid cost savings in jurisdictions where lawyers are paid at an hourly rate. (There are no cost savings if lawyers are paid block fees or flat fees.) However, the use of the expedited process is constrained by several factors, the most significant of which is the portion of well-founded claims that can be reasonably determined without a hearing.

In provinces that pay lawyers an hourly rate for time spent in hearings, the duration of hearings is clearly a cost driver for legal aid. The length of hearings is a function of a complex interplay of factors, most of which are out of the control of legal aid authorities – complexity of the case, skill of the presiding member, and strategies used by protection officers, the Minister's representatives and lawyers. It has been hypothesized that paying lawyers at an hourly rate leaves the system open to 'supplier-induced demand'. If the average length of refugee hearings could be reduced, significant cost savings could be realized. For instance, the average length of refugee hearings in Montreal, where lawyers are paid a flat fee for each case regardless of how much time they spend on the case, is almost 20% less than in Toronto and 33% less than in Vancouver, where lawyers are paid an hourly fee for actual time spent in hearings. If the average length of hearings in Toronto were reduced to the length of hearings in Montreal, legal aid costs in Ontario could be reduced by $280,000 a year.

Decisions of the IRB are subject to judicial review on leave of a judge of the Federal Court. These cases are quite costly. The overall cost has been kept down because leave for judicial review is granted in only a small portion of cases. This situation could change significantly if there is an increase in the number of cases where leave is granted following implementation of the *IRPA*, as the Federal Court is called upon to clarify issues of interpretation with respect to the new legislation.

Appeal proceedings before the Immigration Appeal Division (IAD) of the IRB are not a significant legal aid cost driver. Removal and sponsorship appeals are rarely covered under legal aid plans. Permanent residents who are attempting to sponsor relatives for landing in Canada are generally in an income bracket that disqualifies them for legal aid.

Under the former *Immigration Act*, unsuccessful refugee claimants who were facing removal had two additional avenues of recourse beyond judicial review. They could apply to be recognized as a member of the Post Determination Refugee Claimants in Canada Class (PDRCC) and they could submit a humanitarian and compassionate appeal (H&C). Legal aid costs relating to these proceedings were not high, so PDRCC proceedings and H&C appeals did not constitute a significant cost driver for legal aid plans.

Legislative And Jurisprudential Developments

Recent legislative and policy changes, specifically implementation of the new *Immigration and Refugee Protection Act* (*IRPA*) and the anticipated implementation of a Safe Third Country Agreement between Canada and the United States, are expected to drive immigration and refugee legal aid costs in a number of different ways.

Under *IRPA*, immigration officers are required to determine eligibility of refugee claims to be referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board within three working days after a claim is received. Immigration officers have the authority to re-determine eligibility at any time before a final decision is made on the claim. These measures are unlikely to have any significant impact on legal aid costs.

Under *IRPA* the quorum for refugee status determination hearings has been reduced from two to one RPD member. It is anticipated that as a result of this change, the number of claims determined by the RPD across Canada will increase by 17% - 20%. The impact of this change will be felt most strongly in Toronto, which had the lowest level of hearings conducted by single member panels prior to implementation of *IRPA*. Any increase in the complement of RPD members appointed to Toronto to help clear the backlog of claims that has built up over the last two years will likely result in a further short-term increase in legal aid costs in Ontario.

Another possible effect of the move to one-member panels is that RPD members who have relatively limited experience presiding at hearings may have some difficulty keeping their hearings focused. This may result in lengthier hearings, which could increase legal aid costs in those jurisdictions that pay for actual time spent in hearings, without any cap. It is also possible that there will be an increase in the number of reviewable errors made by new members who are conducting hearings alone without the opportunity to consult a more experienced colleague. Any resulting increase in the number of cases where leave for judicial review is granted and where RPD decisions are quashed and have to be re-heard will be reflected in an increase in legal aid

costs. However, the cost increases resulting from all of these factors combined are likely to be quite small as a portion of total immigration and refugee legal aid costs.

Under *IRPA*, the RPD has been given jurisdiction to grant protection on a variety of grounds that formerly were covered in separate proceedings. Dealing with all risk-based grounds for protection in a single proceeding eliminates the Post Determination Refugee Class in Canada (PDRCC) proceedings and greatly reduces the scope of humanitarian and compassionate appeals (H&C), for which legal aid was provided in some provinces. The immediate impact of this change on legal aid costs will be fairly limited because the amount spent on PDRCC and H&C appeals was quite small.

The consolidation and expansion of the protection grounds has generated some uncertainty that is likely to give rise to legal arguments regarding interpretation, which may lengthen RPD hearings. One can anticipate that there will also be series of test cases as the Federal Court is called upon to provide definitive guidance on the meaning of the legislative changes. The resulting increase in legal aid costs may well offset any saving resulting from elimination of PDRCC and reduced demand for H&C appeals, at least in the short term.

IRPA also establishes a new Refugee Appeal Division (RAD), which is mandated to decide appeals relating to RPD status determination decisions. However, implementation of the provisions relating to the RAD has been delayed. Legal aid cost implications of implementation of the RAD could vary widely, depending on whether there is a significant decline in the number of applications for leave for judicial review and in the number of cases in which leave for judicial review is granted. There could be a saving in legal aid costs in cases where the RAD is able to correct errors in RPD decisions without remitting the claim for a new RPD hearing, and where unsuccessful appellants do not apply for leave for judicial review. However, in cases where RAD decisions become the subject of applications for leave for judicial review, any legal aid costs associated with the RAD proceedings would be entirely new. On balance, it is estimated that implementation of the RAD will generate a net increase in legal aid costs at the national level in the range of $1.2 million to $2.6 million.

Unsuccessful refugee claimants, repeat claimants, and any persons whose refugee claims have been determined to be ineligible for referral to the RPD will be able to apply for a Pre-Removal Risk Assessment (PRRA) when removal from Canada is imminent. This assessment will be limited to evidence that has not previously been considered by the RPD. It is anticipated that in cases where there has been no prior hearing on the merits of a refugee claim and in other cases where credibility of the claimant is in issue, a hearing will be required. Other PRRA proceedings will be based on review of written submissions, similar to PDRCC applications under the former *Immigration Act*. If legal aid coverage is provided for PRRA proceedings, costs would likely be similar to costs per case on claims where an RPD hearing is required. Legal aid costs relating to PRRA based on written submissions would likely be similar to those formerly associated with PDRCC applications or H&C appeals.

Under *IRPA*, at any time before the RPD finalizes the determination of an asylum claim, an immigration officer may reverse a previous eligibility determination. This could raise legal aid costs because claimants whose cases are suspended with likely apply for legal aid for the admissibility determination before the Immigration Division and effort may be wasted on cases that are recalled. The eventual cost impact will be determined by the extent to which legal aid

plans expand coverage to refugee cases before the Immigration Division and by the way CIC applies this new power, both of which are difficult to determine in advance.

Under *IRPA*, all repeat claims, including prior claims that the RPD has determined to have been withdrawn or abandoned, will be dealt with in the PRRA process rather than being referred to the RPD to be determined. This change is expected to have limited impact on legal aid costs. However, dealing with repeat claims in the PRRA process is likely to be less costly than under the former *Immigration Act* where the previous CRDD determination could be completely re-litigated in a repeat claim.

The package of security legislation enacted by Parliament in the wake of the terrorist attacks in the United States on September 11, 2001 is unlikely to have any significant impact on immigration and refugee legal aid costs.

Delays In Processing

Delay in processing refugee claims has the potential to drive legal aid costs in two ways. First, it tends to increase the amount of work that has been done with respect to individual cases, necessitated by rescheduling and extra time spent in hearings. Second, delay in making final determinations on asylum applications, and delay in removing failed claimants, encourage the abuse of the asylum determination process as a means of bypassing regular immigration channels.

An examination of how case backlogs - which is one indicator of increasing processing times - affect overall refugee volumes indicates that delays in the overall time failed claimants can remain in Canada stimulates additional claims because it makes this form of “temporary residence” in Canada an economic alternative for migrants.

All of this is a two-edged sword with respect to legal aid costs. Delay in removal appears to be one of the factors driving intake of refugee claims, and therefore driving demand for legal aid services. However, efforts to discourage demand could drive legal aid costs, should they involve remedies used in other countries, such as increasing the number of detentions or expediting removal procedures, which might give rise to costly legal challenges based on *Charter of Rights and Freedoms* arguments.

Introduction

This study has been undertaken to identify the factors that drive immigration and refugee legal aid expenditures and to outline how these factors influence the cost to governments to provide these services. Every province is facing pressing demand for services in virtually every area where the legal system has significant impact on the lives of Canadians. The per case cost of providing legal aid for immigration and refugee matters has risen even faster than it has in other sectors[3]. Understanding what is driving this cost increase with respect to immigration and refugee matters is essential to the long-term stability of legal aid programs and the development of sound legal aid policy.

Working assumption

Ontario, Quebec and British Columbia among them account for over 90% of all immigration and refugee legal aid expenditures in Canada. Over the past two fiscal years, roughly 92% of Legal Aid Ontario (LAO) expenditures on immigration and refugee matters related to proceedings before the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB) (Rod Strain, memo to Mary Marrone, June 11, 2002)[4]. It is estimated that in fiscal year 2001-02 roughly 90% of immigration and refugee legal aid expenditures in British Columbia related to refugee determination proceedings, including judicial review of CRDD decisions (Legal Services Society, 2001a)[5]. In Quebec, between 90% and 92% of immigration and refugee cases funded by the Commission des services juridiques over the past ten years have related to refugee claims (Claude Hargreaves, interview with Pierre Duquette, June 14, 2002). In Quebec, between 90% and 92% of immigration and refugee cases funded by the Commission des services juridiques over the past ten years have related to refugee claims (Claude Hargreaves, interview with Pierre

[3] Lippert & Easton (1997: 239) note with respect to legal aid costs in Ontario for the period 1985 to 1995, that criminal costs per case in real dollars rose by an average of 10.5% each year. The average annual growth rate for all civil cases was 14.5%. For immigration cases, the growth rate was 79.4%, far and away higher than for any other subject area. Comparable figures for other provinces are not readily available.

[4] Legal Aid Ontario reports that in 2000-01, $12,458,995 out of a total of $13,578,150 spent on immigration and refugee matters was for representation before the CRDD. In 2001-02, $15,273,337, out a total I&R expenditure of $16,438,294, was related to CRDD proceedings.

[5] It is interesting to note that the LSS appears to devote a much higher portion of its budget for immigration and refugee to judicial review than does LAO. LSS reports that $1,097,869, representing roughly 21% of expenditures on immigration and refugee matters in fiscal year 2000-01, was allocated to judicial review proceedings in the Federal Court. For the same year, LAO reports that it spent only $654,794 on judicial review relating to immigration and refugee matters. This represented less than 5% of LAO's total I&R expenditures for that year. It is difficult to explain these figures, particularly considering that roughly four times as many CRDD decisions were rendered in Ontario than in BC. However, this does not alter the core fact that over 90% of I&R legal aid expenditures in both provinces are allocated to providing representation for refugee claimants.

Duquette, June 12, 2002). In all three provinces, the most significant single cost relates to provision of representation for refugee claimants at status determination hearings before CRDD. A substantial portion of the remaining expenditures are directed to providing legal aid for judicial review of CRDD decisions in the Federal Court, and for post-determination risk assessments (PDRCC) and humanitarian and compassionate reviews (H&C) on behalf of failed refugee claimants. Approximately 2-6% of all immigration and refugee legal aid spending is directed to providing legal representation for detention reviews and immigration inquiries before the Adjudication Division of the IRB. Many of these cases also relate to refugee claimants. Immigration Appeal Division (IAD) proceedings[6] account for less than 1% of immigration and refugee legal aid expenditures in Ontario (Roderick Strain, memo to Mary Marrone, June 11, 2002) and the same appears to be the case in British Columbia and Quebec. The balance is allocated to other judicial review proceedings in the Federal Court and to various submissions to the Minister[7]. Many of these proceedings also involve failed refugee claimants. Thus, cost drivers relating to legal aid for immigrants who are not refugee claimants are of marginal interest for purposes of this inquiry.

Approach and structure of the report

Research for this study is focused primarily on cost drivers related to provision of legal aid to refugee claimants and failed refugee claimants. In concentrating on refugee claimants, however, the study does not ignore the significance of immigration considerations as a cost driver for legal aid. Factors that cause would-be immigrants to use the refugee determination process as an alternative channel for gaining admission to Canada are still relevant as cost drivers for legal aid. Substantial legal aid expenditures are committed to dealing with refugee claims of this sort.

Chapter 1 of this report contains a summary overview of legal aid cost drivers as identified in a review of the available literature. Apart from looking at the obvious factors, that is costs being driven by increasing demand for legal aid services and by the increasing complexity of legal proceedings, Chapter 1 includes a brief review of literature relating to how the manner in which legal aid is delivered affects program costs. The problems that arise as a result of specific economic incentives that are at play in the legal aid context are also examined. There are two aspects to this. First, where someone else is paying, clients may be less vigilant about costs incurred on their behalf. Second, when clients have little knowledge about what services they require and legal aid authorities have no ready way to ensure the services provided are necessary, there is a risk that lawyers may provide and bill for services beyond the level intended by the legal aid authority.

[6] Sponsorship appeals and removal appeals by permanent residents.
[7] Humanitarian and compassionate appeals (H&C), Post-determination Refugee class in Canada (PDRCC) submissions, and submissions with respect to certification of individuals as a public danger or security threat.

Chapter 1 also includes a brief examination of the impact of legal aid tariff structures as a cost driver, that is the extent to which the tariff affects how lawyers handle cases and the costs they incur in representing legal aid clients. The significance of external factors, such as the prevailing market rates for legal services and the availability of alternatives to legal aid as cost drivers for legal aid programs is also discussed.

Factors at the international level that are driving legal aid costs by contributing to the continuing increase in the number of asylum claims made in Canada are examined in Chapter 2. These factors in the international environment may have a bearing on choice of Canada as a preferred country of destination, both by persons fleeing persecution and by those who use the refugee determination process simply as a way to gain access to Canada. While these international factors are not significant cost drivers with respect to legal aid programs in general, they potentially have a significant impact on the level of immigration to Canada and the number of refugee claims made in this country, which directly affects immigration and refugee legal aid costs.

Chapter 3 focuses on domestic factors that may be considered cost drivers unique to immigration and refugee legal aid. This includes a review of how Canadian immigration and asylum policies influence the choices people make regarding whether to come to Canada through the asylum route or through normal immigration channels. This chapter also examine how domestic immigration enforcement policies drive legal aid costs. For example, enforcement activities that result in more people being detained or deported have a direct impact on the number of legal aid applications for representation in relation to detention reviews.

Chapter 4 focuses on specific challenges relating to provision of legal aid for immigrants and refuge claimants. First, the cost impact of unique features of immigration and refugee cases, including attributes of the specific clientele for whom legal aid is being provided is examined. For example, the need to deal with clients through interpreters is a direct cost that does not apply to the same extent in other cases where legal aid is provided. It may also be an indirect cost driver since counsel are required to spend more time with clients to obtain necessary information and instructions than they do when no interpreter is required. Most immigrants and refugee claimants are unfamiliar with the Canadian legal system. Also, many refugee claimants are traumatized as a result of experiences they endured in their country of origin. The impact that these factors have on the cost of providing effective legal representation is assessed.

Chapter 5 focuses on structural features of legal processes relating to immigrants and refugee claimants, as they affect legal aid costs. The various legal processes for which legal aid might be provided are reviewed and the impact that established procedures and operational practice may have on legal aid costs is assessed.

Chapter 6 provides an assessment of the anticipated impact of legislative changes, specifically the new *Immigration and Refugee Protection Act* and recent amendments to national security legislation, on the cost of providing legal aid for immigrants and refugee claimants. The impact major court decisions have had on demand for legal aid and on the cost of providing effective representation is also considered.

Chapter 7 is devoted to analysis of the cost consequences of delay at various stages in legal processes involving immigrants and refugees claimants. This chapter includes an examination of the hypothesis that delay in reaching final decisions on refugee claims and delay in effecting removal of failed refugee claimants draws would-be migrants who do not qualify for

admission to Canada to use the refugee determination process as an alternative channel of access. The cost impact of delay at various stages in legal proceedings involving immigrants and refugee claimants is also discussed. For example, costs increase when counsel, in preparation for resumption of an adjourned hearing, is required to review work already completed.

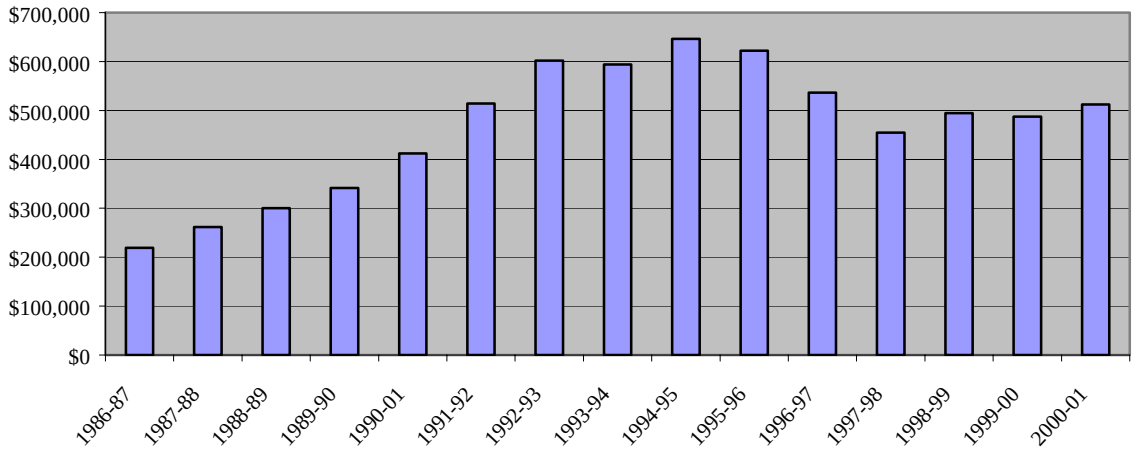
Within the limited scope of this project, it is impossible to undertake a primary econometric analysis of any of the individual cost drivers identified. Rather, the analysis and commentary on specific cost drivers relating to immigration and refugee legal aid is based on a review of readily accessible literature and information pertaining to each of the factors identified. The analysis draws heavily on the author's personal experience in the area[8]. Statistical information on program costs and on migration flows is provided where available.

[8] The author, John Frecker, was Deputy Chairperson of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB) from 1995 to 2001. At this time he planned and supervised implementation of a number of measures designed to increase CRDD productivity. He also directed the Law Reform Commission of Canada's research in administrative law from 1985 to 1992, during which time he authored a Report on the *Determination of Refugee Status in Canada* that informed amendments to the *Immigration Act* made in 1992.

1.0 Legal Aid Cost Drivers – A General Overview

Chart 1 contains a summary of data relating to all legal aid expenditures in Canada over the 14 years from 1986-87 to 1999-2000. In the eight years between 1986-87 and 1994-95, expenditures across Canada increased by 195%, from $219 million to $646 million. Even adjusting for inflation, legal aid expenditures during that eight year period rose by 127% (Canadian Centre for Justice Statistics, 1996: Table 4). Faced with the prospect of uncontrolled growth in legal aid expenses, provincial governments and the federal government, which were providing almost 85% of all legal aid funding, imposed limits on the amount they were prepared to pay. Legal aid authorities were forced to reduce coverage and to impose other cost control measures such as tariff reductions and holdbacks on amounts paid to lawyers who provided legal aid services. From 1995 to 1998 annual expenditures on legal aid declined from $646 million to $454 million, a drop of almost 30%.

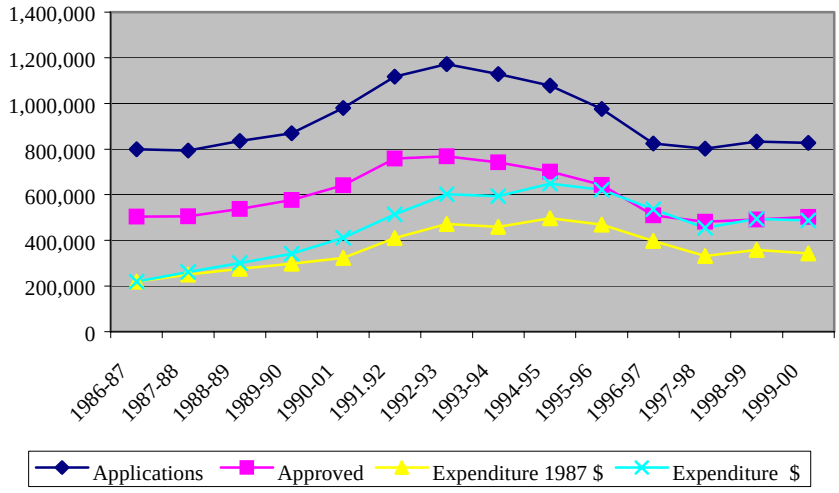
Chart 1 Legal Aid Expenditures in Canada by Year
Current Dollars '000
1986-87 to 1999-00



Source: Legal Aid Resources and Case Load Statistics, 1994-95 – Table 4
Legal Aid Resources and Case Load Statistics, 1999-2000 – Table 4
Legal Aid Resources and Case Load Statistics, 2000-01 – Table 4

One consequence of the sharp expenditure drop from 1994-95 to1997-98 has been a reduction in the number of cases for which legal aid is provided. Chart 2 illustrates the shift in the number of legal aid applications received and approved and fluctuations in the total amount spent on legal aid across Canada from 1986-87 to 1999-00. Some of the savings realized in recent years have been achieved by reducing the cost per case for the legal aid services provided; however, the greatest saving has been achieved through cut backs in the number of clients served.

Chart 2 Legal Aid Applications Received and Approved and Legal Aid Expenditures in Current and 1987 Dollars 1986-87 to 1999-00



Source: Legal Aid Resources and Caseload Statistics, 1994-95 and 1999-2000 – Tables 4, 9 & 10

Changes in the number of people qualifying for legal aid, and increasing incidence and complexity of legal proceedings for which legal aid is required, as well as changes to laws and policies affecting these proceedings, account for a portion of the cost fluctuation that has been observed. Other potential cost drivers identified include the way in which legal aid services are delivered, legal aid tariff structures, and what economists describe as "supplier-induced demand"[9]. The sections immediately following provide a brief overview of key findings from the general literature on legal aid cost drivers.

1.1 Case volume and demand for legal aid services

One might reasonably assume that the most obvious legal aid cost driver is the level of demand for legal representation by people who cannot afford to retain counsel on their own account. The cost impact of increased demand for legal aid services is readily apparent from data on caseload trends in legal aid in Chart 2. The late 1980s and early 1990s were marked by dramatic growth in applications for legal aid, which itself was a function of increased demand and of expansion of the range of matters covered by legal aid programs. Between 1986-87 and 1993-94, the number of applications for legal aid across Canada increased by 35%. At the same time, the number of applications approved for legal aid increased by 40%. Expenditures on legal

[9] "Supplier –induced demand has been defined in a number of ways, but the central idea is that a professional advisor can, because of his or her informational advantage, increase the amount of services the client would like to use (McCamus, Brenner, et al., 1997: 122). In the legal aid context, Bevan (1996: 105) suggests supplier-induced demand arises when "the supplier [the lawyer], in acting as agent for the principal [the legal aid authority], brings about a level of consumption [of legal services] different from that which would have occurred if a fully informed principal had been able to choose freely."

aid through that period rose much faster than the growth in the caseload (by 195% in current dollars, 127% in constant 1987 dollars). However, a significant portion of the expenditure increase can reasonably be attributed to the simple increase in the number of cases for which legal aid was being provided.

In 1994-95, Ontario, which operates the largest legal aid program in the country, imposed sharp limitations on the number of cases approved for legal aid. The resulting decrease in caseload was reflected in the national statistics. Paradoxically, total expenditures on legal aid in that year continued to climb. This is in part attributable to the normal lag factor. Many of the cases approved for legal aid in 1993-94 would not have been billed until 1994-95. As will be seen below, other factors may also have been driving legal aid costs. In any event, the full cost impact of the caseload reduction started to show in 1995-96, and since that time total expenditures on legal aid have declined roughly in line with the decrease in caseload. From 1995-96 to 1999-2000, the number of cases approved for legal aid decreased by roughly 31% and inflation adjusted expenditures decreased by 33%. In current dollar terms, expenditures decreased by 26% over that 5-year period (Canadian Centre for Justice Statistics, 2001: Table 4).

It is clear that during the period of rapid growth, between 1986-87 and 1994-95, expenditures increased at a much faster rate than the growth in caseload. After 1995, when the major restructuring of legal aid programs began to take effect, expenditures, expressed in constant dollars, declined slightly faster than the drop in the number of approved legal aid applications. The non-linear relationship between caseload and expenditures suggests that one must look beyond the simple factor of demand and resulting workload to identify a fuller range of legal aid cost drivers.

A number of possible factors affect demand for legal aid services. Demand for legal aid in criminal cases tends to be directly related to the number of criminal charges laid by the police[10]. Charging activities are affected by policies, such as zero tolerance relating to domestic violence and impaired driving, and by the level of police presence in a community. Increased police presence tends to be accompanied by an increase in the number of charges laid. As more offences are observed and more offenders are apprehended, more charges are laid. Police attention and criminal charges are directed disproportionately to the portion of the population that falls below the income threshold applied to determine eligibility for legal aid (National Council of Welfare, 2000: 12-18). Thus police charging practices have a direct impact on the number of legal aid applications received and approved. This in turn drives legal aid costs.

The picture is much more complex with respect to civil legal aid. For a start, there is wide variation among provinces with respect to the civil matters covered[11]. Also, costs with respect to civil matters, particularly with respect to custody and to immigration and refugee matters, have been more volatile than with respect to criminal matters. In a detailed analysis of legal aid expenditure patterns in Ontario, Owen Lippert and Stephen Easton (1997: 231-233)

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[10] In 1999-00, criminal matters accounted for roughly 46% of all cases approved for legal aid cases and roughly 45% of legal aid expenditures. The ratio of criminal to civil cases varies widely among provinces, from a low of 35% criminal cases in Quebec to a high of 81% in Prince Edward Island. (Statistics Canada, 2001: Table 5 and Table 7). While there is some variance among provinces with regard to which criminal cases are eligible for legal aid, coverage for criminal matters is far more consistent than is the case with respect to civil matters.

[11] For example, four provinces, Nova Scotia, New Brunswick, Prince Edward Island and Saskatchewan, and the three territories, provide no coverage for immigration and refugee matters. Coverage for immigration and refugee matters that is provided in the other six provinces is quite variable.

noted that in every criminal category other than homicide, the trend in expenditures was converging with case volume, that is toward a percentage of spending consistent with the percentage of cases in each category. On the civil side, the percentage expenditures on immigration and refugee cases, and to a lesser extent on contested divorces, was increasing relative to the percentage of these cases in the overall caseload.

Notwithstanding the greater volatility in civil legal aid expenditures, there is a loose correlation between the level of coverage and program costs. The increase in program expenditures observed through the late 1980s and early 1990s was accompanied by an expansion in the range of civil cases for which legal aid was provided. Conversely, the contraction that took place in the late 1990s resulted in part from removal of legal aid coverage for certain types of civil cases, for example the elimination of divorce and wrongful dismissal certificates in Ontario in 1995.

1.2 Government policy and enforcement activities

Demand (in the economic sense) for legal aid services is influenced, in part, by government policy and enforcement practices. LAO attributes a significant portion of the 21% increase in the number of criminal certificates issued between 1996 and 2000 to changes in the *Criminal Code* and other federal and provincial legislation affecting youths[12]. In addition, LAO points to the decision by government to adopt zero tolerance policies in areas such as impaired driving and domestic violence as factors affecting demand for legal aid. These policy changes result in an increased number of charges and greater likelihood of incarceration upon conviction, which is a significant factor in determining eligibility for legal aid. On the civil law side, changes to the *Mental Health Act* contributed to a 126% increase in the number of mental health certificates issued between 1996 and 2001. Similarly, changes in the *Child and Family Services Act* and an increase in resources allocated to issues such as child protection and victims of violence led to increased demand for legal aid in these areas (Legal Aid Ontario, 2001b: 7-9; 2001c: 14-16).

Policy and legislative changes affecting immigrants and refugees have similar potential to influence demand for legal aid. The role of specific developments in this area is examined in detail in Chapters 3 and 6 of this report.

1.3 Process driven costs

Procedural requirements imposed by courts and tribunals, and delays occasioned by backlogs and inefficiencies in court and tribunal processes affect the cost of legal aid services. For example, when court calendars are heavily backlogged and lawyers representing legal aid clients are required to attend multiple times at court simply to secure a hearing date, the cost of these appearances becomes a direct legal aid expense. Added steps, such as mandatory pre-hearing conferences may reduce overall costs if they result in cases being settled without need for a trial. But if they do not result in settlements or reduce the overall court time required to

[12] The LAO Business Plan for 2001-2002 specifically refers to creation of new offences under the *Safe Streets Act*, the introduction by the federal government of procedures requiring persons convicted of some offences to provide DNA samples, changes in the *Criminal Code* establishing new penalties for persons convicted of communicating with a child prostitute, introduction of the new *Youth Criminal Justice Act*, and the *Safe Schools Act.*

resolve cases, they increase legal aid costs. Changes in rules of procedure, such as the new *Family Court Rules* in Ontario, impose additional paperwork and case preparation requirements that are reflected in increased legal aid costs (Legal Aid Ontario, 2001b: 8)

Legislative, procedural and jurisprudential developments all have the potential either to increase or to reduce legal aid costs. It logically follows that where these changes simplify processes or clarify uncertainties in the law, they serve to reduce costs. On the other hand, when the changes create new uncertainty or impose new procedural requirements, they tend to increase the cost of legal representation.

1.4 Nature of cases

It is commonplace for lawyers and judges to observe that litigation, in both criminal and civil matters, has become increasingly complex. Trials that typically lasted just a few days in the past now frequently take weeks to complete. This is in part a function of changes in the way in which lawyers conduct litigation, for example, with increased reliance on expert witnesses and increased resort to complex procedural and evidentiary motions. The *Charter of Rights and Freedoms* has also provided fertile ground for new legal challenges, particularly in the areas of criminal law, administrative law, family law, and human rights law. These are all significant subject areas for legal aid clients. The increase in case complexity has been accompanied by a corresponding increase in the amount of legal work that must be done on individual cases (Legal Aid Ontario, 2001c: 17). This has an impact on legal aid costs, just as it does on the legal service costs that are charged to private, paying clients.

The potential consequences for clients in individual cases also have significant legal aid cost implications. The more significant the outcome of a case is for the client, the greater is the pressure the lawyer is under to do everything possible to ensure that the client achieves the desired outcome. Cost of representation is not likely to be the foremost concern for individuals who face serious criminal charges, who are battling over custody of a child, or who face imprisonment, torture or death in their home country. When the gravity of consequences pushes a lawyer to expend greater effort on a client's behalf, the cost of legal representation will naturally tend to rise.

Negotiated settlement of cases can significantly reduce legal costs. This is one reason why mediation and other forms of alternative dispute resolution have become increasingly more prevalent in civil litigation. Clients involved in cases where everything can be reduced to a monetary sum will generally consider a negotiated settlement if the reduced legal costs will produce an equivalent or better economic outcome than they might get if the case went to trial. But with refugee claims, the only issue to be decided is whether or not an individual falls within the statutory definition of a Convention refugee or a person in need of protection. Cases of this sort cannot readily be resolved through a negotiated settlement. Legal costs tend to be higher when cases have to be determined in a hearing. Where cost of representation is covered by legal aid, which is the case for most refugee claimants, this cost is borne by the legal aid authorities.

1.5 Cost impact of different modes of delivering legal aid

Legal aid programs in Canada differ widely in the ways in which they provide legal aid services, and the portion of such services that are delivered by salaried staff lawyers and by lawyers in private practice. Salary rates and the tariff rates for different services also vary widely among the different legal aid plans. These differences are reflected in different unit costs (i.e. cost per case), which in turn drive overall program costs.

A number of studies, starting with a seminal study on criminal legal aid services in Burnaby (Brantingham, 1981), have noted a significant correlation between legal aid program costs and the way different legal aid plans pay lawyers for the services they provide. Findings from many of these studies are summarized in the overview, *Patterns in Legal Aid*, published by the federal Department of Justice (1995). There has been considerable controversy about the methodology used in many of these studies for calculating "unit costs" for case funded by legal aid plans (Sloan, 1987; Canadian Bar Association, 1987; Meredith, 1991; Meredith, 1994; Prince, 1991; Prince (Pristupa), 1994a; Prince (Pristupa), 1994b; Brantingham, Brantingham & Easton, 1993). However, the evidence, on balance, indicates that it generally costs less to deliver legal aid services through salaried lawyers than through lawyers who work on a fee for service basis (Goriely, 1997b: 189; Currie, 1996: 54-56).

Most legal aid programs in Canada currently utilize some sort of mixed model for service delivery, with some services being provided by salaried lawyers who are employed directly by the legal aid authority in the province, and other services being delivered by lawyers in private practice under a variety of different payment arrangements. This mixed approach is believed to offer the best opportunity to avail of the advantages of the different delivery options in different circumstances (Canadian Bar Association, 1987; Cramsie, 1996: 25-26; Currie, 2000). For example, it may be advantageous to utilize staff lawyers for specialized services in relation to certain poverty law issues and for duty counsel and initial advice services, and to utilize fee-for-service lawyers in private practice to deliver services in remote areas that do not have sufficient population to warrant the establishment of staff offices (Currie, 2000).

1.5.1 Delivery of legal aid services through salaried staff

The debate over legal aid costs in Canada has been dominated by the controversy over the relative merits of the judicare model, under which lawyers in private practice are paid for services rendered in accordance with an established tariff, and the staff model, where services are provided by salaried lawyers and supervised paralegals working directly for the legal aid authority. As noted above, a preponderance of evidence indicates that the staff model for service delivery is generally more cost-effective.

Evidence on relative cost effectiveness of the two models in the area of immigration and refugee legal aid is mixed. The Immigration and Refugee Law Clinic (IRLC) operated by the Legal Services Society in British Columbia is generally regarded as having performed effectively. However, there has been no systematic evaluation of its cost-effectiveness (Macklin, 1997: 1005; Social Policy and Research Council, 2002: 9). Wong- Rieger (1996) found that staff lawyers at the Refugee Law Office (RLO) in Toronto spent substantially more time on each case than did their counterparts in private practice. She found that the average cost per case handled by the RLO in its initial years of operation was about 70% higher than for cases handled by members of the private bar. This finding appears to be borne out in available data from

Manitoba, which indicates that in 1998-99, the average cost for cases handled by members of the private bar ($591) was substantially lower than for cases handled by staff counsel ($960)[13]. The final report on the RLO evaluation (Wong-Rieger, 1998; Wong-Rieger, 2000) found that the differential in average cost per case, as between the RLO and the private bar, had diminished considerably from 1995-96 to 1995-97, but that the RLO cost was still more than 8% higher than the private bar cost. A subsequent supplemental report on cost efficiency of the RLO found that the higher cost per case at the RLO was related to the small number of cases handled by the RLO and the fact that the cases handled by the RLO tend to be more complex. By 1999-2000, when the caseload at the RLO had increased to an adequate level (280 cases), the average cost per case handled by the RLO was 4% less than for cases handled by the private bar (MacDonald, 2001: 9).

