The Battle for the Wrong Mistake: Risk Salience in Canadian Refugee Status Decision-making

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Canadian refugee status adjudicators must choose between two opposing bodies of law, one of which resolves doubt in the claimant’s favour and the other at the claimant’s expense. How do they decide which to prefer? How do they decide whether it would be better to risk accepting an unfounded claim or to risk rejecting a well-founded one? This paper explores one potentially relevant factor: the salience of the harms that decision-makers associate with potential risk outcomes. A brief account of recent events in Canadian refugee law history, beginning with the refugee law reforms of former Conservative Immigration Minister Jason Kenney, shows how risk salience can be manipulated. For each refugee claim to be heard on its own merits, the law cannot leave adjudicators to decide for themselves which kind of error to prefer. It must recognize that sending a refugee home to persecution is the wrong mistake.


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To make findings of fact in any legal domain, decision-makers must turn their doubts into certainty. They must decide by the end of the fact-finding process which of the relevant allegations to accept and which to reject. To do this, they must resolve all relevant doubts, either in favour of accepting a given allegation or in favour of rejecting it. But which way should they err? Should they more readily run the risk of accepting a false allegation or of rejecting a true one? Which of these two potential mistakes would be worse?

Burdens of proof, standards of proof and presumptions are the law’s tools for managing this process, for controlling whether and to what extent an allegation should “pay the price” for the decision-maker’s doubts. If every decision-maker could decide for herself how she would prefer to resolve her uncertainty—and could change her preference in any case, for any reason—decisions would be arbitrary and unjust. The law’s fact-finding structures therefore have one job: they work together to try to constrain decision-makers to follow the law’s error preference rather than their own.

Blackstone’s Maxim is one of the common law’s most famous notions: “It is better that ten guilty persons escape, than that one innocent suffer.” The criminal law’s strong theoretical preference for erring in favour of the accused is why its fact-finding structures work as they do. The prosecution bears the burden of proof; the standard of proof is very high, proof of guilt “beyond a reasonable doubt”; and many presumptions favour the accused


2. As Kaplan explains, while the law’s preference for erring on the side of the accused is a “fundamental tenet” of the criminal law, the accused’s reputation and the nature of the crime (in particular, whether it is one with a high likelihood of recidivism) are factors that might reasonably inflate the jury’s perception of the harm of a false acquittal. Since these are eminently rational considerations, the problem that the law faces in trying to ensure that all cases are decided according to the same set of decision-making principles—“one of the basic dilemmas of our criminal system”—is in essence how to stop jurors from reasoning rationally. Kaplan, ibid at 1074-1077.

and few favour the prosecution. While the criminal justice system may in fact treat any number of accused very badly, and while the law’s fact-finding structures may not constrain its judges and juries in practice, at the level of its legal theory, the criminal law resolves doubt firmly in favour of the accused.

As I have argued elsewhere, Canadian refugee law, in sharp contrast, leaves its decision-makers—the members of the Refugee Protection Division of the Immigration and Refugee Board—entirely free to resolve their doubts in accordance with their own preferences. This is because our Federal Court, which develops Canadian refugee law in its judgments on review of the Board’s decisions, is itself profoundly split about which kind of mistake Board members ought to prefer: should they more readily risk granting a refugee claim that should have been denied or denying a claim that should have been granted? As a result, the Court interprets refugee law’s fact-finding structures differently in two opposing bodies of law, one of which resolves doubt in the claimant’s favour and the other at the claimant’s expense. A Board member can choose which of these bodies of law she prefers to apply—and can change her preference in any case, for any reason. In a refugee hearing, a context characterized by “radical uncertainty” where doubt lurks around every corner, the ability to tip the balance in either direction will often allow members to reach either conclusion on the same evidence. I have argued that this may help to explain the “vast disparities” in the Board members’ acceptance rates.

