



## **Reopening the Safe Third Country Dialogue: Rhetoric, Perceptions and Precedents**

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### **Illegal Border Crossings between Canada and the U.S.**

Amid fears that the U.S. is no longer a safe place for refugees, Canada has experienced a surge of asylum seekers walking across its southern border illegally from the U.S. In the first ten months of 2017 approximately 16,992 asylum seekers have been apprehended at non-official ports of entry, an increase of over 500 percent increase from 2016.<sup>2</sup> These illegal crossings are especially dangerous in winter months, where the treacherous journey into Manitoba has resulted in cases of severe frostbite and one death due to hypothermia.<sup>3</sup>

### **The Safe Third Country Agreement**

Why are people risking their health and safety to illegally enter Canada instead of coming through official points of entry? The answer can be found in the joint Canada-U.S. Safe Third Country Agreement (STCA). Under the agreement, the two nations agree to ensure that refugees apply for asylum in the first safe country they enter so as to prevent duplicative claims in both countries. Because Canada and the United States recognize each other as “safe countries”, refugees applying at official border checkpoints typically have their asylum claims rejected at the Canadian border if they first arrived in the U.S. and vice versa.

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<sup>2</sup> “Key Figures on Asylum Claims Made in Canada.” (Canadian Immigration and Citizenship, October 2017)

<sup>3</sup> Nick Robins-Early, “Canada Debates Whether the U.S. is Still a Safe Place for Refugees,” *The Huffington Post* (February 15, 2017). See also: Laura Glowacki, “Asylum Agreement with U.S. to Blame for Woman’s Death Near Border, Lawyer Says,” *CBC News* (May 31, 2017).

But a loophole in the agreement prevents asylum seekers apprehended inside Canadian territory from being returned to the U.S. until Canada's Immigration and Refugee Board (IRB) has had an opportunity to review their case. This has incentivized thousands of asylum claimants to opt for illegal crossings, rather than face rejection at official border entry points.

An IRB hearing does not guarantee that asylum status will be granted and so far the rejection rate for illegal border crossers coming illegally from the U.S. is 50 per cent, notably higher than the 33.9 per cent rejection rate in 2016 for all asylum seekers in Canada.<sup>4</sup> As of October 3, 2017 only 240 of an estimated 8,000 IRB claims have been heard.<sup>5</sup>

While claimants await their IRB hearing, they are eligible for basic health services and emergency dental services through the federal government. They can also apply for a federal work permit which takes about 3 months to receive, and they could be eligible for a range of provincial benefits such as legal aid, public education, and emergency assistance depending on what province they reside in.<sup>6</sup> Had these claimants tried to enter at official border points, many would have been denied entry due to the STCA with no possibility of staying in Canada and receiving benefits.

### **Public Attitudes and the Canadian Government Response**

Canadian public opinion on the matter is divided. A Nanos poll from September 2017 found that more than one-third of Canadians – 37 percent – say Canada should welcome asylum seekers from the United States, while the same percentage of respondents think Canada should close its borders; 26 percent were unsure.<sup>7</sup>

This pales in comparison to Canadians' enthusiastic embrace of thousands of Syrian refugees in recent years. When Canada began welcoming Syrian refugees, a Nanos survey found that about two-thirds of Canadians supported taking in 25,000 or more Syrian refugees.<sup>8</sup> Between November 2015 and January 2017, around 16,000 Syrian arrivals were wholly or partly sponsored by individual or groups of Canadians that had come together to fund and support the new arrivals.<sup>9</sup>

Internationally, Canada's welcome of Syrians was well perceived, with Mr. Trudeau's greeting of the first planeload in 2015 making the headlines of multiple news sources around the world.

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<sup>4</sup> The higher rejection rate for illegal crossers is based on only a small sample size since the recent surge in claimants has created a backlog of IRB cases.

<sup>5</sup> Stephanie Levitz, "About half of asylum seekers crossing into Canada over U.S. border had refugee claims rejected," *National Post* (October 3, 2017).

<sup>6</sup> Karen Pauls, "Here's how Canadian taxpayers and private agencies help asylum seekers," *CBC NEWS* (March 15, 2017).

<sup>7</sup> Michelle Zilio, "Canadians Divided on Granting Entry to Asylum Seekers from U.S., Poll Finds," *The Globe and Mail* (September 14, 2017).

<sup>8</sup> Johsh Dehaas, "Exclusive Poll Finds Huge Support for Syrian Refugees," *CTV News* (December 23, 2015)

<sup>9</sup> Ian Austen, "In Canada, Justin Trudeau Says Refugees Are Welcome." *The New York Times* (January 28, 2017).

