

**The Safe Third Country Agreement, Irregular Migration  
and Refugee Rights: A Canadian Policy Challenge**

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## GLOSSARY OF ABBREVIATIONS

CBSA:	Canada Border Services Agency
IHAP:	Interim Housing Assistance Program
IRB:	Immigration and Refugee Board (Canada)
IRCC:	Immigration, Refugees and Citizenship Canada
IRPA:	Immigration and Refugee Protection Act (Canada)
LAO:	Legal Aid Ontario
PRAIDA:	Programme Régional D'accueil et D'intégration des Demandeurs A'asile
RCMP:	Royal Canadian Mounted Police
RPD:	Refugee Protection Division (Canada)
STCA:	Safe Third Country Agreement (Canada-U.S.)

## Executive Summary

This paper examines current policy developments surrounding the Canada-U.S. Safe Third Country Agreement (STCA). In 2017, large surges in irregular arrivals crossed Canadian border at points where the Agreement does not apply. This spurred political debates around a so-called “loophole” and the charge that asylum seekers were taking advantage of unauthorized crossings. Efforts to re-claim migration control have triggered more restrictive asylum policies and a colder climate towards refugees in Canada. Amendments to modernize STCA, budget cuts to the services available to refugees as well as a heavy investment into a more “effective” border strategy were presented by the Canadian government as viable solutions to mitigating the implications caused by the large volume of asylum claims and perceived threats to the resilience of the Canadian immigration system.

Currently, there is an ongoing legal challenge against the legality of the Safe Third Country Agreement at the Federal Court of Canada. An exploration of the historical policy challenges to the Canada-U.S. agreement reveals that current controversies have historic roots in Canada. They also reveal that the legitimacy of STCA has been challenged in courts of law since its inception in 2005. The legality of STCA has been largely contested over concerns regarding the state of refugee protection, specifically in the United States. To this end, this paper provides a historic overview of STCA’s development, legal and policy challenges, as well as implications for refugee protection. Against this backdrop, current policy developments under the Trump administration are examined. An analysis of the deteriorating state of refugee protection in the U.S. reveal that its continuous designation as “safe” jeopardizes both the objectives of STCA and state commitments to international law and refugee protection.

Critics argue that under the Trump administration, the U.S. is not safe for refugees and thus, STCA can no longer function as intended. Amending or overturning STCA would ensure that Canada does not jeopardize its commitments to refugee protection and its obligations under international law. This would also reduce incentives for irregular migration and reduce the costs associated with processing high volumes of refugee claims. However, given the continued uncertainty around U.S. immigration policy, it would also likely result in a higher volume of standard refugee claims from the U.S..

The 2017 irregular migration surge brought attention to significant issues concerning asylum protection and necessitating effective strategies that can mitigate the strains put on the Canadian asylum system. These strategies, although put forth to effectively re-claim migration control, must place refugee protection at their core and ensure that state obligations under international law do not decline. The irregular migrant ‘crisis’ poses challenges to the resilience of the Canadian immigration system, placing strains on urban reception areas and calling into question numerous aspects of immigration policy. There has been an increase in right wing populist sentiment around immigration and the need for stronger progressive responses. In order to ensure immigrant-friendly migration, we need to better understand issues like STCA and bring forth evidence-based policy reforms that both maintain Canada’s commitments to refugee rights and help foster resilient communities.

## **Introduction**

Joined by 120 points of entry, the border between Canada and the United States is the world's largest running border between any two countries (Public Safety Canada, 2015, para 1). The relationship between Canada and the U.S. in the contemporary period has in large measure been defined by the 1992 North American Free Trade Agreement (NAFTA) (Parks, 2004, p. 395). Beyond a strong trade relationship, the year 2001 marked an increase in cooperation on border security. In an effort to enhance security and continue to maintain a legitimate and secure flow of people, goods, infrastructure and information, Canada and the U.S. signed the Smart Border Declaration in 2001 (Senate of Canada, 2002; Parks, 2004, p. 395). This declaration included a 30-point action plan (Senate of Canada, 2002). Among them was a commitment to "more effectively exchange information on immigration-related issues", specifically the processing of asylum and refugee claims (Senate of Canada, 2002, Action #4 & 5). As part of the Smart Border Action Plan, Canada and the U.S. signed the Safe Third Country Agreement to manage refugee and asylum claims (Government of Canada, 2016; Senate of Canada, 2002, Action #5).

STCA debates have existed since its inception. In 2017, these debates re-surfaced after a surge in irregular border arrivals across the Canadian- U.S. border. Its legitimacy was questioned by policy-makers as refugee claims were being made from irregular points of entry where the agreement does not apply. This was further complicated by the policy developments under the Trump administration and the deteriorating state of refugee protection in the U.S.. Thus, political efforts since 2017 have been placed into establishing new immigration practices that are able to manage migration flows and prevent future surges. The introduction of new policies in response to shock events, like large migration flows, require a historic analysis of practices. Only then, can the creation of evidence-based policy reforms have the ability to effectively foster resilient political and urban systems that are able to efficiently respond to unexpected shock events.

This paper begins by providing a background that identifies and examines recent developments and controversies to foster a better understanding of policy challenges surrounding irregular migration, refugee protection and the Safe Third Country Agreement. It will then provide an overview of STCA, its policy objectives and provisions. The purpose of this section is to explain the goals of STCA that will contextualize contemporary legal challenges and provide a better understanding of why STCA provisions have and continue to be contested. Next, this paper will explore and analyze STCA's historical legal and political challenges in Canada. This will reveal

issues with immigration policy implementation and practice. Finally, this paper will examine and evaluate implications of the agreement on refugee rights and the state of refugee protection in both Canada and the U.S.. In doing so, this paper aims to draw policy conclusions that ensure immigration policy and practice are resilient, evidence-based, and continue to function in a way that protects refugee rights and does not jeopardize state obligations under international law.

