

Legal Analysis

| To Defer or Not to Defer: Analyzing the Differences Between the Canadian Federal Court and Supreme Court Cases on the *Safe Third Country Agreement*

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In 2023, the Supreme Court of Canada (SCC) contradicted the Federal Court decision on the Safe Third Country Act (STCA), ruling it as constitutional. The STCA allows Canada to send asylum seekers back to the USA if that was the country they first entered. This has resounding and potentially dangerous impacts on asylum seekers as well as on Canadians who are increasingly concerned with immigration.

This paper answers the question of why the Federal Court and Supreme Court decisions were different. By comparing the two judicial decisions, I argue that the Supreme Court showed more deference to the federal government than the Federal Court (FC) did. Deference is defined in this paper as the weight a judge gives to the decision of the legislative and executive branches. This argument adds to the literature by connecting two sides of the debate on whether the SCC is generally deferential or not.

This research provides information for those who continue to bring cases against the STCA about how the SCC and FC differ. The paper begins with background on the topic, a literature review which includes my argument and relevant cases, and then my findings and analysis using judicial reasoning. I conclude with weaknesses in my research and its significance for Canadians.

Background

As one of the two neighbors of America, Canada is preparing for a surge of crossings by asylum seekers; crossings which are more dangerous than ever (Shingler, 2024). This danger is due to the *Safe Third Country Act* (STCA) between the United States and Canada (Shingler, 2024). This statute says that Canada can send any asylum seekers arriving from the US back to America because it is considered a safe country (Canada-U.S Safe Third Country Agreement, 2003). The Supreme Court of Canada (SCC) ruled that the STCA did not violate the *Charter of Rights and Freedoms* in 2023, contrary to the decision from the Federal Court (FC) (*Canadian Council for Refugees v. Canada* (CCR), 2023, [1]). This decision leaves the Canadian government in a position to further control and reduce the flow of refugee claimants. This has many implications for Canadians who are increasingly concerned about immigration (Environics Institute, 2023, pp. 1-2) and for those asylum seekers directly affected by these restrictions. This decision could change the lives of many vulnerable people which is why it is important to understand why this decision was made.

This led to the research question: Why is there a difference in decisions over the constitutionality of the STCA between the Federal Court judge and the unanimous Supreme Court? There are two major differences in issues of law. First, whether the s. 7¹ violations align with the fundamental principles of justice or not. Second, the difference in dealing with concurring s. 7 and s. 15² claims. The latter is addressed now.

Current literature indicates that attempts by the SCC to clarify how to deal with s. 15 claims have failed (Bateman, 2012, p. 593). Additionally, while others have argued that s. 7 can

¹ This section of the *Charter* guarantees the right to life, liberty, and security of the person.

² This section of the *Charter* guarantees the right to substantive equality.

be used in place of s. 15 when the claims are made concurrently (which is often), s. 7 does not lead to any significant difference with such equality claims (Kang & Kang, 2016, p. 255). The SCC in this case explicitly states why they came to a different reasoning than the lower court. First, that they do not want to continue the dangerous trend of ignoring s. 15 claims in favor of s. 7 rights as it implies one is better than the other (*CCR v. Canada*, 2023, [180]). They agree that the lower court's decision was logical based on precedent, but the s. 15 claims should return to a lower court to be considered on their own ([181]³). Of note, the SCC did not provide any principles or guidelines for the lower court to deal with s. 15 which will make this topic interesting for future research.

The s. 7 claims are the focus of this research as it is not clear from an initial reading of the case why this difference exists. This paper argues that the Supreme Court of Canada shows more deference to the federal government than the lower court throughout the judicial reasoning leading to different decisions. Additionally, this paper contends that the reason the Supreme Court of Canada is more deferential to the federal government is because it involves international law. This paper will proceed by first examining the current scholarship and then lays out the argument. Next, the key precedents and the key differences between the judgements are summarized before an analysis of the cause of these differences using the judicial reasoning as evidence. Finally, the paper explores alternative explanations and ends with where this decision leaves Canada and weaknesses in my research.

