

ACCESS TO JUSTICE AND IMMIGRANTS

Annotated Bibliography

ARTICLES

(in alphabetical order by last name of author)

Emily Bates, Jennifer Bond & David Wiseman, *Troubling Signs: in Canada's Refugee System Reform*, (2016) 47 No 1 Ottawa Law Review, [UORAP, Troubling Signs], online, University of Ottawa, <https://commonlaw.uottawa.ca/ottawa-law-review/troubling-signs-mapping-access-justice-canadas-refugee-system-reform>
The authors identify barriers to access to justice faced by refugee claimants under the IRCC's Refugee Determination Process based on the author's work in developing the University of Ottawa Refugee Assistance Program (UORAP). The significant barriers are set out in the discussion under this heading.

Michael Barutciski, *The Impact of the Lack of Legal Representation in the Canadian Asylum Process*, Report researched and written for UNHCR, (6 November 2012) at 6, online: <http://www.unhcr.ca/resources/documents/RPT-2012-06-legal-representation-e.pdf>
The report concerns the procedural fairness of individuals who make a claim under Canada's Refugee status determination system. Within the report they cite that tighter timelines and restricted access to legal aid for asylum seekers create significant barriers for claimants against the Immigration and Refugee Board (IRB). The report is made in the context of new refugee policy implemented by the IRB that was projected to increase the number of refugee that go through a status hearing without representation; significantly lowering acceptance rates for refugees.

☐ The tighter policy regulations come from a concern that the benefit of the refugee system has begun to be abused by individuals who are not in dire need of protection from their country of origin. There is a concern that legal representation will prolong the refugee process while also giving individuals with false claims an advantage (people with false claims will have lawyer to help assist them). Legal Aid for refugees has been interpreted as being not only burdensome but also destructive to Canada's asylum process.

☐ Unlike immigrants who originally arrive with the financial capacity to access the justice system, Refugees (due the nature of their situation) rarely have the financial ability to access the justice system. Therefore, legal representation for refugees is heavily reliant on legal aid.

☐ The attitude taken on Legal Aid for refugees has made an unfair legal environment for refugees in terms of key proceedings that determine refugee status. The hearings conducted by the Refugee Protection Division (RPD) were the main point of discussion from the report due to the critical nature of the process.

☒ Timelines were a major concern. The timeline the refugees are given to make before an RPD hearing is minimal. It gives them little to time to find counsel (if they can afford it) and even if they are able to find counsel it gives little time for the counsel to provide meaningful substance to their work. There are no postponements allowed for refugees attempting to find a lawyer. The short timeline also forces a narrow window of time for refugees to provide evidence needed in the hearing.

☒ There is also a concern that refugees are not able to understand the complexity of the process. Their lack of knowledge towards Canadian culture, the complexity of the procedure and language barriers can make it extremely difficult for refugees to understand the procedure when self-representing.

☒ Policy needs to be reformed to ensure that un-represented asylum seekers can more fairly navigate through the complex asylum process. The alterations to the asylum process are insufficient in providing a fair system for refugees seeking asylum.

Bond, Jennifer; Wiseman, David; and Bates, Emily, *The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector*, 25 Journal of Law and Social Policy 1-25 (2016): online <http://digitalcommons.osgoode.yorku.ca/jlsp/vol25/iss1/1>.

- Access to justice initiatives that can assist immigrant and refugee claimants are reviewed and grouped into three types:

- (1) legal services initiatives, for example, legal pro bono services, collaborative lawyering, unbundled legal services, and duty-counsel services;
- (2) alternative legal services that allow people to access the services of specialists who are not lawyers but knowledgeable and experienced in an area of law. This includes the use of paralegals, community legal workers, and immigration consultants;
- (3) legal support services that deliver legal information to the public through websites or through front line workers who are often not legally trained.

