

**BRIDGES NOT BORDERS:
BRIEFING ON THE SAFE THIRD COUNTRY AGREEMENT WITH THE USA**

Bridges Not Borders is a grass roots community organisation bringing together people living near the USA border (Ormstown, Havelock, Hemmingford, St Bernard de Lacolle) and concerned about the situation facing asylum seekersⁱ who are fleeing the USA to make a refugee claim in Canada and how they are affected by the Safe Third Country Agreement (STCA). **Here are our main concerns about the STCA in point form, followed by more detailed comments:**

1. What is the Safe Third Country Agreement?
2. We do not think the USA is a safe country for asylum seekers. Its human rights and asylum practices and policies are in breach of many international laws and norms.
3. STCA puts asylum seekers in a catch 22: it's not safe to stay in USA and not safe to cross at official border crossings into Canada.
4. The STCA has negative consequences for both asylum seekers and Canadian society.
5. There is a democratic deficit in Canada regarding the STCA: it's a bilateral agreement which is only reviewed by the Governor in Council and not by Parliament.
6. Canadian Federal Court ruling of 2007: USA not a safe country for asylum seekers.
7. Conclusion 1: Canada is failing to honor its responsibilities to people in need of international protection by sending them back to the USA when they fail to meet one of the STCA exceptions.
8. Conclusion 2: Canada should suspend the STCA and consider terminating the agreement as long as the USA continues to be unsafe for asylum seekers

1. What is the Safe Third Country Agreement between Canada and the United States?

The STCA is an agreement that came into force on December 29th, 2004. It means that Canada and the US recognize one another as a *safe country* for asylum seekers/refugee claimants who “*are required to request refugee protection in the first safe country they arrive in unless they qualify for an exception to the Agreement*”. If, for example, someone arrives in the USA and then tries to enter Canada to make a refugee claim, they will normally be returned back to the US to make their refugee claim there (and vice versa). “*The STCA applies only to refugee claimants who seek entry into Canada from the US at Canada-US (official) land border crossings, or by train...*”. The STCA does not apply to refugee claimants who cross into Canada irregularly, i.e. in between official land border crossings such as at Roxham Road.

There are four exceptions to the agreement. Refugee claimants will be able to enter Canada at an official land border crossing if they: 1. can prove that she or he has an eligible family member with the required status in Canada; or 2. is an unaccompanied child under 18 years of age who does not have a spouse, is not accompanied by a parent or guardian and does not have a parent/ guardian in the US or Canada; or 3. is in possession of a valid document allowing them entry into Canada; or 4. falls under a public interest exception (risk of death penalty in US or other country). How does this work in practice? If, for example, an asylum seeker goes to a border crossing and can prove that she or he has a spouse, common-law spouse, child, grandchild, parent, legal guardian, grandparent, sibling, uncle/aunt or niece/nephew in Canada and that this family member has an eligible status (of which there are

several) in Canada, then that asylum seeker can in principle be admitted into Canada to make a refugee claim. However, it may not be easy to prove this relationship. As are all asylum seekers, they will be screened to see if they are eligible to make a refugee claim in Canada.

2. **The USA is not a safe country for asylum seekers.** On the basis of several sources of information we think the USA should no longer be designated as a `safe third country`. The sources of information are: evidence supplied in the 2017 *Contesting the Designation of the US As a Safe Third Country*, submitted by the Canadian Council for Refugees, the Canadian Council of Churches and Amnesty International, the Federal Court judgement of 2007, media coverage, contacts with people supporting refugees in the USA (Plattsburgh Cares) and reports from asylum seekers fleeing from the USA to Canada. Asylum seekers in the USA are at serious risk of both human rights abuses and *Refoulement*: being sent to a country where their safety, lives and freedom are at risk (*contrary to Article 33 of the 1951 Refugee Convention and Article 3 of the Convention Against Torture*). Many of the criticized practices and policies have been in place for some time. President Trump has acted to significantly expand the scope of the arrest, detention, criminalisation and deportation of undocumented people, many of whom are in need of international protection. Two Executive Orders signed by President Trump on January 25th 2017 have been the drivers of this expansion. Furthermore the third Trump travel ban on eight countries, six of which are predominantly Muslim countries, alongside discriminatory rhetoric by the President against Mexicans, Muslims and most recently people from numerous countries such as Haiti, El Salvador and African nations are contributing to a rise in xenophobia in the USA and providing encouragement to extreme right groups.