Literature Review

What is Deference?

For this research paper, it is important to understand what conception of deference is used. Epistemic deference is, “the weight which courts should attribute to the decisions of non-judicial institutions” (Foley in Daly, 2012, p. 7). This definition is the norm for scholarship on this topic which Foley (2012) distinguishes from alternative kinds of deference that have relevance in other areas of legal research (p. 7). The 2023 *CCR* case, focuses on the federal government’s decision to allocate the USA a safe country rather than authority ([40]). This research will proceed through comparing the differences in the SCC and FC judicial reasoning to the definition of epistemic deference.

There is an ongoing debate among scholars in this area about whether the SCC has had a general trend of showing deference to the federal government (Mullan, 2001; Dassios & Prophet, 1993; Knox & Isaac, 2006; Danay, 2016). One side of the debate argues that SCC decisions have had a trend of showing deference. Mullan (2001) focuses on deference to administrative decisions and argues that this trend began before the *Charter* era, extending back to the 19th century (p. 406). Dassios and Prophet (1993) argue that there has been a general trend of deference across all areas of law, even following the development of the *Oakes*³ test (p. 290).

The alternative argument is that SCC decisions have not had a trend of showing deference when it comes to administrative law and criminal law. Knox and Isaac (2006) argue that in cases where Indigenous law and administrative law overlap, the SCC has had a confusing record of decisions, failing to show sufficient deference (p. 487). Danay (2016) argues that in cases of administrative law, the SCC has increasingly shown less deference to the

³ The *Oakes* test is a 4-part test created by the SCC to determine whether or not a statute which has been proven to violate the *Charter*, is still an acceptable limit on rights under s. 1.

government (p. 603).

MacIvor (2013) states that criminal law, because it is an area of expertise for many judges/justices, is exempt from the general deference that courts show the government, specifically on the “rational connection” step of the *Oakes* test (p. 79). Hogg (2012) points out that many important cases which expanded the interpretation of s. 7 rights, such as adding overbreadth as a violation of fundamental justice, were criminal cases (pp. 198 & 201 & 204-5). Expanding the *Charter* is an example of not deferring to the government. This work adds a new perspective that brings the two sides of the debate together: the SCC shows deference, but in non-administrative and non-criminal law cases. In this paper, the focus is on international law, which has limited scholarship related to deference.

The Argument

The thesis is based on a mix of arguments from the above scholarship as well as additional articles which focus on analyzing a single case. Dassios’ and Prophet’s (1993) argument that there has been a general trend of deference irrespective of the area of law alongside the other scholarship that suggests there is not a trend of deference in administrative/criminal law leads to the conclusion that areas of law outside these two should show a general trend of deference. The s. 7 claims in the *CCR v. Canada* case are substantive and involve non-criminal statutes with explicit avoidance of administrative issues (2023, [53]). Thus, this case lands within the areas of law that the SCC decisions have generally shown deference.

Knox and Isaac (2006) show that the SCC has stated that they will show greater deference to the federal government in cases of Indigenous law because of the level of expertise

required (p. 487). It makes sense to apply this to cases involving international law because international law is similar to Indigenous law in theoretically relevant ways. First, Indigenous law involves a number of treaties between various First Nations and Canada which are relevant to legal reasoning. Similarly, international law involves numerous treaties with other nations which form a separate source of law that the SCC would have to consider. Third, the federal government is responsible for negotiating Indigenous and international treaties as well as consulting with First Nations as well as diplomatic relations with other countries. Thus, international law requires a level of expertise from the federal government similar to Indigenous law. This brings about the argument that the SCC would show deference to the government in a case involving refugee claimants as well as a treaty with the US.

