

14 Taking the Harper Government's Refugee Policy to Court

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There is no question that significant changes occurred in Canadian refugee policy under the Conservative government of Stephen Harper during its nearly ten years in power. Indeed, observers note that virtually no aspect was left untouched.² The effects of many of these alterations are still unfolding, and while the subsequent Liberal government of Justin Trudeau committed itself to reversing or modifying some of them, many will likely be preserved.³

In this chapter, we focus on changes that occurred to Canada's *inland* refugee policy, with two larger goals in mind.⁴ First, we aim to demystify the role of the courts in shaping refugee policy in Canada. The literature often attributes a heightened negative (i.e., overly rights-expansive) impact to the courts – largely as a result of the 1985 *Singh* decision, the first Charter case handed down by the Supreme Court of Canada (SCC) that dealt with refugee claims⁵ – without providing much empirical evidence⁶ or focuses on important points of legal interpretation without more fully engaging their policy implications.⁷ Studies that investigate the role of the courts in this policy area on a more empirical basis, in contrast, remain too few.⁸

Second, we seek to contribute to a growing body of work that reflects on the contentious relationship between the Harper government and the courts, which perhaps reached its nadir in the public dispute over Marc Nadon's failed appointment to the SCC.⁹ Such conflict was also notably seen in a 2011 speech in which then immigration minister Jason Kenney accused Federal Court of Canada (FC) judges of undermining the government's rights-restrictive approach to refugees.¹⁰

To shed light on the relationship between the courts and Canadian inland refugee policy, we open with a review of the rights-restrictive

heft and tenor of policy changes – and their surrounding discourse – by the Harper government between 2006 and 2015. Next, we discuss the relationship between the courts and public policy, beginning with some remarks on the challenges of studying the impact of the former on the latter. We suggest that shifting the focus to how and why refugee claimants and their supporters mobilized the law in opposition to the Harper government's restrictive agenda is necessary to grasp the nature and impact of judicial involvement. This is then illustrated by examining the mobilization that occurred through and beyond the courts in response to the government's 2012 cuts to the Interim Federal Health Program (IFHP) for refugees.

Our research shows that while the role of the courts in overseeing Canadian refugee policy is generally quite limited, significant mobilization on behalf of refugees occurred in response to the Harper government's particularly rights-restrictive approach. Indeed, notwithstanding an inherently unfriendly legal opportunity structure (LOS), litigation and "rights talk" played an important part in the broader political advocacy work of refugee organizations (ROs), in tandem with other strategies such as public awareness campaigns, coalition-building, and lobbying for policy change. Importantly, there was the 2011 founding of the litigation-savvy Canadian Association of Refugee Lawyers (CARL), which – together with the Canadian Council for Refugees (CCR) – took a lead legal-mobilization role in the refugee-advocacy community. As well, there was involvement by new constituencies, especially within the medical profession, which created Canadian Doctors for Refugee Care (CDRC) in response to the IFHP cuts. To understand the relationship between the courts and policy, then, it is necessary to appreciate the broader policy and political contours within which court rulings emerge and the specific contexts that prompt court involvement in the first instance.

The Restrictionist Turn under Harper, 2006–15

During its time in power, the Harper government made it harder for asylum seekers to seek and find protection in Canada. It did not simply adopt a more restrictive approach, however, but also sought to shift the Canadian refugee status determination (RSD) regime away from a rights-based and towards a rights-restrictive and more selective foundation. Many "rights-based principles that underlay the pre-existing regime [were] replaced by other justifications that pay significantly

less attention to the interests and experiences of particular claimants," reflecting a privileging of the belief that "the reason to protect is based on *an aspect of the public interest* rather than an individual right."¹¹ The government thereby increased its discretionary power over refugees as an asylum seeker was "reconfigured as primarily a migrant whom the government may have reason to select" rather than an individual empowered to make rights-based claims against the state.¹²

As it transformed the RSD regime, the Conservatives constrained traditional avenues of communication and influence within the refugee policy community. Although this was in many ways consistent with previous trends, the Harper government was particularly direct in its rejection of groups and individuals who did not share its ideological beliefs and practices.¹³ At the same time, it more tightly circumscribed the actions and influence of public servants in favour of policies developed in the Prime Minister's Office.¹⁴ In contrast, although refugee policy had long been dominated by the bureaucracy, there nonetheless had previously been substantial routine interaction (and at times influence) on the part of ROs through such mechanisms as parliamentary committees and regular meetings with, and access to, officials.¹⁵ As the traditional political (and policy) environment was constricted, however, and as the Conservatives consolidated and expanded their rights-restrictive approach, the impetus for ROs to seek extra-parliamentary influence in cases such as the IFHP – especially through the judiciary – increased.

The Harper government expanded and consolidated its rights-restrictive approach in both policy discourse and practice with few political checks, especially during its final, majority-government mandate. Although the balance between refugee protection and border control has long varied over time, Canada had – since the creation of the Immigration and Refugee Board (IRB) in 1989 – adopted a broadly rights-based approach to RSD.¹⁶ For example, a recent comparative study portrays Canada's "Cadillac" model as embodying "a commitment to a system of administrative justice based on a centralized, resource-rich professional judgment."¹⁷ The Conservatives, for their part, sought to redirect the Cadillac along a more rights-restrictive and discretionary road through a range of discursive and policy acts.

This approach was centred on the premise that the Canadian regime was too generous and encouraged those who did not require protection to claim asylum in hopes of obtaining undeserved economic, political, and/or social benefits in Canada or even to threaten its national security.

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For example, in introducing legislation in 2010 to increase restrictions on access to and fairness within Canadian RSD, Kenney argued,

Our generosity is too often abused by false asylum claimants who come here and do not need our protection. They're misusing the asylum system to jump the immigration queue rather than waiting their turn like everyone else. ... They try to enter the country through the back door and they take advantage of our asylum system to avoid waiting in line like everyone should for their application to be processed.¹⁸

This premise and discourse were used consistently and extensively by the Conservatives to justify a three-pronged, rights-restrictive approach.