The self-regulatory bodies that oversee legal professionals in Canada maintain strict control on the delivery of legal services, and access to justice projects must be conscious of activities that would violate law society prohibitions against unauthorized practice. However, this is difficult because the boundary between legal services and legal information services is unclear. Using a project that provides legal assistance for refugees as a case study, the University of Ottawa Refugee Assistant Project (UORAP), this article highlights the challenges that the unclear distinction between “legal information” and “legal services” creates for access to justice initiatives. It concludes that this uncertainty results in unnecessary and significant costs for access to justice projects, and ultimately to disadvantaged individuals and society as a whole.

Bond, Jennifer, *Failure to Fund: The Links Between Canada's Legal Aid Crisis, Rowbotham Applications, & Unconstitutional Delay in the Provision of State-Funded Counsel*, National Journal of Constitutional Law, Vol. 35, No. 1, 2015: online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821270

Access to state-funded legal counsel is a constitutional right in Canada for some criminal charges. Legal counsel is provided through two primary mechanisms: 1) legal aid, and 2) a court-ordered process (Rowbotham applications). A Rowbotham application requires proof that legal aid remedies have been exhausted and is routinely used to compensate for a chronically under-funded legal aid system. Financial eligibility for legal aid is being used as a rationing device rather than factor to assess an accused's actual ability to pay for legal counsel. This article argues that the government's failure to sufficiently fund legal aid is a breach of s 11(b) of the *Charter*, which guarantees the right to be tried within a reasonable time. It is argued that the ongoing failure to sufficiently fund legal aid programs could ultimately result in an inability to prosecute certain criminal cases regardless of the strength of the substantive case. [Note: In the recent case of *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada made broad and sweeping changes to the framework that determines whether an accused has been tried within a reasonable time under s 11(b) of the *Charter* and established timelines within which criminal charges must be tried.]

Jennifer Bond, *The Cost of Canada's Legal Aid Crisis: Breaching the Right to State-Funded Counsel within a Reasonable Time*, (2012) 59:1 Crim LQ 28 [Bond, Legal Aid Crisis]: online,

https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2129558

The author argues that the failure to adequately fund legal aid in Canada may result in criminal trials being found to be unconstitutional. Part I explores cases ruling on the rights of criminal accuseds to legal representation. It is a violation of the *Charter* for the government to fail to fund counsel where the accused is incapable of paying for counsel and legal representation is necessary to ensure a fair trial. Part II argues that state-funded legal representation is constitutionally required and that if it is not provided in a timely fashion, the resulting delay is institutional in nature and attributable to the Crown. If the delay is unreasonable, it violates the accused's *Charter* rights. Part III argues that while violations of the right to counsel may be remedied with a temporary stay to allow the accused to retain counsel, violations of the right to be tried within a reasonable time can only be remedied with a permanent stay in proceedings. As a result, the constitutional deficiencies created by the legal aid crisis could ultimately result in an inability to prosecute many criminal accuseds. [Note: In the recent case of *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada made broad and sweeping changes to the framework that determines whether an accused has been tried within a reasonable time under s 11(b) of the *Charter* and established timelines within which criminal charges must be tried.]

Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act*, November 2013

This report provides an overview of the generic access to justice barriers faced by all Canadians, including new immigration and refugee claimants.

In the first part of this lengthy report, the Canadian Bar Association (CBA) gives various insights into ongoing issues with access to justice. These reports are based on qualitative reports with community members, as well as statistics.

One such issue involves the difficulty community members find at navigating the justice system. They write that “Many community members reported that lack of information, help and direction exacted an emotional toll. They described how scary and intimidating it is not to know what is happening, what the options are, what possible outcomes might be, and so on.” Access to knowledge of the justice system itself is a barrier to justice.

In terms of self-represented litigants, they report that a majority (67%) reported that navigating the court system was difficult or very difficult, and 49% believed the lack of a lawyer made the process slower or much slower.

