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## SLAMMING THE GOLDEN DOOR: CANADA-U.S. MIGRATION POLICY AND ASYLUM SEEKERS\*

Robert Falconer

### SUMMARY

Canada must prepare itself for the repercussions from dramatic changes to U.S. refugee and immigration policy. One change includes further cuts to the U.S.'s longstanding refugee resettlement program. The other change, already announced, could mean that the U.S. will effectively compromise its reciprocal role in the Canada-U.S. Safe Third Country Agreement.

As the U.S. cuts back its intake of refugees, the issue of Canada's obligations to its international partners concerning refugees will surge to the forefront. Last year, Canada was the world leader in refugee resettlement, the program that relocates vulnerable refugees to Canada after being selected and vetted abroad. As the U.S. retreats from its own program, Canada will be forced to decide how many more refugees it can accept. This will be more than a question of humanitarianism. Instead, the shutdown's potentially divisive effects will encompass questions of stress on Canadian public finances, communities and non-profits, along with the bigger political picture of trade, foreign policy and national security.

Not only does the contemplated shutdown mean that the U.S. will be abandoning the millions of people stuck in Third World refugee camps, waiting to go somewhere else, but it will also leave in the lurch the U.S.'s international partners who traditionally house these people. Future U.S. administrations may not be able to quickly restore its place as the world's leader on refugee resettlement, as cuts take their toll on longstanding refugee resettlement agencies charged with receiving and resettling refugees. Adopting Canada's private sponsorship model may be one method of restoring America's place in the world.

\* This research was financially supported by the Government of Canada via a partnership with Western Economic Diversification.

The other policy change came into effect in July 2019, when the U.S. Department of Homeland Security announced that migrants who pass through another country before arriving at or within the U.S. will be barred from claiming asylum in the U.S., with few exceptions. In September, the U.S. Supreme Court upheld the bar for the U.S./Mexico border. This ruling is temporary while lower-court battles play out over the policy. However, if the policy becomes permanent, Canada will have to decide whether or not to continue to designate the U.S. as a safe third country for refugees seeking asylum.

The Canada-U.S. Safe Third Country Agreement allows for refugees transiting from the U.S. into Canada, and vice-versa, to be returned to the other country to have their asylum claim processed. The agreement is founded on the most basic of international refugee policy principles—that of not placing asylum-seekers in danger by returning them to their countries of origin. Instead, the new policy will send refugees seeking asylum in the U.S. back to their home countries, regardless of the danger to them of persecution or torture at home.

Refugee advocacy groups in Canada are currently challenging Canada's agreement with the U.S. at the Federal Court on this and other bases. Should they be successful there would be an immediate impact on Canada's asylum system. It would cause an increased number of claims at the border from previously ineligible asylum seekers coming from the U.S., who would have previously been sent back to the U.S. The ramifications of such a change would include further clogging of an already backlogged Canadian asylum system and increased strain on federal and provincial finances. Tensions between the two countries, already chilled due to issues of trade, would also be worsened. The incoming government after the Oct. 21 federal election in Canada could now be faced with some tough decisions to make about its relationship with the U.S. as one of its first orders of business.

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## CLAQUER LA PORTE DORÉE : POLITIQUES MIGRATOIRES CANADO-AMÉRICAINES ET DEMANDEURS D'ASILE\*

Robert Falconer

### RÉSUMÉ

Le Canada doit se préparer aux répercussions des importants changements apportés à la politique américaine en matière d'immigration et de demandes d'asile. Un des changements prévoit de nouvelles coupes dans le programme américain de réinstallation des réfugiés de longue date. L'autre changement, déjà annoncé, pourrait faire en sorte que les États-Unis compromettent la réciprocité dans l'Entente sur les tiers sûrs entre le Canada et les États-Unis.

Alors que les États-Unis réduisent l'accueil de réfugiés, la question des obligations du Canada envers ses partenaires internationaux concernant les réfugiés passera au premier plan. L'année dernière, le Canada était le chef de file mondial de la réinstallation des réfugiés sélectionnés et approuvés à l'étranger. Alors que les États-Unis se retirent de leur propre programme, le Canada devra décider du nombre de réfugiés supplémentaires qu'il peut accepter. C'est plus qu'une question humanitaire, car l'effet potentiel des coupures se traduira par un stress sur les finances publiques canadiennes, sur les collectivités et sur les organismes à but non lucratif. Sans compter les répercussions sur le contexte politique du commerce, des affaires étrangères et de la sécurité nationale.

