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OVERVIEW OF THE CANADA–UNITED STATES SAFE THIRD COUNTRY AGREEMENT

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Overview of the Canada–United States Safe Third Country Agreement
(Background Paper)

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EXECUTIVE SUMMARY

Refugees are people who flee their countries because of a well-founded fear of persecution. Once refugees arrive in another country and seek asylum, international law protects them from being sent back to face serious threats.

Of course, not all asylum claims are successful. Some asylum seekers may not meet the legal definition of a refugee. In other cases, errors or unfairness occur in a country's assessment of the asylum claim. For various reasons, some asylum seekers pass through multiple countries and make a claim in more than one of them.

Among countries with similar legal standards, separately evaluating the same person's claims may be considered inefficient. To avoid this, some countries have agreements requiring people to claim asylum only in the first "safe" country they enter. In 2002, Canada and the United States (U.S.) agreed to this type of system, through what is known as the Safe Third Country Agreement (STCA).

As a result of the STCA, most people who come to Canada via the U.S. are prevented from claiming asylum in this country. There are some exceptions, including that the STCA applies only at official land border crossings.

However, beginning in 2017, more asylum seekers began crossing the border into Canada between official land border crossings, avoiding the application of the STCA and allowing them to proceed with a claim for asylum. This resulted in renewed advocacy by some to broaden the STCA so that these types of crossings would be included. Others argued for the STCA to be suspended so that Canada would assess asylum claims independently of U.S. decisions.

In response to the COVID-19 pandemic in 2020, Canada imposed new temporary measures restricting claims by those who enter Canada between official land border crossings.

In July 2020, the Federal Court of Canada found the STCA to be unconstitutional, following a claim by the Canadian Council for Refugees and other applicants. The Court made this finding based on the rights of all people in Canada to life, liberty and security of the person. The Court noted that asylum seekers whom Canada turns away because of the STCA are automatically imprisoned by U.S. authorities and treated in ways that cause both physical and psychological suffering. The court decided that the STCA would cease to have effect in January 2021. However, this deadline was extended by the Federal Court of Appeal, pending an appeal by the federal government.

OVERVIEW OF THE CANADA–UNITED STATES SAFE THIRD COUNTRY AGREEMENT

1 INTRODUCTION

Canada's cooperation with the United States of America (U.S.) on matters relating to people claiming refugee protection has been a subject of significant debate over the past several decades.[1] This paper provides an overview of the *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, commonly referred to as the Canada–U.S. Safe Third Country Agreement (STCA).[2] It examines the fundamental aspects of the STCA, the historical and international context of the safe third country concept, and the legal challenges that the STCA has faced since its implementation. It also considers potential changes to the agreement in light of recent increases in irregular border crossings, the temporary border closure during the COVID-19 pandemic, and a July 2020 decision by the Federal Court of Canada that found the STCA to be unconstitutional.

2 THE CANADA–U.S. SAFE THIRD COUNTRY AGREEMENT

In refugee law, a "safe third country"[3] is a country in which an individual who passed through could have made a claim for refugee protection. According to the Government of Canada, only countries that respect human rights and offer a high degree of protection to refugee claimants may be designated as safe third countries.[4]

As part of the U.S.–Canada Smart Border Declaration and Associated 30-Point Action Plan,[5] Canada and the U.S. signed the STCA in December 2002, and it came into effect in December 2004. The agreement provides that persons seeking refugee protection must make a claim in the first of the two countries they arrive in, unless they qualify for an exception.

The exceptions to the STCA are found in Article 4 and fall into four general categories: the unaccompanied minor exception; family member exceptions, such as having a spouse or parent who is already a citizen or permanent resident; document holder exceptions, such as having a valid work or study permit; and public interest exceptions, such as facing the possibility of a death sentence in the U.S.[6] For refugee claimants entering Canada, qualifying under one or more of these exceptions simply means that Canada – rather than the U.S. – will assess the claim. In addition, refugee claimants must still meet all other eligibility criteria[7] of Canada's immigration legislation. For example, a person seeking refugee protection will not be eligible to make a refugee claim in Canada if that person is inadmissible to Canada on grounds of security, human or international rights violations, or criminality.[8]

The STCA applies only to refugee claimants who are seeking entry to Canada from the U.S. at a land port of entry.[9] Individuals making a claim in either country will not be removed to another country until a determination of that person's claim has been made.

The authority for the Canada–U.S. STCA stems from section 101(1)(e) of the *Immigration and Refugee Protection Act* (IRPA), which outlines the criteria that the Minister of Immigration, Refugees and Citizenship must use to designate a country as a safe third country. To date, the U.S. is the only country that Canada has designated as a safe third country under IRPA.

IRPA requires that the federal government continually review countries designated as safe third countries to ensure that the conditions leading to the original designation continue to be met.[10] For example, a pattern of human rights violations by a safe third country could lead to a change in its designation. According to the latest directives issued in June 2015, the minister must review, on a continual basis, the factors listed in section 102(2) of IRPA with respect to the U.S.[11]

2.1 RATIONALE FOR THE CANADA–U.S. SAFE THIRD COUNTRY AGREEMENT

Due to their geographical proximity and high level of interdependence, Canada and Mexico directly feel the effects of the American border policies, which in the 1990s and early 2000s led to "the idea of a North America security perimeter."[12] While Mexico was "deemed unsuitable for a such a project,"[13] Canada and the U.S. started exploring the possibility of establishing a security perimeter around the two countries. The 11 September 2001 (9/11) attacks on the U.S. accelerated these discussions, reinforced the importance of border security and highlighted the corresponding challenges of ensuring the efficient flow of people across the Canada–U.S. border. In a December 2001 joint Canada–U.S. Statement on Common Security Priorities, the implementation of a safe third country agreement was highlighted as part of a commitment to border security.[14] The statement claimed that by allowing either country to return a refugee claimant to the other country for assessment, asylum systems would be able to focus on genuine refugees in need of protection.[15]

The federal government's news release announcing the coming into force of the Canada–U.S. STCA in 2004 stated its objective as follows:

> [T]o create an effective measure of control, necessary to better manage access to Canada's refugee determination system. In fact, the agreement will enhance the orderly handling of refugee claims and strengthen public confidence in the integrity of the asylum systems of both countries.[16]

At that time, the federal government was concerned by the number of refugee claimants coming to Canada from the U.S. It was noted that approximately one-third of all refugee claims in Canada from 1995 to 2001 were made by refugee claimants known to have arrived from or through the U.S.[17] Individuals making claims for protection in multiple countries was also a matter of concern[18] in a context in which the government felt there were "significant pressures on asylum systems in developed countries."[19]

3 THE CONCEPT OF A SAFE THIRD COUNTRY

Academic research shows that, especially since the end of the Cold War, countries have introduced increasingly restrictive migration policies and measures that aim to discourage the arrival of foreign nationals on their territory. These policies and measures include the imposition of visas and externalized border management practices.[20] The safe third country concept demonstrates that borders are not static; they are "developed and retooled through legal decision making."[21] Borders respond to unique issues and policy objectives for a particular geography and population. The safe third country concept is applied on a transnational scale, requiring states to collaborate and share information to implement their migration enforcement practices.[22]

In response to these externalization trends, in 1996, the United Nations High Commissioner for Refugees (UNHCR) published an analysis of the safe third country concept. It included factors that countries should consider before determining that a refugee can legally be returned to a purportedly safe country. These factors include whether the third country has ratified and is in compliance with international refugee and human rights instruments, in particular the principle of *non-refoulement*;[23] the third country's readiness to permit refugee claimants to remain in the country while their claims are examined on the merits; the third country's adherence to basic human rights standards for the treatment of refugee claimants and accepted refugees; and the third country's demonstrated willingness to accept returned refugee claimants and consider their claims fairly on the merits.[24]

