
Postscript — Selective Concern: An Overview of Refugee Law in Canada

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This is a postscript to J.C. Hathaway, "Selected Concern: An Overview of Refugee Law in Canada" (1988) 33 McGill L.J. 676. Since that article was prepared for publication, the Canadian Senate presented studies recommending changes to Bills C-84 and C-55. Both those recommendations as well as the final legislation enacted in the fall of 1988 are addressed by Professor Hathaway.

La présente note est un supplément à J.C. Hathaway, « Selected Concern: An Overview of Refugee Law in Canada » (1988) 33 R.D. McGill 676. Depuis la rédaction de cet article, le Sénat a recommandé des amendements aux projets de loi C-84 et C-55. Ces recommandations ainsi que la loi finalement sanctionnée à l'automne 1988 font l'objet de la présente étude.

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From late 1987 until the summer of 1988, there was something of a tug-of-war between the Senate and the House of Commons over the substance of the Government's proposed refugee law reform. The Senate's Standing Committee on Legal and Constitutional Affairs heard testimony from many Canadians concerned that Bills C-84 and C-55 were designed to do more than preserve the integrity of the inland determination system. Witnesses argued that the true intention of the proposed legislation was to discourage refugee claimants from seeking protection in Canada and that it would contravene domestic and international law. The Senate was persuaded to push for important changes to both bills, and the government, in turn, eventually yielded some ground in order to secure the Senate's assent to passage of the legislation. Although the final amendments failed to dismantle the strong enforcement orientation of the bills, they did attenuate the extent of the protectionist victory.

Under the House of Commons' version of Bill C-84, the Minister of Immigration was to have been given the power to interdict ships at sea, and to turn away vessels carrying undocumented aliens, without inquiring into any claims to refugee status.¹ The Senate rejected this principle in its entirety,

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¹"Where the Minister believes on reasonable grounds that a vehicle ... is bringing any person into Canada in contravention of this Act or the regulations, the Minister may, after having due regard to the safety of the vehicle and its passengers, direct the vehicle to leave or not to enter the internal waters of Canada ... and any such direction may be enforced by such force as is reasonable in the circumstances." Bill C-84, *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, 2d Sess., 33d Parl., 1986-87, as passed by the House of Commons, at s.8.

and determined instead that unauthorized ships should be apprehended and taken to a Canadian port. Once there, the owners and crew could be prosecuted for violation of Canadian law, while any claims to refugee status made by passengers would be examined on their merits.² Under the compromise legislation ultimately enacted, the Minister retains the authority to direct ships suspected of transporting refugee claimants to Canada not to enter Canadian waters, but only in cases where the vessel can safely return to another state that agrees to protect the refugees from persecution.³ Most important, the authority to interdict ships at sea is made an explicitly interim power, and will lapse six months after the new refugee determination system comes into operation.⁴

Changes were also made to the "safe third country" access test. Under the safe country principle as proposed by the House of Commons, refugees arriving in Canada could have been excluded from the determination procedure and summarily expelled if they failed to come directly to Canada from their state of origin.⁵ Refugees arriving from a country judged by the federal cabinet to respect the basic prohibition on the *refoulement* of refugees would have been refused entry, whatever the concerns a particular individual may have had about the true extent of protection available in the intermediate state.

²"The Committee has ... concluded that ships should not be turned around at sea but should be brought to port ... The best deterrence for organizers of irregular boat arrivals is swift and sure punishment. The only appropriate treatment for passengers who claim to be refugees is speedy and just processing according to the laws which apply to all refugee claimants, whether they arrive by air, land or sea." Standing Senate Committee on Legal and Constitutional Affairs, *Report on Bill C-84*, 2d Sess., 33d Parl., 1986-87, at para. 47.

³"The Minister may make a direction [for a ship not to enter Canadian waters] where the Minister is satisfied that (a) the vehicle can return to its port of embarkation without endangering the lives of its passengers; (b) all passengers who seek Convention refugee status and are nationals or citizens of the country where the vehicle embarked them have been removed from the vehicle and brought into Canada; (c) the country where the vehicle embarked its passengers is a signatory to the Convention and complies with Article 33 thereof; and (d) the country would allow the passengers to return to that country or to have the merits of their claims to Convention refugee status determined therein." *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, S.C. 1988, c. 36, s. 8(1) [adding s. 91.1(1.1) to the *Immigration Act, 1976*, S.C. 1976-77, c. 52].

