

The Canadian Association of Refugee Lawyers is a national group of lawyers, law students, and academics researching, advocating and litigating for the human rights of migrants.

Legal backgrounder: refugee claimants are not “illegal”

Entering at a non-official border crossing is not illegal under our immigration law or international law

Among the basic tenets of refugee law is that asylum claimants must be allowed to make their claim for protection via irregular means. The practical reality of attempting to reach safe harbour often necessitates such measures. This understanding is enshrined in both international and domestic law.

Article 31(1) of the *United Nations Refugee Convention*, which Canada has ratified, prohibits state parties from penalizing refugees on account of the means by which they enter a country to seek protection.¹

In Canada, this has been incorporated directly into s. 133 of the *Immigration and Refugee Protection Act* (IRPA):

133 A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

Immigration and Refugee Protection Act (S.C. 2001, c. 27) at s. 133

Furthermore, Canadian immigration law does not mandate entry via a designated port of entry. Rather, the *Immigration and Refugee Protection Regulations* (IRPR) specifically allow that should an individual enter Canada at another part of the border, they must go without delay to the nearest port of entry after arrival:

Obligation on entry

27 (1) Unless these Regulations provide otherwise, for the purpose of the examination required by subsection 18(1) of the Act, a person must appear without delay before an officer at a port of entry.

Seeking entry at a place other than a port of entry

(2) Unless these Regulations provide otherwise, a person who seeks to enter Canada at a place other than a port of entry must appear without delay for examination at the port of entry that is nearest to that place.

¹ 1951 *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, and its 1967 *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267 at Article 31(1)

Immigration and Refugee Protection Regulations (SOR/2002-227) at s. 27(1)-(2)

This is precisely what a vast majority of refugee claimants do; they present themselves voluntarily to the RCMP on the Canadian side of the border, who promptly escort them to the nearest port of entry in compliance with the regulations.

Importantly, Canadian courts have affirmed Parliament's clear intention to absolve refugee claimants of any legal or moral culpability for the means by which they arrive to seek our protection:

[29] ... When one considers the way in which...the 1951 Convention Relating to the Status of Refugees...interacts with the *Immigration and Refugee Protection Act*, **it is clear that refugees are a special protected class of individuals for which the law gives special consideration.** Each of the contracting states to the 1967 protocol (including Canada and the United States) agreed in article 31 that it would **not prosecute refugees for the manner in which they entered their respective countries, recognizing that refugees must often do so in a manner that contravenes the usual rules and laws because of their desperate circumstances....**

[30] **The Parliament of Canada has declared that Redha's conduct in this case is not morally culpable,** specifically because of his situation as an internationally recognized refugee....

United States of America v. Redha, 2003 MBQB 153 (CanLII) at paras. 29-30

Reference to refugee claimants as "illegal" thereby defies long-standing international law, domestic jurisprudence, and basic principles. It connotes a moral opprobrium that is unwarranted.

Reliance on the Customs Act to call refugees "illegal" is inappropriate

In spite of the clear indication in the *Immigration and Refugee Protection Act* and regulation that refugees, the mistaken use of the term "illegal" may flow from a reference to a provision of the *Customs Act* concerned with the regulation of imported goods, not refugee entry:

PART II

Importation

Presentation of persons on arrival in Canada

11 (1) Subject to this section, every person arriving in Canada shall, except in such circumstances and subject to such conditions as may be prescribed, enter Canada only at a customs office designated for that purpose that is open for business and without delay present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties under this or any other Act of Parliament.

Customs Act (R.S.C., 1985, c. 1 (2nd Supp.)) at s. 11(1)

While the statute may on its face apply to refugee claimants, the spirit of the law is as important as its plain text. The reason for requiring travelers to enter at a customs office is to ensure that they pay duty on imported goods. No one is alleging that refugee claimants are importing goods subject to duty, which is the substantive illegality the *Customs Act* is concerned with.²

There is no known instance in which a refugee claimant has been accused of or charged with, let alone convicted of violating s. 11 of the *Customs Act*. That is simply not the intended purpose of the provision. It is thereby disingenuous and misleading to predicate the consistent use of the term “illegal” upon a statute that is inapplicable in practice to the current context.

The correct legal reference point for the arrival and processing of immigrants and refugees, is the *Immigration and Refugee Protection Act*, as well as the binding international conventions on refugees.

The term “illegal” must therefore be avoided. A more accurate and balanced term is that of “irregular” entry or arrival. As confirmed before a Parliamentary Committee, this is also the preferred term used by IRCC officials.³

Words matter, especially when describing vulnerable persons

Referring to claimants as “illegal” distorts the public discourse on refugee protection. It is an implicit confirmation that refugee claimants are criminals who must be stopped and curtailed; a problem to be addressed by the government, instead of a vulnerable group who may deserve thoughtful assistance and compassion.

This perception follows refugees not just at the time of arrival but well after they attempt to establish themselves and their families within Canadian society.

This is critical as public perception forms policy, and policies with respect to refugee claimants can mean the difference between life and death, safe harbour or deportation to torture and persecution.

As such, the choice of terminology is not just semantic but substantively alters the tenor of any coverage regardless of the surrounding content.

² As noted, this is an especially thin excuse upon which to hang the label of “illegal entry,” since claimants are taken by the RCMP to a port-of-entry after arrival, whereby any “import duties” could be collected.

³ Testimony of Paul MacKinnon, Assistant Deputy Minister, Strategic and Program Policy, Department of Citizenship and Immigration, Standing Committee on Citizenship and Immigration (CIMM), 42nd Parliament, 1st Session, Meeting No. 100, March 19, 2018 [stating: “Mr. Chair, I would just say that, to a person, the term the officials use in our daily work is ‘irregular arrivals.’ That’s what we use. I would leave it at that, Mr. Chair.”]