Non seulement la fermeture envisagée signifie que les États-Unis abandonneront des millions de personnes à leur sort dans les camps de réfugiés du tiers monde, mais cela laissera également dans l'embarras les partenaires internationaux des États-Unis qui hébergent habituellement ces personnes. Les prochaines administrations américaines pourraient ne pas être en mesure de restaurer rapidement la place de leader mondial des États-Unis pour la réinstallation des réfugiés, car les coupures pèsent sur les organismes chargés de recevoir et de

\* Cette recherche a été soutenue financièrement en partie par le gouvernement du Canada via Diversification de l'économie de l'Ouest Canada.

réinstaller les réfugiés de longue date. L'adoption du modèle canadien de parrainage privé pourrait être une façon pour restaurer la place des États-Unis dans le monde.

L'autre changement de politique est entré en vigueur en juillet 2019, alors que le département américain de la sécurité intérieure annonçait que les migrants qui traversent un autre pays avant d'arriver aux États-Unis ne pourront pas demander l'asile aux États-Unis, à quelques exceptions près. En septembre, la Cour suprême des États-Unis a maintenu le cap pour ce qui est de la frontière entre les États-Unis et le Mexique. Cette décision est temporaire, le temps que les tribunaux inférieurs se prononcent sur diverses causes. Cependant, si la politique devenait permanente, le Canada devra décider de continuer, ou non, de désigner les États-Unis comme un tiers pays sûr pour les réfugiés qui demandent l'asile.

L'Entente sur les tiers pays sûrs entre le Canada et les États-Unis permet aux réfugiés qui transitent des États-Unis vers Canada, et vice versa, d'être renvoyés dans l'autre pays pour que leur demande d'asile y soit traitée. L'Entente se fonde sur le principe fondamental de la politique internationale concernant les réfugiés : ne pas mettre les demandeurs d'asile en danger en les renvoyant dans leur pays d'origine. Au lieu de cela, la nouvelle politique verra les réfugiés qui présentent une demande d'asile aux États-Unis renvoyés dans leur pays d'origine, quel que soit le danger pour eux de persécution ou de torture.

C'est d'ailleurs sur cette base, entre autres, que les groupes de défense des réfugiés au Canada contestent actuellement l'Entente canado-américaine devant la Cour fédérale. S'ils réussissaient, cela aurait un impact immédiat sur le système d'asile du Canada. Cela entraînerait une augmentation du nombre de demandes à la frontière de la part de personnes auparavant inadmissibles, qui autrement auraient été renvoyés aux États-Unis. Les ramifications d'un tel changement incluraient un encrassement supplémentaire du système d'asile canadien déjà en souffrance, ainsi qu'une augmentation de la pression sur les finances fédérales et provinciales. Les tensions entre les deux pays, déjà refroidies en raison de problèmes commerciaux, s'en trouveraient également aggravées. Le nouveau gouvernement après les élections fédérales canadiennes du 21 octobre pourrait se trouver face à des décisions difficiles à prendre quant à sa relation avec les États-Unis comme l'un de ses principaux partenaires.

