Canada’s Obsession with Shutting Down the 49th Parallel to Refugees

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By: Alex Neve

This month’s Federal Court of Appeal ruling, reversing a July 2020 Federal Court judgement that had found that the Safe Third Country Agreement (STCA) between Canada and the United States violates the Charter of Rights and Freedoms, is the latest chapter in a determined Canadian government effort going back nearly three decades to shut the Canada/US border down to refugees.

Three decades of history

In February 1993, amendments to Canada's Immigration Act introduced the concept of safe third country agreements into the country's refugee determination system. It was an approach modeled on arrangements within Europe, notably the Dublin Convention, under which refugee claimants who travel through what is purported to be a "safe" country on their way to seeking protection in another country are sent back to that country and required to make their claim there. The UN High Commissioner for Refugees has agreed, reservedly, that such agreements may be useful in terms of sharing the international responsibility for refugee protection, while cautioning that they cannot serve as a pretext for reduced standards of protection or denying refugees their rights.

While the amendments did not specify, or even refer to, the United States, that was clearly the end game. At the time it was not uncommon for as many as 40% of claimants seeking refugee status in Canada in any given year to have first passed through the United States. I was a practicing refugee lawyer in Toronto at the time and many of my clients made that journey. For Central Americans coming to Canada by land, escaping ongoing persecutory violence, there was obviously no route that avoided the United States. For refugee claimants from other parts of the world, arriving by air, flight routes and visa restrictions were such that flying to the United States and then continuing overland to Canada was often the easiest or only option available.

What I recall most vividly from that time are the compelling accounts of human rights abuse recounted by women, men and children from Guatemala, Iran, Ethiopia, Sri Lanka, Somalia, Rwanda, Colombia and other corners of the world, who had indeed come to Canada via the United States, whose fears were adjudged to be well-founded and who were granted refugee status by the Immigration and Refugee Board after probing hearings.

That is what the Canadian government was determined to shut down, by requiring those refugee claimants to stay in the United States instead of seeking protection in Canada. The numbers were not even remotely close to a crisis, particularly when viewed in the wider context of global refugee flows. Yet Canada, the self-styled land of welcome to refugees, was insistent.

Once the law was passed Canadian officials enthusiastically dove into an effort to secure an agreement with the United States. They succeeded in concluding a draft with US counterparts which was signed off on by the Chretien government at the time. However, that first attempt was then scuppered by senior officials within the Clinton Administration in 1996, which saw no US interest in such a deal.

September 11th changed everything.

The Bush Administration was interested in talking about securing the North American border. Canadian officials put the safe third country agreement back in the mix. And this time they found traction at the White House. As part of the "Smart Border Action Plan" between the two countries, the Canada/US Safe Third Country Agreement was finalized in December 2002 and entered into force in December 2004 pursuant to ss. 102(2) of the *Immigration and Refugee Protection Act*.

With limited exceptions, refugee claimants presenting at a Canadian land border post would be found ineligible to make a claim in Canada and handed back to US officials instead. Notably, the agreement only applied at those official border posts. It did not extend to refugee claimants arriving in Canada from the United States by air. And it did not apply to claimants who entered Canada from the United States through other means, such as pursuant to a student or visitor visa or by crossing the border irregularly, who made a refugee claim once they were present in Canada.

Objections to the STCA

There was much that was objectionable about this STCA.

First, although the STCA talks of "enhanced international protection", "burden-sharing" and "sharing of responsibility", there has never been any credence to the notion that this is in any way about boosting cooperation between Canada and the United States so as to increase and more equitably share responsibility for refugee protection. Rather, several thousand refugees who in any given year might have obtained refugee status in Canada, where they had community and family relationships or language connections, were now forced into the US asylum system instead. End of story.

Second, the very idea that the US asylum and immigration system was "safe", when measured against international refugee law and human rights obligations, could not have been further from the truth at the time (and even further from that truth in later years). That was particularly the case when it came to the harsh and arbitrary immigration detention system or policies significantly limiting the chances of success for asylum claims made by women. The full list of shortcomings was a long one.

Third, it strips agency from refugees with respect to what is perhaps the most fundamental choice they face: where to seek protection.

And fourth, by shutting down the possibility to make a refugee claim at official land border posts and keeping open the possibility of making a refugee claim after crossing irregularly into Canada, the agreement encouraged refugee claimants to take potentially dangerous journeys. That prospect would prove very much to be the case after the state of refugee protection in the United States deteriorated rapidly under the Trump Administration.

