

Fleeing to Canada on Foot: Reviewing the Canada-U.S. Safe Third Country Agreement

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An agreement most people have never heard of is encouraging thousands of migrants to enter Canada illegally – but it's also deterring many more asylum claims from occurring in the first place

WASHINGTON – Recent <u>media attention</u> has focused on the growing number of refugees walking illegally across the border to seek asylum in Canada.

Migrants have trekked across the frozen North Dakota prairie, sometimes walking 80 miles or more through snow and rugged terrain. Once they enter Manitoba, they promptly surrender to the Royal Canadian Mounted Police (RCMP) in the hopes of making a claim for asylum. Similarly, in Quebec, hundreds have crossed from New York State via a snowy border ditch.

Reports suggest the phenomenon was sparked by shifting U.S. policy towards migrants, refugees, and undocumented immigrants. That story aligns with the data so far.

Immigration, Refugees and Citizenship Canada (IRCC) has released data showing that in just the first two months of 2017, nearly 1000 asylum seekers were intercepted by the RCMP. More recent reports indicate that the frequency of border jumping has increased with the spring weather. Relying on year-to-date RCMP interceptions between Jan 1, 2017 and March 28, 2017, I estimate that Canada could see a 212 percent increase in illegal border walkers over last year (see Figure 1).²

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² The author calculates that 1,811 asylum seekers have been intercepted by the RCMP from January 1, 2017 to March 28, 2017, an average of 21.1 illegal crossing per day. In 2016 there were on average 7 crossings per day.

Figure 1: Projected RCMP interceptions for 2017

Estimate based on the number asylum seekers apprehended between official ports of entry in January and February of 2017, plus author's calculation for March 2017.



Source: <u>IRCC</u> website and author's calculations.

The projected 2017 increase is more astonishing when one considers that many of the 2016 crossings occurred in the run up to or just after the U.S. Presidential election. While historical data is hard to come by, reports from Quebec paint the fullest picture of the increase in irregular crossings to Canada since the U.S. election. Only one month after the November 8 elections, 305 people entered Quebec illegally from the United States to request asylum, up 1,400 percent from December 2015 when only 20 crossed the border illegally (see Figure 2).



Asylum seekers entering Quebec Illegally between January 2016 and February 2017



Source: 2016 data provided by Border Services to <u>Public Radio International</u>. Data for January and February 2017 is from the <u>IRCC</u>.

Media coverage in <u>Manitoba</u> and <u>British Columbia</u> suggests that Quebec's experience is not unique, and that the number of irregular crossings has accelerated in 2017.³ Additionally, while the new American administration is signaling a greater emphasis on border security, Canada has been promoting its embrace of migrants. In fact, as outcry against President Trump's executive order suspending U.S. entry rights for travelers and visa holders from seven predominantly Muslim countries reached a fever pitch, Prime Minister Trudeau tweeted:



The motivation to seek asylum in Canada is not hard to understand, but the decision to walk long distances in frigid temperatures, rather than drive or fly to an authorized border crossing is puzzling. But the pieces fall into place when one considers the strange incentives created by the 2004 *Canada-U.S. Safe Third Country Agreement* (STCA), which governs asylum claims at U.S.-Canada border crossings.

This relatively obscure agreement has encouraged claimants to jump the border before requesting asylum. But, it also accomplishes its intended outcome, which is to deter asylum claims from happening in the first place.

John Manley, who was Canada's Deputy Prime Minister during 9-11 and contributed to various 'smart border' initiatives, recently argued that the STCA has worked to keep refugee claims in Canada at a manageable level and the agreement prevents even larger surges during the present uncertainty. <u>He</u> <u>states:</u>

"If you suspend the Agreement then [claimants] can come across at regular border crossings, so forget 30 here, 20 there that are going through Minnesota into Manitoba, now you're starting to deal with thousands of people."⁴

A review of the historical data confirms his thinking. In fact the data suggests that, on balance, the STCA has significantly reduced the costs to Canada from processing asylum claimants. This was accomplished by dissuading applicants to begin with and by allowing Canadian border security agents to deny asylum claims if the applicant landed in the United States first. Consequently, the STCA has changed the path to asylum in Canada, sometimes encouraging risky and illegal crossings, but it has also reduced the frequency of claims.