In studying civil legal problems, the report notes that 22% of people have 85% of the legal problems (in terms of civil disputes). Overall, the study finds that legal problems tend to trigger further legal problems for individuals. A majority of these—22%—were of low-income.

Among several other issues, the survey found these issues as significant barriers for legal justice

- The complexities of the legal system
- Too little legal aid coverage for civil cases
- Lack of knowledge about the legal system and resources available to support individuals, especially knowledge regarding how to access legal aid or affordable legal services and information
- Fear of becoming involved in the legal system
- Fear of destroying relationships

The report notes that socially excluded groups, such as minorities, women, individuals with disabilities and people of low socioeconomic status are more vulnerable to having legal issues and are more affected by the barriers preventing them from accessing justice.

From the report, it can be gathered that education on the legal system as well as financial issues are the two largest issues facing access to justice today.

Valentina Capurri, *The Medical Admissibility Provision vis-à-vis the Charter of Rights and Freedoms*, (2012) 16:1; online

<file:///Users/heatherforester/Downloads/38499-45777-2-PB.pdf>

The IRPA contains provisions allowing IRCC to refuse to all persons entry into Canada on the grounds of mental and/or physical disabilities. Decisions to exclude persons with disabilities from admission focus on the excessive costs that the disease or disability would likely place on Canadian medical and social services. The article argues that the provision discriminates against persons with disabilities.

Catherine Dauvergne, *How the Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence*, (2013) 58:3 McGill LJ 663 - 728, (2013) 58: 3 RD McGill 663 – 728, online http://lawjournal.mcgill.ca/userfiles/other/88257-Article_4_Dauvergne.pdf

The paper is a study of all the Supreme Court's handling of non-citizen's rights. It begins by explaining the rule outlined in *Singh*, which essentially establishes that non-citizens can be protected under the *Charter*. He then cites the first s.15 challenge, which rules that non-citizens should have protection under the equality rights given in s 15.

Leading from these two cases, the author lays out two structural barriers that non-citizens face when attempting to access their *Charter* rights. The first is that it became necessary to seek leave from the Federal Court, Trial Division (as it then was), in order to have most decisions under the Immigration Act judicially review.

The second is that appealing a judicial review from the Federal Court to the Federal Court of Appeal requires that the judge at first instance "certify" that the case raises a serious question of general importance.

Aside from these barriers, the author also goes through a lengthy analysis to conclude that non-citizens often have very limited power when making use of international rights against the *Charter*. While the assumption is that the *Charter* should deliver any human rights protection that is needed, case law has shown that claimants who are non-citizens have great difficulty accessing international human rights.

The author points out that his data set has only four cases involving refugee matters whereas the High Court of Australia has 103 matters involving refugees alone. This article raises an interesting point against what the author calls "Charter Hubris"; the Supreme Court implicitly assumes the *Charter* is sufficient to cover any human rights issue and therefore limits access to those that wish to advance an international level complaint. This is especially important to refugees, whose access to universal laws from bodies such and UNHRC are important to their protection.

Trevor C.W. Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report*, 2016 Canadian Forum on Civil Justice, Toronto, Canada [2016

Everyday Legal Problems Overview]: online CFCJ <http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>

This overview report summarizes some of the basic findings of the Canadian Forum on Civil Justice's 2014, *Everyday Legal Problems and the Cost of Justice in Canada* survey. The report builds on, and in some cases updates and clarifies, some of the preliminary findings released in the initial report on this survey (Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Fact Sheet*, (12 March 2015), online <http://www.cfcj-fcjc.org/a2jblog/everyday-legal-problems-and-the-cost-of-justice-in-canada>

A. Gray, S Forell, and S Clarke, *Cognitive impairment, legal need and access to justice, Justice issues paper* 10, Law and Justice Foundation of NSW, Sydney (2009) [Gray, Forell & Clarke] online at http://www.lawfoundation.net.au/ljf/app/4016D540ECE363B3CA25756F001DEE70.html#bmk_fnote42.