How, then, do Board members decide which kind of mistake to prefer? This paper looks at one potentially relevant factor. As discussed below,

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4. See Evans Cameron, supra note 1.
6. Evans Cameron, supra note 1.
8. Sean Rehaag, “2017 Refugee Claim Data and IRB Member Recognition Rates” Canadian Council for Refugees (26 March 2018), online: <http://ccrweb.ca/en/2017-refugee-claim-data>. As Rehaag notes, while grant rates can of course be expected to vary as a function of the claimant’s country of origin, “substantial differences” persist when this factor is taken into account. This level of disparity observed in 2017 “is consistent with similar findings from prior years for Canada’s previous and new refugee determination systems.” See also Sean Rehaag, “Troubling Patterns in Canadian Refugee Adjudication” (2008) 39:2 Ottawa L Rev 335.
error preference judgments are affected by the salience of the harms that decision-makers associate with potential outcomes. ‘Salience’ captures the idea that for any decision-maker some types of harm will resonate more strongly than others: some kinds of harms will capture their imagination, will “strike them more forcefully,” will “stand out.” To illustrate this idea, and its relevance to what I have called “refugee law’s fact-finding crisis,” this paper will give a brief account of some recent events in Canadian refugee law history, beginning with the refugee law reforms of former Conservative Immigration Minister Jason Kenney.

The battle for the wrong mistake in refugee status determination
As Minister Jason Kenney went about overhauling the country’s refugee determination system in the early 2010s, he claimed time and again that change was needed because Board members were too often making one kind of mistake: giving refugee protection to those who did not need it. Although Kenney proudly maintained that the Canadian system was head and shoulders above the rest—“the model system in the world for refugee protection”—when our Board recognized more refugees in other countries, this did not suggest to Kenney that this ‘model’ system was working, catching those who elsewhere were slipping through the cracks. It rather implied, on its face, “a fairly significant degree of abuse.” The Board’s surplus positive decisions were not merely exceptional, in other words, they were mistakes. And Kenney had complained for years that these mistakes were coming at too high a price. Among other things, the Board’s “incredibly high acceptance rate for refugee claimants” was making Canada “the laughingstock of the world.”

Yet two potential mistakes hang in the balance in a refugee hearing. The Board might mistakenly grant refugee protection, or it might

10. Evans Cameron, supra note 1.
12. House of Commons, Standing Committee on Citizenship and Immigration, Evidence, 40-2, No 37 (1 December 2009) at 0955 (Hon Jason Kenney).
13. Canada, Parliament, House of Commons (Hansard) 37th Parl, 1st Sess, No 8- (18 September 2011) at 1300 (quoting with approval a comment from an immigration lawyer, Sergio Karas, cited in the National Post, during the debates by Hon Jason Kenney).
mistakenly deny it. “As every elementary handbook of statistics will tell you,” reducing the likelihood of one of these errors means increasing the likelihood of the other kind. Reforming the refugee system so that it generates fewer mistaken grants, then, means accepting that it will generate more mistaken rejections.

To convince Canadians that this trade-off was desirable, Kenney had to decrease their concern with the possibility of rejecting genuine claims, or else make the possibility of accepting unfounded claims so worrying that it would eclipse the fact that his changes would send more people back to persecution (as noted at the time by the UN Committee Against Torture, among others). In the language of cognitive psychology, he had to manipulate the salience of these two associated risks. Throughout his campaign to win over Canadians’ error preference, Kenney used classic rhetorical techniques to turn the knobs: to make one type of harm more salient at the expense of the other.

Researchers have long observed that one of the reasons why “salience seems to have a profound impact on decisional preference” is because decision-makers tend to “overemphasize the information their minds focus on.” In deciding which of two risky options to prefer, a decision-maker may simply be struck by one worst-case scenario and “neglect” the other. By “selectively emphasizing” one type of harm, researchers are able to frame a problem so as to increase the salience of that harm, thereby manipulating their subjects’ perception of which potential worst-case outcome is preferable. To this end, sheer repetition is a powerful

18. Ibid at 1245. For a review see Sunstein 2007, supra note 16, Chapter 1; Sunstein 2005, supra note 16 at 45-49, 89-91, 208-209.
19. Van Schie & Van der Pligt, supra note 9 at 271.
tool. The more often we hear a statement, the more familiar it feels and the more it starts to ring true.\(^\text{20}\)

In the lead-up to the legislative changes, Kenney highlighted the purported harms of mistaken grants at every opportunity, using “such inflammatory language that it has changed the terms of the national debate.”\(^\text{21}\) As he repeated at every turn, our system was staggering beneath the weight of a “massive surge” of cheats and liars:\(^\text{22}\) these “lawbreakers and queue-jumpers”\(^\text{23}\) were arriving in droves to “violate our fair rules,”\(^\text{24}\) “game our system and abuse our generosity.”\(^\text{25}\) They were costing Canada financially, “asking where they can get their welfare cheque” upon arrival at the airport.\(^\text{26}\) They were costing us politically by forcing us to impose visas on friendly countries,\(^\text{27}\) causing a “diplomatic row”\(^\text{28}\) that was hurting Canada’s image.\(^\text{29}\) The fact that people could come to Canada and make a refugee claim inland, rather than “patiently waiting in the queue”\(^\text{30}\) to immigrate, was “an insult to the millions of people who aspire to come

\(^{20}\) “A reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth.” Daniel Kahneman, Thinking Fast and Slow (New York: Farrar, Straus & Giroux, 2011) 62.

