Removing the Devils in the Details: Comments on Bill C-11

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SUMMARY

Bill C-11 is a good first step in developing a refugee claim system that is both fast and fair. The bill does have flaws however. If passed in its present form, it could have disastrous results for some refugees and ultimately for Canada.

Hasty Decisions - The foundation of Canada's refugee system is a well-resourced and sound first decision by an independent decision-maker. However, the unreasonable time limits for the interview and first hearing proposed by government will effectively deny legal counsel to claimants and lead to either hasty and poor decisions or to an excessive number of wasteful and time-consuming adjournments.

Quality and Independence of Decision Makers - The legislation proposes that the first decision will be made by a public servant reporting to the IRB. To ensure the quality and independence of the decision-maker, the legislation should specify that the IRB must consider hiring from outside the Public Service.

The Safe Country of Origin (SCO) list - This is justifiably one of the most controversial provisions in the Bill. Claimants on the SCO list will still receive a full hearing of their claim but will be denied access to an appeal before the Refugee Appeal Division of the Board. The government's stated purpose for the SCO list is to prevent sudden and significant flows of manifestly unfounded claims from overwhelming the asylum system. To ensure it meets these objectives without compromising the safety of legitimate refugees, the legislation should specify that the Minister can only designate a country on the recommendation of an Advisory Committee, and this Advisory Committee should include external members with human rights expertise.

The one-year ban on H&C - It will only be after receiving legal advice that some refugee claimants will be aware that their more appropriate action is an application for permanent residence on humanitarian and compassionate grounds ("H&C application"). Yet, there is no provision in the legislation that allows claimants to withdraw their claim and make an H&C application

This document explores these issues in further detail and provides concrete recommendations.

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Introduction

Bill C-11 is a good first step in developing a refugee claim system that is both fast and fair. The Bill preserves the foundation of the Canadian system which is a full and fair hearing for every eligible refugee claimant. It also includes an appeal of first-level decisions, something which the current system lacks. The Bill eliminates most of the wasteful and ineffectual administrative steps in the removal process that have caused much of the delay in the current system. The Bill includes a smart and underrated element, an Assisted Voluntary Returns Program, which is an effective means of promoting fast and inexpensive departures from Canada by failed refugee claimants. Finally, the government has committed $540 million to the reform package which is an indication that it is serious about implementing effective reforms.

The Bill does have flaws, however. If passed in its present form, it could have disastrous results for some refugees and ultimately for Canada if the refugee claim system bogs down on badly decided cases. In proposing improvements, it is necessary to discuss the government's entire refugee reform package. Bill C-11 is a framework legislation; many of the important details on how the refugee claim system will operate will be found in the regulations, in the rules of the Immigration and Refugee Board and even in the funding package which the government announced along with the bill. Parliamentarians should be informed of the basic elements of the entire package and have a reasonable understanding of how the system will actually work when implemented, in order to pass the bill with confidence.

For the new refugee claim system to be truly fast and fair, the following improvements are required:

1. **More time must be given for the effective legal representation of refugee claimants**
2. **The Safe Country of Origin list must be scrapped or amended**
3. **The hiring process for Public Service decision-makers must be carefully defined**
4. **The one-year bar against humanitarian relief for refused claimants requires amendments.**

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1. A reliable first decision by the Refugee Protection Division

Issue: There are three separate and related issues that can potentially contribute to or detract from a reliable first level decision. This reform proposal has maintained the foundation of the Canadian refugee claim system which is a well-resourced and sound first decision by an independent decision-maker. However the unreasonable time limits and the denial of an

effective role for the claimant's legal representative will lead either to hasty and poor decisions or to an excessive number of wasteful and time-consuming adjournments. The three inter-related issues are:

- the eight-day time limit for the first IRB interview
- the 60-day hearing date
- No provision to ensure effective legal representation

1) The eight-day interview

Recommendation:

A. Allow 30 days for the triage interview.

Bill C-11, S. 11(2) requires the claimant to attend an interview at the Immigration and Refugee Board (IRB). The idea of an interview rather than the detailed and confusing Personal Information Form is a positive one. The time period is not in the legislation, it will be set out in the IRB rules. The government intends the interview to take place in eight days. There is a right to counsel but the short time frame will not allow claimants to obtain legal aid and retain an available lawyer in time for the lawyer to attend the interview. Even the IRB will have trouble meeting the eight day requirement.