### **Policy Issue/Background**

An “unprecedented” surge of irregular border arrivals into Canada from the U.S. began in 2017 (August 1<sup>st</sup> through the 15<sup>th</sup>) when the Royal Canadian Mounted Police (RCMP) reported 3,800 arrivals at an irregular border crossing (Roxham Road) in Quebec (Smith & Laframboise, 2017). The RCMP reported that 200 to 300 asylum seekers were being transferred daily to Saint-Bernard-de-Lacolle, an official point of entry where claims can be processed in Quebec (Smith & Laframboise, 2017). By the end of 2017, the total number of arrivals had risen to 20,593 (Conolly, 2018; CBSA, 2019). In parallel to the rise in crossings, the acceptance of asylum claims increased to the highest they have been in 27 years (Carman, 2018). The rate of acceptance rose to 70% in 2017, compared to 44% in 2013 (Carman, 2018). In 2018 and 2019 the number of border crossings reported by the RCMP continued to increase (19,419 in 2018 and 3,944 in 2019) (Government of Canada, 2019). Making the total number of irregular arrivals since 2017 an estimated 45,000 (Wright, 2019, June 28).

When an asylum seeker arrives anywhere other than an official border point of entry, they are held by RCMP officers or local police and transferred to a Canada Border Services Agency (CBSA) office or an Immigration, Refugees and Citizenship Canada (IRCC) office (Government of Canada, 2019). Here, asylum seekers undergo a health examination and security check that includes biographic and biometric screenings (Government of Canada, 2019; Stevenson, 2017). If an asylum claim is deemed eligible by either an IRCC or CBSA officer, it is referred to the Immigration and Refugee Board (IRB) or the Refugee Protection Division (RPD) where a hearing is scheduled (Government of Canada, 2019; Stevenson, 2017). Once a claim is considered eligible, asylum seekers can access social, health, education, housing and legal support (Government of Canada, 2019; Stevenson, 2017). It is important to note that claimants only become eligible for federal settlement services when their claim is deemed eligible by the IRB (Government of

Canada, 2019). Until their status is determined, a process which can take years, claimants only have access to “some” provincial services (Government of Canada, 2019).

In Quebec, after being registered for a hearing with the IRB, asylum seekers are referred to the Programme Régional D'accueil et D'intégration des Demandeurs A'sile (PRAIDA), a provincial organization also known as the Regional Program for the Settlement of Integration of Asylum Seekers (Stevenson, 2017). PRAIDA carries out psychological and medical need assessments before sending claimants to one of twelve temporary refugee housing centers (Stevenson, 2017). In 2017, the number of claimants being processed by PRAIDA ranged from 1,000 to 2,000, making their screening time approximately three days (Stevenson, 2017).

In Toronto, claimants can access many settlement organizations like the Canadian Red Cross's First Contact Centre, which offers claimants emergency help and assists in the search for shelter, as well as social and legal support upon arrival (Canadian Red Cross, 2019; FCJ Refugee Centre, 2019, p. 13). The First Contact Centre is set to receive financial support from the City of Toronto to expand their hours of operation (up to 12 hours a day) to accommodate for the arrival of more refugee claimants (FCJ Refugee Centre, 2019, p. 13). Claimants can also call to access emergency shelter through the City of Toronto Shelter, Support and Housing Administration Central Intake Line (FCJ Refugee Centre, 2019, p. 16). They are then placed in either a: (1) respite centre, (2) homeless shelter, (3) The Christie Refugee Welcome Centre or Sojourn house which are shelters for claimants, (4) hotels administered by the City of Toronto, Sojourn House or COSTI, or a (5) refugee house run by organizations like Matthew House, FCJ Refugee Centre, Adam House, Romero House or the Silas Hill House (FCJ Refugee Centre, 2019, p. 17). Claimants also become eligible for Ontario Works upon initiating a claim with an officer at the border (Ontario Ministry of Children, Community and Social Services, 2018). Ontario Works provides financial assistance including housing, food and health support for refugee claimants (Ontario Ministry of Children, Community and Social Services, 2018).

The 2017 surge in irregular border crossings had a significant impact on Canada's asylum system and brought to public attention issues related to cost and efficiency. The cost of processing refugee claims as of 2017 have significantly increased. According to the Office of the Parliamentary Budget Office (PBO), the estimated cost of each asylum claim from 2017-2018 was \$14,421 (Office of the Parliamentary Budget Office, 2018, p. 1; Harris, 2018, November 29). Making the total amount spent in 2017 on irregular crossings \$340 million (Office of the

Parliamentary Budget Office, 2018, p. 1). This number is expected to increase to \$396 million as the price of each asylum claim is estimated to grow to \$16,666 between 2019 and 2020 (Office of the Parliamentary Budget Office, 2018, p. 1). The RCMP noted that their cost of processing asylum claims at irregular border crossings in the last two years was \$7.7 million (CTV News, 2018). For the April 2017- June 2018 period, the CBSA reported their costs at \$54.5 million (CTV News, 2018). The Ontario government alone has estimated \$200 million to be the cost of processing arrivals outside of official border points of entry (Harris, 2018, November 29). Response strategies have sought to reduce these costs through policies that aim to reduce irregular arrivals.

Refugee claimants, specifically those who do not have family contacts, are most vulnerable in the first 24 to 48 hours after they arrive to cities (FCJ Refugee Centre, 2019, p. 8). A study with refugee claimants in Toronto conducted by the FCJ Refugee Centre in 2018 reported that approximately 39% of migrants did not have housing arrangements upon arrival (FCJ Refugee Centre, 2019, p. 8). This left 35% of migrants to resort to the shelter system and 18% to hotels in the city (FCJ Refugee Centre, 2019, p. 9). The City of Toronto reported that 40% of their emergency shelters were occupied by asylum seekers in 2017 (Harris, 2018, November 29). With 15 to 20 claimants arriving daily, these shelters reached full capacity and as a result, asylum seekers were first moved to dorms in Humber and Centennial College (Flanagan, 2018), and later to hotels (Wright, 2018, October 2). This housing crisis saw the City of Toronto demand from the federal government \$64.5 million to help mitigate the financial costs of providing emergency shelter to claimants while their applications were being processed (Harris, 2018, November 29). Out of the requested amount, the City of Toronto was initially told it will be receiving only \$11 million from the federal government to alleviate housing costs (CBC News, 2018).

In May 2019, the federal government announced that it will be granting the city of Toronto \$45 million to help with housing expenditures resulting from the high volume of refugee arrivals (Immigration, Refugees and Citizenship Canada, 2019; Howse, 2019). In March of 2019, IRCC announced the Interim Housing Assistance Program (IHAP) that will provide provinces financial support to help alleviate the financial burden associated with housing asylum seekers (Government of Canada, 2019; Wright, 2019, January 29). This support will come in the form of a grant to provincial or municipal governments that allows for the enhancement of temporary “housing capacities” and services (Government of Canada, 2019).