The UNHCR concluded that when these factors are given due consideration, such formal agreements can be advantageous for countries. For example, the safe third country concept could "reduce the misuse of asylum procedures, in particular multiple claims, as well as minimize the risk of the destabilizing effect of irregular movement of refugee claimants."[25] However, it warned that

> unilateral application of the safe third country concept, in the absence of a multilateral responsibility-sharing framework, may result in countries closer to the regions of origin being overburdened.[26]

The UNHCR recalled that it is "in the interest of the international community to provide effective protection to refugees and to promote and find durable solutions for them," based on more equitable and just responsibility-sharing.[27]

3.1 EMERGENCE OF THE SAFE THIRD COUNTRY CONCEPT IN CANADA

In 1985, in *Singh v. Minister of Employment and Immigration*, the Supreme Court of Canada declared that the legal guarantees to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter) apply to everyone physically present in Canada, regardless of their immigration status.[28] The Court also declared that refugee claimants have the right to an oral hearing of their protection claim before being either accepted into Canada or deported.[29] As such, the *Singh* decision drastically changed Canada's immigration and refugee system. The federal government introduced several legislative measures in 1987 that "sought to clear-up the backlog of refugee claimants in Canada and reduce the amount of time required to adjudicate an application for refugee status."[30] It also established the Immigration and Refugee Board of Canada (IRB), an arm's-length administrative tribunal that adjudicates refugee claims.

As part of those legislative measures, Bill C-55, An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof, was introduced in the House of Commons, bringing forward the concept of a safe third country in Canadian legislation. Originally, under the safe third country principle, the bill had proposed that refugees arriving in Canada be excluded from the determination procedure and expelled if they failed to come directly to Canada from their state of origin.[31] However, amendments were introduced to

> limit its application to persons who would actually be allowed to return to the intermediate country, or who would at least be allowed to have their refugee claims decided on the merits in the intermediate state.[32]

This was to respect Canada's international legal obligations towards refugees, including the principle of *non-refoulement*.[33] Bill C-55 came into force in January 1989. This introduced the concept of a safe third country in the *Immigration Act, 1976*, but in order for it to take effect, the federal government had to list the countries considered safe in the regulations. It did not do this.

In the same way that Bill C-55 set the legislative basis for the designation of a country as safe for the purposes of refugee adjudication, it was argued that it also "laid the groundwork for expanding the legal realm of 'Canada' for refugee applicants," by pushing out Canada's borders and "foreclosing any asylum adjudication for a country deemed safe or on behalf of an individual transiting through a safe country."[34]

In the early 1990s the Canadian and American governments started discussions about a possible safe third country agreement between the two countries. In November 1995, both governments publicly released a "preliminary draft Agreement 'For Cooperation in Examination of Refugee Status Claims from Nationals of Third Countries.'"[35] In undertaking a study on the issue, the House of Commons Standing Committee on Citizenship and Immigration (the committee) acknowledged that the refugee advocacy community opposed the preliminary draft agreement, but stated that "the underlying premises of the Agreement are sound" and exceeded the essential standards set out by the UNHCR.[36] In addition, the committee stated that

> the exceptions to the general rules, in particular the recognition of the importance of family and the residual discretion reserved by each country to accept *any* refugee claim presented to it, provide sufficient flexibility and opportunity for humanitarian considerations to mitigate any harshness that might otherwise arise in its application.[37] [Emphasis in the original]

However, due to ongoing legislative changes to asylum law in the U.S. and to immigration and refugee law in Canada, the finalization of the agreement was delayed.[38] In 1996, the U.S. adopted its *Illegal Immigration Reform and Immigrant Responsibility Act*. Canada's new *Immigration and Refugee Protection Act* received Royal Assent on 1 November 2001.

The 9/11 attacks in the U.S. led to renewed negotiations.[39] In December 2001, Canada and the U.S. signed the *Smart Border Declaration and Associated 30-Point Action Plan to Enhance the Security of Our Shared Border While Facilitating the Legitimate Flow of People and Goods*, which envisioned a safe third country agreement between the two countries.[40] In the same month, the committee recommended that Canada and the U.S. continue developing joint initiatives to ensure safe, secure and efficient border practices. It also recommended that

> [w]hile maintaining Canada's commitment to the Refugee Convention and our high standards in respect of international protection, the Government of Canada should pursue the negotiation of safe third country agreements with key countries, especially the United States.[41]

This culminated in the current Canada–U.S. STCA, which was signed in December 2002 and came into effect in December 2004.

3.2 INTERNATIONAL APPLICATION OF THE SAFE THIRD COUNTRY CONCEPT

Canada and the U.S. were not alone in pursuing these types of agreements during this period.[42] One of the most significant precursors to the Canada–U.S. STCA was the 1985 Schengen Agreement, which was initially signed by France, Germany, Belgium, Luxembourg and the Netherlands.[43] The Schengen Agreement sought to gradually

abolish controls at the shared borders of these five countries. With respect to refugees, Article 29 of the Schengen Agreement provided that only one country would have responsibility for processing any given refugee protection application, and that the responsible country would be determined by the criteria set out in Article 30. In cases in which the criteria were not applicable, the default would be that the country in which the claim was first lodged would have responsibility for assessing it.

This concept has continued to expand and evolve over time, including through the Dublin Convention, which was initially ratified by the first 15 members of the European Union (EU), entering into force in 1997. Under the Dublin Convention, all EU member states were designated as safe countries for refugees. The Dublin Convention established comprehensive criteria to determine which country would be responsible for assessing refugee claims. The general rule under the Dublin Convention was that the first country that a refugee claimant entered would be responsible for assessing the claim. However, as with the Canada–U.S. STCA, this general rule was subject to several exceptions, including for situations in which the claimant had close family members in a different EU country. The aim of the Dublin Convention was to reduce the number of refugee claimants seeking asylum in multiple countries, including for economic or other reasons unrelated to their need for protection.[44] Since the Dublin Convention, there have been two new iterations of the legislation, the most recent being the 2014 Dublin III regulation. The aim remained the same, namely to identify "the EU country responsible for examining an asylum application, by using a hierarchy of criteria such as family unity, possession of residence documents or visas, irregular entry or stay, and visa-waived entry."[45]

In 2020 the European Commission proposed a new Pact on Migration and Asylum that aims "to make the system more efficient, discourage abuses and prevent unauthorised movements," including through increased cooperation in terms of capacity building and operational support.[46] However, the criteria for determining the EU country responsible for examining an asylum application would remain unchanged.

4 CHALLENGES TO THE CANADA–U.S. SAFE THIRD COUNTRY AGREEMENT SINCE IMPLEMENTATION

With the entry into force of the STCA between Canada and the U.S. in December 2004, both governments faced several challenges. First, as stipulated in the agreement itself, a review of its implementation had to be conducted within the first year. In addition, the STCA has been the subject of criticism and several legal challenges since its implementation, as detailed below.

4.1 REVIEW OF THE IMPLEMENTATION OF THE CANADA–U.S. SAFE THIRD COUNTRY AGREEMENT

The STCA required that Canada and the U.S., in cooperation with the UNHCR, conduct a review of the agreement and its implementation no later than a year after its coming into force. Accordingly, the UNHCR assessed the implementation of the STCA and examined how effectively its objectives were being met.

