

Commentary



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The Roxham Road legal confusion is back

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Introduction

After a relatively quiet period, Roxham Road is back in the news. Refugee claimants have been entering Canada through this unofficial border crossing between rural Quebec and upstate New York at record rates since the Trudeau government lifted the pandemic-related entry ban. From his public statements, it appears Prime Minister Trudeau believes these migrants have rights in Canada if they try to enter irregularly at Roxham Road, but not if they follow the rules and present themselves at an official Port of Entry. He also has an imprecise understanding of the exact nature of Canada's legal obligations.

It is no wonder part of the population is perplexed and losing confidence in the system. No protection principle could justify treating refugee claimants differently based on which part of the land border they use to enter. While it is unfortunate that an uncritical media and various attention-seeking politicians are unable to properly explain the Roxham problem, it is much more worrisome that the prime minister seemingly does not know the laws applicable in the country he governs.

Laws apply immediately at the border

Given the apparent confusion, it is worth pointing out that a person who arrives at a land Port of Entry is already considered to be in Canada and the authorities are bound by both international and domestic legal obligations. The Canadian government does not apply a type of legal fiction that pretends there is a special “international zone” at the border in which people are not considered to be in Canada until they are officially authorized to enter.

As soon as migrants come into contact with the authorities, both the Geneva Refugee Convention and the *Canadian Charter of Rights and Freedoms* can protect them. If entry is not authorized, then they are returned to the US. As the Canadian system is based on the rule of law, refugee claimants can contest the decision to return. Indeed, several claimants have partnered with advocacy groups to argue that the US is unsafe for them. Their case will soon be heard by the Supreme Court of Canada.

The above legal situation is the same whether it occurs at an official Port of Entry or at an unofficial crossing staffed by the RCMP, such as the one at Roxham Road. The Canada-US Safe Third Country Agreement (STCA), which entered into force in 2004, simply declares both countries to be safe for refugee claimants and introduces formal cooperation on responsibility-sharing between them. It does not change the application of either the Refugee Convention or the Charter, although the substantive rights are affected by the designation of the US as a “safe third country.”

Likewise, the fact that the signatories decided the STCA would apply only at official Ports of Entry (i.e., not at Roxham Road) does not change the legal regime. It does, however, provide migrants with a huge incentive to enter irregularly through Roxham Road rather than the nearby Port of Entry at St-Bernard-de-Lacolle. Indeed, it indicates Canada and the US do not have formalized return arrangements for refugee claimants trying to cross the border in between Ports of Entry.

This loophole is what distinguishes the STCA from a similar agreement between European Union (EU) member states, known as the Dublin Regulation, which also tries to tackle the “asylum shopping” problem. The Dublin Regulation does not contain a loophole based on a migrant’s mode of entry, so EU members are supposed to send refugee claimants who entered their territory irregularly back to the first EU country that they entered. These so-called “Dublin transfers” can be complicated if someone enters irregularly via the Mediterranean only to be processed by the authorities in a northern European member state.

The above summary contextualizes the Roxham controversy. Given that the situation involves sensitive issues related to territorial sovereignty and border control, any serious leader should be able to explain this context to the public. The prime minister’s statements, unfortunately, suggest he has a su-

perfidious understanding of the situation. Speaking about Roxham Road to a group at the University of Manitoba, Prime Minister Trudeau said “Canada has obligations under international treaties to give asylum seekers a hearing.” Yet he somehow also believes these supposed obligations do not apply at the nearby Port of Entry.

The only rational explanation for this position could be that he is under the mistaken impression that a person arriving at the Port of Entry is not actually in Canada and therefore not covered by international and domestic legal obligations. From an analytical perspective, the striking aspect of the Roxham controversy is that the prime minister does not seem to grasp the legal dimensions but he insists they are guiding his government’s policy, as he recently explained to the House of Commons.

In other words, Prime Minister Trudeau does not seem to understand that while the Refugee Convention and the Charter apply to everyone who arrives at Canada’s border, the legal protection they provide depends on each person’s circumstances. He does not grasp the basic consequences of Canada having declared the US to be safe for refugee claimants and how this creates specific circumstances influencing the extent of the protection granted by international and domestic law. However, the prime minister does have a keen sense of political symbolism and a desire to project a humanitarian image.