The first Federal Court challenge

After it entered into force, the Agreement was challenged in Federal Court by the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches, alongside a Colombian refugee claimant. In a lengthy ruling in November 2007 Federal Court Justice Michael Phelan determined that the STCA and the legislation and regulations implementing it in Canada violated the Charter. Justice Phelan found that:

"…the United States' policies and practices do not meet the conditions set down for authorizing Canada to enter into a STCA. The U.S. does not meet the Refugee Convention requirements nor the

Convention Against Torture prohibition (the Maher Arar case being one example). Further, the STCA does not comply with the relevant provisions of the Charter. Finally, the Canadian government has not conducted the on-going review mandated by Parliament despite both the significant passage of time since the commencement of the STCA and the evidence as to U.S. practices currently available."

The ruling was reversed by the Federal Court of Appeal the following year. The Court did not disagree with or even revisit any of Justice Phelan's substantive conclusions about the grave human rights shortcomings of the US asylum system. Rather the Federal Court of Appeal found that he had applied the wrong standard of review in his judgement, namely that the test was not whether the government had properly applied the criteria used to ascertain whether a country is "safe" and come to the correct outcome as to whether there is "actual" compliance with those criteria. Instead, "what is relevant is that the GIC considered the … factors [to be taken into account in designating a safe third country] and, acting in acting in good faith, designated the U.S. as a country that complies with the relevant Articles of the Conventions and was respectful of human rights." In other words, not whether the government got it right, but whether they turned their mind to the right questions.

Additionally, given that the Colombian applicant in the case, known as John Doe, had not been deemed ineligible to make a refugee claim in Canada (because US officials had subsequently agreed to reconsider his claim), the Federal Court of Appeal concluded that the aspects of the challenge that relied on the Charter of Rights could not go ahead. The public interest standing of the three organizations was, in the Court's view, insufficient on its own, and to proceed otherwise ran "directly against the established principle that Charter challenges cannot be mounted on the basis of hypothetical situations."

Thus, the agreement stood. The Supreme Court of Canada declined to hear a further appeal.

The situation gets worse

Over the years that followed, none of the underlying concerns catalogued by Justice Phelan were addressed. The state of respect for the rights of refugees and migrants in the United States continued to worsen, and then sharply escalated when Donald Trump launched his full out assault on the rights of refugees and migrants in 2017. Within a week of his inauguration, he had issued a notorious Executive Order that indefinitely suspended the resettlement of Syrian refugees, paused the overall US refugee resettlement program, and temporarily barred noncitizens from seven majority-Muslim nations from entering the United States. And there was much more to come, including the unimaginably cruel policy shift in 2018 that resulted in young children, including babies, of asylum seekers and migrants being forcibly separated from their parents after crossing the border from Mexico and held in shockingly appalling immigration detention conditions. Suddenly not only was it a misnomer to assert that the United States was a "safe" country for refugees; it had clearly become a "dangerous" country for refugees.

The number of refugee claimants crossing irregularly into Canada began to grow within days of Donald Trump's inauguration in January 2017. Accounts of individuals suffering considerable harm, including at least one death, due to frostbite and exposure became commonplace. And while there were frequent hyperbolic assertions from various politicians and commentators that the increase in irregular arrivals of refugee claimants had provoked a crisis at the Canada/US border, particularly in the summer of 2018, the numbers never even remotely reached such proportions. Instead, the distorted fear-mongering served primarily to erode public support for refugee protection, which had been at a high level following the government's program for resettling Syrian refugees in Canada in 2016.

The evidence as to what was happening so rapidly in the United States was so glaring that advocacy groups, perhaps naively, assumed that the Canadian government would feel compelled to do the right thing and, at a minimum, suspend the Safe Third Country Agreement. That assumption was, unfortunately, misplaced.

Back to court

STCA rally photo

Civil society activists rally at the time of the Federal Court hearing in November 2018. Photo Credit: Amnesty International

When it became clear that the government had no intention to scrap or suspend the STCA and was prepared, instead, to double down in defence of the agreement (no matter how bad things became under Donald Trump), the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches turned once again to the courts and launched a second challenge in July 2017. An initial attempt by the government to have the three organizations struck from the case was resoundingly rejected by the Federal Court in December 2017. Over time the challenge was joined by eight refugee claimants from El Salvador, Syria and Ethiopia.

In July 2020 Federal Court Justice Ann Marie McDonald, following in the footsteps of Justice Phelan almost thirteen years earlier, struck down the designation of the United States as "safe" for refugees, focusing in particular on the many concerns associated with immigration detention in the United States. She found the designation to be in violation of the guarantees of life, liberty and security of the person in section 7 of the Charter (and not saved as "demonstrably justified" under section 1). She had extensive evidence in front of her, from the individual refugee claimants who had joined the challenge, other individuals who had been taken into US immigration detention after being found ineligible under the STCA, US immigration lawyers and advocates with direct experience of how STCA cases are handled, and leading US asylum and immigration academics.