The difference of 20 additional days is not critical to the overall claim processing time. Thirty days will allow the majority of claimants to meet with a lawyer who will be able to advise them about their claim and possibly attend the interview. They will also be able to address special issues such as unaccompanied minors or vulnerable claimants incapable of testifying effectively.

2)The 60 day hearing date

Recommendation:

A. Set hearing dates for 90 days from the date of the interview.

The proposal of 60 days is not sufficient for the claimant to obtain legal aid approval, locate and retain counsel, have counsel analyze the claim and most importantly, obtain the relevant and necessary evidence to complete the hearing in one sitting.

The overall time period to ensure adequate time for effective legal representation is four months (120 days). If the triage interview takes places after 30 days, the hearing date should be set 90 days after that.

3) No provisions to ensure effective legal representation

Recommendation:

A. Amend s. 23 of the bill to state that a claimant may only be represented by a barrister or solicitor.

B. Make a firm commitment to provide federal funding for legal aid representation of all claimants.

The bill in its present form grants claimants a right to counsel and allows anyone to serve as counsel. However, it then seriously limits a meaningful role for legal counsel. It forecloses a genuine opportunity to attend the triage interview; it does not allow adequate time to schedule and prepare for hearings. I have already addressed the time limit issues but there needs to be a serious consideration of the role of legal counsel.

Many refugees don't understand the law or tell their stories easily. Good lawyers take the time and use the trust relationship of counsel to probe the details of the story, particularly for vulnerable claimants; they develop a legal analysis of the claim and then gather the pertinent evidence to prove it. The timely gathering of key evidence before the hearing takes place is their most important contribution. Without competent legal representation, a significant number of cases will be incorrectly decided or will take much longer to decide with a greater number of adjournments. The basic rule is that good lawyers facilitate a claim, delivering pertinent evidence and relevant narrative information to the IRB before the hearing of the claim. Poor lawyers and consultants obstruct claims: they don't get the whole story, they sometimes encourage false testimony, they don't develop a clear legal analysis, they don't deliver the relevant evidence and they play no helpful role at the hearing.

The current quality of legal representation before the IRB is not encouraging. There are probably as many poor legal representatives as there are competent ones. Neither lawyers nor consultants are adequately regulated by their professional organizations. Some progress has been made by the IRB in excluding unregistered consultants from the hearing room but ghost consultants continue to provide abysmal legal representation.

The solution is not to restrict the role of counsel as the proposal does. The time restrictions don't limit bad legal representation - only good representation that requires time and effort. A secondary and unintended consequence may be that the very short time line for the triage interview may drive claimants into the arms of unscrupulous consultants who are closer to the claimant's ethnic community and will be immediately available without an application for legal aid approval.

Along with amending the time lines, s. 23 of the bill should be amended to state that a claimant may only be represented by a barrister, solicitor or notaire. The only way to eliminate the great number of bad representatives is to deny them access to the hearing room as the formal legal representative. There will still be consultants who attempt to attend as friends or advisors of unrepresented claimants but they will be denied any pretence of being recognized as a formal legal representative.

If consultants are eliminated from the hearing room, then legal aid funding must be available for legal representation. To date, five provinces have occasionally provided legal aid funding for refugee claims although much of it has been partial or inadequate. The government must commit a portion of the 540 million dollar funding package to legal aid. Massive funding has been provided for adjudication and removals and nothing for legal representation. It reflects a fundamental imbalance in financial support of a fair and efficient refugee claim system.

Legal aid certificates to private lawyers have only been partially effective. Law societies have not done their job of regulating inadequate legal representation by private lawyers. Although legal aid funding is a matter for federal-provincial negotiation, provinces should be encouraged to fund refugee law clinics which are the most effective form of legal representation assuring a consistent standard of representation.

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2. Safe Country of Origin (SCO) List

Issue: This is one of the most controversial provisions in the bill. The controversy circles around the basic concept of a safe country when refugee claims are determined on an individual basis. Although a country may be generally safe for its citizens, one class or group of citizens may still have a well-founded fear of persecution. In addition, critics are distrustful when much of the substance of the SCO list mechanism will be in the regulations and Minister Kenney has been vague about what countries may be on the list, particularly with regards to countries such as Mexico, the Czech Republic and Hungary.

The government's stated purpose for the SCO list is to prevent sudden and significant flows of manifestly unfounded claims from overwhelming the asylum system. Claimants on the SCO list will receive a full hearing of their claim but will be denied access to an appeal before the Refugee Appeal Division of the Board. They will be able to seek judicial review before the Federal Court which is the limited appeal available to refused claimants under the current system.