Finally, the argument is based on the article by Rangaviz (2011) who makes the normative argument that the federal government showed too much deference in *Canada v. Khadr* (2011, p. 254). While this paper does not include a normative argument, the way Rangaviz (2011) analyzes his data is similar to the research method in this paper. First, it is important to distinguish between two different concepts of deference. One concept is the outcome of a case: did the SCC decide that a statute or action was constitutional? If so, this is deferring to the federal government. This is separate from the concept of deference defined above in the literature review. This second concept of deference applies to the actual judicial reasoning which led to the outcome of a case. Rangaviz (2011) analyzes the legal reasoning behind a single case and distinguishes between the outcome and what led to the outcome. He argues that the SCC showed too much restraint in their role throughout the reasoning which led to an outcome of ruling that the government actions were constitutional (pp. 254 & 268). This paper replaces his concept of restraint with deference because the focus is on legal reasoning

rather than on the role of justices, however the method of analyzing the different steps the Courts took to arrive at their decision is similar.

Evidence that would support the thesis is if the Supreme Court of Canada cites different precedents⁴ in their decision which was more deferential to the government than the precedent cited in the lower court decision. Alternatively, the thesis would be supported if both decisions cite the same cases, but the SCC judgement has clear reasoning favoring deference to the federal government. If there is no identifiable reasoning indicating deference from the SCC judicial reasoning, then there is no proof. Evidence that would weaken the thesis is if there was a clear error by the lower court judge in evaluating evidence which impacted their reasoning. This would mean it is possible the SCC was not more deferential but had corrected a legal error. Other evidence that could weaken the thesis is if there was an intervener in the SCC case which brought a new perspective that changed the course of the decision.

Previous Cases

There are three cases relied on the most in the *CCR v. Canada* case. The first is *Canada v. Bedford* (2013), which explains the principles of fundamental justice. In this case, there were three sections of the Criminal Code which engaged the s. 7 rights of sex workers by banning certain actions that would help sex workers protect themselves ([60]). A person's s. 7 rights are violated if the engagement of s. 7 violates the principles of fundamental justice ([94]). To review this, the Court will establish the legislative purpose of the impugned statute and evaluate whether it complies with the principles of fundamental justice: gross disproportionality and overbreadth ([93]). *Bedford* explains that gross disproportionality is a matter of the impact of the statute

⁴ This is plural.

([109]) while overbreadth focuses on the scope of a statute ([112]). The decision in *Bedford* (2013) was that the violations of s. 7 did not align with these principles ([140]).

The second case is *Suresh v. Canada* (2002), which sets out the concept of foreseeable consequences. In the case of *Suresh* (2002), it was determined that it was unconstitutional to deport someone who would likely face torture ([1]). Although this effect had not happened yet, nor would agents of Canada carry out this effect directly, it was determined that this consequence being foreseeable was enough evidence to show causality ([54]). The third case was *Canada v. PHS Community Services Society* (2011). This case developed the precedent surrounding “safety valves” in statutes. In *PHS* (2011), the Court determined that it was unconstitutional for the Minister to withhold an exemption from the Criminal Code for Insite, a safe injection site ([3]). The Court determined that the existence of these exemptions are a safety valve which prevent the Criminal Code from being applied to situations which would lead to violations of s. 7 ([113]).

Findings: The Differences

There were three issues of law decided on by the SCC in this case. First, that the sections of the *STCA* which allow Canada to deem the US a safe third country are not *ultra vires* (*CCR v. Canada*, 2023, [30]). Second, that these same sections align with the fundamental principles of justice and therefore are not unconstitutional ([30]). Third, that the s. 15 claims should return to the Federal Court for consideration ([30]). As mentioned above, the third issue of law will be better examined when the s. 15 claims are dealt with in the lower court. The Federal Court had similar reasoning and the same decision on the question of *vires*. Thus, the focus of the review is on the second issue of law.

Before any examination of the differences, a summary of the reasoning behind the

judgment on the question of *vires* is necessary. The Federal Court judge determined that a previous decision in the Federal Court of Appeal (FCA) in 2008 on this statute determined that it was not *ultra vires* (2020, [74]). This judge argued that the new arguments did not meet the threshold to overturn the 2008 decision specifically on the issue of promulgation (2020, [74]). The consideration of promulgation is about whether events that took place after the law was enacted should be considered when reviewing the issue of *vires* (*CCR SCC*, 2023, [52]). The SCC determined similarly to the FC that this issue must be determined based on the situation at the time of promulgation and not after and cited the same FCA case ([54]).