Is there a right to a hearing?

Does the Refugee Convention oblige Canada to provide a refugee hearing to anyone who arrives at Roxham Road, as claimed by the Trudeau government? Nowhere in this 1951 treaty is anything mentioned about refugee status procedures. The word “asylum” is not even mentioned in any of its 46 articles. The most relevant obligation is found in article 33, which stipulates that refugees cannot be returned to a country where their “life or freedom would be threatened.”

This basic guarantee is not the same as a right of asylum in that it allows some flexibility as long as refugee claimants’ lives are not endangered. Unless the Supreme Court of Canada determines the US is not safe, there is no violation if refugee claimants arriving at the Quebec border are returned to upstate New York.

The harsh reality is that the Refugee Convention’s limited protection does not oblige Canada to provide a hearing to every refugee claimant who shows up at the border. It also allows claimants to be returned to safe countries, which is why the adoption of the STCA was possible in the first place.

Does the *Canadian Charter of Rights and Freedoms* oblige the government to provide a hearing to anyone who arrives at Roxham Road? The landmark 1985 Singh case established that the Charter applies to anyone on Canadian

soil, but that does not mean its protection necessarily guarantees refugee claimants an automatic right to a hearing. Nowhere in the judgment is it mentioned that there is a general right to a hearing. Rather, the specific circumstances of the case are underlined in order to establish a potential Charter violation because the Sikh claimants risked being returned directly to India where they feared persecution. The Charter's protection of "life, liberty and security" (section 7) was at stake, so the old refugee status determination procedure was considered insufficient and the Supreme Court ruled they were entitled to a hearing.

Refugee claimants at Roxham Road are arriving from the US. Stopping and returning them at the border will not result in a potential Charter violation because the US is deemed safe, so the reasoning behind Singh does not apply. Journalists who accept uncritically the prime minister's position misunderstand why the Court in Singh granted a hearing. There cannot be a Charter violation if someone is sent to a safe place.

The federal *Immigration and Refugee Protection Act* also provides that, when a refugee claimant arrives at the land border, there is an initial determination to establish whether the person can make a claim (section 100). The various grounds for ineligibility are outlined in the following section 101 of the Act. Unsurprisingly, these include diverse security-related reasons. They also include a conspicuous clause rendering claimants ineligible when they come "directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence." This is the legislative provision that allows return to the US and enables the adoption of a responsibility-sharing agreement with the US. As outlined above, laws apply immediately at the border given that there is no fictitious "international zone" or no-man's-land where the authorities can act in a legal vacuum.

Even a quick reading of Canada's main legislation dealing specifically with refugee claims makes clear that an automatic right to a refugee hearing was never intended or established by Parliament.

The predominance of image politics

The inclusion of a major loophole in the STCA so that it does not apply at unofficial crossings such as Roxham Road is the result of an administrative choice that is not required by the legal regime. Rather than explain to Canadians the reasons why such a loophole incentivizing irregular entry was included in the treaty with the US, the Trudeau government has focused on signalling a supposedly virtuous policy and promoting a humanitarian brand. Observers who sympathize with this apparent openness at Roxham Road are missing the underlying political cynicism.

While its legal reasoning is neither rigorous nor nuanced, the Trudeau government seems careful in relation to public messaging and branding. The immigration minister's mandate letter includes a commitment "to modernize" the STCA and the prime minister recently repeated this goal in the House of Commons, yet nobody has ever explained what this actually means.

The policy options are essentially limited to either one of two approaches: a stricter border control approach that involves tightening entry at Roxham Road, or a soft open borders approach allowing refugee claimants to enter openly through the front door at St-Bernard-de-Lacolle. The latter option does not involve any negotiations with the US because the STCA can be unilaterally suspended or terminated. Therefore, "modernizing" the STCA must logically mean removing the loophole and clarifying that all refugee claimants will be returned to the US regardless of which part of the land border they use to enter Canada. However, clearly saying so goes against the Trudeau brand because it can be interpreted as anti-refugee.

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Similarly, despite the prime minister's confusion about legal rules, a closer look reveals that government lawyers have always argued before the courts that migrants can be returned to the US because it is a "safe third country" where rights are respected (under both the Trump and Biden administrations). So far, the government has not said this too loudly outside the courtroom because it clashes with its branding efforts and preferred pro-refugee image.