Comparisons of cost per case may be misleading since they do not take fully into account differences in complexity of cases handled by staff counsel and by private lawyers. Also, as noted by a representative from the IRLC in Vancouver, such comparisons also do not adequately account for time spent by staff lawyers providing additional services that are not covered under the tariff (Social Policy and Research Council, 2002: 9). On balance, it appears that the staff model is at least as cost-effective as the judicare model for providing legal aid to immigrants and refugee claimants, provided an adequate number of cases are referred to the staff offices.

There is also a debate as to which service delivery model produces the best quality of legal representation. Evidence on this issue is mixed. It is extremely difficult to assess the quality of services provided by lawyers to third party clients, and clients are generally ill-equipped to make such an assessment themselves (McCamus, Brenner, et al., 1997: 129-130). Some studies have found that salaried legal aid lawyers get equivalent results, but that they spend less time on each case (Department of Justice, Canada, 1995). Critics of the staff model interpret this to suggest that staff lawyers may be less vigorous than judicare lawyers are in pushing their clients' interests. However, the fact that the salaried staff lawyers achieve equivalent or better results for their clients suggests that this criticism is unfounded.

Goriely (1997a: 2) identifies a number of possible explanations why salaried lawyers spend less time per case. Staff lawyers may choose easier cases, though Goriely notes that the evidence does not support this conclusion. Staff lawyers may be more specialized. Staff offices may achieve economies of scale that enable them to provide better backup services. And salaried staff lawyers have an incentive to get through their caseload as quickly as possible, while lawyers who are paid for the time they spend on each case have an incentive to maximize the time worked.

Some of these observations about salaried lawyers are borne out in the context of immigration and refugee legal aid. Services provided by legal aid staff lawyers at refugee law clinics are widely recognized as being of high quality. Wong-Rieger (1996, 1998) found that RLO lawyers spend more time on individual cases than do their counterparts in private practice, This is directly contrary to the finding that salaried legal aid lawyers in the criminal law area

[13] The information on cost per case is taken from a summary of information gathered from provincial legal aid authorities by the federal Department of Justice. Primary data have not been reviewed to verify these figures.

tend to spend less time per case than lawyers in private practice.[14] She suggests that this accounts in part for lower productivity of RLO lawyers relative to lawyers in private practice.

The Immigration and Refugee Law Clinic (ILRC) in British Columbia is also recognized as providing high quality legal services, but it has not been subject to a cost-effectiveness evaluation similar to the one carried out by Wong-Rieger in Ontario. The ILRC and the RLO have developed considerable expertise in refugee law and with respect to conditions in the source countries from which refugee claimants come. Lawyers at these clinics are also supported by experienced paralegals. Paralegals at both the RLO and the IRLC play an important supporting role for lawyers. McCamus, et al. (1997: 210) note that the RLO expressly recruited lawyers who were among the most highly respected members of the private immigration bar.

A key issue for the private bar in the staff vs. judicare debate is the perception that staff delivery of legal services limits the right of legal aid clients to retain counsel of their choice. It is unclear whether this is as significant a factor with respect to immigration and refugee legal aid as it may be in other areas such as family law and criminal law. Immigrants and refugee claimants who are newly arrived in Canada, especially refugee claimants, have little basis on which to choose among different counsel. Most of them rely on references from friends or acquaintances, or from interpreters whom they have met shortly after arriving in Canada (Macklin, 1997: 1000, citing Wong-Rieger, 1996). Others rely on referrals from community service organizations. Very few of them have any prior knowledge of whom they want to represent them when they make their refugee claims. On the other hand, as a result of the experiences they have endured, many refugee claimants are highly distrustful of strangers, especially those whom they perceive as being in positions of authority. Therefore, claimants' ability to exercise some choice in selecting a representative may be important in establishing a level of trust between the claimants and those who represent them[15]. Endorsement of a particular representative by a relative or a trusted acquaintance may be essential to establishing confidence in the representative on the part of immigrant and refugee clients when they first arrive in Canada (Frecker, Duquette, et al., 2002).

Some lawyers have established strong links with particular immigrant communities and new arrivals in these communities are frequently referred to these lawyers.[16] But there is no assurance that these lawyers are the ones best equipped to represent the persons concerned. In fact, there is significant concern within the Bar and among NGOs about the quality of service provided by some immigration lawyers (Macklin, 1997: 992; Legistec, 2002). This concern is

[14] Findings from the reviews of various criminal legal aid programs are summarized in *Patterns of Legal Aid II* (Canada, Department of Justice, 1995).

[15] This view has been expressed by a number of claimants, lawyers and settlement workers who have been interviewed in connection with a related Department of Justice study on Representation for Immigrants and Refugee Claimants that is currently being carried out by the author (Frecker, Duquette, et al., 2002).

[16] Many immigration lawyers draw most of their clients from particular ethnic communities. There is no clear correlation between quality of service (superior or inferior) and the preponderance that members of particular ethnic communities have for individual lawyers. For some lawyers, concentration of practice with clients from particular countries enables them to specialize and to provide clients with better service than might otherwise be possible. However, there is concern that other lawyers with preferred access to clients from particular communities are providing clearly inferior service. Newly arrived immigrants and refugees are particularly susceptible to being taken advantage of in this way because of their lack of familiarity with the Canadian legal system and the lack of contacts in Canada to whom they can turn for objective advice.

also shared by the IRB (Frecker, Duquette, et al., 2002).[17] There are even greater concerns about the poor quality of representation being provided by some unqualified immigration consultants who are free to sell their services without any effective regulation (Frecker, Duquette, et al., 2002).

Staff programs for service delivery provide more scope for legal aid authorities to control and contain costs. To some extent, management can respond to increases in workload by demanding higher productivity from staff lawyers. However, there are finite limits to this response, beyond which quality of work becomes unacceptably compromised and staff morale collapses.

Staff offices also provide scope for some of the work to be done by supervised paralegal support staff, who are paid at lower rates than lawyers. The RLO, the ILRC and neighbourhood legal clinics that have been operating in Ontario have all made effective use of supervised paralegals (community legal workers) to provide ancillary services. These include the capacity to interview clients in their native languages and to provide basic translation services in multiple foreign languages. Community legal workers employed by staff offices also assist clients to prepare for their refugee hearing, including drafting personal information forms (PIFs), and they occasionally represent claimants at hearings. As well, they help clients with matters such as housing and social benefits, which are not directly related to their refugee claims.

The main risks that have been identified with respect to staff-based legal aid programs are limitation on clients' right to choose counsel, low productivity resulting from the absence of economic incentives to take on additional work, and concern that quality will be compromised as management increases the workload of individual staff lawyers beyond reasonable limits in an effort to contain costs. There is also concern that administrative overhead tends to increase in staff offices that are not subject to competitive market forces and that legal aid programs become more vulnerable to a withdrawal of services if staff have a monopoly over service delivery.

1.5.2 Delivery of legal aid through judicare

In five of the six provinces where immigration and refugee legal aid is available, it is delivered under some variant of judicare.[18] Individual clients who are eligible for legal aid are given a certificate by the legal aid authority. This enables the clients to retain a lawyer in private practice. The legal aid authority then pays the lawyer for services rendered in accordance with an established tariff.

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[17] This statement is based on personal knowledge of the author, based on six years experience as Deputy Chairperson of the CRDD.

[18] Alberta and Manitoba rely on members of the private bar to deliver legal aid services to immigrants and refugee claimants. A paralegal working at the Manitoba International Interfaith Council in Winnipeg assists most refugee claimants in Winnipeg in preparing their Personal Information Forms (PIFs), but members of the private bar represent the claimants at hearings before the IRB. In Alberta, a paralegal working in the Calgary Legal Aid Office assists with PIF preparation, with members of the private bar representing claimants at their hearings. Ontario, Quebec and BC use a mix of judicare and staff service delivery, but the vast majority of legal aid immigration and refugee matters are handled by members of the private bar. Newfoundland relies almost exclusively on staff lawyers to represent clients in immigration and refugee matters, but there are very few immigration and refugee cases in that province. The other four provinces and the three territories provide no legal aid for immigration and refugee matters (Social Policy and Research Council, 2002).

There are three main variants in the way in which Canadian legal aid authorities pay for services within the judicare model of service delivery. Theses are:

1) fee for service, paid on an hourly rate;
2) a flat rate paid for particular services; and
3) competitive tendering for contracted services on blocks of cases.

A fourth variant, licensing or franchising lawyers or law firms in a specific market area, giving them exclusive right to represent legal aid clients in that market on terms set out in the franchise agreement, is being used in England and Wales, but it has not yet been adopted by any legal aid authority in Canada.

Different tariff structures produce different economic incentives for lawyers who provide legal aid services. Assuming lawyers are rational economic actors, they will naturally attempt to maximize the income they earn from the services they provide. The effort expended on legal aid cases will tend to vary to the extent that lawyers have other paying work available from private clients. Those who have no other source of income will tend to maximize their legal aid billings, while those who have more remunerative work available will tend to limit the work they do for legal aid clients (Bevan, 1996; Stewart, 1997). The role that economic incentives to lawyers play with respect to legal aid costs is examined more closely in section 1.5.3 below.

1.5.2.1.Fee for service – hourly rates and flat rates

The most common variant within the judicare model is to pay lawyers in private practice for services provided to legal aid clients at rates specified in an established tariff. Tariffs may specify hourly rates that will be paid, and they may place limits on the number of hours that will be allowed for particular services (e.g. for case preparation, drafting of applications, or attendance at court on uncontested motions). They may also prescribe flat fees for certain services as an alternative to placing a cap on the number of hours allowed. The immigration and refugee legal aid tariffs in Ontario, British Columbia and Alberta are primarily based on hourly rates, with prescribed time limits for certain services. The Manitoba and Quebec tariffs are based more on flat fees for specific services, with amounts provided under the Quebec tariff being significantly lower than in other provinces. Ontario and British Columbia pay the prescribed hourly rate for actual time spent in attendance at most hearings but limit the hours allowed for preparatory work. The Alberta tariff prescribes overall time limits for different types of cases. These limits cover total time spent on preparation and attendance at hearings.

Economists hypothesize that lawyers working for a prescribed hourly rate, with no limit on the time they can spend on a matter, will tend to maximize the hours worked unless they have more remunerative opportunities to earn income from other sources. If a cap is placed on the number of hours that can be spent on any given task, it is hypothesized that lawyers will tend to work to that limit and to bill accordingly. When services are paid for on a flat fee basis, lawyers will tend to maximize their incomes by increasing the number of occasions that they perform the best paid tasks and by minimizing the time spent performing each individual task (Stewart, 1997: 598). These economic incentives make fee-for-service judicare arrangements vulnerable to what economists describe as “supplier-induced demand”, that is, provision of services initiated by the supplier, beyond what the person paying for the services had intended to buy. This issue is examined in more detail in section 1.5.3 below.

1.5.2.2.Block contracts

As an alternative to paying private practice lawyers for each individual case according to an established tariff, some legal aid authorities have had law firms bid competitively for blocks of cases, or they have contracted with firms to handle a specified number of cases of a particular type at an agreed total cost. This arrangement has the effect of transferring the risk of cost overruns to the law firms that are contracted to do the work. By spreading the risk over a block of cases, the firms are able to offset gains from easy cases against losses they might incur on difficult cases.

Provided there is reasonable competition among lawyers seeking to do this work, block contracting enables legal aid authorities to obtain legal services at a reasonable price. In the competitive bidding process, there is risk that some firms may initially underbid in order to secure the legal aid and to discourage competition. If other firms find that the return they can receive from the block contracts is less than they can earn from regular paying clients, they will stop bidding for legal aid work. As competition for contracts is reduced, legal aid authorities become more vulnerable to overpricing of services by the few firms that remain willing to work on block contracts (Goriely, 1997: 203 citing Houlden & Balkin, 1985, and Spangenberg, 1990). If the competition pushes prices unreasonably low, there is also a risk that quality of service may be compromised (Goriely, 1997: 202-204).

Manitoba has successfully used block contracting to induce lawyers to provide legal services in communities where there were insufficient lawyers willing to represent legal aid clients. Block contracts have also been used by Legal Aid Manitoba to deal with family law cases and cases under the *Young Offenders Act*. According to the Executive Director of Legal Aid Manitoba, experience with block contracting in Manitoba has been satisfactory. Not only did this result in improved service delivery, but it also reduced costs (Fineblit, 1997: 78-80). Fineblit suggests that lawyers may be willing to work on block contracts at a low price because of long-term benefits such work produces in building a client base. The desire to obtain repeat business from clients serves as an incentive to maintain high quality of service.

Other writers on block contracting have emphasized the need to invest substantially in quality assurance monitoring to guard against erosion in quality of service as lawyers bid prices down in order to obtain business through block contracts (Stewart, 1997: 603; Goriely, 1997: 205). From the available literature on block contracting, it is unclear whether this mode of payment provides significant cost savings after one factors in the overhead cost of adequate monitoring to ensure that quality of service does not suffer.

Experience with block contracting for immigration and refugee legal aid services in Canada has been very limited. In the summer of 1999, four boatloads of illegal migrants were apprehended off the coast of British Columbia. Of this group, approximately 600 claimed refugee status. Federal immigration officials decided to detain the majority of them pending determination of their claims because there was reason to believe that many of them would fail to attend their refugee status determination hearing or to present themselves for removal from Canada in the event that their claims were rejected. Most of the claimants were detained at facilities remote from Vancouver, at locations where no experienced immigration lawyers were available to represent them. To cope with these unique circumstances the Legal Services Society in British Columbia invited lawyers from across the province to bid a fixed amount for blocks of these cases.

Many immigration lawyers in British Columbia publicly criticized the block bidding arrangement, claiming that the contracts were awarded to lawyers who bid unrealistically low and who then provided poor quality representation since they could not afford to devote the time required for each individual case. As a result of this pressure, block bidding has not been used by the Legal Services Society in British Columbia for any subsequent cases. The circumstances surrounding the marine arrival cases in 1999 were unique. First, the claims clustered around a limited number of scenarios of alleged persecution.[19] Individual claimants presented a limited number of very similar stories, making it possible to utilize the same research materials to prepare for a large number of similar claims. Second, for counsel who had to travel to the remote detention centres for hearings, it was more economical to spread the travel cost over a large number of individual cases. Third, in an effort to get through these cases quickly, the IRB committed special resources to the project and scheduled hearings to be concluded in sequence with minimum adjournments. This arrangement was very conducive to block booking of cases on which a single counsel would be representing the different claimants. This unique convergence of factors favourable to block contracting has not recurred.

Experience with the block contracting for the marine arrival cases was mixed. From the IRB's perspective, scheduling of hearings was far more efficient. Staff had to schedule a limited number of lawyers who traveled to the detention venues for extended periods to deal with their particular block of cases. Also, a new hearing could commence as soon as the previous one was completed, or could be brought forward on short notice if another hearing had to be adjourned (Richard Jackson, personal communication, March 21, 2002). Information on cost per case for the cases dealt with under these block contracts is not available. Given the fact that these cases involved unusual expenses for travel to the centres where the claimants were detained, it would be difficult to compare costs with other immigration and refugee cases in any event.[20]

Block contracting of immigration and refugee cases does appear to offer some scope for improved efficiency in case management. To the extent that block contracts might enable counsel to concentrate on similar cases, and thereby to realize greater efficiencies in case preparation, they may also serve to reduce the overall cost of providing representation services. However, concerns about possible erosion of quality of service and limitation of clients' choice of representative need to be addressed.

1.5.2.3.Franchising

A further variant within the judicare model is for legal aid authorities to license or franchise a limited number of lawyers or firms to do all legal aid work in particular markets. To qualify for this work, the individual lawyers or firms must meet service and quality assurance standards set by the legal aid authority. Rates paid for services may be fixed by tariff or set

[19] For example, many of claims were based on alleged persecution under China's one-child policy; many others were based on alleged persecution of Roman Catholics who did not accept the authority of the state-sanctioned head of the church, or persecution of the claimants as Falun Gong adherents.

[20] The LSS has conducted an internal audit with respect to these cases, but the results of the audit are confidential. It is not known whether this audit included any systematic analysis of the quality of legal representation provided by counsel working on these cases.

through a competitive bidding process, but only lawyers and firms that have been licensed by the legal aid authority are allowed to work on legal aid cases.[21]

In markets where legal aid work constitutes a significant portion of total available billings, there can be significant advantages to franchised lawyers and firms. The legal aid authority can use this arrangement to control the number of lawyers in an area that will be doing legal aid work, thus ensuring reasonable income certainty for the lawyers concerned and sufficient competition to keep the cost of legal services at an acceptable level. The legal aid authority retains the power to control the number of lawyers approved to do legal aid work and the power to withdraw a franchise if work is not performed at an acceptable standard. This gives the legal aid authority greater capacity for quality assurance than exists in an open judicare system where any lawyer who wants to can accept work from legal aid clients. This option is being used extensively by legal aid authorities in England and Wales (Legal Aid Board, 2000: 35-37; Smith, 1997: 171-175).

Franchising programs in England and Wales appear to be more focused on quality assurance than on controlling the number of suppliers who are franchised to provide legal services. Franchising was initially conceived as being limited to provision of legal advice, but it has subsequently been extended to include provision of representation services (Smith, 1997: 171). Law firms and not-for-profit organizations, such as community legal clinics, can apply for franchises in particular subject areas. They are required to meet standards specified by the Legal Aid Franchise Quality Assurance Standard (Legal Aid Board, 2000: 37). This standard focuses primarily on general management and organization of the firm or agency seeking a franchise (supervision, file management, training, recording systems, etc.). Applicants for franchises and franchisees are also subject to audit on the quality of work submitted by the firm or agency to the Legal Aid Board (legal aid applications, bills, etc.), and quality of work done for clients.

The supposed advantages of franchising arrangements will only be realized if the legal aid authority makes an adequate effort to monitor the work done and to ensure compliance with the established service and quality standards. The required monitoring constitutes a significant administrative burden for legal aid authorities. It is also essential that the factors against which performance and capacity are assessed can be reasonably measured.

The fusion of franchising as purely a quality assurance mechanism and as a device to limit the number of approved suppliers in the market results from a combination of the basic franchising concept with variants of the block contracting model. The benefits of this hybrid model are also dependent on there being a reasonable level of competition among lawyers so the legal aid authority has a choice over whom to license and so franchised lawyers and firms stand to derive some economic benefit from the arrangement.

There has been no experience to date with the franchising option as a mode for delivery of immigration and refugee legal aid in Canada. The on-going quality assurance component of

[21] In the literature reviewed for this study, the term "franchising" has been used to describe a variety of arrangements, none of which conform exactly to the description provided here. It is beyond the scope of this study to provide a detailed review of all of the variants of franchising arrangements that have been described in the literature. In its most basic form, pre-qualification to bill for work done under legal aid certificates has been described as a form of franchising. But this is not considered to be franchising in the sense used in this study. The essential features that distinguish true franchising from other arrangements are the control exercised by the legal aid authority over the number of lawyers franchised to provide legal service delivery as a condition of qualifying to obtain and to maintain a franchise.

the franchising arrangement distinguishes it from other judicare funding arrangements in which legal aid authorities play a generally more passive role, relying on the governing body for the legal profession to enforce quality standards.

A form of franchising may be particularly well adapted for delivery of legal aid to immigrants and refugee claimants in Canada. Most private practice lawyers who work in the area of refugee law work as sole practitioners or in small firms. Many of them have relatively specialized practices, sometimes extending to criminal law, family law, and other areas of practice before administrative tribunals, but with heavy emphasis on immigration-related matters. This area of practice is relatively marginalized within the legal profession, with Law Societies showing little inclination to address complaints about quality of work done by lawyers in relation to practice before the IRB. There are many dedicated and competent lawyers who practice in this area, but there are also some whose work is of sub-standard quality.[22] Some sort of franchising, that would be designed to reward those who provide high-quality representation, might serve as a way to address these problems.

Australian experience with tendering for duty counsel services in the area of criminal law, in an arrangement that appears to be similar to franchising arrangements used in Britain, has led to the formation of consortiums of small firms and sole practitioners who share work and cross-refer cases. This has led to improved delivery of duty counsel services as the consortiums have taken on responsibility for ensuring that services are delivered in accordance with pre-established standards [Legal Aid Office (Queensland)].

At present, duty counsel services for immigrants and refugee claimants in Canada are extremely limited. The Legal Services Society in British Columbia provides funding for duty counsel to deal with detention cases, and there have been suggestions that the RLO might expand its services to provide duty counsel coverage for detention cases in Toronto. Beyond that, some NGOs provide advice and assistance to detainees, but there are no other established duty counsel services. Consortiums in the area of immigration and refugee legal aid practice could be used to improve delivery of service for persons detained by immigration authorities and to assist immigrants and refugee claimants when they first seek advice as to how they should proceed.

Such consortiums might also enable groups of lawyers to share common services, such as paralegals trained to deal with the special needs of immigrant and refugee clients, which individual lawyers can not afford on their own.

Given the limited experience with franchising or restrictive licensing in the legal aid context, it is difficult to assess what effect such arrangements might have on legal aid costs. One can assume that lawyers who are franchised as exclusive providers of immigration and refugee legal aid services would seek to maximize the return they could receive from the franchise. Depending on the arrangements under which they would be paid, they could be expected to maximize the hours billed on any given file or to maximize the number of tasks done for a flat fee. To maintain an appropriate level of competition to modulate price pressures, legal aid authorities would have to ensure that the number of lawyers being franchised is periodically adjusted to match fluctuations in total caseload.

[22] This point was made by many of the respondents interviewed for the related study on *Representation for Immigrants and Refugee Claimants* (Frecker, Duquette, et al., 2002)

1.5.3 The problem of agency cost

In economic theory, when any person (referred to as a "principal") relies on someone else (referred to as an "agent") to deliver a service, there is a risk that the agent may provide less than the principal expects for a given price. Or the agent may charge more than the principal intended to pay for the service provided. This difference in the value of what the service is worth to the principal and the amount paid to the agent is referred to by economists as an "agency cost". The problem of agency cost arises when the agent and the principal do not share the same information or objectives regarding whatever it is the principal expects (Bevan, 1996:101, citing Milgrom and Roberts, 1992). That is to say, the agent will take advantage of the information asymmetry to satisfy objectives of the agent that are not shared by the principal.

This problem has been studied extensively in economic literature dealing with the provision of medical services where patients rely heavily on physicians to determine what level of treatment is appropriate. The hypothesis is that over and above physicians' incentive to provide appropriate medical care, they also have an incentive to maximize their own incomes. Patients rely almost completely on physicians to identify what is the most appropriate treatment, and there is wide latitude as to what is the most appropriate treatment in individual cases. In these circumstances, there is risk, at least in theory, that physicians, when choosing between relatively equivalent options, will favour options that maximize their income over options that minimize cost to the patient. Economists refer to this phenomenon as "supplier-induced demand", which is a type of agency cost.

The central problem with respect to supplier-induced demand for professional services is that the impetus for services comes from the service provider and not from the client. Because of his or her informational advantage, the professional adviser is in a position to influence what services, and the amount of services, the client would like to use (Stewart, 1997: 593). This problem is compounded when dealing with services that are being paid for by a third party who is remote from the services being provided by the agent. In these circumstances, the consumer of the services loses interest in the cost of the services being supplied (e.g. when an insurance company is paying for car repairs). Economists refer to this as "moral hazard" inherent in insured transactions (Bevan, 1996:102, citing Milgrom and Roberts, 1992).

Bevan (1996) and Stewart (1997) have examined the extent to which legal aid programs may be subject to agency costs of the sort described above. In the legal aid context, there is a complex three-way relationship between the legal aid client, the legal aid authority and the lawyer providing legal services. The client, as a consumer of services for which he or she is not paying, has an incentive to seek the best possible level of service without regard to the cost. The legal aid authority, which is paying for these services, has an incentive to contain costs so it will be able to provide services to more clients. The lawyer has a professional duty to deliver the best quality of representation possible within the budget that the legal aid authority is prepared to pay. At the same time, the lawyer has an incentive to maximize his or her own income from the transaction.

Given the privileged nature of the solicitor-client relationship, it is difficult for the legal aid authority to assess whether the services provided by the lawyer are the most cost-effective way to deal with the case. The choice of how best to present the client's case is rarely clear-cut. The client relies heavily on the lawyer to define what level of service is required. For different reasons the lawyer's interests and the client's interests converge toward maximizing

expenditures on the client's behalf. However, this is directly contrary to the legal aid authority's objective to contain the cost of representation.

According to Bevan (1996: 100), at the heart of economic analysis of the provision of both legal and medical services is the problem that public financing of professional services creates the potential for supplier-induced demand. While this phenomenon is easy to articulate in theoretical terms, it is extremely difficult to measure. Although the literature is extensive, there is on-going debate over the extent to which supplier-induced demand is a factor in rising health care costs.

Bevan hypothesizes that lawyers seek to manage their work to secure a target income. According to his hypothesis, the target income is likely to be the same as, or an increase on, past income measured in "real terms". Bevan concluded that this hypothesis was largely, though not completely, borne out in his analysis of changes in the portion of solicitors fees earned from legal aid in England and Wales between 1990-91 and 1993-94.

Stewart identifies two other factors that are relevant to the analysis of agency costs in the legal aid context. First, established legal aid tariffs weaken the normal market forces that would normally push the cost of services down when there is excess supply (Stewart, 1997: 592). The price fixed by the tariff does not decline in the face of increased competition for work. Second, there are inherent difficulties in monitoring the quality of legal work, particularly when the legal aid authority that is paying is remote from dealings between the lawyer and his or her client. As a result, there is a risk that lawyers may provide services of a lower quality than the legal aid authority expects for the money being paid (Stewart, 1997: 592-593).

Stewart points out that the judicare model for delivering legal aid services is vulnerable to supplier-induced demand in two ways. Where the supply of lawyers exceeds the demand from private clients, lawyers will be more inclined to encourage clients to apply for legal aid. They will also be more inclined to encourage the legal aid authority to fund whatever steps are recommended on legal grounds (Stewart, 1997: 598). This problem is most acute where the tariff pays lawyers on an hourly rate. Assuming that lawyers are rational economic actors, the incentive for them to work additional hours is diminished when they are paid block fees.

In systems where the tariff places a cap on the number of hours that lawyers can spend on each type of case or on the component parts of each case, there is an incentive to work the maximum number of hours and no more. To the extent that lawyers are expected to work beyond the cap without being paid, quality becomes a concern (Stewart, 1997: 599).

This tendency toward supplier-induced demand and deterioration in quality of service may be inherent in the incentive structures that exist in the complex three-way relationship among the legal aid authority, counsel and legal aid clients. In the absence of effective quality assurance monitoring by the legal aid authority, the professionalism of counsel and their ethical commitment to deliver high quality legal services are the main check against this risk.

As a practical matter, most legal aid plans are built on mixed models of service delivery. Legal aid authorities are experimenting with all of the options discussed above. Suffice it to say for present purposes, that the relative balance among the different modes of service delivery, particularly as between the staff model on one hand and different variants of judicare on the other, give rise to a variety of economic incentives that lead lawyers to conduct themselves in ways that influence legal aid program costs.

All of the economic incentives discussed above are at play with respect to immigration and refugee legal aid to the same extent as they are at play in other areas of legal aid.

1.6 Market cost of legal services

Legal aid is provided in the context of an established market for legal services. The rates charged by individual lawyers vary according to their experience and reputation. Rates also vary depending on the type of work done and the value of the work to the lawyer's clientele. Typically, lawyers working on high value commercial transactions for major corporate clients can bill at a substantially higher rate than can lawyers who work for individual clients of ordinary means. Litigation lawyers commonly base their billings on a combination of the time spent on a particular matter and the value of the outcome for the client, especially where the lawyer is successful and the client receives a substantial amount of money as a result of the litigation.

By definition, the clientele for legal aid services are the least able to pay high legal fees. Individual clients of modest means are the most appropriate comparable client group for purposes of establishing what one might regard as the market rate for the services lawyers provide to legal aid clients. It is estimated that private lawyers currently charge between $100 and $165 per hour to clients of modest means (Legal Aid Ontario, 2001c: 21). This is considerably more than the rates provided in any legal aid tariff in Canada. This market rate can be expected to have an impact on legal aid costs by conditioning the price at which lawyers will be willing to do legal aid work and by conditioning the number of lawyers who are prepared to do such work.

Lawyers who work for legal aid clients have the option of working for private clients and billing their services at the prevailing market rates.[23] Staff lawyers in a legal aid clinic have the option of leaving to go into private practice if they are dissatisfied with the salaries they receive. Lawyers in private practice have the option of declining legal aid work if they do not find the remuneration competitive with what they can earn from private clients. Thus, the prevailing market rates set a benchmark for what legal services cost.[24]

In a Business Case submission prepared in 2001 to support a recommended tariff increase, Legal Aid Ontario noted that it is becoming increasingly difficult to find lawyers who are willing to represent clients on legal aid certificates at tariff rates that had not changed since 1987. This reluctance applies not only to experienced counsel, who might be expected to have established practices with clients who are prepared to pay more than provided under the legal aid

[23] It is an open question whether lawyers with practices heavily weighted to immigration and refugee law have the same degree of mobility as lawyers in other practice areas. To some extent, they may be captives of their particular area of specialization. On balance, the level of mobility is probably reasonably high. Many lawyers who start their practice in immigration law working for legal aid clients do make the transition to an immigration practice with paying clients. The skills required for practice before the IRB are also readily transferable to other areas of administrative law. And many lawyers who do legal aid work with immigrants and refugees also have experience in criminal law and / or family law.

[24] There may also be an obverse side to the relationship between market rates and legal aid tariff rates. Paul Brantingham, Patricia Brantingham and Stephen Easton (1993) suggest that the legal aid tariff sets a baseline for other costs in the legal system, including the salaries demanded by staff lawyers, the salaries of Crown prosecutors, and the rates lawyers in private practice charge to paying clients. It is beyond the scope of this inquiry to sort out the directionality of influence between legal aid tariffs and market rates for legal services.

tariff, but also to newly called lawyers, who will normally be billing at the low end of prevailing market rates (Legal Aid Ontario, 2001c: 19).

Three factors serve to keep rates paid for legal aid services below the prevailing rates in the private market. First, legal aid lawyers have a higher level of certainty that they will be paid for their services than is the case for lawyers dealing with private clients who do not have legal aid certificates. Lawyers in private practice do not incur costs to collect payments from legal aid authorities, nor do they have to write off bad accounts. Accounts receivable are simply not an issue for salaried legal aid lawyers. It is generally conceded that this factor alone justifies an hourly rate for legal aid work that is around 15% below the current market rates (Legal Aid Ontario, 2001c: 21).

Second, lawyers have a professional duty to ensure that the less fortunate in society have access to legal services. Many, if not most lawyers who do legal aid work, do so in part for altruistic reasons. They are willing to work for legal aid clients at a rate considerably lower than they would charge to clients who can afford to pay the going rate. This is particularly true in relation to lawyers who practice in the areas of poverty law, human rights law and refugee law. Many of these lawyers have a deep ideological commitment to serve severely disadvantaged people in the community. They therefore consciously accept substantially lower incomes than their colleagues earn in other areas of legal practice.

Third, many lawyers in private practice, particularly new lawyers working as sole practitioners or in small firms, have difficulty finding remunerative work. For these lawyers, legal aid work provides income that they are unable to earn from private clients. The amount that they will accept for this sort of work is lower than the prevailing market rate.

If all players in the system could be presumed to be “rational” economic actors, in the sense that economists see individual wealth maximization as rational economic behaviour, then one could hypothesize a direct link between market rates for comparable legal services and legal aid program costs. Private practice lawyers would only be willing to do legal aid work if it provided a return at least equal to what they could earn in private practice. Provided there was complete mobility between private practice and legal aid staff work, staff lawyers would remain in their positions only as long as their salaries remained competitive with what they could earn in private practice.

In real life, ideological commitment to legal aid work, oversupply of lawyers in private practice, and career immobility arising from natural inertia and fear of the unknown, complicate the pure, rational economic calculus. As a result, it is difficult to assess with any precision the impact that market rates for legal services have on legal aid costs. The intensity and extent of the impact is conditioned by various factors, such as the availability of alternative paying work, the value lawyers place on income security and freedom from the insecurity and commercial pressures that are features of regular private practice. The cost impact of market rates for legal services is also conditioned by limitations on mobility between private practice and legal aid staff work and by non-economic considerations that motivate lawyers to do legal aid work.

Increases in the legal tariff are naturally followed by an increase in legal aid program expenditures.[25] This is partly a function of the direct additional cost occasioned by the tariff increase. If the premise underlying the LAO business case submission is correct, some of the cost increase may also be attributable to the fact that a tariff increase induces lawyers who previously could earn marginally more money doing other work to join the legal aid pool. This could lead to increased supplier-induced demand, which in turn has an impact on program costs.

1.7 Availability of alternatives to legal aid

Not all legal aid work needs to be done by lawyers. Some tasks can be handled quite competently by trained paralegals, who are paid at lower rates than lawyers. Others can be handled by the clients themselves, provided they have access to competent advice as to what is required.

In certain areas of practice where the cost of obtaining legal representation is disproportionately high relative to the matter in issue, consultants and unsupervised paralegals are providing representation services that might otherwise be provided by lawyers. For many clients, these consultants and unsupervised paralegals provide effective representation at a lower price than they would have to pay to be represented by a lawyer.[26] Many of the areas in which consultants and paralegals work are areas of great importance to low-income individuals, who are clients for legal aid. To the extent that consultants and paralegals provide a low cost substitute for legal aid, they have a material impact on legal aid costs.

A key issue with respect to paralegals relates to whether they are supervised or are free to work independently. The *Code of Professional Conduct* applicable to lawyers in Ontario requires lawyers to supervise all staff, including paralegals, who work for them (Law Society of Upper Canada, 2001: Rule 5.01(2)). There are strict prohibitions against the practice of law for remuneration by anyone who is not an accredited member of the Bar (*Solicitors Act*, R.S.O. 1990, c.S-15, s.1). Similar restrictions apply in other provinces. There are no comparable limitations with respect to the right of unsupervised consultants to represent clients in immigration and refugee matters before the IRB. Indeed, section 167)(1) of the *Immigration and Refugee Protection Act* expressly provides that "Both a person who is the subject of Board proceedings and the Minister may, at their own expense be represented by a barrister or solicitor or other counsel".[27]

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[25] The Legal Aid Ontario Business Case submission calls for allocation of $65.9 million to be spent over the three years of LAO's next budget cycle to cover the costs associated with proposed tariff increases (Legal Aid Ontario, 2001c: 46).

