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# Bordering the Constitution, Constituting the Border

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## Bordering the Constitution, Constituting the Border

EFRAT ARBEL\*

It is an established principle in Canadian law that refugees present at or within Canada's borders are entitled to basic constitutional protection. Where precisely these borders lie, however, is far from clear. In this article, I examine the Canadian border as a site at which to study the constitutional entitlements of refugees. Through an analysis of the Multiple Borders Strategy (MBS)—a broad strategy that re-charts Canada's borders for the purposes of enhanced migration regulation—I point to a basic tension at play in the border as site. I argue that the MBS imagines and enacts the border in two fundamentally different ways. On one hand, it conceives of the border as a multiple, moving barrier that can be selectively positioned outside Canada's territorial boundaries to expand state power outward. On the other hand and at the same time, it conceives of the border as a singular and static barrier positioned at the edge of Canadian territory and asserts this as the "actual" border. By simultaneously conceiving of the border in these two conflicting ways—and maintaining that Canada's extraterritorial borders are not its actual borders—the MBS frustrates a basic principle of Canadian constitutional law. It not only deprives refugees of constitutional protection but also, more fundamentally, of legal and constitutional recognition. To illuminate the legal and conceptual violence of the MBS, I turn to the work of Hannah Arendt on the "right to have rights." By reference to Arendt's work, I argue that the MBS not only re-charts Canada's national boundary, it also alters the juridical relationships produced by that boundary and the rights and duties they prescribe. I conclude by advocating for better alignment between Canada's constitutional commitments and its border laws and policies. I argue that to give meaning to the right to have rights within Canada's constitutional framework and to ensure that those subject to the force of Canadian law may also benefit from its protection, Canada must ensure that wherever its legal borders go the constitution follows.

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Un principe juridique bien établi au Canada veut que l'on accorde une protection constitutionnelle de base aux réfugiés qui se trouvent au Canada ou à ses frontières. L'emplacement exact de ces frontières est toutefois loin d'être clair. Dans cet article, j'examine la frontière canadienne comme lieu où peut se dérouler une étude des droits constitutionnels des réfugiés. Par le biais d'une analyse de la stratégie des frontières multiples (SFM)—vaste stratégie qui redéfinit les frontières canadiennes dans le but de faciliter les procédures d'immigration—je souligne une tension fondamentale qui se manifeste quant à l'emplacement de la frontière. Je prétends que la SFM imagine et met en œuvre la frontière de deux manières fondamentalement différentes. Elle se représente d'une part la frontière comme un continuum de points mobiles de contrôle qu'il devient possible de situer à l'extérieur du territoire canadien afin d'étendre hors de nos frontières les pouvoirs de l'État. Dans un même temps, elle se représente d'autre part la frontière comme une barrière singulière et statique située à la limite du territoire canadien, barrière qu'elle considère être la « véritable » frontière. En considérant simultanément la frontière de ces deux manières conflictuelles—et en affirmant que les frontières extraterritoriales du Canada ne sont pas ses véritables frontières—la SFM déroge à un principe fondamental de la loi constitutionnelle du Canada. Non seulement prive-t-elle ainsi les réfugiés de leur protection constitutionnelle mais également, de manière plus fondamentale, de leur reconnaissance constitutionnelle. Pour jeter un éclairage sur la violence juridique et conceptuelle de la SFM, je me tourne vers le « droit d'avoir des droits » qui se dégage de l'œuvre de Hannah Arendt. Emboîtant le pas avec elle, je prétends que la SFM non seulement redéfinit la frontière du Canada, mais encore transforme les relations juridiques qui émanent de cette frontière, de même que les droits et les responsabilités qu'elles entraînent. En conclusion, je plaide en faveur d'un meilleur alignement des lois et des politiques frontalières du Canada sur ses engagements constitutionnels. Afin que le droit d'avoir des droits ait un sens dans le cadre constitutionnel du Canada et pour permettre à ceux qui sont assujettis à l'impact des lois canadiennes de bénéficier également de leur protection, je prétends que le Canada doit faire en sorte que sa constitution s'applique où que se déplacent ses frontières juridiques.

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**IN THE FALL OF 2015**, the haunting photo of three-year-old Alan Kurdi's drowned body on the Turkish shores forced Canadians to contend with the gravity of the global refugee crisis. The Kurdi family's link to Canada—a Canadian aunt who sought to sponsor the family's refugee claim—exposed Canada's failure to respond to this crisis. With the election of its new government, Canada launched an unprecedented effort to open its borders and resettle tens of thousands of

Syrian refugees,<sup>1</sup> gaining international praise for its efforts. The Chief of the United Nations hailed Canada for its “compassionate leadership and generosity,”<sup>2</sup> the UN High Commissioner for Refugees celebrated Canada as “exemplary,”<sup>3</sup> and *The New York Times* praised Canada for its compassion in contrast with the “callous and irresponsible behavior” of the United States.<sup>4</sup>

Canada’s response to the Syrian refugee crisis is indeed commendable, and illustrative of a longstanding tradition of Canadian generosity and leadership in refugee protection.<sup>5</sup> Canada has long been celebrated both for the fairness of its laws and the generosity of its people and has, over the years, been praised for setting an example that “raised the standards of refugee protection worldwide.”<sup>6</sup> But, as Canada opens its borders to certain refugees it also closes its borders to others. Notwithstanding its generous resettlement efforts, Canada has for decades deployed substantial resources and engaged significant efforts to keep refugees away from its shores. It achieves this through a series of interdiction and interception measures enacted under the rubric of the Multiple Borders Strategy (MBS), a broad strategy that re-charts Canada’s borders for the purposes of enhanced migration regulation. The MBS’s stated goal is to “push the border

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1. Citizenship and Immigration Canada (CIC) reports that between 4 November 2015 and 8 May 2016, a total of 27,005 Syrian refugees were admitted to Canada. This figure consists of 15,412 government-assisted refugees, 2,405 blended visa-office referred refugees, and 9,763 privately sponsored refugees. See Citizenship and Immigration Canada, “#WelcomeRefugees: Key Figures”, online: < <http://www.cic.gc.ca/english/refugees/welcome/milestones.asp>>.
  2. Giuseppe Valiante, “UN Chief Praises Canada’s Response to Syrian Refugee Crisis”, *CTV News* (12 February 2016) online: CTV News <[www.ctvnews.ca/canada/un-chief-praises-canada-s-response-to-syrian-refugee-crisis-1.2775923](http://www.ctvnews.ca/canada/un-chief-praises-canada-s-response-to-syrian-refugee-crisis-1.2775923)>.
  3. “Canada’s Refugee Model Praised by UN High Commissioner”, *CBC Radio* (22 March 2016) online: CBC <[www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.3502370/canada-s-refugee-model-praised-by-un-high-commissioner-1.3502379](http://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.3502370/canada-s-refugee-model-praised-by-un-high-commissioner-1.3502379)>.
  4. “Canada’s Warm Embrace of Refugees”, Editorial, *The New York Times* (11 December 2015) online: *The New York Times* <[www.nytimes.com/2015/12/12/opinion/canadas-warm-embrace-of-refugees.html?\\_r=0](http://www.nytimes.com/2015/12/12/opinion/canadas-warm-embrace-of-refugees.html?_r=0)>.
  5. In 1986, the United Nations High Commissioner for Refugees awarded the “people of Canada” the prestigious Nansen Refugee Award, awarded annually in recognition of outstanding work on behalf of the forcibly displaced. See United Nations High Commissioner for Refugees, “Archive of Past Nansen Winners” online: <<http://www.unhcr.org/subsites/nansen/4ad5dc559/1986-people-canada.html?query=people%20of%20canada%20nansen>>. Canada has also been the subject of much-deserved criticism. See e.g. Efrat Arbel & Alletta Brenner, *Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion* (Cambridge, MA: Harvard Immigration and Refugee Law Clinic, 2013).
  6. *Ibid* at 104; Testimony of Deborah E Anker, Director, Harvard Immigration and Refugee Clinic. House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 39th Leg, 1st Sess, No 33 (8 Feb 2007).

out”—outside Canada’s geographic perimeter—to keep refugees and other so-called undesirable travellers away from Canada’s territorial frontiers and block them from seeking asylum.<sup>7</sup>

In this paper, I examine Canada’s response to global displacement beyond the Syrian refugee crisis and focus instead on its treatment of refugees along its borders. My analysis centres on the MBS and, more specifically, its impact on the legal and constitutional rights of refugees. I argue that by redrawing Canada’s borders the MBS subverts a core principle in Canadian law—established by the Supreme Court of Canada in *Singh v Canada (Minister of Employment and Immigration)*<sup>8</sup>—namely, that refugees who are physically present at or within the Canadian border are entitled to basic protection under the *Charter of Rights and Freedoms*.<sup>9</sup> Highlighting a basic contradiction in the conceptual underpinnings of the MBS, I argue that the MBS constitutes the border in two opposing ways. On one hand, it enacts the border as a singular, static line positioned along Canada’s territorial perimeter and asserts this as the “actual” border.<sup>10</sup> On the other hand, and at the same time, the MBS enacts the border as a multiple, moving barrier that protrudes outside state territory and asserts this as the legal border.<sup>11</sup> Since Canadian law limits the *Charter’s* extraterritorial application, this dual understanding of the border undermines the core principle outlined in *Singh*: it delinks the reciprocal connection *Singh* draws between refugees’ amenability to Canadian law and their ability to claim its protection, and also places refugees who are present at Canada’s asserted legal border beyond the *Charter’s* reach.