First, the government made it more difficult for asylum seekers to travel to and enter Canada. A prominent practice of such interdiction involved imposing visa requirements alongside more rigorous and multilayered document and transit inspections. For example, visitor visa requirements were imposed to prevent Roma and Mexican asylum seekers from travelling to Canada to make refugee claims.¹⁹ New data-sharing arrangements with countries and air carriers were introduced to facilitate tracking and excluding potential asylum seekers before, or removing them after, arrival.²⁰ The government also reduced the number of exemptions under the restrictive Canada-U.S. Safe Third Country Agreement, and it pursued more vigorous enforcement policies at and beyond the Canadian border, including helping other states intercept sea vessels carrying asylum seekers.²¹ These and other measures prevented asylum seekers from being able to make rights-based claims against the state (insofar as they could not reach Canada) and increased the state's discretionary power.

Second, the government made it harder for individuals to pursue asylum claims in Canada after their arrival, both in terms of their access to the RSD system and the fairness with which they were treated within it. Most notably, the Balanced Refugee Reform Act and the Protecting Canada's Immigration System Act "increased the difficulties for all claimants who [were] attempting to navigate the channels that led to the determination of their status, with some being singled out to face additional burdens."²² Such changes, among other measures, decreased the chances of claimants receiving a fair hearing as new limits were placed on processing and appeal timelines, while decision making was shifted from independent appointees to public servants. A qualified exception involved the creation of the Refugee Appeal Division (RAD),

which instituted an appeal of a negative determination of a refugee claim on its merits; this is discussed in more detail in the next section.

Of particular relevance to this chapter is the differentiation created among claimants according to their country of origin and method of arrival, which negatively affected prospects in RSD and appeal rights, for example. The lack of arm's-length authority in designating countries as "safe," as seen under new Designated Country of Origin (DCO) provisions, meant that political interests and pressures could take precedence over an individual's right to seek and find refuge.²³ It is worth noting that when these provisions were first introduced by the Conservative minority government in 2010, a number of limits on ministerial discretion were included; these were removed when new legislation was passed in 2012 under a Conservative majority. At that time, the government also created a Designated Foreign National (DFN) category, targeting "irregular" arrivals of migrants "in groups of two or more in a way that prevents the timely examination of their identity and admissibility" or that appears to involve human smuggling.²⁴

The third prong made it harder for asylum seekers to remain in Canada, especially but not only after an initial denial of their claim. Thus, for those from DCOs, removals could be undertaken even if an individual applied for judicial review, and greater restrictions were placed on their ability to apply for a Pre-Removal Risk Assessment (PRRA). Alongside an increased use of detentions and deportations,²⁵ the Conservatives restricted work permits for those from DCOs and proposed changes through their 2014 omnibus budget bill to allow provinces to deny social assistance to refugee claimants. In addition, greater efforts were made to remove protected status (so-called cessations) from refugees who had "re-availed themselves of the protection of their home country," even those who had received Canadian permanent resident status.²⁶

Given the constrained political environment the Harper government created, and the rights-restrictive approach it pursued, the courts provided a logical avenue along which to counter Conservative policies towards asylum seekers. The history of the LOS in this area, however, suggests that groups would have met with limited courtroom success.

Courts, Mobilization, and Policy Outcomes

Although courts are part of the policymaking cycle, analysts have found it challenging to pin down theoretically and empirically the impact of

their presence more generally, and their decisions more specifically, on policy outcomes.

Traditional "top-down" impact studies are limited in their conceptualization of the consequences of judicial decisions and assessment of litigation and policy reform efforts as constituting a "success" or "failure." First, most try to draw a linear, causal connection between a decision and its aftermath. As McCann put it, this approach is like a bowling ball rolling down an alley: the greater the number of "pins" that fall following a decision, the greater the impact. If few or none fall, then the "bowl" is judged less effective.²⁷ Often, the "impact" bar is set quite high – for example, Rosenberg's well-known analysis of US civil rights litigation anticipated that to be deemed to have had an impact, judicial decisions would have to have no less than "nation-wide" effects and produce "significant" social change.²⁸ Moreover, because of its tendency to equate impact with change, this approach at best discounts but often ignores other responses, ranging from compliance to defiance, that are difficult to conceptualize using the "bowling alley" analogy.²⁹

Second, most Canadian research has concentrated on studying instances of *successful* litigation by groups, predominantly by analysing the aftermath of SCC cases involving social movement organizations that resulted in policy change.³⁰ Cases in which groups did not pursue their goals through the courts, in contrast, are much less frequently studied.³¹ Third, many such studies concentrate on tracing the reverberations of a few "big," atypical cases,³² thereby limiting their generalizability. Finally, a narrow definition of "success" is often attributed to the groups examined, leaving the varied goals that they may have had underexplored or ignored.³³

In response, a growing interdisciplinary and international literature has emerged. Legal mobilization scholarship understands litigation as only one of a number of political strategies, such as protest and lobbying, employed by societal actors to effect change.³⁴ This perspective decentres law and the courts and places them back into the policymaking cycle, challenging scholars to understand the effects of courts more broadly than is typical for most litigation-centric analyses. As Galanter famously observed, courts (and the law they apply) can endow subjects with bargaining norms, symbols, and procedures that "radiate" outwards beyond litigation.

The effects of a court ... cannot be equated with the dispositions in the cases that come before it. There are a host of other effects that flow from

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the activity of a court. ... The patterns of general effects that we attribute to the courts depend on the endowments that actors extract from the messages radiating from the courts.³⁵

Research has identified three main factors that structure the degree of mobilization: access to the courts, sufficient “resources” (broadly defined) for effective legal advocacy, and the availability of “legal stock” (existing laws conferring legal rights, legal precedent, and so forth). Generally speaking, more closed and conservative structures deter, while more open and liberal structures encourage, legal mobilization.³⁶ While any given LOS tends to be relatively stable, each is “shaped by [group] strategies in turn.”³⁷ Thus, some scholars have studied the interaction between structure- and agent-level variables, ranging from group perceptions and internal culture to resources and inter-group dynamics. Others have explored reasons why some groups do not resort to litigation or do so despite a seemingly unfavourable LOS.³⁸

The following section highlights factors that structure legal mobilization for asylum seekers and their advocates in Canada. It shows that they managed – despite a fairly “closed” LOS – to forge significant opportunities for themselves during the Harper years.

Refugees in the Courts under Harper: “Contained” Justice?