The problem is that political marketing has contributed to the polarization of views regarding Roxham Road. Moreover, the resulting ideological battle is misleading. It has become a false symbol dividing Canadians into supposedly pro-refugee or anti-refugee camps. It obscures that Canadian policy regarding uninvited refugee claimants (to be distinguished from resettled refugees) has always been anchored to the basic concept of interdiction with strict visa issuance policies and airline sanctions for undocumented travellers. Despite the rhetoric, governments of all stripes have done everything possible to prevent potential refugee claimants from reaching Canadian shores. It is not by chance that many migrants from poor countries obtained US visas to fly to New York City before taking a bus/taxi to Roxham Road. They would never have received Canadian visas.

Academics and advocates have opposed any idea of responsibility-sharing with the US since the late 1980s because they do not believe US standards are good enough. Prime Minister Trudeau sees these influential groups as part of his

political constituency and is trying to be sensitive to their particular concerns. This is apparent in the careful use of progressive language and terminology that reflects the latest trends in refugee studies. The risk is that superficial image-based approaches to refugee policy take precedence over substantive or nuanced hard discussions about the dilemmas inherent in managing borders while respecting human rights.

Conclusion

To sum up, Prime Minister Trudeau's explanation of his incoherent border policy concerning refugee claimants misunderstands how international and domestic law applies. It also promotes an unprincipled double standard that favours refugee claimants who enter irregularly over those who present themselves at a Port of Entry.

Prime Minister Trudeau also provides a practical argument to defend his incoherent border policy: he claims it is not actually possible to prevent entry in between land Ports of Entry. If Roxham Road is closed, the prime minister insists refugee claimants will simply enter elsewhere. This is the same disingenuous argument the Prime Minister used during the first three years of the Trump administration. If closing borders is ineffective, why did his government adopt in 2020 a special Order in Council that prevented entry at Roxham Road during the pandemic? Roxham is making headlines again because refugee claims immediately shot up as soon as the Order was lifted a few months ago.

This general futility-based argument on border control has widespread support in academia, even though it is based on an unproven hypothesis. It is presently being used by activists to denounce the British government's new controversial approach to dissuade irregular migrants from crossing the English Channel, as well as to criticize the Biden administration's intention of lifting its own pandemic-related entry ban at the Mexico border.

Just as no government claims that tax evasion can be completely stopped through tough law enforcement, no government is claiming that irregular migration will stop with the adoption of greater border control measures. The issue is rather about risk mitigation and not making illegal entry so easy that it becomes almost an invitation for potential migrants to travel to Canada's borders in order to access the country's lengthy and generous refugee status determination procedure.

However, an ideological dimension has dominated both sides of the debate. For the Trudeau government, it has become symbolically important to avoid the appearance of militarizing the border. The various US responses to the plight of desperate migrants on the Mexican border over recent years have understandably antagonized anyone with liberal views regarding migration.

It is nevertheless dangerous to suggest to Canadians that their country's land borders cannot be controlled: while the entry of desperate irregular migrants involves a morally complicated problem, public anxiety about gun and drug smuggling is clear.

Despite Prime Minister Trudeau's unhelpful attempts at explaining government policy and available options at Roxham Road, Canadians have an interest in rejecting superficial image-based approaches to refugee policy in a post-pandemic context that will see increased international mobility. The government could improve public trust by eliminating the incoherence in the way refugee claims are handled at Roxham Road, while also being more precise and upfront about its actual position. It is time our leaders' role in elevating the public discourse overrides the fondness for political marketing.

About the author

Michael Barutciski is an associate professor at York University's Glendon College. Prior to joining Glendon, he directed the diplomacy programme at the University of Canterbury (New Zealand) and was a fellow in law at Oxford University's Refugee Studies Centre. Upon his return to Canada, he chaired the Department of Multidisciplinary Studies at Glendon and helped create the Glendon School of Public and International Affairs, where he served for several years as director of graduate studies. He has conducted research in conflict zones and refugee camps in Europe, Africa and Asia. He holds a doctorate in law from the University of Paris (Panthéon-Assas).



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