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# Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States

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EFRAT ARBEL\*

## Abstract

This article analyzes the Canadian Federal Court and Federal Court of Appeal decisions assessing the Safe Third Country Agreement between Canada and the United States (STCA). It examines how each court's treatment of the location and operation of the Canada–US border influences the results obtained. The article suggests that both in its treatment of the STCA and in its constitutional analysis, the Federal Court decision conceives of the border as a moving barrier capable of shifting outside Canada's formal territorial boundaries. The effect of this decision is to bring refugee claimants outside state soil within the fold of Canadian constitutional protection. In contrast, the Federal Court of Appeal decision conceives of the border as both static and shifting. In its treatment of the STCA, the Court conceives of the border as a moving barrier that shifts outside Canada's formal territorial boundaries to extend state power outwards. Yet, in its constitutional analysis, the Court conceives of the border as a static barrier that remains fixed at the state's geographic perimeter to limit access to refugee rights. By simultaneously conceiving of the border in these opposing ways, the Court of Appeal decision places refugee claimants in an impossible legal bind: it requires them to present at the (static) border to claim legal protection, but at the same time shifts the border in ways that preclude them from doing so. The decision thus suspends refugee claimants between two opposing directives, deprives them of otherwise actionable rights, and denies them recourse to meaningful legal action under Canadian law. The article argues that, in this key way, the Federal Court of Appeal decision does much more than clarify the executive discretion of the Governor-in-Council, as it purports. Rather, it redefines the Canadian refugee regime as fundamentally exclusionary towards STCA claimants, and calls into question the central principles by which this regime is distinguished and defined.

## 1. Introduction

In 2004, Canada and the United States entered a bilateral agreement known as the Safe Third Country Agreement (STCA), which provides for the regulation of refugee claims across the Canada–US border.<sup>1</sup> Safe

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<sup>1</sup> National Legislative Bodies, Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries (2004), available at: <<http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>> last accessed 15 Sept 2012 (STCA).

Third Country Agreements, new in North America but common in Europe, allow one state party to return refugee claimants back to the other (and vice versa) under certain circumstances.<sup>2</sup> Enacted to enhance border security and promote the orderly handling of refugee claims across the Canada–US border, the STCA prevents refugee claimants who are in the United States from lodging claims in Canada (and vice versa), subject to certain limited exceptions. Soon after its implementation, the STCA was subject to a constitutional challenge before the Federal Court of Canada. In a decision released in November 2007, the Federal Court determined that the STCA violated section 15 (equality) and section 7 (life, liberty, and security of person) of the Canadian Charter of Rights and Freedoms,<sup>3</sup> and declared it to have no force and effect.<sup>4</sup> In June 2008, the Federal Court of Appeal reversed this decision: it found the Charter did not apply and restored the STCA's validity on other grounds.<sup>5</sup>

This article analyzes these decisions by evaluating how each court's conception about the location and operation of the border influenced the results obtained in each case. It draws attention to two distinct principles at play – the 'static border' principle and the 'shifting border' principle – and locates these in each legal judgment.<sup>6</sup> It suggests that both in its treatment of the STCA and in its constitutional analysis, the Federal Court decision conceives of the border in shifting terms, and thus partakes of the logic of the 'shifting border' principle. The effect of this is to bring refugee claimants within the fold of constitutional protection, and entitle them to basic rights. In contrast, the Federal Court of Appeal decision conceives of the border as both static *and* shifting. In its constitutional analysis, the Court determines the border to be a static line that remains fixed at the state's geographic perimeter, and extends constitutional protection only to claimants who cross this line. To this extent, the decision partakes of the logic of the 'static border' principle. However, at the same time, in its treatment of the STCA, the Court conceives of the border as a shifting barrier that disallows refugee claimants from claiming constitutional protection, and thus also partakes of the logic of the 'shifting border' principle.

The article proposes that this approach is both conceptually flawed and legally problematic. By simultaneously conceiving of the border as both static and shifting, the Court of Appeal decision suspends STCA

<sup>2</sup> The STCA is modelled on the Dublin II Regulation of the European Union. See, Council Regulation 343/2003, 2003 OJ (L 50) 1; Commission Regulation 1560/2003, 3003 OJ (L 222) 3.

<sup>3</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>4</sup> *Canadian Council for Refugees v Canada*, 2007 FC 1261 (STCA FC).

<sup>5</sup> *Canada v Canadian Council for Refugees*, 2008 FCA 229 (STCA FCA).

<sup>6</sup> For a discussion locating both 'shifting' and 'static' border policies in Canadian and US law, including the STCA, see, A Shachar, 'The Shifting Border of Immigration Regulation' (2007) 3 *Stan J Civil Rights & Civil Liberties* 165–93.

claimants between two contradictory directives, deprives them of otherwise actionable rights and remedies, and strips them of recourse to meaningful action under Canadian law. The decision thus operates to redefine the Canadian refugee protection regime as fundamentally exclusionary towards STCA claimants. In so doing, it calls into question the basic principles by which the Canadian refugee regime is distinguished and defined.