\(^{21}\) Marci McDonald, “And you think Harper is Right Wing: The ascent of Jason Kenney,” The Walrus (May 2014) 27. As one reporter noted, for example, in describing on an open letter that Kenney wrote to Amnesty International in response to the organization’s criticisms of his ministry, “The tone of Mr. Kenney’s letter...feels personal. It reads like the kind of letter we sometimes write when we feel wronged, but then delete before sending. The tone makes sense only if Mr. Kenney recently broke up with Amnesty International.” Tabatha Southey, “Look out, Unicef. Next Jason Kenney might be gunning for you,” The Globe and Mail (12 August 2011).

\(^{22}\) Cited in Jaroslav v Canada (Minister of Citizenship and Immigration) 2011 FC 634 at para 44, 390 FTR 248.

\(^{23}\) Cited in Nicholas Köhler, “A crackdown on queue-jumpers: Will the Tories make bogus refugee claims an election issue?,” Maclean’s (3 August 2009) 19.

\(^{24}\) Cited in McDonald, supra note 21 at 35.


\(^{27}\) See Kenney’s comments quoted in Cervenakova v Canada (Minister of Citizenship and Immigration) 2010 FC 1281 at para 46, 381 FTR 74 [Cervenakova]. See also Prime Minister Stephen Harper’s comments, cited in Campbell Clark, “Ottawa announces deal to fast-track Mexican refugees,” The Globe and Mail (14 February 2013) (“On a visit to Mexico in 2009, Mr. Harper even told the Mexicans the visa restrictions were not their fault, but Canada’s. ‘This is a problem in Canadian refugee law which encourages bogus claims,’ he said.”); Köhler, supra note 23.

\(^{28}\) Cited in Cervenakova, ibid at para 46.

\(^{29}\) See discussion in Köhler, supra note 23; Carl Meyer, “Where’s the beef? Sizing up Canada-Mexico relations,” Embassy (26 May 2010).

\(^{30}\) Cited in Köhler, supra note 23. See also Hon Jason Kenney (Address delivered at the Faculty of Law, University of Western Ontario, 11 February 2011), Immigration, Refugees and Citizenship Canada: Newsroom Archives: Speeches for 2011, online: <http://www.cic.gc.ca/english/department/media/speeches/2011/2011-02-11.asp> [“Speech at Western”].
to Canada legally,”\(^{31}\) and was also jeopardizing their warm welcome: “when Canadians don’t think the government can control its own borders, public support for generous levels of immigration drops significantly.”\(^{32}\) It was likewise “an insult to the important concept of refugee protection”\(^{33}\) and kept us from doing more to help genuine refugees, who in Kenney’s esteem were not those who arrive “illegally…on dangerous vessels across the oceans,”\(^{34}\) but rather those “living in UN refugee camps by the millions.”\(^{35}\) Moreover, our security was compromised. We had become an obvious destination for “any serious criminal, any terrorist, any dictator” with a fake passport.\(^{36}\) And, of course, handing out refugee status to cheats and liars was rewarding their deception and allowing them to “play this country for fools.”\(^{37}\)

Emphasizing the price that Canada is paying to protect refugees not only increases our concern with mistaken grants, it also decreases the salience of the risk of sending them back to persecution. Drawing attention to the costs inherent in reducing a risk—bringing these costs “on-screen”\(^{38}\)—is an effective way of decreasing its salience. In one study, for example, parents were very worried about the asbestos in their children’s schools and demanded that it be removed, even though experts assured them that it posed only a minimal risk. Once it became clear that removing the asbestos would cause the schools to be closed for weeks, however, “parental attitudes turned right around” and asbestos no longer seemed very dangerous.\(^{39}\) Such studies have led Sunstein to predict, for example, “that if people were informed that eliminating pesticides would lead to

\(^{31}\) Cited in Kühler, supra note 23. See also “Speech at Western,” ibid.

\(^{32}\) “Speech at Western,” ibid.