[26] For example, a substantial portion of debt collection work in small claims court is handled by collection agents or by staff officers from the business institutions to which the debts are owed. Consultants also handle many cases before specialized administrative tribunals such as assessment appeal boards and planning authorities. Consultants, many of them former police officers, provide services representing individuals charged with motor vehicle offences. Others, with a background in financial planning and human resources, act as representatives in cases involving claims for disability pensions, workers compensation and employment insurance benefits. They also represent recipients who are appealing against reassessments of benefit overpayments. Consultants also play a significant role in representing immigrants, and to a lesser extent, refugee claimants, in dealing with Citizenship and Immigration Canada (CIC) and in proceedings before the IRB.

[27] The former *Immigration Act* included similar provisions relating to right to counsel in specific proceedings. Section 69(1) of the *Immigration Act* explicitly provided that the person who was the subject of refugee status

In theory, at least, considerable savings could be realized by having paralegals do more of the work that is currently done by lawyers. Legal aid authorities in Ontario, and British Columbia cover the salaries of paralegals who work in clinics that the authorities fund directly.[28] However, most plans do not reimburse lawyers in private practice for services provided by paralegals working under their supervision. Nor do they permit immigration consultants or unsupervised paralegals to represent clients on legal aid certificates. Therefore, the scope for delegating work to paralegals is quite limited.

Immigration consultants and unsupervised paralegals are not permitted to represent clients on legal aid certificates; however, lawyers in private practice can charge Legal Aid Ontario for work done by paralegals under their supervision. The Ontario tariff provides for work done by law clerks or paralegals to be billed at an hourly rate of $23. This is considerably lower than the minimum $70.35 that can be charged by junior lawyers. However, the lawyers rarely use paralegals because the tariff rate is not sufficient to cover the associated salary and overhead expenses (Jack Martin, personal communication, August 27, 2002). According to one lawyer from British Columbia, who was interviewed in connection with the related study on *Representation for Immigrants and Refugee Claimants*, it is economically more attractive for the lawyers to do the work themselves or to pay a salary to a junior lawyer, who can be billed out at a much higher rate.

Some paralegals and consultants who provide these services are highly experienced and quite competent. However, others have no apparent qualifications for the work they purport to do. They are not licensed or subject to regulation by any professional body, and they are not subject to any code of professional conduct. As a result, there are serious concerns about the quality of the services that these unqualified individuals provide. There is a particular concern with respect to some immigration consultants. Refugee claimants are particularly vulnerable to being taken advantage of since they have little way to assess the consultants' competence and little capacity to seek redress if the consultants provide inadequate representation.

From a quality control perspective, it is important that any non-lawyers who are providing services paid for by legal aid be subject to effective supervision by a lawyer. The overall cost impact of providing the necessary supervision, and the savings that might be realized by delegating more tasks to paralegals have not been fully explored. The most recent evaluation of the Refugee Law Office in Ontario suggests that overall costs per case completed are comparable as between the RLO, which utilizes paralegals extensively, and lawyers in private practice representing refugee claimants under legal aid certificates (MacDonald, 2001: 8).

1.7.1 Role for paralegals and consultants

There is considerable scope for making greater use of paralegals in dealing with refugee claimants as legal aid clients. In many cases, it is easier for claimants to relate their stories to an understanding and supportive caseworker who speaks their own language than it is for them to

determination proceedings could, at the person's own expense, be represented by a barrister, solicitor or other counsel. Section 30(1) made similar provision with respect to persons who were the subject of an immigration inquiry. Section 103.1(14) provided persons who were detained with the "right to retain and instruct counsel" but made no reference to whether such counsel should be a barrister, solicitor or other counsel.

[28] The top of the salary range for paralegals employed by the Legal Services Society of British Columbia is around $45,000 (Thomas Fisk, personal communication, August 23, 2002). The comparable figure for paralegals employed by the Refugee Law Office in Ontario is $48,730 (Jack Martin, personal communication, August 27, 2002).

relate to a lawyer with whom they can only communicate through an interpreter. Some lawyers are also able to communicate with clients in their own language without need for an interpreter, but this is not the norm. Paralegals drawn from various ethnic communities play a valuable role in filling this gap. Refugee claimants also have many needs, such as finding suitable housing and accessing social assistance benefits, that are unrelated to their refugee claims but of vital importance to their well-being. Claimants' ability to focus on what must be done to establish their claim to asylum can be seriously compromised if these ancillary needs are not properly addressed. Paralegal caseworkers are often better equipped than lawyers are to deal with these problems.

Many paralegals and support staff working at legal clinics and with NGOs have extensive cross-cultural experience that is of great value when dealing with immigrants and refugee claimants. The positive role played by paralegals and other support staff who have the cultural background and language skills to deal with immigrant and refugee clients in their native languages is cited as one of the special attributes of legal clinics and the Refugee Law Office in Ontario and the Immigration and Refugee Law Clinic in Vancouver (Macklin, 1997: 1003-1005; Social Policy and Research Council, 2002: 9).

A paralegal working for the Manitoba International Interfaith Council in Winnipeg assists refugee claimants in preparing their PIFs. According to the *Profile Study of Immigration and Refugee Legal Aid Services* prepared by the Social Policy and Research Council, experience with the service provided by the Manitoba project has been favourable (2002: 21). The Legal Aid Society of Alberta (LASA) has also initiated a pilot project under which it provides paralegal support to lawyers in Calgary. Experience with this project has been more mixed than in Manitoba, but this is attributed to unfamiliarity with the service rather than to any shortcoming in the quality of support provided (Social Policy and Research Council, 2002: 15-16). Lawyers from Calgary who were interviewed in connection with the *Representation Study* are generally pleased with the service being provided by the LASA paralegal (Frecker, Duquette, et al., 2002).

Many paralegals and consultants who work with immigrants and refugee claimants are well qualified and provide high quality service. However, there are many instances of persons purporting to provide paralegal and consulting services for which they have no qualifications. There are also incidents of unscrupulous immigration consultants exploiting and defrauding unsuspecting clients who are completely unfamiliar with the Canadian legal system and have no idea of where to seek recourse.[29] Low income clients of immigration consultants are especially vulnerable. Many of them are newly arrived in Canada. They have limited skills in either

[29] Fraudulent behaviour and incompetence is not restricted to immigration consultants. There have also been instances of outrageous conduct and incompetence on the part of lawyers. The big difference is that the lawyers are subject to being disciplined by the Law Society. Other lawyers have a professional duty to report any incidents of professional misconduct of which they become aware. Consultants and other unsupervised paralegals are not subject to such regulation and monitoring. Indeed, there is nowhere to bring complaints even when one becomes aware of misconduct or incompetence. The IRB has limited authority to regulate the right of appearance of consultants, however, in the absence of established standards of conduct and any external professional regulation, it is extremely difficult to exercise this authority effectively.
The Law Society of Upper Canada has been actively pursuing a proposal under which it would become the body responsible for regulating all legal services in Ontario (Law Society of Upper Canada, 2002). The matter is considered less urgent in British Columbia, though the Benchers of Law Society in that province have received a report from a task force established to look into options with regard to regulation of legal assistants (Law Society of British Columbia, 2001).

official language, and they are totally unfamiliar with Canadian legal processes. They have no way of assessing whether the level of service they are receiving is competent or whether it is worth what they are being charged.[30]

Respondents interviewed in connection with the study on *Representation for Immigrants and Refugee Claimants* (the *Representation Study*) currently being carried out by the author of this report have pointed out that legal issues raised in refugee claims can be quite complex and challenging even for lawyers with extensive experience in the area. Carefully focused debriefing of claimants and close analysis of their stories is sometimes required to identify the legal basis for claims. The stakes are extremely high since failure to establish a valid claim may result in removal of the claimant to the country where he or she faces persecution, possibly even death. It is therefore important that access to competent legal advice not be arbitrarily restricted.

At the same time, respondents for the *Representation Study* also note that the issues in many refugee claims are readily apparent. All that is required is that someone who understands the basic legal requirements to establish refugee status be available to assist claimants in preparing their PIFs. In such cases, the role of the paralegal is to make sure the claimant's story is presented in an orderly and readily understood fashion and that all of the key requirements are properly addressed in the PIF.

These respondents suggest that some services that are currently being provided by lawyers, particularly with regard to initial client interviews and preparation of PIFs in routine cases, could reasonably be transferred to paralegals without compromising quality of service. They note, however, that it is important that there be some legal supervision to ensure quality of service and to ensure that important legal issues are not overlooked. This can be accomplished through clinics and staff offices, as is currently being done to a limited extent. It can also be accomplished by implementing measures to encourage utilization of paralegals by members of the private bar who provide legal aid services.

It is reasonable to suppose that increased use of paralegals for delivery of immigration and refugee legal aid services has potential to produce cost savings. Based on limited experience with the RLO and community legal clinics in Ontario and the IRLC in British Columbia, however, it is not entirely clear whether use of paralegals does, in fact, reduce costs. According to Wong-Rieger (1996), lawyers and paralegals working together at the RLO spent more time on individual cases than do lawyers who represent refugee claimants under legal aid certificates. The quality of services provided by the RLO is acknowledged to be high. But in the RLO's initial years of operation, the average cost per case at the RLO was higher than the cost for cases handled by lawyers in private practice.[31] By 2001 that cost differential had disappeared

[30] There is no reliable information available on the amounts charged by immigration consultants for their services. However, a number of respondents interviewed in connection with the *Representation Study* (currently in progress) have reported anecdotally that immigration consultants representing refugee claimants typically charge amounts equivalent to what lawyers in private practice are charging their fee-paying refugee claimant clients. Lawyers who represent both fee-paying clients and legal aid clients have indicated that they typically charge fee-paying clients approximately $4,000 to handle a refugee claim of average complexity. They charge less in very simple cases and more in unusually complex cases. The equivalent amount paid for legal aid cases varies widely among the five provinces that provide legal aid in refugee cases through judicare arrangements. Lawyers in Ontario and British Columbia, which have the most generous legal aid tariffs for these cases, report that they typically bill Legal Aid between $1,600 and $2,000 for cases of average complexity.

[31] There has been no systematic evaluation of the comparative cost of cases handled by the IRLC in Vancouver relative to cases handled by lawyers in private practice. However, the report from the concurrent study on

(MacDonald, 2001). However, extensive utilization of paralegals has not enabled the RLO to handle cases at a lower cost than that charged by lawyers in private practice.

The reasons for the higher costs at the RLO are quite complex and cannot be attributed simply to the fact that more time is being spent on individual cases. Macklin (1997: 999-1002) suggests that the restricted mandate of the RLO has prevented it from building a sufficiently large client base to realize economies of scale that might make it more cost-effective. Also, the calculation of average cost per case in the evaluation carried out by Wong-Rieger does not fully factor out the cost of ancillary services, such as public outreach, that are provided by the RLO.

It is not possible, in the limited context of this study, to provide any detailed calculation of extent of possible savings that might be realized by having paralegals provide to immigrants and refugee claimants some of the services currently provided by lawyers. Detailed analysis of the range of services that can be provided by paralegals and the probable cost of such services requires empirical research. This is the subject of related pilot project evaluations currently underway in Alberta and Manitoba.

1.7.2 Assisted self-representation

Assisted self-representation is a variant form of service delivery for people who do not qualify for legal aid. It combines public legal information with summary advice, and, in some cases, limited legal assistance. To the extent that assisted self-representation enables individuals to participate effectively in legal proceedings without need for counsel, it may be an effective option in minimizing legal aid costs. However, results from the one published evaluation of a pilot project on assisted self-representation suggest that the potential utility of this option is limited. In that project, the Legal Services Society in British Columbia provided a brochure to rejected legal aid applicants informing them on how to defend themselves in criminal proceedings. The evaluation of this project found that the material helped to alert the clients to the seriousness of their situation; however it did not prepare them to defend themselves effectively on their own (Currie, 2000: 314, footnote 90, citing Currie and McEown, 1998).

Legal Aid Ontario has experimented with a program under which family law clients are provided with a certificate for a few hours of legal advice from a private bar lawyer to get advice or assistance on drafting documents. To date there has been no published evaluation of this project. However, Legal Aid Ontario reports that evaluations of this and other pilot initiatives indicate significant savings, client service quality improvements and better case management as results (Legal Aid Ontario, 2001c: 37). This “unbundling” of legal services is intended to enable clients to handle routine aspects of cases that do not require a lawyer (Mosten & Borden, 2000). This may be an effective option for minimizing legal aid costs in cases where full service legal representation is not required, for example for uncontested divorces where there are no issues relating to custody or division of property. However, summary advice of this sort is not likely to be very effective in cases involving immigrants and refugee claimants who have limited skills in English or French and limited familiarity with the Canadian legal system. Also, one may surmise that such advice is of limited utility in cases where the legal and procedural issues are complex and the consequences for clients may be severe if their case is not properly presented.

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representation services carried out by the Social Policy and Research Council, suggests that for the IRLC, cost has been less of a consideration than quality of service.

The possible effectiveness of assisted self-representation in the immigration and refugee context is questionable. With immigrants and refugee claimants, there are the added problems of ability (or lack of ability) to work in either of Canada's official languages and a general unfamiliarity with the Canadian legal system. A very limited number of the immigrants and refugee claimants who are currently represented in proceedings before the IRB might have sufficient background with legal process in general and sufficient ability to work in English or French to prepare and present their own case. But that number is small.

A first challenge with assisted self-representation for immigrants and refugee claimants would be to develop appropriate reference materials that could be used by the persons concerned. The linguistic backgrounds of the people who appear before the CRDD are enormously diverse. The CRDD uses interpreters in more than 130 different languages and dialects for refugee hearings. Even limiting oneself to the top ten source countries in each region (which change on a regular basis), 16 distinct language groups were represented in the quarter ending December 31, 2001. This number is fairly typical, though the mix of which language groups are included frequently changes. The cost of developing support materials and translating them into all of these languages would be significant, and even with such resource material available, a significant portion of the intended clientele would be unable to use them effectively.

At detention reviews and refugee hearings it is common to observe that the persons concerned have little comprehension of the exchanges that take place between their representatives and the tribunal members, even when the exchange is translated into their own language by the interpreter. They find it difficult enough to present their story in response to specific questions that are put to them by their representative. It would be even more difficult for them if they had to conduct their case without the assistance of some representative who has a basic understanding of the process to guide them in the presentation of their claim.

In the experience of the author and many CRDD members with whom the author has worked, cases involving unrepresented claimants are especially difficult.[32] Despite best efforts of tribunal members to put the claimants at ease and to explain the process to them, claimants have great difficulty understanding why they are being asked to focus on specific issues that appear to underlay their claims. Many refugee claimants, even those who are represented, feel compelled to share their cumulative lifetime experience with the tribunal. In the context of a refugee hearing, it places tribunal members in a very difficult position to have to constrain claimants' presentation of their stories in order to get to the key issues on which the claims are based. When this can be done through a representative, there is less risk that the proceedings will appear to be unfair and arbitrary to the claimant. When it must be done with unrepresented claimants, it frustrates claimants and often makes them feel they are not receiving a fair hearing.

[32] Unrepresented claimants at CRDD hearings are divided roughly into two groups. The first group comprises primarily claimants whose cases are heard in provinces where legal aid is not available, most notably Nova Scotia and New Brunswick. The majority of claimants in Saskatchewan are represented by counsel despite the unavailability of legal aid. The second group comprises those who have been found ineligible for legal aid in provinces where it is available. In most of these cases, legal aid has been denied because the claims have not met the basic merit threshold applied by the legal aid authority, for example repeat claims where there has been no change in circumstance. The comment about difficulties encountered in conducting hearings with unrepresented claimants applies primarily to the first group. Claims that are patently without merit are relatively easy to deal with, regardless whether the claimant is represented or not. However, in cases where the lack of merit in the claim is less evident, the same considerations apply with respect to the first group.

Given these considerations, it is difficult to envision how assisted self-representation can be adapted for use in the immigration and refugee context. Therefore, it is not regarded as offering significant cost saving potential for legal aid programs.

1.7.3 Role for NGOs and community support groups

Many non-government organizations (NGOs) and community support groups are actively involved in supporting clients who require assistance to deal with legal issues relating to housing, human rights, and access to social benefits. A substantial portion of legal aid work on the civil law side relates to these same issues. Given the overlapping interests of legal aid authorities and these support groups, the question arises whether there may be more effective ways to coordinate the efforts of both to ensure that legal aid is delivered in the most cost-effective manner possible to those who need it. To date, there has been no serious examination of how this might be accomplished and no assessment of what impact such a development might have on legal aid costs in Canada.

Most NGOs that work actively with immigrants and refugee claimants are focused primarily on providing settlement services, such as language training, skills training, and other services to assist newcomers in getting established in Canada. A limited number of groups do provide representation support to refugee claimants with respect to establishing refugee status in Canada, but this is the exception, not the norm.[33] Many of these groups rely on volunteers and they do not have the resources to deliver legal support services in any systematic way. They also lack the administrative structure needed to take on this responsibility.

Individuals from the NGO sector have expressed concerns that their organizations might be called on to fill the gap if legal aid services for immigrants and refugees are curtailed. They feel that taking on such a role would require radical change in the way their organizations are structured, changes so fundamental that they would alter the very character of the organizations as they know them. They have a strong preference for maintaining legal aid with extensive involvement by lawyers.[34] For this reason, the scope for NGOs and community support organizations to take on a significant role as an alternative to legal aid appears to be limited.

The most likely way in which these organizations might become involved in delivery of legal aid services is as a working base for specialized paralegals who could assist refugee claimants in much the same way that paralegals working in community legal clinics currently do. However, for the reasons already noted in the discussion on the role of immigration consultants and paralegals, there is need for some form of lawyer supervision. This would have to be factored into any estimate of what it might cost to deliver legal aid services through NGOs and

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[33] According to data from the concurrent *Profile Study* being carried by the Social Policy and Research Council, very few of the community service organizations working in this area provide any kind of representation services. Most of these agencies concentrate on providing settlement services, assisting clients with language training, employment, housing and other settlement related matters.

[34] Comments to this effect have been expressed by a number of individuals working with NGOs who have been interviewed by the author in connection with a concurrent study on representation for immigrants and refugee claimants being carried out for the federal Department of Justice.

community support organizations. Franchising arrangements could possibly facilitate the use of supervised paralegals and NGO workers to deliver some required services in relation to immigration and refugee matters. This could serve to reduce legal aid costs. However, careful evaluation of appropriately designed pilot projects is required before any definitive conclusion can be drawn in this regard.

2.0 Cost drivers unique to immigration and refugee legal aid

The starting point for any analysis of immigration and refugee legal aid cost drivers is level of demand or need for legal aid services. The more immigrants and refugee claimants there are who require legal aid, the greater will be the cost of providing the required services. For the reasons noted in the preceding chapter, only a small portion of legal aid budgets is devoted to assisting immigrants who are not claiming refugee status. The great bulk of legal aid spending in this area is directed to providing refugee claimants with the legal assistance they desperately need to help them through the refugee determination process. The primary cost driver in relation to legal aid for immigration and refugee matters is the volume of the caseload, or the number of refugee claims made in Canada in any given time period. Anything that influences the number of refugee claims made in Canada can therefore be considered a secondary cost driver for legal aid. The first factor influencing the refugee caseload in Canada is the number of persons there are worldwide who might be inclined and able to travel to Canada to make a refugee claim. The second factor is the ease with which these people are able to reach Canada to present their claims, or conversely the barriers to access that they are likely to encounter in any attempt to reach this country.[35]

Beyond the number of persons there may be who require legal aid, the nature and complexity of the services required affect the cost of providing these services. In this regard, the complexity of procedures in which refugee claimants are involved is also a legal aid cost driver.

2.1 Immigration to Canada and legal aid costs

International migration is driven by a variety of factors. On the one hand, overpopulation, poor economic conditions, natural disasters and endemic civil conflict can be considered as "push" factors driving global migration. On the other hand, other people migrate because other countries offer them better economic prospects. Factors that lead people to move simply to pursue better economic opportunities can be loosely characterized as "pull" factors.

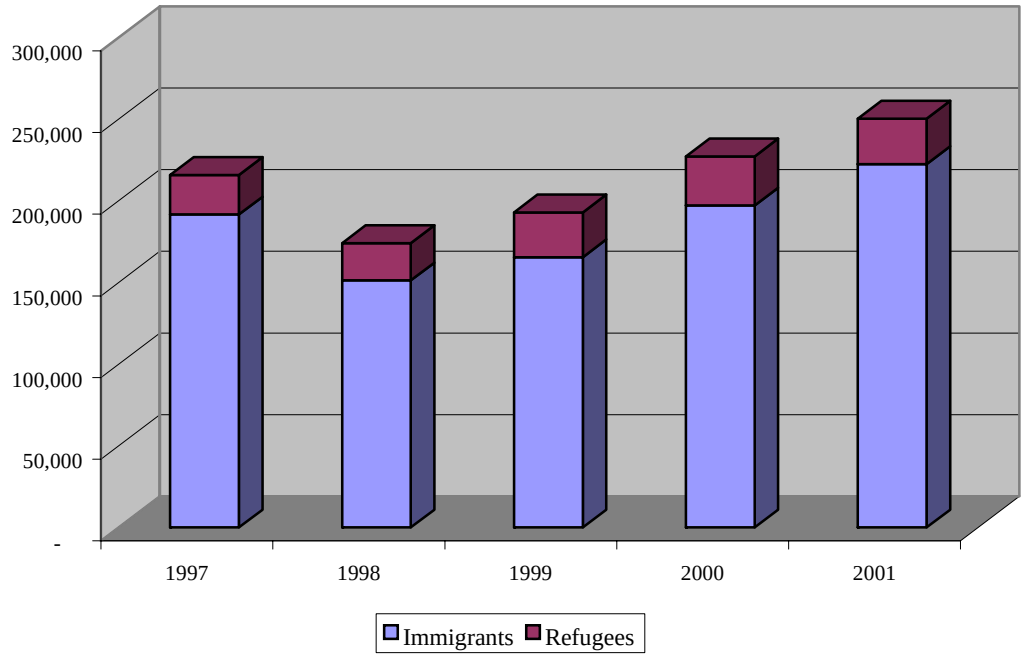
[35] As a practical matter, individuals seeking asylum in Canada must generally travel to this country to make their claim. There have been instances where Canadian missions abroad have assisted refugees to obtain asylum in Canada, but this is highly unusual. Canadian missions overseas are not equipped to deal with asylum claims on a regular basis and these missions are not readily accessible to individuals who want to make refugee claims. Canada does have a program for resettlement of refugees from abroad, but this is directed to finding a durable solution for persons who have been determined by the UNHCR to have no reasonable prospect of being resettled in their home country. It does not cover prospective refugee claimants. The definition of a Convention refugee requires that claimants must be outside their country of nationality and be unwilling to return to that country by reason of a well founded fear of persecution based on one or more of the five grounds set forth in the Convention. Therefore, on purely technical grounds, persons making a refugee claim at a Canadian mission in their home country would qualify as Convention refugees. Signatories to the Refugee Convention are under an obligation not to return a person to a country in which that person has well founded fear of persecution. But signatories are not under any obligation to grant asylum to individuals who present claims at their diplomatic missions in foreign countries. The ordinary expectation in such circumstances would be that the refugee claim be made to the country in which the Canadian mission is located.

The level or total number of asylum claims made in Canada, as in most other developed industrial countries, is driven both by refugee producing conditions in source countries and by general economic conditions that induce people to migrate. Both of these factors have an impact on the number of people seeking to migrate to Canada. To the extent that prospective immigrants claim refugee status as a means to gain admission to Canada, these factors have an impact on legal aid costs and may therefore be regarded as indirect legal aid cost drivers.

At present, Canada, the United States, Australia and New Zealand are the only countries that encourage and plan for immigration. According to the Canadian government's Immigration Plan for 2002, immigrants now account for more than 70% of all labour force growth in Canada, a proportion that will grow to 100% in the next 10 years (CIC, 2001a). On the one hand, Canada is competing at the international level to attract skilled immigrants. On the other hand, Canada and other developed countries are struggling to manage the influx of prospective immigrants who do not have the skills and education to fit the countries' labour market needs.

Between 1997 and 2000, the number of immigrant applications received by Canada increased by 46% (CIC, 2001a). In calendar year 2000, 197,129 new immigrants were landed in Canada. In addition to this number Canada granted landed residence status to 30,080 refugees. In 2001, 222,504 new immigrants and 27,882 refugees were granted landed status in Canada. Data on landings in each of the past five years are presented in Chart 3.

Chart 3 Immigration Landings in Canada : 1997-2001

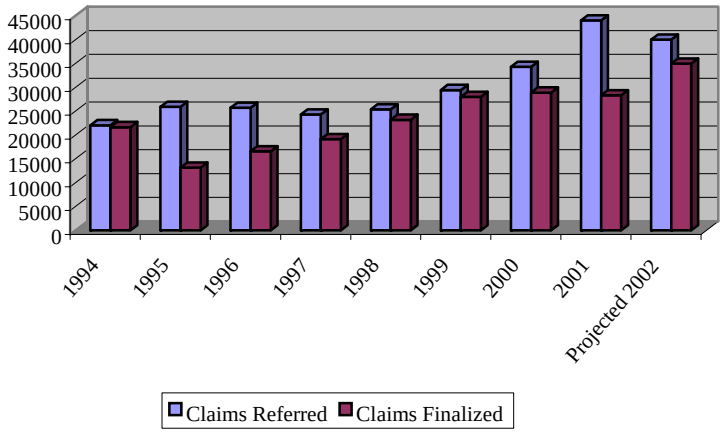


Sources: 1) CIC, Annual Immigration Plan, 2000: Appendix E
2) CIC, Annual Immigration Plan, 2002: Appendix E
3) CIC, News Release 2002-11, April 17, 2002

Roughly 11% of persons currently being granted landed immigrant status in Canada are refugees. This group is quite distinct from the other 89% who arrive through regular immigration channels. Regular immigrants are admitted to Canada on the basis of qualifications intended to address Canadian priorities. Family class immigrants, skilled workers, business

investors and entrepreneurs are admitted to Canada based on an assessment of the contribution they can make to Canadian society and the likelihood of their adapting successfully to life in Canada after their arrival.[36] Emphasis is placed on factors such as language skills, education and employment prospects, and in the case of immigrants in the family class, the capacity of sponsoring relatives to support them in Canada after their arrival. Refugees, on the other hand, are admitted to Canada for humanitarian reasons. With refugees whose claims are determined in Canada, the focus is entirely on the individual refugee's need for protection. With refugees sponsored from overseas, prospects for successful integration in Canada are also considered.

Chart 4 Refugee Claims Referred to IRB : 1994-2002



Source : IRB

Over the past four years, the number of refugee claims referred to the IRB has increased significantly, rising from just under 25,000 in 1998 to more than 35,500 in 2000 (CIC, 2001a: 5). The number of refugee claims referred to the IRB in 2001 exceeded 44,000. That number is projected to decline to 40,000 this year (IRB, 2002b). The upward trend in the number of refugee claims being made in Canada in recent years can be seen in Chart 4. The number of refugee claims determined by the IRB is also rising, however the Board has not been able to keep pace with the increased intake of claims. As a result, a substantial inventory of claims has built up. In order to clear this inventory and to reduce processing times to an optimal level, the Board will have to continue increasing the number of claims determined each year for the next few years, even if the number of new claims received declines. The expected increase in IRB capacity to hear cases will exert further cost pressure on legal aid authorities.

Significantly, over 90% of the immigrants and refugees landed in Canada in 2000 settled in Ontario, Quebec and British Columbia. Nearly 75% of all immigrants currently coming to Canada choose to live in Toronto, Montreal and Vancouver, an increase of 5% over the past decade (CIC, 2001a: 5). The proportion of refugee claims made in Canada is weighted even more heavily towards the three largest centres. The IRB estimates that 54% of all in-Canada claims for 2002-03 will be referred to Toronto, 30% to Montreal and 9% to Vancouver (IRB,

[36] According to the federal government's *Immigration Plan for 2002*, skilled workers, business people and provincial or territorial nominees, together with their families, will make up about 60 percent of all landings in 2002, and family members of Canadian citizens and permanent residents, slightly more than one-quarter. It is estimated that refugees will again account for more than 10% of landings.

2002c). This concentration of newly arrived immigrants and refugees in three provinces imposes especially heavy cost burdens on legal aid programs in these provinces.

Some refugees are highly qualified and they adapt easily once they settle in Canada; but others have great difficulty integrating into the Canadian economy. When they arrive in Canada, many refugee claimants are destitute. From the moment they present their refugee claim, they are drawn into complex legal proceedings. In contrast, regular immigrants, whose resettlement in Canada has been pre-approved, are far less likely to encounter legal problems when they arrive. As a pre-condition to their being approved for permanent residence status in Canada, regular immigrants must have sufficient resources to support themselves, or they must have a sponsor in Canada who is prepared to support them. As a result of these factors, refugee claimants are more likely than regular immigrants to require legal aid, both with respect to status determination proceedings and with respect to the regular incidents of life in Canada, after they are accepted as refugees. Again, the cost impact for legal aid programs that flows from the special needs of refugees are concentrated overwhelmingly in Ontario, Quebec and British Columbia.

2.1.1 The refugee determination process as an alternative channel for immigration

To be accepted for landing in Canada through regular immigration channels, prospective immigrants must meet demanding qualifying criteria relating to matters such as level of education, language skills, and employment prospects. Individuals claiming refugee status, on the other hand, are permitted to remain in the country until their refugee claim is determined. Claimants who are granted asylum in Canada qualify for landing as permanent residents, and they can sponsor their spouse and dependent children for landing without regard to the qualifying criteria that apply to other immigrants. While their refugee claims are being processed, claimants are also permitted to work in Canada. For individuals who want to immigrate to Canada, but who do not have much prospect of qualifying for admission through regular immigration channels, the refugee determination process offers an attractive alternative avenue for admission to the country.

Two different patterns that are apparent in the composition of the intake of refugee claims to Canada illustrate this point. Two primary source countries, China and India, currently account for close to 30% of new immigrants to Canada (CIC, 2001a: Appendix E). India and China are also perennially among the top 10 source countries for refugee claimants arriving in Canada. While some of the refugee claims from these two countries are accepted, the majority of them are rejected (IRB, 2002e). This suggests that a significant number of claimants from these countries may be using the asylum process as an alternative to regular immigration channels.

In a completely different vein, in recent years Canada has also received sudden influxes of refugee claims from Chile and Argentina at a time when these countries were not commonly regarded as refugee-producing countries. Most of these claimants appear to have been motivated more by stories they had heard about good economic prospects in Canada than they were by any objective fear of persecution in their home countries, and very few of these claims were accepted. The large number of claims received in recent years from the Czech Republic and from Hungary appears similarly to have been driven in large measure by media reports in the source countries about living conditions in Canada. Most of the claimants from these latter two countries were Roma, who as a group have faced a history of severe discrimination and

persecution throughout Central Europe. But at the time Roma claimants started arriving in Canada in large numbers, the national governments in Hungary and the Czech Republic were making serious efforts to redress this historic abuse. This suggests that a significant number of claimants from these countries may also be using the refugee determination process as an alternative channel for immigration to Canada.

This is not to imply that all, or even most, refugee claimants are abusing the asylum process. Indeed, the fact that approximately half of all the claims made in Canada are determined to be well-founded indicates the exact opposite.[37] Many people who do not fit the legal definition of Convention refugee migrate to countries like Canada to escape from intolerable conditions in their home countries. The fact that they attempt to come as refugees is not surprising. The boundary between refugees and so-called economic migrants is often very thin. But the very fact that the boundary is so thin makes it possible for prospective immigrants, particularly those from countries with poor human rights records, to use the refugee determination process as an alternative avenue for admission. To the extent that Canada is perceived by these prospective immigrants as an attractive immigration destination, it is to be expected that a significant number of them will look to the asylum process as an alternative route of access. This, in turn, has a significant impact on legal aid costs since there is a high probability that people claiming refugee status in Canada will require legal aid.

2.2 Global migration issues

Review of major trends in global migration provides a starting point for identifying the forces that influence refugee claimants' decision to seek asylum in Canada. As a direct consequence of globalization and increased accessibility to international travel, large numbers of people are moving from their countries of origin to other countries in pursuit of economic opportunities and a better life. It has been estimated that about 150 million people around the world are on the move at any given time (CIC, 2001a: 5).

In 1999, there were about 22 million refugees and internally displaced people around the world identified as persons of concern to the United Nations High Commissioner for Refugees. Less than one-sixth of this group has been granted asylum in Western Europe, Canada, the United States and Australia (UNHCR, 2000).[38] But the total number is so large that even the

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[37] Canada applies a broader interpretation of the 1951 *United Nations Convention relating to the Status of Refugees* than do many other developed, industrialized countries. However, the difference is not as significant as appears at first glance. Asylum seekers who are not accepted as Convention refugees in these countries can still access effective protection under other arrangements that in Canada are subsumed within the broader interpretation of the definition of a Convention refugee. Also, these other countries have appeal procedures that result in significant numbers of asylum seekers who are rejected by decision-makers of first instance being granted asylum on appeal. For example, the United Kingdom, at first instance, granted protected status to 32% of applicants whose claims were decided in 2001. A further 19% obtained protected status on appeal. Similar results obtained in Australia and Germany, meaning that approximately half of the persons who applied for asylum in these countries were ultimately allowed to stay there under some protected legal status. In the United States in 2001, 56% of refugee applicants were granted protected status by INS. In cases determined by immigration judges in the US, some 35% were granted protection. Thus, the effective "acceptance rates" in all of these countries are similar to the rate in Canada (IRB, 2002a).

[38] According to UNHCR figures for 1999, approximately 3.6 million of the 22 million persons of concern were identified as living in developed countries. Of these, only 148,030 were identified as living in Canada (UNHCR, 2000). The most recent report from the UNHCR estimates that the population of persons of concern had declined to

small number who manage to reach these developed countries have a significant impact in the destination countries.

In addition to the 22 million identified as persons of concern to the UNHCR, a significant number of migrants are also moving from less developed countries to Western Europe, North America and Australia in search of economic opportunities. Some of these migrants arrive through regular immigration channels; others enter the destination countries illegally or do not leave when their visas expire.

2.3 Conditions in source countries as "push" factors

International migration is driven by a variety of factors. On the one hand, overpopulation, poor economic conditions, natural disasters and endemic civil conflict can be considered as "push" factors driving global migration. On the other hand, other people migrate because other countries offer them better economic prospects. Factors that lead people to move simply to pursue better economic opportunities can be loosely characterized as "pull" factors.

In common discourse, people attempt to distinguish between so-called "genuine refugees" and "economic migrants". But this distinction is somewhat misleading. Many of the individuals who present refugee claims are not refugees within the strict meaning of the 1951 *United Nations Convention relating to the Status of Refugees* and the 1967 *Protocol* to that Convention (together referred to as "the *Refugee Convention*"), but they are fleeing from inhuman and intolerable conditions in their home countries. On top of the millions who are driven from their homes by war, famine and other catastrophes, millions more are forced to move in order to survive because they are simply unable to eke out a living in their place of origin. In many cases the search for better economic prospects and the struggle for survival are hard to distinguish.