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7. Office of the Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons, Chapter 5*, Citizenship and Immigration Control and Enforcement (2003) at 8, online: <<http://www.oag-bvg.gc.ca/internet/docs/20030405ce.pdf>> [*OAG 2003 Report*], 8. See also Canada Border Services Agency, Strategy and Coordination Branch, *Admissibility Screening and Supporting Intelligence Activities: Evaluation Study* (July 2009) online: <<https://web.archive.org/web/20150911191357/http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2009/assia-aeasr-eng.html>> [CBSA, *Admissibility Study*]; Citizenship and Immigration Canada, *Statement of Mutual Understanding on Information Sharing* (2003), preamble at para 3, online: <[www.cic.gc.ca/english/department/laws-policy/smu/smu-ins-dos.asp](http://www.cic.gc.ca/english/department/laws-policy/smu/smu-ins-dos.asp)> [CIC, *Statement of Mutual Understanding*].
  8. [1985] 1 SCR 177, 17 DLR (4th) 422 [*Singh*].
  9. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
  10. CBSA, *Admissibility Study*, *supra* note 7.
  11. For an analysis of how states shift their borders for the purposes of enhanced migration regulation, see Leanne Weber, “The Shifting Frontiers of Migration Control” in Sharon Pickering & Leanne Weber, eds, *Borders, Mobility and Technologies of Control* (Dordrecht: Springer, 2006) 21; Ayelet Shachar, “The Shifting Border of Immigration Regulation” (2008) 30:3 *Mich J Int’l L* 809.

I begin this article with an overview of the *Singh* decision. I then examine the MBS in detail and analyze its operation and effect. To highlight the legal and conceptual violence of the MBS, I turn to Hannah Arendt's writing on the "right to have rights,"<sup>12</sup> which has become foundational to scholarly understanding of the limits of law in protecting refugee rights. By reference to Arendt's writing, I argue that the MBS not only deprives refugees of basic rights, it also denies them fundamental legal and constitutional recognition under Canadian law. As a result, it suspends refugees in an exceptional state, wherein they are subject to the force of Canadian law but unable to benefit from its protection. After canvassing the problems with this approach, I conclude by advocating for a better alignment between Canada's constitutional commitments and its border laws and policies. I argue that if Canada's stated commitment to protect refugees is to have normative force, it must be applied consistently. Following *Singh*, Canada must ensure that those subject to the force of its laws may also benefit from the law's protection. This means that Canada must avoid disingenuous policies that purport to extend constitutional protection to the border but enact the border in ways that exceed the *Charter's* application. Simply put, I argue that wherever Canada's legal borders go, the constitution must follow.

## I. THE PROMISE OF RIGHTS PROTECTION

*Singh* lies at the heart of Canada's refugee determination system. As Catherine Dauvergne explains, the decision forms "part of the mythic foundation of Canadian refugee law," with the date of its release still celebrated annually as Refugee Rights Day by the refugee advocacy community.<sup>13</sup> *Singh* involved a

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12. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1967) [Arendt, *Origins*] at 297.
  13. Catherine Dauvergne, "How the *Charter* Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663 at 669 [Dauvergne, "How the *Charter* Has Failed Non-Citizens"]. For an example of the celebration of Refugee Rights Days within the refugee advocacy community, see Canadian Council for Refugees, "Refugee Rights Day April 4" online: <ccrweb.ca/en/refugee-rights-day>. For early praise of the *Singh* decision, see e.g. Donald Galloway, "The Extraterritorial Application of the *Charter* to Visa Applicants" (1991) 23:2 Ottawa L Rev 335 at 337 (stating that *Singh* obliges Canada to treat refugees at or within its borders "with much the same respect that it accorded to its own citizens and permanent residents"); F Pearl Eliadis, "The Swing from *Singh*: The Narrowing Application of the *Charter* in Immigration Law" (1995) 26 Imm LR (2d) 130 (stating that *Singh* strengthened "the trend towards ensuring that the newest members of our society as well as those seeking entry to Canada are treated in a way that is consonant with the way Canadians expect to be treated themselves"); Julius Grey,

section 7 *Charter* challenge to the refugee determination procedure in place at the time. The applicants were all foreign nationals who applied for refugee protection in Canada but were found not to satisfy the definition of “refugee” set out in the United Nations *Convention Relating to the Status of Refugees* and were consequently deemed ineligible for protection.<sup>14</sup> They argued that the procedure by which their status was assessed—which at no point involved an oral hearing on the merits—violated their rights under section 7 of the *Charter*, which guarantees “everyone ... the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>15</sup> More specifically, they argued that in the absence of an oral hearing, the determination procedure did not provide them with “a fair opportunity to present their refugee status claims or to know the case they had to meet.”<sup>16</sup>

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“Comment on *Singh v. Minister of Employment and Immigration*” (1986) 31:3 McGill LJ 496 at 506 (praising *Singh* as a “major step forward in immigration law, human rights law and administrative law”). For an example of the criticism directed at the *Singh* decision after its release, see e.g. Stanislaw Oziewicz, “Manning Plays Down Immigration Policy: Reform Party Literature Advocates Harsher Restrictions” *Globe and Mail* (15 July 1991) A6, cited in Sean Rehaag, *Bordering on Legality: An Investigation into the Lines ‘We’ Draw / the Lines that Draw ‘Us’ (and the Spaces in Between)* (JSD Thesis, University of Toronto Faculty of Law, 2008) [unpublished] at 71, n 42. Oziewicz reported that Preston Manning, then leader of the Reform Party of Canada, said that the *Charter*’s override (notwithstanding) clause should be invoked to get around the *Singh* decision.

14. Article 1(A)(2) of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 2545, as amended by the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 8791 [*Refugee Convention*]. Article 1(A)(2) defines a refugee as a person “who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Canadian law incorporates this definition almost verbatim into the *Immigration and Refugee Protection Act*, SC 2001, c 27, s 96 [IRPA].
15. *Charter*, *supra* note 9, s 7; *Singh*, *supra* note 9 at paras 3-5, 23-25.
16. *Singh*, *supra* note 9 at para 33.

Before the Court could entertain the *Charter* claim, it had to determine whether the *Charter* even applied in the circumstances of the case.<sup>17</sup> Some of the applicants had lodged their refugee claims at ports of entry, which raised the threshold question of whether section 7 of the *Charter* extends to non-citizens at the border. Answering this question in the affirmative, *Singh* decided that the word “everyone” in section 7 includes “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law,” including refugees.<sup>18</sup> Importantly and in contrast with other jurisdictions, *Singh* extended such protection to refugees who are physically present not only within but also at Canada’s borders, without distinguishing between those who seek and those who have secured entry into the state.<sup>19</sup> It also extended section 7 protection both to citizens and non-citizens, without distinguishing between the

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17. Notably, only three of the six justices that decided *Singh*—Wilson J, with Dickson CJC and Lamer J concurring—relied on the *Charter* in their reasons. Beetz, Estey, and McIntyre JJ based their decision on the *Canadian Bill of Rights*, SC 1960, c 44. As Dauvergne explains, this fact has been lost in *Singh*’s mythology, and it is Justice Wilson’s decision “that has stood the test of time and crystallized into what *Singh* stands for.” Dauvergne, “How the *Charter* Has Failed Non-Citizens”, *supra* note 13 at 670-71. See e.g. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at para 113 (citing Wilson J’s decision as authoritative for its interpretation of section 7 and for the proposition that the principles of fundamental justice demand, at a minimum, compliance with common law requirements of procedural fairness). For subsequent application of Wilson J’s judgment, see also *infra* notes 23-28.

18. *Singh*, *supra* note 9 at para 35.

19. *Singh*, *supra* note 9 at paras 53-54. With this finding, Justice Wilson explicitly rejected the US approach that would have extended *Charter* protection to refugees only when present within state borders. She identified two core objections to this approach. First, she held that a rule “which provided *Charter* protection to refugees who succeeded in entering the country but not to those who were seeking admission at a port of entry would be to reward those who sought to evade the operation of our immigration laws over those who presented their cases openly at the first available opportunity.” Second, she found that the US approach did not properly “differentiate between the special status accorded to Convention refugees who are present in this country and the status of other individuals who are seeking to enter or remain in Canada,” and thus could not be upheld under Canadian law. Contrast, for example, the decision of the Supreme Court of the United States in *Zadvydas v Davis*, 533 US 678 at 693, 121 S Ct 2491 (2001) (finding that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent” [emphasis added]).



presence or absence of immigration status.<sup>20</sup> Rejecting distinctions based both on territory and immigration status, *Singh* stated that it would be “unthinkable” to subject refugees to the force of Canadian law without also extending them the benefit of its protection.<sup>21</sup> In doing so, *Singh* explicitly embraced refugees who are physically present at Canada’s borders within the ambit of *Charter* protection.