\(^{33}\) Cited in Cervenakova, supra note 27 at para 46.

\(^{34}\) “Speech at Western,” supra note 30.

\(^{35}\) Cited in Cervenakova, supra note 27 at para 46. See also discussion in McDonald, supra note 21 at 38. On Kenney’s analysis, when a claimant comes to Canada without authorization “rather than applying for refugee status at a United Nations High Commissioner for Refugees office abroad,” even if her claim is genuine, not only is she diverting resources that could be put to better use resettling refugees from abroad, but “the integrity of our immigration system is compromised, it undermines the entire immigration process, and it undermines the confidence and respect for that process that we require amongst all of those law-abiding immigrants.” “Speech at Western,” supra note 30. For discussion and critique of this argument see Andy Lamey, Frontier Justice: The Global Refugee Crisis and What to Do About It (Toronto: Anchor Canada, 2013) 243-247.

\(^{36}\) “Speech at Western,” supra note 30.

\(^{37}\) House of Commons, Standing Committee on Citizenship and Immigration, Evidence, 40-3, No 12 (4 May 2010) at 1540 (quoting with approval from an editorial in The Globe and Mail, in comments to the committee by Hon Jason Kenney). See also House of Commons, Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, Evidence, 41-1, Issue 20 (18 June 2012) (Hon Jason Kenney): “I do not like us being taken for suckers.”

\(^{38}\) See discussion in Sunstein 2005, supra note 16 at 47-49.

\(^{39}\) Ibid at 47-48.
a significant cost in the price of apples and oranges, the perceived risk would go down.”40

In addition, Kenney sought to decrease concern about mistaken denials by creating the impression of a high base rate of fraudulent claims. No one knows what percentage of refugee claimants lie to the Board, including Kenney himself. As his then Director General recently admitted, “We never really had quantifiable information on how much fraud there was.”41 But if most claimants are frauds, then mistaken grants are unlikely. This suggestion may not have much effect on those for whom this kind of harm is already very worrying—when a risk is salient, “degrees of unlikeliness seem to provide no comfort”42—but it will have an evident effect on those who judge its cost, instead, based on some sense of its magnitude and its likelihood.43 Moreover, rhetoric that works to create the impression of a high base rate of fraudulent claims can become a self-fulfilling prophecy. If members themselves can be made to believe that most claimants are liars, then since they will be more likely to view claimants with suspicion, they will be more likely to conclude that they are lying: “investigator bias” is the well-noted tendency of those looking for deception to find it where none exists.44 More negative decisions, in turn, only strengthen the appearance that many claimants are frauds.

Kenney used several effective methods of creating the impression of a high base rate of lying claimants. His rhetoric brought the ‘bogus’ refugee claimant squarely to the forefront of the popular imagination, and one of his most obvious rhetorical strategies was what psychologists call “imaging
the numerator". He illustrated his arguments with numerous concrete examples of actual lying claimants. Allowing us to picture a particular person is one of the most effective ways of increasing our impression that there are many more people like her. It is why advertisements for lotteries always show a photograph of the winner holding the cheque: so that we can “image” her, the numerator, and neglect the denominator, the millions of people who played and lost. And time and again, Kenney used a tactic that has become a prominent feature of the refugee protection debate worldwide, one that the Court has recently noted is “both unfair and inaccurate” and that reflects “a grossly simplistic understanding of the refugee process,” implying that any and all rejected claims must have been fraudulent.

In sum, Kenney made very astute use of rhetorical tools that influence how listeners perceive, assess and weigh competing risks to reduce popular concern with wrongly rejecting refugees and to raise the alarm about the costs of mistaken grants. Then, in December 2012, he “performed radical surgery” on Canada’s refugee determination system, bringing about “the most dramatic change since the Second World War.”

At around the same time, the refugee crisis sparked by the outbreak of civil war in Syria was intensifying across the Middle East and North


46. See, e.g., “Speech at Western,” supra note 30.

47. For discussion, see Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (London, UK: Pluto Press, 1996) at 20 (claimants who “fall outside the legal definition of refugee” are seen “increasingly...as ‘bogus’ or ‘fraudulent.’”).


49. *Ibid* at para 840. As the Court goes on to explain at para 842, “[r]efugee claims are often brought on the basis of real hardship and genuine suffering. Amongst those whose claims do not succeed will be individuals who may well have come to Canada because of a real fear of persecution in their country of origin, but who were unable to meet the strict legal requirements of the refugee definition.” See also Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) at 62 (“Some people will, of course, believe that they are entitled to refugee status and later find out that others do not agree with them. This is not an abuse of the asylum process, but a rational response to any number of difficult or desperate situations.”)