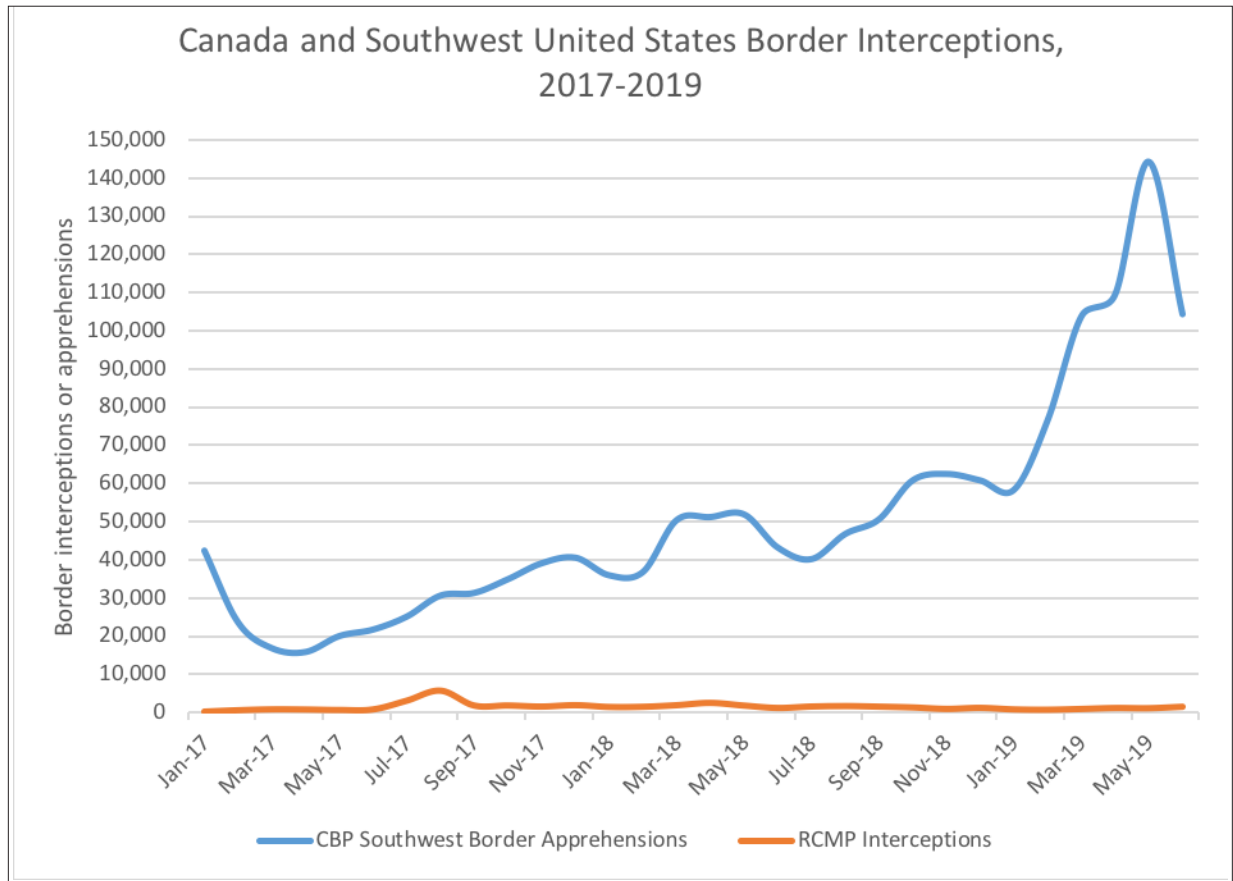
## **INTRODUCTION**

In the past few weeks, the United States has either announced or considered noteworthy changes to refugee and asylum policies. On July 15, 2019, the Department of Homeland Security announced that asylum seekers passing through other countries on the way to the U.S. would be barred from claiming asylum, regardless of the merits of their claim, and would be deported to their home countries even if they qualified for refugee status, with few exceptions (Department of Homeland Security 2019). Three days later, it was reported that the Trump administration is considering drastically reducing the number of refugees it resettles from abroad for the coming year, including potentially shutting down its refugee resettlement program (Hesson 2019). Both of these policy changes have significant implications for Canada. This communiqué will focus on the first of these changes, referred to here as the “asylum bar”, while a second focuses on the potential shutdown of the U.S. resettlement program.

## **ASYLUM CLAIM PROCESSING**

The change in U.S. asylum policy comes in response (Department of Homeland Security 2019) to the rising number of asylum seekers and other migrants intercepted at its southern border (U.S. Customs and Border Protection 2019), shown in Figure 1. RCMP interceptions of asylum seekers entering Canada are shown by way of comparison (IRCC 2019). Table 1 shows the average number of monthly claims during this period, how much monthly variation could be expected compared to the average of monthly claims, the size of each country’s peak interception period, and the month in which that peak occurred. As shown, the number of RCMP interceptions, even at its peak in 2017, pales in comparison to the U.S. numbers.

**FIGURE 1: CANADA AND SOUTHWEST UNITED STATES BORDER APPREHENSIONS, 2017-2019**



**TABLE 1: SUMMARY STATISTICS OF BORDER INTERCEPTIONS, U.S. AND CANADA, JANUARY 2017-JUNE 2019**

Variable	Mean ± SD (range)	Peak (date)
U.S. Southwest Border Apprehensions	50,960 ± 30,202 (20,759 - 81,162)	144,278 (May 2019)
Canada RCMP Border Interceptions	1,557 ± 980 (577 - 2,537)	5,712 (Aug 2017)

Notes: SD = standard deviation

The numbers used here reflect average, standard deviation and range during the same time period used in Figure 2 (January 2017-June 2019).