While the housing crisis in Toronto was framed as a consequence of the arrival of refugee claimant, the lack of available shelter has in fact been a “long-standing issue” in the City (FCJ Refugee Centre, 2019, p. 2). This has been attributed to many factors including a decline in social housing investments and growing inequality and discrimination against newcomers (FCJ Refugee Centre, 2019, p. 2). Toronto’s current shelter system is a “bandage solution” that can only react to housing crisis’ like the one caused by refugee claimants (FCJ Refugee Centre, 2019, p. 16). It does not operate in a “proper way of receiving people who are arriving in the city in need of immediate accommodation” (FCJ Refugee Centre, 2019, p. 16). Thus, the funding efforts by the federal government that are intended to alleviate the costs of emergency housing to refugee claimants can only provide a temporary solution.

Aside from Toronto’s shelter system, the impact of the border crossings also revealed that the asylum system in Canada is not well equipped to handle large border flows (Forrest, 2019). As a result, political debates have been directed at mitigating these effects and re-claiming migration control. Research suggests that policy developments in the U.S. have been a “major driver of irregular migration to Canada” (Damian-Smith, 2019), and as such the Safe Third Country Agreement (STCA) has become an important policy issue at the heart of public and political debate. This agreement designates both Canada and the U.S. as “safe” countries. This designation is based on state compliance with the: (1) UN Convention on refugees, (2) Convention on Torture, and (3) having a “good human rights record” (Office of the Auditor General Canada, 2019; Wright, 2018, October 22). The core principle of STCA outlines that those claiming refugee status must do so in the “first safe country they enter” (Office of the Auditor General Canada, 2019; Wright, 2018, June 21). This means that those who claim protection at official border crossings from the U.S. are denied entry (and returned) because they are arriving from a country that does not put their lives in danger and can provide them protection (Wright, 2018, June 21). This has been called into serious question since the Trump Presidency.

Most of the migrants that arrived at the Canadian border from the U.S. in 2017 arrived at irregular rather than official border points of entry. Should asylum seekers have arrived at designated border crossings, they would have been prevented from entering Canada and sent back to the U.S. under STCA provisions (Office of the Auditor General Canada, 2019). By means of irregular crossings, asylum seekers have been able to use a so-called “loophole” where the agreement does not apply. Once in Canada, asylum seekers are entitled to make a refugee claim



(Office of the Auditor General Canada, 2019) and have that claim fairly heard by court. The legitimacy and relevance of STCA has come under scrutiny by the Canadian government because asylum seekers from the U.S. cannot be sent back once they are in Canada.

In the past two years, the federal government has engaged in efforts to close this “loophole” (Wright, 2019, March 15). These efforts include talks with the United States to “suspend or amend the agreement” (Wright, 2019, March 15). The 2017 surge in border crossings revealed that while STCA continues to effectively function at official border points like the airport, it is not “working as intended” with those who arrive irregularly (Wright, 2019, March 15). While the number of irregular border crossings into Canada from the U.S. fell by 45% from its peak in April 2018 (CBC News, 2019), efforts to close this “loophole” by modernizing the agreement remain ongoing.

The increase in irregular arrivals revealed problems with the asylum system’s effectiveness. The 2019 Auditor General Report found that the asylum system in Canada is “rigid” and “not equipped to respond quickly to an increased number of claimants” (Office of the Auditor General Canada, 2019; Forrest, 2019). The system is currently “facing the largest backlog of asylum claims ever” (Wright, 2019, May 7). This backlog is worse than it was before the 2012 changes introduced by the Harper government (Office of the Auditor General Canada, 2019). As of May 2019, the number of backlogged cases was reported to be 75,000 and is likely to reach 100,000 by 2021 according to the IRB (Montgomery, 2019). Officials have not been able to process claims within a pre-set 60 day target (see Figure 1) and as a result, the wait time for claimants may be as long as five years if the backlog remains at 50,000 per year (Wright, 2019, May 7; Office of the Auditor General Canada, 2019). Modernizing STCA has come to be cast as the most important policy solution to managing irregular migrant flows and limiting claims to asylum in Canada.

*Figure 1: Percentage of claims heard within the 60-day timeline (Office of the Auditor General Canada, 2019)*

	2015	2016	2017
<b>Number of claims referred to the Board</b>	15,220	22,442	46,643
<b>Percentage of claims heard within the required 60 days</b>	61%	44%	18%

The 2019 federal elections further heightened debates over modernizing the STCA. Both the Liberal and Conservative Party in their pre-election campaigns vowed to reduce the numbers of irregular border crossings and close the “loophole” within the Agreement. Conservative leader Andrew Scheer in an announcement on May 28, 2019 promised to “restore fairness and faith in the integrity of Canada’s immigration system by cracking down on those who ‘game’ the refugee process” (Harris, 2019, May 28). Scheer also vowed to end the irregular crossings from unofficial entry points by closing the “loophole” that “allows these irregular migrants to ‘skip the line and avoid the queue’” (Wright, 2019, May 28).

In April 2019, the Liberal Government also announced its plans to reduce irregular flows across the border and the backlog in claims. These changes were revealed in the 2019 Federal Budget and include a \$1.18 billion investment over the span of five years to increase border security and ensure that the asylum system is both fair and efficient (Government of Canada: Budget Plan, 2019, p. 184). The RCMP and CBSA will receive more funding to enhance border security and increase law enforcement (Wright, 2019, March 19). The IRB will obtain \$208 million to increase processing capacity to 50,000 claims per year (Government of Canada: Budget Plan, 2019, p. 307; Chiasson, 2019). This would reduce the current 75,000 backlog in claims. The Liberal Government’s new budget ultimately aims to “strengthen processes at the border, and accelerate the processing of claims and removals” (Government of Canada: Budget Plan, 2019, p. 184).