50. See, e.g., “Speech at Western,” supra note 30; comments cited in Cervenakova, supra note 27 at para 46.


52. McDonald, supra note 21.
Africa. In September 2015, the photograph of Alan Kurdi, a three-year-old Syrian boy who drowned attempting to reach safety, hit newspapers around the globe. This photograph has been widely credited with focusing the world’s attention, at least for a time, on the plight of refugees fleeing the region. It is generally accepted that this photograph helped to make Canada’s response to refugees a “defining issue” of the 2015 national election, which saw the election of a Prime Minister who ran on the promise to bring 25,000 Syrian refugees to Canada by the end of that year. It has also been suggested that this photograph had a “disproportionate effect” on public opinion here because it “hit close to home:” members of the Kurdi family had unsuccessfully applied to come to Canada. For a time, Alan Kurdi’s little face became the face of mistaken rejection.

Our ability to change the channel when confronted with human suffering is, of course, profound. But the following year brought a spectacle from which it was harder to turn away: the 2016 US election and all that followed. As pollsters must ever remind us, “Canadians aren’t as accepting as we think.” But ‘welcoming’ and ‘generous’ are key aspects of “the way many Canadians traditionally see themselves.” A new government website, which allowed us “to track the arrival of Syrian refugees in communities across the country, receive information on how they could help welcome the refugees, and view photos and stories of refugee resettlement,” bore the heading “Open Hearts and Welcoming Communities: It’s the Canadian Way.” Crucially, though, we see ourselves as warm and generous not just in absolute terms but in relative terms: we are a “welcoming land… unlike our neighbour to the south.”

in the US started to decline in 2015, and even under President Obama, polls showed that we “associate[d] few positive attributes with the U.S.” After President Trump was elected, with esteem for the US “plummeting” across the globe, Canada showed “the largest such decline of any country within the Western Hemisphere.” In the first months of 2017, as the US administration announced that it was temporarily barring the citizens of seven Muslim-majority countries, along with all refugees, from entering the country, our opinion of our neighbour’s human rights record reached its lowest level recorded to that point, and our Prime Minister famously assured refugees via tweet that “Canadians will welcome you.”

A risk’s salience may be affected by a decision-maker’s “self-categorization,” by how she conceives of her own identity in relation to it. Decision-makers’ risk judgments will reliably change in response to experimental manipulations that affect how they see themselves and their decision-making role. When reminded of their role as parents, for example, subjects perceived strangers to be more dangerous and trusted them less. When reminded of their own mortality, subjects were more inclined to support harsh measures to counter the risk of terrorism. Legal scholar and former Board member Audrey Macklin observed years ago that some members “conceive of their mandate in terms of fulfilling Canada’s human rights obligations under the Refugee Convention and Canadian law,” while others “understand themselves as gatekeepers, tasked with protecting Canada’s borders from unscrupulous and undeserving migrants who

60. Zilio, supra note 54.
64. See, e.g., Diederik A Staple, Stephen D Reicher & Russell Spears, “Social identity, availability and the perception of risk” (1994) 12:1 Social Cognition 1. See also Esses et al., supra note 54.
abuse the asylum system to gain entry.” Kenney’s rhetoric emphasized the latter identity. In the first months of 2017, looking south with mouths agape, more Board members may have been reminded of the former. And if affirming this identity was pleasing, if it brought with it a warm satisfied feeling—smugness, if you will—this would only have intensified its effect on risk salience. The more appealing a decision, the less we worry about its attendant risks. If preferring mistaken grants allowed members to identify themselves as Canadians—as a different and better kind of creature than their southern neighbours—they may more easily have looked past any harms that they associated with accepting unfounded claims.

When Board members now look south, however, they may well be struck by a different vision. Canada does not accept refugee claims at official ‘ports of entry’ along our southern border on the increasingly untenable premise that asylum seekers will get a fair hearing in the US. Those who enter Canada at unauthorized crossings, however, may make refugee claims at a government office inland. By August 2018, around 30,000 people had side-stepped our ports of entry in this way in order to make refugee claims.


69. See Teresa Wright, “Canada faces mounting pressure to end safe third country agreement with U.S.” CTV News (21 June 2018).