This article examines the barriers to access to justice faced by people with cognitive disabilities because of various factors including lack of awareness of the justice system, higher dependence on others, fear of retribution, failure of those in the justice system to recognize their impairment, communication barriers, misconceptions about mental disabilities, anxiety and stress resulting from legal processes, reliance on formal written processes, the complex and stressful nature of legal processes, and under resourced specialist services.

Stephen Gaetz, *Street Justice: Homeless Youth and Access to Justice* (Toronto: Justice for Children and Youth, 2002) at 43-46 [NTD: add this link http://www.homelesshub.ca/sites/default/files/Street_Justice.JFCY.02.pdf.

This is a preliminary summary of the findings of research conducted in 2001-2002, in order to evaluate the legal and justice issues of homeless youth in Toronto. It reports on the characteristics of homeless youth, the legal and justice issues they experience including housing, employment, family law issues as well as unique issues faced by refugee and immigrant youth. It explores how this youth is victimized and their experiences with the criminal system. It examines their relatively greater involvement with police. Lastly it looks at the barriers they face in accessing justice.

Arghaven Gerami, *Access to Justice For Canadian Refugees: Legal, Practical, Procedural, Societal and Global Challenges*, presentation to the 2014 Canadian Lawyers Abroad, Student Chapter Training on Refugee Rights, University of Ottawa October 18, 2014, online <https://www.geramilaw.com/wp-content/uploads/2015/03/RefugeeAccessToJusticePresentation.pdf>

Access to justice for refugees is defined as:

- Access to fair and impartial procedure

- Access to resources and support to present their claim
- Access to adequate legal representation
- Sufficient time to present documentary evidence
- Access to health care
- Access to social assistance
- Access to appeal process
- Access to PRRA [pre-removal risk assessment], H&C [humanitarian and compassionate] mechanisms

Barriers to access to justice include:

- Practical Barriers including: challenges related to travel, accommodation and childcare to attend refugee hearings; difficulties in scheduling a hearings due to short timelines for preparing for hearings; and getting documents in time and adequate translation;
- Societal Barriers - many Canadians do not have the real facts and statistics surrounding refugees, and are led to believe that they come to Canada to take advantage of our social services. This negative perception of refugees as “bogus” has an impact on both public and political support for services such as health care and access to legal services.

Other deficiencies in the Refugee Determination Process [RDP] are also discussed including insufficiency of *Guidelines for Vulnerable Claimants* developed by Immigration Review Board; impact of short timelines in RDP on vulnerable claimants.

Canada’s refugee claimant system is compared to those in other countries.

Patricia Hughes, *Advancing Access to Justice through Generic Solutions: the risk of perpetuating exclusion*, 31 Windsor Yearbook of Access to Justice 1 (2013)

[Hughes, Access to Justice and Generic Solutions], online

<http://ojs.uwindsor.ca/ojs/ledy/index.php/WYAJ/article/view/4308>

The author reviews major Canadian reports examining access to justice issues in Canada. These reports tend to recommend “generic” solutions intended to help people represent themselves better and to access limited legal services. The author argues that access to justice reformers must consider access to justice issues from the point of view of marginalized groups in society. Such groups are different and disadvantaged by the economic, social and cultural differences and disadvantages they experience. If access to justice issues are not considered from the point of view of these marginalized groups, proposed solutions run the risk of further marginalization.

- **IRCC, *Canada’s 2016 Immigration Levels Plan*** [IRCC 2016 Report to Parliament], online <http://news.gc.ca/web/article-en.do?nid=1038699>

Under section 94 of the Immigration and Refugee Protection Act (IRPA), the Minister for Immigration, Refugees and Citizenship Canada (IRCC) is required to table an annual report in Parliament on the specific aspects of Canada's immigration system. This is the report for 2015, released in early 2016. It is divided into four sections:

Section 1 provides key statistics relating to permanent residents admitted in 2015, and highlights the 2017 Immigration Levels Plan.