Trudeau himself observed:

*This is a wonderful night where we get to show not just a planeload of new Canadians what Canada is all about, but we get to show the world how to open our hearts and welcome people who are fleeing extraordinarily difficult straits.*<sup>10</sup>

Shortly after President Trump announced a travel ban for citizens from seven predominantly Muslim countries in January 2017, the Canadian PM's following tweet received 770,000 likes and almost 420,000 retweets: "To those fleeing persecution, terror & war, Canadians will welcome you, regardless of your faith. Diversity is our strength #WelcomeToCanada."<sup>11</sup>

Justin Trudeau and his government have continued to promote Canada's international reputation as a welcoming nation through statements made abroad and at home on the Syrian refugee crisis. By contrast, some have argued that the new groups of asylum seekers coming from the U.S. are in fact economic queue jumpers and, unlike Syrians, they are not in need of protection. Thus, the government has taken a decidedly different track in response to the growing numbers of illegal border crossers entering from the U.S.

For example, in August, Haitian-Canadian MP Emmanuel Dubourg visited Miami to correct the impression that Canada would grant refugee status to any Haitian coming from the U.S. Thousands of Haitian migrants had headed north to Quebec after misinformation on social media suggested Canada would accept them. Between 80 and 85 percent feared being expelled under the Trump administration's decision to end a program in January 2018 that granted them temporary protected status (TPS)<sup>12</sup> after the catastrophic 2010 earthquake in their home country.<sup>13</sup>

Similarly, Liberal MP Pablo Rodriguez travelled to Los Angeles to deter citizens of El Salvador, Honduras and Nicaragua from heading north. It is estimated that 195,000 Salvadorans, 57,000 Hondurans and 2,550 Nicaraguans are living in the United States under TPS.<sup>14</sup> In November, after the Trump administration gave 58,000 Hondurans an extension of only six months to their TPS in the U.S. and placed about 5,000 Nicaraguans on notice that their TPS will be revoked in the next year, Canadian MPs Dubourg and Rodriguez were sent back on a second trip to the U.S. to prevent

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<sup>10</sup> Ibid

<sup>11</sup> Justin Trudeau, Twitter (January 28, 2017).

<sup>12</sup> During a designated period, individuals who are TPS beneficiaries or who are found preliminarily eligible for TPS upon initial review of their cases are not removable from the United States, can obtain an employment authorization document and may be granted travel authorization. "Temporary Protected Status," U.S. Citizenship and Immigration Services.

<sup>13</sup> Michelle Zilio, "Canadians Divided on Granting Entry to Asylum Seekers from U.S., Poll Finds," *The Globe and Mail* (September 14<sup>th</sup>, 2017).

<sup>14</sup> Ibid

another surge in asylum seekers.<sup>15</sup> The government is also sharing information on social media to clarify Canada's immigration policies and combat misinformation.

Early data suggests that the government interventions are working. Between July and August, an average of 138 asylum seekers crossed into Quebec daily, but in September crossings into Quebec slowed to approximately 57 per day, a decrease of 59 percent.<sup>16</sup> Reduced crossings are not solely due to the government information campaign. Other factors such as the beginning of the school year also contributed to the decline.<sup>17</sup> Some commentators have used the seasonal decline as evidence that the illegal border crossers are in fact queue jumpers who are seeking a faster entry into Canada as opposed to fleeing persecution.

Perceptions aside, Canadian officials must prepare for the possibility that U.S. TPS will expire for hundreds of thousands in the coming years. Additionally over 800,000 beneficiaries of the Deferred Action on Childhood Arrivals in the United States may see their status revoked in the near future.<sup>18</sup> With these possibilities in mind, Canada will need to allocate resources and establish new processes for what is likely to be a sustained increase in illegal border crossers under the Trump administration.

### **Canadian Historical Attitudes**

Despite division in current public opinion on the matter, Canadians have a strong track record of welcoming new immigrants. While Canada is not immune to anti-immigrant protests, the country as a whole has a reputation for welcoming new refugees and economic immigrants alike. According to journalist Paul Wells:

*If you stop a stranger on the street in Frankfurt or Rio or Cape Town, you'd probably get a distracted and reasonably familiar opinion: that Canada remains a country of relative fairness and welcome, whose people don't fuss much and can usually be relied on to help when asked.<sup>19</sup>*

Before nationhood, the colonies that would become Canada welcomed 3,000 Black Loyalists in 1776, among them freemen and slaves, who fled oppression during the American Revolution. In 1783, Sir Guy Carleton, Governor of the British Province of Quebec, safely transported 35,000

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<sup>15</sup> "Liberal MPs Head to U.S. to Deter New Surge of Asylum Seekers in Canada," *The Canadian Press* (November 8, 2017).

<sup>16</sup> "Canadians Equally Divided on Whether to Welcome U.S. Asylum Seekers." Canadian Citizenship and Immigration Resource Center Inc., (November 2017).