³ Mostly due to geography and proximity to population centers, nearly all of the illegal crossings have occurred in Quebec, Manitoba, and British Columbia. Entry into Ontario is discouraged by physical barriers like the Great Lakes and the Canadian Shield.

⁴ Brennan MacDonald, "Scrapping Refugee Deal with U.S. would lead to thousands more heading north," CBC News (March 1, 2017).

While additional resources will be needed to accommodate the expected swell of border walkers in 2017, these costs will be more than offset by the overall reduction in asylum claims linked to the deterrence and refusal mechanisms embedded within the STCA.

The Canada-U.S. Safe Third Country Agreement

Although it took years to finalize, the Safe Third Country legislation was one of several Canada-U.S. border initiatives agreed to after the September 11, 2001 attacks.⁵ The law came into effect December 29, 2004. Safe third country agreements aim to prevent "asylum shopping" where claimants make simultaneous or consecutive appeals in different countries to find their best option.

Under the Canada-U.S. agreement however, refugees must apply for asylum in the first safe country they enter.⁶ For the purposes of this pact, Canada and United States have only designated each other as safe countries.

In practice, this means that unless otherwise exempted from the agreement, refugees will have their asylum claims rejected at the Canadian border if their foot first touched American soil and vice versa. STCA exemptions exist for refugees arriving via the United States if they have family members living in Canada or if they are holders of Canadian travel documents such as a student visa.⁷ Claimants not meeting these exceptions will be denied entry.

Asylum seekers may prefer Canada for any number of reasons. For instance, Canada has traditionally provided higher social assistance levels for refugees, especially when integration benefits such as language and skill training are included.⁸ Or, Canada could just be a fallback option for those who originally preferred the United States for family or economic reasons, only to determine later that it may be beneficial to apply for asylum in Canada as well.

At the time of the STCA's implementation, a parliamentary report noted that "selecting a new home based on personal preferences or for economic reasons [should] fall within the domain of immigration and does not properly belong in the asylum context."⁹ Such agreements make sense on both fiscal and humanitarian grounds. If refugees can receive fair treatment in a neighboring jurisdiction, why waste resources processing duplicative appeals? This is especially relevant when one considers that the OECD estimates the cost for processing and integrating a single asylum seeker in the first year at C\$14,000.¹⁰

⁵ U.S. State Department Archives, "U.S.-Canada Smart Border 30 Point Action Plan," (December 2002).

⁶ Canada uses four criteria to designate a country as a safe as a safe third country: 1) Whether the country is a party to the United Nations 1951 Refugee Convention and to the 1984 Convention Against Torture; 2) The country's practices, claims, and obligations respecting the two UN conventions; 3) the country's human rights record; and 4) Whether the country has an agreement with the Government of Canada for sharing responsibility with respect to claims for refugee protection.

⁷ There is also a narrow public interest exception that allows those who could be subject to the death penalty in the U.S. or a third country to have their claim heard.

⁸ While International treaties require governments to provide means tested assistance to refugees, the benefit levels can vary considerably, especially in the U.S. where most means tested programs are set at the state level. ⁹ Standing Committee on Citizenship and Immigration, "The Safe Third Country Regulations," (December 2002).

¹⁰ This is the first year cost and it can be significantly higher if integration support such as language and job training is provided. After the first year the cost declines considerably. See OECD, Who Bears the Cost of Integrating Refugees? *Migration Policy Debates* (January 2017).

Asylum Seekers are not Sponsored Refugees

Before reviewing the possible fiscal savings for Canada, it's useful to consider the three main categories of refugees in Canada:

- 1) Government Assisted Includes many of the resettled Syrian refugees;
- 2) Privately Sponsored Community groups agree to provide care, lodging, and other assistance; and
- 3) Asylum Claimants Persons who arrive unannounced at a border or inland facility

Both government- and privately-sponsored refugees are vetted before they arrive in Canada, including medical and security screening. Asylum claimants, on the other hand, apply for status by presenting themselves inland or at a designated port of entry.¹¹ If they apply at the border and are found ineligible under STCA they are returned to the United States.

If however, they are apprehended within Canadian territory, claimants are protected by the *Canadian Charter of Rights and Freedoms*.¹² Illegal crossers cannot be returned to the United States until Canada's Immigration and Refugee Board has had an opportunity to review their case.¹³

The Safe Third Country Agreement Deters Asylum Claims

Bouts of irregular migration are more common than one might think. The STCA was first negotiated to resolve a surge in claims after the U.S instituted temporary refugee controls in response to the 9-11 attacks.