Canada’s refugee policy is governed by both domestic and international legal norms. The definition of a refugee, as established under the 1951 Geneva Convention and 1967 Protocol (to which Canada acceded in 1969), was incorporated into Canadian immigration law in the early 1970s, while the 2002 Immigration and Refugee Protection Act (IRPA) contains a clause that explicitly acknowledges Canada’s international human rights commitments. IRPA also grants protection to those who cannot return to their country of origin due to a fear of torture, explicitly referencing the Convention against Torture.³⁹

Despite this seemingly strong foundation of legal stock, international human rights norms are mostly irrelevant as a source of rights-claiming because adjudicators largely rely on domestic legal norms in their decision making. Moreover, the administration of Canada’s domestic legal norms concerning refugees is controlled almost exclusively by the IRB (Canada’s largest administrative tribunal), which makes most final decisions concerning refugees.⁴⁰ This high level of “administrative insulation”⁴¹ is no accident. Access to the judiciary for rejected refugee

claimants and their supporters is limited in multiple ways, a fact that illustrates how procedural norms structuring access to the courts can "contain" the potential for substantive rights mobilization.⁴²

First, before the 2012 creation of the RAD, it was not possible to have a negative decision by the IRB reviewed on its merits. Although the RAD now provides this option and the success rate for rejected claimants is higher than it was previously before the FC,⁴³ research has already identified a number of systemic restrictive features.⁴⁴ Second, the FC can review IRB decisions only from a procedural justice perspective. Compared to a "full-fledged" appeal, judicial review limits court oversight to errors in law and is generally a deferential exercise designed to respect the special expertise of bureaucratic decision makers. Moreover, claimants must obtain "leave" (i.e., permission) from the FC to have their case heard, something that was denied more than 80 per cent of the time during 2003–10.⁴⁵ Studies also demonstrate that despite the high stakes involved in refugee determination (stemming from the well-founded fear of persecution under consideration), being granted leave is very much a matter of chance; it depends on the judge involved, the presence or absence of counsel, and access to legal aid.⁴⁶

During the Harper years, between 582 (2008) and 926 (2015) refugee cases were granted leave before the FC each year; this constitutes a low of 13 and a high of 40 per cent of refugee cases granted leave between 2008 and 2015. The most prominent ROs with a dedicated history of involvement in litigation, the CCR and CARL, participated in thirty-two⁴⁷ and seven⁴⁸ cases as an intervener or public interest party, respectively.

Third, access to the Federal Court of Appeal (FCA) is – unique to immigration and refugee law – restricted. It requires the same FC judge who ruled on a given case to certify (upon request of counsel) that it raises "a serious question of general importance" that necessitates resolution through an appeal to the FCA.⁴⁹ While the FCA heard an average of 562 refugee cases a year during the Harper period, only about 300 questions *in total* have been certified to proceed to the FCA since the IRPA came into force in 2001;⁵⁰ this further underscores the limits placed on access to the judiciary. During the Harper period, CARL participated in only one case, and the CCR in eight cases, before the FCA.

Two additional cases were to be heard by the FCA but were withdrawn by the new Trudeau government. In each case, key rights restrictions implemented under Harper were involved, and the Conservatives had lost before the FC. In *Y.Z. v. Canada* 2015 FC 892, the FC

ruled unconstitutional the denial of appeal rights (to the RAD) for refugee claimants from DCOs that had been implemented in 2012. CARL was granted public interest standing in this case. The FC judge refused, however, to consider the unconstitutionality of the DCO regime as a whole. In *Canadian Doctors for Refugee Health Care v. Canada (AG)* 2014 FC 651, which we discuss in more detail shortly, an FC judge ruled the 2012 IFHP cuts unconstitutional.

Of the cases heard by the FCA, the one case supported by CARL (the decision was released in February 2016) involved the Harper policy of foreclosing most appeal avenues to individuals from DCOs – more specifically, the thirty-six-month “bar” on accessing PRRA. Although the FC and FCA rejected this legal challenge, litigation on this matter continues.⁵¹ Meanwhile, in *Bermudez v. Canada*, the FCA affirmed the lawfulness of a 2012 Harper government policy change regarding cessations, mentioned earlier. It has not been reversed to date, although public hearings on reforming Canada’s refugee law, including cessations, were held during the summer of 2016.⁵²

Given that a leave to appeal barrier also governs access to the SCC, it is perhaps not surprising that the Court hears refugee (and immigration) cases infrequently. During the Harper years, the overall leave-grant rate did not deviate much from its historical average, ranging from 12 per cent (or fifty-five cases) in 2006 to 8 per cent (or forty cases) in 2015.⁵³ Of the 569 cases heard by the SCC during this entire period, only fourteen involved non-citizens (roughly 2.5 per cent), which is in line with previous years.⁵⁴ The CCR, often together with other ROs like CARL, intervened in *all* these cases.

Of the fourteen, *B010 v. Canada* and *R. v. Appuloappa* were brought before the courts in 2015 following legislative changes in response to the arrival of mostly Tamil asylum seekers aboard the *Ocean Lady* and the *Sun Sea* in 2009 and 2010, respectively. These arrivals had led the Harper government to toughen IRPA’s human-smuggling provisions, chiefly by codifying the DFN category for “irregular arrivals” into law in 2012, as discussed previously.⁵⁵ Although both cases can be considered rights-defensive “wins”⁵⁶ since the SCC sided with the argument (supported by the interveners) that the legislation was overbroad, both cases actually turned on pre-Harper, anti-smuggling, IRPA provisions. In fact, thus far, most of the 2012 human-smuggling amendments remain in place (including the controversial DFN category).

All but two of the remaining ten SCC cases involved scenarios relating to non-citizens and security, broadly defined.⁵⁷ None challenged

legislative changes originally introduced by the Harper government, although one, the 2014 *Canada v. Harkat* case, upheld the Harper government's legislative response to the SCC striking down the pre-Harper security certificate regime in the 2007 *Charkaoui v. Canada* case.⁵⁸ In another case (*Agraira v. Canada*), involving an argument over the grounds on which the public safety minister could set aside decisions of inadmissibility, the government (after having won before the FCA) incorporated narrower inadmissibility grounds (which removed humanitarian and compassionate factors from consideration) in its 2013 Faster Removal of Foreign Criminals Act, despite the fact that it could have still lost the argument before the SCC (which later sided with the government).⁵⁹

Finally, one last SCC case is worth noting here since it illustrates the "dialogue" between the SCC and the Harper government in the broader arena of immigration, even though it did not involve a refugee claimant.⁶⁰ In *R. v. Pham*, the SCC allowed the reduction of a sentence of a "foreign criminal" to two years less a day to facilitate access to an appeal of his removal order. That same year, the Harper government moved the appeal "cut-off" from two years of imprisonment to six months as part of its Faster Removal of Foreign Criminals Act.