<sup>17</sup> Ibid

<sup>18</sup> On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.

<sup>19</sup> Paul Wells, "What is Canada's Reputation, Really?," *Maclean's* (July 15, 2015)

Loyalist refugees from New York to Nova Scotia. Beginning in 1891, Canada welcomed the migration of 170,000 Ukrainians fleeing oppression from areas under Austro-Hungarian rule. After World War II, Canada took in 250,000 displaced persons from Central and Eastern Europe, victims of Nazism and Communism both. In 1956, 37,000 Hungarians escaped Soviet tyranny and found refuge in Canada. Between 1970 and 1990, 20,000 Soviet Jews, deprived of political and religious freedom, settled in Canada. After the Communist victory in Vietnam in 1979, Canada airlifted 60,000 Boat People stranded in refugee camps across Southeast Asia and granted them refugee status. As recently as 2008, Canada began the process of resettling more than 5,000 Bhutanese refugees. Canada's status as a country that can be counted on to support migrants in need of protection is well deserved. In 1986, Canada was awarded the Nansen Medal by the UN High Commission on Refugees in recognition of the country's outstanding service to the cause of refugees, displaced or stateless persons.<sup>20</sup>

### **Reopening the Dialogue**

The rising tide of asylum seekers entering illegally via the U.S. southern border has put the Canadian government in a precarious position. While Canadian officials eagerly accepted international recognition for welcoming Syrian refugees, officials are now trying to deter migrants from the United States with expiring TPS.

Solutions to the challenges created by the STCA are difficult. While Canada could try to close the STCA loophole by immediately rejecting asylum claims and deporting those who are caught crossing illegally, many legal scholars believe this would violate Canada's Charter of Rights and Freedom.<sup>21</sup> In addition to possible court battles, Canada would open itself to criticism that the country is not doing enough to assist international migrants who've lost the right to stay in the U.S. due to the actions of a U.S. administration eager to demonstrate a hardline approach to immigration.

Another option is to minimize the incentive to cross illegally into Canada by repealing the Canada-U.S. STCA entirely. This would reduce dangerous crossings by reverting to the pre-STCA process of accepting asylum claims at official border entry points.<sup>22</sup> But a repealed or suspended STCA would substantially increase the total of number of asylum seekers entering from the U.S. since these claimants could longer be rejected. A Canada Institute review of the STCA found that Canada may have avoided \$2.03 billion in additional asylum spending between 2005 and 2015 due the deterrence and refusal mechanisms embedded in the STCA agreement.<sup>23</sup> Without an STCA in

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<sup>20</sup> "Canada: A History of Refuge: A Time Line," *Canadian Immigration and Citizenship* (October 2017). See also: Krishnadev Calamur, "Canada Returns to Airlifting Refugees," *The Atlantic*, (December 11<sup>th</sup>, 2015)

<sup>21</sup> In 1985 a Canadian court ruled that refugees at the Canadian are guaranteed charter rights as in anyone inside the country. See: "Singh V Canada," *Supreme Court of Canada* (April 4, 1985).

<sup>22</sup> "Repeal Safe Third Country Agreement Says Manitoba Lawyer," *Canadian Lawyer* (February 2017).

<sup>23</sup> "Fleeing to Canada on Foot: Reviewing The Canada-U.S. Safe Third Country Agreement," *Wilson Center Canada Institute* (April 4 2017).

place, more Canadian resources would need to be devoted to processing a higher number of asylum claims from the U.S.

Despite the lack of clear solutions, Canadian officials must proceed in a more proactive manner. The government should give serious consideration to reopening dialogue with the U.S. on the STCA and examining creative solutions. Given the Trump administration's current approach towards immigration and refugees, it might be worth aligning the countries' policies by developing a systematic approach for processing former TPS beneficiaries considering a move to Canada.

By reopening dialogue with the U.S on the STCA, Canada could also enhance the safety of asylum seekers considering the Canadian option; officials could maintain control over a flow of immigrants and refugees at the border; Canadians could take in refugees and immigrants in a manner that is consistent with national willingness and resources; and the government could also address the growing economy's labour market needs. According to a report by the Conference Board of Canada, if Canada were to welcome 450,000 newcomers per year, real GDP would grow by an average of 2.05 percent annually, with immigration contributing nearly one-third of economic growth.<sup>24</sup> For Trudeau's government, it would be an opportunity formalize policy in response to an expected sustained surge in asylum seekers, while also maintaining Canada's reputation as a welcoming nation for economic migrants and those fleeing persecution.

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<sup>24</sup> "Report: 450,000 Immigrants Annually? Integration is Imperative to Growth." (The Conference Board of Canada. October 2<sup>nd</sup>, 2017)

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