Here are basic details of some of the concerns we have about the USA asylum and human rights policies and practices:

- **The One Year Bar.** Since 1996, asylum seekers, with limited exceptions, must apply for asylum within one year of entering the USA. Many people with valid claims do not do so for a number of reasons, for example, because they do not know they can apply, because of fear and trauma due to persecution suffered and so on. UNHCR has urged the USA to repeal this. According to a study, an estimated 15,000 asylum claims would have been granted from 1998-2009 but for the Bar. UN Declaration of Human Rights: *'everyone has the right to seek and to enjoy in other countries, asylum from persecution'* (Art.14)
- **Expedited Removal Process:** Since 2002. Criticized by UNHCR and Canadian Standing Committee on Immigration and Citizenship. An undocumented person can be removed from the USA on the sole basis of one meeting with a Customs and Border Protection (CBP) Officer. They do not go before a Judge. Once removed they are barred for 5 years from entering the USA. CBP officers are required to identify people who fear persecution and refer them for a `credible fear` interview with an asylum officer. Referrals are routinely not done and credible fear interviews have become more stringent and restrictive. These are normally conducted without Legal Counsel for the asylum seeker. As a result, many in need of protection are likely to be removed. The consequences can be fatal. From Jan 2014 to Sept 2015, 83 people who had been deported back to El Salvador, Honduras and Guatemala were killed. *Contravenes principle of Non- Refoulement*

- **Detention.** Detention of migrants and asylum seekers, including children, is widespread and growing. It is used punitively and arbitrarily as a deterrent, rather than on a case by case basis. This may be in violation of international refugee law, the 1971 Covenant on Civil, and Political Rights and the UN Convention on the Rights of the Child. *Article 31(2) of Refugee Convention: states may restrict movement of asylum seekers only when necessary.* Conditions in detention are prison like with two thirds detained in federal prisons without internal freedom of movement; solitary confinement is used. Families are separated. Medical care is often inadequate and 15 deaths by neglect have been determined from 2010 -2016. Many detention facilities are located in remote areas restricting access by families, lawyers and NGOs. Detention can be prolonged – months, even years. The psychological impact on those already traumatized by persecution and on children can be severe. Sexual violence in detention is widespread and yet from 2010 to 2016 less than 1% of complaints were investigated. LGBT persons are at heightened risk of abuse. Arguably such treatment may constitute ‘*cruel, inhumane or degrading treatment or punishment*’ as prohibited under Article 16 of the Torture Convention.
Lack of legal representation Access to legal counsel is curtailed (only 14% of detainees had counsel in 2015 study). This has very negative results for someone’s asylum claim. A 2016 study found that asylum seekers with a lawyer had a 10 times greater chance of a making a successful asylum claim. Thus the lack of access to a lawyer *puts asylum seekers at risk of being refused asylum and therefore a possibility of Refoulement.*
- **Operation Streamline** This is aimed at prosecuting people for unlawful entry, document misuse and transporting or harbouring non-citizens. Once referred to O.S. a person with a fear of persecution may never be able to make a claim, and there are inadequate safeguards to prevent this happening. *Art. 31 (1) of the Refugee Convention: States shall not impose penalties, on account of their illegal entry or presence, on refugees.’*
- **‘Asylum-Free Zones’ and Inconsistent Gender Based Determinations.** Being recognized as a refugee can depend on where your case is heard. There are huge variations in **denial** rates of asylum claims. In 2015 the average denial rate was 52% but in some areas it is much higher: Atlanta (98%), Houston and Dallas (91%) Charlottesville (87%). Acceptance rates are falling and there are many complaints of hostile immigration judges. The US asylum system fails to provide consistent protection for female and LGBT asylum seekers. Many women from countries close to the USA desperately seek refuge in the USA. *“In the Northern Triangle (Honduras, El Salvador and Guatemala) and Mexico the problem of femicide and violence against women has reached epidemic levels, in many cases with links to organized crime,”* (Nov. 2017, Eugenia Piza-Lopez, head of UNDP's gender mission in Latin America). Violence against LGBT persons is also very high in these countries.