In her extensive analysis of SCC cases concerning non-citizens, Dauvergne concludes that the Canadian Charter of Rights and Freedoms has "failed to deliver on its promises for human rights protection" for non-citizens (for more on the Charter and non-citizens, see Gaucher, this volume).⁶¹ Earlier observers of the Court's jurisprudence in the mid-1990s similarly argued that rights-expansive decisions like *Singh v. Canada* were followed by a "swing" towards more rights-restrictive ones.⁶² This brief analysis of the Harper government's refugee policy in the courts confirms this overall trend. Most of the government's rights-restrictive policy innovations are still in place or have not been subject to extensive litigation. The so-called wins (rights restrictions struck down) have been few and far between.

Yet despite this track record and a highly constrained LOS, there was significant mobilization inside and outside the courts on behalf of refugees during the Harper years. As we will now see, law "mattered"⁶³ in the broader political struggle of ROs as rights talk and litigation were employed in tandem with other strategies. We now turn to a closer examination of the context surrounding one such case – *Canadian Doctors for Refugee Health Care* – to illustrate this point.

Fighting the Restrictionist Turn inside and outside the Courts: The Cuts to the IFHP

With its origins at the end of the Second World War, the IFHP had become – by the mid-1990s – “a temporary health insurance program available to refugees, protected persons, and refugee claimants in Canada[, with] coverage ... similar to the level of coverage that provincial and territorial governments provide[d] for people receiving social assistance, including coverage for prescription drugs, dental, and vision care.”⁶⁴ In April 2012, the Conservatives announced the removal for rejected refugee claimants and asylum seekers from DCOs of all benefits except emergency coverage, and it cut supplemental coverage for all others. Eventually, an estimated 86 per cent of individuals previously covered under the IFHP (including asylum seekers) would be denied access to preventive and even – for some – emergency care.⁶⁵

In justifying its actions, the government claimed that the cuts would save money, prevent refugees from accessing “gold-plated” benefits above those available to “ordinary Canadians,” protect public health and safety, and deter abuse by “bogus refugees.”⁶⁶ Although the cuts prompted widespread opposition on rights-based, ethical, and practical grounds, the government remained intransigent despite mounting evidence that its policy goals were not being met and that the health of some refugees and asylum seekers was being undermined.

The political environment for those opposed to the cuts was constrained from the outset as there were no consultations with the provinces, the medical profession, social welfare organizations, or ROs before the announcement. Rick Dykstra (Jason Kenney’s parliamentary secretary) maintained that since the policy “was part of the economic action plan, budget 2012, and was under budget secrecy,” stakeholders could not be consulted and that the government possessed sufficient internal medical expertise to develop an appropriate health policy for refugees on its own.⁶⁷ A subsequent analysis, however, found that “the exclusion of refugee advocates and the public health sector from this process was both deliberate and systematic.”⁶⁸ Indeed, repeated efforts on the part of national medical stakeholders, such as the Canadian Medical Association, to sit down with the government on this issue were rebuffed.⁶⁹

This likely stemmed from the fact that the medical profession was unequivocal in its opposition to the cuts. Apart from labelling them unethical, unfair, and inhumane, it anticipated that the overall costs

associated with refugee health would grow as preventable and treatable health problems persisted and worsened, putting the health of refugees and the broader Canadian public at risk.⁷⁰ The cuts were, moreover, held to be discriminatory in distinguishing health care access for refugees by factors such as country of origin.

In response, the government portrayed the criticisms as being unfounded and ideological, labelling critics in the medical profession "left-wing militants" who were "ideologically motivated" and belonged to "hard-core pressure groups."⁷¹ The government accused opponents of not understanding the policy,⁷² being unrepresentative of "the entire medical profession in Canada,"⁷³ and making claims that were "unsubstantiated" or "factually incorrect," in which they purposefully altered facts.⁷⁴ Government representatives even attacked individual doctors by disclosing their donations to non-Conservative political parties and interactions with non-Conservative politicians.⁷⁵

The constrained political environment also arose with the government's reluctance to engage with criticism on a factual basis, frequently responding instead with its negative discourse concerning refugees. For example, when questioned in the House of Commons about the possible "cost in long-term health care expenditure," Kenney replied, "I will say what is unfair and unethical: a health program that gave better benefits to smuggled false asylum claimants than to Canadian seniors who have been paying their taxes their whole lives."⁷⁶ The juxtaposition of "bogus" refugees with "hard-working, taxpaying Canadian citizens" was repeatedly offered by Conservatives in support of the cuts.⁷⁷ When challenged to listen to the concerns of medical professionals, the government often responded that it chose instead to listen to average Canadians. When opposition MPs persisted, then immigration minister Chris Alexander (who succeeded Kenney in 2013) accused critics of proposing "that anyone who comes to Canada – and 10 million people come a year – should receive provincial health care."⁷⁸ As evidence of the policy's negative effects on refugees and asylum seekers mounted, Alexander alleged that opponents were enacting a "vindictive campaign against honesty."⁷⁹

This combative approach continued in the Standing Committee on Citizenship and Immigration. When Liberal MP Kevin Lamoureux introduced a motion on 26 September 2012 to study the effects of the cuts on refugees and asylum seekers, it was voted down by a united bloc of six Conservative MPs. When Lamoureux invited a witness to address the cuts, government MPs introduced obstructive points of

order, a tactic used again when opposition committee members questioned Kenney on the IFHP. Ultimately, the IFHP cuts received no sustained scrutiny by the standing committee, and no critic was invited to discuss them. As a result, this traditional avenue of state-societal interaction and debate was essentially foreclosed.⁸⁰

The constrained political environment also arose in the government's decision to sideline evidence-based policymaking. The IFHP decision – which Sheridan and Shankardass label a social policy failure – was taken despite “a lack of an evidentiary basis for major government claims in defense of the” decision and in the face of contrary evidence generated and shared internally.⁸¹ When the government received internal advice that challenged its claims, such voices were marginalized.⁸²