Section 2 provides key statistics relating to temporary residents admitted in 2015.

Section 3 reports on IRCC's partnerships with the provinces and territories, including bilateral agreements in force between the federal government and provincial and territorial governments and major joint initiatives.

Section 4 describes IRCC's framework for gender-based analysis, highlights gender-based analysis activities and provides an overview of gender differences in relation to permanent and temporary resident admissions.

Law Society of Upper Canada, Access to Justice Themes: 'Quotable Quotes'

(October 29, 2013): online:

[http://www.lsuc.on.ca/uploadedFiles/For the Public/About the Law Society/Convocation Decisions/2014/Quotable quotes.pdf](http://www.lsuc.on.ca/uploadedFiles/For%20the%20Public/About%20the%20Law%20Society/Convocation%20Decisions/2014/Quotable%20quotes.pdf)

This is the second of two background papers prepared for participants of the Access to Justice Symposium hosted by the Law Society of Upper Canada on October 29, 2013. It briefly sets out themes observed from reviewing selected Ontario and Canadian national reports on access to justice issues. The themes are illustrated with quotations.

Muriel McQueen Fergusson Centre for Family Violence Research, *Barriers and strategies: How to improve services for abused immigrant women in New Brunswick*. Fredericton, NB: University of New Brunswick, Muriel McQueen Fergusson Centre for Family Violence Research, 1999.

- While this article relates specifically to women within New Brunswick, it draws on overarching issues that can be a reality for immigrant women. By accessing the voices of immigrant women the article is able to identify barriers of service for immigrant women. Racial, social, cultural and economic marginalization creates a unique situation for immigrant women in terms of barriers to justice. Structural oppression can cause immigrant women difficulties when seeking help.
- A major issue is immigrant women's economic reliance on their spouses. Often times women are reliant on their male spouses in order to survive.
- Knowledge of their legal situation can be an issue. Women often do not realize their sponsorship can be protected in cases of male abuse. In some cases they do not know that they are protected by the law and threats to renounce sponsorship cause abused women to avoid legal assistance. Threat of deportation has been a means to keep women silent.

- Immigrant Women face language barriers that limit their economic ability to access higher paying jobs, furthering their dependence on their spouse.
- Cultural, social and linguistic isolation from a family/friend support unit is also a structural issue. Women are often isolated from a support unit that would help them attain legal assistance for domestic abuse.
- Patriarchal family structures can cause women to reluctantly seek help or even interpret their situation as deserved. They often interpret men as having absolute power over the family and the threat of shaming or dishonour has strong influences on their decision to get help.

The study summarizes three important structural barriers for women:

1) Information and Education

Many women did not know their legal rights in areas of sponsorship, status and general abuse laws. This lack of education allowed them to be coerced by their spouses on false legal information.

2) Lack of Cultural Diversity in Social Programming and Staff

The council was often not cultural specific or did not recognize the cultural significance of the situation. Approaches were done in a universal and systematic way.

3) Lack of Outreach Programs

Lack of outreach programs increased women's access to justice because women often could not access programs that catered to their specific situation.

On an institutional level there were problems with the social worker legal knowledge. The case study found that few social workers actually had knowledge about the law in terms of domestic abuse for immigrant women. This was key because most immigrant women relied on the assistance of social workers for guidance and assistance.

Computerized services often pose difficulty for immigrant women because of the language barrier. Therefore, legal advice through the computerized services of Immigration Canada was difficult for immigrant women to access.

Overall the article states that the structural barriers for immigrant women come from economic, cultural and educational origins. Often women have no knowledge of their legal rights and allow the domestic abuse to carry on. They can be intimidated through their lack of knowledge by the domestic abusers themselves. This creates significant access to justice barriers.