Released in June 2006, the UNHCR report provided a generally positive assessment of the STCA but raised some concerns for both countries to address. The primary areas of concern were as follows:

> (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.[47]

The Canadian government responded to the UNHCR's recommendations in November 2006, stating that it had "accepted, in whole or in part, 13 out of the 15 new or outstanding UNHCR recommendations."[48] The two unfulfilled recommendations were the creation of an administrative review mechanism for "cases that may have been erroneously found ineligible" and the "broadening [of] the interpretation of Article 6 to include … vulnerable persons who do not fall under any of the exceptions" to the STCA.[49] In both cases, the government argued that the existing mechanisms were sufficient and effective in ensuring a full and fair refugee determination process that captured all types of refugee claimants. In October 2007, in response to a parliamentary study, the federal government reiterated that most of the UNHCR's recommendations had already been implemented and that others would be implemented in the future.[50]

4.2 STAKEHOLDER PERSPECTIVES

As noted in the impact statement accompanying the regulations designating the U.S. as a safe third country (the regulations),[51] some stakeholders, particularly non-governmental organizations, have consistently opposed the Canada–U.S. STCA on principle. These stakeholders argue that refugees should have the right to choose where to seek protection, noting that the United Nations (UN) Refugee Convention does not require refugees to apply to the first safe country in which they arrive. There are a number of reasons a refugee claimant might choose to apply for refugee protection in a country other than the one of first arrival. Some of those reasons

include the existence of extended family or support communities and language or cultural affinities in the country of choice. Further, some countries may have a broader interpretation of the refugee definition to the benefit of a particular population, such as people seeking protection on the basis of sexual orientation.[52]

Other concerns raised when the regulations were pre-published centred on whether the U.S. is in fact a safe country for refugees, as well as the perceived narrow scope of the exceptions and the potential for the STCA to increase incentives for irregular entry into Canada. While the final version of the regulations included some changes to the exceptions, the other concerns have persisted. For instance, a 2013 report prepared for the Harvard Immigration and Refugee Law Clinical Program found that refugee claimants have resorted to smugglers to help them circumvent the Canada–U.S. STCA.[53]

Academics have also raised concerns about the STCA, which is seen as:

> "pushing the border out," to a distinct legal end where "Canada seeks to avoid its legal obligations, and in doing so, weakens the legal protections available to asylum seekers, under domestic and international legal instruments."[54]

Proponents of safe third country agreements suggest that such agreements are required to prevent those looking for refugee protection from "shopping" for a specific or preferred destination country. According to a researcher from the Centre for Immigration Policy Reform, the safe third country concept is based on the following principle:

> [I]f someone flees their country of origin, they should seek sanctuary in the first safe country they are able to reach. If, however, they choose to move on to somewhere else to seek asylum, it indicates that their primary concern was not to reach safety but rather to be allowed to seek asylum and remain permanently in countries where there are generous benefits, high rates of acceptance, etc. In this regard they are considered to be "asylum shoppers."[55]

This justification is based on the premise that "asylum shopping" is equivalent to manipulating the international refugee system, and refugee claimants who are willing to manipulate the system may be less than truthful or genuine about their need for protection.[56]

Such stakeholders have argued that the Canadian government did not go far enough with the STCA. For instance, it has been suggested that the STCA is flawed because there are too many exceptions to it.[57] Further, it was argued that the Canadian government should enter into safe third country agreements with other countries as well, such as the United Kingdom, France and Germany.[58]

4.3 LEGAL CHALLENGES

While the UNHCR's 2006 assessment of the STCA found that the U.S. sufficiently upholds its international obligations with respect to refugees,[59] advocates have pointed to differences between the two countries to argue otherwise. Their concerns include migrant detention conditions in the U.S., U.S. restrictions on refugee claimants' ability to work pending hearings, and the U.S. interpretation of the Refugee Convention and the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention against Torture).[60] For example, stakeholders in the mid-2000s pointed to different acceptance rates for refugee claimants from certain countries, such as Colombia, as well as the stronger protections Canada affords to victims of gender-based persecution.[61] Advocates have also suggested that refugee claimants in Canada have more access to legal aid, and to social assistance, if needed.[62] These claims have surfaced through multiple legal challenges over the course of three decades.

The constitutionality of the safe third country provision was first challenged in 1989, immediately after the amended *Immigration Act, 1976* came into force and more than a decade before the Canada–U.S. STCA was implemented. In *Canadian Council of Churches v Canada*,[63] the Supreme Court of Canada disallowed the challenge on the ground that the Canadian Council of Churches lacked standing. In other words, the Court held that this type of challenge would have to come from refugee claimants who believed their rights had been violated, rather than by an organization seeking to make arguments on behalf of the public interest.

One year after the STCA came into effect in 2004, a second challenge was brought by the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches, along with a Colombian refugee claimant in the U.S.[64] These groups argued that the regulations designating the U.S. as a safe third country were invalid and unlawful, primarily because the U.S. does not comply with certain aspects of the Refugee Convention and the Convention against Torture. They argued that as a result, the STCA violates administrative law principles, the Canadian Charter, and international law.

In 2007, this argument was upheld by the Federal Court, which found that the designation of the U.S. as a safe third country was invalid.[65] This was based on a finding that the U.S. was not in compliance with its international obligations, such as *non-refoulement*, and that the application of the safe third country rule unjustifiably violated refugees' Charter rights to life, liberty and security of the person (section 7) and to non-discrimination (section 15). The Court also found that the federal Cabinet had failed to comply with its obligation to ensure continuing review of the status of the U.S. as a safe third country.

However, in 2008, the Federal Court of Appeal overturned this ruling, concluding that so long as the federal Cabinet gives due consideration to the four factors set out

in section 102(2) of IRPA[66] and accepts that the country in question is safe, the designation of a safe third country is not reviewable by courts.[67] Moreover, Cabinet's obligation to continuously review the STCA must be directed specifically at the four factors, and not necessarily at the compliance of the U.S. in absolute terms. Finally, the Federal Court of Appeal concluded that there was no factual basis to assess the Charter claims, since the refugee claimant in question had not attempted to enter Canada.

A related challenge was dismissed by the Federal Court of Appeal in 2019. In *Kreishan v. Canada*, STCA-excepted refugee claimants whose claims had been rejected by the Refugee Protection Division (RPD) of the IRB argued that they should be able to appeal their decisions to the Refugee Appeal Division of the IRB.[68] The Federal Court of Appeal rejected this argument, noting that international law does not mandate any particular form of appeal. It also stated that the question of whether some refugees are treated better through a more favourable appeals process has no bearing on whether the refugee claimants' rights were denied.

Many legal experts and advocates have maintained their position that the U.S. does not adequately fulfil its obligations to refugee claimants. A 2013 report prepared for the Harvard Immigration and Refugee Law Clinical Program concluded that through the STCA, Canada is systematically closing its borders to asylum seekers and circumventing its refugee protection obligations under domestic and international law. Canada also "jeopardizes asylum seekers' ability to obtain fundamental legal protections by returning them to the United States despite clear deficiencies in the U.S. asylum system."[69]

In 2017, the Canadian Council for Refugees, the Canadian Council of Churches and Amnesty International Canada, along with a Salvadoran woman accompanied by her children,[70] launched another legal challenge in the Federal Court about the designation of the U.S. as a safe third country for refugees. The organizations argued that the U.S. asylum system and immigration detention regime fails to meet required international and Canadian legal standards, especially since the Trump administration took office in January 2017.[71] They argued that this situation results in substantial risk of detention, wrongful return to a country in which a refugee claimant would face persecution (*refoulement*), and other rights violations.

In July 2020, these applicants were successful. The Federal Court found that the STCA unconstitutionally violates the rights to life, liberty and security of the person.[72] The Court noted that asylum seekers at land ports of entry receive no consideration of the substance of their refugee claims and are returned to the U.S. to face automatic detention, sometimes in solitary confinement or in inhumane conditions. This causes physical and psychological suffering. The Court emphasized that the STCA was supposed to be about "sharing of responsibility" but fails to provide any guarantee of access to a fair refugee determination process. The Court

relied on the Supreme Court of Canada's statement in *Suresh v. Canada* that the government "does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand."[73]

The Federal Court suspended the effects of the decision until January 2021,[74] leaving time for Parliament to respond through legislation before the STCA ceases to have effect. The Federal Court of Appeal suspended the effects of the decision again, pending an appeal by the federal government.