For their part, opponents pursued various political strategies before and after turning to the courts. Notably, there was a significant mobilization and expansion of societal actors. Apart from traditional voices such as ROs, human rights organizations, and religious leaders, a wide range of medical professionals and professional associations began to address this issue. Indeed, more than twenty national and provincial medical associations became directly engaged in opposing the government's policy,⁸³ joined by numerous hospitals, medical centres, clinics, and social welfare organizations, among others. Alongside collecting signatures on petitions, writing to and meeting with MPs and the media, using the Internet and social media to raise awareness, occupying Conservative MPs' offices, and interrupting government photo ops, opponents instituted a National Day of Action for Refugee Health, held in June each year from 2012 to 2015 in some twenty cities across Canada. Medical professionals also created networks through which to mobilize and share information, both within the profession and with ROs.⁸⁴

In response to the cuts, medical professionals collected and analysed data from front-line health workers and institutions, publishing and releasing results to the broader public. For example, a 2013 Wellesley Institute study documented how “the new system creates confusion, lessens access to health care services among vulnerable populations, leads to inconsistency in care across Canada, and results in poorer health and avoidable illness for refugees and refugee claimants.”⁸⁵ Other studies highlighted the negative effects on refugee children⁸⁶ and reported the decreased willingness of many practices and clinics to administer to those covered under the new IFHP rules given the confusion and uncertainty surrounding coverage.⁸⁷ Although the cuts had negatively

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affected "a very significant number of people in very dramatic fashion," CARL President Lorne Waldman observed, it was "quite clear that the government [was] not willing to change its mind."⁸⁸

In the context of the rights-restrictive nature of the cuts, and the tightly constrained political environment, three individuals who had been denied medical assistance under the new IFHP rules, alongside CDRC and CARL, argued in their FC submissions in late February 2013 that the policy violated the rights of refugees under the Charter.⁸⁹ In particular, they claimed that the cuts:⁹⁰

- threatened the rights to life and security of the person in section 7 of the Charter;
- amounted to cruel and unusual treatment, contrary to section 12 of the Charter;
- discriminated against refugees from certain countries, and discriminated against people based on their immigration status, contrary to section 15 of the Charter; and
- were inconsistent with Canada's international law obligations.

Arguments were heard in December 2013 and January 2014, and the Honourable Madam Justice Anne L. Mactavish handed down her ruling on 4 July 2014.

Although the section 7 argument was denied, Mactavish accepted the section 12 challenge, finding that the government had "intentionally set out to make the lives of these disadvantaged individuals even more difficult than they already are in an effort to force those who have sought the protection of this country to leave Canada more quickly, and to deter others from coming here."⁹¹ She emphasized that the cuts "potentially jeopardize the health, the safety and indeed the very lives, of ... innocent and vulnerable children in a manner that shocks the conscience and outrages our standards of decency."⁹² Moreover, she "found as a fact that the 2012 changes to the IFHP are causing illness, disability, and death."⁹³ As for section 15, Mactavish ruled that the restraints on DCO claimants put "their lives at risk and perpetuates the stereotypical view that they are cheats and queue-jumpers, that their refugee claims are 'bogus,' and that they have come to Canada to abuse the generosity of Canadians."⁹⁴ For these and other reasons, she concluded that "the profoundly deleterious effects of the 2012 changes to the IFHP greatly outweigh the salutary goals of the Governor in Council in making these changes [, especially as] it has not been established that the changes

will in fact contribute in a material way to the realization of *any* of these goals."⁹⁵

Although the Harper government immediately appealed the case to the FCA and only reluctantly moved to reverse the cuts after losing a stay on the FC decision in advance of the appeal, quite soon after the 2016 election, the Trudeau government signalled its intention not to pursue the appeal. By 1 April 2016, coverage was reinstated, with an anticipated expansion of the program one year later.

Conclusions

The IFHP case provides an opportunity to explore the intersection of refugee policy and the courts in Canada at close hand. First, and in keeping with one of the two framing objectives of this chapter, it helps to clarify the Harper government's contentious relationship with the courts during its years in office. As we have seen, the Conservatives worked to weaken the rights-based foundations of Canadian inland refugee policy, which had supported the RSD regime since the 1980s. Moreover, they constrained the traditional political environment, shutting out alternative points of view and marginalizing evidence-based policymaking. Their actions thus strongly encouraged opponents to seek rights-based and judicial avenues of influence. In short, the government adopted an approach that increased the chances of its policies being challenged and even overturned through judicial venues, even as it sought to undermine the legitimacy of such judicial intervention through its political discourse (particularly evidenced by Kenney's public criticisms of the courts, noted at the outset).

Second, the IFHP case assists in demystifying the role of the courts in shaping refugee policy in Canada. At first glance, the success of this case (alongside other cases, such as *Y.Z.*) seems to confirm the rights-expansionist effects of the courts in this policy area, a claim that is commonly made in the literature on both Canadian refugee policy and the Charter. However, a major contribution of this chapter lies in situating such cases within the broader contexts of (a) the constrained LOS that defines Canadian inland refugee policy generally *and* (b) the especially constrained political environment that existed during the Harper years. Only when this is done can the political import of these examples be evaluated and understood more fully. In the IFHP case, the potential for a court ruling that would go against the government was increased by the rights-restrictive nature of the changes and the inadequate

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evidentiary basis offered to support them as well as the effective legal mobilization fostered by the government's actions and discourse. Additional contextual factors – such as the newly elected Trudeau government's decision not to pursue the FCA appeal and the willingness of the judge who heard the case to accept many of the rights-based arguments made by the litigants – were also critical to the eventual policy outcome.

Finally, the significant growth of legal mobilization in the refugee-advocacy community during the Harper years – especially with respect to legal stock and “resources,” broadly understood – merits further exploration. For instance, can these advocates transform the remaining structural constraints that limit their access to the courts under the Trudeau government? What are the costs of directing so much of their efforts to litigation? To what extent will the existence of the RAD change the “contained” role of the courts in this policy area? Overall, more holistic research on the impact of the courts (which transcends the traditional litigation-centric analysis) is needed to understand better the effects of courts in shaping public policy.