The federal budget also included a 392-page omnibus bill, which has received royal assent, that prevents “asylum shopping” by adding new restrictions for refugee claimants (Wright, 2019, April 9). Asylum seekers are no longer eligible to make a claim in Canada if they have already claimed protection in other “safe” countries including the U.S., UK, New Zealand, and Australia (also known as the 5 Eyes Partners) (Harris, 2019, April 10). These measures are aimed directly at reducing the number of irregular crossings, specifically at the Canada-U.S. border and ultimately tightening the loophole in STCA (The Star, 2019). Initial data, however, indicates that this move has had very limited success with only 400 asylum claims “being deemed ineligible since June 2, 2019 when the rule was introduced to prevent refugees from seeking protection in Canada if they have made similar claims in other countries”, a figure that is well below the expected result (Keuhg, 2020, p. A1, 7).

While this policy aims to resolve a political issue, it has implications for asylum seeker rights. A 1995 Supreme Court ruling in the *R. v. Singh* case granted asylum seekers the “right to full oral hearings of their refugee claims” (Wright, 2019, April 9; Judgements of the Supreme Court, 1985). S.7 of the Canadian Charter of Rights and Freedoms which guarantees “everyone” the right to life, liberty and security was interpreted to include “every person physically present in Canada” (Judgements of the Supreme Court, 1985, para 5; Arbel & Brenner, 2013, p. 21). Once on Canadian soil, the Charter guarantees that asylum seekers cannot be turned away, even if they arrive irregularly.

The 2019 Ontario Budget voiced strong anti-irregular migrant rhetoric and introduced more restrictive measures against asylum seekers. The budget revealed a \$164 million cut to Legal Aid Ontario (LAO) (Ontario Budget: Protecting What Matters Most, 2019, p. 279). The purpose of this was purportedly to streamline “the delivery of legal aid to promote long term sustainability” (Ontario Budget: Protecting What Matters Most, 2019, p. 279). This 30% cut amounted to a loss of the \$45 million used to provide provincial legal services for refugees and immigrants (Syed & Keogh, 2019). These changes put refugees in more vulnerable and disadvantaged positions for their claim hearings (Evans, 2019; Tumilty, 2019). They would no longer have access to lawyers through LAO and will have to pay a private lawyer to represent them in court (Evans, 2019). The legal Aid cuts and restrictions in Ontario would likely lead, ironically, to increased delays in refugee determination hearings and may result in Charter challenges in support of refugee rights. The Trudeau Federal government has criticized the Ontario Ford government for these cuts and committed almost \$26 million in one-time funding for legal aid supports for refugee and immigration cases. This is in addition to \$49.6 million in support of immigration and refugee legal aid over three years that was outlined in the federal budget (Harris, 2019, August 12). Several Ontario judges also criticized the funding cuts to the LAO (Jeffords, 2019). The Ford government, after consultations with legal experts, announced that they will be backtracking on these cuts for 2021-2022 (Stone & Fine, 2019). However, the cuts for this year will remain (Stone & Fine, 2019).

The surge in border arrivals in 2017 has changed political discourse surrounding asylum and have led to more restrictive measures and policies at the provincial and federal levels. According to the Office of the Auditor General (2019) this surge revealed that the government was “outstripped” to efficiently respond and process the high volumes of asylum claims. These ‘inefficiencies’ sparked government debate for plans to enhance its asylum system and restore its

efficiency. At the heart of these political efforts and debates lies the Safe-Third Country Agreement “loophole” and government strategies to close it. To better understand STCA and the political shift in asylum policy, in what follows, this paper will outline the objectives of the agreement. It will then explore historical and contemporary legal challenges. Finally, it will discuss the impact of STCA on refugee protection and asylum rights reflecting on the resilience of the Canadian asylum/refugee system.

### **The Canada-U.S. Safe Third Country Agreement (STCA): An overview**

The Canada-U.S. Safe Third Country Agreement (STCA) is a border strategy used by the Canadian government to manage and control the arrival of asylum seekers (CBSA, 2009; Arbel & Brenner, 2013, p. 23). While STCA’s are common in Europe (Arbel, 2013, p. 66), the Canada-U.S. agreement is the only existing one in North America (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 7). STCA came into effect in 2004. It is a bilateral agreement between Canada and the United States that aims to “regulate” the asylum claims made at land crossings (CBSA, 2009; Arbel & Brenner, 2013, p. 27; Arbel, 2013, p. 65). The agreement also applies to those making claims at airports only if they have been “determined not to be a refugee in the United States” (CBSA, 2009). STCA does not apply to those arriving by boat at harbor ports or for those filing claims from within Canada (inland) (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 8; Arbel, 2013, p. 69). Asylum seekers must make a claim in the first safe country they arrive in (CBSA, 2009). There are four exceptions to this agreement that can apply to those who are not “inadmissible on grounds of security, violating human rights or international rights or criminality” (CBSA, 2009). The types of exceptions include (1) having a family member in Canada (see figure 2 for family member criteria), (2) unaccompanied minors (see figure 3 for criteria), (3) having valid documents (see figure 4 for list of valid documents), and (4) public interest exceptions (see figure 5 for criteria) (CBSA, 2009).

## *Figure 2: Family Member Exceptions (CBSA, 2009)*

### **Family member exceptions**

Refugee claimants may qualify under this category of exceptions if they have a family member in Canada who:

- is a Canadian citizen;
- is a permanent resident of Canada;
- is a protected person under Canadian immigration legislation;
- has made a claim for refugee status in Canada that has been accepted by the [Immigration and Refugee Board of Canada](#) (IRB), an independent organization;
- has had his or her removal order stayed on humanitarian and compassionate grounds;
- is the holder of a valid Canadian work permit;
- is the holder of a valid Canadian study permit; or
- is over 18 years old and has a claim for refugee protection that has been referred to the IRB for determination.

## *Figure 3: Unaccompanied Minor Exceptions (CBSA, 2009)*

### **Unaccompanied minors exception**

Refugee claimants may qualify under this category of exceptions if they are unaccompanied minors (under the age of 18) who:

- are not accompanied by their mother, father or legal guardian;
- have neither a spouse nor common-law partner; and
- do not have a mother, father or a legal guardian in Canada or the United States.

## *Figure 4: Document Holder Exceptions (CBSA, 2009)*

### **Document holder exceptions**

Refugee claimants may qualify under this category of exceptions if they:

- hold a valid Canadian visa (other than a transit visa);
- hold a valid work permit;
- hold a valid study permit;
- hold a travel document (for permanent residents or refugees) or other valid admission document issued by Canada; or
- are not required (exempt) to get a temporary resident visa to enter Canada but require a U.S.-issued visa to enter the United States.

