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Overlooking Lived Experiences: Access to Asylum & Canada's Safe Third Country Agreement

"U.S. Canadian Border" by Rick Beauregard | stock.adobe.com

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Key Ideas

• **The Canada-US Safe Third Country Agreement (STCA) limits access to refugee protection** in Canada by disallowing asylum seekers who arrive from the United States from seeking refugee protection in Canada.

• **Asylum seekers at the Canadian land border are almost always returned to the U.S.** The agreement assumes that asylum seekers have access to protection in the United States. Canadian law offers few, if any, meaningful legal avenues through which to contest returns.

• **Canadian appellate courts have not sufficiently addressed the realities of asylum seekers who reach Canada's borders.** Ongoing STCA challenges, including at the Supreme Court of Canada, have mischaracterized the agreement's impacts and overlooked lived experiences.

Recommendations

• **As the legal challenges to the STCA continue, Canadian courts should evaluate the agreement's legal validity by reference to how it operates in practice.** This process should examine how the STCA operates on the ground, paying attention to lived experiences.

• **Courts should consider how asylum seekers' positionality and vulnerabilities shape access to legal remedies.** Without this, the STCA's operations and effects cannot be fully understood.

As the STCA litigation continues, future courts must focus on understanding the unique positioning of asylum seekers, and consider lived-experience evidence about how returns are administered at the Canada-US border.

The Safe Third Country Agreement (STCA) is a bilateral agreement between Canada and the United States that operates by preventing most asylum seekers who cross the Canada-U.S. border (in either direction) from seeking asylum in the second country of arrival. For instance, most asylum seekers who are physically in the United States and attempt to claim asylum in Canada at the border are returned to the United States. The STCA justifies this practice by asserting that the U.S. is a "safe" country that does not return asylum seekers to countries where they risk persecution.

CMS Affiliate and UBC Allard School of Law Associate Professor, Efrat Arbel, examines five major Canadian court decisions on the STCA from 2007 to 2023. She argues that, across these cases, appellate courts have repeatedly misunderstood how the STCA operates at the border. Instead of examining the lived experiences of asylum seekers under the STCA, Arbel argues appellate courts have focused instead on the stated assurances built into Canadian law – assurances which do not in and of themselves provide meaningful protection in practice. Arbel's work argues that Canadian appellate courts have misunderstood the legal and practical operation of the STCA and argues for future courts to take a different approach in evaluating the STCA's legal validity.

Key Findings

Who Gets to Ask Canada for Safety?

The STCA limits access to protection in Canada by restricting who is allowed to seek asylum at the land border. Since its implementation in 2004, asylum seekers who made refugee claims at ports of entry along the Canada-US border have been turned back to the U.S. unless they fell into one of a few narrow exceptions including: having a close family member already in Canada or being an unaccompanied minor. Asylum seekers who do not meet one of the Agreement's stated exceptions are refused entry and returned to the United States, often within hours. Since 2023, the STCA's operation has extended across the entire border.

The STCA has led to a sharp decline in the number of asylum claims made at Canada's land border. The reduction, though, does not signal a drop in the number of refugee claimants fleeing persecution. Rather, it reflects a narrowing of safe and lawful pathways to protection in Canada. The STCA operates to limits who can access safety in Canada.

Unusable Alternatives at the Border

In 2023, the Supreme Court of Canada upheld the legal validity of the STCA under section 7 of the Canadian Charter of Rights and Freedoms, on the basis that even if asylum seekers face a real risk of harm upon return to the U.S., Canadian law established sufficient alternatives to avoid return to the United States. The Court identified several such mechanisms, for example, requesting a temporary residence permit or filing an application for deferring one's removal.

As Arbel argues, however, these alternative pathways are, for most asylum seekers, effectively unreachable. People often arrive tired, frightened, and unsure of their rights. Since most returns to the United States occur within hours, there is no window in which asylum seekers could realistically benefit from these alternatives. In short, asylum seekers positions' hinder their ability to access these alternatives.

How Courts Have Misread the STCA

Canadian appellate courts have upheld the legal validity of the STCA based on a shaky evidentiary foundation and flawed legal analysis. Rather than assessing whether asylum seekers could realistically access protection, appellate courts emphasized discretionary legal mechanisms as alternative pathways available to potential asylum seekers. The possibility that protection might be available at some later point was treated as sufficient to uphold the agreement.