The first difference over whether the s. 7 violations were in line with the fundamental principles of justice was due to the usage of different standards of review. Both courts agreed that the applicable principles of justice were overbreadth and gross disproportionality. However, the lower court used both *Bedford* (2013) and the “shock the conscience” standards of review to make their determination (*CCR FC*, 2020, [136-37]). They determined that the violations of the claimants s. 7 rights were disproportionate and went on to a s. 1⁵ analysis of the statute ([140-41]). Their determination was that the violations were not a reasonable limit on the claimants rights ([150]). The SCC relied only on the *Bedford* principles to determine whether the statute was constitutional (2023, [121 & 127]). Using this, the SCC determined that the statute was not overbroad or disproportionate ([163]). The SCC then proceeded to do a short, and incomplete, analysis of s. 1 ([165-71]).

Another difference between the two judgments stems from different interpretations of the legislative purpose of the *STCA*. The lower court used the purpose of the *STCA* as it was laid out in the FCA 2008 case:

“ . . . the sharing of responsibility for the consideration of refugee claims with countries

⁵ This section of the *Charter* states that all rights guaranteed within the *Charter* are subject to reasonable limits.

that are signatory to and comply with the relevant articles of [the *Refugee Convention* and the *Convention Against Torture*] and have an acceptable human rights record” (2020, [119]).

Whereas the SCC used various sources of evidence including the *IRPA*, the *STCA*, and international treaties, to lay out their own interpretation of the legislative purpose:

“ . . . to share responsibility for fairly considering refugee claims with the United States, in accordance with the principle of *non-refoulement*” (2023, [139]).

The last two differences relate to a difference in interpretations of the evidence. The SCC states that the lower court made three errors that could not be ignored. First, that the FC did not properly weigh the presence of the safety valves in the *IRPA* and erred in deeming these safety valves illusory (2023, [148 & 160]). Second, the SCC states that the FC erred in their judgment that there was evidence that detention was automatic ([86]). Third, the SCC states that the FC erred in determining there was a real risk of *refoulement* rather than a speculative one ([102]).

Analysis

International Law

When discussing international law in relation to this case, it is important to note that the *Safe Third Country Act* is a treaty which is separate from the domestic legislation, whereas the *International Refugee Protections Act* brings it into effect ([2]). The SCC focuses on the latter ([4]), whereas the FC focuses on the former (*CCR FC*, 2020, [8]). The difference manifests most strongly when the SCC determines the legislative purpose, which is argued below. Since the SCC focuses on the *IRPA*, international law is less central to the judicial reasoning than is the case for

the FC. This can be seen where the SCC makes a point to explain that they are not entering into a discussion on whether the *IRPA* aligns with international law (*CCR SCC*, 2023, [4]), suggesting that differing levels of deference would not be due to a presence of international law. Thus, this part of the thesis would be better studied in a case where international law is more central to judicial reasoning.

Legislative Purpose

While both the FC and SCC decisions reference the *Bedford* (2013) precedent, there is a difference in the application of its principles due to the SCC's unique interpretation of the legislative purpose. This demonstrates that the SCC is more deferential to the federal government. The FC judge states that the section of the purpose which matters for determining whether the *STCA* is overbreadth or disproportionate is the "sharing responsibility" aspect (2020, [122]). This contrasts with the SCC which states that ultimately, in regards to the detention and medical isolation, it is a matter of determining whether the American system is fair (2023, [142]). The SCC's focus on fairness allows them to come to the determination that it is fine if the American system is different, so long as it is fair ([142]). Thus, the presence of different risks in the American system does not necessarily mean that the system is unfair.

This is in contrast to the FC which, by focusing on responsibility sharing, hinges their determination of what is fair on a comparison between the American system and the Canadian system (2020, [128]). To the FC, since detention is different from what happens in Canada, it is not fair ([128]). This shows less deference to the federal government than the SCC's focus on fairness because it lowers the burden of proof to the claimant. The claimant now has to prove not that the outcome of claiming asylum is different, but that the different outcome violates their s. 7

rights. This is an example of greater epistemic deference as the SCC weighs the decision to designate America as safe with greater weight than the FC did by giving the federal government the benefit of the doubt.