One solution is to simply scrap the SCO list. It can be argued that manifestly unfounded claims can still be removed within 18 months and that is sufficient to deter large flows of fraudulent claims. However, the government is very reluctant to do that. If the list is going to be retained, the provisions of the bill and the regulations must ensure that "safe" means safe. The result would be a very limited number of countries that were both high volume source countries and were truly safe.

Recommendations:

A) Establish clear criteria for determining a country as safe in the regulation. Those criteria should include:

1) Record of human rights violations

2) Capacity of the government to protect its citizens

3) Acceptance rate for claims from the country in the past six months

4) A significant number of claims from the designated country (5% of the annual claim flow)

B) The Minister may only make a designation upon receiving a recommendation from the Advisory Committee. This provision, since it limits the authority of the Minister, should be contained in Bill C-11 and not in the regulations.

C) Grant the Advisory Committee the authority to recommend the suspension of a designation when there is a change of circumstances in the designated country. As well, add a sunset clause whereby the designation for any country is automatically terminated after two years unless the Advisory Committee recommends that the designation be extended for an additional two years.

D) Members of the Advisory Committee should include 2 members external to the government who are recognized experts in human rights law.

E) Delete the sub-section of S. 12 of the bill, namely s.109.1 (3) (b) that states:

F) Include "safe" in S. 12 of the bill as in "designated safe countries of origin"

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3) Acceptance rate for claims from the country in the past six months

4) A significant number of claims from the designated country (5% of the annual claim flow)

The first three criteria will be used to ensure that the country is indeed safe. The fourth criterion is a claim management tool but is included in the list of criteria to limit the use of the SCO list to a modest number of countries where there is a potentially serious abuse of the asylum system by a significant flow of manifestly unfounded claims. The occasional flagrant case from countries like Germany or South Africa would not be affected by the SCO list provision.

B) The Minister may only make a designation upon receiving a recommendation from the Advisory Committee. **This provision, since it limits the authority of the Minister, should be contained in Bill C-11 and not in the regulations.**

S. 12 of the Bill should be amended to stipulate that the minister may only designate a country upon receiving a recommendation from an Advisory Committee which will be established through regulation. This provision introduces a modest balance against arbitrary designations by a minister. It also shields the minister from direct submissions in regard to the SCO list.

C) Grant the Advisory Committee the authority to recommend the suspension of a designation when there is a change of circumstances in the designated country. As well, add a sunset clause whereby the designation for any country is automatically terminated after two years unless the Advisory Committee recommends that the designation be extended for an additional two years.

The designation is based on the frequency of human rights violations in a particular country and the capacity of the government to protect its citizens. Such human rights circumstances are subject to change. The committee should have the responsibility of monitoring events in designated countries. Where the Committee finds that a country is no longer safe, it would have the authority to recommend suspension of the designation. The Minister would retain the power to act upon the recommendation or not. This provision should be contained in the Bill, not the regulations.

To avoid the accumulation of countries on the SCO list that no longer meet the criteria of the original recommendation, the designation would automatically terminate after two years unless the Committee recommended extension of the designation and the Minister renewed the designation.

D) Members of the Advisory Committee should include two members external to the government who are recognized experts in human rights law.

The government has indicated that membership on the Advisory Committee would include only CIC officials and a representative of the UNHCR. The regulations should stipulate that the Committee must include two external members with human rights expertise who are not government officials.

The UNHCR must often seek various forms of funding or other assistance in regard to international projects. Canada has been one of the most generous supporters of UNHCR and that is why the UNHCR should not be the sole voice of independence on the Advisory Committee.

E) Delete the sub-section of S. 12 of the bill, namely s.109.1 (3) (b) that states:

3) Neither the person who is the subject of a decision of the Refugee Protection Division nor the Minister may appeal against that decision to the Refugee Appeal Division if the person

(b) is a national of a country of which a part was, on the day on which the decision was made, a part designated under subsection (1) and the person lived in that part before they left the country

Although particular non-risk groups may be definable within a country (for example non-Roma in the Czech Republic or men in certain countries where women may be at risk of domestic violence), defining risk groups by geography is particularly problematic and unnecessarily specific. The fundamental logic of the 1951 Convention refugee definition is the responsibility of the home state to provide protection throughout the country and the obligation of the refugee to seek it. This provision is unwieldy and unnecessary.