Despite its early promise, *Singh* has failed to secure refugees expansive rights protection under the *Charter*.<sup>22</sup> Courts have since narrowed its application, as for example in *Medovarski v Canada* where the Court held that the deportation of a non-citizen does not engage section 7 of the *Charter*. The Court later clarified in *Charkaoui v Canada (Citizenship and Immigration)* that “[w]hile the deportation of a non-citizen in the immigration context may not *in itself* engage section 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so.”<sup>23</sup> The Court further held in *Dehghani v Canada* that non-citizens do not

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20. For additional analysis, see Dauvergne, “How the Charter Has Failed Non-Citizens”, *supra* note 13 at 672, suggesting that the Supreme Court of Canada’s early decisions fit “squarely within the trend ... of human rights eclipsing citizenship rights as an aspect of contemporary globalization.” Specifically, Dauvergne references Saskia Sassen’s suggestion that the rise of human rights protection means that distinctions in rights protection are not drawn between citizens and non-citizens but between those with secure immigration status and those without status. See Saskia Sassen, *Losing Control: Sovereignty in an Age of Globalization* (New York: Columbia University Press, 2006). Dauvergne posits that by extending the *Charter* to persons “physically present” in Canada, the *Singh* decision “eclipses even Sassen’s analysis of the importance of immigration status.” Dauvergne, “How the Charter Has Failed Non-Citizens”, *supra* note 13 at 673.
21. In Justice Wilson’s words, it would be “unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status.” *Singh*, *supra* note 9 at para 52.
22. See *e.g.* Marc Gold, “Constitutional Scholarship in Canada” (1985) 23:3 Osgoode Hall LJ 495 at 513 (stating that the long-term impact of *Singh* on immigration law “is likely to be minimal”). See also Audrey Macklin, “Borderline Security” in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 at 394 [Macklin, “Borderline Security”] (noting that “while it is technically true that most *Charter* rights apply to all persons physically in Canada, in practice the courts have sharply circumscribed the nature and extent of those rights for non-citizens faced with removal” [citations omitted]).
23. *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 351 [*Charkaoui*] at para. 17.

have a right to counsel at port-of-entry examinations,<sup>24</sup> and noted later in *B010 v Canada (Minister of Citizenship and Immigration)*, albeit in obiter, that section 7 interests are not engaged at the early stage of refugee protection proceedings where the claimant still has access to a pre-removal risk assessment.<sup>25</sup> The Federal Court of Appeal has similarly narrowed *Singh's* application, stating in *Nguyen v Canada* that denying individuals with serious criminal convictions access to the refugee determination system is constitutionally valid.<sup>26</sup> Most recently in *Savunthararasa v Canada (Minister of Public Safety and Emergency Preparedness)*, however, citing *Singh*, the Federal Court of Appeal asked whether a “more expansive approach to security of the person should be taken.”<sup>27</sup>

Notwithstanding these findings, and in cases not involving the prospect of removal, *Singh's* central principle endures: refugees present at or within Canada's borders are entitled to basic protection under the *Charter*.<sup>28</sup> Thus, in *Toussaint v Canada* the Federal Court held that after *Singh* there is “no debate that non-citizens in Canada, including illegal immigrants, are entitled to the protections of s. 7 of the *Charter*,” and that “all human beings, regardless of their immigration status, are entitled to dignity and the protection of their fundamental right to life, liberty and security of the person.”<sup>29</sup> The Immigration Appeal Board in *Sethi v Canada* similarly cited *Singh* for the proposition that the protection of section 7 “is not restricted to Canadian citizens and permanent residents but refers to any person

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24. *Dehghani v Canada (Minister of Employment & Immigration)*, [1993] 1 SCR 1053, 101 DLR (4th) 654. See also *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 90 DLR (4th) 289 (where the Supreme Court of Canada held that the deportation of long-term permanent residents who commit crimes is constitutionally valid). For a complete discussion, see Dauvergne, *supra* note 13 (analyzing how *Singh* has failed to secure non-citizens with meaningful rights protection under the *Charter*).
  25. *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] SCJ No 58 [B010], at para 75.
  26. *Nguyen v Canada (Minister of Employment & Immigration)*, [1993] 1 FC 696, 18 Imm LR (2d) 165 (CA), leave to appeal to SCC refused, [1993] 3 SCR viii.
  27. *Savunthararasa v Canada (Minister of Public Safety and Emergency Preparedness); Peter v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 51, [2016] FCJ No 173 at para 28 [Savunthararasa]. Notably in this case, the Federal Court of Appeal refused to answer whether the impugned bar on pre-removal risk assessments violation of section 7 of the *Charter* on the basis that there was insufficient evidence before it to decide the claim.
  28. See *Singh*, *supra* note 9 at paras 20, 56, 79, 101-02. But see Macklin, “Borderline Security”, *supra* note 22 for critique.
  29. *Toussaint v Canada (Attorney General)* (2010), [2011] 4 FCR 367 at para 87, [2010] FCJ No 987 (QL), aff'd 2011 FCA 213, [2013] 1 FCR 374 (finding no section 7 violation and stating further that non-citizens who have violated Canadian immigration laws are not entitled to remain in Canada or claim the protection of its laws).

whose life, liberty or security is infringed provided that person is in Canada.”<sup>30</sup> The Quebec Superior Court in *Noor v Canada* further confirmed that in *Singh*, the Supreme Court of Canada decided that refugee claimants are “entitled to the protection of those sections of the Charter which refer to ‘everyone’,”<sup>31</sup> and in *Bah v Canada* cited *Singh* for the principle that “every human being who is physically present in Canada is entitled to the protection and rights afforded by the *Charter*.”<sup>32</sup> Other courts have cited *Singh* for similar principles<sup>33</sup> and have also extended refugees protection beyond that outlined under section 7.<sup>34</sup>

The broad impact of the *Singh* decision is more significant than the case law suggests. *Singh* does much more than extend refugees the right to fundamental justice in the adjudication of their claim. It also extends refugees basic legal and constitutional recognition under Canadian law. *Singh* effectively enacts

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30. *Sethi v Canada (Minister of Employment and Immigration)*, 10 Imm LR (2d) 251, [1989] IADD No 49 (QL) at para 26.
  31. *Noor v Canada (Minister of Employment and Immigration)*, [1989] QJ No 722 at para 70 (QL) (Sup Ct (Civ Div)).
  32. *Bah v Canada (Minister of Manpower and of Immigration)*, [1989] QJ No 2470 at para 46 (QL) (Sup Ct).
  33. See e.g. *Canada (Minister of Employment and Immigration) v Borowski (TD)*, [1990] 2 FC 728 at para 19, [1990] FCJ No 132 (QL) (stating that *Singh* “put it beyond any further social or academic discussion that any person physically present in Canada was entitled to the whole panoply of rights and freedoms available under the *Charter of Rights and Freedoms*,” and further that a port-of-entry refugee claimant may be in “greater jeopardy than an inland claimant” and may therefore be entitled to a greater scope of rights protection including, for example, the right to counsel). Notably, *Singh* makes clear that refugees and other non-citizens are not entitled to certain *Charter* rights, such as those reserved only for citizens. See also *Slahi v Canada (Minister of Justice)*, 2009 FC 160 at para 47, 340 FTR 236 [*Slahi*] (emphasizing that section 7 protection “may be available to non-Canadians when they are physically present in Canada”); *Kofitse v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 894 at para 22, [2002] FCJ No 1168 (QL) (citing *Singh* in stating that it has “already been determined that Convention refugees are entitled to fundamental justice in the adjudication of their status”); *Canada (Minister of Citizenship and Immigration) v Fast (TD)*, 2001 FCT 1269 at para 30, 208 DLR (4th) 729 (citing *Singh* in stating that “refugee claimants are entitled to the benefit of section 7 of the *Charter*”); *Xu v Canada (Minister of Employment and Immigration)*, 79 FTR 107 at para 13, 25 Imm LR (2d) 120 (stating that since *Singh*, “there is no longer any question that refugee claimants are entitled to fundamental justice in the determination of whether they are Convention refugees”).
  34. See e.g. *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, [2015] 2 FCR 267 (finding that federal government cuts to refugee health care violate the *Charter*’s section 15 equality guarantee and its section 12 prohibition on “cruel and unusual treatment”); *YZ v Canada (Minister of Citizenship and Immigration)*, 2015 FC 892, [2015] FCJ No 880 (QL) (finding that a bar on appeals for refugees from “Designated Countries of Origin” violates the *Charter*’s section 15 equality guarantee).

the Canadian border as a site of rights protection for refugees—a site at which they are recognized as juridical actors entitled to a limited but actionable rights claim against the state.<sup>35</sup> It does so by drawing a reciprocal connection between a refugee’s physical presence on Canadian soil, her amenability to Canadian law, and her ability to benefit from its protection.<sup>36</sup> Since such amenability extends only as far as the Canadian border, understanding precisely where the border lies is essential for understanding the limits and possibilities of this legal principle.

## II. SHIFTING THE BORDER, RESTRICTING RIGHTS

In the years since *Singh*, the legal landscape of the Canadian border has changed dramatically and with it the application of the *Singh* principle. In finding that the protection of the *Charter* extends to “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law,”<sup>37</sup> the Court in *Singh* imagined the nation-state as a clearly bounded entity and presumed a direct, coterminous correlation between state, territory, and authority—three central building blocks of the nation-state.<sup>38</sup> It further constituted the border as a stable and static line located along Canada’s geographic perimeter, clearly delineating both the edge of the territory and the bounds of Canada’s constitutional reach.

This approach is, however, out of step with the current legal and material realities of the Canadian border. Canada has redesigned its borders through a series of domestic measures, bilateral agreements with the United States, and

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35. For an analysis of how the Canadian border has been reconstituted as a site of punishment for refugees through the enactment of the “Designated Foreign National” regime, see Efrat Arbel, “Between Protection and Punishment: The Irregular Arrival Regime in Canadian Refugee Law” in Keramet Reiter & Alexa Koenig, eds, *Extreme Punishment: Comparative Studies in Detention, Incarceration, and Solitary Confinement* (London: Palgrave, 2015) 197.

36. More specifically, *Singh* presents physical presence at or within the border as the triggering criterion that makes refugees amenable to Canadian law. It is this amenability, as Galloway explains, that is the “salient factor.” See Galloway, *supra* note 13 at 339 (suggesting further that Wilson J’s decision can be read as establishing the principle that “everyone who is amenable to Canadian law, whether or not they find themselves in Canada, is embraced by the relevant sections of the *Charter*”). But see *infra* notes 77-78.

37. *Singh*, *supra* note 9 at para 35.