It is impossible to provide any detailed estimate of the number of people who are on the move because of "push" factors, but it is generally agreed that the number is huge. The 22 million persons identified by the UNHCR as persons of concern are primarily victims of political and ethnic persecution, general civil conflict or environmental disasters. The number of forced economic migrants who do not fall within the UNHCR mandate may be as large or even larger than the group identified as refugees or internally displaced persons who are of immediate concern to UNHCR.

Approximately 57% of the population of concern to UNHCR are outside their countries of nationality, either seeking asylum or living as refugees in some other country. Roughly 3.5 million of these are living in Western Europe, the United States, Canada and Australia (UNHCR, 2001). Approximately 148,000 were identified as living in Canada in 2000.

Conditions in countries of origin serve primarily to initiate migration. These "push" factors do not, generally speaking, influence the choice of where the person migrating will go. Canada, in particular, as a destination quite remote from the countries from which most immigrants and refugee claimants originate, is not likely to be an obvious destination unless

19.8 million at the start of 2002 (UNHCR, 2002). The 1999 figure is used for these calculations because more comprehensive data are available for that year. These numbers are used merely to illustrate the magnitude of the problem and to provide a general indication of how small a portion of the population of concern is living in Canada.

there are other factors influencing the person's choice. However, once people have made the decision to move, there are factors associated with particular countries of origin that influence the choice of Canada as a preferred destination. It is this combination of conditions in countries of origin and links with Canada that influence the number of refugee claims that are made in Canada, as opposed to other developed countries. Thereby, this combination acts as a secondary driver of legal aid costs in Canada.

2.4 Refugee claim distribution dynamics among industrialized countries

International population flows are unlikely to have any significant cost impact on legal aid programs in Canada, except to the extent that prospective migrants to Canada are driven to use the asylum determination process as a way to gain entry to Canada.

The number of potentially mobile people in countries that are in a state of civil and economic upheaval is huge, though there is no way of making a meaningful count. Many of these individuals are prepared to go to great lengths to gain admission to a developed, industrialized country in the West where they have some prospect of finding stability and personal security. Of these, many have a well-founded fear of persecution in their home country and readily qualify as Convention refugees. Many others face intolerable living conditions in their home country, but do not meet the legal requirements to qualify as refugees. Others are pure economic migrants seeking to move in search of a better life. What they all have in common is very little prospect of qualifying for admission to their desired destination countries as regular immigrants.

The large migration flows that have taken place since World War II are made up of a mix of economic migrants and people who are forcibly uprooted by civil strife and environmental disasters. It is impossible to estimate with any precision the portion of the migration flow that is attributable to civil strife and environmental crises and the portion that is driven simply by the quest for improved economic circumstances. Most of the movement has been between less developed countries in the third world. Notwithstanding the restrictions on migration imposed by developed industrialized countries, a substantial number of migrants arrive in these countries each year. Some arrive as legal migrants, some arrive as refugees, and others arrive as illegal migrants simply seeking work.

Of all migrants seeking entry to the seventeen developed countries that comprise the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia)[39] in 2000-2001, 542,971 claimed asylum.[40] The total number of asylum claims presented in IGC countries has been fairly stable (between 542,000 and 555,000) over the past three years (see Appendix 1 – Sheet 1).

Over the past thirteen years, Canada's share of all asylum claims made in IGC countries has averaged around 5%. The annual level of claim intake over much of that period has been around 25,000, but between 1998 and 2001, annual intake rose from 25,396 claims to 44,502 claim, representing an increase from 5% to 8% of all claims lodged in IGC countries (see

[39] In addition to Canada, the member countries of the IGC are: Australia Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom, and the United States.

[40] This percentage includes dependants of asylum seekers who may have arrived at a subsequent date.

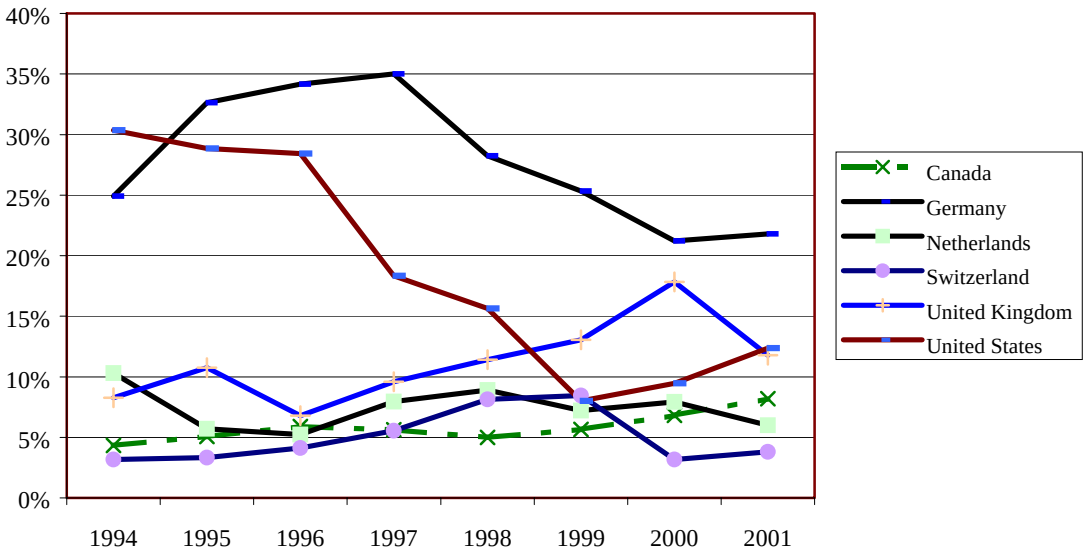
Appendix 2 – Sheet 2). Between January and June of 2002, the number of refugee claims made in Canada has declined by 28% from the number received in the preceding six-month period. But this decline has been matched by a decline in claims lodged in other IGC countries (UNHCR, 2002). As a result, Canada's share of the total is likely to remain around 8% for 2002.

The situation in Canada is somewhat different from that in other IGC countries because of Canada's geographic position. To reach Canada, one must traverse the Atlantic or Pacific Ocean, the Arctic, or the United States. Migration over the northern route is totally impractical and can therefore be disregarded. Arrivals from Europe, Asia or Africa are overwhelmingly made by air. The number of immigrants arriving by sea in recent years has been negligible as a portion of total immigration to Canada. A significant number of immigrants and refugee claimants do arrive in Canada via the United States, having either traveled overland from South America or having arrived in the United States by air and moved on to Canada. The significance of Canada's sheltered position in geopolitical terms is that this country does not have to deal with overland arrival of as large a number of migrant labourers as do the United States and member countries of the European Economic Community. The number of these illegal migrant workers in Canada is impossible to determine because Canada does not keep track of when visitors to the country depart. Also, migrant workers who are illegally in the country avoid contact with the authorities as much as possible. Since their contacts with the legal system are limited, it is assumed for purposes of this inquiry that the cost impact that migrant workers who are not seeking asylum have on legal aid programs in Canada is small.

Beyond the migrant labourers, however, are the many refugees and economic migrants for whom making an asylum claim represents the only (or best) option for gaining admission to a desired host country. The IGC numbers reviewed above provide a reasonable indicator of the magnitude of this population and of trends in its distribution among the countries that are favoured destinations. Fluctuation in the percentage of all asylum claims made in select IGC countries, including Canada, is illustrated graphically in Chart 5.[41]

[41] In order to simplify the chart, data is limited 6 of the 17 IGC countries and only the period from 1994 to 2001 is covered. The chart is provided more for purposes of illustrating the discussion point than to provide a comprehensive presentation of the data on which the foregoing observations are based. More complete data are provided in Appendix A.

Chart 5 Refugee Claims filed in selected IGC countries
Percentage of total claims filed from 1994 to 2001



Source Appendix A – Sheet 2

Relative to many other countries in the IGC, the level of refugee claims made in Canada has been quite stable. For example, claim intake in Germany rose from 121,316 in 1989 to 438,191 in 1993. German intake has subsequently declined to 118,306 in 2001. As a percent of the total IGC intake, the German intake has varied from a high of 52% to a low of 21%, with wide year-to-year variations in between. Comparable volatility has occurred in the United Kingdom and the United States. The Netherlands, Sweden, and Switzerland have also experienced year-to-year fluctuations wider than those experienced in Canada. Year-to-year fluctuations in most other IGC countries have been comparable to those experienced in Canada (see Appendix "A").

The variation in claim intake in other countries does not appear to be closely associated with shifts in the number of claims received in Canada. At the same time that refugee claim intake was declining rapidly in Europe, from 1992-1994, there was a sharp decline (1992-1993) in Canada and a sharp increase in the United States. The situation in Europe and Canada stabilized in the mid-1990s. At the same time, there was a significant decline in the number of claims lodged in the United Kingdom and the United States. After 1997, the number of claims made in Europe, including the United Kingdom, began to climb again, while claim intake in the United States continued to decline. Intake in Canada remained stable, at around 25,000 claims per year, until 1998, when the number of new arrivals began to increase.

During most of the period of sharp decline in the United States and in Europe, applications in Canada remained relatively stable. The increase in Canada, from 25,396 claims in 1998 to 30,887 claims in 1999, may have been linked with the continuing decline in the United States, or it may have been linked to the increase that was already underway in Europe. But that runs contrary to the continued increase experienced in Canada over the past two year,

when applications in the United States have been increasing and applications in Europe have been declining.

The absence of any clear correlation between intake trends in Canada and in other IGC countries suggests that policy shifts that affect claim intake in other developed Western countries do not have a significant influence on claim intake in Canada. The number of refugee claims made in Canada appears to be influenced more by other factors specific to Canada and the countries from which most refugee claims made in Canada originate.

2.5 Factors influencing choice of Canada as a host country

The level of intake of immigration and of refugee claims from particular countries is influenced by a complex mix of factors that vary from one country of origin to another. Robert F. Barsky (1997) has examined the factors that influenced the decisions of different groups of refugees to choose Canada as a host country. He found that the country of origin is a significant variable. Refugees from different countries of origin had different motives for choosing Canada, motives which they tended to share in common with other refugees from the same country of origin, but not necessarily with refugees from other countries of origin.

The Peruvian refugees whom Barsky interviewed chose to come to Quebec primarily because of the presence of other family members there. A perceived affinity between Quebec and Latino cultures, and distaste for the United States as a destination because of the perceived relationship between oppressive Peruvian regimes and American involvement in the country also influenced their choice. Other factors that influenced the choice were accidental, for example utilization of Gander as a stopover point for Aeroflot flights, and visa and other travel restrictions, which influenced the route of travel.

Respondents from Russia and Ukraine saw Canada as an “immigration country” with a multicultural society that admits refugees and persons from other cultures. Knowledge of the existence of a Russian or Ukrainian community in Canada and perception of a strong resemblance between Canada and their countries of origin (climate, geography, level of education) were also important factors. Even though many of these individuals were encouraged by immigration officials in Gander to make their claims in St. John’s, they chose to move to Montreal where they had family or friends and because they felt they had better prospects of being accepted in the community there.

The Barsky study identifies other factors beyond those listed. For example, his Pakistani respondents had no particular interest in coming to Canada and very little knowledge about this country. It was the agents who had assisted their departure from Pakistan and Pakistanis in New York who encouraged them to make their claims in Canada. But a recurring theme with many of Barsky’s respondents is the importance of some prior connection with Canada, either though presence of family, friends or an anchor community from the country of origin. Factors of this sort influence the mix of immigrants and refugee claimants who choose to come to Canada. The strength of particular factors may also influence the number of persons who come, which in turn has a predictable impact on legal aid costs.

2.6 Impact of Canadian interpretation of the *Refugee Convention*

Another factor that is sometimes mentioned as possibly drawing refuge claimants to Canada is the liberal approach to interpretation of the *Refugee Convention* that is applied in this country. The contrast in interpretation is particularly notable between Canada and most countries in Europe. The Canadian interpretation of the Convention refugee definition set forth in Article 1 of the *Refugee Convention*, and incorporated in Canadian law in section 96(1) of the *Immigration and Refugee Protection Act*[42], differs from the interpretation in most European countries in two important respects. Canada applies a more expansive interpretation of "particular social group" as one of the five grounds on which refugee status can be granted. Canada also does not require that the agent of persecution be associated with the State or that the State acquiesces in the persecution, which most European countries do. As a result, many people – for example women fleeing domestic violence or other forms of gender-based persecution - who have little chance of qualifying for refugee status in Europe can make a successful claim in Canada.

One might reasonably suppose that this difference in approach would draw claimants to Canada and act as a driver for legal aid costs. However, the limited movement there has been in Canada's share of overall intake of refugee claims made in IGC countries does not in any way correlate with high profile developments such as 1993 Supreme Court of Canada decision in Canada *(A.G.) v. Ward*, which expanded application of the 'particular social group" provision in the definition of a Convention refugee. In fact, the years when claim levels in Canada and Canada's share of claims made to IGC countries was lowest were 1993 and 1994, a period when the *Ward* decision was drawing the greatest international attention. Likewise, from 1995 to 1998 when the IRB's pioneering work with respect to female refugee claimants was drawing considerable international attention, claim intake in Canada remained stable at around 25,000 claims per year.

2.7 Impact of easing of barriers to international travel

The increasing globalization of the international economy, which has been accompanied by rapid expansion of international travel and easing of international travel restrictions, has had a profound impact on the level of migration around the world. In earlier times, Canada was a distant and difficult to reach destination for any but the most determined migrants. Now, provided an individual can raise the money to purchase an airline ticket and the necessary travel documents to be allowed on a flight, Canada can be reached from virtually anywhere in the world in less than 24 hours.

For many years, the Canadian government actively recruited immigrants from Europe in an effort to populate Canada's vast open spaces. More recently, the Canadian government has begun to regulate migration more closely to ensure that the mix of new immigrants meets Canada's current labour market needs, which are totally different than they were in the first quarter of the 20th century.

The convergence of easy physical access to Canada from abroad and greater restriction on permanent migration to this country has resulted in a large increase in the number of

[42] The definition of Convention refugee was formerly contained in section 2(1) of the *Immigration Act*.

prospective migrants, particularly from Asia, for whom an application for asylum in Canada may be the most viable way to obtain permanent resident status in this country.

2.8 Impact of anchor communities in Canada

The presence of friends or family members in a particular destination country is one of the factors that influences refugee claimants' choices with respect to where they make their refugee claims (Barsky, 1997). In a country such as Canada, which receives immigrants from many countries, the building of anchor communities from particular refugee producing counties may be a factor that is fueling the growth in the number of refugee claims being made here.

In each of the three years between 1998 and 2000, China, India, Pakistan, Philippines and Korea have been among the top 10 source countries for migrants to Canada. Sri Lanka and Taiwan have also been among the top 10 source countries in two of the past three years. Hong Kong ranked fifth in 1998, but had dropped to 17th by 2000. Among them, these eight Asian countries have accounted for almost 45% of all new immigrants to Canada in 2000 (CIC, 2001a: 12). China, Pakistan, Sri Lanka and India have also consistently been among the top 10 source countries for persons claiming refugee status in Canada, while these countries have not featured as prominently as sources of refugee claims made in other IGC countries (UNHCR, 2001).

A significant number of refugee claims referred to the CRDD are from individuals who indicate on their Personal Information Form that they have relatives in Canada.[43] This is particularly notable with respect to claims from India, Sri Lanka, Somalia and Iran. It is not surprising that many newly arrived refugee claimants have relatives already in Canada, particularly where those relatives had originally come to Canada as refugees. Family members who remained in the home country when the original refugee came to Canada may well have experienced similar persecution. The presence of a relative in Canada would quite naturally be a significant factor affecting the subsequent family member's choice of Canada as a country of asylum. This is consistent with Barsky's finding that presence of family members or friends in a country is an important factor in refugees' choice of that country as their destination.

2.9 Role of smugglers

Faced with significant restrictions on legal immigration, migrants are increasingly turning to migration agents and smugglers to assist them to gain access to the desired destination countries. Human smuggling has become a major business activity in recent years. It is estimated that revenues from human smuggling and trafficking[44] range from US$ 5 - US$ 7 billion annually (Morrison and Crosland, 2001: 3, footnote 1, citing Widgren, 1994). Estimates

[43] There has been no systematic study of what portion of refugee claimants in Canada indicate that they have relatives here, but experienced observers at the CRDD are aware of this phenomenon from experience acquired in hearing hundreds of refugee claims. The statement is based on the author's personal experience as Deputy Chairperson of the CRDD from 1995 to 2001.

[44] A distinction is drawn between human smuggling and trafficking, though both are significant factors in the illegal movement of people across international borders. Smuggling has been defined to mean "the intentional procurement for profit of illegal entry of a person into and/or illegal residence in a State of which the person is not a national or a permanent resident" (*Revised draft Protocol against Smuggling of Migrants,* Article 2). Trafficking connotes the presence of an additional element of exploitation of the person who is being moved across international borders.

vary widely as to the percentage of asylum seekers and illegal migrants who are moved across international borders with the assistance of professional smugglers, but it is generally acknowledged that it is significant and is increasing. Ironically, the very measures that governments are taking to curtail illegal migration may be forcing asylum seekers and other migrants to avail themselves of the services of smugglers since it is becoming increasingly difficult to gain entry to developed, industrialized countries without such professional assistance.

Smugglers and migration agents facilitate illegal migration in a number of ways. Agents provide forged and fraudulent identity papers and travel documents to enable migrants to leave countries that have exit controls, to cross international borders, and to travel on commercial carriers. Smugglers also arrange transportation by clandestine routes, moving people in large groups on derelict ships engaged expressly for the purpose, as stowaways on fishing vessels and merchant ships, and in sealed freight containers. In order to conceal the routes used and to make deportation more difficult, the smugglers instruct their clients to destroy their travel documents and identity papers. When the documents are of high quality, the smugglers often recycle them for use by other migrants. As a result, many of the illegal migrants arriving in Canada and other developed countries have no travel papers or documents by which they can be identified.

The role of agents and smugglers in international migration is ambiguous. History is replete with examples of heroic people who used illegal means to smuggle persecuted people to safety. At one level, smugglers provide a vital service, even if they charge extortionate amounts for that service. However, there is also a darker side. Many of these agents and smugglers have links to organized crime syndicates. People are often smuggled under deplorable conditions, without any regard for their safety or well being. Migrants are forced to enter into highly exploitative arrangements, often indenturing themselves to the smugglers for years. If they fail to pay, they or other family members may be severely dealt with, sometimes even killed.

Many of the people who are smuggled have no fear of persecution. They are simply using the smugglers to circumvent normal immigration channels. If they are apprehended by the immigration authorities, they are advised to claim refugee status to forestall immediate deportation. The smugglers and migration agents abet this abuse of the asylum process by providing their clients with false stories and documents to support these stories. The criminal overtones of human smuggling and the fact that many of the migrants are abusing the refugee determination process has generated an intense backlash against refugee claimants in general and demands for imposition of more severe immigration restrictions.

The activities of smugglers and migration agents have led the government to introduce more severe measures to curb illegal migration, including measures that may lead to extended detention of a large number of illegal migrants. The authority currently exists to detain foreign nationals for purposes of establishing identity. This authority has been rarely used, but the new regulations enacted under the *Immigration and Refugee Protection Act* (IRPA), explicitly list factors to be considered by an adjudicator when deciding whether to detain persons whose identity has not been established. The listed factors include: failure to cooperate in establishing identity, provision or existence of contradictory information concerning identity, and destruction of identity documents, or use of false identity documents, in order to mislead CIC (*Immigration and Refugee Protection Regulations*, s. 251(c) and s.254(a)-(e)). Also under section 252(f) of these *Regulations*, foreign nationals whose arrival in Canada is part of a criminally organized smuggling or trafficking operation are regarded as a flight risk and are therefore more likely to be detained.

Increased use of detention in these cases, which is intended, in part, to counter smuggling and trafficking of humans, will lead to an increase in the number of detention reviews. Since legal aid is likely to be required for these reviews, this has direct cost implications for legal aid programs.[45] The added cost is likely to be directly proportional to the increase in the number of detention review hearings.

2.10 Problems in establishing identity of refugee claimants

The activities of human smugglers and traffickers have also contributed to problems in establishing the identity of refugee claimants. These activities affect legal aid costs in two major ways. First, the widespread disposal or concealment of travel documents by refugee claimants and abuse of the refugee determination process by illegal migrants has made the refugee determination process more complicated as considerable effort must be expended to establish claimants' identity by other means. The widespread use of forged and fraudulent travel documents and identity papers provided by migration agents and smugglers has compounded this problem. It has become increasingly difficult to establish the identity of refugee claimants with any degree of confidence, even in cases where claimants ostensibly have good identity documents.

The Auditor General for Canada has reported that more than 60% of refugee claimants in Canada do not have proper travel documents (e.g. airline ticket, visa, passport) when they present their claims (1997: 6). Claimants give a variety or reasons for not having these documents, which they would have needed to travel from overseas to Canada.[46] By the time these cases reach the CRDD, many of the claimants have obtained identity papers, including birth certificates, passports, work permits, housing permits and internal passports. However, the reliability of many of these documents is highly suspect.

Because of concerns about undocumented and improperly documented claimants, IRB members have been hesitant about accepting refugee claims through the expedited process. Status determination proceedings are delayed while claimants attempt to assemble reliable identity information. Documents that are provided are treated with suspicion. Hearings must sometimes be adjourned to allow for forensic examination of documents submitted. All of these factors contribute to increased legal aid costs as lawyers are required to do more work on cases than might otherwise be necessary.

Under the former *Immigration Act* (s.69.1(5)(ii)), Minister's representatives were allowed to present evidence in any refugee claim, but they could only question the claimant or other witnesses and make representations in cases where the Minister notified the CRDD that such

[45] Under the former *Immigration Act*, detention reviews were required every 7 days for persons who are being held to establish identity. This is in contrast to the "48 hour, 7 day and every 30 days thereafter" review cycle prescribed with respect to persons who are detained as flight risks or for security reasons. Under *IRPA*, detention reviews in identity cases have been placed on the same cycle as other detention reviews.

[46] For example, their papers were stolen, the migration agent who assisted them to reach Canada took back the documents or advised them to destroy them because they were false, or they managed to travel without any documents. It is not at all surprising that refugees travel using false documents. This is often the only way in which they can escape from the countries where they fear persecution. A person who genuinely fears persecution at the hands of an oppressive regime is unlikely to approach that regime for a passport and other travel documents. Other refugees come from countries such as Somalia and Afghanistan where there has been no civil authority in place to issue documents.

matters involved exclusion issues under section E or F of Article 1 of the *Refugee Convention*, and/or if the CRDD otherwise considered it appropriate. Under *IRPA* (s.170(e)), the Refugee Protection Division of the IRB (which replaces the CRDD) is required to give the Minister a reasonable opportunity to present evidence, question witnesses and make representations in all cases.

This widening of the scope for Minister's interventions is a direct response to the increasing concern about undocumented and improperly documented claimants, and to concern about involvement of criminal elements in facilitating illegal immigration. Increased intervention by Minister's representatives in hearings before the RPD has significant cost implications for legal aid because such interventions make the hearings more adversarial and hearings in which the Minister intervenes typically require more time to complete.

2.11 Bilateral and multilateral agreements and "safe third country" provisions

2.11.1. The Schengen Agreement and the Dublin Convention

Two major international agreements affecting persons seeking asylum in Western Europe, the *Dublin Convention* and the *Schengen Agreement* came into force in the 1990s. As has already been noted in section 2.4 above, there is no discernable correlation between these and other developments in Europe and the number of refugee claims received in Canada from year to year. However, the impact that these agreements have had within Europe has a bearing on the present inquiry into legal aid cost drivers from a completely different perspective.

The *Dublin Convention*, in particular, assigns responsibility for determining individual refugee claims to the country through which the claimant first entered the geographic zone comprised by States party to the *Dublin Convention.* Canada and the United States have recently confirmed their intention to implement a similar bilateral agreement in the North American context. The Canada-US agreement could have a profound impact on the number of refugee claims that have to be determined in Canada. This, in turn, could have a significant impact on legal aid costs.

The *Schengen Agreement* provides for free movement of people across national frontiers within the Europe. It was first entered by France, Germany, the Netherlands, Belgium and Luxembourg in 1985, and was expanded to include 13 countries in 1997. It was incorporated into European Union (EU) law by the *Treaty of Amsterdam* in 1999 (Europa, 2001). This agreement makes it relatively easy for asylum seekers to move anywhere within the European Union once they have gained access to any member country. The elimination of barriers to free movement within the European Union led a majority of member countries in 1997 to enter into the *Dublin Convention.*[47] This *Convention* establishes criteria and procedures for determining which State within the Union has responsibility for examining refugee claims lodged within the Union.

[47] The 15 countries that have signed the *Dublin Convention* are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

Underlying the *Dublin Convention* is the basic principle that persons claiming asylum within the European Union should make their claim at the first opportunity. Conversely, the *Dublin Convention* is based on the premise that the first country through which a claimant enters the European Union should assume responsibility for determining the claim. Exceptions are made for claimants who have a visa for admission to, or who have family members in, another country within the EU. An exception is also made for claimants who have resided for more than six months in a country other than the country through which they entered the EU. This agreement is intended to make it more difficult for asylum seekers to make sequential claims for refugee status in more than one country within the European Union.

According to a study on implementation of the *Dublin Convention* funded by the European Commission and carried out by the Danish Refugee Council (DRC) (Danish Refugee Council, 2001), the Member States generally agree that the "Dublin system" does not function as expected. Among other issues, the DRC study noted that the procedures are lengthy and the criteria are unclear and difficult to implement. Moreover, the results are not significant since only a few asylum seekers are ultimately transferred. At the same time, some of the concerns expressed by refugee advocates and NGOs across Europe have materialized. Claimants are subject to a longer (pre-procedural) period of uncertainty. Family members are separated. Member countries within the European Union have not yet harmonized their material law and practice with regard to how they deal with refugee claims. As a result, claimants are incited to destroy identity and travel documents and to choose illegality and go underground to avoid transfer to a country where their claim may be dealt with less favourably.

The impact of these two agreements on the number of asylum applications received in Europe is unclear. There was a sharp decline in claims made in Europe in 1993 and 1994. This predated the *Dublin Convention* and expansion of the Schengen Area beyond the original five countries. The reduction in claims made in these years was related primarily to developments in Germany, which at the time was receiving more than half of all refugee claims lodged in Western Europe. In the wake of the sharp decline in the number of claims made in Germany, there was some fluctuation of intake in other European countries. Belgium and the Netherlands, both members of the Schengen Area with Germany, experienced an increase in claims in the first year after Germany began restricting access. But the additional claims they received amounted to only one-fifth of the reduction in Germany. France, another Schengen country, had no significant increase. The following year, in the face of an even bigger reduction in Germany, the Netherlands experienced an increase amounting to less than one-tenth of the German decline, while the other Schengen countries experienced a decline.

Following expansion of the Schengen Area, and introduction of the *Dublin Convention* in 1997, the number of claims lodged in European countries increased in both 1998 and 1999. Claim intake in Europe started to decline again after 1999; but it is unclear whether this has anything to do with the *Dublin Convention* or the *Schengen Agreement*, or whether it is a function of restrictions that have been imposed by individual member countries.

2.11.2 "Safe third country" provisions

When the *Immigration Act* was amended in 1988, a provision was included authorizing the Governor-in-Council to prescribe "for the purpose of sharing responsibility for the examination of persons who claim to be Convention refugees, countries that comply with Article

33 of the [Refugee] Convention", that is countries that will not return a refugee claimant to a country in which that person has a well founded fear of persecution based on any of the five Convention grounds (*Immigration Act*, s.114(1)(s)). A similar provision is included in section 96 of the *Immigration and Refugee Protection Act.* Countries to which asylum seekers might be returned pursuant to such a provision are generally referred to as "safe third countries".

The underlying logic of this provision is that genuine refugees should reasonably be expected to claim asylum in the first safe country in which they arrive after leaving their home country. It is this same logic that persuaded European countries to adopt the *Dublin Convention*, which effectively makes every signatory country a safe third country vis-à-vis all other signatory countries.

Such a provision has obvious attraction for Canada as a way to limit the number of asylum claims that have to be determined in Canada. The vast majority of persons claiming asylum in Canada have to transit through the United States or though countries in Western Europe, all of which are signatories to the *Refugee Convention* and all of which have well developed asylum determination procedures. Many people who claim asylum in Canada have spent significant time in one or more of these transit countries before embarking to come to Canada.

The federal government has yet to prescribe any countries in Western Europe safe third countries. This is in part because of strong opposition to such a move by refugee advocates in Canada. Also, before prescribing any country pursuant to this authority, the Governor-in-Council is required to make an assessment regarding, among other things, the third country's policies and practices with respect to Convention refugee claims and the country's record with respect to human rights. This could prove problematic since there are material differences in the way in which Canada and countries in Western Europe interpret the definition of a Convention refugee. Furthermore, passage of such a regulation would have the effect of shifting the burden of determining asylum claims from Canada to other countries. There is little scope for reciprocity in sharing the determination of claims between Canada and countries in Europe since few, if any, asylum seekers travel to Europe via Canada.

In the circumstances, it is highly unlikely that the authority to designate safe third countries will be used, in relation to countries other than the United States. Therefore, designation of countries in Western Europe as safe third countries is unlikely to be a factor with regard to legal aid costs. However, Canada has recently negotiated bilateral "safe third country" agreement with the United States. The implications of this agreement are discussed in the section immediately following.

2.12.3 Canada – US bilateral agreement

Over the years there has been a strong interest in utilizing this regulation making authority to prescribe the United States as a "safe third country". Since most of the refugee claimants who present claims at Canadian points of entry arrive in this country from the United States, such a provision could have an enormous impact on the number of claims that have to be determined in Canada. A significant reduction in the number of claims being determined in Canada would significantly reduce the cost of providing legal aid for refugee claimants.

For a "safe third country" provision to work, it must be implemented in cooperation with the country to which claimants would be returned. Since the number of claimants who enter

Canada from the US is considerably higher than the number who enter the US through Canada, the advantages to be gained from any reciprocal "safe third country" agreement are likely to be greater for Canada than for the United States. As a result, until recently the Americans have shown little interest in implementing such an arrangement. However, following the terrorist attack in the US on September 11, 2001, the situation has changed significantly. The Canadian and American governments have recently announced an agreement that will allow immigration authorities in either country to return to the other country persons who make a refugee claim at the land border. Consultations with stakeholders have been completed and the only step remaining before implementation of the final agreement is review and approval by the governments of both countries. (CIC, 2002h).

If this agreement has the predicted effect of reducing the number of refugee claims from individuals who enter Canada from the United States, it could significantly reduce legal aid costs. However, it is still uncertain how the agreement is going to work out in practice. Therefore, it is difficult to draw any conclusions as to the impact this development might have on legal aid costs.

Since the agreement applies only with regard to refugee claims made at the land border, one can anticipate that claimants who want to have their claims determined in Canada will try to avoid making their claim at a point of entry. This is likely to result in an increase in the number of inland claims. If this turns out to be the case, the anticipated reduction in the overall number of claims to be determined in Canada may not materialize. Critics of the proposed agreement have expressed concern that claimants will try to enter Canada clandestinely (possibly under extremely dangerous conditions) so they can conceal evidence of their sojourn in the United States. This is consistent with experience in Europe where claimants are reportedly resorting to destruction of identity papers and other illegal means to avoid transfer to another country pursuant to provisions of the *Dublin Convention* (Danish Refugee Council, 2001: 1). Such developments could further complicate the refugee determination process since they would raise increased concerns about the reliability of documents presented by claimants and increased uncertainty about the circumstances under which they traveled to Canada. If the experience with the *Dublin Convention* in Europe holds true, it is likely that the Canada-US agreement will also raise new pre-determination procedural issues regarding which country has responsibility to determine individual claims. All of these possible developments could result in an increase in legal aid costs.

It can be expected, moreover, that Canadian refugee advocates will challenge the return of asylum seekers to any country that is thought to have harsher asylum determination procedures than Canada. At present, the United States makes much more extended use of long-term detention of asylum seekers than is the case in Canada. Without having been the subject of any criminal charge or conviction, many asylum seekers in the US are detained with convicted criminals in regular jails. This practice arguably contravenes sections Articles 9 and 10 of the *International Covenant on Civil and Political Rights*. Operation of a Canadian law in a way that would result in routine detention in the United States of an asylum seeker turned back at the Canadian border might, arguably, also infringe rights protected under sections 7 and 9 of the *Charter* and Section 2(a) of the *Canadian Bill of Rights.* If there is a serious possibility that asylum seekers who are returned to the United States under the Safe Third Country Agreement may be detained in this way, one can anticipate lengthy and costly legal challenges. This observation is not intended as a comment on the merits of such a challenge. However, one needs

to be mindful of the fact that anticipated legal challenges of this nature could represent a significant additional cost for legal aid plans until the matter is authoritatively settled by the courts.

2.12 Composition of refugee claim intake in Canada

The composition of the claim intake in Canada is quite different from that in the United States and other industrialized countries. In 2001, three of the top four source countries for refugee claims made in Canada (Hungary, Pakistan, Sri Lanka and Zimbabwe) were not even among the top ten source countries for claims made in the United States or in all industrialized countries other than Canada. Of the four top source countries for claims in Canada, only Sri Lanka ranks in the top ten – at ninth - in the group of other industrialized countries, and it was not among the top ten source countries in United States in that year. Table 1[48] provides a more detailed comparison of the national origin of refugee claimants in Canada, the United States and all industrialized countries other than Canada in 2001.

Table 1 Countries of Origin of Refugee Claimants And % of Total Claims (2001)

	Canada		USA		All Industrialized Countries (except Canada)	
1	Hungary	9%	Mexico	16%	Afghanistan	10%
2	Pakistan	7%	China	14%	Iraq	9.5%
3	Sri Lanka	6.5%	Colombia	12%	Turkey	5.8%
4	Zimbabwe	6%	Haiti	8%	FR Yugoslavia	5.4%
5	China	5.6%	Armenia	3.2%	China	3.5%
6	Mexico	3.8%	Indonesia	3%	Russia	3.4%
7	Colombia	3.8%	India	2.9%	Iran	2.8%
8	Turkey	3.7%	Ethiopia	2.5%	Somalia	2.6%
9	India	3.3%	Somalia	2.5%	India	2.5%
10	DR Congo	2.8%	Albania	2.4%	Sri Lanka	2.3%

Source: CIC and UNHCR

Over the past six years, Canada has experienced three separate surges of asylum applications from unexpected sources. In 1996 and 1997, there was a sudden influx of claims from Chile. This was at a time when conditions in Chile were not conducive to producing an exodus of refugees. In 1997-98, Canada started to receive a large number of claims from the Czech Republic, and subsequently from Hungary, neither of which is commonly thought of as producing large refugee outflows in recent years. In 2000-01, Canada received a significant number of claims from Argentina, again in the absence of systematic human rights abuses that might be expected to produce a large refugee outflow. A summary of the number of claims from each of these countries from 1995 to 2001 is provided in Table 2.