Canada also witnessed a post-STCA spike in claimants in 2008. This rise was attributed to the global economic downturn, plus an influx of Romani Hungarian claimants who no longer needed a visa to enter Canada or the U.S. as a result of Hungary's admission to the European Union. Data released by IRCC suggests that asylum claims in 2017 may approach 2008 levels but there will still be about 10,000 fewer claims than in 2001.¹⁴

At the time of the 2008 peak, media reports documented <u>passenger vans</u> filled with Romani people deliberately speeding through border check points to avoid being returned to the U.S. Figure 3 shows this spike as well as the projected increase in 2017 claimants. But, importantly, it highlights an overall reduction in the number of asylum claims post-STCA.

In 2005, the year after STCA took effect, the Canadian Border Services Agency (CBSA) reported that the number of claims made at the border dropped 54 percent, from 8,904 to 4,041.¹⁵ It seems the threat of being refused due to the STCA deterred claims from occurring in the first place. While some of the reduced claims at ports of entry may be the result of claimants heading inland, the overall trend is clear: the STCA caused total asylum claims (inland + port of entry) to decrease.

¹¹ Designated ports of entry include airports as well as official road, rail and ferry crossings.

¹² Unless the claimants are deemed to be a threat to Canadian safety, usually because of a prior criminal record.

¹³ In 2015, 67% of claimants were granted refugee status by the Internal Refugee Board. See Sean Rehaag, "2015 Refugee Claim Data and IRB Member Recognition Rates," (March 30, 2017).

¹⁴ In January and February 2017 a total of 5,520 persons have already requested asylum in Canada, or an average of 93.56 request per day. At this rate Canada is on pace to receive 34,149 claims in 2017. <u>See IRCC website.</u>

¹⁵ Of the asylum claims made at the border, 74 percent of applicants were deemed eligible to lodge a claim.

During the 11 years since STCA implementation, Canada has processed an annual average of 22,839 asylum claims, 23 percent fewer than the annual average of 29,682 claims processed between 1989 and 2004, before the agreement was in effect.



Figure 3: Annual Asylum Claimants in Canada (1989-2017)

Sources: Data for 1989-2003 from <u>Canadian Council of Refugee Report</u>. Data from 2004-2016 supplied by the Minister of Public Safety's office. *2017 is a projection based on year-to-date asylum claims up to February 28, 2017 available at <u>IRCC</u>.

Canada's lower absolute number of asylum claims also came at a time when total global asylum claims were rising. So, as more people were seeking asylum around the world, Canada's share of total claims was falling.

In the five years prior to the agreement, Canada received 4.1 percent of total global asylum claims.¹⁶ But, in the 11 years since the agreement, Canada received only 2.9 percent of global asylum seekers. A percentage point here or there may seem insignificant, but had Canada continued to receive global asylum claims at the previous rate of 4.1 percent, Canada would have needed to process an additional 145,000 asylum claimants between 2005 and 2015.¹⁷

Given the OECD estimated cost of C\$14,000 per asylum seeker, the STCA may have reduced Canadian spending on asylum by C\$2 billion over a 10 year period.¹⁸

¹⁶ Unfortunately, U.N. global asylum seeker data only dates back to 2000, so the time series prior to the agreement taking effect is only five years. See <u>The UN Refugee Agency Population Statistics</u>

¹⁷ This decline in asylum share should not be all attributed to the safe third country agreement, as the recent rise in global asylum seekers has primarily taken place in Europe.

¹⁸ 145,000 (claimants)*\$C 14,000 (OECD fist year cost) = \$2,030,000,000.00

Canada has also benefitted from the ability to refuse claims

In addition to dissuading asylum claims at the outset, the STCA has also allowed the Canadian Border Services Agency to refuse a significant number of claims from those crossing via the United States.

When the U.N. High Commission on Refugee's reviewed the STCA results in 2005, it found that Canada returned more than 1,000 land border claimants to the United States that year. Incomplete data makes it difficult to provide the exact totals but, as Figure 4 indicates, the STCA has allowed Canada to return hundreds of refugees annually to the United States.