Baukje Miedema & Sandra Wachholz, *A Complex Web: Access to Justice for Abused Immigrant Women in New Brunswick* (March 1998) at v (Executive Summary), online: Government of Canada Depository Services Program, <http://dsp-psd.pwgsc.gc.ca/Collection/SW21-24-1998E.pdf>

Researchers interviewed 48 immigrant women in New Brunswick to review barriers to the criminal justice system and justice-related services for abused immigrant women residing in the province. Approximately one third of the women identified themselves as abused. The research discusses the cultural norms and structural oppression identified by the women that make it difficult for them to

access the justice system. Barriers to access that were identified by participants included the lack of legal information on abuse and factors that made them reluctant to report abuse to the police. The report makes recommendations to improve abused immigrant women's access to the criminal justice system and justice-related services.

Petra Molnar, *Immigration Detention*, online

<http://www.thecanadianencyclopedia.ca/en/article/immigration-detention/>

This article discusses the access justice to barriers faced by refugee claimants that have been detained under the IRPA. This article is summarized in the discussion in our brief under this section.

Parveen Nangia, *Discrimination Experienced by Landed Immigrants in Canada*, RCIS Working Paper No. 2013/7: online,

http://www.ryerson.ca/content/dam/rcis/documents/RCIS_WP_Parveen_Nangia_No_2013_7.pdf.

One fifth of those immigrating to Canada report facing discrimination, primarily on grounds of ethnicity, race, language, and religion. This paper reports on the experience of discrimination by landed immigrants compared with those who are not immigrants to Canada. The article reports that immigrants are much more likely to face discrimination than non-immigrants. Visible minorities and younger immigrants face higher levels of discrimination than non-visible minorities and older persons. Irrespective of their gender, income, language, and religion, landed immigrants have similar chances of facing discrimination compared to non-immigrants.

Rehaag, Sean, *The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment*, (2011) Osgoode Hall LJ 49: 71.

The article examines over 70,000 refugee cases from 2005 and 2007 to show the importance of counsel within refugee hearings as well as the diminishing access to justice for refugees. In displaying these two issues, the author concludes that Canada is putting refugees lives at risk not providing legal council to refugees.

1) The Effect of Counsel in Refugee Claims

- There is a much stronger chance that a claimant's case be abandoned or denied in the claimant is without legal assistance. This is true for all refugees, but especially significant for refugees whose countries have low or average sized grants.
- The amount of experience was significant for whether or not refugees were successful in their hearing. The quality of Legal Aid was important to providing successful legal aid.
- Male claimants generally had more difficulty accessing legal council than female claimants.

2) Assistance Through Legal Aid

☐ 5.2% of Canada's Refugees are processed through Alberta

☒ In Alberta, very limited Legal Aid is available for refugees. It is primarily provided through a mix of staff at Legal Service Centres run by Legal Aid Alberta (LAA).

☒ Refugees have trouble meeting the substantive conditions set out by the LAA, primarily because the government funding only provides for a limited amount of assistance.

☒ The criteria is based on the likelihood of the case succeeding and the importance of the case itself.

☒ Hearing representation is not available where clients are able to self-represent, despite the fact the LAA has addressed the fact that most refugees are unable to self represent.

☒ Report was made in 2010 and informed that cuts to will likely result in further denial of legal aid.

☒ Lack of funding has created a system that heavily filters who can be giving legal aid services.

The lack of access to legal assistance is significant because of the impact legal assistance has on a refugee hearing. Therefore, lack of access to justice leaves refugees going to the RPD (Refugee Protection Division) (or any other refugee hearing) in danger of being sent back to their country of origin.

Sheppard, Colleen, *Women as wives: Immigration law and domestic violence*. (2000).

The article argues that the threat of punishment by immigration law accentuates the immigrant women's vulnerability to domestic violence. Unlike most citizens, immigrant women must think about how filing a domestic violence charge will affect their status as an immigrant within Canada.

In some immigrant's situations, especially immigrants whose status is linked to another family member's status (often the abuser), the complex legal issues surrounding the women's situation can coerce her to dismiss the idea of seeking legal help.