3. The STCA puts asylum seekers in catch 22 position. Asylum seekers feel it is not safe to stay in the USA and neither is it safe to cross into Canada at official border crossings. Most asylum seekers do not qualify for one of the four exceptions to the STCA which allow them to enter Canada legally and make a claim for asylum. In order to escape from the very real threat of arrest, detention and expedited removal back to their home country, they are forced to cross into Canada irregularly. Some BNB members heard direct accounts from people when we participated in the Refugee

Breakfast program at Lacolle border last year. See also pp. 13-14 of *Contesting the Designation of the United States as a Safe Third Country* for testimonies of asylum seekers in Manitoba who crossed irregularly

4. The STCA has negative consequences for both asylum seekers and Canadian society.

- Irregular crossings can put asylum seekers at risk. During the winter of 2016-17 several people suffered severe frostbite, loss of digits and some nearly died in Manitoba as well as one person here in Quebec ('Mamadou'). A Ghanaian woman died of hypothermia trying to cross from Minnesota. This winter three people have suffered severe frostbite crossing into Manitoba. It is urgent that something be done to make this situation safer. People are taking risks because they feel unsafe; having abandoned the lives they managed to create in the USA and often travelling long distances to reach Canada.
- People crossing irregularly are not able to seek asylum in dignity. They are arrested and often subject to aggressive attitudes by officers at Roxham Road.
- The STCA undermines support for Canada's refugee program within Canada as the media often present a negative view of people crossing irregularly. Many Canadians do not understand our international obligations, the right of everyone to seek asylum and why people cross irregularly.
- The irregular crossings caused by the STCA have been used by extreme right-wing groups to foster anti-refugee sentiments. Bridges Not Borders members have been witness to their growing presence at two border demonstrations on July 1st at Roxham Rd and September 30th at Lacolle. These were organized by two far right groups Storm Alliance and La Meute who were protesting what they called illegal crossings and asserting that asylum seekers were 'illegals', which has no basis in Canadian or international law. They also promote mis information about the entitlements of asylum seekers awaiting a decision on their claim. Yet, we all have the right to seek asylum if we fear persecution, lose of freedom or life.
- The STCA encourages exploitation in the form of human smuggling and the reported cases of some taxi drivers charging exorbitant prices to bring people to Roxham Rd.
- Policing of irregular crossings is expensive and takes RCMP and police officers away from important work.

5. Parliamentary oversight of STCA is lacking. A 1988 amendment to the 1976 Immigration Act allowed Canada to designate another country as a 'safe country'. This allowed Canada to deny access to an asylum seeker who enters Canada via this 'safe country'. However, the STCA itself was an Order in Council, approved only by the Privy Council. The designation of the USA as a safe third country is reviewed by the 'Governor in Council'. It is the Minister of Immigration, Refugees and Citizenship who monitors the designation of the US and then reports to the Governor in Council as needed. So while the legal basis for designating a country such as the US as a safe country has been approved by Parliament, it seems to us that this important agreement requires greater Parliamentary oversight.

6. Canadian Federal Court ruling of 2007: In response to an earlier legal challenge of the STCA, the Canadian Federal Court has already ruled in 2007, that the USA is not a safe third country. Despite the fact that this ruling was reversed on appeal, it was overturned on a point of administrative law.