Figure 4: Annual Asylum Claimants Rejected at the Canadian Border (STCA)

Sources: 2005 Data based on U.N. Refugee Monitoring Report. 2006-2011 data reported in Efrat Arbel, <u>Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between</u> <u>Canada and the United States</u>, (2013).

The STCA has generated considerable savings for Canada, but it has done little for the United States. In fact, the STCA imposes a net cost increase on the U.S. asylum system, since refugees who may prefer to seek asylum in Canada must first pursue a U.S claim if they landed there first.¹⁹

As an example of the asymmetric cross border flow in asylum seekers, consider that when the agreement was first negotiated in 2001, Canada received 12,822 refugee claims from people crossing from the U.S. land border. U.S. border agents received only 200 claimants coming from the Canadian crossings.²⁰ The one-sided natured of the STCA is further reinforced by reviewing asylum refusal

¹⁹ For a variety of reasons, even if asylum seekers prefer Canada, circumstances may encourage them to enter the U.S. first (thereby triggering the STCA). For one, the U.S. has more consular offices around the world than Canada, so asylum seekers may find it easier to gain a travel permit at a U.S. consular office based on proximity alone. Additionally the U.S. grants temporary stay visas to individuals with family members living in the United States, this creates a pathway for asylum seekers to enter under a U.S. B-2 visitor visa before pursuing an asylum claim in Canada. Canada's northern geography also means that overland travelers from Latin America need to enter the U.S. on their journey to Canada, also sometimes it's just harder to find a direct flight to Canada.

²⁰ Standing Committee on Citizenship and Immigration, (December 2002).

statistics from the first year of implementation. Canada used the STCA to reject and return over 1,000 claimants to the U.S. in 2005, but the U.S. only returned 16 refugees to Canada in that year.²¹

By deterring and rejecting asylum claims under the STCA, Canada has been able to shift the economic burden of processing and integrating asylum claims to U.S. authorities.

Cost savings are not the whole story

If the objective of the STCA was only to reduce to the cost of processing asylum claims, Canadian policymakers might be saying "so far, so good." But, events that push more migrants to Canada, such as the post-U.S. election chill on immigration will inevitably lead to more people walking into Canada illegally to circumvent the STCA.

From a resourcing perspective, the cost of managing an additional 5,000 thousand border jumpers in 2017, is far less than the cost of processing more than 44,000 asylum seekers in 2001, pre-STCA.²² Thus, even when events cause a temporary surge in inland claims, Canada devotes fewer resources to asylum claims with the STCA than without it.

But, costs are not the whole story. Crossing illegally is dangerous, especially in winter. As recently as <u>March 8, 2017</u>, 19 asylum seekers crossed into Manitoba during a whiteout blizzard with temperatures reaching minus 28 degrees Celsius. The incentive to jump the border also creates profit opportunities for human smugglers. These unsafe crossings may undermine the Trudeau government's well-deserved praise for welcoming refugees. Additionally, the U.S. may perceive the disproportionate benefits received by Canada under the STCA as evidence that Canada is not accepting its fair share of overall asylum seekers entering North America.

Finally, refugees who arrive in Canada under government sponsored or private programs have been fully screened by Canadian law enforcement, security and immigration officials. Asylum seekers crossing illegally to make inland claims have not.²³

What's next for the STCA?

The STCA has had many and sometimes contradictory effects on asylum outcomes in Canada. On the one hand, Canada has utilized this agreement to refuse thousands of asylum claims at the border if the applicant is arriving from the United States. Crucially, even more have been dissuaded from applying in the first place because the STCA acts as a deterrent.

²¹ The United Nations High Commissioner for Refugees, Canada-United States Safe Third Country Agreement, (June 2006).

²² The Canadian Council for Refugees estimated that, in the first year of the agreement, more than 3,000 refugee displaced away from the border showed up in Canada to be pursued as inland claims. See Canadian Council for Refugees, Closing the Front Door on Refugees: Report on the First Year of the Safe Third Country Agreement (2005).

²³ This security risk is somewhat minimized by the fact that many of the illegal crossers into Canada were screened by U.S. officials they first landed stateside. Unofficial reports suggest that 83 per cent of all illegal border crossers into Canada were previously processed by U.S. officials. Canada can use this information to verify the personal details provided by inland asylum seekers.

From a cost savings standpoint, Canada is the primary beneficiary of the agreement. Since Canada has traditionally received many more claims from asylum seekers entering via a U.S. land border than vice versa, almost all of the savings from preventing those claims go to Canada.