38. See Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (New Jersey: Princeton University Press, 2006) (identifying territory, authority, and rights as core components that make up any society in any age, and examining how these components have changed—in themselves and in their interrelationships—across medieval, national, and global assemblages).

international agreements with other states.<sup>39</sup> These instruments establish a complex matrix of legal measures designed to combat terrorism, enhance security, collect and share biometric data, facilitate trade and travel, and restrict migration. Unconstrained by geographic specificity, these measures can be selectively positioned in multiple locations far removed from Canada's territorial boundary line. Their implementation reconstitutes Canada's border as a "smart" border that extends to both territorial and extraterritorial locations and, as Leanne Weber explains, is asserted differently "in relation to different groups of border crossers."<sup>40</sup>

Chief among these measures is the MBS, discussed briefly above, through which Canada re-charts its borders for the purposes of enhanced migration regulation. The MBS is described most clearly in the preamble to the 2003 *Statement of Mutual Understanding* between Canada and the United States:

Recognizing that moving the focus of control of the movement of people away from our shared land border to overseas, where potential violators of citizenship or immigration laws are interdicted prior to their arrival in the United States and Canada, enables Canada and the United States to manage more effectively their movement into and within North America. Canada and the United States are pursuing a regional approach to migration based on the *Multiple Borders Strategy* ... At every checkpoint along the travel continuum — visa screening; airport check-in;

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39. Principal among these is the *US and Canada Smart Border Declaration* (2001) online: <[www.legislationline.org/documents/id/7543](http://www.legislationline.org/documents/id/7543)>. The *Smart Border Declaration* was signed by the parties in December 2001 to enhance border security and border control. See also Public Safety Canada, "Smart Border Declaration and Action Plan" online: <<https://web.archive.org/web/20130412191938/http://www.publicsafety.gc.ca/prg/le/bs/sbdap-eng.aspx>>. In February 2003, Canada and the United States also signed a *Statement of Mutual Understanding* outlining 16 articles to enhance co-operation and collaboration between Canada and the United States with respect to information sharing in relation to border security and border management. *Statement of Mutual Understanding*, *supra* note 7. In August 2003, the parties signed an *Asylum Annex* to extend the *Statement of Mutual Understanding's* application and facilitate information sharing in asylum matters. See *Annex Regarding the Sharing of Information on Asylum and Refugee Status Claims to the Statement of Mutual Understanding on Information Sharing*, US-Canada, 18 September 2003, online: <[www.cic.gc.ca/english/departement/laws-policy/smu/smu-ins-annex1.asp](http://www.cic.gc.ca/english/departement/laws-policy/smu/smu-ins-annex1.asp)> [*Asylum Annex*]. In February 2011, the parties issued *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness* (2011) online: <[actionplan.gc.ca/en/page/bbg-tpf/beyond-border-action-plan](http://actionplan.gc.ca/en/page/bbg-tpf/beyond-border-action-plan)>. It was designed to enhance border security and economic competitiveness based on a "perimeter approach," which allows the parties to work together both at and beyond the border. More recently, the parties signed the *Agreement on Land, Rail, Marine, and Air Transport Preclearance Between the Government of the United States of America and the Government of Canada* (2015), online: <[www.dhs.gov/news/2015/03/16/united-states-and-canada-sign-precleanance-agreement](http://www.dhs.gov/news/2015/03/16/united-states-and-canada-sign-precleanance-agreement)>.

40. Weber, *supra* note 10 at 23.

points of embarkation; transit points; international airports and seaports; and the Canada-United States border — there is an opportunity for the Participants to link the person and the document and any known intelligence.<sup>41</sup>

The MBS serves several legitimate and compelling objectives ranging from the preservation of national security to intelligence gathering to crime control. With respect to refugees, however, it is applied as an interdiction measure designed to stem asylum flows offshore. While questionable in their legality, such interdiction measures take advantage of what Sean Rehaag describes as a gap in the protection offered to refugees by the *Refugee Convention*.<sup>42</sup> As Rehaag explains, because persons are legally defined as “refugees” only when they leave their countries of origin, and because the *Convention’s* prohibition on *refoulement*—the forcible return of refugees to a country where they are likely to be persecuted—applies only to refugees who are physically located in the territory of a host state, the rights of refugees in transit can more easily be violated or ignored.<sup>43</sup>

Under the rubric of the MBS, Canada has enacted various measures designed to exploit this gap in protection. These measures are applied with the explicit aim of blocking refugees “as far away from North America as possible”—before they set foot on Canadian soil and trigger the protections outlined in *Singh*.<sup>44</sup> The MBS achieves this aim by quite literally redrawing Canada’s borders in order to “push the border out.”<sup>45</sup> Citizenship and Immigration Canada represents this redrawing as a series of concentric rings radiating out from the territorial border (Figure 1).

Figure 1 fundamentally reconceptualizes both the location and operation of the Canadian border. It conceives of the border not as a singular static line positioned at the edge of territory—in keeping with the approach adopted in *Singh*—but rather as a moving line that can be selectively positioned in multiple locations at once. Significantly, the MBS also de-territorializes the border by redefining it as “any point at which the identity of the traveller can be verified.”<sup>46</sup> To this end, the Canada Border Services Agency (CBSA) explains that the MBS “views the border not as a geo-political line but rather a continuum of

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41. *Statement of Mutual Understanding*, *supra* note 7, preamble at para 3.

42. Rehaag, *supra* note 13 at 88.

43. *Ibid.* But see Penelope Mathew, “Australian Refugee Protection in the Wake of the Tampa” (2002) 96:3 AJIL 661 at 666 (arguing that extraterritorial interception is not generally accepted as permissible).

44. *OAG 2003 Report*, *supra* note 7 at 8.

45. *CBSA Admissibility Study*, *supra* note 7 at “Overview of CBSA Admissibility Screening and Supporting Intelligence Activities.”

46. *OAG 2003 Report*, *supra* note 7 at 8.

checkpoints along a route of travel from the country of origin to Canada or the United States.”<sup>47</sup>

Canada is not alone in redrawing its borders in this manner. As Ayelet Shachar explains, the “firm borderlines drawn in the world atlas do not necessarily coincide with those adhered to, indeed created through, immigration law and policy. Instead ... the location of the border is shifting—at times penetrating into the interior, in other circumstances extending beyond the edge of the territory.”<sup>48</sup> Étienne Balibar’s description is apt:

[S]ometimes noisily and sometimes sneakily, *borders have changed place*. Whereas traditionally, and in conformity with both their judicial definition and “cartographical” representation as incorporated into national memory, they should be *at the edge of the territory*, marking the point where it ends, it seems that borders and the institutional practices corresponding to them have been transported *into the middle of political space*.<sup>49</sup>

As Balibar maintains, laws and policies that push the border into the “middle of political space” also alter the juridical relationships that the border prescribes.<sup>50</sup> How we think about and institute the border is central to how we think about political association and juridical status: “[I]t is the working of the border ... which constitutes, or ‘produces’ the stranger/foreigner as a social type.”<sup>51</sup> Indeed, laws enacted pursuant to the “moving border paradigm,” as Huyen Pham terms

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47. *Statement of Mutual Understanding*, *supra* note 7, preamble at para 3.

48. Shachar, *supra* note 10 at 810 [emphasis in original removed]. For further discussion, see e.g. Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (New Jersey: Princeton University Press, 2006) at 6-7 (noting that the “growing (though uneven) permeability of national borders, often described under the rubric of ‘globalization,’ has become axiomatic in much social and economic scholarship”); Karine Côté-Boucher, “The Diffuse Border: Intelligence-Sharing, Control and Confinement along Canada’s Smart Border” (2003) 5:2 *Surveillance & Society* 142; Alison Mountz, “Spectres at the Port of Entry: Understanding State Mobilities through an Ontology of Exclusion” (2011) 6:3 *Mobilities* 317.

49. Étienne Balibar, *We, the People of Europe?: Reflections on Transnational Citizenship* (New Jersey, Princeton University Press, 2004) at 109 [emphasis in original]. For further discussion of the meaning of “political space,” see Étienne Balibar, “Europe as Borderland” (2009) 27:2 *Society and Space* 190 (explaining that the concept of “political space” examines relationship between the constitution of political power and the control of space, and analyzing the notion through, *inter alia*, a consideration of political spaces, borders, and citizenship).

50. Étienne Balibar, “Europe as Borderland” (The Alexander von Humboldt Lecture in Human Geography, delivered at the University of Nijmegen, 10 November 2004) at 16, online: <gpm.ruhosting.nl/avh/Europe%20as%20Borderland.pdf>.

51. *Ibid* at 16. See also *ibid* at 14, 17.



it, not only re-draw state borders but also redistribute the rights and relations produced on either side of those borders.<sup>52</sup>

In the context of refugee law, moving borders are almost always enacted with the goal of limiting access to lawful migration and asylum and with the effect of restricting refugee rights.<sup>53</sup> As Audrey Macklin explains, “since asylum seekers’ entitlement to claim refugee status is triggered by reaching the frontier of the asylum state, if the border is no longer the border, the state can deny responsibility for entertaining the refugee claim.”<sup>54</sup> The MBS, for example, facilitates Canada’s ability to shift the locus of border control away from its territorial borders to what the CBSA describes as “the many, more effective, ‘borders’ that a traveller will pass through before reaching North America.”<sup>55</sup> In doing so, the MBS allows Canada to subject refugees to inspection long before they set foot on Canadian soil and trigger the legal safeguards outlined in *Singh*. In the result, Canada acts as an “architect of statelessness”—to borrow Alison Mountz’s term—pushing migrants into intentionally ambiguous thresholds where their legal status and entitlements can more easily be denied.<sup>56</sup>

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52. Huyen Pham, “When Immigration Borders Move” (2009) 61:5 Fla L Rev 1115 (examining the significance of moving border laws in the context of United States immigration law).
53. As Shachar further explains, moving borders allow states to enforce “the sovereign prerogative to deny or permit access in a whole new way: by redrawing (indeed, redefining) the once fixed and static territorial border, transforming it into something more malleable and movable, which can be placed and replaced – by the words of law – in whatever location that best suits the goals of restricting access.” Shachar, *supra* note 10 at 811. For a discussion of how moving border laws impact asylum seekers, see *e.g.* Gerald Kernerman, “Refugee Interdiction Before Heaven’s Gate” (2008) 43:2 Government and Opposition 230; Lori A Nessel, “Externalized Borders and the Invisible Refugee” (2009) 40:3 Colum HRL Rev 625; Lory Diana Rosenberg, “The Courts and Interception: The United States’ Interdiction Experience and Its Impact on Refugees and Asylum Seekers” (2003) 17:2 Geo Immig LJ 199.
54. Audrey Macklin, “Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement” (2005) 36:2 Colum HRL Rev 365 at 369.
55. *OAG 2003 Report*, *supra* note 7 at 8.
56. Alison Mountz, *Seeking Asylum: Human Smuggling and Bureaucracy at the Border* (Minneapolis: University of Minnesota Press, 2010) at 167, 172 [Mountz, *Seeking Asylum*]. See also Alison Mountz, “Shrinking Spaces of Asylum: Vanishing Points Where Geography Is Used to Inhibit Access to Asylum” (2013) 19:3 Austl J HR 29.