[48] This table is reproduced, with permission, from a presentation given by Judith Kumin, Representative of the United Nations High Commissioner in Canada at the May 2002 National Consultation of the Canadian Council for Refugees. Data for the table is drawn from statistics provided by UNHCR and by CIC.

Table 2 Claims referred to CRDD : 1995-2001
Chile, Argentina, Hungary and the Czech Republic

Claims referred	1995	1996	1997	1998	1999	2000	2001
Chile	1495	2828	103	49	95	67	90
Argentina	99	89	100	130	438	1452	1454
Hungary	38	64	300	982	1581	1932	3900
Czech Republic	13	144	1230	175	94	60	43

Source: CRDD, Country Reports – 1995 to 2001

The surge in Chilean and Argentinean claims has been traced back to activities of migration agents in these countries, who misled people into believing that they could find easy employment and access social benefits in Canada. The claims from Chile abated sharply when a visa requirement was imposed for travel from Chile to Canada. Likewise, the flow from Argentina has abated in the wake of imposition of a visa requirement on travel from that country to the United States, through which most of the Argentinean claimants have traveled to reach Canada.

Reasons for the surge in claims from the Czech Republic, and subsequently from Hungary, are a bit more complex. In both instances, the initial increase in refugee claims followed media reports in the source countries that painted a very positive picture of life for Roma (Gypsy) immigrants to Canada from these countries.[49]

The ongoing hostility which Roma face in their home countries, combined with an easing of restriction on travel to other countries following the collapse of communist regimes in Central and Eastern Europe, led many Roma to migrate to countries in Western Europe. Those who have claimed refugee status in Western Europe have had little success with their claims. The interpretation of Article 1 of the *Refugee Convention*, as applied in most European countries, requires some form of State involvement or acquiescence in the alleged persecution in order to ground a refugee claim. Since the governments in the claimants' countries of origin officially condemn the mistreatment of the Roma, refugee decision-makers in Western Europe have held that most Roma claimants are not Convention refugees.

In contrast, many of the initial refugee claims from Central European Roma decided in Canada in the mid-1990s were accepted. Canadian jurisprudence interpreting the definition of a Convention refugee does not require active State involvement or acquiescence in the alleged persecution. Based on the evidence received in these early claims, CRDD members, in a substantial number of cases, accepted that the claimants had a well-founded fear of persecution, as opposed to discrimination, and granted the claimants refugee status.

Reports of this development, combined with the media reports of favourable living conditions in Canada, made this country an attractive destination for Roma refugee claimants.

[49] Historically, the Roma in Central and Eastern Europe have been a downtrodden minority. In recent years, with the breakdown of the old Communist regimes, they have increasingly been the victims of racist attacks from neo-fascist gangs. Governments in these countries have condemned the attacks, but there are strong allegations that they have failed to provide effective protection for the Roma minorities within their borders. There is an active debate, reflected in CRDD jurisprudence on refugee claims from these countries, whether treatment of the Roma in countries like Hungary and the Czech Republic amounts to persecution, or whether it is better characterized as severe discrimination (IRB, 1999a).

The number of claims from the Czech Republic referred to the IRB increased from 144 in 1996 to 1230 in 1997. The flow of claims from the Czech Republic declined precipitously when a visa requirement was imposed in the latter half of 1997. But this was followed by a marked increase in the number of claims from Hungary, rising from 300 in 1997 to 982 in 1998 and reaching a peak of 3900 in 2001. A visa requirement for travel from Hungary was imposed in December of 2001. Since then the intake of refugee claims from Hungary has fallen off sharply.

The pattern observed with respect to the Roma claims appears to run contrary to the observation made earlier in this report that the broader interpretation of the definition of a Convention refugee applied in Canada does not appear to be a factor influencing the number of refugee claims made in this country. However, the fact that the influx of Roma claims continued even when most of the Roma claims were being refused[50] suggests that factors other than prospect of success in establishing a refugee claim strongly influence the choice of people to claim refugee status in Canada. In each of these instances, the most notable common element was the information, albeit distorted, that the claimants had received before coming to Canada, to the effect that good prospects for personal advancement awaited them in this country.

It is premature to draw any firm conclusion from this limited experience. However, it suggests that positive publicity about living conditions in Canada (whether accurate or not), circulated in countries from which people have strong reasons to migrate, acts as a catalyst that affects the number of refugee claims being made in Canada. This phenomenon is likely strengthened when there are agents in the source countries who actively promote Canada as a destination, as was the case with Chile and Argentina. It is also strengthened when a critical mass of refugees from a particular country become established in Canada and act as a draw for their fellow nationals to choose Canada in preference to other possible destinations.

2.13 Legal aid cost implications of the marine arrivals in 1999

The refugee claimants who arrived by boat from China in 1999 are a fourth group of asylum seekers that attracted considerable media attention. While Canada has experienced far fewer organized group arrivals of this sort than have many other countries, including Australia,

[50] The acceptance rate on Hungarian claims in 1999 was only 8% (94 accepted out of 950 decided). In 2000 the acceptance rate climbed to 21% (334 accepted out of 1585 decided), and in 2001, it dropped back to 12% (217 accepted out of 1789 decided). Experience with claims from Argentina followed a similar pattern. In 1998, 10% of Argentine claims (12 out of 120) were accepted. The acceptance rate climbed to 22% (30 out of 137) in 1999 and then dropped back to 12% (67 out of 545) in 2000. In 2001, only 4% (59 out of 1499) were accepted (D. Gerlitz, personal communication, June 7, 2002). The lack of any link between acceptance rates and intake was even more dramatic in the case of the claims from Chile. When it became apparent that there was a rapid increase in claims from Chile, the CRDD established a special team of decision-makers to deal with these claims on a priority basis. Cases were heard within a few months after arrival and less than 3% of the claims were accepted. Many of the rejected claims were determined to have no credible basis, which meant that the claimants were liable to be removed prior to a decision being rendered on any application for judicial review. Despite this minimal prospect for success, Chilean claimants continued to arrive in Canada in substantial numbers until the visa requirement was imposed. Information relating to the Chilean claims is from personal knowledge of the author, acquired as Deputy Chairperson of the CRDD from 1995 to 2001.

the United States, Mexico and Italy, the 1999 incident and similar incidents in the late 1980s have had a profound impact on Canadian immigration and refugee policy.[51]

The manner in which the 1999 incident was handled is being taken as a model of how to deal with similar group arrivals in the future. This has significant implications for future legal aid costs. The logistics of providing legal aid representation in the 1999 marine arrival cases were greatly complicated by the fact that most of the claimants were detained. Because of the lack of sufficient detention facilities in the lower mainland, the claimants were held at facilities in locations where there were no lawyers with experience in dealing with refugee cases. As a result, the Legal Services Society in British Columbia (LSS) had to cover the added costs incurred by lawyers from Vancouver and Victoria, who had to travel to Prince George and Allouette River.[52] These expenses would not have arisen had the cases been heard in Vancouver. Also, since the claimants were detained for many months, the LSS incurred additional costs to provide legal representation at periodic detention review hearings.

The need to process these claims on a priority basis disrupted the normal flow of work at the CRDD in Vancouver. Most of the CRDD members in Vancouver were assigned to work on the marine arrival cases. Hearings on pending claims were delayed to make way for priority processing of the marine arrival cases. Without detailed empirical study, it is difficult to assess whether this disruption resulted in increased legal aid costs, reduced costs, or whether it was cost neutral. However, the potential cost impact of such disruption is a factor that needs to be borne in mind.

The impact of exceptional events, such as arrival of large groups of refugee claimants by sea, as a legal aid cost driver depends on how Canadian immigration authorities respond. If claimants who arrive in large, organized groups, whether by sea, air or land, are dealt with in the ordinary course, the primary cost implication is related to the number of claimants involved who require legal aid. However, if the government responds with special measures, such as detaining most of the claimants involved, money has to be found to cover the added legal aid costs associated with periodic detention review hearings, as well as the added costs associated with providing legal representation to persons who are being held in secure detention facilities.

[51] The arrival of two boatloads of refugee claimants on the east coast in the late 1980s was a major factor in the debates surrounding amendment of the *Immigration Act* in 1988. Likewise, the arrival of the four boatloads of Chinese migrants on the West Coast in 1999 added great urgency to the debate already underway about the need for major reform of the *Immigration Act*. This culminated in passage of the new *Immigration and Refugee Protection Act*. These marine arrivals represent a very small percentage of the total intake of refugee claims in Canada. However, they capture public attention in a more dramatic way than does the arrival of large numbers of individual asylum seekers by land and on scheduled commercial flights every day of the year.

[52] LSS does not have a detailed breakdown of expenses associated with marine arrival cases, but it is estimated that it cost in excess of $1 million to provide legal aid services to the detained claimants during the first year (James Deitch, e-mail to author, June 12, 2002).

3.0 Domestic considerations

3.1 The dynamic relationship between immigration policy and asylum policy

The volume of the immigration and refugee legal aid caseload, or more specifically, the number of refugee claims made in Canada, is the principal cost driver for immigration and refugee legal aid. The overwhelming majority of legal aid costs in this area are incurred in relation to refugee status determination and related legal proceedings involving refugee claimants. Consequently, factors that influence the number of asylum claims made in Canada can be seen as secondary cost drivers. The dynamic relationship between the regular immigration system and the refugee determination system appears to be a major factor in this equation.

In earlier times, when Canada was wide open to immigration from Europe, many of those who arrived through regular immigration channels were fleeing from repression and political persecution. Many among the thousands of immigrants who came to Western Canada in the early part of the 20th century and in the aftermath of World War II were simultaneously seeking new economic opportunities and fleeing from repressive regimes in Eastern Europe. If all that is required to gain entry to a country like Canada is that one apply to the immigration authorities and buy passage from one's country of origin, there is little need to subject oneself to the vicissitudes of the refugee determination process. Refugees are rational people and they will normally seek out the easiest and surest path to safety.

There is also a flip side to this picture. If the barriers to regular immigration are inordinately high, prospective immigrants to Canada will naturally gravitate to the refugee determination process as an alternative path of access. There has been no systematic study of this phenomenon, but experienced observers of the refugee determination process in Canada are aware of the fact that a significant number of the refugee claimants who have sought asylum in Canada in recent years had relatives who were already established in Canada, many of whom had originally come themselves as refugees.[53] At one level, this is to be expected since family members are likely to be subject to the same sort of persecution that drove the original refugee to seek asylum in Canada. It is only normal that other claimants from the same family gravitate to a country where a relative had already been granted asylum. But the phenomenon continues long after the conditions in the source countries that gave rise to the original claim have changed.

[53] This pattern, which the author had occasion to observe over the course of 6 years as Deputy Chairperson of the CRDD, is evident, for example, with respect to refugee claims from India. In the early 1990s, brutal suppression of Sikh militancy in the Punjab led many young Sikh males to seek asylum in Canada. By all accounts, suppression of the militants in the Punjab ended in 1994, yet the majority of asylum claims that Canada receives from India, even today, are based on the same fact patterns that underlay the original claims. The weight of available evidence, however, indicates that the objective basis for most of these claims no longer exists. On closer examination of the individual claims, one is struck by the fact that many of the recent claimants are brothers or cousins of refugees already present in Canada. A similar pattern has been noted with respect to claims from Somalia and Iran.

It is an open question whether some of the people in this "second wave" of asylum seekers are in reality prospective immigrants who do not qualify to come to Canada through regular immigration channels. Many of them lack the formal education and language skills required to meet the basic qualification thresholds to come as independent immigrants, and the relatives in Canada are often not well enough established to act as sponsors. As a result, some of these people may be driven to use the refugee determination process as an alternative channel for gaining entry to Canada for purposes of family reunification. More in-depth study is required before any definitive conclusion can be reached as to the extent to which the asylum process may be being used this way. Without a clear measure of how pervasive this phenomenon is, one cannot measure the impact on legal aid costs. It is reasonable to surmise that increased emphasis on measures to reunite refugee families as early as possible in the process might reduce reliance on the refugee determination process as a means to effect family reunification. This, in turn, could help to reduce legal aid costs.

A number of respondents interviewed in connection with a study on family reunification carried out by the author for the Canadian Council of Refugees (Frecker, 1995) noted that limited access to Canadian consular services in certain parts of the world, particularly in Africa[54], drives some individuals to turn to the asylum process as an alternative to making a regular immigration application. When one comes from a country where objective conditions provide good prospects for making a successful asylum application, and one faces major logistical problems and lengthy delays in pursuing a regular immigration application, claiming asylum offers an attractive alternative method to immigrate to Canada.

Many of these individuals have valid refugee claims, but they would be just as happy to come to Canada through regular immigration channels if that were a practical and accessible option. The significance of this with respect to legal aid costs is that in most provinces, in particular the provinces where most immigrants to Canada settle, asylum determination proceedings are covered by legal aid, whereas immigration applications are not. If more cases of this type could be handled through regular immigration channels, in all likelihood, there would be a decrease in the number of immigration and refugee cases funded by legal aid.

3.2 The dynamic relationship between overseas selection of refugees and inland determination of refugee claims

Canada is recognized by the UNHCR as one of the leading countries for resettlement of refugees who cannot be repatriated to their country of origin. In recognition of the work done by Canada in the early 1980s with respect to resettlement of over 80,000 displaced persons from Indo-China, the UNHCR awarded the Nansen medal to the "people of Canada". This was the first time ever that prestigious award was granted to an entire country.

There is a widely held belief among the general public that the inland refugee determination process favours queue jumpers, many of whom are less deserving of Canada's protection than are the millions of refugees living in desperate conditions overseas. Critics also allege that the inland determination facilitates entry into Canada of individuals who have not

[54] In the years since 1995, CIC has taken steps to increase consular presence in Africa, but the basic point made in the CCR report, that people who have difficulty accessing consular services sometimes use the asylum process as a channel for immigrating to Canada, remains valid.

been subject to any effective security screening. These views have been aired with particular vigor in the wake of the terrorist attacks in the United States on September 11, 2001.[55] Proponents of these views advocate that Canada should restrict inland asylum procedures and place more emphasis on overseas selection. It might reasonably be assumed that if asylum determinations took place overseas, the demand for legal aid services for refugee claimants in Canada would decline, or at least fall outside the mandate of any legal aid authorities in Canada.

Each year, the Canadian government sets targets for the number of sponsored refugees who will be brought to Canada from overseas. The Canadian government sponsors some of these and others arrive under private sponsorship arrangements. Over the past 10 years, there has been a sharp decline in the number of privately sponsored refugees.[56] The reasons for this are complex, and beyond the scope of this report to address. But one might reasonably surmise that increased overseas selection of refugees and an easing of the administrative impediments to sponsorship of refugees from overseas would reduce the need for asylum seekers to make their refugee claims in Canada. Since claim volume is the dominant immigration and refugee legal aid cost driver, a reduction in the number of refugee claims made in Canada should result in reduced legal aid costs.

It is unclear, however, how overseas selection of refugees or increased private sponsorship of refugees from abroad are linked, if at all, with the spontaneous arrivals that drive the inland refugee determination process. There is little, if any, evidence that people who are pursuing claims through the CRDD process might otherwise have come to Canada as sponsored refugees. Only a small portion of those who claim refugee status in Canada have come from situations which would have made them likely candidates for private sponsorship or overseas selection prior to their having come to Canada. Furthermore, refugees sponsored from overseas are selected, in part, on the basis of their expected ability to settle successfully in Canada. Refugees who present their claims in Canada are not required to demonstrate such capacity. So the two groups cannot readily be compared.

While the objective of increasing overseas selection and facilitating private sponsorships is laudable, it is unlikely to reduce the number of persons who come on their own to Canada to claim asylum. People may be genuinely in need of Canada's protection, whether they are selected overseas or they travel to Canada on their own. Like other signatories, Canada is bound under the *Refugee Convention* not to return Convention refugees to a country in which they have a well-founded fear of persecution based on any of the listed grounds. One can anticipate that among the millions of foreign visitors to Canada each year, there will continue to be a large number of asylum seekers, regardless of how many refugees Canada selects overseas. Therefore, increased private sponsorship and overseas selection of refugees are unlikely to affect the number of inland claims, and consequently, are unlikely to have any significant impact on immigration and refugee legal aid costs.[57]

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[55] These viewpoints have received wide airing in various media, including opinion columns in major newspapers, and various radio and television commentaries.

[56] In 1992, 9,181 refugees from overseas were privately sponsored for permanent landing in Canada. That number declined to a low of 2,140 in 1998 and since then has risen gradually to 3,570 in 2001 (CIC, 1999a: 11, CIC, 1999b, 52; CIC, 2002g: 57).

[57] If the presence of relatives and friends is one of the factors drawing people to claim asylum in Canada, increased private sponsorship and overseas selection could, in fact, lead to an increase in the number of refugee claims made in Canada. This could have the effect of increasing legal aid costs.

3.3 Impact of domestic enforcement policies on demand for legal aid

3.3.1 Detention of immigrants and refugee claimants

Ever since the arrival of the four boatloads of Chinese migrants off the coast of British Columbia in 1999, active consideration has been given to increasing the detention of illegal migrants to discourage irregular immigration flows. Increased detention of migrants and refugee claimants has major cost implications for legal aid programs. Experience with the BC marine arrivals provides clear illustration of these implications.

First, when individuals are detained for lengthy periods without being convicted of any offence, there is need for regular detention reviews. The *Immigration and Refugee Protection Act* (s.57) prescribes that there be a detention hearing within 48 hours of the initial detention, and a review of the detention within 7 days following the initial review and every 30 days thereafter.

Many detainees are completely unfamiliar with the Canadian legal system. Often they do not speak either official language. As a result, they need some form of representation or assistance in order to participate effectively in detention reviews. To the extent that legal aid programs cover detention reviews, an increase in the number of detentions represents an additional legal aid cost.

Depending on where the detainees are held, cost for counsel to attend detention reviews or status determination proceedings and to meet with clients to take instructions may also be increased. The Chinese migrants who arrived by boat in 1999 were detained in Prince George and Allouette River where there were no lawyers with experience in immigration matters. The Legal Services Society in British Columbia had to cover travel expenses of counsel from Vancouver and Victoria.[58] These expenses would not have been as high had the claimants been detained at facilities in or near Vancouver. Similarly in Ontario, many of the individuals who are detained by immigration authorities are held in provincial jails outside the greater metropolitan area of Toronto. Legal Aid Ontario incurs travel costs for counsel to attend detention reviews at these facilities.

Apart from travel costs for counsel to attend hearings and client interviews at remote detention facilities, the logistics of representing detained clients are much more complicated than is the case when clients are able to attend at the lawyer's office for meetings. Lawyers encounter lengthy delays in getting access to their clients. Security procedures at detention facilities create major scheduling problems. The hours when hearings can be held are restricted and cases that could normally be completed in a single sitting frequently have to be adjourned (Grant Simmie, personal communication, June 14, 2002).[59] Wherever possible, lawyers pass the cost of these disruptions on to the legal aid authorities.

[58] The data provided by LSS does not permit segregation of travel costs for the cases in Prince George and Allouette River, but these costs were presumably significant. The LSS tariff provides a fee of $180 for each half day of travel, plus $90 for visits to a client in custody. This does not include the cost for airfare or other transportation to get to these remote locations, or for accommodation at these locations. It is unofficially estimated that the total legal aid cost associated with these marine arrival cases exceeded $1million. This includes fees and all disbursements, including travel (James Deitch, e-mail to author, June 12, 2002).

[59] Counsel who appear before the Adjudication Division have also made this point at consultative meetings with the IRB. However, data to enable one to estimate the cost impact of scheduling problems created by restrictions at detention centres are not available.

The amounts paid under the legal aid tariffs in the five provinces that provide legal aid coverage for detention hearings and reviews range from a flat $200 for preparation and attendance in Manitoba to $160 for the first half day plus up to 3 hours preparation time in British Columbia (see Table 3). Given the wide variability in tariffs, it is difficult to estimate an average cost for detention hearings and reviews.

Table 3 Legal Aid Tariffs for Detention Reviews

<table>
<tr><th></th><th>Preparation</th><th>Attendance</th><th>Additional Items</th></tr>
<tr><td>British Columbia</td><td>>3 hours @ $80.00 / hr.</td><td>1st half day – $160.00
2nd half day - $120.00</td><td>Visits to clients in custody - $90.00
Travel - $180 / half day</td></tr>
<tr><td>Alberta</td><td colspan="2">>3 – 4 hours @ $72.00 / hr</td><td></td></tr>
<tr><td>Manitoba</td><td colspan="2">Flat fee - $200.00</td><td></td></tr>
<tr><td>Ontario
– first review</td><td>>3 hours</td><td rowspan="2">Actual time @
$70.35 / hr
to
$87.94/ hr.</td><td rowspan="2">Travel > 50 km
$ / hour plus mileage</td></tr>
<tr><td>- subsequent reviews</td><td>> 1 hour</td></tr>
<tr><td>Quebec</td><td colspan="2">Flat fee - $100.00</td><td></td></tr>
</table>

Source: Legal Services Society, (1999)
Legal Aid Society of Alberta, (1993)
Legal Aid Services Society of Manitoba Act, Legal Aid Regulation, Tariff of fees, Part 4.1
Gerry McNeilly, interview, July 29, 2002
Legal Aid Ontario, (2001a)
Legal Aid Ontario, (2002a)
Commission des services juridiques, (2000)

The calculation is more complex for the other provinces because of the more open-ended nature of their tariffs. British Columbia is the only province for which available data permits even a rough calculation of the average cost per case. According to the information provided by LSS, in most detention cases legal aid is provided for only one hearing (Legal Services Society, 2001a). Assuming this to be the case, one can use the $160 tariff allowance for the first hearing as a reasonable average cost for actual hearing time. British Columbia also allows an additional amount for hearing preparation. But, according to information provided by LSS, in fiscal year 2000-01 the fee for preparation was paid in less than one third of the cases approved for legal aid (Legal Services Society, 2001a).[60] In cases where payment was made for hearing, average payment was $93, representing roughly 70 minutes billable time, per case. Thus, it is reasonable to allow an average of one hour for hearing preparation, in addition to the time allowed for the hearing itself.

[60] The low incidence of lawyers charging for hearing preparation may be attributable to the fact that duty counsel handle most detention hearings in BC. If the detainee subsequently qualifies for legal aid, LSS provides retroactive payment to duty counsel who appeared at the initial detention review hearing.

In addition to these charges, the BC tariff also provides an allowance of $90 for each visit to a detention facility to interview a client or to attend a hearing. The BC tariffs also include an allowance for travel to remote detention facilities. If there is to be increased use of detention in immigration cases, it is probable, in the short term at least, that a significant number of the detainees will be held in facilities remote from the centres where IRB operations are centered. Therefore, one should also factor in the anticipated cost for counsel to travel to these facilities. The average expenditure per case where LSS paid travel allowances in 2000-01 was $183 (Legal Services Society, 2001a).

Extrapolating from this information, one can project an average cost of $240 - $513 for each person detained who is covered by legal aid in British Columbia. This calculation is based on $80 for preparation, $160 for the hearing attendance, $90 to visit the client in detention, and $183 for travel to the detention facility. This estimate is extremely crude, but it provides some indication of the cost impact of any significant change in the incidence of detention.

The estimated cost of impact of increased use of detention in immigration and refugee cases is somewhat lower in the other provinces that provide coverage for detention reviews. The legal aid tariffs in Ontario and Alberta do not include a special allowance for visits to detention facilities and payment for attendance at hearings is limited to actual hearing time, which is generally less than the two hours covered by the $160 first half-day payment under the BC tariff.[61] Legal Aid Ontario currently covers fewer than 500 detention reviews per year, so this is not, at present, a significant legal aid cost driver in Ontario (Roderick Strain, e-mail to Andrea Long, April 1, 2002).[62] The Ontario tariff allows for one-half hour administration time on each file (Legal Aid Ontario, 2002a). Detention hearings are typically concluded in a single sitting lasting less than one hour (IRB, 2002f). Allowing one hour for hearing preparation, it is reasonable to assume that approximately 2.5 hours billable time for detention reviews covered by legal aid in Ontario. Under the current LAO tariff, this represents an average cost for each additional detention review case in the range of $175 - $220, plus any additional amount required for travel. Applying the same time allowance for Alberta, the estimated additional cost per case there would be around $180 plus any required travel allowance. Quebec pays lawyers a flat fee of $100 for each detention review hearing, while Manitoba pays a flat fee of $200 per hearing.

For present purposes, suffice it to note that increased detention of immigrants and refugee claimants would have tangible cost implications in all jurisdictions that provide legal aid coverage for detention review hearings. But this cannot be considered a major cost driver in the overall context of legal aid programs for immigrants and refugees.

[61] The IRB reports that detention hearings, on average last between 30 and 40 minutes (IRB, 2002d)

[62] Legal Aid Ontario paid for only 190 detention reviews in 1999-00, 177 in 2000-01, and 129 in 2001-02. These figures do not include detention reviews involving refugee claimants. Legal assistance for detention reviews in such cases is covered under the certificate issued for the CRDD proceedings. However, LAO estimates that coverage is provided for fewer than 500 detention hearings and reviews in any year (Mary Marrone, personal communication, June 12, 2002). According to the IRB, there were 2,704 detention hearings in Ontario in 2001-02, up from 2,108 the previous year. There were also 3,837 detention reviews in 2001-02, up from 3,335 in 2000-01. Assuming that most legal aid coverage is directed to initial detention hearings, LAO is providing coverage in less than 20% of these cases.

3.3.2 Ministerial "Public Danger" Opinions

Section 77(1) of the *Immigration and Refugee Protection Act* provides authority for the Minister of Immigration and the Solicitor General jointly to certify, with respect to a person other than a citizen or a permanent resident, that the person is inadmissible to Canada on grounds of security, violating human or international rights, serious criminality, or organized criminality.[63] Section 78 prescribes a summary process whereby a judge of the Federal Court has to review the reasonableness of the Ministers' certificate. The person named in the certificate is informed of the review and must be given reasonable opportunity to be heard, but the person named in the certificate is only provided with a summary of the information on which the Ministers have relied. If the reviewing judge determines that disclosure of the information would be injurious to national security or to the safety of persons, even the summary of the information is withheld from the person concerned.

Because of the serious consequences for persons who are the subject of a danger opinion, and because of restrictions on disclosure of information against the person named in the certificate, legal proceedings to review reasonableness certificates issued under section 77(1) pose major challenges for counsel who represent the persons concerned. These proceedings have the potential to be considerably more complex than other proceedings under the *Immigration and Refugee Protection Act*.

At present, Ontario, British Columbia and Alberta are the only provinces that provide legal aid coverage for submissions on these reviews. The BC tariff allows 9 hours for all work related to a submission to the Minister relating to a danger opinion. The Ontario tariff allows 10 hours. Alberta will, subject to a legal opinion indicating merit, allow up to 10 hours for the submission. Thus, the maximum cost on these submissions would be $720 in British Columbia and Alberta and would range between $670.00 and $837.50 in Ontario. LSS approved 49 certificates for submissions relating to danger opinions in 2000-01. The total expenditure on this tariff item was only $27,552, which represented less than 0.7% of the total amount paid out in fees under the immigration tariffs that year (Legal Services Society, 2001a). Legal Aid Ontario does not maintain separate data on expenditures on legal aid certificates relating to submissions on danger opinions. This item is subsumed in the category "Other Immigration", which also includes detention reviews and submissions on humanitarian and compassionate appeals. All of these items together accounted for only 2% of all immigration and refugee legal aid expenditures in Ontario in 2001-02.[64] To date, the number of cases in which "public danger" opinions have been issued is so small that this cannot be regarded as a significant legal aid cost driver.

However, following the events of September 11 of last year and the resulting heightened concern about national security, the likelihood that this provision in the *Immigration and Refugee Protection Act* will be used more frequently has increased. Any significant measure to exclude suspected criminals and terrorists may give rise to calls from the immigration bar for expanded legal aid coverage to enable them effectively to represent refugee claimants who are the subject to exclusion from Canada under the process. Since this is only a possibility at this time and there is very little past experience with respect to legal aid for submissions on danger opinions, it is

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[63] Similar provisions relating to issuance of these ministerial certificates were contained in s.40.1 of the former *Immigration Act.*

[64] LAO expenditure on "other immigration" matters in 2001-02 was $3,362,777. Total expenditure on immigration and refugee matters was $16,438,294 (Roderick Strain, memo to Mary Marrone, 11 June 2002).

impossible to quantify the potential cost impact. But it should be noted that there is potential for this to become a new cost driver for legal aid should use of danger certificates increase significantly.

3.3.3 Removal proceedings

Failure of immigration authorities to remove unsuccessful refugee claimants and other persons illegally in Canada has been identified as a major problem in the Canadian immigration system (Auditor General of Canada, 1997: 17-18; 2001, 16-17). CIC has responded to this criticism by devoting more resources to removals. The number of individuals removed from Canada has increased in each of the past three years, and CIC projects that this trend will continue.[65]

Legal aid coverage for immigration inquiries before the Adjudication Division, which is the first step in removal proceedings of persons who have been allowed to enter Canada, is available, subject to a merit test, in British Columbia, Alberta, Manitoba and Quebec. Newfoundland also provides legal aid for immigration inquiries on a discretionary basis. However, there is no provision for immigration inquiries in the Legal Aid Ontario tariff.

The IRB reports that roughly 64% of immigration inquiries are concluded in a single sitting and that average sitting time on these inquiries is around 1 hour (IRB, 2002d).[66] Applying these figures to the tariffs in each of the provinces that provide legal aid for immigration inquiries, the estimated average legal aid cost for immigration inquiries ranges from a low of $100 in Quebec to a high of $320 in British Columbia.[67] Immigration inquiries represent a very small portion of all immigration and refugee legal aid costs in these provinces and inquiries are not driving legal aid costs in any significant way at the present time. The cost impact of any increase in removals will depend on how the respective legal aid authorities deal with individual applications for legal aid in relation to immigration inquiries in the future.

3.3.4 Increased focus on point-of-entry interviews

One of the major challenges in the refugee determination process is to obtain as much information as possible from claimants soon after they arrive in Canada. There is a widely held belief among immigration officers and IRB members that information provided by claimants when they first arrive in Canada is likely to reflect their true story. There is concern that

[65] CIC reports that "Removals have increased steadily in recent years. The 8,636 individuals removed in 2000 represent a 3.7 percent increase over 1999 and a 48 percent increase over the 5,849 people removed in 1995." (CIC, 2001h).

[66] Average duration and number of sittings required vary from one region to another, but the national average figures are reasonably representative.

[67] Calculation of the average cost for BC is based on the assumption that the 3 hours of preparation time provided under the tariff is fully utilized and that there are no additional expenses for travel. Allowing an average of 4 hours (3 hours prep + 1 hour hearing attendance) per inquiry at the BC tariff rate of $80 per hour yields an average cost of $320. It must be noted, however, that time spent on individual immigration inquiries varies widely, depending on the complexity of the issues in each case. According to data provided by LSS, the average billing for hearing preparation in relation to proceedings before the Adjudication Division of the IRB in 2000-01 was only $93, representing 70 minutes billable time. The LSS tariff allows 5 hours preparation time for immigration inquiries involving Convention refugees. But this tariff item relates to removal appeals before the Immigration Appeal Division, as distinct from immigration inquiries before an IRB adjudicator (James Deitch, personal communication, June 17, 2002).

claimants are sometimes counseled by people they meet in the community after they arrive in Canada to revise their stories in ways that are supposed to be more convincing (Frecker, Duquette, et al., 2002). In the past, immigration officers attempted to interview claimants at points of entry to get basic information needed to determine their eligibility to make a refugee claim. However, the quality of interpretation and the quality of the information obtained from these interviews have been very uneven. IRB members and CIC officials have a shared interest in improving the quality of front-end information gathering. The question is how best can that be accomplished without fundamentally altering the nature and purpose of point of entry interviews.

Arrangements are currently being made to increase resources at points of entry with a view to interviewing all those who make refugee claims. These interviews are intended to be more structured than in the past, though they will still be focused primarily on getting information needed to facilitate security checks and eligibility determinations (Frecker, Duquette, et al., 2002).

The Supreme Court of Canada has held that point of entry interviews are not analogous to a hearing. The purpose of these interviews is to aid in the processing of the individual's application for entry and to determine the appropriate procedures for dealing with his or her refugee claim. According to the Court, the principles of fundamental justice do not include a right to counsel in these circumstances of routine information gathering (Supreme Court of Canada, 1993, *Dehghani v. Canada (Minister of Employment and Immigration*).

No legal aid plans in Canada currently provide coverage for point of entry interviews. Assuming that these interviews remain essentially as characterized in *Dehghani*, any increase in the number of such interviews should have no cost implications for legal aid. However, if the nature of point of entry interviews changes and the interviews are used to gather information beyond that required to determine admissibility and eligibility to have the claim referred to the IRB for a hearing, one can anticipate that counsel will question whether the ruling in *Dehghani* still applies. Should the nature of these interviews change to the point that principles of fundamental justice require that claimants have a right to counsel at such interviews, legal aid authorities will have to decide whether involvement by counsel at these interviews will be covered. This would represent a new cost for legal aid plans.

Logistics for providing counsel at points of entry, should that become necessary, are quite complex. Some form of duty counsel system, involving either lawyers or paralegal advisors, would likely be the only practical option since large numbers of claimants must be processed within a short time when they arrive at points of entry. However, there is no right to counsel at these interviews at present. And there is no reason at this time to contemplate that legal aid will be provided for these interviews. Therefore, provision of counsel for point-of-entry interviews can safely be ignored as a legal aid cost driver unless, and until such time as, the case law changes.

4.0 Challenges relating to provision of legal aid for refugee claimants

As previously noted, roughly 90% of all legal aid expenditures relating to immigration and refugee matters are devoted to providing representation for refugee claimants. Refugee claimants arrive in Canada from a wide array of countries and they have special representation needs that distinguish them from other legal aid clients. The sections immediately following examine the extent to which these special needs may be viewed as cost drivers for immigration and refugee legal aid.

4.1 Need for interpreters and translation of documents

Lawyers representing refugee claimants frequently require the services of an interpreter to communicate with their clients, to take instructions, and to gather the information needed to complete the claimants' Personal Information Forms. The IRB pays for interpreters at hearings before all three divisions of the Board. But interpreters required for case preparation and for solicitor-client communications have to be paid by the lawyers or by the clients who retain their services.

In all three Divisions of the IRB, parties are required to provide a certified translation of any document submitted in evidence where the original version is not in one of Canada's official languages (*Immigration Division Rules,* s. 25(1); *Refugee Protection Division Rules,* s.28(1), *Immigration Appeal Division Rules,* s. 29(1)). Wherever possible, the cost for translation and interpretation services is passed on by counsel directly to the legal aid authority as necessary disbursements.