But the STCA has also increased Canada's share of inland claims, as some of those displaced at the border choose to enter Canada illegally and try their luck with Canada's Immigration and Refugee Board. The rising number of inland claims, the hazardous crossing, and potential security concerns presented by unknown border crossers has led to some calls for the Agreement to be suspended.

When Canada's Immigration Minister Ahmed Hussen was asked in the House of Commons if he was prepared to make any changes to the agreement, he responded: "The safe third country agreement between Canada and the United States is crucial to the handling of asylum claimants in both countries." The Minister has also previously referred to the STCA as an orderly system for managing asylum claims.²⁴

Canada's caution on the STCA makes sense given that the agreement was originally designed to respond to temporary migration surges in the first place. Suspending the agreement would intensify the already considerable media attention that this issue is receiving in both countries. Abandoning the agreement unilaterally could also prove to be a diplomatic challenge for Canada since it would naturally spark a debate on whether the United States is a safe place for asylum seekers. Such a move could provoke the ire of the U.S. government.

Additionally, an STCA suspension would tax Canadian border and asylum resources as refugees already in the U.S. begin to arrive in higher numbers at the land border. The reduced cost of processing border jumpers would not make up for the influx of new asylum claims at ports of entry.

But doing nothing is also an insufficient response to the challenges posed by the STCA. We now have over 12 years of experience living in a post STCA world and policymakers have had an opportunity to observe the outcomes, the loopholes, and the unintended consequences of the agreement.

While exploring longer-term solutions, Canada should continue to provide additional resources to the affected border towns in Quebec, Manitoba and British Columbia to deal with the surge. The \$30,000 in federal funding recently provided to Emerson, Manitoba's volunteer fire department is a good start.²⁵

U.S. and Canadian officials should also continue to work proactively to share information. It has been reported that agencies from both countries gathered in Montreal at the end of February to swap information border crossers. This came on the heels of a February 23, 2017 phone call between Prime Minister Trudeau and President Trump.²⁶ This information sharing is vital since many of the border crossers may have first crossed legally into the United States, Canadian agencies can use this information to assess possible security concerns.

Canada and the United States should also redeploy resources towards monitoring border areas in provinces where illegal crossing is common. Better monitoring would shed light on the extent of the

²⁴ House of Commons Question Period Transcripts, Debates of February 13, 2017 (2017).

 ²⁵ Steve Lambert, "Ralph Goodale Announces \$30,000 for Cross Border Influx", *Huffington Post* (March 4, 2017).
²⁶ Andrea Hopkins and David Ljunggren, "Canada's Trudeau Pressured to Tackle Problem of Asylum Seekers," *Reuters* (February 24, 2017).

problem, make crossing safer, and ensure that both countries can track who is coming and who is leaving their jurisdiction.

Over the long term, Canada and the United States should initiate a renewed dialogue in cooperative management of asylum seekers in our shared territory. Since Canada is the overwhelming beneficiary of the STCA, perhaps some concessions are in order.

When the agreement was originally being negotiated, the United Stated proposed that they should be allowed to refer up 2,400 asylum seekers annually to Canada for resettlement under the STCA.²⁷ Canadian negotiators balked at this proposal and it was not included in the final agreement. However, an accompanying diplomatic note specified that Canada may accept up to 200 refugee referrals from the United States, as long as the referrals are living outside of the United States.

Earlier this year, President Trump tweeted a criticism of an Obama-era deal with Australia to bring to the around 1250 refugees to the United States from detention centers off the coast Papa New Guinea.



With the President showing a willingness to negotiate on many issues, a concession from Canada, such as a willingness to accept asylum seekers referred by the U.S. under the STCA could generate some goodwill from the administration on other issues in the future. A referral process would also encourage asylum seekers currently in the United States but wishing to try their luck in Canada to apply through legal channels. This would cut down on the number of dangerous crossings and give Canadian authorities more information on asylum applicants before they arrive on Canadian soil.

By welcoming additional asylum claim referrals from the U.S. administration, Canada would be doing its neighbor a favor, while also doubling down on its support for migrants in need of protection.

²⁷ Standing Committee on Citizenship and Immigration, (December 2002). See Section G <u>Supplementary Draft</u> <u>Agreement</u>.

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