The images of masses of claimants crossing ‘illegally’ into Canada have caught and held the public’s attention. For a majority of Canadians, the fear that the country “is being invaded” has become powerfully salient; pollsters predict that it may in fact threaten the government’s chances of re-election. At least one Canadian commentator has called on the government “to build a wall.” Moreover, 40% of respondents to a recent poll, and nearly two-thirds of those who identify as Conservative, believe that these claimants are “mostly economic migrants” and not refugees. “The perception is that these people are illegal and that they’re violating Canada’s borders and that they’re just queue jumpers trying to get freebies on welfare.” In short, the sheer number of new arrivals, and the manner of their arrival, are greatly increasing popular concern with the purported harms of mistaken grants.

Conclusion

If you had to make a refugee claim at some point during this historical narrative, when would you choose to do it? If you chose the period when Kenney was hard-selling his plan to limit ‘bogus’ claims, you chose poorly. At that point, the Board’s acceptance rate, which had “declined substantially since 2006 when the Conservative Party took of

71. In a recent poll, “[f]ully 70 per cent of respondents…said they were either ‘following it in the news and discussing it with friends and family’ or ‘seeing some media coverage and having the odd conversation.’” Grenier, supra note 70. Of note, under both Canadian and international law, a person will not be penalized for entering a country without authorization for the purpose of claiming asylum, and moreover, Canadian immigration law “does not make it illegal to enter Canada using informal border crossings, as long as a person reports to border services without delay.” Lobat Sadrehashemi & Lorne Waldman, “Four myths about Canada’s border crossings,” Ottawa Citizen (15 May 2018).

72. Sigal Samuel, “‘There’s a Perception That Canada Is Being Invaded’: Justin Trudeau’s government has started rejecting more refugee claims from migrants who cross the U.S.-Canada border on foot,” The Atlantic (26 May 2018).


74. Anthony Furey, “Someone has to say it—it’s time to build a wall at Roxham Rd.,” Toronto Sun (22 May 2018).

75. Grenier, supra note 70; Angus Reid Institute, supra note 73.

76. Samuel, supra note 72.
approaching an all-time low. If you chose the time when Prime Minister Trudeau was tweeting Canada’s welcome to refugees, you chose wisely. At that point, our Refugee Board was accepting a greater percentage of claims than it had at any point in the previous 27 years.

Myriad other factors affect the Board’s acceptance rate in significant ways, of course. But as Macklin notes, “it would be naïve to suggest that decision makers are impervious to the political currents circulating around them.” There is ample evidence of the power of political and media rhetoric to sway public opinion about refugees, both positively and negatively, and as the Federal Court has observed, Board members make their decisions “in the glare of…political and public attention.” Or as Lord Sedley of the Court of Appeal of England and Wales has put it: “You can attend fifty social gatherings, you can drink in a hundred bars, where the conversation never comes remotely near the problems of eviction or bankruptcy; but it’s unusual to be in any gathering where immigration does not sooner or later come up.”

Policy concerns have no place in a refugee hearing room. A Board member’s sole responsibility is to determine whether the claimant needs protection. Members have no broader mandate to save Canada money, to spare it embarrassment, or to promote a particular vision of the social order. In her study of the Board’s institutional culture, however, political scientist Rebecca Hamlin noted that its members at times came under considerable...
pressure to make negative decisions on policy grounds. Hamlin explained that there was “no clear mechanism for how politicians or policymakers can force the [Board] to crack down and be less generous.” Yet as long as the law allows members to resolve their doubts as they choose, none is needed. Convincing them that granting refugee status is the wrong mistake will achieve the same result.

Sending a refugee home to persecution is the wrong mistake. This error preference, anchored in the Refugee Convention, is as fundamental to refugee law as Blackstone’s Maxim is to the criminal law. Fact-finding structures that entrench this foundational normative principle are refugee law’s strongest tool for protecting these life and death decisions from what Lord Sedley calls “the ambient pressure” on decision-makers “to put a finger in the dyke, to stem the tide, to stop the rot; to reject the stories they hear from asylum-seekers so that they can be sent home.”

Without a coherent and principled law of fact-finding, it is too much to hope that each refugee claim will be heard on its own merits. As the harms of mistaken grants become more salient with each unauthorized border crossing, Canadian refugee law must fix this elemental flaw at its core.

86. Ibid.
87. For this argument, see Evans Cameron, supra note 1.
88. Cited in Barisic, supra note 83.