Two structural concerns are that 1) immigrant women are concerned that their right to stay in Canada will be jeopardized if they report domestic abuse (this is especially important for women whose status is precarious to their spouses) and 2) that their husband may be subject to deportation and therefore putting their family at risk.

To illustrate the concerns, the author focuses the spousal sponsorship programs and the position it puts women in. The author argues that the family category treats immigrants whom are sponsored as economically dependent on the father; it reinforces male headed and patriarchal family structures. The view of the immigrant family is that there is one independent member of the family to which all other members are dependent. This provides anxiety to women who are victims of domestic violence and want to file a claim.

For immigrant women awaiting sponsorship, their spouse can unilaterally decide to withdraw sponsorship at any given time. This is quite detrimental to the women's ability to autonomously seek legal help without coercion. If they do seek help and their sponsorship is withdrawn, then their appeal must be through a humanitarian and compassionate grounds appeal which is up to the immigration officer.

The author notes that the officer guidelines explicitly mention that domestic abuse can affect the immigration process; the issue is not ignored by the state. The problem is that the immigration standards for non-sponsorship is unrealistic for women in isolated family circumstances mainly because they favour economic autonomy.

Also, the immigration officer has total autonomy in deciding the legitimacy of the humanitarian and compassionate grounds plea. Even if abuse has been confirmed it does not guarantee that their plea will be accepted as sufficient enough to allow an appeal. The power the immigration officer has can create hesitation for women wanting to make a domestic violence charge.

Women that are sponsored are protected by their husband's sponsorship, i.e. the husband cannot unilaterally dismiss the sponsorship. However, the barrier they face is still symbolically significant. In the absence of clear and accessible information women are often coerced into thinking that reporting domestic abuse will result in putting either their children's status or their status at risk.

The structure of the immigrant system makes women believe that they have no independence separate from their spouse. Their perceived political identity is one without significant enough status to attain legal help. In these circumstances, the symbolic obstacles can be as significant as legal obstacles.

Overall, the symbolic and actual threats of deportation deprive women of an access to justice through coercion. This is arguably a result of a system that reinforces patriarchal family structures while symbolically (and literally) making it harder for women to see themselves as protected by the state. The Government of Canada should look deeper into educating immigrant women about their rights as citizens and ensuring they know their identity under the law.

Felix Semberov, *Current Legal Recourse Available to Unsuccessful Independent Applicants at Visa Posts Abroad: Justice for All or Entrenched Control and Bias?*, (1996) 24 Man. L.J. 92-136, online http://felixsemerov.com/main.aspx?id_doc=8
While this article takes a primary focus on Canada's point system when it comes to immigration, it provides a discussion about the application of the Charter on person in contact with Canadian law but not geographically located within Canada.

The author points out that the current state of affairs is somewhat uncertain. While some case law has made an effort to ban *Charter* application for individuals not

physically within Canada, many consider this view erroneous because it does not take into account extraterritorial application of the *Charter*.

The author lays heavy criticism on the *Ruparel v Canada* where the judge ruled that individuals not located within Canada (and who are non-citizens) are not allowed status. The author notes that this violates s 32(1) of the *Charter* which states the *Charter* applies to the Parliament of Canada in respect to all matters within the authority of Parliament. The fact that someone subject to Canadian law is not protected by the *Charter* is contrary to the logic of the *Charter*.

The author then goes on to note several benefits that *Charter* application would have for those immigrants who have been denied access under the Canadian system.

It should be important to note that although the author has high hopes of this case being appealed, the rule behind it has failed to be reformed by the Supreme Court. In a recent case *Jia v Canada* the Court stated that "While the applicants may well provide a defensible basis for distinguishing these cases, they neglect to deal with the significant jurisprudence of this Court and of the Federal Court of Appeal that holds that foreign citizens outside Canada have no rights under the Charter in respect of activities that occur outside of Canada. Several of these cases involve situations that are analogous to the ones involved here." Immigrants that are challenging Canadian law abroad do not have access to the *Charter*.