⁴*Ibid.*, s. 8(2). The new determination system began operation on 1 January 1989, the result of which is the lapse of the interdiction power as of 1 July 1989.

⁵"A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if ... (b) the claimant came to Canada from a country that has been prescribed as a safe third country..." *Bill C-55, An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, 2d Sess., 33d Parl., 1986-87, as passed by the House of Commons, at s. 15 [purporting to add s. 48.1(1)(b) to the *Immigration Act, 1976*, *supra*, note 3].

The Senate elected not to challenge the safe third country concept, but did limit its application to persons who would actually be allowed to return to the intermediate country, or who would at least be allowed to have their refugee claims decided on the merits in the intermediate state.⁶ Moreover, the Senate recognized that cabinet authority to draft the safe country list would move refugee protection issues into "the political arena"⁷, and proposed instead that it be compiled by the more expert Chairman of the Immigration and Refugee Board. The legislation as finally enacted retains the right of cabinet to draft the "safe country" list, but adopts the spirit of the Senate's concern to safeguard the rights of individuals by providing that refugees can be returned to a safe intermediate state only if that state's "laws or practices" establish that they would be "allowed to return" to that country, or alternatively "would have the right to have the merits of their claims determined in that country".⁸ The amendment seems to contemplate the possibility that evidence may be adduced at the access hearing on the impact of the intermediate country's laws and practices on the refugee claimant and persons similarly situated. The meaning that will be given to the phrases "ability 'to return'" and "to have 'the merits' of one's refugee claim determined" is unclear. This may pose serious protection problems unless it is established that "return" implies a right to remain and enjoy basic human rights, and that a determination of a refugee claim on the merits requires access to a full and fair hearing on the substance of the claimant's fear of persecution.

Other important concerns remain as well. The government's power to prosecute Canadians who help refugees enter Canada in order to claim protection was enacted,⁹ Senate efforts to the contrary notwithstanding.¹⁰ Judicial review of a negative refugee determination is no longer available as of right, but is now subject to a leave requirement, generally without the opportunity of personal appearance.¹¹ Harsh provisions on detention and an overly broad power to define and exclude "security risks" are further evidence of the strong tendency to curtail Canada's provision of asylum to persons at risk. In tandem with the ongoing policy of imposing visa controls

⁶Standing Senate Committee on Legal and Constitutional Affairs, *Report on Bill C-55*, 2d Sess., 33d Parl., 1986-87, at 5-7.

⁷*Ibid.* at 8.

⁸*An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, S.C. 1988, c. 35, s. 14 [adding s. 48.01(1)(b)(ii) to the *Immigration Act, 1976*, *supra* note 3].

⁹*An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, *supra*, note 3, s. 9 [adding s. 95.1 to the *Immigration Act, 1976*, *supra*, note 3].

¹⁰"The law should apply only to those who encourage people to come to Canada and make refugee claims knowing that the individuals in question have spurious cases." Standing Senate Committee on Legal and Constitutional Affairs, *supra*, note 3, at para. 52.

¹¹*An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, *supra*, note 8, s. 19 [adding s. 83.1(1) and (3) to the *Immigration Act, 1976*, *supra*, note 3].

on refugee-producing countries and stiff penalties for transportation companies that fail to enforce those restrictions on their passengers, the net result will clearly be a reduction in the number of refugees admitted to Canada through the inland determination process.

Legal challenges to the refugee law reform on these and other grounds have already been commenced. The government's refusal to accede to the Senate's well-informed counsel, and to pursue instead a decidedly restrictionist refugee policy threatens both the safety of persons in flight from persecution and the ability of the new determination procedures to withstand constitutional scrutiny. The steadfast commitment of the government to the interposition of political and administrative discretion in what should be a human rights-based protection system confirms once more the selectivity of Canada's concern for refugees.