Source: Author’s compilations from DHS (2019) and IRCC (2019) data.

Under the new regulation, asylum seekers, even those with well-founded fears, would be deported to their home countries if they transited through another country on their way to the U.S.<sup>1</sup> This policy differs from a safe third country agreement, such as the one signed between Canada and the U.S. Under the Canada-U.S. Safe Third Country Agreement, an asylum seeker transiting through the U.S. on their way to claim asylum at a Canadian port

<sup>1</sup> Exceptions are made for victims of human trafficking and those who failed an attempt to claim asylum in another country prior to arriving in the U.S.

of entry will be returned to the U.S. to have their claim processed there (IRCC 2016). In this case, the U.S. is deemed to be a safe third country where asylum claims are afforded due process. The same applies in reverse for asylum seekers who transited through Canada before claiming asylum at an American port of entry (IRCC 2016). In this case, Canada is deemed to be a safe third country. To quote the final text of the Canada-U.S. agreement, both countries commit to “safeguard for each [refugee claimant] eligible to pursue a refugee status claim ... access to a full and fair refugee status determination procedure ...” (IRCC 2002). Conversely, this new U.S. regulation would return potential claimants not to a safe third country but to their home countries, regardless of the credibility of their fear of persecution or torture. The practice of returning a refugee to a territory where they will be persecuted or tortured is called “refoulement”. The principle of non-refoulement is considered the cornerstone of international refugee policy (UNHCR 1997).

This new regulation has possible implications for Canadian asylum policy. The enabling legislation behind the Canada-U.S. Safe Third Country Agreement allows Canada to designate safe countries with whom it may share asylum claim processing (Department of Justice Canada 2018). It may only designate countries that do not refoule refugees or refugee claimants. In considering whether to designate a country, Canada must consider four factors, including that country’s assignment to the Refugee Convention and the Convention Against Torture, its policies and practices with respect to these conventions, its human rights record, and whether it has an agreement with Canada to share asylum claim processing. As this review is conducted by the minister of Immigration, Refugees and Citizenship, the question of whether the U.S. continues to qualify for designated safe-country status is both a political question and a legal one.

## **THE POLITICAL QUESTION**

### **BELIEF IN U.S. CHECKS AND BALANCES**

The federal government may choose to uphold the U.S.’s ongoing designation for several reasons. First, it may genuinely believe that the U.S. continues to comply with its designated safe-country obligations, despite U.S. policies to the contrary. It has repeatedly stated its confidence in the ability of the U.S. judiciary and Congress to check any policies or practices that are contrary to the standards in the Safe Third Country Agreement (IRCC 2016; MacDonald and Kapelos 2019). This argument is built on a somewhat shaky foundation. As of Sept. 11, 2019, the U.S. Supreme Court has let the asylum bar stand, pending further litigation on the matter (SCOTUS 2019). This follows a confusing two months, during which time the policy was blocked by a U.S. Federal Court judge (U.S. District Court 2019a), before it was re-imposed by the Ninth U.S. Court of Appeals (2019) along the U.S.-Mexico border in Texas and New Mexico (but not California or Arizona). It was then blocked again by the same U.S. Federal Court judge in the original ruling (U.S. District Court 2019b), before the U.S. Supreme Court finally allowed it to proceed pending a final outcome.

If the Supreme Court upholds the policy, and asylum seekers are returned to their home countries without proper assessment, the Canadian government will have lost one of its strongest justifications for the ongoing designation of the U.S. as a safe country. Even if



the Supreme Court ultimately strikes down the policy, the confusing back-and-forth in the court system does not lend asylum claimants a clear and timely resolution of their cases.

## **CANADA-U.S. RELATIONS**

Second among the political reasons for the U.S.'s ongoing designation as a safe country is the possibility of exacerbating Canada-U.S. tensions if this status were to be repealed. The current U.S. administration has expressed a willingness to disregard Canada-U.S. relations in the quest for what it perceives as a fair trade deal (Trump 2018). Given that the renegotiated North American Free Trade Agreement is not yet ratified, Canada may wish to avoid labelling the U.S. an unsafe country for the purposes of processing asylum claims. Whether or not such a label is warranted, its implications may have serious consequences.