Shetty, Sudha, *Equal Justice Under the Law: Myth or Reality for Immigrants and Refugees?*, Seattle Journal for Social Justice 2.2 (2004): 28.

A brief study of the United States immigration and refugee system reports similar financial and cultural issues that prevent immigrants from accessing justice. It reports that language translation is one of the largest barriers. This includes communication from counsel as well as written documents. Overall, the report simply confirms that the migrants to the United States and Canada face similar issues in accessing justice.

Wachholz, "A Complex Web: Access to Justice for Abused Immigrant Women in New Brunswick" (March 1998) at v (Executive Summary), online: Government of Canada Depository Services Program, <http://dsp-psd.pwgsc.gc.ca/Collection/SW21-24-1998E.pdf>

Researchers investigating the use of the legal system by abused women in immigrant communities found that cultural norms, language barriers, and perceived racism in the criminal justice system and social service agencies were all factors that discouraged women from exercising their legal rights,

CASES

Canadian Bar Assn. v British Columbia, 2008 BCCA 92

In this case, the Canadian Bar Association (CBA) attempted to bring forward an action against the British Columbia government based on inadequate funding for legal aid. The CBA argued that the inadequate funding was against s 7 and s 15 of the *Charter* (as well as other international laws) because it prevented people of lower socioeconomic status from getting basic advice on serious legal matters.

The court found that providing legal aid was not a constitutional duty because legal services are context specific and therefore do not always require legal counsel. Therefore, while it is necessary that the individual has a right to defend themselves, it is not necessary that they have counsel under the *Charter*. The action of legal aid was a move of “altruism” as opposed to a state imposed right.

Singh v Minister of Employment and Immigration, [1985] 1 SCR 177.

As to whether or not s 7 of the *Charter* could be applied to a non-Canadian within the county, the Supreme Court of Canada concludes that use of the word “everyone” in s 7 encompasses all those individuals who are physically present within Canada. Therefore, refugees within the country have *Charter* protection, but it is unclear from the case whether or not refugees outside of Canada are allowed *Charter* protection. The court writes (at para 35):

Section 7 of the *Charter* states that ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’. Counsel for the appellants contrasts the use of the word ‘Everyone’ in s. 7 with language used in other sections, for example, ‘Every citizen of Canada’ in s. 3, ‘Every citizen of Canada and every person who has the status of a permanent resident of Canada’ in s. 6(2) and ‘Citizens of Canada’ in s. 23. Counsel for the Minister concedes that ‘everyone’ is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.

Ruparel v Canada, [1990] FCJ No 701

This case is significant for the reason that it interprets the rule established within *Singh* and prior cases against non-Canadians who live outside the country. Essentially, they cite the Supreme Court in *Singh* and *Canadian Council of Churches v Canada, [1992] 1 SCR 236* to reiterate the rule that non-Canadians physically outside of Canada are outside the scope of *Charter* protection. They state (at para 26):

Alas, the applicant cannot have the remedies which he so justly seeks. In *Singh et al. v Minister of Employment and Immigration, [1985] 1 S.C.R. 177*, at pages 201-202, [additional citations omitted] Madam Justice Wilson, writing

for one of the two equal divisions of the Supreme Court of Canada in that case, considered the application of the *Charter*, and came to this conclusion:

Counsel for the Minister concedes that ‘everyone’ is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term *includes every human being who is physically present in Canada* and by virtue of such presence amenable to Canadian law [Emphasis not in original text].

Here is the point of guidance taken up, no doubt, by MacGuigan J.A. in the *Council of Churches* case wherein, in regard to certain matters pleaded in the statement of claim, he is reported (at page 563) as holding:

This [pleading] could found a right of standing, but cannot constitute a reasonable cause of action since the claimants affected would all be non-citizens outside Canada with no claim to admission, and therefore beyond the scope of the *Charter*.