“Shook the Conscience”

One of the main differences between the two decisions, being the different standards of review used, demonstrates the different levels of deference shown by the two courts. The reasoning behind why the SCC did not use the “shocks the conscience” review also shows a different level of deference. The SCC determined that the “shocks the conscience” standard is to be reserved for administrative law or the individual decisions made by the government officials that carry out the statute (2023, [118]). As stated in Danay (2016), the SCC has shown more deference in cases involving administrative law (p. 603). This gives an indication that the lower court had chosen a standard of review that shows less deference to the federal government. In fact, the SCC states that there is plenty of room for a future case in which the individual decisions involved with carrying out the provisions of the *IRPA* are challenged ([118]). Thus, the choice in standard of review indicates a different level of deference shown to the initial decision that America was safe.

The *Bedford* (2013) principles standard of review used by the SCC is also a more deferential standard of review than “shocks the conscience” because it raises the threshold of proof for the claimant. The FC decision stated that gross disproportionality could be determined using the claimant: Ms. Mustafa (2020, [137]). Ms. Mustafa was detained and medically isolated “in an abnormally cold facility” for three weeks alongside criminals and given a diet that did not respect her religious needs (*CCR SCC*, 2023, [17]). The FC said that this was enough to “shock

the conscience” of an average Canadian (2020, [137]). The *Bedford* principles ask the claimants to prove that the s. 7 violations are both disconnected from the legislative purpose, which includes the presence of safety valves, and that the negative effects are grossly disproportionate (*CCR SCC*, 2023, [127]). Thus, even if a claim sounds alarming, as Ms. Mustefa’s did to the trial judge, this is not enough to say that her s. 7 rights were violated according to the *Bedford* (2013) principles. By raising the threshold of proof for the claimant, the SCC is giving the benefit of the doubt to the federal government, thus, showing deference to their decision that America is safe. I believe it is relevant to add a reminder that the SCC sent the s. 15 claims back to the lower court as these are relevant to Ms. Mustefa’s claim regarding her religious needs. A case involving equality rights may lead to different results.

Section 1 Analysis

Because the FC had determined that the *STCA* violated the claimant’s rights, the FC decision has a complete analysis of these violations using the *Oakes* test. The SCC does not cover a complete s. 1 analysis, however, the portion that the SCC covers demonstrates that the SCC was more deferential. The fact that the FC evaluated the violations according to s. 1 of the *Charter* is already proof of this. This is because, as stated by the SCC, when a case moves from proving s. 7 violations to proving reasonableness, the burden of proof shifts ([165]). Rather than the claimant proving individual harms done, the state must prove that they did their due diligence when creating this law. By not reaching a s. 1 analysis, the SCC lowered the burden of proof for the state, giving them the benefit of the doubt. Thus, the SCC remained more deferential to the state’s decision to designate the US as a safe country.

Additionally, there is proof that had a reasonable limits test been carried out, the SCC

would have been more deferential to the government than the FC. The SCC implies that, although the burden of proof is shifted to the government, it is not a high threshold. They imply this by stating that the government can use the presence of safety valves, even if they are imperfect or illusory for some individuals, to pass the minimal impairment stage of the *Oakes* test ([170]). In fact, the SCC says that even if an individual can prove their s. 7 rights are violated and that the safety valves are out of reach, the violations can still be ruled a reasonable limit so long as the safety valves work for most people ([171]).

This is in direct contrast to the FC which ruled that the government's evidence failed to justify violations of s. 7. The FC states that the *STCA* failed on both the minimal impairments and proportionality steps of the *Oakes* test (2020, [149]). Rather than note the safety valves, the FC pointed out that the government had failed to justify why the non-exempt refugee claimants should be treated so disproportionately ([148]). Nor had the government proved that there was a fair review process for those who were detained, while also not proving that Canada's could not handle this group of refugee claimants ([146-7]). These requirements set out by the FC judge show a high threshold of proof for the government to meet. It could be argued that the FC considered more evidence because their s. 1 analysis was complete. However, the fact that the SCC made a pointed effort to explain how the safety valves could justify the s. 7 violations proves that the SCC had a lower threshold of proof for the government. Thus, they once again showed deference to the government's decision to designate America as safe.