## **INCREASED ASYLUM CLAIMS**

Stripping the U.S. of its designated safe-country status would allow asylum seekers residing in the U.S. or transiting through it to apply for asylum directly at Canadian ports of entry. While the current Canada-U.S. Safe Third Country Agreement does nothing to deter determined asylum seekers from simply crossing the Canada-U.S. border before claiming asylum in Canada, it is entirely possible that it deters some potential claimants. Without the current agreement, Canada could face an increased number of claims at its southern border from claimants who were previously ineligible to make a claim at a Canadian port of entry. This would have political, fiscal and asylum-related implications. Increased stress on an already backlogged asylum system may undermine Canadians' confidence in the efficacy and fairness of the overall immigration system. Current literature suggests that animosity toward immigration increases as public trust in a government's ability to handle border security erodes (Harell, Soroka and Iyengar 2017). This outcome is not certain, as other literature suggests that people are more welcoming toward immigrants perceived as being involuntarily forced from their homes (Verkuyten, Mepham and Kros 2017) migrants are described as either having little choice but to migrate (involuntary). Claimants coming from an "unsafe" U.S. would not have the same incentive to cross the border before making a claim. Canadians may be more inclined to accept asylum seekers making claims at ports of entry, rather than crossing the border, especially if Canadians perceive the U.S. as involuntarily forcing them to move due to harsher immigration policies. While the public perception of larger volumes of asylum seekers under this scenario is uncertain, what is certain is the inability of our current asylum system to process these potential claims in a timelier manner than it is already doing. An additional surge in claims would impact provincial and federal expenditures.

## **THE LEGAL QUESTION**

Another challenge arising from the U.S. policy change is the effect it could have on a recent court challenge to the Canada-U.S. Safe Third Country Agreement. In late 2007, several refugee advocacy groups successfully challenged the agreement in the Federal Court of Canada (Arbel 2013). The Court found that U.S. asylum policies and actions did not comply with non-refoulement provisions, and that the agreement violated Charter provisions of



equality before the law, and life, liberty and security of person (Arbel 2013). The agreement was thus suspended.

The Federal Court of Appeals (FCA) (2008) quickly overturned the agreement's suspension. The FCA ruled that the lower court had overstepped its bounds in assessing U.S. compliance with human rights and non-refoulement provisions. It further ruled that these factors were assessment measures to which the Immigration minister owed "due consideration" in the ongoing designation of the U.S. as a safe country, rather than necessary conditions for U.S. safe-country status. Put another way, the Immigration minister was only bound to review these factors in good faith in order to inform the designation of the U.S. as a safe country.

This good-faith ruling, which overturned the lower court's suspension of the agreement, may have a new challenge in the U.S. policy change. The Court cited several UNHCR reports to Parliament supporting U.S. safe-country status, giving these as evidence that the Canadian government was acting in good faith in its review of U.S. safe-country factors. The Immigration minister may not enjoy UNHCR support for its review of these factors under the new U.S. policy. In response to the policy, the UNHCR (2019) issued a statement in which it expressed its belief that the policy "jeopardize[d] the right to protection from refoulement ... and is not in line with international obligations." A recently revived challenge to the agreement may submit this as evidence that the Canadian government is acting with due consideration in its ongoing designation of the U.S. as a safe country for asylum seekers (Canadian Council for Refugees 2017).

## **CONCLUSION**

The course of Canada-U.S. asylum policy hinges on issues of domestic politics, international relations and parallel court systems. If the U.S. court system ultimately strikes down the U.S. asylum bar, the Canadian government may be vindicated in designating the U.S. as a safe country with whom Canada may share asylum claim processing responsibilities. If it is upheld, the Canadian government may face new challenges regarding its relationship with the U.S., as it relates to asylum claim policy. These include actual legal challenges and pressure from advocacy groups and the public. The outcome of these challenges may include the ongoing designation of the U.S. as a safe country, with Canada trying to navigate conflicting interests of Canada-U.S. relations, humanitarian commitments and stymieing the arrival of new asylum claimants. It may also force Canada to break off its current arrangement with the U.S., resulting in heightened tensions as we functionally declare the U.S. an unsafe country, along with the possibility of the increased arrival of asylum seekers transiting through the U.S. Preparing for both possibilities will rely on careful monitoring of the U.S. and Canadian legal spheres and refugee sectors in the coming months and years.

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**Robert Falconer** is a researcher with The School of Public Policy, and holds a master's degree in public policy. His current research examines immigrant and refugee policy, and includes issues such as asylum system reform, refugee resettlement and retention of immigrants in various Canadian cities and towns.

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