Although outside the scope of this paper, in 2019, the U.S. signed new safe third country agreements with Guatemala, Honduras and El Salvador, its first since the agreement with Canada. The American Civil Liberties Union is challenging the legality of these agreements under U.S. and international law.[75]

5 CURRENT CONTEXT AND POLICY CONSIDERATIONS

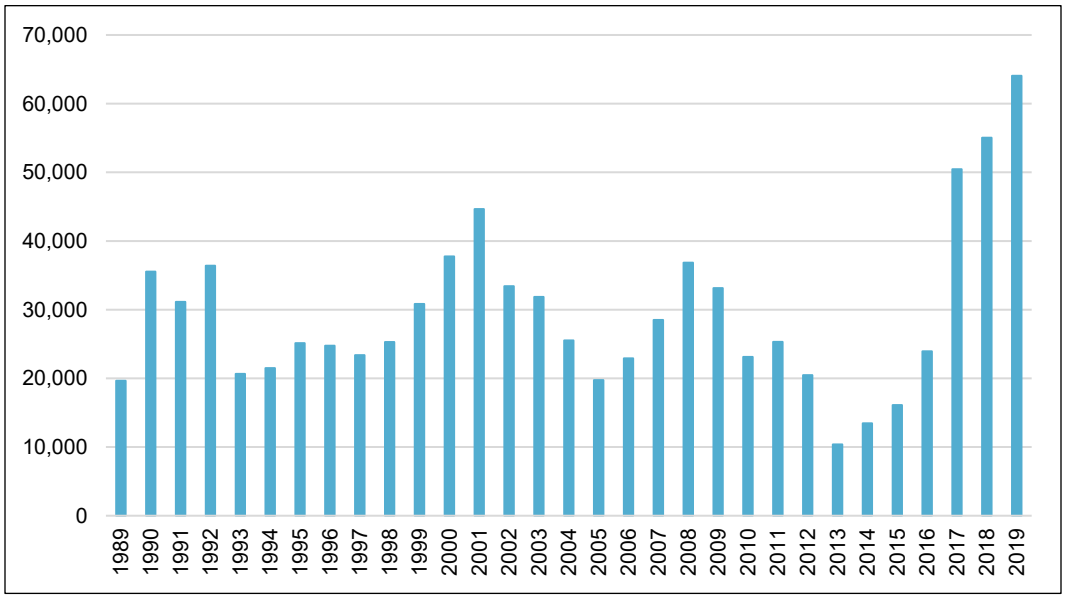
The 2020 Federal Court finding that the STCA is unconstitutional has the potential to permanently end the agreement. Nevertheless, it is possible that some version of the STCA will continue to exist, either because of a successful appeal to a higher court, or through new, constitutionally compliant legislation. The following section aims to clarify several issues pertaining to the Canada–U.S. STCA that have been in the public discourse in recent years, including the number of refugee claimants and the potential renegotiation of the agreement.

5.1 DATA AND RECENT POLICY CHANGES

Since 1989 and the coming into force of the 1987 legislative measures discussed above, the federal government has tracked the number of refugee claims made in Canada. These in-Canada claims can be made either at a port of entry to the country or, within Canada, to an officer of the Canada Border Services Agency (CBSA) or Immigration, Refugees and Citizenship Canada (IRCC).[76] Individuals who cross the border between ports of entry are generally intercepted and transported by the Royal Canadian Mounted Police (RCMP) to either a CBSA or an IRCC office to make a claim.[77] The RCMP does not take any enforcement actions "against people seeking asylum as per section 133 of the *Immigration and Refugee Protection Act*."[78] For this reason, those who cross the border between ports of entry are commonly called irregular border crossers. As discussed above, the Canada–U.S. Safe Third Country Agreement applies only to refugee claimants who are seeking entry to Canada from the U.S. at land ports of entry.

As seen in Figure 1, between 1989 and 2019 inclusively, the overall number of claims averaged at around 29,000 per year. The lowest number of claims was registered in 2013 (10,378) and the highest in 2019 (64,050).

Figure 1 – Refugee Claims Made in Canada, 1989–2019



Note: The source entitled "Canada – Temporary residents by yearly status, 1988–2012," *Canada Facts and Figures: Immigration Overview – Permanent and Temporary Residents* by Citizenship and Immigration Canada from 2012 does not have any data entered under refugee claimants for 1988, which is why the data series starts at 1989. In addition, the series in that source is broken from 1998 but has data from a more recent edition of the same source. The series is again broken from 2017 and has a different source. The terms "refugee claimants" and "asylum claimants" in the sources are used interchangeably and refer to people who have applied for refugee protection status in Canada.

Sources: Figure prepared by the authors using data obtained from Citizenship and Immigration Canada, "Canada – Temporary residents by yearly status, 1988–2012," *Canada Facts and Figures: Immigration Overview – Permanent and Temporary Residents*, 2012, p. 52; Government of Canada, "10.1. Asylum Claimants by gender, 1997 to 2017," *Facts and Figures 2017 – Immigration Overview – Temporary Residents*; Government of Canada, *Asylum claims by year – 2018*; and Government of Canada, *Asylum claims by year – 2019*.

From 2016 to 2017, the number of claims more than doubled to make the biggest increase seen year over year. As of 2017, the increase in the number of claims made in Canada was in part due to people crossing the Canada–U.S. border between ports of entry. For instance, in 2017, about 41% of total claims were from people intercepted by the RCMP between ports of entry.[79] In 2018 such claims represented about 35% of the overall claims, and in 2019 they made up about 26%. The federal government started publicly tracking the number of RCMP interceptions between ports of entry only as of 2017, due to the increase in irregular border crossings.

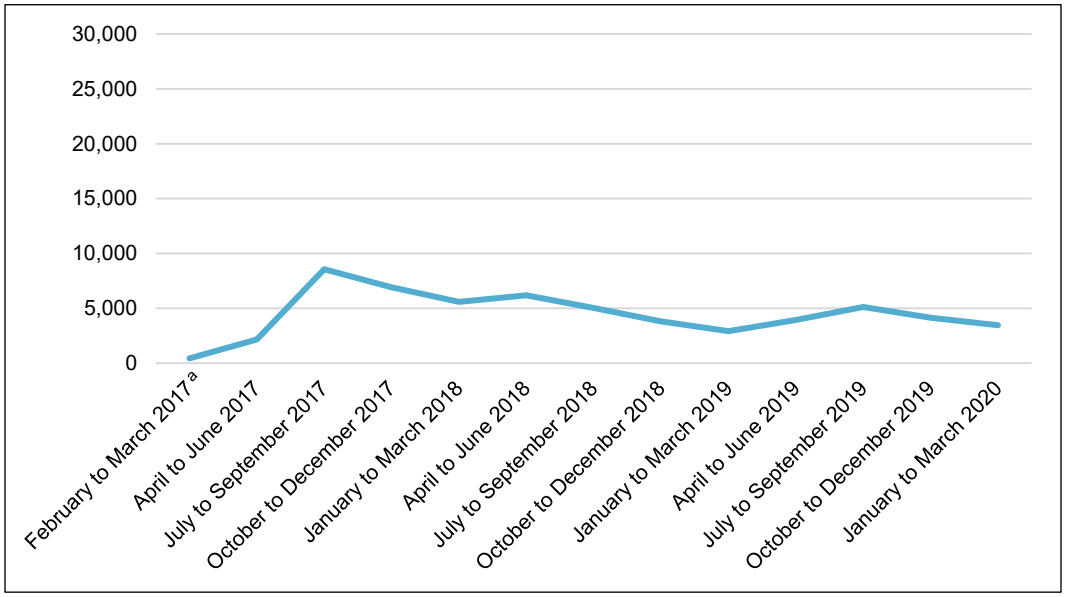
Between January and May 2020, the CBSA and IRCC offices processed 15,350 refugee claimants, of which the RCMP had intercepted 3,062 – about 20% – who had crossed between ports of entry. Due to the COVID-19 pandemic and the temporary Canada–U.S. border closures,[80] there were only six interceptions in April and 21 in May 2020.