The Court of Appeal did not reverse the Federal Court's findings that the designation of the USA as a safe country was unreasonable.

*“Phelan J of the Federal Court ruled in 2007 that the United States’ human rights and refugee protection record at that time did not meet the requirements of Canadian law and overturned the designation on administrative law and Charter grounds. He found that the United States’ resort to expedited removals and detention, taken in conjunction with other factors meant that the **Governor in Council’s designation of the United States as a safe country was unreasonable...** Phelan J also found that the Safe Third Country Agreementviolated the right to life, liberty and security of the person under s. 7 of the Charter and the right to equality under s. 15 of the Charter.” (p.8 of Contesting the Designation of the United States as a Safe Third Country`)*

7. Conclusion 1: Canada is failing to honor its responsibilities to people in need of international protection by sending them back to the USA, when they fail to meet one of the STCA exceptions.

UNHCR developed a list of `critical factors for the appreciation of “effective protection” in the context of return to third States’ (2002). These include that there is no real risk in such a third country that the person returned would be: 1. subject to torture or cruel, inhumane or degrading punishment or treatment; 2. deprived of liberty without due process; 3. sent by the third State to another State in which they would not receive effective protection. In light of the information above at point 2 - outlining how the US is not a safe country for asylum seekers - we believe returned asylum seekers are at real risk of all three outcomes in the USA.

8. Conclusion 2: Canada should suspend the STCA and consider terminating the agreement as long as the USA continues to be unsafe for asylum seekers.

More than 65 million people are currently forcibly displaced - internally and externally - by armed conflicts, persecution, and violence and human rights abuses. 22.5 million of these people are refugees (i.e. forcibly displaced outside of their country) half of whom are children. While countries in the developing world and in Europe are hosting the bulk of people in need of international protection, Canada receives a minute percentage of the world’s refugees. Canada is a prosperous and safe country which has the resources to increase its share of the refugee population by taking in more people in need. The total numbers of asylum claims received in 2017 was 50,649. While this is higher than in recent years, it is similar to the 44,695 claims made in 2001. Refugee movements are not predictable and variations in the annual number of claims received are inevitable. We feel that refugees are not the problem; it is the multiple and brutal causes of refugee movements that are the real problem the world faces.

Canada should revoke the STCA until such time as the USA is a safe country for refugees. The conditions in the USA are incompatible with its designation as a safe third country. Canada has a duty of protection towards those who seek asylum at our borders. We urge the Canadian government to act humanely and decisively to protect asylum seekers coming from the USA and enable them to seek asylum in Canada in safety and dignity.

Revised May 21st, 2018 (see References below)

References:

Final Text of the Safe Third Country Agreement December 5th, 2002

<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html>

Information on Safe Third Country Agreement: Canadian Council for Refugees (bilingual)

<http://ccrweb.ca/en/safe-third-country>

<http://ccrweb.ca/en/refugees-entering-us-and-safe-third-country-faq>

<http://ccrweb.ca/en/us-safe-third-country-infographic>

Contesting the Designation of the United States as a Safe Third Country. 19th May 2017, Canadian council for Refugees, Amnesty International Canada (and joined by the Canadian Council of Churches) Full document available in English only. French summary below.

<http://ccrweb.ca/sites/ccrweb.ca/files/stca-submission-2017.pdf>

Contester la désignation des États-Unis en tant que tiers pays sûr : Sommaire exécutif

<http://ccrweb.ca/fr/contester-designation-tiers-pays-sur>

President Trump's Executive Orders, January 25th 2018

<https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>

<https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>

President Trump's Third Travel Ban Discriminates against Muslims

<https://theconversation.com/trumps-travel-ban-is-just-one-of-many-us-policies-that-legalize-discrimination-against-muslims-89334>

Harvard Law School Immigration and Refugee Clinical Programme: The Impact of Trump's Executive Orders on Asylum Seekers and Letter to PM Trudeau and Minister Hussen