## *Figure 5: Public Interest Exceptions (CBSA, 2009)*

### **Public interest exception**

Refugee claimants may qualify under this category of exception if:

- They have been charged with or convicted of an offence that could subject them to the death penalty in the United States or in a third country. However, a refugee claimant will be ineligible to have his or her claim referred to the IRB if he or she has been determined to be inadmissible to Canada on grounds of security, violating human or international rights, or criminality.

Third countries are those in which asylum seeker passes through to get to their final destination (Macklin, 2005, p. 370). In Canada, Section 102 of the Immigration and Refugee Protection Act (IRPA) assigns the Governor in Council the responsibility of designating the countries where claims are ineligible (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 7; Government of Canada: Canada-U.S. Safe Third Country Agreement, 2016). The following criteria are considered for this designation process, and include if a country: (1) has

signed onto the Refugee Convention and the Convention Against Torture; and, (2) respects and puts into action the provisions and policies under these two Conventions; (3) has a good record with human rights; and, (4) aligns itself with Canada with regards to sharing responsibility over refugee protection (Government of Canada: Canada-U.S. Safe Third Country Agreement, 2016; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 7). This designation, according to the four criteria, must be “continuing” (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 7; Government of Canada: Canada-U.S. Safe Third Country Agreement, 2016). This means that the Governor in Council should conduct an ongoing review of the aforementioned factors even after a country is designated as safe (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 7).

Designating a country as “safe” ensures that refugee claimants are returned to where their claims will be rightfully considered (Arbel, 2013, p. 69). STCA guarantees claimants that they will not be returned to “any country other than Canada or the U.S. until their claim is heard” (Arbel, 2013, p. 70). This non-return guarantee is known as the principle of non-refoulement (Article 33 of the Refugee Convention) which guarantees that claimants will not be sent back to a country where they may be persecuted (UNHCR, 1951; Arbel, 2013, p. 70).

STCA was created to ease the strains on Canada’s refugee system and stop “asylum shopping” (Standing Committee on Citizenship and Immigration, 2007, p. 29). Asylum shopping refers to the process by which asylum seekers make more than one claim in different countries until they are granted refugee protection (Standing Committee on Citizenship and Immigration, 2007, p. 29). Between 1995 and 2001, the number of asylum seekers coming from the U.S. to make claims in Canada was between 8,000 to 13,000 (Arbel, 2013, p. 71). STCA had a significant impact on these numbers (Standing Committee on Citizenship and Immigration, 2007, p. 29). The number of asylum claims dropped by 40% between December 2004 and March 2005 at land ports (Standing Committee on Citizenship and Immigration, 2007, p. 29). In 2005, numbers decreased again to 4,033 (Standing Committee on Citizenship and Immigration, 2007, p. 29). While STCA reduced the flow of asylum seekers, its implementation raised a series of policy and legal challenges as well as concerns around refugee protection and rights.

### **Legal and policy challenges to the Safe Third Country Agreement: A historical overview**

An assessment of obligations under the Safe Third Country Agreement was conducted by UNHCR from 2004-2005 after an invitation from Canada and the United States to monitor policy implementation (Standing Committee on Citizenship and Immigration, 2007, p. 29; UNHCR, 2006, p. 3). The main goal of this assessment was to determine if Canada and the U.S. have met their responsibilities under international law and if STCA was consistent with refugee law (Standing Committee on Citizenship and Immigration, 2007, p. 29; UNHCR, 2006, p. 3). The monitoring of the Agreement's practical implementation included visits from UNHCR to land ports and detention centres, claim interviews and meetings with government officials, NGO's, lawyers, families and claimants, as well as reviews of policy guides provided by the government and other selected cases (UNHCR, 2006, p. 3). UNHCR concluded in its overall analysis that STCA had been implemented in accordance to its provisions and had "generally respected international law" (Standing Committee on Citizenship and Immigration, 2007, p. 29; UNHCR, 2006, p. 6).

While UNHCR's overall analysis was encouraging, it outlined a series of concerns and problems associated with STCA's practical application (Standing Committee on Citizenship and Immigration, 2007, p. 29; UNHCR, 2006, p. 6). These concerns include:

(1) lack of communication between the two governments on cases of concern; (2) adequacy of existing reconsideration procedures; (3) delayed adjudication of eligibility under the Agreement in the United States; (4) in some respects, lack of training in interviewing techniques; (5) inadequacy of detention conditions in the United States as they affect asylum-seekers subject to the Agreement; (6) insufficient and/or inaccessible public information on the Agreement; and (7) inadequate number of staff dealing with refugee claimants in Canada (UNHCR, 2006, p. 6; Standing Committee on Citizenship and Immigration, 2007, p. 29).

Of serious concern, was Canada's 'direct back policy' which is a process where asylum seekers are sent back to the U.S. after being given an appointment for an interview with Canadian officials to determine their eligibility (UNHCR, 2006, p. 10). During the 12-month monitoring period, UNHCR outlined that 129 asylum seekers were sent back to the U.S. (UNHCR, 2006, p. 10). Of these 129 claimants, 25 of them were subjected to detention and six of them were returned from the U.S. back to their original country (UNHCR, 2006, p. 10). This contravened the principle of non-refoulement. It also meant that the six claimants removed from the U.S. could not attend their scheduled eligibility interviews in Canada (UNHCR, 2006, p. 10). UNHCR in its review recommended this 'direct back policy' be eliminated and in August 2006 the Canadian government

discontinued its use unless “exceptional circumstances” arose (Standing Committee on Citizenship and Immigration, 2007, p. 31; UNHCR, 2006, p. 10).

Further challenges to STCA came soon after its implementation in the form of a Federal Court challenge in 2005 by Amnesty International, The Canadian Council of Churches, the Canadian Council for Refugees as well as John Doe (Arbel, 2013, p. 78; Canadian Council for Refugees, 2008). John Doe was an asylum seeker from Colombia who applied for protection in the United States but was rejected (Arbel, 2013, p. 78). He argued that if it was not for STCA, a protection application in Canada would have been possible for him (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 8). John Doe applied for judicial review in Canada challenging that the U.S. is a “safe third country” and that the provisions under STCA that do not allow asylum seekers to apply for protection in Canada are “invalid and unlawful” according to both the Canadian Charter of Rights and international law (Supreme Court of Canada, 2016, para 2; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 8).