While the overall reasons[81] and full impact[82] of this increase in refugee claims from irregular border crossers are outside the scope of this paper, one reason that the increased volume is significant is its impact on the functioning of the IRB. The sudden increase in the number of claims referred to the IRB[83] has placed a strain on its resources. The IRB was already struggling to make decisions under prescribed timelines and dealing with a backlog of older claims.[84]

A 2018 independent review of the IRB found that the prescribed timelines for holding hearings were met in only 59% of cases in 2017, down from a high of 65% between 2014 and 2016. The IRB reported that these delays were largely attributable to human resources challenges, including insufficient recruitment, and a more complex caseload due to a large variety of countries of origin.[85]

Prior to 2017, the IRB did not specifically track statistics on refugee claims made by irregular border crossers. Figure 2 provides a three-year overview of the number of claims received by the IRB from people intercepted by the RCMP between ports of entry. The highest number of claims received in a quarter was registered from July to September 2017 (8,559) and the second highest was registered from October to December 2017 (6,908).[86]

Figure 2 – Refugee Claims Made by Irregular Border Crossers, February 2017 to March 2020

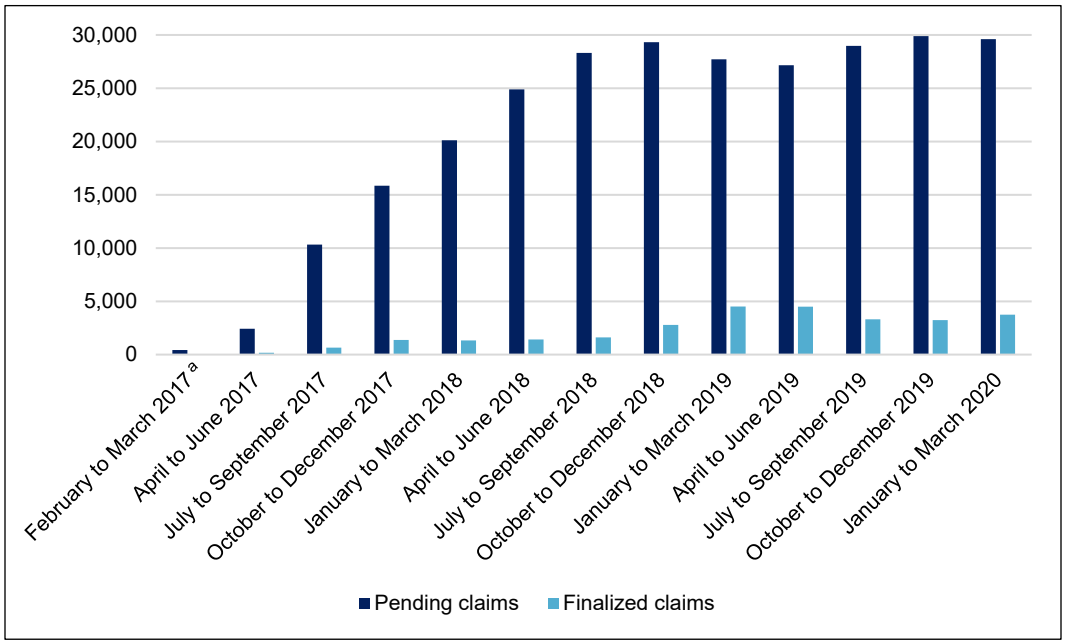


Note: a. The Immigration and Refugee Board of Canada [IRB] has only partial data for February and March 2017.

Source: Figure prepared by the authors using data obtained from IRB, "Statistics on refugee claims made by Irregular Border Crossers, by Calendar Year and Quarter," *Irregular border crosser statistics*.

This created significant backlogs for the IRB, as seen in Figure 3. The number of claims finalized could not keep up with the intake, resulting in an increase of pending cases over time.

Figure 3 – Pending and Finalized Refugee Claims Made by Irregular Border Crossers, February 2017 to March 2020



Note: a. The Immigration and Refugee Board of Canada [IRB] has only partial data for February and March 2017.

Source: Figure prepared by the authors using data obtained from IRB, "Statistics on refugee claims made by Irregular Border Crossers, by Calendar Year and Quarter," *Irregular border crosser statistics*.

In 2018, the IRB established an inventory reduction task force for less complex claims, which focused on claims that "lend themselves to quicker resolution through paper-based or short-hearing decisions."[87] To increase its productivity and improve its case management approach, the IRB also updated its policy on the expedited processing of refugee claims by the RPD and issued instructions governing the streaming of less complex claims at the RPD.[88] As such, the IRB has established "shorter, more focused hearings to resolve straightforward claims and has also decided claims without a hearing, where appropriate."[89]

In addition to streamlining its processes, the IRB received, through Budget 2018, $74 million over two years to "enable faster decision-making on asylum claims, including money to *hire 64 decision makers plus 185 support staff*."[90] [Emphasis in the original]. As such, the IRB was able to finalize "30% more refugee claims, and over 60% more refugee appeals in fiscal year 2018 to 2019 than in the previous year."[91]

Also in Budget 2018, the Government of Canada provided about $100 million over two years for the IRCC, the CBSA, the RCMP and other concerned departments to address operational pressures resulting from irregular migration.[92] Those funds helped support "intake of new asylum claims, front-end security screening procedures, eligibility processing, removal of unsuccessful claimants, and detention and removal of those who pose a risk to the safety and security of Canadians."[93]

In 2019, IRPA and associated regulations were amended to provide an additional reason for which refugee claims in Canada may be found ineligible.[94] As of April 2019, a person is ineligible for refugee protection in Canada if they have made a previous refugee claim in a country with which Canada has an information-sharing agreement.[95] For those excluded from the refugee determination process because they have made a refugee claim in a country with which Canada has an information-sharing agreement, the pre-removal risk assessment process includes a mandatory oral hearing.[96]

5.2 POTENTIAL RENEGOTIATION OF THE CANADA–U.S. SAFE THIRD COUNTRY AGREEMENT

Despite all these public policy and operational changes, the main issue in the public discourse is the future of the Canada–U.S. STCA. Since 2017, there have been numerous calls for its suspension, while others have advocated for its application regardless of how a refugee claimant crosses into Canada.[97] In light of the Federal Court's finding that the STCA is unconstitutional, the STCA will cease to have effect in 2021. However, it is possible that the government will succeed in its appeal or that Parliament will enact new legislation, which could open opportunities to renegotiate a constitutionally compliant version of the agreement.