F) Include "safe" in S. 12 of the bill as in "designated safe countries of origin"

Only safe countries will be designated. There will be no designated countries that are not safe. Inclusion of the word in the bill will reassure critics. The omission of words in laws often gives rise to unexpected interpretations by judges. There is no good reason for not including it.

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3. The appointment of Public Service decision-makers

Issue: The appointment of Public Service decision-makers significantly changes the institutional relationship between the decision-maker and the IRB. It offers the possibility of a superior corps of decision-makers instead of short-term Governor-in-Council appointees. It also contains some dangers in regard to the loss of individual member independence as well as the effective management of long-term employees. The Bill is particularly vague on this point, simply stating

that members of the Refugee Protection Division (RPD) will be appointed in accordance with the *Public Service Employment Act* **(S.*26)***.

Recommendations:

A) Ensure an open hiring process that allows candidates from outside of the Public Service an equal opportunity to compete for decision-maker positions.

B) It should be stipulated either in the bill or in the regulations that the IRB has both the authority and the obligation to include candidates from outside of the Public Service in the appointment process.

One advantage of the public service model is that merit is the sole criteria for hiring. The IRB has significant experience at defining the competencies of an RPD decision-maker. Given the salary range of approximately $100,000, there will be an abundant field of candidates both within and outside of the Public Service. This is an exceptional opportunity to hire the best talent available. It is an opportunity to lay the foundation for an excellent corps of decision-makers. This opportunity will be squandered if the field of candidates is limited to the IRB or even to the Public Service. This is particularly the case since, once hired, the possibilities for turn over within the decision-maker corps will be very limited (see below).

A second reason for ensuring an open hiring process is the issue of institutional bias. Experienced CIC officials and CBSA officials should of course be candidates for the RPD decision-maker position but it should be candidly acknowledged that some departmental officials have developed views about refugees or refugees from particular countries. Bias is a personal challenge for all quasi-judicial decision-makers and for their institution. It is fundamentally unhealthy to be hiring all decision-makers from a limited sector of the professional field that has experience with immigrants and refugees. It would be equally inappropriate to be hiring primarily immigration lawyers or refugee settlement workers.

Government departments function differently from quasi-judicial institutions. They make administrative decisions based on policy. Public servants are trained to function according to policies and procedures that can be altered by ministerial direction. RPD decision-makers are independent, deciding claims based on the law and the facts in the individual case. Refugee claim decisions are not based on policy. Many public servants will easily assume this new role but others will not. It is again an argument for ensuring that the candidate field is as large as possible from a variety of professional backgrounds.

The Chairperson of the Board retains the power to manage RPD decision-makers but that authority will now be limited by the requirements of the *Public Service Employment Act.* The job classification for the RPD decision-maker will be at the top of their public service category. Apart from a few who may qualify for executive level positions, many decision-makers will be at the highest level of their Public Service careers. It must be candidly stated that while the Public Service has focused on merit-based hiring processes, it has not done a good job of managing discipline and dismissal procedures for inadequate employees. The strength of having a long-term corps of experienced decision-makers contains the weakness of not being able to remove inadequate decision-makers. The traditional remedy of transferring a problem employee to another government department will be difficult for decision-makers with such a high job classification. That will ultimately be the challenge of IRB management but it is another important reason for ensuring an open and a well-conceived hiring process that will hire the best available candidates in the beginning.

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4. The one-year bar on post-claim applications by refused claimants.

Recommendations:

A) Amend S. 4(1) of the bill to allow refugee claimants to make an application for permanent residence if they withdraw their refugee claim prior to their hearing at the Immigration and Refugee Board

B) Delete the sub-section of S. 4 (1) that restricts the power of the Minister to consider evidence related to persecution when deciding H&C applications for permanent residence.

(C) Recommendation: Add a provision in the Bill that allows a refused claimant to apply to the Refugee Appeal Division (RAD) to re-open the file within the one year period of the bar when there is new evidence that could reasonably lead to a reversal of the original decision.

A) Amend S. 4(1) of the bill to allow refugee claimants to make an application for permanent residence if they withdraw their refugee claim prior to their hearing at the Immigration and Refugee Board

S. 4 (1) of the bill prevents refugee claimants from making an application for permanent residence on humanitarian and compassionate grounds ("H&C application") unless one year has elapsed since being refused refugee status. See specifically under S. 4, the amendment to S. 25 (1.2) of IRPA.

