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Defending an Application for Cessation: Protecting Refugee Status in Canada

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There seems to be a growing number of cases brought by the Government of Canada against those who came to Canada and have been granted refugee protection, to strip such persons of their protected status (and then automatically their permanent resident status) if they have gone back to visit their country of nationality. That is, persons who have been granted Convention refugee status, have become permanent residents of Canada, and then return, even briefly, to their country of nationality against which they claimed, and were granted, refugee status. The Government of Canada can even take the position that a single return to their home country could be enough to justify the application to strip status. Some Canadian jurisprudence even considers the application to and grant of a foreign passport by the source country to possibly amount to an act of re-availment of the protection of that foreign country. Such can be the impact of these actions, even unknowingly.

It seems harsh. In some cases, it seems like overreach. It could even be an abuse of process. But these proceedings are happening at an increasing rate.

These applications are called cessation cases: applications brought by ***the Minister of Public Safety and Emergency Preparedness***, filed with the federal tribunal ***Immigration and Refugee Board/IRB (Refugee Protection Division),*** which convenes a hearing at which the subject of the proceeding must attend. The burden of proof is on the Minister to establish that the subject no longer needs the protection of Canada because they have re-availed themselves of the protection of their country of nationality. But do not under-estimate these cases: a thorough and an aggressive defence is required in order to rebut the allegation, and to rebut the presumption of re-availment. The IRB's own published statistics demonstrate the enormity of the issue.

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In play are subsection 108 of the ***Immigration and Refugee Protection Act*: "Cessation of Refugee Protection,** and Rule 64 of the **Refugee Protection Division Rules.**

Having recently successfully defended a person who was subject to these extremely harsh proceedings, we want to share our experience. It was our second such case, and both were successfully defended. The tribunal dismissed the government's applications. Our clients have been able to stay in Canada with their precious status preserved.[2]

Back to our opening line in this article: are there a growing number of such applications brought by the Government of Canada? And what really is the number? In 2022 (the last full year for which data is available), there were 513 such cases having a final determination by the IRB.[3] There were in that same year 481 other cases pending hearing/adjudication by the Tribunal. Together that is almost 1,000 cases in a single year where the Government of Canada is trying to strip persons in Canada of refugee and permanent resident status that they worked so hard to achieve.

In 463 such cases, the IRB granted the application brought by the Government of Canada. By comparison, only 50 of the cases were dismissed, that is, where the person mounted a successful defence and won. That is a win rate for the little guy of only 9%. Reviewing the statistics from previous years, the total number of applications brought by the Government of Canada is considerably lower. There has been a steady increase in this form of enforcement action. But why? We cannot and will not speculate, however, suffice it to say that this area of law is expanding in size and importance.

We believe that the starting point is to understand that the potential consequences to the client are severe: if the Minister prevails, the client will lose their protected status and automatically also their permanent resident status. He/she/they cannot apply for a pre-removal risk assessment (PRRA) and cannot even make an application for permanent resident status based upon humanitarian and compassionate grounds for a year following the decision. They face removal from Canada and will likely never be able/allowed to return. The client must be counselled on these possible severe consequences.

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[2] Our most recent case involved a person in Canada for 19 years. He was very well established. All immediate family members were Canadian citizens. He travelled back to his country of nationality 9 times. We demonstrated exceptional and compelling circumstances significant enough to warrant the rebuttal of the re-availment allegation. Compare that to all the other cases in Canada we have researched: the next largest number of return trips was 6, and that person lost their Canadian status because of it.

[3] Immigration and Refugee Board of Canada. (2023, August 23). *Applications to cease or vacate refugee protection*.https://www.irbcisr.gc.ca/en/statistics/protection/Pages/RPDVacStat.aspx

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It does not matter how many years they have been in Canada. It does not matter how many relatives (including close family members) they have in Canada. It does not matter how established they are in Canada. It does not even matter how weak their connections are to their homeland. None of that matters, other than perhaps optics.

Unfortunately, the Minister sometimes brings an application such as this on vary scant evidence. A brief interview may have taken place in a Canadian airport or at the land border when the person concerned is seeking to re-enter Canada. "Where have you come from? Why did you go back to your country? Do you not know that doing so could put your status in Canada at risk?" Cryptic notes are made in the GCMS database, and the file is referred for enforcement action. It seems that at this stage there is very little further investigation, oversight, analysis, or quality control: only an automatic referral to the ***Immigration and Refugee Board*** to convoke a hearing. Seems a bit harsh, does it not?

Why do in-land officers of the CBSA not conduct a more thorough investigation, sometimes not done at an airport or land port-of-entry, where officers there do not have the benefit of time? Given the very high risk of consequences to the subject, it seems very odd to us that the CBSA in-land officers do not pursue a wider more thorough investigation. They do not balance and compare a fulsome review of the evidence against the relevant factors set out in Canadian jurisprudence, but instead rely on the scant evidence collected by border officers, sometimes even cryptic notes, sometimes even one-sided.

While improper in our view, such weak evidence (ie. a few thin notes made by a border officer) does allow counsel and his/her client a very considerable advantage to defend against the allegation. Use the time. Mount a compelling and powerful defence.

The leading case in this area of law is that of the Federal Court of Appeal: ***Camayo***.[4] This decision sets out a very long (yet non-exhaustive) list of factors that the trier of fact should consider in assessing whether the subject has re-availed themselves of the protection of their country of nationality.

To defend against the allegation, counsel and his/her client must know these factors and bear them in mind while preparing documentary evidence, while preparing the testimony of the subject, and also while preparing the testimony of others who might be able to corroborate substantial parts of the evidence.

Article 1C of the Refugee Convention provides that an individual may lose their refugee protection when that individual's actions indicate that they no longer have a well-founded fear of persecution in their country of nationality.

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[4] *Canada (M.C.I) v. Galindo Camayo,* 2022 FCA 50

Paragraphs 118 to 125 of the ***United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook)*** will be considered by the Board Member. The concepts of voluntariness, intention, and re-availment will all be considered.

The grounds for the original refugee claim will be important, and the current National Documentation Package for the country will be introduced in evidence by the Tribunal, which can be complemented by counsel introducing other country condition evidence. Whether there is a current fear, and if so of what agent of persecution, will also be explored.

The ***Enforcement System (ICES)*** chronology which shows departures from Canada (airline manifest) and returns to Canada every time a passport is scanned will be filed in evidence. Although destination and routing are not captured.

How many trips back? For what durations? What are the exact dates? What was the purpose of each trip? Were any precautions taken while in the home country? Did they have any idea at all that travel back could jeopardize his/her Canadian status? These issues and more are in play.

As is often the case in most --- if not all --- hearings before the Tribunal, the credibility of the evidence ---both documents and testimony --- will be weighed and assessed.

It will be important to demonstrate that the reason or reasons for travel back to the country against which protection was granted were motivated by exceptional and compelling circumstances. By comparison, travel back for holiday, for vacation, for business, for pleasure, to merely visit family or friends, and even for medical care available in Canada will all not normally justify a finding that such trips have been made for exceptional reasons.

Of course, Canadian citizenship risk-proofs any possible loss of refugee and permanent resident status, however, refugees do sometimes travel to their country of nationality before obtaining citizenship. If so utmost care must be taken.

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For customized professional assistance on any particular case or situation, please consult qualified legal representation, which we are authorized and specialized to provide.

Please contact **Warren Creates,** head of immigration at Perley-Robertson, Hill & McDougall LLP/srl at **(613)238-2022** and/or **wcreates@perlaw.ca**.

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