To modify the STCA, both Canada and the U.S. must agree to any changes in writing. In addition, either party may suspend application of the STCA for a period of up to three months upon written notice to the other party. That suspension is renewable for additional periods of up to three months.[98]

Considering that the STCA must be continually reviewed, there have been other proposals for updating it in the past. For instance, in 2011, officials from the IRCC (then Citizenship and Immigration Canada) identified the STCA's inapplicability at airports and to irregular arrivals between ports of entry as areas to examine for possible future changes.[99] The increase in irregular border crossings as of 2017 brought attention to significant issues concerning Canada's overall immigration system. However, the Minister of Immigration, Refugees and Citizenship has stated that the Canada–U.S. STCA remains crucial to the handling of asylum claims in both countries.[100]

While the federal government put in place operational and policy changes in 2017, it also recognized that "there are opportunities to negotiate and enhance a safe third country agreement that will operate more effectively to the mutual benefit of both countries."[101] This is consistent with early indications in the 1990s and early 2000s that Canada was always open to continuing conversations with the U.S. on asylum, the STCA and related issues.[102] In 2019, the Prime Minister publicly mandated the relevant ministers to continue working with the U.S. on a new Border Enforcement Strategy and on modernizing the STCA.[103] However, as one researcher argued, "Canada must also consider the possibility that the United States may not want to ultimately modify the agreement, even if it expresses a willingness to open renegotiations."[104]

Any potential renegotiation of the STCA will now also have to take into consideration the impact of the temporary border closures between Canada and the U.S. due to the COVID-19 pandemic. As of March 2020, a temporary agreement between Canada and the U.S. has limited all non-essential entries, both at official ports of entry and between official ports of entry.[105] As such, in general,

- individuals entering Canada from the U.S. to make an asylum claim are temporarily being sent back to the U.S.; and
- individuals entering the U.S. from Canada to make an asylum claim are temporarily being sent back to Canada.[106]

Under the temporary agreement, the STCA still applies, which means that refugee claimants can claim asylum at a land port of entry if they fall under one of the four exceptions.

The Government of Canada issued a series of orders in council (OIC) under the *Quarantine Act*, intended to stop the spread of COVID-19. The OICs also had the consequence of limiting refugee claimants' entry into the country. Under the first OIC, only a small group was eligible to make a refugee claim: unaccompanied minors, parents of a minor U.S. citizen, a person who usually lives in the U.S. but is stateless, or an American citizen.[107] The federal government was criticized by civil society groups for restricting access and not respecting its own immigration laws and its international obligations with respect to refugees.[108] Since the renewal of the OIC in April 2020, foreign nationals who have already been determined in need of protection in Canada and certain persons allowed to make refugee protection claims are once again permitted to enter Canada at the land border. In addition, stateless persons, foreign nationals with a family member in Canada or facing the death penalty, American citizens, and persons whose presence in Canada is considered to be in the national or public interest are permitted to make refugee claims at designated ports of entry. An unaccompanied minor, a person who usually lives in the U.S. but is stateless, or an American citizen can also make a refugee claim by entering Canada between ports of entry.[109]

6 CONCLUSION

The future of the STCA is uncertain. In 2019, the Canadian government expressed an intention to modernize the agreement. Since then, the Federal Court has ruled that the STCA is unconstitutional, and it will cease to have effect unless the federal government's appeal to a higher court is successful. In addition, temporary measures in response to the COVID-19 pandemic have further restricted asylum seekers from entering and remaining in Canada. These developments highlight the barriers and uncertainty facing refugees who hope to seek asylum in Canada.

The STCA has been controversial from its inception. Its proponents have argued that it allows Canada and the U.S. to better manage access to the refugee determination process. Critics have argued that the U.S. is not safe for refugees, and that sending asylum seekers to the U.S. without independently assessing their claims is a violation of fundamental rights.

The outcome of the federal government's appeal could determine whether it will be able to find a constitutionally compliant way to modernize the STCA or attempt to return to the pre-pandemic status quo. These choices could have far-reaching consequences for refugees and for the broader Canadian public.

NOTES

1. Refugee claimants are people who have applied for refugee protection status in Canada. They are also sometimes referred to as "asylum claimants" or "asylum seekers." For the purposes of this paper, these terms are interchangeable. See Government of Canada, "Refugee Claimant," *Glossary*. For more information on Canada's refugee determination process, see Government of Canada, *Claim refugee status from inside Canada: About the process*.
2. Government of Canada, *Final Text of the Safe Third Country Agreement*.
3. Government of Canada, "Safe third country," *Glossary*.
4. Government of Canada, "Designation of Safe Third Countries," *Canada–U.S. Safe Third Country Agreement.*
5. U.S. [United States] Department of State, "U.S. – Canada Smart Border/30 Point Action Plan Update," *Fact sheet*, Washington, D.C., 6 December 2002.
6. Canada Border Services Agency [CBSA], "Exceptions to the Agreement," *Canada–U.S. Safe Third Country Agreement.*
7. *Immigration and Refugee Protection Act*, [IRPA], S.C. 2001, c. 27, s. 101
8. IRPA, ss. 34–42. There are 11 grounds for inadmissibility: security, violation of international human rights, serious criminality, criminality and organized criminality, health grounds, financial grounds, misrepresentation, cessation of refugee protection, non-compliance with the Act and accompanying a family member who is inadmissible.
9. According to the CBSA, the Canada–U.S. Safe Third Country Agreement (STCA) applies at airports only if the person seeking refugee protection in Canada has been refused refugee status in the United States and is in transit through Canada after being deported from the United States. It does not apply to those who cross the border in between ports of entry. A port of entry is defined in section 2 of the *Immigration and Refugee Protection Regulations* [IRPR]. See CBSA, "Where the Agreement is in effect," Canada–U.S. Safe Third Country Agreement; and IRPR, SOR/2002-227, s. 2.

10. Government of Canada, "Review of Safe Third Countries," *Canada–U.S. Safe Third Country Agreement*.

11. Government of Canada, "Directives for ensuring a continuing review of factors set out in subsection 102(2) of the *Immigration and Refugee Protection Act* with respect to countries designated under paragraph 102(1)(a) of that Act (2015)," Order in Council P.C. 2015-0809, 11 June 2015.

12. Ruben Zaiotti, "Beyond Europe: Toward a New Culture of Border Control in North America," Chapter 9 in *Cultures of Border Control: Schengen and the Evolution of European Frontiers*, University of Chicago Press, Chicago, 2011, p. 204. This idea is widely implemented between Canada and the U.S. today following the formal declaration of a shared vision for perimeter security and economic competitiveness, which, in 2011, established "a new long-term partnership built upon a perimeter approach to security and economic competitiveness. This means working together, not just at the border, but beyond the border to enhance our security and accelerate the legitimate flow of people, goods and services." See Public Safety Canada, *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*.

13. Discussions with Mexico took place as of 2003 and led to the 2005 Security and Prosperity Partnership of North America, which includes the Smart Border Declaration. See Zaiotti (2011), pp. 207–208.

14. Ibid., pp. 204–205.

15. "Canada–United States Issue Statement on Common Security Priorities," *PR Newswire*, 4 December 2001. [Subscription required]

16. Government of Canada, "Safe Third Country Agreement Comes into Force Today," News release, 29 December 2004.

17. House of Commons, Standing Committee on Citizenship and Immigration [CIMM], *The Safe Third Country Regulations*, First Report, 2nd Session, 37th Parliament, December 2002, p. 3.

18. CIMM, *Safeguarding Asylum – Sustaining Canada's Commitments to Refugees*, Fifteenth Report, 1st Session, 39th Parliament, May 2007, p. 29.

19. *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-217, 12 October 2004, in *Canada Gazette*, Part II, Vol. 138, No. 22, 3 November 2004, p. 1622.

20. Such practices include the "offshoring" of border checks and asylum processing. See Ruben Zaiotti, "Mapping remote control: the externalization of migration management in the 21st century," Chapter 1 in *Externalizing Migration Management: Europe, North America and the spread of 'remote control' practices*, ed. Ruben Zaiotti, Routledge, New York, 2016, pp. 3–4.

21. Joshua Labove, "Judging borders: Expanding the Canada–United States border through legal decision making," Chapter 10 in *Externalizing Migration Management: Europe, North America and the spread of 'remote control' practices*, ed. Ruben Zaiotti, Routledge, New York, 2016, p. 194.

22. Ibid., p. 201.

23. *Non-refoulement* is defined as

> [t]he prohibition for States to extradite, deport, expel or otherwise return a person to a country where his or her life or freedom would be threatened, or where there are substantial grounds for believing that he or she would risk being subjected to torture or other cruel, inhuman and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm.