NOTES

- 1 We would like to thank Pierre-André Thériault as well as the anonymous reviewers for their suggestions and comments.
- 2 Naomi Alboim and Karen Cohl, “Shaping the Future” (Toronto: Maytree Foundation, October 2012).
- 3 Stephen Meurrens, “Immigration after the Conservative Transformation,” *Policy Options*, 9 September 2015, <http://policyoptions.irpp.org/magazines/september-2015/election-2015/immigration-after-the-conservative-transformation/>.
- 4 Inland refugee policy refers to the government's response to asylum seekers (or refugee claimants) who are already in the country and who claim to possess a well-founded fear of persecution if returned beyond Canada's borders.
- 5 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.R. 177.
- 6 This argument made an early appearance in the Charter politics literature, as seen in Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson Canada, 1992) and Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: Oxford University Press, 2001). It also appears in works on Canadian immigration

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- and refugee policy, such as Valerie Knowles, *Strangers at Our Gates* (Toronto: Dundurn Press, 1997) and Martin Collacott, "Reforming the Canadian Refugee Determination System," *Refugee* 27, no. 1 (2010): 110–18. At a political level, it is a position commonly advanced by Conservative parliamentarians. For an interpretation of *Singh* that situates it within the policy and political context of the times, see Christopher G. Anderson, "Restricting Rights, Losing Control: The Politics of Control over Asylum Seekers in Liberal-Democratic States – Lessons from the Canadian Case, 1950–1989," *Canadian Journal of Political Science* 43, no. 4 (2010): 937–59.
- 7 E.g., Donald Galloway, "Rights and the Re-identified Refugee," in *Refugee Protection and the Role of Law: Conflicting Identities*, ed. Susan Kneebone, Dallal Stevens, and Loretta Baldassar (London: Routledge, 2014), 36–55; Audrey Macklin, "Disappearing Refugees," *Columbia Human Rights Law Review* 36 (2005): 365–426.
 - 8 E.g., Catherine Dauvergne, "How the Charter Has Failed Non-citizens in Canada," *McGill Law Journal* 58, no. 3 (2013): 663–728; Rebecca Hamlin, *Let Me Be a Refugee* (Oxford: Oxford University Press, 2014); Dagmar Soennecken, "Extending Hospitality," *Studies in Law, Politics and Society* 60 (2013): 85–109.
 - 9 Christopher Manfredi, "Conservatives, the Supreme Court of Canada, and the Constitution," *Osgoode Hall Law Journal* 52, no. 3 (2015): 951–84.
 - 10 Jason Kenney, speaking notes, University of Western Ontario, 11 February 2011, <http://www.cic.gc.ca/english/department/media/speeches/2011/2011-02-11.asp>.
 - 11 Galloway, "Rights and the Re-identified Refugee," 44, 50; emphasis in original.
 - 12 *Ibid.*, 38.
 - 13 Miriam Smith, *A Civil Society?* (Peterborough: Broadview Press, 2005); Lawrence Martin, *Harperland* (Toronto: Viking Canada, 2010); Paul Wells, *The Longer I'm Prime Minister* (Toronto: Vintage, 2014).
 - 14 Evert A. Lindquist and Chris Eichbaum, "Remaking Government in Canada: Dares, Resilience, and Civility in Westminster Systems," *Governance* 29, no. 4 (2016): 553–71.
 - 15 Gerald E. Dirks, *Controversy and Complexity* (Montreal and Kingston: McGill-Queen's University Press, 1995); Alan B. Simmons and Kieran Keohane, "Canadian Immigration Policy: State Strategies and the Quest for Legitimacy," *Canadian Review of Sociology and Anthropology* 29, no. 4 (1992): 421–52.
 - 16 Christopher G. Anderson, *Canadian Liberalism and the Politics of Border Control: 1867–1967* (Vancouver: UBC Press, 2013).

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- 17 Hamlin, *Let Me Be a Refugee*, 100.
- 18 Jason Kenney, speaking notes, 30 March 2010, <http://www.cic.gc.ca/english/department/media/speeches/2010/2010-03-30.asp>. On the deep roots of this political discourse, see Anderson, *Canadian Liberalism and the Politics of Border Control*; on its extensive use by the Harper government, see Alex Neve and Tiisetso Russell, "Hysteria and Discrimination," *University of New Brunswick Law Journal* 62, no. 9 (2011): 37–45.
- 19 Cynthia Levine-Rasky, Julianna Beaudoin, and Paul St Clair, "The Exclusion of Roma Claimants in Canadian Refugee Policy," *Patterns of Prejudice* 48, no. 1 (2014): 67–93; Paloma E. Villegas, "Assembling a Visa Requirement against the Mexican 'Wave,'" *Ethnic and Racial Studies* 36, no. 12 (2013): 2200–19. The previous Liberal government had imposed visa restrictions on the Czech Republic and Hungary to interdict Roma refugee claimants. While the Conservatives removed these restrictions soon after gaining power, they reimposed them on the Czech Republic in 2009 and then lifted them again in 2013. As Levine-Rasky, Beaudoin, and St Clair relate, both the Liberals and the Conservatives pursued a number of other mechanisms to limit access to and fairness within the Canadian RSD with respect to Roma refugees.
- 20 Christopher G. Anderson, "Out of Sight, Out of Mind: Electronic Travel Authorization and the Interdiction of Asylum Seekers at the Canada-U.S. Security Perimeter," *American Review of Canadian Studies* 47, no. 4 (2017): 385–407. With less controversy, the government imposed visitor visa requirements on Botswana, Namibia, St Lucia, St Vincent, and Swaziland in 2012.
- 21 François Crépeau and Idil Atak, "The Securitization of Asylum and Human Rights in Canada and the European Union," in *Contemporary Issues in Refugee Law*, ed. Savinder Juss and Colin Harvey (Cheltenham, UK: Edward Elgar Publishing, 2013), 227–57.
- 22 Galloway, "Rights and the Re-identified Refugee," 37.
- 23 Dagmar Soennecken, "Shifting Back and Up," *Comparative Migration Studies* 2, no. 1 (2014): 102–22.
- 24 See Alboim and Cohl, "Shaping the Future," 38. Such claimants are subject to mandatory detention and a five-year prohibition on obtaining permanent residence after a positive refugee determination, s. 20.1 and 55 (3.1) IRPA.
- 25 Carrie Dawson, "Refugee Hotels," *University of Toronto Quarterly* 83, no. 4 (2014): 826–46.
- 26 Andrea Woo, "'Draconian' Changes to Refugee Act Put Those with Protected Status on Edge," *Globe and Mail*, 7 May 2014.