After making their refugee claim and then receiving legal advice, some claimants will realize that their refugee claim is not well founded but they would have grounds for remaining in Canada for humanitarian and compassionate reasons. It is easier, faster and cheaper to decide an H&C application and for some claimants, it is the appropriate remedy. If claimants withdraw their claim before their first hearing, they should be permitted to make an application for permanent residence with the assurance that the application will be decided promptly, prior to any attempt to remove the person from Canada.

If the government is going to sustain the bar against making an H&C application *after* a refused refugee claim, it should make H&C a viable option *prior* to hearing the refugee claim.

B) Delete the sub-section of S. 4 (1) that restricts the power of the Minister to consider evidence related to persecution when deciding H&C applications for permanent residence.

In **S. 4** of the bill, the amendment, 25 (1.3), states that the Minister, when considering an H&C application, may not consider "factors" taken into account when deciding refugee claims under S. 96 or S. 97. This is an unnecessary provision that may have the effect of eliminating relevant evidence about a person's fear of harm when deciding an application for permanent residence on humanitarian grounds.

This provision seeks to make an artificial distinction between personal harm that is relevant to a refugee claim and harm relevant to a humanitarian application for permanent residence. Often, they are the same harm that may or may not meet the definition of a refugee. For example, someone may have suffered physically abusive treatment, property damage, loss of employment, physical disability and other forms of harm that may or may not be characterized as persecution under the Refugee definition. Those forms of harm would be relevant to a consideration of humanitarian reasons for granting permanent residence.

The Bill requires that a person proceed solely by one of two routes, either a claim for protection under s. 96 or s. 97 or by way of an application for permanent residence based on humanitarian reasons. Concurrent applications are not permitted. If a person chooses to apply for permanent residence based on humanitarian reasons, there is no need to restrict the evidence that may support the application. It will be appropriately assessed on humanitarian factors rather than according to the s. 96 and s. 97 definitions. Humanitarian and compassionate applications are assessed on all of the circumstances of an individual applicant and it would be quite unfair to restrict the application to only minor forms of harm. It would also be a major disincentive for a person to apply for H&C if they could not include all of their reasons for seeking to remain in Canada.

(C) Add a provision in the Bill that allows a refused claimant to apply to the Refugee Appeal Division (RAD) to re-open the file within the one year period of the bar when there is new evidence that could reasonably lead to a reversal of the original decision.

The purpose of the one year bar is to allow for the prompt removal of refused claimants without continual recourse to additional litigation to impede the removal process. It is a reasonable goal if the claimant has already received a sound first decision that was reliably reviewed by the Refugee Appeal Division. However there is still the matter of changed circumstances within the one year period.

S. 15 (2) of the bill gives the Minister the power to rectify the general situation when a change of circumstances occurs in an entire country, for example, a military coup. The Minister may exempt the country from the one year bar. No comparable allowance has been made for a serious change of circumstances for an individual. The Minister retains a general power to make a humanitarian exception under **S. 5** of the Bill, but that power is exercised on the Minister's own initiative, and there is no available procedure to request a humanitarian exception. The application for re-opening to the RAD would be intended solely for a significant change of individual circumstances *since* the final refusal of the refugee claim, for example, where other family members had been killed. It would serve as a last hope clause *solely* where there is new evidence that the fear of persecution is now well founded.

This proposal seeks to strike a balance between the legitimate need to bring the refugee claim process to a point of finality and the humanitarian imperative not to return someone to persecution. The re-opening is not another level of appeal. Claimants have already received a full hearing, an appeal (except for SCO list claimants) and a judicial review to the Federal Court. Where the RAD concludes that the evidence is not new or relevant, it may dismiss the application summarily without reasons. If the RAD concludes that the evidence is new and relevant, it could re-open the claim, give notice to the Minister and reconsider whether the person is, in light of the new evidence, a refugee or a person in need of protection. If the RAD does re-open the claim, it would then be obliged to give reasons for its decision whether positive or negative.

The government will understandably be concerned about an excess of applications to re-open that could delay the removal process, drain the resources of the RAD and lead to another round of applications to the Federal Court for judicial review. However the process could be stringently controlled by a strict standard for new and relevant evidence. The very great majority of the applications would result in a summary dismissal of the application. The legislation should stipulate that the re-opening procedure is intended solely for exceptional cases of compelling new evidence and judicial review is not available. Without the assurance of an effective privative clause, the re-opening provision would not be successful and could force a fourth round of delay before removal.