According to John Doe, the United States was not “safe” for asylum seekers because it violates both the Refugee Convention along with the Convention against Torture (Arbel, 2013, p. 78; Supreme Court of Canada, 2016, para 2). Thus, the returning of asylum seekers from Canada back to the United States under STCA violated the principle of non-refoulement (Arbel, 2013, p. 78). More importantly, STCA was challenged on the basis of violations to s.15 of the Charter which guarantees equality before the law for all and s. 7 that ensures life, liberty and security of the person (Constitution Act, 1982, s. 7, 15; Supreme Court of Canada, 2008, p. 278; Arbel, 2013, p. 78; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 8).

In 2007, Justice Michael Phelan released a Federal Court ruling determining that STCA *did* in fact violate s.7 and s.15 of the Canadian Charter of Rights in a way that is not justifiable (Supreme Court of Canada, 2016, para 1; Canadian Council for Refugees, 2008, para 6; Arbel, 2013, p. 66, 78). Justice Phelan also reversed the designation of the United States as a “safe” country (Arbel, 2013, p. 78; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 8). Phelan justified this overturning based on the U.S.’s non-compliance with the principle of non-refoulement (article 33 of the Refugee Convention) as well as its removal and detention records (UNHCR, 1951; Arbel, 2013, p. 78; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 8). The Supreme Court of Canada (2008) added that there “are significant gaps in protection in the U.S. asylum system” (p. 278). Based on these factors, Justice Phelan



declared STCA as “invalid” and of “no force and effect” (Arbel, 2013, p. 78). Phelan further reiterated that the reversal of the U.S.’s designation as “safe” meant that it no longer satisfied the conditions outlined in s.102 of the IRPA which is only permitted *if* the U.S. continues to satisfy international law and both Conventions (Refugee and Torture) (Supreme Court of Canada, 2008, p. 277; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 8).

In 2008, this decision was reversed by the Federal Court of Appeal (Canadian Council for Refugees, 2008). This meant that STCA regained its validity and returned to operation (Arbel, 2013, p. 81). The court cited that the U.S.’s violations of international conventions did not impact all refugees but “only some categories of refugees” (Supreme Court of Canada, 2008, p. 283). The court further found that Justice Phelan “applied the wrong standard of review” by using an “administrative” evaluation when overturning the designation of the U.S. as a “safe third country” (Canada: Federal Court of Appeal, 2008, p. 2; Arbel, 2013, p. 81). Rather, the matter of designating a country as “safe” was not up to an “applications judge” and that conditions of actual compliance with international law in the U.S. need *not* be considered by the Governor in Council (Arbel, 2013, p. 81). In its place, the Governor was responsible for considering s.102 of the IRPA “in good faith” and determining whether the U.S. was generally a “country that complies with the relevant articles of the Conventions and was respectful of human rights” (Arbel, 2013, p. 81).

With regards to Charter violations, the Court of Appeal also found that the Charter did not actually apply to John Doe because he “never presented himself at the Canadian border and therefore never requested a determination regarding his eligibility” (Canada: Federal Court of Appeal, 2008, p. 44). While the Charter did extend to refugee claimants, the condition is that they *must* be on Canadian soil (Arbel, 2013, p. 80). John Doe was not and therefore, there was “no factual basis” to “assess” any Charter violations (Canada: Federal Court of Appeal, 2008, p. 44). Based on these facts, the Court of Appeal overturned Justice Phelan’s decision.

The Supreme Court of Canada in 2009 declined the request to appeal the judgement (Canadian Council for Refugees, 2008; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 9). While STCA was back in operation, the Court of Appeal did not “reverse” the findings of the Federal Court regarding its “human rights and refugee protection concerns in the United States” (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 9). The Court of Appeal “left” all the “factual findings and conclusions of U.S. noncompliance untouched” (Supreme Court of Canada, 2008, p. 278).

This raises important policy challenges to STCA. It also raises an important issue related to “compliance” with international law (Supreme Court of Canada, 2008, p. 286). The Court of Appeal in their decision cited that the U.S.’s actual compliance with the Conventions and international law was not necessary to the process of designating it as a “safe” country by the Governor (Supreme Court of Canada, 2008, p. 286). Hence, the fact that refugees were being removed from the U.S. back to their country of origin was determined to be “irrelevant” by the judge (Supreme Court of Canada, 2008, p. 286). This poses implications for asylum seekers as it places them at an increased risk of persecution and refoulement. The actions of the current U.S. Trump administration makes the situation even more egregious.

The overturning of Justice Phelan’s decision also revealed policy challenges with regards to s.102 of the IRPA. The Supreme Court of Canada (2008) outlined that s.102 should “require compliance” with the Conventions, specifically article 33 which guarantees protection from non-refoulement (non-return) (p. 287). It also emphasized that the Court of Appeal’s interpretation of s.102 was “inconsistent” and failed “to ensure actual protection of refugees” especially with regards to the Charter’s guarantee of the right to “freedom from discrimination” (Supreme Court of Canada, 2008, p. 286; Constitution Act, 1982, s.15). Thus, s.102 should also apply the Canadian Charter in its safe third country designations (Supreme Court of Canada, 2008, p. 287). These are important considerations for the current (2019) court challenge launch by the Canadian Council for Refugees, the Canadian Council of Churches and Amnesty International at the Federal Court (Zilio, 2019; Neve & Huang, 2019). Lawyers are defending the right of claimants to seek protection in Canada on the basis that the U.S. is not a safe country for refugees (Zilio, 2019; Neve & Huang, 2019). Actual compliance and practical application of international law in the United States is important for the legitimacy and legality of STCA. The state of refugee protection in the U.S. has significant implications for refugee rights. Since 2008, the Federal Court had concluded that “STCA operates in violation of fundamental human rights” and that these violations have not been adequately addressed by the Court of Appeal (Supreme Court of Canada, 2008, p. 296). This raised serious policy concerns for refugees 11 years ago, as it continues to do so today with even greater urgency.