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- 27 Michael McCann, "Causal versus Constitutive Explanations (or, On the Difficulty of Being So Positive ...)," *Law and Social Inquiry* 21 (1996): 459.
- 28 Gerald N. Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991), 4.
- 29 Mary Volcansek, *Judicial Politics in Europe* (New York: Peter Lang, 1986), 8; Charles A. Johnson and Bradley C. Canon, *Judicial Policies: Implementation and Impact* (Washington, DC: Congressional Quarterly Press, 1984).
- 30 Lori Hausegger, Matthew Hennigar, and Troy Riddell, *Canadian Courts: Law, Politics, and Process* (Don Mills, ON: Oxford University Press, 2009), 366.
- 31 Dagmar Soennecken, "The Growing Influence of the Courts over the Fate of Refugees," *Review of European and Russian Affairs* 4, no. 2 (2008): 55–88; Lisa Vanhala, "Legal Opportunity Structures and the Paradox of Legal Mobilization by Environmental Movements in the UK," *Law and Society Review* 46, no. 3 (2012): 523–56.
- 32 Volcansek, *Judicial Politics in Europe*, 9.
- 33 Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council," *Canadian Journal of Political Science* 35, no. 1 (2002): 1–29.
- 34 Chris Hilson, "New Social Movements," *Journal of European Public Policy* 9 (2002): 238–55; Ellen Ann Andersen, *Out of the Closets and into the Courts* (Ann Arbor: University of Michigan Press, 2005).
- 35 Marc Galanter, "The Radiating Effects of Courts," in *Empirical Theories of Courts*, ed. Keith D. Boyum and Lynn Mather (New York: Longman, 1983), 123–4, at 123 and 127.
- 36 Rhonda Evans Case and Terri E. Givens, "Re-engineering Legal Opportunity Structures in the European Union?," *Journal of Common Market Studies* 48 (2010): 221.
- 37 Andersen, *Out of the Closets and into the Courts*, 9; see also Lisa Vanhala, "Legal Opportunity Structures."
- 38 Karen Alter and Jeannette Vargas, "Explaining Variation in the Use of European Litigation Strategies," *Comparative Political Studies* 33 (2000): 452–82; Lisa Vanhala, "Disability Rights Activists in the Supreme Court of Canada," *Canadian Journal of Political Science* 42, no. 4 (2009): 981–1002; Soennecken, "The Growing Influence of the Courts over the Fate of Refugees."
- 39 S. 96 and 97 IRPA.
- 40 Gerald P. Heckman, "Securing Procedural Safeguards for Asylum Seekers in Canada," *International Journal of Refugee Law* 15, no. 2 (2003): 212–53; Catherine Dauvergne, "International Human Rights in Canadian Immigration Law," *Indiana Journal of Global Legal Studies* 19, no. 1 (2012): 305–26.
- 41 Hamlin, *Let Me Be a Refugee*, 90.

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- 42 Lisa Conant, *Justice Contained* (Ithaca, NY: Cornell University Press, 2002).
- 43 The RAD success rate for rejected refugee claimants was 26.4% in 2013–14 –much higher than before the FC under the pre-2012 system, when the average was 7.8% in 2005–10; see Sean Rehaag, “Judicial Review of Refugee Determinations,” *Queen's Law Journal* 38, no. 1 (2012): 1–58. The scope of the RAD's powers was subject to litigation in *Canada (CIC) v. Huruglica* 2016 FCA 93. The Conservatives also limited access to the RAD, rendering it unavailable to DCOs, DFNs, claims deemed “manifestly unfounded” or “with no credible basis,” and claimants falling under an exception of the Safe Third Country Agreement.
- 44 Sean Rehaag and Angus Grant, “Unappealing,” *University of British Columbia Law Review* 49 (2016): 203–74.
- 45 Dauvergne, “International Human Rights in Canadian Immigration Law.”
- 46 Ian Greene and Paul Shaffer, “Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee Determination System,” *International Journal of Refugee Law* 4 (1992): 71–83; Jon B. Gould, Colleen Sheppard, and Johannes Wheeldon, “A Refugee from Justice,” *Law and Policy* 32 (2010): 454–86; Rehaag, “Judicial Review of Refugee Determinations.”
- 47 Dagmar Soennecken, “The Growth of Judicial Power over the Fate of Refugees” (PhD diss., University of Toronto, 2008).
- 48 The calculation of granting rate in percentage terms may be somewhat inaccurate due to the court's backlog. Unless otherwise noted, all data in this section are available from the authors on request.
- 49 IRPA 2001, s. 74 (4) (d).
- 50 Hamlin, *Let Me Be a Refugee*, 94.
- 51 *Savunthararasa v. Canada (Public Safety and Emergency Preparedness)* 2016 FCA 51 at 22; Canadian Association of Refugee Lawyers, “Brief: Reform Proposals for Canada's Inland Refugee Determination System and Other Aspects of the Immigration System,” July 2016, http://www.carl-acaadr.ca/sites/default/files/CARL%20brief%20FINAL_July2016.pdf.
- 52 *Bermudez v. Canada (CIC)* 2016 FCA 131, <http://ccrweb.ca/en/release-cessation-reform-urgent-following-bermudez-court-decision>; <http://www.carl-acaadr.ca/sites/default/files/CARL%20%20Cessation%20Briefing%20Note%20for%20Minister%20McCallum%2019%2004.pdf>.
- 53 See Supreme Court statistics; 2015 rate not final.
- 54 Soennecken, “The Growth of Judicial Power over the Fate of Refugees.”
- 55 CIC, “Backgrounder – Overview: Ending the Abuse of Canada's Immigration System by Human Smugglers,” http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16d.asp?_ga=1.74316048.349030836.1486237210.