Alternative Explanations

One major difference which can be attributed to an alternative explanation is the matter of interpreting the evidence of the case differently. Namely, the error the FC had made in ruling

that the safety valves written into the *STCA* were illusory. Because the FC had determined that these safety valves were inaccessible, they had no effect on the application of the *Bedford* standard (2020, [130]). However, when the SCC had taken these into account, they determined that the risk of *refoulement* was mitigated by the safety valves and, thus, the *IRPA* was not overbreadth or disproportionate (2023, [163]). This is a difference that could be attributable to an error by the FC judge and not due to a different level of deference. This does not prove the thesis wrong, however, it does add nuance to the original thesis: it is likely that both errors and different levels of deference contributed to the different decisions.

One other alternative explanation that is plausible would be if there were new interveners in the SCC case that had not intervened in the FC case. Importantly, there was no list of interveners for the FC identified during this research to compare to the list from the SCC. Additionally, there was no evidence in the judicial reasoning provided by the SCC that they considered evidence that the FC had not. Even if there was evidence of new interveners, the presence of new affidavits would not change the thesis for two reasons. First, if the new affidavits explain why the SCC had different interpretations of evidence this would not change the addition made above that errors in fact-finding are part of the explanation of the different outcomes. Second, if new affidavits were introduced, they would be introduced to the legal reasoning that has already been evaluated. Thus, they could explain why the SCC and FC had differences in legal reasoning, but that does not change that the SCC had more deferential legal reasoning.

Conclusion

In sum, the evidence suggests that the Supreme Court of Canada showed more deference to the federal government than the Federal Court at various levels of their judicial reasoning leading to different decisions on the constitutionality of the *STCA/IRPA*. The use of the “shock the conscience” standard of review by the FC allowed them to lower the burden of proof for the claimants. When compared to the demands of the *Bedford* (2013) principle on the claimant, it is clear that the SCC was more deferential to the federal government. The different interpretations of the legislative purpose of the *STCA* led the SCC to focus on how fair the American refugee system was while the FC focused on the differences between the American and Canadian systems. This allowed the SCC to be more deferential to the government. Finally, the different approaches to the s. 1 analysis proved that the SCC was more deferential. The SCC demanded less evidence than the FC on the effects of the *STCA* by focusing on the overall usefulness of the safety valves written into the *STCA*. This shows deference to the federal government. There are also differences in the legal reasoning caused by errors in fact-finding made by the FC which contributed to this outcome.

This paper connects two sides of a debate on whether the SCC shows deference or not by showing a case, which was not administrative and not criminal, where the SCC was more deferential than the Federal Court. Further research into whether the existence of international law in a case matters for when the SCC shows deference is warranted. While there was no specific evidence in this case that the existence of international law was why the SCC showed more deference, it is still a viable explanation. There are a number of cases which involve a more complex mix of international law and refugee policy that could be analyzed and/or compared. For example, *R v. Hape* (2007) analyzes the cross between criminal law, the *Charter*, and international law principles such as sovereignty and international human rights (*R. v. Hape*, 2007,

SCC).

The *STCA* creates a more restrictive immigration policy in Canada. For asylum seekers this can mean a number of different things. For some, it may mean a return to an unsafe place. This research provides information for the Canadians and asylum seekers concerned for the status of the *STCA*, especially those that continue to bring cases to the courts over the next few years. What kinds of arguments work and how the SCC operates differently from the lower courts are important to know as we see the s. 15 claims case sent back to the Federal Court. There will likely be procedural cases brought against the government officials that must carry out the *STCA*, especially as immigration policy shifts with the Trump presidency. These cases may end up with a very different result for the *STCA*, so concerned citizens should pay careful attention to the results.

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