Regrettably, Justice McDonald did not feel it necessary to reach a decision with respect to the section 15 equality arguments that were an essential component to the challenge, meaning that the glaringly increased risk that the STCA poses for refugee women was left unaddressed. The applicants had put

comprehensive evidence and arguments in front of the Court, in particular highlighting the concern that the Trump Administration had issued a ruling making it virtually impossible for asylum claims involving a fear of "private violence" to be accepted. That was a significant barrier to claims based on domestic violence made by refugee women from countries in which their governments do little or nothing to provide protection.

James Hendry has written previously in this Journal, providing an insightful and helpful overview of Justice McDonald's ruling.

Humanity stripped away on appeal

As expected, there was an appeal.

And the Federal Court of Appeal ruling reversing Justice McDonald's judgement, written by Justice David Stratas on behalf of Chief Justice Noël and Justice Laskin as well, is very déjà vu. In both instances – 2007 and 2020 – the initial Federal Court rulings from Justices Phelan and McDonald are full of the refugee reality, assessing evidence that conveyed the experience of refugee claimants who have tried to cross the border and seek protection from Canada. In both instances the Federal Court of Appeal rulings virtually ignore that underlying reality.

Justice Stratas considers administrative law hypotheticals and speculation at length and concludes that the challenge has not properly attacked the right provision. There were, admittedly, a stew of possibilities among an international agreement, the Immigration and Refugee Protection Act and regulations under the Act, to choose from, reflective of how convoluted and opaque the STCA arrangement is. Challenges could have been mounted to the agreement itself, the provision in the Act allowing for such agreements to be reached, the criteria for designation, the decision to designate the United States as "safe", the failure to revoke that designation of the United States as "safe", the outcome of any such review of the United States as "safe", the lack, inadequacy or secrecy of ongoing reviews to determine whether the United States continues to be "safe", and the specific decisions finding the individuals refugee claimants who joined the legal challenge to be inadmissible to make claims in Canada because of the STCA.

The challenge had focused on the designation of the United States as "safe" under s. 159.3 of the *Immigration and Refugee Protection Regulations* and the consequent decision that the individual applicants were ineligible to make refugee claims in Canada. The ruling reads primarily as a discursive analysis of an alternate legal strategy preferable to Justice Stratas. He concludes that the challenge should have been to the government's obligation to review the designation of the United States on an ongoing basis and that evidence about those reviews should have been adduced. That would have been an almost impossible challenge to meet, with the government inevitably maintaining that the bulk of information related to those reviews was subject to Cabinet privilege.

Justice Stratas also finds that "certain 'safety valves' exist that can stop any unconstitutional effects that might arise in extreme cases" [para. 143] when a refugee claimant is turned away at the border

pursuant to the STCA. He relies primarily on the fact that the individual applicants who were part of this legal challenge were able to launch judicial reviews of the decisions finding them ineligible to make refugee claims in Canada. He disagrees with the Federal Court finding that such safety valves were “not generally available.” [para. 144] He pays no heed to how unusual, in fact nothing short of heroic, the effort to pursue judicial review was in those instances. Any such “safety valves” are an illusory fiction to the overwhelming majority of refugee claimants for whom the STCA remains as insurmountable barrier to seeking protection in Canada.

Along the way the appeal ruling does grave disservice to the underlying substantive human rights concerns.

Justice Stratas does turn his attention, though not at length, to the considerable evidence that was before the Court regarding the harrowing reality of the US immigration detention system, which has been researched, documented, exposed and criticized in reports far too numerous to count. Those realities are in essence sidelined and given little consideration in the appeal, beyond the following cursory and selective summaries:

“The highest possible finding on this record is that returnees to the United States are exposed to a risk of discretionary detention. Refugee claimants in Canada are exposed to that sort of risk... This similarity suggests that sending refugee claimants to the United States is not against the principles of fundamental justice… The evidence shows that returnees who are detained in the United States can seek release and release is often granted, either on bond or without…There is also evidence that some returnees have access to counsel while in detention. One of the individual Claimants testified that her detention conditions were unacceptable as she was cold and was held in solitary confinement for a week while awaiting a tuberculosis test. She suspected that her religious dietary needs were not accommodated. However, there is no evidence that these practices are widespread or regular.” [paras 140-142]

Furthermore, given that refugees are already suffering from what has compelled them to flee in the first place, Justice Stratas is apparently of the view that whatever more they may suffer in the United States after being shunted back from Canada will not make that any worse:

“…psychological suffering is inherent in the plight of refugees fleeing their home country out of fear of persecution. Thus, one must ask whether sending refugee claimants back to the United States actually increased psychological suffering above this inherent level.” [para. 148]

Perversely this seems to suggest that since refugees have already endured human rights violations, more of the same is not of particular concern.