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- 56 F.L. Morton and Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada," *Canadian Journal of Political Science* 34 (2001): 55–84.
- 57 *Kanthasamy v. Canada* 2015 SCC 58 involved a rejected seventeen-year-old refugee claimant who was subsequently denied the right to remain in Canada on humanitarian and compassionate grounds. Although many lawyers consider the case to have far-reaching effects yet to be seen, it did not test any Harper government policy changes. *Ezokola v. Canada* 2013 SCC 4, *Febeles v. Canada* 2014 SCC 68, and *Nemet v. Canada* 2010 SCC 56 involved refugee claimants and war crimes or serious crimes, but none involved policy changes made by the Harper government.
- 58 *Canada (Citizenship and Immigration) v. Harkat* 2014 SCC 37; *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9.
- 59 *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36.
- 60 *R. v. Pham* 2013 SCC 15.
- 61 Dauvergne, "How the Charter Has Failed Non-citizens in Canada," 666.
- 62 F. Pearl Eliadis, "The Swing from Singh," *Immigration Law Reporter* 26 (1994): 130–47.
- 63 Michael McCann: Pay Equity Reform and the Politics of Legal Mobilization, *Rights at Work* (Chicago: University of Chicago Press, 1994).
- 64 Steven Barnes, "The Real Costs of Cutting the Interim Federal Health Program" (Wellesley Institute, 2013), 4, <http://www.wellesleyinstitute.com/wp-content/uploads/2013/10/Actual-Health-Impacts-of-IFHP.pdf>.
- 65 Ruby Dhand and Robert Diab, "Canada's Refugee Health Law and Policy from a Comparative, Constitutional, and Human Rights Perspective," *Canadian Journal of Comparative and Contemporary Law* 1, no. 1 (2015): 351–406.
- 66 Paul Sheridan and Ketan Shankardass, "The 2012 Cuts to Refugee Health Coverage in Canada," *Canadian Journal of Political Science* 48, no. 4 (2016): 905–31.
- 67 Rick Dykstra, House of Commons, Debates, 41st Parl., 1st Sess., vol. 146, no. 177, 6 November 2012.
- 68 Sheridan and Shankardass, "The 2012 Cuts to Refugee Health Coverage in Canada," 907.
- 69 E.g., eight national medical associations "three times requested a meeting with Kenney to discuss the cuts. He has not officially responded for over a year except to indicate that he did not have time to fit such a meeting into his schedule"; see Meb Rashid and Philip Berger, "Let's End the Nasty Fight on Refugee Health Care," *Toronto Star*, 5 July 2013.

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- 71 Laura Eggertson, "Health Care Organizations Wait to Talk to Citizenship Minister about Cuts to Refugee Benefits," *Canadian Medical Association Journal* 185, no. 7 (2013): E279–80.
- 72 Gloria Galloway, "Nobel Laureate Joins Toronto Rabbi Group in Condemning Refugee Health Cuts," *Globe and Mail*, 7 July 2012.
- 73 Tobi Cohen, "Protesters in Lab Coats Pose New Challenges," *Montreal Gazette*, 21 July 2012.
- 74 Louisa Taylor, "Refugee Health Cuts Cause Chaos, Doctors Say," *Ottawa Citizen*, 28 September 2012.
- 75 Tobi Cohen, "Refugee Health Ignites Political War," *Ottawa Citizen*, 4 February 2014.
- 76 Jason Kenney, House of Commons, Debates, 41st Parl., 1st Sess., vol. 146, no. 120, 9 May 2012.
- 77 Christopher Olsen, Rowan El-Bialy, Mark McKelvie, Peggy Rauman, and Fern Brunger, "'Other' Troubles: Deconstructing Perceptions and Changing Responses to Refugees in Canada," *Journal of Immigrant and Minority Health* 18, no. 1 (2014): 58–66.
- 78 Chris Alexander, House of Commons, Debates, 41st Parl., 2nd Sess., vol. 147, no. 087, 15 May 2014.
- 79 Chris Alexander, House of Commons, Debates, 41st Parl., 2nd Sess., vol. 147, no. 165, 29 January 2015.
- 80 As well, the cuts were scarcely broached in the Senate.
- 81 Sheridan and Shankardass, "The 2012 Cuts to Refugee Health Coverage in Canada," 923.
- 82 Stephanie Levitz, "Bureaucrats Forced into Last-Minute Pitch to Save Some Refugee Health Benefits," *Canadian Press*, 7 January 2013.
- 83 An incomplete list of organizations includes the Canadian Association of Optometrists, Canadian Association of Social Workers, Canadian Dental Association, Canadian Medical Association, Canadian Nurses Association, Canadian Pharmacists Association, Canadian Association of Midwives, Canadian Psychiatric Association, College of Family Physicians of Canada, Royal College of Physicians and Surgeons of Canada, Canadian Paediatric Society, Canadian Association of Social Workers, Canadian Association of Community Health Centres, Community Health Nurses of Canada, Association of Medical Microbiology and Infectious Diseases Canada, and Canadian Federation of Medical Students as well as numerous provincial associations and the newly formed CDRC.

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- 84 There was also significant mobilization against the cuts on the part of the provinces, primarily but not only on the grounds that the changes would increase costs at the provincial level.
- 85 Barnes, "The Real Costs of Cutting the Interim Federal Health Program," 1.
- 86 Andrea Evans, Alexander Caudarella, Savithiri Ratnapalan, and Kevin Chan, "The Cost and Impact of the Interim Federal Health Program Cuts on Child Refugees in Canada," *PLoS ONE* 9, no. 5 (2014).
- 87 Taylor, "Refugee Health Cuts Cause Chaos, Doctors Say."
- 88 Michael Woods, "Doctors, Lawyers to Challenge Conservative Refugee Health-Care Cuts," *Postmedia News*, 24 February 2013.
- 89 An earlier, unsuccessful court case had been filed in 2012 by the Anglican Synod of the Diocese of Rupert's Land and Hospitality House Refugee Ministry of Winnipeg on the grounds of breach of contract as the government would no longer – under the IFHP changes – be providing medical coverage for refugees whom it had already cleared for private sponsorship resettlement.
- 90 Canadian Association of Refugee Lawyers, "Doctors and Lawyers Challenge Federal Health Cuts to Refugees," press release, 25 February 2013, <http://www.carl-acaadr.ca/our-work/issues/IFHP>.
- 91 *Canadian Doctors for Refugee Health Care*, 7–8.
- 92 *Ibid.*
- 93 *Ibid.*
- 94 *Ibid.*
- 95 *Ibid.*, 256; emphasis in original.