International Organization for Migration, "Non-refoulement (principle of)," *Key Migration Terms*.

24. United Nations High Commissioner for Refugees [UNHCR], *Considerations on the "Safe Third Country" Concept*, July 1996.

25. Government of Canada, *Historical Context for the Safe Third Country Agreement*, Request number A-2017-14215, Informal Request for ATI Records Previously Released, p. 42. According to the UNHCR, "where refugees and asylum-seekers move in an irregular manner from a country where they have already found protection, they may be returned to that country" in compliance with the state's international legal obligations. See UNHCR, *Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018.

26. UNHCR (1996).

27. Ibid.

28. *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, para. 35.

29. Ibid., para. 58.

30. Jan Raska, *Canada's Refugee Determination System*, Canadian Museum of Immigration at Pier 21. See also Bill C-55, An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof, 2nd Session, 33rd Parliament, 1988; and Bill C-84, An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof, 2nd Session, 33rd Parliament.

31. James C. Hathaway, "Postscript – Selective Concern: An Overview of Refugee Law in Canada," *McGill Law Journal*, Vol. 34, No. 2, 1989, p. 355.

32. Ibid., p. 356.

33. Brahm Segal, "Restructuring Canada's Refugee Determination Process: A Look at Bills C-55 and C-84," *Les Cahiers de droit*, Vol. 29, No. 3, 1988, p. 745.

34. Labove (2016), p. 196.

35. CIMM, *The Preliminary Draft Agreement Between Canada and the United States Regarding Refugee Claims*, First Report, 1st Session, 35th Parliament, May 1996, p. 1.

36. Ibid., p. 2.

37. Ibid.

38. Ibid.

39. Government of Canada, *Historical Context for the Safe Third Country Agreement*, p. 42.

40. U.S. Department of State (2002). The action plan has four pillars: the secure flow of people, the secure flow of goods, secure infrastructure, and information sharing, as well as coordination in the enforcement of these objectives.

41. CIMM, *Hands Across the Border: Working Together at our Shared Border and Abroad to Ensure Safety, Security and Efficiency*, Second Report, 1st Session, 37th Parliament, December 2001, pp. xii.

42. Several European countries have introduced the concept of safe third country in their national legislation, including Belgium (1980), Sweden (1989) and Switzerland (1979). See Government of Canada, *Canada–U.S. Safe Third Country Agreement: A Partnership for Protection – Year One Review*, November 2006, p. 9. Other examples include Australia, which adopted safe third country regulations for "specific categories of asylum seekers" in 1994, and Tanzania and South Africa, which adopted safe third country regulations in 1998. The concept was also introduced in the national legislation of several Eastern European countries and former Soviet republics. See Agnès Hurwitz, "Safe Third Country Practices, Readmission, and Extraterritorial Processing," Chapter 2 in *The Collective Responsibility of States to Protect Refugees*, New York, Oxford University Press, 2009, pp. 47–50.

43. "Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders," *Official Journal of the European Communities*, 22 September 2000, p. 19.

44. Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," *International Journal of Refugee Law*, Vol. 15, No. 4, October 2003, pp. 579–580.

45. Anja Radjenovic, *Reform of the Dublin system*, European Parliamentary Research Service, 1 March 2019. As of 2016, the European Union is in the process of reforming the Dublin III regulation. While proposals have cast doubt on the existing criterion of responsibility by the member state of first entry for the examination of a claim for international protection, there are currently no indications that the criterion will be completely omitted. The new legislation will aim to balance responsibility and solidarity in processing asylum applications in European member states.

46. European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, 23 September 2020.

47. UNHCR, *Monitoring Report: Canada–United States "Safe Third Country" Agreement – 29 December 2004 – 28 December 2005*, June 2006, pp. 6–7.

48. Government of Canada (2006), p. 6.

49. Ibid., pp. 32 and 36. Article 6 of the STCA permits both countries to use their discretion in examining any refugee status claim made in their country to determine that it is in the public interest to do so.

50. Government of Canada, *Government Response to the Fifteenth Report of the Standing Committee on Citizenship and Immigration*.

51. *Regulations Amending the Immigration and Refugee Protection Regulations* (2004), p. 1622.

52. Rachel Gonzalez Settlage, "Indirect Refoulement: Challenging Canada's Participation in the Canada–United States Safe Third Country Agreement," *Wisconsin International Law Journal*, Vol. 30, No. 1, 27 November 2012, p. 150.

53. Efrat Arbel and Alletta Brenner, *Bordering on Failure: Canada–U.S. Border Policy and the Politics of Refugee Exclusion*, Harvard Immigration and Refugee Law Clinical Program, Harvard Law School, November 2013, p. 1. See also CIMM (2007), p. 33.

54. Labove (2016), p. 196.

55. Martin Collacott, "Reforming the Canadian Refugee Determination System," *Refuge: Canada's Journal on Refugees*, Vol. 27, No. 1, 2010, p. 115.

56. Zaiotti (2016), p. 18.

57. CIMM, *Evidence*, Meeting 38, 1st Session, 41st Parliament, 3 May 2012, 0910 (Mr. James Bissett, as an individual).

58. CIMM, *Evidence*, 1st Session, 41st Parliament, 30 April 2012, 1535 (Mr. Martin Collacott, Spokesperson, Centre for Immigration Policy Reform).

59. UNHCR (2006), p. 6; and "'Don't panic,' UN refugee agency representative to Canada says," *CBC News: Power & Politics*, 23 February 2017.

60. Ibid.; and Mark von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared*, Martinus Nijhoff Publishers, New York, 2002, p. 24.

61. CIMM (2007), p. 33.

62. Arbel and Brenner (2013), p. 10.

63. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236.

64. Canadian Council for Refugees [CCR], *Safe Third Country: more information*.

65. *Canadian Council for Refugees v. R.*, 2007 FC 1262 (CanLII).

66. These factors are

> (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
>
> (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
>
> (c) its human rights record; and
>
> (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

IRPA, s. 102(2).

67. *Canadian Council for Refugees v. Canada*, 2008 FCA 229 (CanLII).

68. *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223 (CanLII).

69. Arbel and Brenner (2013), p. 1.

70. CCR, *Why we are challenging the USA as a "safe third country" in the Federal Court of Canada*, December 2017; and *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 (CanLII).

71. Amnesty International Canada and CCR, *Contesting the Designation of the US as a Safe Third Country*, 19 May 2017, pp. 15–51.

72. *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770.

73. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, para. 54.

74. Specifically, section 101(1)(e) of IRPA and section 159.3 of the IRPR will have no force or effect as of 23 January 2021.

75. American Civil Liberties Union, *U.T. v Barr*.

76. IRPA, s. 99(3); and Government of Canada, *Procedures at inland offices regarding in-Canada claims for refugee protection*.

77. For more information on Canada's inland refugee determination process, see Government of Canada, *Claim refugee status from inside Canada: About the process*.

78. Government of Canada, *Asylum claims by year*. Canada's borders are protected by the CBSA and the Royal Canadian Mounted Police [RCMP]. The CBSA is responsible for border security at all ports of entry and inland, while the RCMP is responsible for border security between ports of entry.

79. Calculation by the authors based on statistics from Government of Canada, "RCMP Interceptions," *Asylum claims by year – 2017*; and Government of Canada, "Total Asylum Claimants processed by the CBSA and IRCC, January–December 2017," *Asylum claims by year – 2017;* Calculation by the authors based on statistics from Government of Canada, "RCMP Interceptions," *Asylum claims by year – 2018*; Government of Canada, "Total Asylum Claimants processed by the CBSA and IRCC, January–December 2018," *Asylum claims by year – 2018;* Government of Canada, "RCMP Interceptions," *Asylum claims by year – 2019*; and Government of Canada, "Total Asylum Claimants processed by the CBSA and IRCC, January 2019–December 2019," *Asylum claims by year – 2019*.