The courts' decisions on the STCA as legally valid are based on an assessment that is factually inaccurate, resulting in a privileging of abstract legal mechanisms over the lived experiences of asylum seekers who are subject to its operation. In practical terms, these legal decisions put countless asylum seekers in harm's way while simultaneously failing to address the serious legal defects in the STCA's operation.

Methods

Arbel uses a legal analysis to examine the five major Canadian court cases challenging the Safe Third Country Agreement between 2007 and 2023. Her methodology involves close examination of court records and evidentiary findings to trace how the STCA has been interpreted over time and how these interpretations do and do not align with conditions at the border.

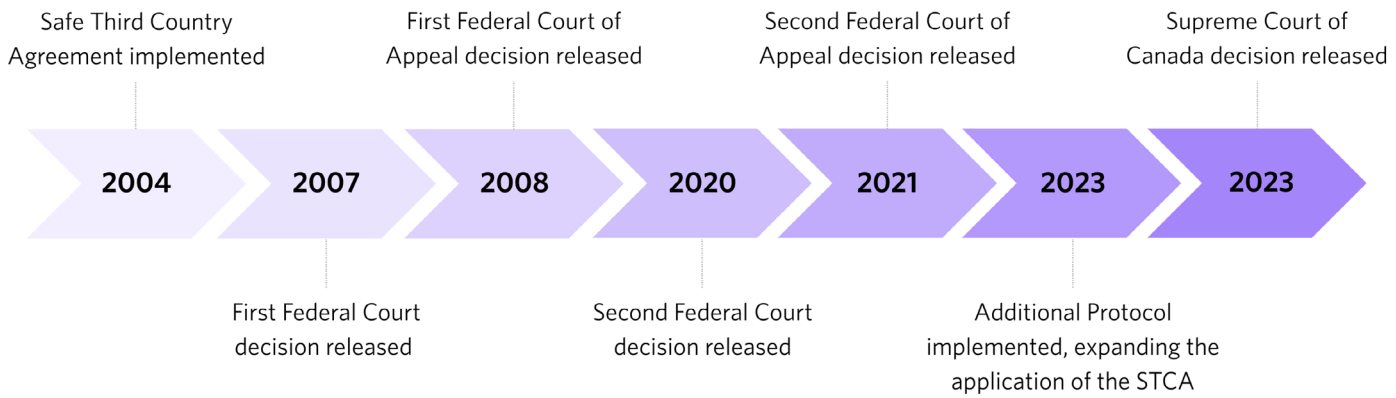

Figure 1. STCA establishment and Canadian legal decisions from 2004 - 2023. (Source: Arbel, 2024)

Conclusion

The Safe Third Country Agreement determines which asylum seekers can seek protection in Canada at the land border. By tracing two decades of litigation, Arbel shows how Canadian appellate courts have focused on the formal structure of the STCA rather than its practical operation and have failed to understand the real and concrete protection challenges people face at the border.

As it stands, most asylum seekers who seek asylum at the Canadian border will be returned to the US quickly, without being able to access any form of legal protection. Going forward, Arbel argues that future Canadian courts must evaluate the STCA by focusing not on the law on the books, but rather on its application on the ground. This would include an examination of the lived experiences and positionality of asylum seekers at Canada's borders.

References

1 Arbel, Efrat. Border Trouble: Critical Reflections on the Canada–US Safe Third Country Agreement Litigation. *International Journal of Migration and Border Studies* 8, no. 3–4 (2024).

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About the Authors

Efrat Arbel is an Associate Professor at the Peter A. Allard School of Law. Her research is focused on Canadian immigration detention, refugee protection, and border governance. She has published widely in these fields. Her research has helped shaped law and policy in Canada and has introduced creative tools to advance legal education and public engagement.

Marjorie Rugunda is a PhD student in the department of Gender, Race, Sexuality and Social Justice at the University of British Columbia. She holds a BA degree from Rhodes University, South Africa and a Master's degree from the University of Calgary. Her current research studies how institutions within Africa represent entrenched colonial legacies that shape contemporary social and political relations in (post)colonial contexts.