### **Implications for refugee rights: A contemporary analysis**

A contemporary overview of the state of refugee protection in the U.S. under the Trump administration is necessary for its continuing designation as “safe” and ultimately the legitimacy

of the Safe Third Country Agreement. STCA provisions as outlined above, require a continuing review by the Canadian government to determine if the designation of the U.S. as a “safe” country should remain. Recent changes to asylum policy under the Trump administration have prohibited Central American migrants crossing through the Southern border from seeking refugee protection if they failed to apply for asylum in a “safe” country on their journey (MacDonald & Kapelos, 2019). Following these policy changes, Amnesty International raised concerns over refugee rights in the U.S. (MacDonald & Kapelos, 2019). Amnesty International also argued that the denial of protection for Central American migrants means “there is no single basis upon which STCA can, in any way, be defended” (Mohammed in MacDonald & Kapelos, 2019). UNHCR has also voiced concerns regarding this new policy, outlining that it puts asylum rights at risk, threatens the right to non-refoulement, and does not align with international obligations (MacDonald & Kapelos, 2019).

For Canada, this policy means that those who arrive here will be returned to the U.S. despite the fact that they will be prohibited from applying for protection. The Canadian government stated that it continues to stand “by its designation of the U.S. as a safe third country despite domestic and international calls to suspend” the Agreement (MacDonald & Kapelos, 2019). This places asylum seekers at an increased risk of being returned to persecution and contravenes international law (MacDonald & Kapelos, 2019).

Refugee protection in the United States has long been “diminished” and suffers “from significant failings” (Arbel, 2013, pp. 72, 73; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 3). Recent policy developments under the Trump administration, has renewed concerns over the continuing designation of the U.S. as a “safe” country despite its “material breach of international refugee protection obligations” (Arbel, 2013, p. 73). In the past, the state of refugee protection made the designation of the U.S. as a “safe” country for the purpose of STCA “unreasonable” (Arbel, 2013, p. 73). These issues have long posed implications for refugee rights and threatened the legitimacy of the Agreement.

Further concerns with STCA are related to the differences between the Canadian and the U.S. asylum systems. These differences are both substantive and procedural (Akibo-betts, 2006, p. 5). Substantive differences are those related to the ways in which the fear of persecution (outlined in the Refugee Convention and are based on one’s religion, race, nationality, ethnicity or

affiliation with a political or social group) is interpreted during the claim process (UNHCR, 1951; Akibo-betts, 2006, p. 5). Determining refugeehood based on a well-founded fear of persecution is applied by Canada and the U.S. differently (Akibo-betts, 2006, p. 5). As a result, those who would be given protection in Canada are often denied in the U.S. (Akibo-betts, 2006, p. 5).

Another example of a substantive difference is related to gender-based claims. Gender-based fears of persecution are not outlined in the Refugee Convention, and as a result women filing for protection must do so under affiliations with a social group or any of the other categories (Akibo-betts, 2006, p. 6). Canada's interpretation of the Convention recognizes the credibility of gender-based claims, and refugee determination processes do grant women refugee status based on a fear of persecution related to gender, if it is well-founded and can be established in court (Akibo-betts, 2006, p. 6). Canada was the first country in 1993 to release guidelines for "Women Refugee Claimants Fearing Gender-Related Persecution" (Akibo-betts, 2006, p. 6). These guidelines came into effect in 1996 and function as tools for IRB members assessing refugee eligibility by providing considerations as well as a framework for analyzing evidence (Immigration and Refugee Board of Canada, 1996). The U.S. does not acknowledge that gender can be a category of fear on its own and considers cases of violence against women a "private" matter (Akibo-betts, 2006, p. 6). Thus, STCA becomes contentious when those arriving in Canada are returned to the U.S. to a system that does not consider gender-based claims.

Further procedural differences between Canada and the U.S. are directly related to asylum policies and practices. The asylum system in the U.S. has been condemned for many of its policies. These include the: (1) one-year bar/deadline, (2) expedited removals, (3) detention practices, and (4) immigration raids (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 3; Akibo-betts, 2006, p. 9, 10). The one-year bar does not allow asylum seekers to file a claim for refugeehood after one year of arrival to the U.S. (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 3). Exceptions are granted only to those with "extraordinary circumstances" (Akibo-betts, 2006, pp. 9-10). Those who arrive without appropriate documentation or have committed an act of fraud are directly considered inadmissible and deported by an immigration officer (Akibo-betts, 2006, p. 8). Those that affirm a "credible fear" of persecution get a hearing but are detained until a court date is set (Akibo-betts, 2006, p. 8). Claimants who do receive a hearing are not entitled to an interpreter or a lawyer to represent them in court (Akibo-betts, 2006, p. 8). The Trump administration has further expanded and expedited

the removal process by denying some groups of asylum seekers entry and court hearings (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 3). Furthermore, those who have credible fears of persecution are now subjected to more restrictive measures that put them at an increased risk of return to their country of origin where their lives are in danger (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 3). Meanwhile in Canada, the removal process is not accelerated but rather, those who are to be deported have the right to a “pre-removal risk assessment” which re-assesses conditions of deportation (Akibo-betts, 2006, p. 8).

Those who arrive to the U.S. without proper documentation are “routinely” detained (Akibo-betts, 2006, p. 8). Detention under Trump’s administration has been expanded to include “eligible” asylum seekers “for the duration of their asylum process” (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4). This means that it no longer is a measure used to weed out ineligible refugees. Rather, detention has been dangerously expanded to legitimate claimants who have credible fears of persecution and are highly vulnerable. Detainees are subjected to dire living conditions and have restrictions in their access to legal counsel and medical assistance (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4). For irregular migrants, their method of arrival is used as a justification for persecution, and although this practice has long existed in the U.S. it has been further utilized by the Trump administration (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4).

The Refugee convention (article 31) prohibits the punishment of refugees based on their method of arrival, meaning that those who arrive by using irregular border points of entry have not committed a criminal act that warrants prosecution (UNHCR, 1951; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4). The persecution of asylum seekers who arrive irregularly and the turning back of asylum seekers at the Southern border with Mexico, contravenes international law, specifically the right to non-return (refoulement) (UNHCR, 1951; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4). In assessing the state of asylum protection in the U.S., there is “overwhelming evidence” of a “failure to fulfill obligations” under international law “as well as [a failure] to uphold the human rights of asylum seekers” (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4). This overwhelming evidence, calls into question the legitimacy of STCA (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4).