### III. CIRCUMVENTING RESPONSIBILITY

By “push[ing] the border out,”<sup>57</sup> Canada engages in a range of activities that not only block refugees but also sidestep Canada’s legal responsibilities towards refugees under domestic and international law. For example, Canada positions Liaison Officers in several refugee-producing countries around the world and tasks them with intercepting refugees and other so-called “irregular” migrants before they board Canada-bound boats or planes.<sup>58</sup> Canada currently positions Liaison Officers in forty-seven countries around the world.<sup>59</sup> As Mountz explains, while Liaison Officers have “little to no jurisdiction,” they “act informally as liaisons between foreign embassies, private security companies at airports, airlines, and host authorities” and facilitate Canada’s ability to block refugees offshore.<sup>60</sup> Indeed, according to the CBSA, the Liaison Officer Program “has strengthened the CBSA’s capacity to interdict irregular migrants overseas.”<sup>61</sup> The Program has proven an effective interdiction measure: between 2001 and 2014, Liaison Officers intercepted over 86,000 persons offshore, many of whom were likely refugees.<sup>62</sup> Because they operate outside state soil, Liaison Officers can more easily circumvent Canada’s refugee protection obligations. They are not required to consider the individual circumstances of interdicted individuals,

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57. *CBSA Admissibility Study*, *supra* note 7 at “Overview of CBSA Admissibility Screening and Supporting Intelligence Activities.”

58. Canada Border Service Agency, “Fact Sheet: CBSA International Network” (June 2012) at para 2, online: <<https://web.archive.org/web/20130425110301/http://www.cbsa-asfc.gc.ca/media/facts-faits/113-eng.html>> (explaining as follows: “The Government of Canada began deploying migration officers overseas in 1989, and the network has continued to evolve to meet changing global priorities and threats. In spring 2011, the CBSA began to expand the scope of its international network to better reflect the full spectrum of the Agency’s mandate. With this new expanded profile, migration integrity officers (MIOs) were renamed CBSA liaison officers”), cited in Arbel & Brenner, *supra* note 5 at 29, n 55.

59. For an overview of Liaison Officers located abroad see Canada Border Service Agency, *Guide for Transporters: Obligations under the Immigration and Refugee Protection Act (2012)*, online: <<http://www.cbsa-asfc.gc.ca/publications/pub/bsf5023-eng.html#a4>> (listing locations and operations of Liaison Officers abroad).

60. Mountz, *Seeking Asylum*, *supra* note 53 at 137.

61. Canada Border Services Agency, *Departmental Performance Report (2005-2006)*, online: <[www.collectionscanada.gc.ca/webarchives/20071126140658/http://www.tbs-sct.gc.ca/dpr-rmr/0506/bsa-asf/bsa-asf\\_e.pdf](http://www.collectionscanada.gc.ca/webarchives/20071126140658/http://www.tbs-sct.gc.ca/dpr-rmr/0506/bsa-asf/bsa-asf_e.pdf)>.

62. For statistics between 2001–2011, see Arbel & Brenner, *supra* note 5 at 34. Statistics for 2012–2014 were obtained through Freedom of Information Request A-2014-13676/ MB, completed 29 July 2015, current to November 2014.

to differentiate between refugees and other travellers, or to ensure that intercepted individuals are not sent back to their countries of origin to face persecution.<sup>63</sup>

Offshore interdiction works in tandem with carrier sanctions and visa restrictions—also operative along the MBS’s external borders—to keep countless more refugees at bay.<sup>64</sup> Canadian law prohibits carriers “from carrying to Canada any person who does not hold the prescribed documents required for entry into Canada.”<sup>65</sup> Failure to meet this requirement can result in the imposition of significant fees.<sup>66</sup> Consider, for example, the 2004 decision of the Federal Court

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63. See Andrew Brouwer, *Attack of the Migration Integrity Specialists: Interdiction and the Threat to Asylum*, Canadian Council for Refugees (29 May 2003), online: <ccrweb.ca/interdictionab.htm> (providing details about offshore interdiction, noting that liaison officers seldom differentiate between refugees and other migrants, and explaining how interdiction violates international law).
64. For discussion of how interdiction policies operate in tandem, see John Morrison & Beth Crosland, “The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?” United Nations High Commissioner for Refugees, Working Paper No 39 (April 2001) at 28, online: <www.unhcr.org/3af66c9b4.pdf> (noting that “[t]he imposition of visa restrictions on all countries that generate refugees is the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal migration.”)
65. Canada Border Services Agency, *Guide for Transporters: Obligations Under the Immigration and Refugee Protection Act* (2012), online: <www.cbsa-asfc.gc.ca/publications/pub/bsf5023-eng.html>. While Canada has imposed such sanctions on carriers since the early 1980s, it has retooled their use as interdiction measures in recent years. See François Crépeau & Delphine Nakache, “Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection” (2006) 12:1 *Immigration and Refugee Policy Choices* 3 at 13 (explaining how various Canadian migration mechanisms have been retooled as interdiction measures). For discussion, see Andrew Brouwer & Judith Kumin, “Interception and Asylum: When Migration Control and Human Rights Collide” (2003) 21:4 *Refugee* 6 at 9 (explaining how carrier sanctions work in concert with visa requirements as interdiction measures).
66. The fee obligations are delineated in the Immigration and Refugee Protection Regulations, SOR/2002-227, ss 278-80. See also IRPA, *supra* note 14, s 148. Carriers may be charged an administrative fee of up to \$3,200 per foreign national and may also be charged for associated removal costs including expenses incurred for accommodation and transport, associated fees, medical expenses, translation services, meals, and incidentals. Section 279 of the Regulations establishes the procedure by which an administrative fee is assessed and outlines exceptions. Section 280 of the Regulations outlines a range of administrative fees to be imposed on carriers, in accordance with the Memorandum of Understanding, ranging from \$0 to \$3,200 depending on several criteria. For further discussion, see Mountz, *Seeking Asylum*, *supra* note 53 at 137 (explaining that carrier sanction programs exemplify the privatization of enforcement, since private companies are being paid by states to police borders, and also forced to pay states when they fail); Brouwer & Kumin, *supra* note 62 at 12-13 (explaining the carrier sanctions program, the procedure for imposing fees, and the procedure for entering pre-inspection agreements to allow for payment of

in *KLM Royal Dutch Airlines v Canada*, ordering KLM to pay \$114,715.68 for costs associated with a Somali national who came to Canada using a false passport on a KLM flight from Paris and who was eventually returned to France by the Canadian government.<sup>67</sup> The threat of financial sanction creates incentives for airlines and other surrogate screeners to prevent travellers who lack proper identity documents from travelling to Canada without consideration of their potential status as refugees. Since Canada does not monitor the activities of surrogate screeners, it is difficult to know how many refugees are blocked as a result of this program. The evidence is clear, however, that private carriers sometimes engage in improper conduct to avoid incurring fees, including throwing refugees overboard mid-journey on the high seas to meet their death.<sup>68</sup> In the Maersk Dubai incident, for example, officers of a Taiwanese vessel discovered Romanian men stowed away mid-journey on two separate voyages to Canada, two men on the first voyage and one on the second.<sup>69</sup> The officers were accused of throwing the men overboard, ostensibly to avoid paying carrier sanctions.<sup>70</sup> In a United States case involving a similar scenario, the Chinese crew of a Panama-flagged vessel departing from the Dominican Republic found five men stowed away on board and, in an effort to avoid financial sanction, threw two of the men overboard and left three on a life raft in the middle of the ocean.<sup>71</sup> The men in the raft were saved by another vessel, and the shark-eaten bodies of the two men thrown overboard were found sometime later.<sup>72</sup>

Canada also has a long history of imposing visa requirements on countries that produce large numbers of refugees, particularly during times when refugee arrivals from a given country increase substantially.<sup>73</sup> As James Hathaway and Alex

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reduced fees); François Crépeau, Delphine Nakache & Idil Atak, "International Migration: Security Concerns and Human Rights Standards" (2007) 44:3 *Transcultural Psychiatry* 311 at 324 (noting that sanctions transfer migration management to private carriers who must make decisions on the travellers' possession and authenticity of documents to avoid substantial fines).

67. *KLM Royal Dutch Airlines v Canada (Solicitor General)*, 2004 FC 308, 48 Imm LR (3d) 28, cited and discussed in Rehaag, *supra* note 13 at 97.

68. *Romania (State) v Cheng* (1997), 158 NSR (2d) 13, 114 CCC (3d) 289 (SC).

69. *Ibid* at paras 1-4.

70. *Ibid* at para 1.

71. *De Leon v Shih Wei Navigation Co, Ltd*, 2007 US Dist LEXIS 49665 at 3-5, 2007 WL 20121738, aff'd 2008 US App LEXIS 5464 (5th Cir Tex 2008).