80. Bashar Abu Taleb et al., *The Movement of Goods and People In and Out of Canada in a COVID-19 World*, HillNotes, Library of Parliament, 3 April 2020; and Government of Canada, "RCMP Interceptions," *Asylum claims by year – 2020*; and Government of Canada, "Total Asylum Claimants processed by the CBSA and IRCC, January–May 2020," *Asylum claims by year – 2020*.

81. Some of the reasons cited include the global context of unprecedented numbers of people forcibly displaced in 2015 and subsequent years, as well as the executive orders made by the U.S. President on border security, interior enforcement, and refugees and visa holders from designated nations. See Adrian Edwards, "Global forced displacement hits record high," UNHCR, 20 June 2016; *Executive Order 13767 of January 25, 2017, Border Security and Immigration Enforcement Improvements*, 82 FR 8793, 2017; *Executive Order 13768 of January 25, 2017, Enhancing Public Safety in the Interior of the United States*, 82 FR 8799, 2017; *Executive Order 13769 of January 27, 2017, Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 FR 8977, 2017. For a full list of executive orders since 1994, see United States, "Executive Orders," *Federal Register* (database). See also Kathleen Harris, "Refugee influx: 5 things to know about illegal border crossings into Canada," *CBC News*, 26 February 2017; Deepa Nagari, "The Safe Third Country Agreement: An Analysis Thirteen Years Later," M.A. thesis, Carleton University, Ottawa, 2018, pp. 33–40; and Craig Damian Smith, "Changing U.S. Policy and Safe-Third Country 'Loophole' Drive Irregular Migration to Canada," *Migration Policy Institute*, 16 October 2019.

82. For the fiscal impact, see Office of the Parliamentary Budget Officer, *Costing Irregular Migration across Canada's Southern Border*, 29 November 2018. For social impacts, see Deborah Mebude and Sarah DelVillano, "Have Refugees Created a Housing Crisis in Canada?," Citizens for Public Justice, 29 August 2018. For impacts on public attitudes to immigration, see Shachi Kurl and Dave Korzinski, "Immigration: Half back current targets, but colossal misperceptions, pushback over refugees, cloud debate," Angus Reid Institute, 7 October 2019.

83. The Refugee Protection Division of the Immigration and Refugee Board of Canada [IRB] is mandated to hear and adjudicate all refugee protection claims made in Canada. See IRB, "Refugee claims by irregular border crossers," *Irregular border crosser statistics*.

84. In February 2018, the IRB changed how refugee hearings are scheduled due to a significant increase in refugee claims in 2017. All refugee claims are now heard on a first-come, first-served basis, within a time frame of 30 to 60 days from arrival, depending on where the claim was filed and where the claimant comes from. In addition, according to a spring 2019 Report of the Auditor General of Canada, if the number of new asylum claimants remains steady at around 50,000 per year, the wait time for protection decisions will increase to five years, more than double the current wait time, by 2024. See IRB, *The Immigration and Refugee Board of Canada changes how refugee hearings are scheduled*, News release, 20 February 2018; and Office of the Auditor General of Canada, *Processing of Asylum Claims*, Report 2 in *Reports of the Auditor General of Canada – Spring 2019*, 2019.

85. Neil Yeates, *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum*, 10 April 2018, p. 19.

86. IRB, "Statistics on refugee claims made by Irregular Border Crossers, by Calendar Year and Quarter," *Irregular border crosser statistics*.

87. IRB, "Board establishes Inventory Reduction Task Force for Less Complex Claims," News release, 2018.

88. IRB, *Instructions governing the streaming of less complex claims at the Refugee Protection Division*.

89. IRB, "IRB Issues New Instructions Governing the Streaming of Less Complex Claims at the Refugee Protection Division," News release, 2019.

90. Department of Finance Canada, "Table A2.11: Budget 2018 Measures by Department" in *Equality + Growth: A Strong Middle Class*, 27 February 2018, p. 334; and Immigration, Refugees and Citizenship Canada [IRCC], "Investing in Canada's asylum system," Backgrounder.

91. IRCC, "Investing in Canada's asylum system."

92. Department of Finance Canada (2018), pp. 332–334 and 337.

93. IRCC, "Investing in Canada's asylum system."

94. See *Legislative Summary of Bill C-97: An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, Publication no. 42-1-C97-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 25 June 2019, pp. 47–49.

95. At the time of writing, the countries with which Canada has data-sharing agreements are the United States, Australia, New Zealand and the United Kingdom. See IRPA, s. 101(1)(c.1); and IRPR, ss. 315.21–315.43.

96. IRPA, s. 113.01.

97. Robert Falconer, *Ping-Pong Asylum: Renegotiating the Safe Third Country Agreement*, SPP Briefing Paper, Vol. 12, No. 13, The School of Public Policy Publications, University of Calgary, April 2019, pp. 5–8; and Christian Leuprecht, *The End of the (Roxham) Road: Seeking coherence on Canada's border-migration compact*, Macdonald-Laurier Institute, December 2019, pp. 18–25.

98. Government of Canada, *Final Text of the Safe Third Country Agreement*, art. 10.

99. CIMM, *Evidence*, 1st Session, 41st Parliament, 29 September 2011, 1130 (Mr. Les Linklater, Assistant Deputy Minister, Strategic and Program Policy, Department of Citizenship and Immigration).

100. House of Commons, *Debates*, 1st Session, 42nd Parliament, 13 February 2017, p. 8843.

101. House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 1st Session, 42nd Parliament, 25 September 2018, 1550 (Hon. Bill Blair, Minister of Border Security and Organized Crime Reduction).

102. CIMM, *Evidence*, 1st Session, 42nd Parliament, 3 May 2018, 1135 (Mr. Mike MacDonald, Associate Assistant Deputy Minister, Strategic and Program Policy, Department of Citizenship and Immigration).

103. The Honourable Bill Blair, Minister of Public Safety and Emergency Preparedness, is leading this file with the support of the Honourable Marco Mendicino, Minister of Immigration, Refugees and Citizenship. Justin Trudeau, Prime Minister of Canada, *Minister of Public Safety and Emergency Preparedness Mandate Letter*, 13 December 2019; and Justin Trudeau, Prime Minister of Canada, *Minister of Immigration, Refugees and Citizenship Mandate Letter*, 13 December 2019.

104. Falconer (2019), p. 8. See also Benn Proctor, "Fleeing to Canada on Foot: Reviewing the Canada–U.S. Safe Third Country Agreement," Canada Institute, Wilson Center, 4 April 2017, pp. 9–10.

105. Abu Taleb et al. (2020).

106. Government of Canada, "Refugee claimants in Canada," *Coronavirus disease (COVID-19): Refugees, asylum claimants, sponsors and PRRA applicants*.

107. Government of Canada, "Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)," Order in Council P.C. 2020-0185, 26 March 2020.

108. Kathleen Harris, "Canada to turn back asylum seekers, close border at midnight to stop spread of COVID-19," *CBC News*, 20 March 2020; Mélanie Marquis and Agnes Gruda, "Les migrants irréguliers seront renvoyés," *La Presse*, 20 March 2020; and Teresa Wright, La Presse canadienne, "Ottawa se retrouverait dans l'eau chaude si des migrants se font refouler," *Le Devoir*, 28 March 2020.

109. Government of Canada, "Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)," Order in Council P.C. 2020-0263, 20 April 2020. Since the issuance of the first Order in Council, the border has remained restricted on a monthly basis. At the time of writing, the latest Order in Council is Government of Canada, "Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)," Order in Council P.C. 2020-1128, 18 December 2020.