Justice Stratas moves on to apply the “shock the conscience” test to assess violations of section 7 of the Charter of Rights. That test was adopted by the Supreme Court of Canada in the 1987 case of *Canada v Schmidt*, as a means of determining whether the circumstances of an extradition were in keeping with the “fundamental justice” requirements of section 7. He notes it is a high threshold, which

he specifies to include such things as “torture, stoning, mutilation or the death penalty.” [para. 159] Most Canadians' consciences would certainly shock at grievous levels of harm other than and even below those examples of brutality. But Justice Stratas comes to the conclusion that the agonies, humiliation, suffering, degrading dehumanization, cruelty and torment (though evidently not the adjectives he would use) that have marked US immigration detention for years, worsening rapidly recently, evidence of which was extensive in the court record, may constitute “substandard treatment but nothing that rises to the very high level required by the 'shocks the conscience' standard.” [para. 161]

The Federal Court of Appeal also declined to revisit Justice McDonald’s decision not to rule on the section 15 arguments in the challenge. As such the very serious concerns about the STCA’s particular impact on refugee women remain entirely unaddressed.

Along the way the Federal Court of Appeal ruling is sterile and dismissive of the experiences of the individual claimants who were parties to the challenge. It was notably courageous of ABC, DE, FG, Mohammad Majd Maher Homsi, Hala Maher Homsi, Karam Maher Homsi, Reda Yassin Al Nahass and Nedira Jemal Mustefa, eight refugee claimants from El Salvador, Syria and Ethiopia, to challenge the STCA. Summing up his views of the evidentiary record in the case, including from these applicants, Justice Stratas notes, “voluminous it was, particularly concerning the experiences of some refugee claimants in the United States and the experiences of some refugee claimants in Canada who were returned to the United States. But the value of evidence is not measured by the pound.” [para. 77] They deserved better than what they received from the Court.

Where to from here?

Human rights violations continue at the Canada/US border by virtue of the Safe Third Country Agreement. That is undeniable. It has not changed, certainly not overnight, with the transition from Donald Trump to Joe Biden. In 2008 and 2021 the Federal Court of Appeal sidesteps that reality.

As such, this may be headed for the Supreme Court, which had, to widespread surprise, refused to hear an appeal back in 2008. Surely they cannot duck a second time.

Meanwhile, it is worth emphasizing that in the past thirteen years on two occasions Federal Court judges have unequivocally concluded that Canada’s Safe Third Country Agreement arrangement with the United States contravenes the Charter. Two times that has been reversed, but on technical, legal and jurisdictional grounds, by the Federal Court of Appeal.
The federal government seems nonplussed by the fact that on each occasion the Court that delved most deeply (very deeply in fact) into the substance of the case, was clear: the United States does not meet its human rights obligations to refugees and should not be a refugee protection partner for Canada.

There is no comfort in, and certainly nothing to be proud of, appeal victories that do not disturb that foundational and shameful reality.

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About the author

Alex NeveAlex Neve believes in a world in which the human rights of all people are protected. He served as Secretary General of Amnesty International Canada's English Branch from 2000 - 2020. In that role he carried out numerous human rights research missions throughout Africa, Asia and Latin America, and closer to home to such locations as Grassy Narrows First Nation in NW Ontario and to Guantánamo Bay. He speaks to audiences across the country about a wide range of human rights issues, appears regularly before parliamentary committees and UN bodies, and is a frequent commentator in the media. Alex is a lawyer, with an LLB from Dalhousie University and a Master's Degree in International Human Rights Law from the University of Essex. He has served as a member of the Immigration and Refugee Board, taught at Osgoode Hall Law School and the University of Ottawa, been affiliated with York University's Centre for Refugee Studies, and worked as a refugee lawyer in private practice and in a community legal aid clinic. He is a Senior Fellow at the Graduate School of International and Public Affairs at the University of Ottawa and serves on the Board of Directors of the Centre for Law and Democracy. Alex has been named an Officer of the Order of Canada and a Trudeau Foundation Mentor. He is a recipient of a Queen Elizabeth II Diamond Jubilee Medal. He has received honorary Doctorate of Laws degrees from St. Thomas University, the University of Waterloo and the University of New Brunswick.