72. *Ibid*.

73. See Arbel & Brenner, *supra* note 5 at 35-40 (outlining Canada's visa policies and their impact on asylum seekers, and citing statements by Citizenship and Immigration Canada officials suggesting that stemming refugee flows is a central motivating factor in deciding when to impose visa requirements).

Neve explain, since “a Canadian visa will not be issued for the purposes of seeking asylum in Canada, refugee claimants who are honest about their intentions will be denied the documentation necessary to come to Canada legally.”<sup>74</sup> Identified by Hathaway as a “classic mechanism of *non-entrée*,”<sup>75</sup> visa restrictions are often utilized as the “‘first line of defense’ against the entry of undesirables.”<sup>76</sup> Canada has been candid in its position that visa requirements act as an effective way to stem refugee flows from certain source countries and save “considerable resources.”<sup>77</sup> The Liaison Officer program, visa restrictions, carrier sanctions, and other interdiction measures work together to close Canada’s borders to refugees

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74. See also James C Hathaway & R Alexander Neve, “Fundamental Justice and the Deflection of Refugees from Canada” (1996) 34:2 Osgoode Hall LJ 213 at 223.
75. James C Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 291. As Hathaway explains: “Canada, for example, has long required the nationals of countries likely to produce refugees to obtain a visa before boarding a plane or otherwise coming to Canada.” *Ibid* at 291-92. The term “non-entrée” is coined to describe the array of legalized policies adopted by states to stymie access to refugees to their territories. See generally James C Hathaway, “The Emerging Politics of Non-Entrée” (1992) 91 *Refugees* 40 (describing terminology).
76. John Torpey, “Coming and Going: On the State Monopolization of the Legitimate ‘Means of Movement’” (1998) 16:3 *Sociological Theory* 239 at 252 (explaining the operation of visa restrictions and passport requirements). For a discussion of how states use visa restrictions as instruments of interdiction, see e.g. Brouwer & Kumin, *supra* note 62; Ninette Kelley, “International Refugee Protection Challenges and Opportunities” (2007) 19:3 *Int’l J Refugee L* 401 at 421 (explaining the severe risk posed by visa restrictions, combined with offshore interdiction and document inspection programs, to asylum seekers in need of international protection).
77. Citizenship and Immigration Canada, *Public Safety and Anti-Terrorism: Final Report* (Ottawa: CIC, 2003) at 4.2. For example, in July 2009, the Canadian government imposed visa requirements on Mexico and the Czech Republic. See Citizenship and Immigration Canada, News Release, “Canada Imposes a Visa on the Czech Republic” (13 July 2009) [“CIC News Release, Czech Republic”], online: <<https://web.archive.org/web/20130621075627/http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13a.asp>>; Citizenship and Immigration Canada, News Release, “Canada Imposes a Visa on Mexico” (13 July 2009) [“CIC News Release, Mexico”], online: <<https://web.archive.org/web/20131222203953/http://www.cic.gc.ca/english/department/media/releases/2009/2009-07-13.asp>>. See e.g. “CIC News Release, Mexico”, *ibid* (citing Minister of Citizenship, Immigration and Multiculturalism Jason Kenney stating: “The visa requirement I am announcing will give us a greater ability to manage the flow of people into Canada and verify bona fides. By taking this important step towards reducing the burden on our refugee system, we will be better equipped to process genuine refugee claims faster.”) See also “CIC News Release, Czech Republic”, *ibid*.

such that, as Sharryn Aiken notes, “vast numbers of bona fide refugees are being caught up in the web of immigration control with devastating results.”<sup>78</sup>

Measures that “push the border out” are legally problematic in that they also push Canada’s interdiction activities outside the ambit of *Charter* review and leave those who are subject to them with little to no legal recourse. While Canadian law is still murky with respect to the *Charter’s* extraterritorial application, the Supreme Court of Canada made clear in *R v Hape* that Canadian officials operating outside of Canada are largely exempt from constitutional scrutiny.<sup>79</sup> *Hape* created what Kent Roach has described as extra-territorial “*Charter*-free zones.”<sup>80</sup> As regards individual applicants, the Court held in *Canada v Khadr* that the protection of the *Charter* can extend beyond Canada’s borders where fundamental human rights are at stake, but only, it seems, in cases involving Canadian citizens.<sup>81</sup> Other courts have held that non-citizens off state soil can claim the *Charter’s* protection only if they can “establish a nexus to Canada,” for example by being subject to a criminal trial.<sup>82</sup> Otherwise, the courts have held that the *Charter* does not apply extraterritorially to “foreigners, with no attachment whatsoever to Canada or its laws.”<sup>83</sup>

Given that fundamental human rights are always at stake when a refugee flees persecution, what kind of nexus or “attachment ... to Canada or its laws” must a

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78. Sharryn Aiken, “Racism and Canadian Refugee Policy: Diverse Perspectives on Refugee Issues” (1999) 18:4 *Refugee* 1 at 6.

79. *R v Hape*, 2007 SCC 26 at para 14, [2007] 2 SCR 292 (finding that “international customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada”).

80. Kent Roach, “*R v Hape* Creates *Charter*-Free Zones for Canadian Officials Abroad” (2007) 53:1 *Crim Law Q* 1 (analyzing the *Hape* decision). See also *Amnesty International Canada v Canada (Chief of the Defense Staff)*, *infra* note 80 (finding that while Canadian Forces can exercise power beyond state borders, they are not circumscribed by the *Charter* while abroad).

81. *Canada (Justice) v Khadr*, 2010 SCC 3 at para 14, [2010] 1 SCR 44 (finding that in circumstances where “Canadian participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations or fundamental human rights norms”, the *Charter* can apply abroad). Similarly, the Federal Court has been consistent in its position that “*Charter* protections may be available to non-Canadians when they are physically present in Canada, subject to a criminal trial in Canada, and that Canadian citizens, in certain circumstances, may assert their section 7 *Charter* rights when they are outside Canada”, and dismissing the claim on grounds that the applicants “have failed to establish a nexus to Canada that would engage their section 7 *Charter* rights.” *Slahi*, *supra* note 29 at paras 47-48. See also *Kinsel v Canada (Citizenship and Immigration)*, 2012 FC 1515, [2014] 2 FCR 421.

82. *Slahi*, *supra* note 29 at para 48.

83. *Amnesty International Canada v Canada (Chief of the Defense Staff)*, 2008 FCA 401 at para 14, [2009] 4 FCR 149, leave to appeal to SCC refused, 33029 (21 May 2009).

refugee establish to benefit from the *Charter's* protection offshore? By the Court's logic in *Singh*, physical presence at (one of) Canada's borders should be enough. Indeed, if the extraterritorial borders drawn by the MBS are to function as true borders—as the MBS asserts—*Singh* would prescribe that a refugee's presence at any of these borders makes him amenable to Canadian law and therefore entitles him to *Charter* protection. By this logic, a refugee stopped by a Liaison Officer at one of the MBS's legal borders should be able to assert the protections outlined in *Singh*. The same should apply for a refugee subject to visa restrictions or carrier sanctions.<sup>84</sup>

The MBS negates this possibility, however, by enacting the border in two fundamentally different ways. On one hand, it redefines the border as a shifting, multiple continuum that extends extraterritorially. On the other hand, it conceives of the border as a singular static line positioned along Canada's cartographic boundary line and asserts this as the “actual” border.<sup>85</sup> Herein lies the core contradiction underpinning the MBS: it simultaneously asserts Canada's extraterritorial borders as real borders, while maintaining the fiction that they are not actual borders. By constituting the border as at once static and shifting, the MBS places refugees in an intractable legal position. It suspends refugees between two contradictory directives: It requires them to present themselves at the “actual” border to claim the legal protections outlined in *Singh*, but also shifts the border to confound their ability to do so. Canada uses the MBS to subject refugees to the force of Canadian law but avoid the obligation to extend refugees the legal and constitutional duties triggered by physical presence along the actual border. This fundamentally undermines *Singh*, weakening both the protection it affords to refugees and its broader legal and normative force.

#### IV. UNDERMINING THE “RIGHT TO HAVE RIGHTS”

The effects that flow from the MBS's operation are profound and are helpfully illuminated by reference to the work of Hannah Arendt. In particular, her analysis of the “right to have rights”<sup>86</sup>—which, as Dana Schmalz writes, has become an “almost unavoidable reference” in discussions of refugee rights and

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84. Such a reading accords with Galloway's analysis, *supra* note 32.

85. The MBS does this explicitly, by stating that the strategy's goal is to intercept migrants “as far away from the *actual* border as possible, ideally before a person departs their country of origin.” *OAG 2003 Report*, *supra* note 7 at 8 [emphasis added].

86. Arendt, *Origins*, *supra* note 12.

the boundaries of law—highlights the legal and conceptual violence ushered in by the MBS’s subversion of *Singh*’s core principles.<sup>87</sup>

Arendt’s discussion of the right to have rights powerfully captures the legal and political loss suffered by the figure of the refugee.<sup>88</sup> She introduces the right to have rights briefly in *The Origins of Totalitarianism*, defining it rather vaguely as the right “to belong to some kind of organized community” and to “live in a framework where one is judged by one’s actions and opinions.”<sup>89</sup> In *Origins*, she explains that the world first became aware of the existence of the right to have rights as a result of its deprivation—when, during the First World War and its aftermath, European nation-states denationalized and deported millions of unwanted minorities, disentiing them from legal and political membership. Left with no government to represent them, the “new refugees” were rendered stateless and deprived of meaningful rights protection.<sup>90</sup> In Arendt’s analysis, statelessness was produced by a confluence of various conditions: the lack of coordination between states, the thoughtless application of denationalization and

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87. Dana Schmalz, Book Review of *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* by Christian Volk, (2015) 13:4 Int’l J Const L 178 at 178.