Counsel and legal aid officials have raised strong objections to the requirement that certified translations be provided for all documents filed in evidence, noting that the substantive content of many of the documents is of little probative value. In many cases before the RPD, the only issue with many of these documents, particularly identity documents, is whether they are genuine and whether the identity as disclosed in the various documents provided is consistent. Dates are also of great importance, but much of the detailed content of such documents, which has to be translated at considerable cost, is of very little relevance for purposes of the proceedings. Other documents, such as newspaper articles referring to incidents in which the claimant was allegedly involved, or referring to the claimant by name, are quite lengthy and costly to have translated. Counsel and the legal aid authorities have requested the IRB to relax the translation requirement and to allow interpreters at hearings to read into the record pertinent information from the documents required for purposes of the hearing.

Expenditures for translation and interpretation represent a very large portion of all disbursements made by legal aid authorities with respect to immigration and refugee matters. LSS in British Columbia reports that it paid $907,408 for interpretation and translation relating to immigration and refugee matters in fiscal year 2000-01 (Legal Services Society, 2001a). This represented almost 68% of all disbursements under the immigration tariff or more than 17% of the entire cost of immigration and refugee legal aid for that year. LAO reports that disbursements

for translation and interpretation in fiscal year 2001-02 represented 16.4% of the entire legal aid budget for immigration and refugee matters for that year. The Quebec tariff allows only $100 per case for interpretation and translation expenses so clients are forced to rely on volunteer services or have to pay themselves to obtain required certified translations of documents. While experience with this issue varies among provinces because of differences in tariff arrangements, interpretation and translation requirements represent a significant cost driver for legal aid programs in provinces that fully cover interpretation and translation costs.

4.2 Need for medical reports and psychological assessments

Refugee claims, by definition, are based on the allegation that the claimant has a well-founded fear of persecution. Events giving rise to that persecution are sometimes so traumatic in nature that the claimants suffer from post-traumatic stress disorder (PTSD). For claimants who have endured severe trauma, it can be extremely difficult to recount their experiences in a way that is convincing to the CRDD members charged with determining claims. Counsel representing claimants in such cases are forced to seek out expert psychological and medical evidence to establish the claim. In other cases, detailed medical reports are required to corroborate claimants' stories of abuse and torture. While similar expert evidence may be required in other areas covered by legal aid, the additional cost incurred to obtain these reports is a specific legal aid cost attributable to the unique needs of refugee claimants as legal aid clients.

LSS paid $97,703 for medical assessments and attendance of medical witnesses in relation to immigration and refugee matters in 2000-01. This represented 7.3% of all disbursements or 1.9% of fees and disbursements combined. Comparable data from other provinces are not available, but it is reasonable to assume that medical assessments and attendance of medical experts at hearings represent a comparable portion of immigration and refugee legal aid costs in other provinces. On balance it appears that this is considerably less significant as a cost driver than is the requirement for interpretation and translation because the cases where medical reports are required are few in number relative to the overall number of refugee claims for which legal aid is provided.

4.3 Unfamiliarity with Canadian legal processes

Lawyers dealing with immigrants and refugee claimants as legal aid clients have to familiarize their clients with the basic requirements of the Canadian legal system. The majority of refugee claimants come from countries with fundamentally different legal systems, where corruption on the part of public officials is widespread. As a result, many refugee claimants have a deep-seated distrust of the legal system and of people in authority. Even claimants who come from countries such as India, which have legal systems based on the British common law model, are unfamiliar with core elements of the Canadian legal system, such as the *Charter of Rights and Freedoms*.

When dealing with refugee claimants, lawyers have to spend considerable time explaining the status determination process and getting their clients to focus on the information that is required to establish their refugee claims. Considering the nature of the issues that have to be covered in preparing for refugee hearings, the limited time allowanced for case preparation, are barely adequate even if the clients are thoroughly familiar with the process and know exactly

what information to provide to their lawyer.[68] As a consequence, legal aid authorities are under constant pressure to revise their tariffs to more reasonably reflect the actual effort that lawyers are required to devote to immigration and refugee cases. It is not the place of this review to comment on the merits of this particular issue. However, one must be mindful of the unique challenges associated with legal aid work relating to immigration and refugee matters when assessing whether future tariff adjustments may become a significant cost driver for immigration and refugee legal aid. Any increase in tariff rates or time allowances can be expected to have immediate cost consequences for legal aid plans.

4.4 Gender-related claims and cases involving victims of torture

Canada has played a leading role in recognizing that persecution based on gender falls within the "particular social group" ground set forth in Article 1 of the *Refugee Convention*. Canada's approach to gender-based refugee claims could conceivably be acting as a legal aid cost driver in two ways. First, the relatively expansive interpretation of the Convention refugee definition that is applied in Canada may be acting as a pull factor, drawing to Canada claimants who might otherwise seek asylum elsewhere if the prospect of having their claim accepted were equal. Most European countries have been reluctant to follow the Canadian approach with regard to gender-related persecution, as elaborated in the Chairperson's Guidelines relating to *Women Refugee Claimants Fearing Gender-Related Persecution* (the *Gender Guidelines*). However, that approach is now more widely accepted than it was when these guidelines were first promulgated in 1993 UNHCR, 2002b). Other destination countries, including Britain, the Netherlands and the United States, are now applying a similar interpretative approach to that set forth in the *Gender Guidelines.* It is hard to assess whether Canada is receiving more claims than would be the case if the guidelines had not been issued. However, even for the period in the mid-1990s when Canada was alone in pursuing this expansive interpretation of the Refugee Convention, there is no indication that this contributed to any increase in the number of refugee claims made in this country (see section 2.6 above).

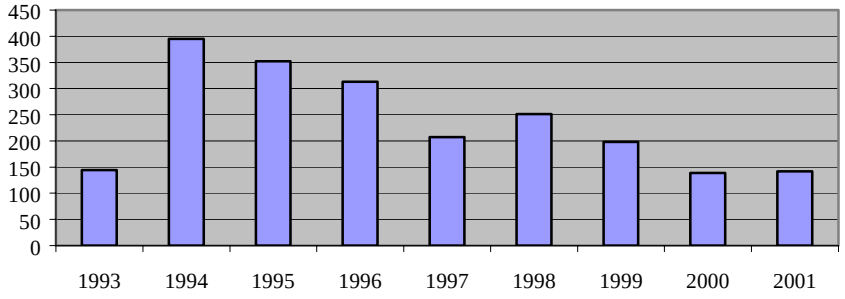
Issuance of the *Gender Guidelines* does not appear to have had any significant impact on composition of the claims being referred to the Board. According to an internal report prepared by the IRB, the number of claims from women did not rise significantly following publication of the *Gender Guidelines.* Despite the fact that the acceptance rate for female claimants has consistently been slightly higher than for male claimants, the ratio of male to female claimants has remained relatively constant at roughly 60% male and 40% female (IRB, 2002g).

The number of claims identified as gender-related did increase following issuance of the *Gender Guidelines;* but the total number of these claims was so small as to have no material

[68] It has been estimated that in British Columbia, 80% of cases are being completed within the time allotted, but that the time allotted is insufficient to provide quality service to immigrants and refugee claimants (Social Policy and Research Council, 2002: 5). According to a recent report on legal aid tariff reform in Ontario, many lawyers representing legal aid clients are not being fully remunerated for the services they provide. The maximum tariff in Ontario for refugee-related matters ranges from 50% to 85% of the average fee that lawyers charge to their paying clients for the same service (Legal Aid Ontario, 2001c: 22). Three-quarters of lawyers who represent legal aid clients on judicial review applications relating to immigration and refugee matters report that they perform unpaid hours on legal aid cases often or very often (Legal Aid Ontario, 2001c: 22).

impact on total claim intake.[69] In 1993, the Board determined 144 gender-related claims. That number increased to 395 in 1994, but by 2000, it had declined to 139 claims, and the number remained below the 1993 level again in 2001 (see Chart 6).

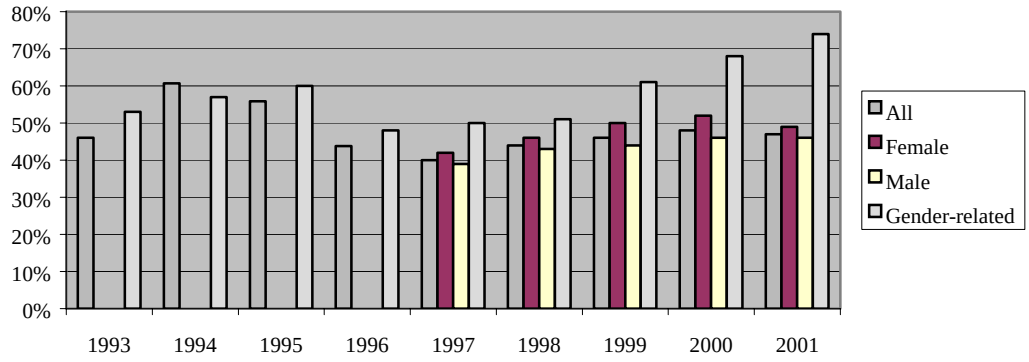
Chart 6 Gender-related claims: 1993 - 2001



Source: IRB, 2002g

In 1994, the acceptance rate on gender-related claims was lower than the overall acceptance rate. In every year since then, the acceptance rate for gender-related claims has been higher than the overall acceptance rate. That gap has steadily widened since 1997 while the number of gender-related claims has declined (see Chart 7). Therefore, the Canadian approach on gender-related claims cannot be regarded as a significant pull factor that might be driving legal aid costs.

Chart 7 Gender-related claims: 1993 -2001



Source: IRB, 2002g[70]

The second way in which gender issues may be affecting legal aid costs relates to the nature of gender related claims and to the cultural sensitivities of many women from refugee producing countries. Gender-based refugee claims often touch on intimate details of their family life or details regarding incidents of sexual abuse, which claimants, particularly females from traditional, conservative cultures, are reluctant to discuss with strangers. Counsel who deal with

[69] The reliability of this data is uncertain because IRB members have not been consistent in the way in which they have recorded this information.

[70] Data on acceptance rates for males and females are not available for years prior to 1997.

cases involving gender-based persecution report that they must often spend extra time preparing these clients for their refugee hearings.[71]

Similarly, victims of torture often have great difficulty recounting what they have endured. In such cases, counsel must often spend considerably more time than is required in more straightforward cases, simply to elicit from the client the information required to prepare the claimant's PIF.

This added effort would ordinarily constitute an additional legal aid cost. However, the legal aid tariffs in all Canadian jurisdictions that cover refugee status determination proceedings place a cap on preparation time. The British Columbia and Ontario tariffs, which are the most generous with respect to preparation time, provide a maximum of 15 and 16 hours respectively for case preparation. This may be adequate for routine cases, but legal aid counsel who act in cases that require extra preparation are generally required to do the extra work for free or to rely on others to prepare clients for their hearings.[72] Therefore, the extra effort required in these cases does not, at present, give rise to any additional legal aid costs. However, this could become a cost issue for legal aid authorities should tariffs be amended.

Beyond any additional costs that may be incurred in relation to case preparation, cases involving severely traumatized clients should not, as a general rule, entail significant extra costs for legal aid. Victims of torture and other horrific experiences normally have little problem establishing a well-founded fear of persecution. The main problem in such cases is linking the trauma with one of the five Convention grounds. This may be less of a problem under *IRPA* since a link to one of the ground listed in the definition of a Convention refugee is not required if the claimant may be subject to torture, or faces a risk to life, or risk of cruel and unusual treatment or punishment.

[71] This was noted as a significant concern by a number of the lawyers and NGO personnel who were interviewed in connection with the related study of *Representation for Immigrants and Refugee Claimants* (Frecker, Duquette, et al., 2002).

[72] Most tariffs provide discretion for the legal aid authority to approve payments over the tariff limit in exceptionally complex cases. However, this discretion is rarely exercised to approve additional payments for extra preparation made necessary because of claimants' sensitivities.

5.0 Procedural requirements as a cost driver

5.1 Initial determination of status

5.1.1 Expedited determination of refugee claims

Section 170(f) of the *Immigration and Refugee Protection Act* provides authority for the RPD to grant refugee status without a hearing.[73] The process for expedited determination of well-founded claims is established in *RPD Rules* (s. 19).[74] Expedited interviews, on average, are completed in about one hour, which is roughly a quarter to half the length of regular hearings.

The RPD endeavours to stream manifestly well-founded claims into the expedited process. Provided the claimant is able to credibly recount the circumstances that have given rise to the claim and identity is not in issue, cases involving severe trauma are generally well suited for determination without a hearing. The interview format for expedited determination of refugee claims is generally less stressful for traumatized claimants. It is also more cost-effective for the RPD to determine well-founded claims without a hearing wherever possible.

Legal aid costs are considerably lower for cases dealt with through this expedited process than they are for cases determined in hearings. Macklin (1997:1013) noted that one of the factors driving high legal aid expenditures for refugee cases under the Ontario Legal Aid Plan was the fact that at the time, virtually no cases in the Toronto CRDD were being accepted through the expedited process. In contrast, at the Montreal office, approximately 40% of positive determinations were being made following an interview with the claimant in the expedited process.

The IRB further distinguishes between short, single issue hearings, which are expected to be completed in less than two hours, and regular hearings, which involve more than a single issue and typically take three and a half to four hours to complete. The legal aid cost for attendance at an expedited interview is one-half of the cost for attendance at a short RPD hearing.[75] Under the Ontario tariff, the time allowed for preparation is also reduced by half for cases determined through the expedited process.

The IRB has issued a policy directive encouraging members to determine well-founded claims through the expedited process wherever possible (IRB, 2001d). The RPD is currently

[73] This authority was originally established under section 69.1(7.1) of the former *Immigration Act.*

[74] With implementation of IRPA on June 28, 2002, procedures for the expedited process are now governed by the *Refugee Protection Division Rules*.

[75] The current Ontario legal aid tariff allows 8 hours preparation time for expedited cases, in contrast with the 16 hours allowed to prepare for cases determined at a hearing. The BC tariff allows 15 hours preparation time regardless whether the claim is determined in the expedited process or at a hearing. Both tariffs provide an hourly rate for actual time spent at an expedited interview or at a CRDD hearing. The Quebec and Manitoba tariffs pay a flat fee for each case without regard for which process is used. However, the Manitoba tariff allows an additional payment for time spent in hearings if a case goes beyond a half day. Alberta pays a standard hourly rate for up to 25 hours for preparation and attendance without reference to the process used.

endeavoring to stream 25%[76] of all referrals for consideration in the expedited process (Glen Bailey, interview, March 21, 2001). For the quarter ending on December 31, 2001, 8% of all cases screened were streamed for expedited consideration and 20% of all positive decisions were made without need for a hearing. Approximately 60% of the cases where expedited interviews were held resulted in positive decisions. The remaining 40% were remitted for a hearing. If the RPD is successful in increasing the portion of claims accepted through the expedited process, this should reduce the effect on legal aid costs.

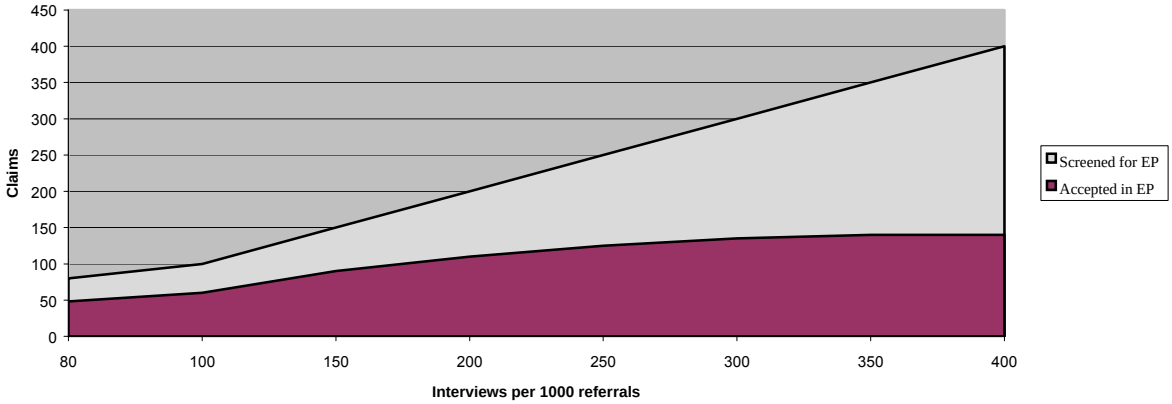
Increasing the portion of positive decisions that can be made on the basis of an expedited interview is an objective that is shared by the IRB and by legal aid authorities. However, achieving this goal involves complex trade-offs. An expedited interview with the claimant is a first, essential step to determining any claim without a hearing. To maximize the chances for identifying claims suitable for expedited determination, the RPD must cast the net wide and interview as many claimants as possible. However, as the screening to identify cases suitable for expedited interviews becomes more inclusive, the percentage of interviews that will result in positive determinations will tend to decline. As one culls off the most obvious well-founded claims, it becomes increasingly difficult to identify the remaining claims that are likely to be accepted without a hearing.

Based on past experience in dealing with refugee claims, the author estimates that roughly one-quarter of the well-founded claims referred to the CRDD are suitable for determination without a hearing. Given the frailty of evidence and problems with claimant credibility, it becomes increasingly difficult beyond that point to identify additional well-founded claims without holding a hearing. The diminishing return that comes from streaming a progressively higher portion of referred claims for expedited interviews is illustrated in Chart 8. This chart is based on a rough working assumption that a 60% "capture" rate in the expedited process can be sustained up to 150 interviews per 1,000 referrals. At 300 interviews per 1,000 referrals, it is assumed that 45% of the interviews would result in claims being accepted without a hearing. At 400 interviews per thousand, the "capture" rate would decline to 35%, and so forth.[77]

[76] The target rate for streaming claims into the expedited process in Vancouver has been set at 15% because of the different mix of cases in that region. Vancouver receives fewer claims from countries that are generally recognized as sources of large numbers of well-founded refugee claims. There has been a marked increase in utilization of the expedited process in Toronto over the past two years. In Montreal, the CRDD has resumed expediting a substantial portion of positive decisions following a sharp decline in 2000. The percentage of positive decisions expedited has been consistently high in Ottawa and remains low in Calgary and Vancouver.

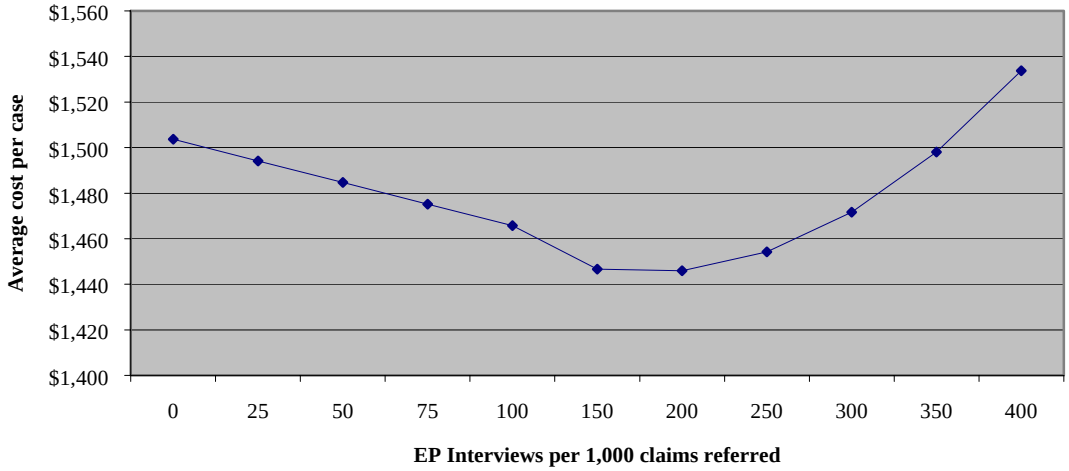
[77] This working assumption is derived from the author's experience as Deputy Chairperson of the CRDD from 1995 to 2001.

Chart 8 Effect of Increasing the Number of Expedited Interviews



If the net is cast too wide and many cases end up being remitted for hearing after the interview, the exercise will tend to drive up costs. It will also produce delays as claims that are considered but not accepted in the expedited process are put through two processes instead of one. There comes a point at which this results in an overall increase in average cost per case, as is illustrated in Chart 9.

Chart 9 Increasing Number of Expedited Interviews - Average Cost per Case



The balance between the number of cases that can be determined without a hearing and the number of cases for which a hearing is required has a direct effect on legal aid costs. In reviewing legal aid cost drivers, it is useful to examine the various factors that influence the extent to which the expedited process for determining manifestly well-founded claims is used.

The analysis of the impact of supplier–induced demand, set out in section 1.5.3 above, suggests that lawyers doing legal aid work will attempt to maximize their incomes in different ways depending on the economic incentives created by different legal aid tariff structures. Lawyers who are paid for time spent in hearings might reasonably be expected to be less

enthusiastic about expediting refugee claims than would be the case for lawyers who are paid a flat fee and want to maximize the number of cases they can conclude in a given time period. This expectation is, to some extent, borne out in experience with utilization of the expedited process in Quebec, Ontario and British Columbia.

Legal aid tariffs in Ontario and British Columbia provide an hourly rate for time spent in hearings. The Quebec tariff provides a flat payment per case. For many years, the CRDD in Montreal expedited close to 40% of its positive decisions while Toronto and Vancouver expedited almost none. This difference may in part have been conditioned by differences in the legal aid tariffs, as Quebec lawyers had a clear incentive to maximize the number of cases they handled and Toronto and Vancouver lawyers had an incentive to maximize the time spent in hearings. However, one must be careful not to jump to conclusions prematurely, based on the simple observation that fewer cases have been expedited in provinces where the legal aid tariff provides an hourly payment for time spent in hearings.

Other factors were also likely in play to produce these differences. During these years, the Montreal office had a larger caseload per CRDD member than did the offices in Vancouver or Toronto. Managing the intake was the key priority in the Montreal office. Also, Montreal had a well-established unit of refugee claim officers (RCOs) assigned to work with a single CRDD member in a specialized unit dedicated exclusively to handling expedited claims.

In the mid to late 1990s, RCOs and CRDD members in Toronto had strong antipathy towards expediting claims, feeling credibility could only be tested effectively in the context of a hearing. The situation in Toronto changed when some of the key opponents to the expedited process left the IRB. This coincided with a dramatic increase in the caseload in Toronto, which forced everyone in the region to look for ways to increase productivity. As a result, the CRDD in Toronto is now expediting a significant number of refugee claims[78] At the same time, utilization of the expedited process in Montreal has dropped back from the very high levels seen in the mid-1990s and is now comparable to the utilization rate in Toronto.

The recent dramatic increase in the number of refugee claims referred to the CRDD in Toronto has resulted in more work being available to members of the refugee bar in Toronto. The prospect for increased volume of work may make the expedited process more attractive for counsel than would be the case when there is a shortage of work.

In jurisdictions that pay lawyers at an hourly rate, as opposed to paying on a block fee or flat fee basis, level of utilization of the expedited process has a direct impact on legal aid costs. The foregoing observations suggest that the interplay of work pressures on the RPD, the commitment of IRB personnel to utilization of the expedited process, and incentives on counsel to push for expedited processing of refugee claims, all affect what portion of refugee claims will be expedited. All of these factors, of course, are subject to one key overarching factor, that is the portion of potentially well-founded claims in the overall caseload, which determines what portion of refugee claims can reasonably be expedited.

[78] Approximately 18% of all positive determinations made in Toronto are currently being made in the expedited process (IRB, 2002c).

5.1.2 Determination of claims in hearings

In provinces that pay lawyers an hourly rate for time spent in hearings, the duration of hearings is clearly a cost driver for legal aid. The longer the hearings, the more the legal aid authority will be required to pay. The length of RPD hearings is a function of a complex interplay of factors. These include the complexity of each case, the presiding skills of the RPD member, the length of questioning by the RCO, and the ability of witnesses to give clear and concise testimony. Claimants' counsel also influence the length of hearings. The manner in which they present a case, their style of questioning, interaction with other parties, and the number of witnesses they call all affect how long it takes to conclude a hearing.

Bevan (1966) has hypothesized that lawyers who are paid at an hourly rate have an incentive to maximize the number of hours spent on the task for which they are being paid. If this is correct, one would expect to find that refugee hearings tend to be longer in jurisdictions where the legal aid tariff pays lawyers an hourly fee for time spent in hearings than in jurisdictions where lawyers are paid a flat fee per case. This factor may be influencing the differences in average duration of refugee hearings in the different IRB regional offices (see Table 4).

Table 4 CRDD Hearing Statistics by Region : March 1, 2001 – February 28, 2002

	National	Montreal	Toronto	Ottawa	Calgary	Vancouver
Single sitting : half-day (proportion of caseload)	64%	74%	54%	61%	44%	43%
Average time per hearing (in hours)	3.5	3.1	3.7	3.5	4.1	4.9
Number of hearings concluded	13186	4763	6204	447	588	1184

Source: IRB, 2002d

According to IRB data on CRDD operations during fiscal year 2001-02, the average length of refugee hearings in Montreal was almost 20% less than in Toronto and 33% less than in Vancouver. Lawyers in Montreal are paid a flat fee for each case regardless how much time they spend on the case, whereas lawyers in Toronto and Vancouver are paid an hourly fee for actual time spent in hearings. Taking the national average of 3.5 hours per hearing as a benchmark, the extra time spent in hearings in Vancouver represented an additional cost of $112[79] per case, or roughly $132,000 if one extends that cost to the 1184 hearings concluded in Vancouver in fiscal year 2001-02. The 3.7 hours average hearing time in Toronto is only slightly higher than the national average, but given the number of claims determined in hearings in Toronto, even this slight difference represents a cost for Legal Aid Ontario of roughly $98,000.[80] If the average hearing time in Toronto were reduced to the 3.1 hours achieved in Montreal, legal aid costs would be reduced by almost $294,000. It must be noted that this analysis does not control differences in the composition of the caseload in each region and other factors, such as the presiding style of RPD members and the manner in which protection officers (formerly known as

[79] This calculation is based on the tariff rate of $80 per hour (i.e. $80 x 1.4 hours = $112).

[80] This is assuming an average hourly rate of $79.00 that is slightly under the tariff rate of $79.14 rate provided for counsel with 4-10 years experience in civil or criminal law. This is presumed to be a reasonable average for all the counsel who represent refugee claimants on legal aid certificates in Ontario.

RCOs) handle examination of witnesses. These factors also have a significant influence on duration of hearings. The observation is simply made to flag the fact that there is a possible correlation between legal aid tariff structures and the length of hearings.

Over the past few years the IRB has implemented measures to improve productivity, including measures to reduce the length of refugee hearings and to increase the number of cases that are concluded in a single sitting. As these measures take effect, they may help to reduce some legal aid costs. However, there are other forces at play that may increase the time required for RPD hearings. These are discussed in detail in Chapter 6 below.

5.2 Judicial review

Decisions of the RPD are subject to judicial review on leave of a judge of the Federal Court. In 2001, leave was sought in approximately 63% of cases where refugee claims were rejected. According to the IRB, leave is granted in approximately 12% of the cases where it is sought, and roughly 12% of the decisions reviewed are overturned (see Table 6) (Hasan Alam, personal, communication, April 8, 2002).[81] When a decision is overturned on judicial review, the case is remitted back to the Board to be determined again, usually by a different panel.

Table 5 Judicial Review Outcomes: 2001

	Number	% of level above
CRDD negative decisions	7115	100%
Leave applications	4490	63.1%
Leave granted	557	12.4%
CRDD decision overturned	69	12.4%

Judicial review proceedings drive legal aid costs in three ways. First, there are the direct costs associated with the proceedings – filing fees, fees paid to lawyers to draft pleadings, to prepare for the hearings, to argue the application before the court, to review the court's decision, and to communicate that decision to the client. Second, there are the indirect costs relating to procedural requirements imposed by the court. If procedures were less complex, lawyers would require less time to handle each application. Third, there are the consequential costs that flow when decisions are quashed and claims have to be reheard. This results in repeat legal aid expenditures on cases that have already been funded for the original refugee determination hearing.

Proceedings in the Federal Court are sufficiently complex that it is not practical for claimants to pursue judicial review applications without the assistance of a lawyer. Claimants are permitted to represent themselves if they choose to do so, but if they wish to be represented by someone else, only lawyers are permitted to plead cases before the Federal Court.

Table 6 provides a brief overview of tariffs for judicial review applications in each of the five provinces that deliver legal aid representation through the private Bar.[82]

[81] By mere coincidence, the percentage of applications for leave for judicial review granted (12.4%) and percentage of CRDD decisions quashed (12.4%) on judicial review after leave was granted were identical in 2001.
[82] In Newfoundland, applications to the Federal Court are handled by staff lawyers.

Table 6 Legal Aid Tariffs for Judicial Review

	Opinion letter & Notice	Preparation of leave application	Preparation of judicial review application	Attendance at Federal Court
British Columbia $80 / hour	>5 hours = $400	>15 hours = $1,200	>10 hours = $ 800	Actual time
Alberta $72 / hour	Check civil action tariff	>5hours	>10 hours for drafting, filing and service = $720 >10 hours for briefing of law = $720	$155 / half-day
Manitoba $45 / hour	$480		$855	
Ontario $70.35-$89.74 / hour	>14 hours	>15 hours	>15 hours	Actual Time
	To maximum 27 hours total preparation = $1,900 - $2,423			
Quebec	$345			$200 / half-day

Source: Legal Services Society, (1999)
Legal Aid Society of Alberta, (1993)
Legal Aid Services Society of Manitoba Act, Legal Aid Regulation, Tariff of fees, Part 4.1
Gerry McNeilly, interview, July 29, 2002
Legal Aid Ontario, (2001a)
Legal Aid Ontario, (2002a)
Commission des services juridiques, (2000)

All six provinces that cover immigration and refugee matters provide legal aid for judicial review applications in the Federal Court. Funding is approved on a discretionary basis following a review of the merits of each application and an assessment of the prospects for success. Tariffs provide a certain number of hours for preparation of the leave application. If the leave application is successful, the tariffs provide additional hours for the judicial review application itself, including time to prepare the factum and time to argue the case at the Federal Court. Tariffs also prescribe amounts for proceedings in the Federal Court of Appeal and the Supreme Court of Canada, but these apply in very few cases and so are not included in Table 6. Access to the Federal Court of Appeal is limited to cases where the Trial Division judge who has decided a judicial review application certifies that the case raises a serious question of general importance and the trial judge states that question (*Immigration and Refugee Protection Act*, s.74(d)). All legal aid plans that cover immigration and refugee cases will normally approve funding to take a case to the Federal Court of Appeal where a certificate is granted. The number of these cases is so small, however, that they do not represent a significant legal aid cost driver.

A breakdown of legal aid expenditures for judicial review in immigration and refugee cases is currently not available. From data provided by LSS, it appears that approximately

$680,000 was paid in fees related to judicial review applications in 2000-01[83]. This includes judicial review of decisions from all three Divisions of the IRB and judicial review of certain decisions made by officials at CIC. Fees paid in relation to judicial review proceedings represent approximately 17.5% of all fees paid by LSS in relation to immigration and refugee matters in that year.[84] Legal Aid Ontario reports that expenditures on judicial reviews relating to immigration and refugee matters totaled $654,794 in 2000-01 and $690,291 in 2001-02 (Roderick Strain, memo to Mary Marrone, June 11, 2002).[85]

The overall cost of this aspect of immigration and refugee legal aid has been kept down by the fact that leave for judicial review is granted in such a small portion of cases. This situation could change significantly if, following implementation of the new *Immigration and Refugee Protection Act*, there is an increase in the number of cases where leave is granted as the Federal Court is called upon to clarify issues of interpretation with respect to the new legislation.

5.3 Sponsorship appeals

Sponsorship appeals are rarely covered by legal aid. In all cases except those involving sponsorship of spouses, fiancés and dependant children, sponsors are required to have financial capacity and a level of income that effectively makes them ineligible for legal aid. Individuals in this situation are represented at IAD appeal proceedings either by legal counsel or by immigration consultants, whom they pay directly for the services provided.

Many permanent residents who are attempting to sponsor spouses, fiancés and children are also in an income bracket that disqualifies them for legal aid. The most likely clients for legal aid in sponsorship appeals are refugees who have been landed as permanent residents and who are attempting to sponsor their spouses or children for purposes of family reunification (Nancy Goodman, personal communication, June 20, 2002).[86] The typical problem in these cases relates to establishing the familial relationship, which can sometimes be quite difficult. Refugee families may have been separated for many years. The sponsor and the sponsored family members may not have reliable identity documents. For children in these cases, DNA testing is sometimes the only way to establish the relationship, but this expense is not covered by

[83] This figure is calculated by adding all of the coded tariff expenditures under the Immigration Appeal Tariff that are clearly attributable to judicial review proceedings ($355,424), which represents 72% of the $494,042 paid in fees other than for general preparation. Adding a prorated share (72%) of the $452,304 paid for general preparation to the amounts expressly attributed to judicial review proceedings yields a total of $681,083. (Legal Services Society, 2001a)

[84] It is not possible to segregate disbursements in relation to judicial review proceedings from disbursements relating to other matters under the Immigration Appeal Tariff, for example PDRCC applications and humanitarian and compassionate appeals.

[85] Considering that the IRB renders approximately four times as many decisions in Ontario as it does in British Columbia, the similarity in magnitude of expenditures on judicial review in the two provinces is difficult to understand. It may be a function of differences in how LSS and LAO code expenditures for reporting purposes, but this is not evident from the information provided.

[86] IAD data on sponsorship appeals does not distinguish appellants who are landed in Canada as refugees from other landed immigrants so it is impossible to give an accurate estimate of the portion of sponsorship appeals that are launched by refugees. A detailed breakdown of their expenditures in relation to sponsorship appeals is not available from provincial legal aid authorities.

legal aid.[87] While these cases are quite complex, the number of such cases where legal aid is sought is small. For example, Legal Aid Ontario expended only $138,389 on proceedings before the IAD in fiscal year 2001-02 (Roderick Strain, memo to Mary Marrone, June 11, 2002). This was less than one-tenth of one percent of LAO's total expenditures on immigration and refugee matters in that year. As a result, sponsorship appeals cannot be considered a significant legal aid cost driver.

5.4 Pre-removal proceedings

Under the former *Immigration Act, u*nsuccessful refugee claimants who were facing removal had two additional avenues of recourse beyond judicial review. They could apply for admission to Canada as a member of the Post Determination Refugee Claimants in Canada Class (PDRCC), and they could submit a humanitarian and compassionate appeal (H&C). The risk-related criteria under which a claimant could be granted protection under the PDRCC process or under an H&C appeal have been subsumed in the definition of "a person in need of protection" in section 97(1) of *IRPA.* As a result of these changes, the grounds on which the RPD can grant protection to refugee claimants have been widened. But at the same time, the post-determination recourse available to failed refugee claimants has been considerably narrowed. Under the new legislation, failed refugee claimants may apply for a pre-removal risk assessment (PRRA), which is carried out shortly before the planned removal of the individual to another country. An appeal to the Minister on humanitarian and compassionate grounds is still available, but this is limited to issues relating to the applicant's situation in Canada and has nothing to do with possible risks the person may face if removed to another country.

