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Sourcing Out Canada's Refugee Policy: The Safe Third Country Agreement

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Sourcing Out Canada's Refugee Policy: The Safe Third Country Agreement

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Please note that the views expressed in this document are those of the author.

Over the past several years Canada's immigration policies have been subjected to a series of sweeping critiques. As a consequence, a more stringent set of immigrant entry conditions appeared in June 2002 that has resulted in a drop in overseas skilled applicants. However, even more important changes in entry conditions to Canada appear much closer to home, namely at the Canada-United States border. In particular, recent initiatives by Canada to enter into a "Safe Third Country Agreement" with the U.S. are especially disconcerting. Under this agreement refugees seeking asylum in Canada who transit via the United States must make a claim in the United States for refugee status. This policy, in effect, partially transfers Canadian refugee determination to U.S. officials who will employ their unique refugee entry criteria. In addition, the Safe Third Country Agreement violates the first principle of any sound asylum policy, since refugees can no longer choose the country in which to plead their case. Finally, it would appear that, in the negotiations for the 30-point Smart Border Plan, it was Canada, not the US, who brought the idea of a Safe Third Country Agreement to the table. It was not, as widely reported in the mainstream media, *simply* a matter of Canada trying to appease American politicians' complaints that Canada's wide-open refugee system presented a security risk. Nor was it, as alleged in left wing media outlets, *simply* a matter of the Liberal government caving in to pressures from the roughly 40% of the Canadian electorate who oppose what they perceive as a "lax" refugee system. While it may have been both of these in part, these rationales made it all too easy for the Canadian Government to avoid giving the Canadian public the fuller explanation that it deserved.

Canada's reasons for entering into the agreement now should be distinguished from those it claimed to have had in the recent past for pressing for such an agreement. In the early 1990s Canada recognized the existence of the "Buffalo Shuffle," a term coined to describe refugees who made repeated and unsuccessful claims at Buffalo, in the United States, and then at Niagara, in Canada, leading to a continuous stateless cycle. Borrowing from a European model, Canada tried in the mid-1990s to get a Memorandum of Understanding with the United States to implement a "Safe Third Country" concept in North America. These negotiations failed since the United States did not want to cede any aspect of its refugee-determination process to Canadians.

This time around the Canadian government has also been quietly trying to address a 'management problem,' but not the "Buffalo Shuffle" or "asylum shopping" as recently claimed by Minister Coderre in Detroit in March of 2003. In fact, just the opposite! Canadian refugee claimants are not moving in an endless cycle; rather, failed claimants choose to stay in Canada for years appealing their claims. The sedentary nature of Canada's asylum seekers arises from legislative and legal decisions within Canada. In

1988 the Canadian Supreme Court ruled, in 'the Singh decision,' that an unsuccessful asylum claimant on Canadian soil has the legal rights of any Canadian, including the right to seek leave to the Federal court to appeal a denial of his refugee claim. Given that refugee determination proceedings can in some cases take 3-4 years, refugee claimants now have an incentive to stay in Canada (no need to shuffle off to Buffalo), until their appeal is heard.

As noted wryly in the preamble to the Government Response to the Report of the Standing Committee on Citizenship and Immigration on Safe Third Country Regulations (May 2003), "Many refugee claimants who arrive in Canada pass up the opportunity to seek protection in other countries, such as the United States, that have asylum systems that meet the same high standards as Canada's own determination process. This is undermining public confidence in the integrity of our refugee determination system and has weakened public support for our protection programs." Instead of shuffling off to Buffalo, initially unsuccessful Canadian asylum seekers stay for their appeal, and if they lose, go through the court system with a court-appointed lawyer paid for by the Canadian taxpayer, and enjoy other benefits. No wonder Canada has recently been seeking to process as many refugee claims as possible overseas!

The rationale for the Safe Third Country Agreement suggested by the impact analysis published in the Canada Gazette was to stem the growth of "mixed flows" of migrant refugees through "irregular channels." This seems to be code for stemming the flow of 'economic migrants' through refugee channels. But if so, this rationale does not withstand serious scrutiny of the recent pattern of refugee claims.

One made-in-America security rationale for the Agreement offered by Minister Coderre in the speech referred to above, is to prevent "especially Pakistanis" who may be illegal U.S. residents from seeking asylum in Canada, and thereby being allowed to remain just across the border in Canada for years while their claims are processed (too close for comfort if they turn out to be al-Queda sleeper agents). But this is hard to reconcile with the evident American reluctance to enter into the Agreement (see below), leaving aside the unlikely possibility we were simply acting paternalistically.

The only credible rationale for Canada seeking and entering into this agreement is the management problem previously alluded to, which arises from a made-in-Canada appeal process and not from a revolving door at Buffalo. In the wake of our Supreme Court's decision, there is an embarrassing structural inadequacy to our system of asylum, not easily rectified since it is difficult to appeal a Supreme Court decision about the interpretation of our Charter of Rights. So bureaucrats came up with the Safe Third Country idea, and a way to sell it to the U.S. and market it to the public. The Safe Third Country Agreement effects an end-run around the Supreme Court decision by dramatically reducing the numbers

of refugee claimants that Canada would have to process *at all*. This end-run strategy is borne out by the fact that refugee claimants arrive at the Canada-U.S. border in a highly asymmetrical fashion. In 2001, for instance, there were 13,497 Canadian refugee claimants who came from or through the U.S., whereas there is an estimated "few hundred" each year who make claims in the U.S. after having been in Canada (Report of the Standing Committee on Citizenship and Immigration: Safe Third Country Regulations, Section B, Statistics). Talk about increasing the efficiency of our determination system at American expense!

Why would the Americans enter into this asymmetrical agreement? In fact, to date they have been reluctant partners, since they have stalled the Safe Third Country implementation legislation in the U.S. Senate and have not followed Canada's lead. Even given this initial foot-dragging the Americans will eventually agree, this time, to the "Safe Third Country" agreement, but only because it is part of a larger security and economic package that they do care about, namely the 30-point Smart Border Plan. This plan incorporates increased security provisions at the Canada-US border while simultaneously attempting to insure a smooth flow of NAFTA commerce. Here one must at least acknowledge Canada's strategic adeptness, or low political cunning.

Sadly, in its bid to circumvent the Singh decision, restore public confidence in the asylum system, increase the efficiency of its refugee determination process, and appease the security concerns of American critics, the Canadian Government has been all too willing to give up some of its sovereignty, and thereby turn its back on *bona fide* asylum claimants who wouldn't be recognized as such in the USA and who have the misfortune of showing up at the wrong door.

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03-06	Don J. DeVoretz and Philip Hanson	Sourcing Out Canada's Refugee Policy: The Safe Third Country Agreement	11/03

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