88. Notably, while she used the term “refugees,” Arendt rejected the distinction between the various categories of displacement (refugees, stateless persons, displaced persons, etc.). In *Origins*, she writes: “[t]he many and varied efforts of the legal profession to simplify the problem by sating a difference between the stateless person and the refugee – such as maintaining ‘that the status of a stateless person is characterized by the fact of his having no nationality, whereas that of a refugee is determined by his having lost diplomatic protection’ ... were always defeated by the fact that ‘all refugees are for practical purposes stateless.’” Arendt, *Origins*, *supra* note 12 at 281, n 28. For further discussion, see Patricia Tuitt, “Refugees, Nations, Law and the Territorialization of Violence” in Peter Fitzpatrick & Patricia Tuitt, eds, *Critical Beings: Law, Nation, and the Global Subject* (London: Ashgate, 2004) 37 at 37 (criticizing Arendt for focusing on the territorial refugee in her analysis of statelessness/rightlessness, and arguing that as a result Arendt conceptualizes “rightlessness in territorial terms, by assuming that displacement occurs outside one’s state,” and arguing instead that it is not the refugee but rather the “internally displaced” that disrupts the conventional nexus of state, identity, and territory).

89. *Origins*, *supra* note 12 at 296-97. While Arendt only discusses the right to have rights in *Origins*, her writing on political action in *The Human Condition*, 2nd ed (Chicago: University of Chicago Press, 1998), discussed in the analysis below, helps illuminate the meaning and significance of the right.

90. *Origins*, *supra* note 12 at 296-97.



expulsion policies, and the coercive application of identity politics within and between nation-states.<sup>91</sup>

Arendt suggests that the true loss refugees experienced stemmed not from their loss of nationality, home, or “social texture into which they were born,” for these losses were not unprecedented in human history.<sup>92</sup> Nor was their loss experienced in the deprivation of life, liberty, or equality before the law, for these formulations were designed to provide protection to individuals within a legal order. Rather, as Bridget Cotter explains, Arendt claims that refugees suffered true loss in their expulsion from the legal and political order of organized states and in their concurrent loss of a political and juridical context in which their legal rights could be realized or enforced.<sup>93</sup> This, in Arendt’s analysis, is what it means to be deprived of the right to have rights: to be denied a “place in the world” where one’s rights can be exercised and enforced and where one’s actions acquire meaning and significance.<sup>94</sup>

Building on these readings, my treatment of Arendt departs from critics who suggest that the right to have rights is a right of citizenship or national belonging. I analyze the right to have rights not as a status or entitlement, but as a process that is maintained through political action and is “rooted in the practices of

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91. *Ibid* at 296. For further discussion, see Judith Butler, “I Merely Belong to Them” Book Review of *The Jewish Writings* by Hannah Arendt, (2007) 29:9 *London Review of Books* 26 at 26 (explaining that in Arendt’s conception, statelessness was more than the manifestation of mass displacement, but was the “recurrent 20th-century predicament of the nation-state”).
92. Arendt, *Origins*, *supra* note 12 at 293.
93. Bridget Cotter, “Hannah Arendt and ‘The Right to Have Rights’” in Anthony F Lang, Jr & John Williams, eds, *Hannah Arendt and International Relations: Readings Across the Lines* (New York: Palgrave MacMillan, 2008) 96 at 110.
94. Arendt, *Origins*, *supra* note 12 at 293. For Arendt, the promise of rights protection is substantively meaningless if it is not accompanied by correlating duties of enforcement that make actions and opinions meaningful. As Jeffrey Isaac explains, Arendt’s analysis makes clear that “those very rights long considered universal and attached, as it were, to individuals by virtue of their very humanity, require for their existence institutional supports that are utterly contingent and by no means universal.” Jeffrey C Isaac, “Hannah Arendt on Human Rights and the Limits of Exposure, or Why Noam Chomsky Is Wrong about the Meaning of Kosovo” (2002) 69:2 *Social Research* 505 at 509. As Martha Minow explains, Arendt “celebrated politics as an area of action in which ‘people create, through words and deeds, the power they need to initiate new projects or response to shared predicaments.’” See Martha Minow, *Not Only for Myself: Identity, Politics, and the Law* (New York: New York Press, 1997), citing “Justice, Equality, Democracy” in Lewis P Hinchman & Sandra K Hinchman, eds, *Hannah Arendt: Critical Essays* (New York: State University of New York Press, 1994) 257 at 258.



rights-bearers themselves.”<sup>95</sup> In Arendt’s analysis, the right to have rights depends on, and is realized through, one’s own contribution to the production and enforcement of rights through political action. It is for this reason that critics like Frank Michelman reject a reading that understands the right to have rights as comprised of two constitutive rights: a preliminary moral claim (right 1) to a set of legal or empirical rights (right 2).<sup>96</sup> Michelman shows that Arendt “befuddles and collapses” any conceptual distinction between moral and empirical rights.<sup>97</sup> Instead, as James Ingram suggests, Arendt conceives of the right to have rights as a right that is sustained by a continuous process of action and exchange through which fundamental rights are negotiated and defined.<sup>98</sup> Its realization, Arendt argues, hinges on the existence of a “place in the world” where one can contribute to the production and enforcement of rights through political action.<sup>99</sup>

In Arendt’s analysis, laws and constitutions are necessary to preserve a “place in the world.”<sup>100</sup> Refugees who were denied a “place in the world” were cast “outside the pale of law” and rendered not just stateless but also rightless—a condition constituted by a loss of polity.<sup>101</sup> Thus, in Arendt’s thinking, the role

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95. James D Ingram, “What Is a ‘Right to Have Rights’?: Three Images of the Politics of Human Rights” (2008) 102:4 *Am Polit Sci Rev* 401 at 402, 408, 412. This reading builds on Étienne Balibar’s equation of the right to have rights with a “right to politics.” See Étienne Balibar, *Masses, Classes, Ideas: Studies on Politics and Philosophy before and after Marx* (London: Routledge, 1994). As Ingram explains: “Human rights are thus on [Balibar’s] account a principle internal to modern politics that always potentially exceeds the limits of any given political order or community. Because this ‘right to politics’ is a right to *action*, Balibar insists, it can only be ‘a right of everyone *on his or her own behalf* – which signifies, ‘among other things, that no one can be liberated or emancipated by others, from ‘above.’” Ingram, *supra* note 91 at 411 [emphasis in original].

96. See Frank I Michelman, “Parsing ‘A Right to Have Rights’” (1996) 3:2 *Constellations* 200.

97. *Ibid* at 203-04.

98. Ingram, *supra* note 91 at 408, 412.

99. Arendt, *Origins*, *supra* note 12 at 293.

100. Christian Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (London: Hart, 2015).

101. Arendt, *Origins*, *supra* note 12 at 268-69, 295.

of law is not to enact or even guarantee the right to have rights.<sup>102</sup> Rather, the role of law is to create a system that enables its constituents to engage in political action and participate in the production of rights.<sup>103</sup> Law—as preserved and enshrined in constitutions—thus establishes essential foundations for the right to have rights.

Arendt's analysis helps clarify the Court's contribution in *Singh*. While *Singh* does not guarantee refugees broad *Charter* protection—or, for that matter, enact the right to have rights—it nonetheless extends them legal and constitutional recognition under Canadian law. *Singh* recognizes refugees as legal subjects and entitles them to participate in the adjudicative process that governs their rights

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102. Arendt herself, in fact, questioned whether enacting the right to have rights was possible. After introducing the right to have rights, Arendt states: "It is by no means certain whether this is possible. For, contrary to the best-intentioned humanitarian attempts to obtain new declarations of human rights from international organizations, it should be understood that this idea transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and, for the time being, a sphere that is above the nations does not exist." Arendt, *Origins*, *supra* note 12 at 298-99. For an analysis of whether the right to have rights can ever be meaningfully implemented, see Judith Butler & Gayatri Chakravorty Spivak, *Who Sings the Nation-State?: Language, Politics, Belonging* (New York: Seagull Books, 2007) at 65.
103. As Volk further demonstrates, in Arendt's analysis, laws and constitutions provide the "enabling reasons" for political action. See Volk, *supra* note 95. In Arendt's thinking, political action—which she viewed as the highest form of human activity—both embodies and enables human freedom, heroic action, self-invention, and creativity. Volk's reading convincingly shows that Arendt sees the experience of political action as essential for freedom. *Ibid* at 230. Arendt further explains that for human action to truly flourish, human beings must live in a polity that is plural, equal, and diverse. Arendt constructs plurality and equality as mutually enforcing conditions. Through equality and distinction, she explains, human beings experience true freedom and development. Equality and distinction allow human beings to both express and be judged by their actions and opinions—the markers that define "who," not "what," they are. See generally Arendt, *The Human Condition*, *supra* note 85. For further discussion on this point, see Morris B Kaplan, "Refiguring the Jewish Question: Arendt, Proust, and the Politics of Sexuality" in Bonnie Honig, ed, *Feminist Interpretations of Hannah Arendt* (Pennsylvania: Pennsylvania State University Press, 1995) 105 (noting that Arendt saw self-formation as an inherently political process and saw identities as being formed by negotiation of a plurality of forces and relations).