Experience with the PRRA process in the few months since *IRPA* came into force is too limited to permit any meaningful assessment of the potential impact that these changes may have on legal aid costs. However, a review of the experience with PDRCC and H&C appeals does provide a useful starting point for such an assessment. PDRCC was a class prescribed in regulations under which unsuccessful refugee claimants would be allowed to stay in Canada if they were determined to be at risk of death or serious harm in the country to which they were to be removed. There was no requirement that the harm feared be related to any specific ground, as is a requirement for refugee status. However, the risk of harm had to apply to the individual personally, not merely as a member of a class of persons subject to a common risk. PDRCC applications were assessed in an administrative, as opposed to a tribunal process. The risk assessment was made by a CIC officer based on a review of a written application, supplemented by the record from the CRDD status determination hearing and general information about conditions in the country to which an unsuccessful claimant might be removed.

Unsuccessful refugee claimants facing deportation can apply to remain in Canada on humanitarian and compassionate grounds. H&C applications focus primarily on the personal circumstances of the applicant in Canada, rather than on the risk the applicant may face in the country of return. H&C assessments sometimes take into account risks that applicants might face if they were returned to their home country. But with the expanded protection grounds

[87] The base fee for a DNA test that can be used for immigration purposes is approximately $725. Costs for sample collection and delivery to a testing lab must be added to this base fee (Helix Biotech, personal communication, September 5, 2002). This can be a prohibitive cost barrier to many indigent refugees who are seeking to sponsor dependent children to join them in Canada.

provided under *IRPA*, the RPD is supposed to consider this sort of risk when deciding the refugee claim. Immigration officers from CIC review written submissions in support of H&C appeals and they make a recommendation to the Minister, who has discretion to allow the applicant to remain in Canada under a Minister's permit.[88]

British Columbia and Alberta were the only provinces that provided legal aid coverage for PDRCC submissions. In both provinces, coverage was provided only when the legal aid authority was satisfied that the application had merit. The legal aid tariff in British Columbia allowed for up to 3 hours ($240) for all work relating to a PDRCC submission. Alberta allowed up to 5 hours ($360) for such submissions (Pat Bard, e-mail to Austin Lawrence, Department of Justice, Canada, March 1, 2002). The Legal Services Society in British Columbia expended $66,416 on PDRCC submissions in 2000-01. This represented 1.7% of the total expenditure on fees relating to immigration and refugee matters in that year (Legal Services Society, 2001a). Data on what portion of the Legal Aid Society of Alberta budget for immigration and refugee matters was devoted to PDRCC submissions is not available.

As with PDRCC, legal aid for H&C appeals is discretionary and is approved based on a review of the merits of each application. Coverage, similar to that provided for PDRCC applications, is available in British Columbia and Alberta. Coverage is also provided in Manitoba and Ontario (Social Policy and Research Council, 2002) and to a limited extent in Newfoundland (Nick Summers, interview 25 May 2002).

The only data available that segregates the amount paid with respect to H&C submissions is from British Columbia, where LSS paid $19,096 in fees in 2000-01. In data from Legal Aid Ontario, H&C submissions are subsumed with detention reviews and "danger opinion" submissions in a category labeled "other immigration, which together accounted for only 2% of the total LAO immigration and refugee budget in 2001-02. The number of applications approved for coverage is the primary legal aid cost driver in relation to PDRCC and H&C appeals. But in the overall scheme of things, total expenditures in relation to these proceedings are so small that they cannot be regarded as a significant factor driving overall immigration and refugee legal aid costs.

[88] For example, a Minister's permit might be granted on humanitarian and compassionate grounds to a rejected refugee claimant who has found stable work in Canada if it is likely that the individual or his or her Canadian dependants would suffer undue hardship if the person were forced to return to his or her country of origin. An elderly individual who has close relatives in Canada and no surviving relatives in his or her country of origin might also be landed in Canada on humanitarian and compassionate grounds.

Table 7 Legal Aid Tariffs for PDRCC and H&C Appeals

	British Columbia	Alberta	Manitoba	Ontario	Quebec	Newfoundland
PDRCC	>3 hours @ $80	>3-4 hours for opinion @ $72 >5 hours for hearing @ $72	N/A	N/A	N/A	N/A
H & C	>3 hours @ $80	>3-4 hours for opinion @ $72 >5 hours for hearing @ $72	$425	>10 hours	N/A	Staff counsel in cases judged to have strong merit and good prospect for success

Source: Legal Services Society, (1999)
Legal Aid Society of Alberta, (1993)
Legal Aid Services Society of Manitoba Act, Legal Aid Regulation, Tariff of fees, Part 4.1
Gerry McNeilly, interview, July 29, 2002
Legal Aid Ontario, (2001a)
Legal Aid Ontario, (2002a)
Commission des services juridiques, (2000)

Table 7 provides a summary of available data respecting tariff allowances for PDRCC and H&C applications in the provinces where coverage for these applications is available. The Ontario tariff allows up to 10 hours for H&C submissions, whereas BC allows only 3 hours.[89] Alberta allows 3-4 hours[90] for an opinion with respect to any post-determination appeal. A further 5 hours is allowed under the Alberta tariff for post-determination hearings. It is unclear whether this includes PDRCC and H&C submissions since these applications are based on written submissions and there is no hearing as such. The Manitoba tariff prescribes a flat fee of $425 for H&C applications, which is equivalent to slightly under nine hours at the current $48 per hour rate paid under the Manitoba tariff.

It is unclear whether legal aid costs in relation to PRRA will be as limited as they have been in relation to PDRCC and H&C proceedings. On the one hand, pre-removal risk assessments are quite different from PDRCC and H&C assessments. The grounds for protection in the PRRA process are the same as those applied by the RPD, whereas the protection ground applied in PDRCC and H&C cases were different from those applied by the CRDD in the original decision. On another level, PRRA is limited to review of new evidence that was not reasonably available when the claim was originally decided.

[89] The tariffs are described in the present tense, even though PDRCC no longer exists.
[90] 3 hours if counsel represented the person concerned in the action that is the subject of the appeal, 4 hours for new counsel.

The key factors with respect to legal aid costs are the nature and extent of coverage that individual plans provide, and the complexity of the proceedings for which coverage is provided. Whether coverage for PRRA will be more extensive or more limited than the coverage previously provided for PDRCC and H&C applications is a matter within the control of individual legal aid authorities. The issue of what sort of coverage is likely to be required for PRRA is addressed in more detail in section 6.1.3.1 below.

6.0 Impact of legislative and jurisprudential developments

6.1 Cost implications of the new Immigration and Refugee Protection Act

6.1.1 Front end processing linked to rapid referral to RPD

Section 100(1) of the new *Immigration and Refugee Protection Act* (IRPA) provides that an officer from CIC shall, within three working days after receipt of a claim, determine whether the claim is eligible to be referred to the Refugee Protection Division (RPD) of the IRB.[91] In the event that the eligibility determination is not made within the three working days, the claim is deemed to have been referred to the RPD (s.100(4)). Section 104 of *IRPA* provides authority for CIC to re-determine eligibility at any time after a claim has been referred to the RPD, in which case the RPD loses jurisdiction to determine the claim.[92] This combination of measures gives the RPD jurisdiction to start the asylum status determination process quickly after claims are presented. This overcomes problems that formerly occurred when referral of claims to the CRDD was delayed, sometimes for months.[93] At the same time, claims that are subsequently discovered to be ineligible can be easily pulled from the refugee determination process.

It is anticipated that this change will have little if any cost impact for legal aid. There may be a short term increase in legal aid costs if the RPD succeeds in significantly increasing the number of claims determined within a given time period. But this would not be directly attributable to the accelerated referral provided for under s.100(1) of *IRPA*. Depending on how many referrals are ultimately pulled back, it is possible that legal aid expenditures may be incurred on behalf of claimants who may otherwise never have been able to pursue their claim. But based on past experience, with less than one percent of all claims having been found to be ineligible, it is unlikely that there will be very many of these cases. Even with the increased security screening that has been implemented in the wake of the terrorist attacks in the United States in September of 2001, there has not been a significant increase in the number of claimants found to be ineligible. In cases where the claimant is making a repeat claim, ineligibility for

[91] The operative provisions in *IRPA* simply refer to "an officer". Section 6 of *IRPA* provides that the Minister may designate any person or class of persons as officers to carry out the purpose of any provision of the Act. In all of the provisions in *IRPA* dealing with refugee claimants, the designated officers are staff officers employed by CIC.

[92] A refugee claim is ineligible to be referred to the RPD if Canada or another country to which the claimant can be sent has conferred refugee protection on the claimant, or if the claimant has made a previous refugee claim that had been determined to be ineligible or to have been withdrawn or abandoned, or has been rejected by the IRB. A claim is also ineligible if the claimant has come to Canada, either directly, from certain countries designated by regulations (of which there are none at present) or if the claimant is inadmissible on grounds of security, serious criminality or connection with organized crime, or on grounds of the claimant's involvement in violation of human or international rights.

[93] Since more than 99% of claimants were ultimately found to be eligible, delayed referral unnecessarily prolongs processing time. Delayed referral also creates hardship for individual claimants, since they are unable to access interim federal health benefits until after their claim is found eligible to be referred to the CRDD.

referral will be readily apparent. The remaining cases, where claimants may be determined to be ineligible after a considerable amount of work has been done with respect to their claims, are likely to be so few in number as to have a negligible impact on legal aid costs.

Current implementation plans for the new legislation call for immigration officers to place greater emphasis on front-end screening of refugee claimants when claims are first presented. In recent years, point of entry interviews of refugee claimants were substantially curtailed as a result of resource cutbacks at CIC. Eligibility decisions have increasingly been made on the basis of replies to mail-in questionnaires, which were given to claimants after a cursory interview at the point of entry. Additional resources are now being provided at points of entry to enable immigration officers to conduct more in-depth interviews so they can make informed eligibility determinations within the three working-day time frame prescribed in *IRPA*.

The primary focus of these interviews is to gather information required to make eligibility determinations. However, much of this information is also relevant for purposes of determining the merits of individual refugee claims. For example, information provided in eligibility and admissibility interviews may be consistent with or may contradict important elements of the stories that claimants tell in their Personal Information Form (PIF) and at their status determination hearings. These consistencies and contradictions can be important factors in assessing the credibility of individual claimants. Also, disclosures of eligibility and admissibility of entry interviews allow the RPD to make an early assessment of the sort of research that may be required and the potential for streaming cases for determination in the expedited process.

RPD members have indicated a strong desire to make greater use of officers' notes from eligibility and admissibility interviews, especially if appropriate measures are put in place to ensure the accuracy and relevance of these notes. In the past, claimants' counsel have raised concerns about the reliability of the notes, considering the circumstances under which the interviews are conducted[94]. It can be anticipated that if immigration officers conduct more in-depth point of entry interviews and RPD members make greater use of notes from these interviews, there will be an increase in motions to exclude the notes from evidence at RPD hearings. If RPD hearings become more protracted as a result of procedural wrangling over admissibility of interview notes, this may result in increased legal aid costs, especially in provinces where lawyers are paid for actual time spent in hearings.

Increased focus on accelerating front-end processing and on gathering substantive information about refugee claims during eligibility and admissibility interviews is likely also to lead to increased pressure from lawyers and other refugee advocates to provide some form of advice or representation to refugee claimants for these interviews.[95] In the *Dehghani* decision ([1993] 1 S.C.R. 1053), which is the current leading case on this issue, the Supreme Court of Canada held that there is no right to counsel at admissibility and eligibility interviews. However, should this ruling be successfully challenged, providing legal aid for these initial interviews would constitute an entirely new expense that could be a significant cost driver for legal aid programs.

[94] Refugee advocates assert that claimants who are tired and disoriented when they are interviewed can easily be intimidated by overbearing immigration officers. Claimants who are fleeing from oppressive regimes may be fearful of telling the truth to persons in authority, or they may have been advised by smugglers who assisted them to tell a false story when they first arrive in Canada. The advocates are also concerned that the quality of interpretation at admissibility and eligibility interviews is sometimes inadequate.

[95] See section 3.3.4, above.

6.1.2 Increased RPD hearing capacity as result of move to single member panels

Under the *Immigration and Refugee Protection Act*, the RPD normally sits in single-member panels. This is a significant departure from the former *Immigration Act,* which specified two members as the quorum for CRDD panels. The impact of transition to single member panels is muted by the fact that, prior to implementation of *IRPA*, the CRDD had already made significant progress in having cases heard by single-member panels with the consent of the parties. In fiscal year 2001-02, 57% of CRDD hearings concluded across Canada were conducted by single-member panels. In Vancouver, 82% of hearings were conducted by a single member of the CRDD, while in Montreal, 58% of hearings were conducted by a single member. Utilization of single-member panels was lower in Toronto, where only 48% of hearings were concluded by single member panels (IRB, 2002d). However, the shift to single-member panels in the vast majority of cases to be determined by the RPD after June 28, 2002 can be expected to significantly increase the total number of cases that can be concluded each year. This will have a direct and immediate impact on legal aid costs.

It is difficult to calculate the full significance of the move to single-member panels with regard to the number of cases the RPD will be able to conclude. The IRB projects that 41,000 refugee claims will be concluded in 2002-03, which represents a 46% increase over the output achieved in 2001-02. This increase is not entirely attributable to the move to single-member panels. Other measures, such as increased utilization of the expedited process and an increase in the member complement are also expected to play an important role. But it is reasonable to suppose that two members sitting alone can conclude at least 50% more cases[96] than they can when sitting as a two-member panel. Beyond the percentage of hearings that were concluded by single member panels in 2001-02, there will be roughly a 35% to 40% increase in utilization of single-member panels nationally as a result of implementation of *IRPA.* From this, one can project that the move to single-member panels will increase the number of hearings the RPD is able to conclude by 17% to 20%.[97] The impact of this change will be felt more dramatically in Toronto, where utilization of single member panels will increase by 45% to 50%, resulting in an increased hearing capacity in the range of 22% to 25%.[98]

If this increase leads to a proportionate increase in the number of refugee claims for which legal aid is required, the potential cost impact for legal aid authorities could be quite significant. Legal Aid Ontario estimates that it spent $15,273,337 to provide legal aid for refugee determination proceedings before the CRDD in 2001-02 (Roderick Strain, memo to Mary Marrone, June 11, 2002). A 22% to 25% increase in the number of certificates for refugee status determination proceedings could conceivably result in an additional cost of $3.6 million to $3.8 million for LAO. Looked at in a different way, an increase of 1,550 refugee status

[96] This is a conservative estimate. It makes allowance for the fact that each member sitting alone requires more time for case preparation and for preparing decisions than is the case when two members sit together and share responsibility for case preparation and reason writing.

[97] In estimating increased hearing capacity resulting from the move to single-member panels, an allowance of 3%-8% is made to account for the fact that a small portion of RPD hearings will be assigned to three-member panels pursuant to s.163 of *IRPA.*

[98] Any increase in the complement of RPD members appointed to Toronto to help clear the backlog of claims that has built up over the last two years will likely result in a further short-term increase in legal aid costs in Ontario.

determination hearings[99] at an average cost of $1,700 for lawyers' fees[100] would cost LAO an additional$2.8 million. This figure does not include disbursements. The potential cost increase in Quebec could be 16% to 18% of the portion of its budget that is devoted to RPD proceedings. The impact for LSS in British Columbia is likely to be considerably smaller because single-member panels were already utilized in 82% of CRDD hearings in Vancouver prior to implementation of *IRPA* (IRB, 2002d). Increased hearing capacity in Vancouver resulting from the move to single-member panels will be limited to 5% to 7% or roughly 80 additional refugee status determination hearings. At an average cost of $1,600 per hearing[101], this would represent an added cost of $128,000.

This projected impact of the move to single-member panels as a legal aid cost driver is limited to the timing of when the cost may be incurred. The real underlying cost driver is the number of refugee claims to be determined. The immediate cost challenge arises from the fact that the inventory of claims pending has increased steadily over the past three years as a result of the increased number of refugee claims being made in Canada. Despite year-to-year improvements in per-member productivity, the CRDD has been unable to keep pace with that increase. Until such time as the accumulated inventory of 55,000 refugee claims can be cleared, one can anticipate that cost pressures on legal aid programs will continue, even if the annual intake of new refugee claims abates. If the annual intake of new claims does decline the move to single member panels will eventually be accompanied by attrition in the number of members appointed to the IRB. In that case, the number of hearings conducted by the RPD should decline accordingly.

It is unclear what impact the move to single-member panels will have on the average length of RPD hearings. Other things being equal, hearings should tend to be shorter because there will be one less participant and there will be no need for the two panel members to synchronize their understanding of the evidence. The reduction in average length of hearings observed over the past two years may in part be associated with the increased utilization of single-member panels. However, RPD members who have not had much experience conducting hearings on their own may have problems maintaining effective control over proceedings when they no longer have the option of sitting with a second panel member.

To the extent that counsel have an incentive to maximize time spent in hearings, some of them may avail of the transition to test individual members' capacity to control proceedings. The IRB has provided customized training to prepare members for the transition to single-member panels. It remains to be seen whether this will be sufficient to equip the less experienced members for their new responsibilities, or whether there may be a short-term increase in the average duration of RPD hearings as members adapt to the change. Any increase

[99] This is a 25% increase over the approximately 6,200 hearings concluded by the CRDD in Toronto in 2001-02. It does not include the increase in output that would result from the move to single-member panels in the Ottawa office.

[100] This average is based on the assumption that lawyers would bill for the full 16 hours preparation time allowed for refugee status determination hearings under the Ontario tariff and that the average time billed for hearing attendance would be 4 hours, plus the half-hour allowed for administration. The assumed hourly billing rate is $79, which is close to the amount allowed under the Ontario tariff for counsel with 4-10 years experience in civil or criminal law (Legal Aid Ontario, 2002e). The estimate is rounded to the nearest $100.

[101] This average is based on the assumption that lawyers would bill for the full 15 hours preparation time allowed for refugee status determination hearings under the LSS tariff and that the average time billed for hearing attendance would be 5 hours. The assumed hourly billing rate is $80.

in hearing time could be reflected in an increase in legal aid costs, especially in those jurisdictions that pay for actual time spent in hearings, without any cap.

It is also possible that there will be an increase in the number of reviewable errors made by new members who are conducting hearings alone without the opportunity to consult a more experienced colleague. To the extent that there is a resulting increase in the number of cases where leave is granted for judicial review and where RPD decisions are quashed and have to be reheard, this will be reflected in an increase in legal aid costs.

6.1.3 Consolidation of grounds for protection

Another significant change in the new legislation is the consolidation of the grounds on which asylum seekers can be granted protection. Under the former *Immigration Act*, the CRDD had jurisdiction to determine whether a claimant was a Convention refugee within the meaning of section 2(1) of the *Immigration Act*, which reflected the definition contained in the *Refugee Convention*. The PDRCC class covered failed refugee claimants who faced an objectively identifiable risk to their life, or who face extreme sanctions or inhumane treatment in the country to which the person could be removed. The grounds for granting protection under PDRCC were different from the grounds under the *Refugee Convention* and s.2(1) of the *Immigration Act* in that there was no requirement that the risk be linked to any of the five Convention grounds.[102]

Under *IRPA*, the RPD is given jurisdiction to grant protected status to Convention refugees and to persons in need of protection. The statutory definition of "a person in need of protection" set forth in section 97 of *IRPA* incorporates key elements of the definition of a "member of the PDRCC class" set forth in s.2(1) of the former *Immigration Regulations.* However it does not exactly mirror the PDRCC definition as it substitutes the phrase "cruel and unusual treatment or punishment", drawn from the *International Covenant on Civil and Political Rights*, for the phrase "inhumane treatment" used in the PDRCC definition. The definition of "person in need of protection" in s.97(1) of *IRPA* also includes persons who are believed to be at risk of torture, as defined in Article 1 of *the Convention Against Torture*, and s.97(2) provides scope for regulations to prescribe other classes of persons in need of protection.

The consolidation of grounds for protection set out in sections 96 and 97 of *IRPA* also encompasses the risk elements that underlay some of the current H&C applications. H&C appeals based on personal risks that the person concerned may face in a country to which he or she could be returned are now being dealt with by the RPD in the refugee status determination hearing.

This melding of provisions from the former *Immigration Act* and *Immigration Regulations* with international human rights conventions raises interesting challenges with regard to definitive interpretation of the new law. It is anticipated that in the short run there will be a flurry of new legal arguments before the RPD and before the Federal Court as to how the extended definition should be interpreted. This could exert upward pressure on legal aid costs in two ways. First, RPD hearings will tend to be longer than at present, at least until such time as jurisprudence regarding interpretation becomes more settled. Second, in the initial period

[102] Under the definition of the PDRCC class, the risk must apply in every part of the country and it must be a risk that would not be faced generally by other individuals in that country. Also, it must not be a risk that is caused by the inability of the country to provide adequate health or medical care [Immigration Regulations, SOR/78-172, s.2(1)].

following implementation of the new Act, judicial review applications to the Federal Court are likely to raise complex legal questions. Lawyers working on these cases will be required to put in more effort than would be required for more routine appeals. They may look to legal aid to pay for this additional work.

Beyond creating some uncertainty regarding interpretation, the impact that consolidation of grounds for protection will have on case preparation and the length of RPD hearings is unclear. Widening the range of issues that have to be addressed could make preparation more complex and it could result in lengthier hearings on refugee claims. To the extent that this happens, it will exert upward pressure on legal aid costs in all jurisdictions, particularly those that pay counsel for actual time spent in hearings. Alternatively, consolidation of protection grounds could reduce the need to make convoluted arguments to bring claimants who are in need of protection within the Convention refugee definition. This could conceivably simplify case preparation and could result in shorter hearings.

6.1.3.1 Elimination of PDRCC review and changes to H&C appeals

Even if consolidation of protection grounds does make RPD proceedings more complicated, the consequent elimination of some of the formerly available appeal processes should serve to reduce legal aid expenses at the post-determination level.

As already noted in section 5.4, legal aid expenditures for PDRCC and H&C applications have been quite limited. This means that any potential cost reduction flowing from consolidation of the PDRCC and the risk aspect of H&C grounds with RPD refugee status determination hearings will also be quite limited. With H&C appeals, in particular, it is unclear how much saving will result from the consolidation. These will continue to exist for purposes of dealing with humanitarian and compassionate issues that are not related to risk, such as hardship caused to dependents in Canada if a supporting individual is removed.

Also, a completely new pre-removal risk assessment process (PRRA) is being introduced. While the PRRA process is limited to new evidence not reasonably available at the time of the original RPD hearing, it stands to completely absorb all of the resources currently devoted to reviewing PDRCC applications. Thus, the likelihood that the elimination of PDRCC and risk-based H&C appeals under *IRPA* will result in an easing of cost pressures on legal aid programs is extremely low. (See section 6.1.5 for further discussion of the PRRA.)

6.2 Appeal to new Refugee Appeal Division as of right

Under the new *Immigration and Refugee Protection Act*, the CRDD has been replaced by the newly named Refugee Protection Division (RPD). *IRPA* also establishes a new Refugee Appeal Division (RAD), which is mandated to decide appeals relating to RPD status determination decisions. However, implementation of the provisions relating to the RAD has been delayed. The following discussion on implications of creation of the RAD is highly speculative and is intended primarily to give the reader a sense of what might happen to legal aid costs when the RAD is eventually implemented.

Both individual claimants and the Minister have the right to appeal any RPD decision to the RAD (s.110(1)). This new appeal will be conducted based on a paper review of the record from the RPD proceedings, together with written submissions from the Minister and the person

who is the subject of the appeal (s.110(3)). The RAD may also consider written submissions from the representative of the United Nations High Commissioner for Refugees and from other interveners when interventions are allowed by the RAD.[103] There will be no oral hearings. Appellants will be expected to establish an arguable case as to why the RPD decision is flawed. If such an arguable case is not evident from the appellant's written submission, the RAD may summarily dismiss the appeal. Where such a case is presented, out, the RAD will look more deeply into the matter. The RAD jurisdiction is to confirm the RPD decision [s.111(1)(a)] or to set it aside and make the decision that, in the opinion of the RAD, should have been made [s.111(1)(b)]. The new Act also gives the RAD authority to remit cases to the RPD to be re-heard [s.111(1)(c)], and where RAD has allowed an appeal by the Minister that was based on a question of the claimant's credibility, s.111(2) of the new Act directs the RAD to remit the case to the RPD for a new hearing.

The key differences between this new right of appeal and the present judicial review process in the Federal Court are:

1. decisions can be appealed as of right; there is no requirement for an appellant to obtain leave, whereas judicial review of CRDD decisions was only available on leave of a judge of the Trial Division of the Federal Court;
2. appeals to the RAD can be based on a question of fact or mixed fact and law, whereas judicial review is essentially limited to alleged errors of law;[104]
3. the RAD will have authority to substitute its own decision for that made by the RPD, whereas the Federal Court on judicial review, when it finds a decision to be defective, can only remit the case to be re-heard by the RPD; and
4. decisions of the RAD will be subject to judicial review in the Federal Court on leave of a judge of that court, whereas there is no further review of a judicial review decision made by a judge of the Trial Division of the Federal Court unless that judge certifies that the case raises serious question of general importance and states that question.

This new appeal process has significant potential cost implications for legal aid.

Within 45 days after receiving notice of the RPD decisions, appellants will be required to submit a written memorandum that sets out the facts and the law they are relying upon in the appeal. They must also provide all or part of the transcript of the RPD hearing if they choose to rely upon the transcript in the appeal. And they must provide any documents that the RPD refused to take into evidence if this is relevant to the appeal [RAD Rules, s.11(1)]. For an appeal to have any realistic prospect of success, this means, as a practical matter, that appellants are going to require legal assistance to prepare appeal submissions. Without expert, experienced legal assistance, appellants who are not proficient in either of Canada's official languages, and who are completely unfamiliar with the technical legal requirements of the refugee determination process, will likely not be able to prepare a submission within the tight timeframe envisaged. This could lead to a significant increase in demand for legal aid.

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[103] s.110(3) and *Refugee Appeal Division Rules*, s. 37 and 38.

[104] On judicial review, the Federal Court can grant relief on questions of fact only where the decision under review is based on a finding of fact that has been made in a perverse or capricious manner or without regard for the material before the decision maker, or where the decision maker acted or failed to act by reason of fraud or perjured evidence.

The information required for an appeal is similar to that required for a judicial review leave application. Under the current system applications for leave for judicial review that fail to disclose a fairly arguable case for the relief sought are liable to be summarily dismissed (*Bains v. Canada (Minister of Employment and Immigration)*). Likewise, the RAD can be expected to summarily dismiss appeals where submissions fail to identify an arguable factual or legal error in the challenged decision. There is a key difference, however. Whereas denial of leave by the Federal Court effectively amounts to a final decision in the matter, an appellant will be able to seek leave from the Federal Court for judicial review of the RAD decision.

From a legal aid perspective, one can presume that the level of work required to prepare an appeal to the RAD will be similar to what is currently required to prepare an application for leave for judicial review. Submissions on appeals to the RAD may have to be more fully developed than is currently required for leave applications, but it is not anticipated that this will require significant additional work in the majority of cases.[105] For purposes of the analysis that follows, it is assumed that for applications to the RAD, counsel representing appellants would require approximately 20 hours to prepare submissions. This is roughly equal to the time allowed for preparation of leave applications under the Ontario and British Columbia legal aid tariffs.[106] Thus, total fees per case charged to legal aid for appeals to the RAD should be comparable to fees currently charged for judicial review leave applications.

Since the RAD process will be entirely based on written submissions, there is no need for counsel to appear before the tribunal to argue the case. However, if appellants choose to rely on the transcript of the RPD hearing, they will have to bear the cost of preparing the transcript for an audio recording that will be provided by the RPD unless the RAD orders otherwise (RAD Rules, s.12). This represents a limited departure from current practice. At present, the IRB bears the cost of producing transcripts in all cases where leave for judicial review is granted. Applicants for judicial review have to pay for transcripts of the CRDD hearing only where the transcript is required for purposes of preparing the leave application. The plan with respect to use of hearing transcripts at the RAD is that the RPD will, on request, provide claimants and /or their counsel with audio recordings of RPD hearings. Persons preparing appeal applications will have the option of producing, at their own expense, a full transcript of the hearing or of transcribing portions of the recording that are directly relevant to the appeal.

Assuming that the number of appeals to the RAD would be roughly equal to the number of applications for leave for judicial review, one can anticipate that total legal aid cost for appeals to the RAD will be roughly equal to the current cost for judicial review leave applications. If transcripts are required in a substantial number of cases and legal aid plans cover

[105] The original premise behind establishment of the RAD was that there is need for some mechanism to catch obvious errors in CRDD decisions without requiring parties to go through the full judicial review process. RAD members are expected to have a high level expertise in country conditions and in the law as it relates to refugee status determination. With this specific subject matter expertise, it is anticipated that RAD members will be able to readily identify errors in RPD decisions provided that they are pointed in the right direction by appellants' submissions.

[106] Both the Ontario tariff and the BC Tariff allow 15 hours for preparation of an application for leave for judicial review of a CRDD decision. Additional time (5 hours in BC and 14 hours in Ontario) is allowed for preparation of a Notice of the leave application and an opinion letter on merits of the application for review by the legal aid authority. Further time is allowed to prepare for the judicial review if leave is granted. The 20-hour estimate for appeals to the RAD includes time for preparation of necessary notices, opinion letters, and all required submissions.

this item, this could represent a new legal aid cost. For purposes of the analysis that follows, it is assumed that transcripts costing $200 each will be required in 10% of appeals to the RAD.

The full legal aid cost implications associated with the introduction of an appeal to the RAD are difficult to calculate. There should be some reduction in the number of cases where leave for judicial review is granted and in the number of cases that are referred back to the RPD for re-determination. It is reasonable to assume that the RAD could correct obviously erroneous RPD decisions and that in most of these cases, the RAD could make a final decision on the case without remitting the matter back to the RPD for re-determination. Thus, intervention of the RAD could eliminate the need for judicial review and for a new RPD hearing in these cases. End-to-end legal aid costs related to cases of this sort should therefore decline. A cursory review of reasons given by Federal Court judges on judicial review of CRDD decisions indicates that approximately one-third of the decisions quashed fall into this category.

If current experience in the Federal Court is any guide, the RAD will reject a substantial number of claimants' appeals. Also, on Minister's appeals, the RAD may overturn RPD status determinations made in favour of individual asylum seekers. In both of these instances, a fair number of the parties against whom RAD decisions are made will likely seek leave for judicial review of the RAD decisions since it is the only remaining available recourse. It is difficult to predict how many leave applications there would be; however, if the number is high, this could be a major additional cost for legal aid.[107]

Assuming that the RAD is staffed by highly qualified decision makers, as originally intended, it is anticipated that Federal Court judges will accord greater deference to RAD decisions than they have, in the past, been prepared to accord to CRDD decisions. If this turns out to be the case, there should be a further reduction in the number of cases for which leave for judicial review is granted.[108] However, if for any reason, the RAD fails to gain increased deference, the number of cases in which leave for judicial review is granted could remain a significant legal aid cost driver.

Following is a summary projection of the potential cost savings and / or increases that may be occasioned under different scenarios as a result of the establishment of the RAD. These projections are somewhat speculative, but they do provide a starting point for a discussion of the potential impacts that introduction of the RAD could have on the demand for legal aid. In all cases, calculations are based on the number of cases in which leave for judicial review was granted in 2000-01 (see Table 6, above). It is assumed that the percentage of RPD decisions appealed to the RAD will be equivalent to the percentage for which leave for judicial review is currently being sought.[109] The actual number of decisions that will be appealed to the RAD

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[107] This is an area where economic incentives to lawyers arising from the structure of the legal aid tariff and from difference in mode of legal aid delivery as between staff lawyers and lawyers in private practice may have an impact. Staff lawyers may be more inclined to let a case drop if it is evident that prospects on appeal are very poor. Lawyers in private practice, on the other hand, may be more inclined to pursue an appeal, provided they have some guarantee of being paid, whatever the outcome. Legal aid plans can limit this risk to some extent by imposing a merit test before funding applications for leave for judicial review. Such a limitation on access to legal aid is reasonable in circumstances where two separate tribunals have already adjudicated a claim.

[108] In 2000-01, leave for judicial review was granted in slightly more than 12% of the cases where it is sought. Roughly 12% of the decisions for which leave was granted were quashed.

[109] Since appeal to RAD will be available as of right, the rate of appeals could conceivably exceed the current rate of leave applications for judicial review. However, the right to apply for leave for judicial review is equally unrestricted. The total number of leave applications made in 2000-01 equaled 63% of negative CRDD decisions.

when it is eventually implemented may be substantially higher than the numbers shown in the calculations that follow.[110] But change in case volume is an independent cost driver that needs to be accounted for separately.

Table 8 presents a summary of anticipated legal aid costs associated with the addition of the new appeal as of right. These calculations are based on three different scenarios respecting the number of leave applications that would be made for judicial review of RAD decisions and respecting the level of judicial deference to RAD decisions. For scenario 1, it is assumed that RAD would resolve all of the cases that are currently being overturned on judicial review plus one-third of the cases for which leave for judicial review is currently being granted. As well it is assumed that increased judicial deference will result in a 50% reduction in the rate at which leave for judicial review is currently being granted.

For scenario 2, it is assumed that the RAD would resolve 75% of the cases that are currently being overturned on judicial review plus one-third of the cases for which leave for judicial review is currently being granted, and that increased judicial deference will result in a 25% reduction in the rate at which leave for judicial review is currently being granted.

For scenario 3, it is assumed that the RAD would resolve 50% of the cases that are currently being overturned on judicial review plus one-third of the cases for which leave for judicial review is currently being granted. It is further assumed that the rate at which leave for judicial review is currently being granted would remain unchanged.

Table 8 Projected National Legal Aid Costs Associated with New Appeal

	Pre-RAD	Scenario 1	Scenario 2	Scenario 3
Negative status determinations				
Appealed to RAD		$ 6,016,600	$ 6,016,600	$ 6,016,600
Leave applications to FC	$ 6,016,600	$ 1,665,285	$ 2,280,380	$ 2,891,888
Leave granted by FC	$ 522,466	$ 72,305	$ 148,517	$ 198,022
Quashed by FC	$ 36,984	$ 5,118	$ 10,513	$ 14,017
Transcripts		$ 89,800	$ 89,800	$ 89,800
Total cost	$ 6,576,050	$ 7,759,308	$ 8,456,010	$ 9,120,527

The figures in Table 8 suggest that legal aid costs associated with appeals to the RAD and subsequent judicial review applications could be 18% to 39% higher than current costs associated with applications for judicial review without any prior appeal. The only way in which net total cost of the combined processes could be less than the current cost for the two-stage judicial review process is if there is a drastic decline in applications for leave for judicial review as a result of the introduction of the right of appeal to the RAD. If the frequency at which leave is sought with respect to RAD decisions declined to the range of 10% to 15% from the current level of 63%, the net total legal aid cost could conceivably be lower than at present. But that is such a remote possibility that it can safely be ignored.