For Canada, the continuous designation of the U.S. as a “safe third country” means that refugees are being returned to conditions where there is an increased risk of removal, detention or prosecution, all of which have significant implications on the rights of asylum seekers (Arbel, 2013, p. 73; Amnesty International Canada & Canadian Council for Refugees, 2017, p. 4). Asylum seekers arriving from the U.S. to Canada have made the decision to do so based on many motivations. A study conducted by Amnesty International (2017) revealed that refugees reported being detained by authorities in the U.S. and placed in overcrowded rooms with no access to lawyers (p. 14). Other refugees reported that their claims were initially rejected in the U.S. but upon arrival into Canada (irregularly), they were able to make a successful claim and receive protection (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 15). Some reported that they were unaware of the one-year bar and as a result, were not able to claim refugee protection while others outlined that they were arrested during immigration raids at work or at home (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 14). These experiences in the U.S. are what motivated asylum seekers to continue their journey to Canada (Amnesty International Canada & Canadian Council for Refugees, 2017, p. 14).

The questionable state of refugee protection in the U.S. has pushed the flows of irregular arrivals into Canada. Since STCA does not apply at irregular points of entry, this has created incentive for asylum seekers to enter Canada through unconventional pathways to make a claim on Canadian soil (Damian-Smith, 2019; Arbel, 2013, p. 72). Despite concerns surrounding these policies, the designation of the U.S. as a “safe” country continues. An internal memo for the Canadian government revealed that STCA “was no longer working as intended” and that the arrival of asylum seekers by “crossing into Canada between ports of entry where the agreement does not apply” has revealed that the STCA “gap” is creating a “pull factor” for irregular methods of arrival (Connolly, 2019). In response to these developments, a review was conducted from January to March 2017 of STCA by Canadian immigration officials (Wright, 2018, October 22). This review concluded that the “United States remains a safe country for asylum seekers” (Wright, 2018, October 22).

Some critics argue that STCA should be overturned while others suggest that it should be expanded to include all border points of entry (Leuprecht, 2019, p.5). This would mean that those who fear making a refugee claims in the U.S. can do so in Canada through regular and official border points of entry (Standing Committee on Immigration and Citizenship, 2019, p. 66). Aside

from eliminating incentives for irregular entry, amending or suspending STCA would also address the costs associated with irregular arrivals (Standing Committee on Immigration and Citizenship, 2019, p. 66). More importantly, it would ease negative discourses and feelings associated with the images of asylum seekers arriving irregularly into Canada (Standing Committee on Immigration and Citizenship, 2019, p. 66). These images have been used to justify more restrictive asylum and border policies, evident in both the 2019 federal and provincial budgets. This shift in both policy and public discourse have created a colder climate towards refugees and a sense of crisis among the public. A pre-election survey conducted by CBC News revealed that 57% of Canadians agreed that “Canada should not be accepting more refugees” (Johnston, 2019). Citing the media coverage of asylum seekers crossing into Canada from the U.S., the survey revealed that there is a “drastic decline in welcoming of refugees” (Johnston, 2019). This suggests a shift in attitudes since 2016.

A federal survey conducted in 2016 had revealed that 41% of Canadians thought that the number of refugees taken in was “already too high” (McCarthy, 2017; Levitz, 2017). This survey was conducted before Trump was elected in 2016 (Levitz, 2017). The 16% difference (increase) between 2019 and 2016 with regards to refugees suggests an attitude shift among Canadians. STCA debates emerging out of the 2017 surge in border arrivals have raised concerns over refugee protection and the legitimacy of the Agreement. They have also impacted public opinion surrounding these arrivals. Resolving these policy challenges can significantly improve refugee protection and help ease the anxieties of the general public about the arrival of refugees. The modernization of STCA is not, of course a silver bullet. Flows of regular refugees across the U.S. border would undoubtedly also place, as we witnessed in the pre-STCA period in Canada, strains on the refugee system and likely public opinion. This approach, however, would create greater claimant predictability and consistency with Canada’s obligations under international human rights. This would also help ensure that refugee rights are not jeopardized.

## **Conclusion**

A surge of irregular border arrivals at the Canadian border from the United States in 2017 had significant impacts on Canada’s asylum system. The costs of processing claims significantly increased as did government spending on housing and emergency shelter. The large volume of claims revealed gaps in the asylum system’s ability to effectively respond. The arrival of asylum seekers from the U.S. sparked debates concerning the Safe Third Country Agreement. This agreement was designed to manage the flow of migration between Canada and the U.S. in 2004.

Its policy objectives and provisions necessitate that those who arrive from the U.S. at official border points of entry be returned. Although international law protects refugees from refoulement (return), in circumstances where countries are designated as “safe” based on their human rights record and commitment to the refugee conventions, refugees can be sent back. What was significant about the 2017 border arrivals was that asylum seekers used irregular points of entry where the agreement did not apply. Thus, being on Canadian soil gave them the right to apply for protection and be given a fair oral hearing by a court of law. The use of irregular points of entry revealed a gap in STCA. This gap became widely known as the STCA “loophole”. Current Canadian government efforts have been placed into controlling irregular arrivals and modernizing the agreement to manage this “loophole”. These have included more restrictive policy measures and large investments in security at the border.

Legal and policy challenges concerning STCA objectives and provisions have existed since its inception in 2004. A historical analysis revealed issues with its practical implementation. Most importantly, it raised concerns over refugee rights, the state of refugee protection and the risk associated with returning refugees to the U.S.. The legitimacy of STCA ultimately relies on the designation of the U.S. as a “safe” country by the Canadian government. Taking into account s.102 of the IRPA and current developments in refugee protection under the Trump administration, this designation must be re-evaluated. As outlined by the Federal Court in 2005, this review should also apply the Canadian Charter. The questionable state of refugee protection in the U.S. jeopardizes the functionality of STCA. Amending or suspending STCA would reduce incentives for irregular migration and reduce the costs associated with processing irregular arrivals. This would help ensure that asylum seeker rights are not jeopardized and that Canada does not contravene its obligations under international law.

The irregular migrant ‘crisis’ posed challenges to the resilience of the Canadian immigration system. The strains placed on urban and social systems calls into question numerous aspects of immigration policy and necessitates resilient evidence-based strategies. These policy responses, which aim to re-claim migration control, must place refugee rights and protection at their core and ensure that state obligations under international law are not weakened.



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