entitlements.<sup>104</sup> By embracing them within the constitutional fold, it carves out a “place in the world” where, despite their non-membership in the national polity, refugees are recognized as juridical actors who possess a limited but actionable rights-claim against the state.<sup>105</sup> In doing so, it establishes important legal foundations for the right to have rights in Canada’s constitutional framework. The MBS, however, allows Canada to banish refugees outside “the pale of law,”<sup>106</sup> or more accurately, outside the ambit of Canadian legal consideration. It denies refugees the place in the world that *Singh* ostensibly safeguards, by dismantling the legal and political context that enables refugee rights to be enforced and applied. Thus, the MBS does much more than re-chart Canada’s borders; it also alters the legal and constitutional entitlements of refugees present at those borders and undermines the legal foundations established in *Singh* for the realization of the right to have rights. Absent those legal foundations, the MBS allows Canada to avoid its legal and constitutional obligations and treat refugees not as juridical actors but as strangers whose rights can be ignored or denied. By depriving refugees of legal and constitutional recognition, the MBS leaves refugees in a state of suspended legal status, subject to the violence of our laws but denied the

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104. Notably there are several differences between the “right to have rights” and the principles outlined in *Singh*. First and foremost, Arendt conceives of the “right to have rights” as something that must exist independent of the nation-state structure. See Jeffrey C Isaac, “A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights” (1996) 90:1 Am Polit Sci Rev 61 at 71 (interpreting Arendt as implying that rights do not emerge from the nation-state or an international covenant or tribunal but rather “from the praxis of citizens who insist upon these rights and who are prepared to back up this insistence through political means.”). See also Butler & Spivak, *supra* note 97 at 32-35 (analyzing Arendt’s understanding of the limitations of the nation-state structure and the role the nation-state plays in producing statelessness). *Singh*, in contrast, outlines an understanding of rights protection that is bound to and circumscribed by the nation-state. Second, Arendt conceives of the right to have rights as a principle that acquires juridical significance through correlating duties of enforcement that fall on the “whole of humanity.” This reading finds support in Arendt’s statements in the original preface to *Origins* where she suggests that the Rights of Man need “a new guarantee,” which can be “found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity.” Arendt, *Origins*, *supra* note 12 at ix. The principles outlined in *Singh*, in contrast, acquire juridical significance through correlating duties that fall on the nation-state alone.

105. While refugees are formally entitled to the legal protections outlined in the United Nations *Refugee Convention*, once an individual is outside his or her country of origin, these rights are often difficult to enforce in practice. For discussion, see *e.g.* Catherine Dauvergne, “The Dilemma of Rights Discourses for Refugees” (2000) 23:3 UNSWLJ 56 at 57 (commenting on the “meagre” rights granted to refugees). *Refugee Convention*, *supra* note 14.

106. Arendt, *Origins*, *supra* note 12 at 277.

protections of our constitutional documents. In this respect, the MBS signals a shift not just of *policy* but also of *polity*: its application reconfigures the “we” that are the subject of Canadian constitutional rights.

## V. CONCLUSION

With its reconstitution as a “smart” border and its transposition into the middle of non-jurisdictional political space, the Canadian border no longer functions as a site of rights protection for refugees. Rather, by redrawing its borders, Canada now frames new parameters of belonging that exclude some who were previously embraced within the constitutional fold. Take, for example, the case of Mr. K, an Iranian refugee persecuted for his pro-reform views, who fled Iran to seek refugee protection in Canada where his brother is a citizen.<sup>107</sup> Mr. K flew from Iran to Moscow and then to Havana using false identity documents, intending to connect to Canada via Havana.<sup>108</sup> A Canadian Liaison Officer stationed in Havana intercepted him and barred him from boarding his Canada-bound flight.<sup>109</sup> Since Cuba is not party to the United Nations *Refugee Convention*, Mr. K could not seek refugee protection in Havana and was instead deported to Moscow. Before his deportation, with the assistance of his Canadian brother, he reached out to the Ottawa office of the United Nations High Commissioner for Refugees, which in turn reached out to counterparts in Moscow to seek their assistance. Despite these efforts, Mr. K was detained at Moscow International Airport, returned to Tehran, and arrested on arrival.<sup>110</sup>

When blocked by the Liaison Officer in Havana, Mr. K was physically present at one of Canada’s extraterritorial borders as drawn by the MBS and thus both amenable to and at the mercy of Canadian law. By *Singh’s* logic, this alone should have entitled him to the constitutionally protected right to basic legal recognition: to be recognized as a legal subject and appear before a Canadian adjudicator to advance his claim. But without access to the “actual” border, he could not claim the constitutional protections promised in *Singh*. Instead, he was intercepted, deported, and *refouled* to face the very persecution

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107. See Brouwer & Kumin, *supra* note 62 at 7 (discussing and reflecting on Mr. K’s story).

108. Recognizing that refugees often cannot secure original documentation while fleeing persecution, the United Nations *Refugee Convention* prohibits signatory states from imposing sanctions on refugees who use false documents to seek asylum. See *Refugee Convention*, *supra* note 14, art 21(1). This principle is incorporated into Canadian law in IRPA, *supra* note 14, s 133.

109. See Brouwer & Kumin, *supra* note 62 at 7.

110. *Ibid.*

from which he fled. As a result, Mr. K was not only denied basic rights but also denied that “place in the world” where he could be recognized as a juridical actor and meaningfully participate in the legal and political process through which his rights were determined and defined. In Arendtian terms, Mr. K was denied not just rights but the right to have rights.

Mr. K’s story illuminates the core problems that stem from conceiving of the Canadian border as both static and shifting in a legal framework that limits the *Charter’s* extraterritorial reach. On one hand, in keeping with *Singh*, Canada purports to extend basic constitutional protection to refugees present at its borders and establish legal foundations that can enable the realization of Arendt’s right to have rights. But on the other hand, by “pushing the border out” and maintaining the fiction that its extra-territorial borders are not “actual” borders, Canada denies refugees present at those borders the protection *Singh* purportedly safeguards. In Mr. K’s case, due to the limited extraterritorial application of the *Charter*, the Liaison Officer responsible for Mr. K’s interception was largely exempt from constitutional scrutiny. And Mr. K himself was suspended in an exceptional state—subject to the force of Canadian law but denied legal and constitutional recognition.<sup>111</sup> At all material times, Mr. K was unable to claim the benefit of the constitutional protections and commitments *Singh* purportedly enshrines.

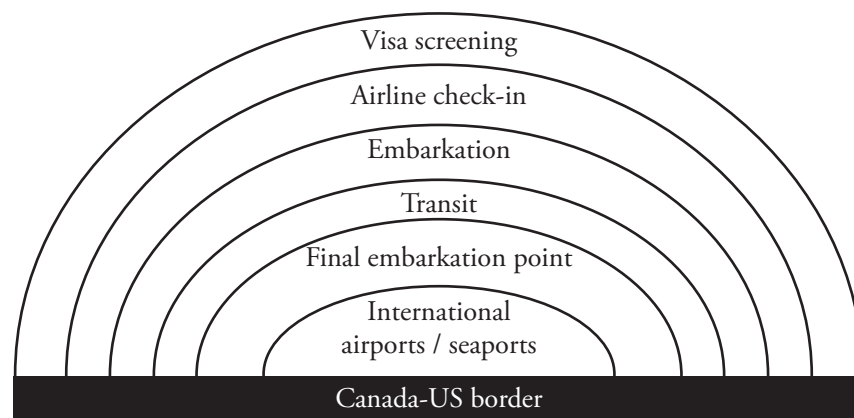
As Mr. K’s story demonstrates, the MBS is fundamentally unprincipled: it treats refugees at our borders in a manner that is inconsistent with our own legal precedent and constitutional imperatives. Applying Arendt’s analysis to the MBS, it becomes clear that the violence ushered in by the MBS lies not only in denying refugees subject status in the eyes of the law; it also lies in the dismantling of one of our most progressive constitutional principles and in the concurrent weakening of our constitutional commitments.<sup>112</sup> As a constitutionally minded nation, Canada has an obligation to regulate its borders in ways that reflect its

111. For a discussion of how and when the Canadian border operates as a site of exception, see Efrat Arbel & Benjamin Goold, *Not So Exceptional? Understanding the Canadian Border as a Place of Law* [forthcoming, on file with authors].

112. Indeed, by adopting such an approach, we injure both refugees and our own constitutional order. As Volk explains, adopting a politics of exclusion negatively affects not just those who are excluded, but the constitutional order itself. Volk further reminds that the refugee represented for Arendt the “anomaly for whom the general law did not provide,” whose legal treatment undermined constitutionality itself. The refugee illuminates the “corruption of constitutionality,” as Volk terms it, whereby the “important decisions ... [are] no longer taken within the constitutional framework.” See Christian Volk, “The Decline of Order: Hannah Arendt and the Paradoxes of the Nation-State” in Seyla Benhabib, ed, with the assistance of Roy T Tsao & Peter J Verovšek, *Politics in Dark Times: Encounters with Hannah Arendt* (New York: Cambridge University Press, 2010) 172 at 187-90, citing Arendt, *Origins*,

constitutional commitments. Indeed, for the *Singh* principle to retain meaning in Canada's constitutional framework, Canada must ensure that the *Charter* extends not just to its territorial border but also its legal borders, wherever they may be drawn. If Canada de-territorializes the border, then it must also de-territorialize the constitution to ensure that refugees who are subject to Canadian law may also benefit from its protection. To do otherwise would be to adopt a duplicitous, unprincipled stance in our treatment of refugees at our borders and to erode one of the most progressive tenets of our constitutional system. It would be to undermine our long-standing tradition of leadership in refugee protection and to call into question Canada's stated commitment to open our borders to those in need as well as its global reputation as a generous, hospitable nation.

FIGURE 1: CBSA ADMISSIBILITY SCREENING POINTS



Source: Citizenship and Immigration Canada<sup>113</sup>

*supra* note 12 at 286 (elaborating upon how statelessness undermines the constitutional character of a political order).

113. *OAG 2003 Report*, *supra* note 7 at 8. For a more explicit rendering, see *CBSA Admissibility Study*, *supra* note 7 at "Overview of CBSA Admissibility Screening and Supporting Intelligence Activities."