The Minister also occasionally seeks leave for judicial review of positive decisions, but these applications are included in the 63% figure.

[110] When the new Act comes into force, as a result of full implementation of single-member panels, the RPD is expected to make more determinations per year than the CRDD is currently making. Any increase in RPD output is likely to result in a proportionate increase in the number of appeals.

These calculations are provided simply to illustrate the point that the introduction of the new right of appeal is likely to result in higher legal aid costs. The figures cannot be taken as indicative of actual anticipated increased cost since the assumptions on which they are based do not apply in all jurisdictions. Any difference in hourly rates, time allowed for work on appeals, discretionary or merit screening policies, and any differences in percentage of decisions that are the subject of appeal and judicial review leave applications, would have a direct impact on bottom-line costs.

6.3 Pre-removal risk assessment (PRRA)

The new *Immigration and Refugee Protection Act* provides for a pre-removal risk assessment (PRRA) to ensure an effective review of risk prior to removal. Such reviews currently take place, but they are not formalized in legislation (CIC, 2001f: 16). The assessments are conducted by designated officers within CIC (PRRA officers), rather than by the IRB. The process is intended in most cases to be a purely administrative review, based on written submissions. Section 113(b) of *IRPA* provides that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. Section 159 of the proposed new *Immigration and Refugee Protection Regulations* specifies the factors to be considered by the Minister in forming that opinion. It can be anticipated that hearings will be required in cases where there is evidence central to the risk determination that raises a serious issue as to the applicant's credibility.

The PRRA process is used in three different situations. First, immediately prior to removal of a failed refugee claimant, the PRRA is used to determine whether there are any changes in the situation in the country to which the failed claimant is to be removed that would alter the original protection determination. If at the time of proposed removal, new evidence that was not available when the original determination was made establishes that the claimant falls within any of the grounds for protection in s.96 or s.97 of the Act, the individual will be given the same protected status that could have been conferred by the RPD. As a practical matter, this situation is most likely to arise where there has been a significant lapse of time between the original protection determination and removal.

Second, the PRRA is used to deal with all repeat claims. Persons who have made a previous refugee claim in Canada are ineligible to have a new claim referred to the RPD for determination. Any failed claimant who presents a new claim after having left Canada for more than six months after the removal order came into force will be dealt with through the PRRA, rather being referred to the RPD for a new hearing.[111] Only evidence that was not available at the time of the original RPD determination will be considered in the PRRA (IRPA, s.113(a)).

Third, asylum claims from any persons found to be ineligible to have their claims determined by the RPD, including persons who have been found to have abandoned or withdrawn a claim previously referred to the RPD (*IRPA*,s.101(1)(c)), are dealt with through the PRRA.[112] Where ineligibility to have a claim determined by the RPD is based on security or

[111] A failed claimant who returns to Canada within 6 months after receiving notice of the RPD decision rejecting his or her claim is not eligible to apply for a pre-removal risk assessment (*IRPA*, s.112(2)(d)).

[112] A person may not apply for a pre-removal risk assessment if they are a person referred to in *IRPA*, s. 115(1) ("a protected person or a person who is recognized as a Convention refugee by another country to which the person may

serious criminality grounds, determination in the PRRA that the individual is in need of protection can only result in a stay of removal. Other persons found to have a well founded fear of persecution or otherwise to be in need of protection are eligible for permanent landing in Canada in the same way they would have been had the risk determination been made by the RPD.

The PRRA process represents a significant formalization of the risk assessments that were formerly conducted immediately prior to removal. Many of the individuals applying for PRRA will presumably apply for legal aid. It is anticipated that PRRA applications will generally involve an effort similar to the effort formerly required for PDRCC applications. However, where a hearing is required, the effort involved in preparation and presentation of PRRA applications will be similar to that required in cases handled through the regular RPD determination process.

When assessing the possible legal aid cost implications of the PRRA, one must take into account the following factors. With respect to failed claimants who have never left Canada, the key issue is to what extent, if any, have conditions in the country to which the person would be removed changed since the original determination was made. If removal takes place within a short time after the RPD determination, it is unlikely that there will be any substantial evidence to support a PRRA application. The PRRA process in these circumstances is likely to be quite summary and applications for legal aid are unlikely to meet the merit threshold to qualify for legal aid. However, where there is a long delay following the original RPD determination, evidence in support of a PRRA application could be quite extensive. If the new evidence relates to circumstances particular to the claimant, as opposed to well-documented changed conditions on the country to which the person is to be removed, the new evidence may raise credibility issues that require a hearing. In these circumstances, the PRRA could be similar in complexity to the original refugee determination process before the RPD.

Similar considerations apply with regard to repeat claims. The closer in time a repeat claim is to the original RPD determination, the more likely it is that the matter will be summarily dealt with in the PRRA. But where considerable time has elapsed and conditions in the claimant's country of nationality have changed, a hearing may be required. However, limitation of the PRRA inquiry to new evidence should simplify matters considerably. In virtually all circumstances, use of the PRRA for dealing with repeat claims is likely to be less costly for legal aid than the process under which the previous CRDD determination could be completely re-litigated.

Since serious issues regarding the claimant's credibility almost invariably arise with respect to the alleged grounds on which protection is sought, individuals who have never had their claim determined by the RPD will likely require a hearing. Legal aid costs relating to these cases are likely to be very similar to the cost for cases that go before the RPD. At present, over 99% of the individuals who make refugee claims in Canada are found to be eligible to have their claims determined by the RPD. *IRPA* widens the grounds of ineligibility, so it is possible that some cases that were formerly referred to the CRDD will be now dealt with in the PRRA. However, since these cases would otherwise have been referred to the RPD, the net impact of this change on legal aid costs should be neutral.

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be returned") or if they are the subject of an authority to proceed issued under s. 15 of the *Extradition Act* (*IRPA*, s.112 (1) and (2))

When assessing legal aid cost implications of the PRRA, it is important to bear in mind that legal aid coverage for PDRCC submissions was formerly provided in only two provinces, British Columbia and Alberta. Expenditures in relation to PDRCC submissions in these provinces accounted for a very small portion of the entire legal aid budget for immigration and refugee matters.[113] If other provinces, particularly Ontario and Quebec, which between them account for almost 80% of all refugee claims determined in Canada, provide coverage for PRRA, total cost for delivering immigration and refugee legal aid across the country will rise. Whether the impact will be limited to the range of 2% to 2.5% of fee expenditures relating to immigration and refugee matters, which is the amount LSS in BC currently devotes to PDRCC submissions, remains to be seen. This will depend very much on how legal aid authorities exercise discretion in granting certificates for PRRA proceedings.

6.4 Changes in eligibility criteria

Section 100(1) of *IRPA* provides that a refugee claim is ineligible to be referred to the RPD if the claimant already has refugee status in Canada or another country, or has made a prior claim that has been determined to be ineligible or to have been withdrawn or abandoned. Claims are also ineligible for referral to the RPD if the claimant came to Canada from a designated "safe third country" or has been determined to be inadmissible to Canada on grounds of security, violating human rights or international rights, serious criminality or involvement in organized crime. Most of these eligibility criteria parallel the criteria set forth in s.46.01(1) of the former *Immigration Act*. However, there are two notable differences.

Under the former *Immigration Act*, a person whose refugee claim had been rejected by the CRDD was not eligible to make a new claim if the person had, since last coming to Canada, been determined by the CRDD not to be a Convention refugee or to have abandoned the claim [*Immigration Act*, s.46.01(1)(c)(i). However, such persons became eligible to make a repeat claim once they had been outside Canada for at least 90 days after the notice of abandonment or the negative decision was issued [*Immigration Act*, s.46.01(5)]. Persons who had withdrawn their claims before a decision was made, could make new claim at any time. Under *IRPA*, a claim is ineligible to be referred to the RPD if a prior claim has been rejected by the IRB or has been determined by the RPD to have been withdrawn or abandoned. Any repeat claim made more than six months after the prior claim was rejected is dealt with in the PRRA. Otherwise, the claimant is not eligible to apply for any sort of protection in Canada.

It is unclear how many claims will be screened out of the refugee determination process as a result of these changes. It is estimated that 2% to 3% of claims referred to the CRDD under the former *Immigration Act* were repeat claims.[114] Repeat claims referred to the CRDD prior to implementation of *IRPA* are going to be dealt with in the regular RPD hearing process. But repeat claims made after June 28, 2002 will be dealt with in the PRRA process, provided the claimants have been outside of Canada and at least six months have passed since their prior claim was rejected, or determined to have been withdrawn or abandoned.

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[113] In fiscal year 2000-01, the LSS in British Columbia devoted less than 2.5% of immigration and refugee expenditures to PDRCC applications (Legal Services Society, 2001a).

[114] This estimate is based on a count of repeat claims made by the IRB in anticipation of implementation of *IRPA*. Approximately 1200 of the 51,521 refugee claims awaiting a hearing at the end of June 2002 were identified as repeat claims (Hasan Alam, personal communication, September 10, 2002).

The probable impact of this change on legal aid costs is likely to be small. The issues to be dealt with under PRRA are different from the issues dealt with in the original decision since the only evidence that will be admissible in PRRA is evidence that was not considered when the original decision was made. Repeat claims that do not raise any substantive new issues will be dealt with summarily, and likely will not qualify for legal aid. But prior to implementation of *IRPA*, this was already the case with repeat claims that raised no new issues. Claims that were previously withdrawn or abandoned, which were never the subject of a prior hearing, will likely require a hearing in the PRRA process very similar to the hearing that would be held if the case were referred to the RPD. If claims dealt with in the PRRA process appear to have merit, it is probable that they will qualify for legal aid in much the same way as would have been the case had they been referred to the RPD. The work required in representing claimants at hearings in the PRRA process is similar to the work required on claims that are referred to the RPD. Bearing all of these considerations in mind, any reduction in legal aid costs as a result of the more restrictive eligibility provisions under *IRPA* will likely be quite limited.

There could be a reduction in legal aid costs if the criteria for approving legal aid coverage for PRRA proceedings are more restrictive than was the case for proceedings before the CRDD under the former *Immigration Act*. However, changes to legal aid costs occasioned by changes in coverage, as decided by legal aid authorities, are independent of changes in federal immigration legislation.

6.5 Recent changes in national security legislation

In the wake of the terrorist attacks on September 11, 2001, the federal government introduced four separate bills to address the issue of terrorism. Close reading of the various bills that comprise this legislative package indicates that there is nothing in the package that has any bearing on legal aid costs relating to immigration and refugee matters.

Bill C-35 deals with foreign missions, international organizations and inter-governmental conferences. Bill C-44 contains a single provision that amends the *Aeronautics Act* to permit Canadian airlines to forward passenger manifests to foreign states.

Bill C-36, *The Anti-Terrorism Act*, is omnibus legislation that amended sixteen Acts of Parliament, including the former *Immigration Act* and the new *Immigration and Refugee Protection Act.* However, none of the amendments effected by Bill C-36 have any bearing on immigration and refugee legal aid costs. The provisions in Bill C-36 that create authority for the police to detain individuals suspected of having information related to a terrorism offence and individuals suspected of planning to carry out terrorist activity might conceivably be applied to immigrants and refugees. But any legal aid costs associated with such detentions are more properly ascribed to criminal legal aid than to immigration and refugee legal aid. Amendments to the former *Immigration Act* and the *Immigration and Refugee Protection Act* effected by s.46 of Bill C-36 are technical in nature, reconciling provisions in these Acts with other legislation, and these changes have no bearing on legal aid costs.

Bill C-42, which has subsequently been withdrawn by the government, included a number of provisions that might have potentially affected legal aid costs. The most significant of these changes was a provision that would allow for the detention of foreign nationals within Canada who are unable to prove their identity. At present, foreign nationals who are unable to prove their identity can be detained at a point of entry, but not after they have entered Canada. Such a provision, if enacted, could have the effect of increasing the number of immigration inquiries, which in turn could affect legal aid costs. However, all provisions relating to the *Immigration Act* and to the *Immigration and Refugee Protection Act* have been dropped from the new Bill C-55, which is intended to replace Bill C-42. Bill C-55 has not yet been enacted.

7.0 Impact of delays in process

7.1 Delay as a "load" factor increasing work to be done

Delay in legal processes has potential to drive legal aid costs in two ways. First, it tends to increase the amount of work that has to be done with respect to individual cases. Second, and specific to the immigration and refugee context, delay in making final determination on asylum applications, and delay in removing failed claimants, encourages abuse of the asylum determination process as a means to bypass regular immigration channels.

Procedural delays, for example prolonged adjournments and repeated postponements, increase the amount of work that lawyers are required to do. When hearings are adjourned for an extended period, lawyers who represent legal aid clients involved in these cases have to spend time reviewing the case in preparation for resumed sittings. Additional time is also required to maintain contact with clients and witnesses and to deal with client problems that may arise while the case is adjourned. Repeated postponements and the associated need to establish new hearing dates consume lawyers' time but contribute nothing to the resolution of the substantive matters in relation to which the lawyers have been retained.

This sort of delay could be a legal aid cost driver if lawyers were able to bill for all of the time spent on individual cases. But in the context of immigration and refugee legal aid, the cost impact is muted because all tariffs limit the amount that can be charged for pre-hearing work. The allotted preparation time is not adequate for required case preparation in many cases (Social Policy and Research Council, 2002: 9). As a result, lawyers are rarely able to bill for additional work incurred as result of procedural delays. However, in jurisdictions where lawyers can bill for the full time spent in hearings, additional legal aid costs are incurred when hearings are not concluded in a reasonable time. Where tariffs allow an additional charge for adjourned hearings, delays that result in adjournments also result in additional legal aid costs.

7.2 Delay in determination of cases and removal of failed claimants

The impact that delay in reaching decisions and in removing failed claimants has on the intake of asylum claims in Canada is a separate issue and possibly more significant as a cost driver with respect to immigration and refugee legal aid. No detailed calculations of how delay might influence intake has been carried out, but over the years, build up of case backlogs, which are one indicator of increased processing times, have tended to be followed by increases in claim intake.

The most obvious example of this phenomenon was in the period between 1985 and 1988, immediately prior to the establishment of the IRB. In 1985 the Supreme Court of Canada held that an oral hearing is required for refugee claims (*Singh v. Minister of Employment and Immigration*). Immediately following that decision, the number of refugee claims made in Canada started to rise sharply. The former Immigration Appeal Board (IAB), which at the time had only 18 members and sat in three-member panels, was quickly overwhelmed by the

increased intake. Additional members were appointed, but they were unable to keep pace with the rising intake. In the latter half of 1986, when it became obvious that the system would be unable to cope with the mounting backlog, the floodgates opened.

The average intake of refugee claims from 1981 to mid-1986 is estimated to have been around 769 per month or 9,228 per year. For the period from mid-1986 when the Administrative Review Program was established to deal with the accumulating backlog of refugee claims, until the end of 1988, when responsibility for determination of refugee claims was transferred to the IRB, the average intake was estimated to have been 3,425 claims per month or 41,100 per year (CIC, 1994). However, this average does not tell the full story. During the 1986 to1988 period, the intake was rising steadily, with an estimated 50,000 claims being received in 1988 alone. Over 23% of the claims received during the 1986 to 1988 period were from Portugal and from Trinidad – Tobago. The influx of a large number of claimants from these non-refugee-producing countries is a clear indication that the asylum system was being used by many claimants as a back door for immigration to Canada. The sudden interest in Canada as a destination appears to have been directly related to the likelihood that claimants would be able to stay in Canada for at least a few years before their case would be heard. As the crisis mounted, there was also widespread anticipation that the government would declare an amnesty for persons already in the country, so prospective immigrants used this avenue as a way to "get in under the wire" without passing through regular immigration channels.

The government of the day responded by replacing the IAB with the IRB. More than 220 members were appointed to the CRDD when it was first established. Some of these were assigned to a special "backlog clearance" program under which claimants already in the country would be allowed to stay if they could establish a credible basis for their refugee claim. The others were assigned to the regular hearing process to deal with new refugee claims. Intake of claims between 1989 and 1992 fluctuated from just over 20,000 in 1989 to 37,729 in 1992. In 1993, when CRDD output caught up with the intake, the number of claims received dropped to 21,192.

The pattern noted in the late 1980s has been repeated over the past two years. A sudden increase in intake, up from 25,396 in 1998 to over 44,000 in 2001, has triggered the build-up of a pending inventory of over 50,000 claims. This has forced the IRB to revise estimates of how long it is expected to take, on average, to decide refugee claims after they are referred to the RPD. In its 1999 Report on Plans and Priorities (RPP), the Board projected that processing time would be reduced to eight months in the 1999-2000 fiscal year (IRB, 1999b).[115] In its most recent RPP, filed in March of 2002, the Board estimates that average processing time in fiscal year 2002-03 will be 16 to 18 months (IRB, 2002b: 11).

Delays between the referral of claims and RPD decisions are only part of the picture. To that must be added all of the post-determination delays. Failed claimants have 45 days after receipt of notice of the RPD decision to perfect an application for leave for judicial review. The

[115] These surges in claim intake have also coincided with the introduction of major amendments to the *Immigration Act*, such as Bill C-55 in 1988, Bill C-86 in 1992, and Bill C-31 in 2000, which was subsequently re-introduced as Bill C-11 and enacted as the *Immigration and Refugee Protection Act*. The cause-effect relationship here is difficult to sort out. Many of these legislative changes were introduced in response to perceived problems in the system, including slow processing time and the build-up of a large backlog of refugee claims. However, the announcement of pending legislative changes may also have acted as a catalyst for even more claims, as claimants attempted to lodge their claims before the new legislation came into force.

Federal Court, on average, takes four months to make a decision on leave applications and an additional 12 months before delivering a decision in cases where leave for judicial review is granted. The time required for pre-removal risk assessment and to complete the arrangements that must be made before the person concerned can be returned to his or her country of origin cause further delay in the removal of failed refugee claimants.

The real issue for people who might abuse the asylum system to gain access to Canada is how long they expect to be able to stay and work in Canada before they are removed. If they are likely to be removed quickly, the cost of making the trip – including payments to migration agents for false travel documents and assorted other expenses over and above the normal travel cost – makes the exercise uneconomic. But if they have a good prospect of staying in Canada for many years, even if their asylum claim is rejected, claiming asylum becomes much more attractive. The longer the delay in removal of failed refugee claimants, the more attractive the asylum process becomes as an alternative route for immigration. Knowledge that claiming refugee status provides an excellent prospect of being able to remain in Canada for a number of years, even if the claim is rejected, may draw prospective migrants to make refugee claims here, which in turn, drives legal aid costs.

This phenomenon appears to be a factor behind a significant number of the asylum claims received in IGC countries. It has caused many of these countries to impose drastic measures to discourage asylum seekers. In a very controversial move, Australia, for example, has begun detaining all refugee claimants in remote facilities to frustrate their efforts to seek work in that country while awaiting their status determination hearings. Since 1996, the United States has also been detaining a significant number of refugee claimants. Many countries in Europe have been experimenting with expedited proceedings for dealing with manifestly unfounded claims and with prescription of presumed "safe countries of origin" in an effort to facilitate speedy removal of failed refugee claimants. These developments have not gone unnoticed in Canada and serious consideration has been given to imposing similar measures here in order to curtail the perceived abuse of the asylum process.

All of this is a two-edged sword with respect to legal aid costs. On the one hand, delay in removal appears to be one of the factors driving intake of refugee claims, and therefore driving demand for legal aid services. On the other hand, efforts to discourage demand could drive legal aid costs in other ways. For example, increasing the number of detained cases would result in more detention reviews, for which legal aid would be required. And any move to introduce expedited removal procedures of the sort being tried in some European countries would likely be met by a concerted *Charter* challenge, for which legal aid funding would almost certainly be sought. A more attractive option from a legal aid perspective would be to reduce delays by streamlining current decision-making processes without introducing new measures that would be likely to generate demand for additional legal aid coverage.

Conclusion

Availability of legal aid for immigration and refugee matters is an issue of great importance, particularly in relation to the determination of refugee claims. Decisions made in the refugee determination process affect the life, liberty and security of the persons concerned in a fundamental way. Very few refugee claimants have even a rudimentary familiarity with the Canadian legal system. Many of them are unable to function in either of Canada's official languages when they claim asylum in this country. Refugee claimants have a compelling need for assistance in order to present their claims effectively. Yet many refugee claimants are heavily dependent on legal aid because they do not have sufficient financial resources to retain legal counsel on their own.

The primary cost driver with respect to immigration and refugee legal aid services is the number of refugee claims made in Canada. Other factors also influence legal aid costs, but these are all secondary to the overwhelming importance the demand for legal aid services for refugee claimants as a legal aid cost driver. Different ways in which legal aid tariffs are structured create economic incentives for lawyers to conduct their practices in particular ways that ultimately have a bearing on legal aid costs. Procedural requirements imposed by legislation and by operating practices at the IRB influence costs by affecting the effort that must be expended in individual cases. However, these factors pale in comparison to the base factor of sheer volume of demand for services.

There is little evidence of any correlation between policies and practices in other countries with respect to the admission of asylum seekers and the number of refugee claims lodged in Canada. There have been limited short-term fluctuations in Canadian intake of claims as a result of restrictions imposed by other countries, particularly the United States, but such impact appears to be transitory and there is no clearly identifiable pattern. Likewise, the perceived generosity of Canada's refugee policies does not appear to be playing a major role in making Canada a preferred destination for refugee claimants, as Canada's proportionate share of refugee claims lodged in the major refugee receiving industrialized countries has remained fairly stable over the past 14 years.

Factors that may be contributing to intake of asylum claims are difficult to identify in any systematic way. There is some anecdotal evidence that the presence in Canada of a large base population of refugees from certain countries may be drawing additional asylum seekers from these countries. The asylum determination process may be providing an alternative route of access to Canada for individuals, related to persons already resident in Canada, who have difficulty qualifying for landing in Canada through regular immigration channels.

There appears to be some correlation between the level of refugee claim intake and the timing of major changes in Canadian immigration legislation. There also appears to be some correlation between level of intake and average elapsed time between arrival and removal of unsuccessful refugee claimants. The uncertainty created by the prospect of legislative change may be motivating prospective immigrants to lodge asylum claims here in an effort to "get in under the wire" before the changes come into force. Delay in removing unsuccessful refugee

claimants may be drawing illegal migrants to use the refugee determination process as a means to gain temporary admission to Canada.

Beyond simple volume of demand for services as a legal aid cost driver, certain features of the current legal processes in which immigrants and refugee claimants are involved appear to be driving legal aid costs. For example, case management practices at the IRB, particularly with regard to case scheduling and utilization of the expedited process to grant refugee status in well founded cases, have a direct impact on the time lawyers are required to spend on individual cases. Requirements with respect to translation of documents, utilization of detention in cases involving immigrants and refugee claimants, and choice of where people are detained also have direct cost consequences for legal aid.

It is anticipated that legislative changes introduced under the new *Immigration and Refugee Protection Act* will exert short-term cost pressure on legal aid programs. The transition is likely to generate new legal challenges in relation to elements of the new legislation that depart from established practice. A number of test cases will likely be required before interpretation of the new legislative provisions is well established. On the other hand, the new Act simplifies certain elements of the present refugee determination process, most notably by addressing all grounds on which protection can be granted in a single hearing and providing that refugee status determination hearings shall be conducted by panels of one, rather than two, decision-makers.

Creation of a new right of appeal in asylum claims is likely to give rise to additional legal aid costs that will not be entirely offset by the anticipated reduction in the number of judicial review applications. Delay in implementation of the Refugee Appeal Division provides an opportunity for a more systematic analysis of the potential impact of this particular change that has been possible within the limited scope of this report.

It is unclear whether making significant changes in the way in which legal aid services are delivered to immigrants and refugee claimants might reduce legal aid costs. The most significant cost with regard to legal aid for refugee claimants relates to the time lawyers must spend with claimants debriefing them regarding details of their claim and preparing them for their hearing. In theory, it might be possible to reduce legal aid costs if some of this preparatory work could be handled by paralegals, who are paid less than lawyers.

Recent experience in Manitoba offers some evidence in support of this proposition. In Manitoba, most of the case preparation work is done by two salaried paralegals working with the Manitoba Interfaith Immigration Council. The legal aid tariff in that province provides far fewer hours for work on refugee claims than is allowed under the tariffs in British Columbia, Ontario and Alberta.[116] The total salary paid to the paralegal is likely considerably less than it would cost to pay lawyers for an additional five to six hours of preparatory work on each claim. However, there is a peculiar confluence of circumstances that make this arrangement possible in Winnipeg, circumstances that might not be readily reproduced in larger centres with much larger numbers caseloads. First, the senior paralegal at the Interfaith Immigration Council in Winnipeg is very experienced. Second, the number of lawyers representing refugee claimants in Winnipeg is very

[116] The legal aid tariffs in Ontario allow 16 hours of preparation time for refugee claims, while the average hearing time for such claims in recent years has been less than 4 hours. The tariff in British Columbia allows 15 hours preparation for hearings that are typically concluded in less than 5 hours. The Alberta tariff allows a total of 25 hours for each case, and most of that time is devoted to pre-hearing preparation. The Manitoba tariff allows only 10 hours for preparation and the first half-day of hearing.

small, so the paralegals are able to establish a good working relationship with all of the lawyers involved without undue difficulty. Third, the claim intake in Winnipeg is sufficiently small that two paralegals can handle almost all of the work. As a result, there is minimum need for administrative support, coordination and supervision and therefore very limited overhead cost beyond the salary for the paralegals who are doing this work. To provide the same service in Toronto, where the annual intake of refugee claims is almost 100 times higher, or in Montreal where claim intake is almost 40 times higher than in Winnipeg, would require a much more complex administrative structure and unit costs would accordingly be substantially higher.

Both the Legal Services Society in British Columbia and Legal Aid Ontario have experience with providing services to refugee claimants through clinics that are staffed by salaried lawyers and paralegals. It is generally agreed that the quality of service provided through these clinics has been good. However, delivery of services through these clinics has not been any less expensive than it has been through the more common judicare arrangements with members of the private bar. The main reason for this is that lawyers and paralegals at clinics, between them, on average, devote more time to each case than do members of the private bar working under judicare arrangements. Lawyers in private practice complain that the time limits prescribed under legal aid tariffs are unrealistically low, and that they are effectively providing some services for free. This experience suggests that if paralegals are fully paid for the time they devote to each case, and if lawyers are to be paid for the minimum preparation time required from them when representing claimants at hearings, the net cost will be similar to what is currently being paid under judicare arrangements.

There is clearly scope for utilizing paralegals and trained client support workers at NGOs to provide some of the services required by immigrants and refugee claimants. But improved quality of service, rather than reduced cost, is the main benefit that is likely to be realized from such a change.

It is an open question how legal aid programs might best be modified to involve paralegals and trained client support workers more fully. Franchising arrangements that foster cooperation between lawyers in private practice and established non-government settlement organizations that are already providing services to immigrants and refugees may be an alternative to staff-based legal aid clinics that warrants further consideration. Such arrangements would enable lawyers in private practice to share the services of competent paralegals who are working in a structured, well managed environment and who are readily accessible to immigrants and refugee claimants who are seeking legal services. At the same time, the lawyers would not have to assume responsibility for directly employing the paralegals, but could work with them as required in individual cases. Since the settlement service organizations already have an infrastructure in place, the legal aid authorities could avoid the cost of having to operate specialized immigration and refugee legal aid clinics. Such an arrangement would foster innovation as groups of lawyers and NGOs put together different proposals for delivering legal aid services. It would also maintain a higher degree of freedom of choice of counsel than is possible in clinics that are operated directly by the legal aid authority.

Appendix A - Sheet 1

Refugee Claims Filed in Europe, North America and Australia: 1989 - 2001

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total	Annual Average
Australia	1,260	12,130	16,740	6,090	7,215	6,376	7,677	9,770	9,704	7,992	9,496	12,608	12,366	**119,424**	9,600
Austria	21,880	22,790	27,310	16,240	4,750	5,080	5,920	6,991	6,719	13,805	20,129	18,284	30,135	**200,033**	16,000
Belgium[1]	8,110	12,960	15,170	17,398	26,281	14,456	11,648	12,412	11,639	21,965	35,778	42,677	24,527	**255,021**	20,400
Canada	**20,056**	**36,691**	**32,313**	**37,729**	**21,192**	**22,059**	**25,945**	**25,743**	**24,333**	**25,396**	**30,887**	**37,792**	**44,502**	**384,638**	**30,800**
Denmark[2]	4,590	5,290	4,610	13,884	14,347	6,651	5,104	5,891	5,100	5,699	6,467	10,077	12,403	**100,113**	8,000
Finland	180	2,740	2,130	3,634	2,023	836	854	711	977	1,272	3,106	3,170	1,650	**23,283**	1,900
France[1]	61,420	54,810	47,380	28,872	27,564	25,791	20,329	17,283	21,256	22,375	30,832	38,747	47,260	**443,919**	35,500
Germany[3]	121,316	193,063	256,112	438,191	322,599	127,210	166,951	149,193	151,700	143,429	138,319	117,648	118,306	**2,444,037**	195,500
Ireland	-	-	30	39	91	362	424	1,179	3,882	4,626	7,724	10,920	10,325	**39,602**	3,200
Italy	2,250	4,830	26,470	2,589	1,571	1,844	1,752	681	1,712	9,513	33,000	15,564	9,620	**111,396**	8,900
Netherlands	13,900	21,210	21,620	20,346	35,399	52,576	29,258	22,857	34,443	45,217	39,299	43,895	32,579	**412,599**	33,000
Norway	4,430	3,960	4,570	5,238	12,876	3,379	1,460	1,778	2,277	8,543	10,160	10,843	14,782	**84,296**	6,700
Spain	4,080	8,650	8,140	11,710	12,620	11,901	5,678	4,730	4,975	6,639	8,405	7,235	9,219	**103,982**	8,300
Sweden	30,340	29,420	27,350	84,020	37,580	18,638	9,047	5,774	9,619	12,844	11,231	16,283	23,499	**315,645**	25,300
Switzerland	24,430	35,840	41,630	17,960	24,739	16,134	17,021	18,001	23,982	41,302	46,068	17,611	20,633	**345,351**	27,600
U.K.[4]	11,640	26,210	44,840	34,539	28,000	42,201	54,988	29,642	41,500	58,000	71,158	98,866	64,024	**605,608**	48,400
U.S.[5]	101,680	73,640	56,310	103,964	160,495	155,038	147,686	124,112	79,454	79,454	43,677	52,414	67,141	**1,245,065**	99,600
Total IGC	**431,562**	**544,234**	**632,725**	**842,443**	**739,342**	**510,532**	**511,742**	**436,748**	**433,272**	**508,071**	**545,736**	**554,634**	**542,971**	**7,234,012**	**578,700**

Notes:

[1] Belgium and France - figures do not include accompanying minor claimants.

[2] Denmark - 2001 claims are in line with other EU Member States. Data now includes 'safe third' adjustments and transfers to other EU States.

[3] Germany - figures include new and repeat claims

[4] United Kingdom - figures adjusted by IGC to approximate total number of claimants, including dependents.

[5] United States - figures include only principal claimants filed at INS, i.e., not dependents and not claims filed or reopened at EOIR.

Sources:

Canada - Citizenship and Immigration Canada (CIC)

Germany - Federal Office for the Recognition of Foreign Refugees (BAFL).

Shaded Figures - United Nations High Commission for Refugees (UNHCR)

All Others - Intergovernmental Consultations on Asylum, Refugee and Migration Policies (IGC)

Appendix A - Sheet 2

Refugee Claims Filed in Europe, North America and Australia
Percentage, by country, of total claims filed

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Total	Minimum Annual Share
Australia	0%	2%	3%	1%	1%	1%	2%	2%	2%	2%	2%	2%	2%	**2%**	0%
Austria	5%	4%	4%	2%	1%	1%	1%	2%	2%	3%	4%	3%	6%	**3%**	1%
Belgium[1]	2%	2%	2%	2%	4%	3%	2%	3%	3%	4%	7%	8%	5%	**4%**	2%
Canada	**5%**	**7%**	**5%**	**4%**	**3%**	**4%**	**5%**	**6%**	**6%**	**5%**	**6%**	**7%**	**8%**	**5%**	**3%**
Denmark[2]	1%	1%	1%	2%	2%	1%	1%	1%	1%	1%	1%	2%	2%	**1%**	1%
Finland	0%	1%	0%	0%	0%	0%	0%	0%	0%	0%	1%	1%	0%	**0%**	0%
France[1]	14%	10%	7%	3%	4%	5%	4%	4%	5%	4%	6%	7%	9%	**6%**	3%
Germany[3]	28%	35%	40%	52%	44%	25%	33%	34%	35%	28%	25%	21%	22%	**34%**	21%
Ireland	0%	0%	0%	0%	0%	0%	0%	0%	1%	1%	1%	2%	2%	**1%**	0%
Italy	1%	1%	4%	0%	0%	0%	0%	0%	0%	2%	6%	3%	2%	**2%**	0%
Netherlands	3%	4%	3%	2%	5%	10%	6%	5%	8%	9%	7%	8%	6%	**6%**	2%
Norway	1%	1%	1%	1%	2%	1%	0%	0%	1%	2%	2%	2%	3%	**1%**	0%
Spain	1%	2%	1%	1%	2%	2%	1%	1%	1%	1%	2%	1%	2%	**1%**	1%
Sweden	7%	5%	4%	10%	5%	4%	2%	1%	2%	3%	2%	3%	4%	**4%**	1%
Switzerland	6%	7%	7%	2%	3%	3%	3%	4%	6%	8%	8%	3%	4%	**5%**	2%
U.K.[4]	3%	5%	7%	4%	4%	8%	11%	7%	10%	11%	13%	18%	12%	**8%**	3%
U.S.[5]	24%	14%	9%	12%	22%	30%	29%	28%	18%	16%	8%	9%	12%	**17%**	8%
Total IGC	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	

Notes:

[1] Belgium and France - figures do not include accompanying minor claimants.

[2] Denmark - 2001 claims are in line with other EU Member States. Data now includes 'safe third' adjustments and transfers to other EU States.

[3] Germany - figures include new and repeat claims

[4] United Kingdom - figures adjusted by IGC to approximate total number of claimants, including dependents.

[5] United States - figures include only principal claimants filed at INS, i.e., not dependents and not claims filed or reopened at EOIR.

Sources:

Canada - Citizenship and Immigration Canada (CIC)

Germany - Federal Office for the Recognition of Foreign Refugees (BAFL).

Shaded Figures - United Nations High Commission for Refugees (UNHCR)

All Others - Intergovernmental Consultations on Asylum, Refugee and Migration Policies (IGC)

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