<https://today.law.harvard.edu/harvard-releases-first-report-effect-trumps-executive-orders-asylum-seekers/>

Canadian Council for Civil Liberties

<https://ccla.org/ccla-calls-for-concrete-action-from-canadian-government-on-u-s-travel-ban/>

Canadian Association of Refugee Lawyers

<http://www.carl-acadr.ca/articles/139>

Deaths of People Deported from USA to Central American Countries

<https://www.theguardian.com/world/2015/oct/12/deportation-migrants-flee-honduras-guatemala-salvador>

Women Deported from US to El Salvador Girls and young women recently deported from US to El Salvador in fear for their lives from gangs.

National Study of Access to Legal Counsel (USA 2015)

http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review

(Only 14% of those in immigration detention have access to lawyers)

Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States

(2016 Study by American Immigration Lawyers Association)

<http://www.aila.org/infonet/report-due-process-denied>

Gender -Based Asylum Claims in USA

<http://www.tahirih.org/news/new-executive-orders-will-keep-immigrant-women-and-children-from-accessing-legal-protection/>

Winter Crossings – Frostbite- Death by Hypothermia- Smuggling - Criminality

<http://www.cbc.ca/news/canada/montreal/safe-third-country-agreement-mamadou-quebec-border-trump-1.4023285>

<http://www.cbc.ca/radio/asithappens/as-it-happens-monday-edition-1.3927604/abandoned-by-smugglers-on-toronto-s-streets-refugees-treated-for-severe-frostbite-1.3927612>

<http://www.cbc.ca/news/canada/manitoba/us-border-patrol-on-asylum-seeker-death-1.4140685>

<http://www.cbc.ca/news/canada/manitoba/manitoba-emerson-border-town-asylum-seeker-refugees-1.4480884>

<http://www.cbc.ca/news/canada/manitoba/refugees-manitoba-emerson-crossing-1.3926754>

<http://www.cbc.ca/news/canada/manitoba/seidu-mohammed-chasing-soccer-dreams-1.4273340>

<http://www.cbc.ca/news/politics/border-crossers-asylum-criminality-1.4339781>

Less than one per cent of the asylum seekers crossing into Canada irregularly have a serious criminal background, according to the Canada Border Services Agency.

2007 Federal Court Judgement

Canadian Council for Refugees v R, [2008] 3 FCR 606, 2007 FC 1262 (CanLII)

Full text of the judgement rendered in Federal Court by Justice Phelan regarding the legal challenge to the designation of the USA as a safe third country. Available in English and French.

<https://www.canlii.org/en/ca/fct/doc/2007/2007fc1262/2007fc1262.html>

<https://www.canlii.org/fr/ca/cfpi/doc/2007/2007cf1262/2007cf1262.html>

UNHCR: Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002),

February 2003 at 15 (b)(c)(f)(g)&(h)

<http://www.refworld.org/docid/3fe9981e4.html>

Refugee Claims in Canada: Statistics

Asylum Claims in Canada 2017: <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims-2017.html>

Asylum Claims in Canada 2018: <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims.html>

Decisions on Refugee Protection Claims made by irregular border crossers 2017: <http://www.irb-cisr.gc.ca/Eng/res/stat/Pages/Irregular-border-crosser-statistics.aspx>

Decisions on Refugee Protection Claims made by irregular border crossers by country 2017: <http://www.irb-cisr.gc.ca/Eng/res/stat/Pages/irregular-border-crossers-countries.aspx>

<https://globalnews.ca/news/3687694/asylum-claims-canada-numbers-compare-historical/>

ⁱ In this document we use both the words asylum seeker, refugee claimant and refugee. Refugee is used very broadly and includes 1. Asylum Seekers or Refugee Claimants who have made a claim for asylum but have not yet been accepted as a refugee. 2. People who have been accepted in Canada as a refugee as per the definition found in the 1951 Refugee Convention. 3. People who have been accepted as Protected Persons in Canada.