Before turning to an examination of the legal judgments, the static and shifting border principles should be briefly explained. These principles are not established precepts recognized in legal doctrine but, rather, concepts that animate legal discourse. The static border principle, familiar to most, imagines the border as a stable perimeter positioned at Canada's geographic boundary line, marking both the state's territorial edge and the bounds of its legal authority. It is rooted in the traditional Westphalian conception of statehood, and presumes a coherent and mutually enforcing correlation between state territory, authority, and rights, with each constituted as contingent on the other.<sup>7</sup> The shifting border principle, in contrast, imagines the border as a moving barrier that is legally distinct from Canada's cartographic perimeter, that can be positioned outside Canada's geographic boundary line. These two principles thus stand in stark opposition to one another: while the static border principle presumes a direct correlation between a state's territory and its legal authority, the shifting border principle disaggregates them, and re-locates the locus of border control to places far removed from the territorial boundaries of the state. Both static and shifting border policies are common in Canadian law, and are selectively applied to impede or advance different policy goals, be it with respect to migration regulation or other transnational or cross-border matters. While neither principle is inherently 'good' or 'bad', their *simultaneous* application – as in the Court of Appeal decision – gives rise to serious coercive consequences both for refugee rights, and Canada's refugee regime as a whole.

In part two, the article outlines the STCA, detailing its operation and effect, to provide context for discussion. In part three, it examines the Federal Court and Federal Court of Appeal's STCA decisions, focusing primarily on the courts' respective findings on the application of the Canadian Charter of Rights and Freedoms. In part four, it concludes by evaluating the broader consequences stemming from the Court of Appeal decision and, more broadly, from legal decisions that conceive of the Canadian border in both static and shifting terms.

<sup>7</sup> For a discussion of how these three components – territory, authority, and rights – have changed in themselves and in their interrelationships across medieval, national, and global assemblages, see, S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Stanford University Press, 2006).

## 2. The STCA: an overview

### 2.1 Creating a ‘smart’ border

A safe third country clause first appeared in Canadian law in the 1988 amendments to the Immigration Act of 1976,<sup>8</sup> to enable the designation of another country as a ‘safe third country’ for refugees.<sup>9</sup> Throughout the 1990s, Canada and the United States continued to negotiate towards a mutual designation, but did not arrive at a final agreement.<sup>10</sup> The parties resumed negotiations in the aftermath of the 11 September 2001 attacks on the United States, and, within three months, issued the Smart Border Declaration. The Declaration sets out the Thirty-Two Point Action Plan designed to ‘enhance border security’ and facilitate ‘the legitimate flow of people and goods’ across the Canada–US border.<sup>11</sup> The Action Plan calls for common standards of biometric information, anti-terrorism measures, and increased visa policy coordination. It also permits extensive sharing of information on high-risk travellers, and establishes the STCA between Canada and the United States.<sup>12</sup> On 12 October 2004, the Governor-in-Council formally designated the United States as a ‘safe third country’ under section 101(1)(e) of the Immigration and Refugee Protection Act (IRPA).<sup>13</sup> The final agreement came into effect on 29 December 2004.<sup>14</sup>

In a nutshell, the STCA empowers Canada to summarily turn back third country nationals who openly lodge refugee claims at the Canada–US

<sup>8</sup> Immigration Act 1976, SC 1976–77, c 52, cited in STCA FC, above n 4.

<sup>9</sup> An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof, SC 1988, c 36

<sup>10</sup> STCA FC, above n 4, at para 8.

<sup>11</sup> See, Public Safety Canada, *Smart Border Declaration and Action Plan*, <<http://www.publicsafety.gc.ca/prg/le/bs/sbdap-eng.aspx>> last accessed 15 Sept 2012.

<sup>12</sup> Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence, 12 Dec 2001, available at: <<http://www/dfait-maeci.gc.ca/anti-terrorism/declaration-en.asp>> last accessed 15 Sept 2012.

<sup>13</sup> Immigration and Refugee Protection Act, RSC 2001, c 207 (IRPA). The IRPA and its associated regulations prescribe that a country designated as a ‘safe’ country must comply with art 33 of the Convention Relating to the Status of Refugees, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 28 July 1951, 189 UNTS 2545, as amended by the 1967 Protocol Relating to the Status of Refugees, 189 UNTS 150 (Refugee Convention) and art 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (10 Dec 1984), 1465 UNTS 85, entered into force 26 June 1987 (Convention Against Torture). Both of these provisions function as *non-refoulement* provisions and prohibit signatory states from returning a claimant to a country where he or she faces torture or other forms of persecution. In designating a country as ‘safe’, the Governor-in-Council is required to also consider its policies and practices with respect to claims under the Refugee Convention and its human rights record. The United States is the first and only country designated under s 101(1)(e) of the IRPA.

<sup>14</sup> Citizenship and Immigration Canada, ‘News Release – Safe Third Country Agreement comes into force today’, 29 Dec 2004, available at: <<http://www.cic.gc.ca/english/department/media/releases/2004/0420-pre.asp>> last accessed 15 Sept 2012.

border, unless they fall within certain limited exceptions.<sup>15</sup> Put simply, the STCA prohibits refugee claimants who first set foot in the United States from lodging refugee claims in Canada, and vice versa. The STCA binds both Canada and the United States to ‘take back’ claimants who attempt to enter in violation of the agreement, and to assume responsibility for adjudicating their claims. The agreement allows for some exceptions that accord with the governing ideologies of the Canadian refugee regime – cases of family unification, child and minor applicants, and claimants facing the death penalty – but it is otherwise applicable to all refugee claimants who lodge claims at the land border.<sup>16</sup> Notably, the STCA does not apply to claimants who arrive other than by land, or who lodge ‘inland’ claims from within Canadian territory.<sup>17</sup>

The premise of the STCA is that since both Canada and the United States recognize each other as ‘safe’ countries for refugees, wherein refugee

<sup>15</sup> Art 4(1), which lies at the heart of the STCA, provides that ‘the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim’. STCA, above n 1.

<sup>16</sup> There are four broad exceptions to the STCA: the family member exception, the unaccompanied minors exception, the document holder exception, and public interest exception. See, CBSA, ‘Canada-U.S. Safe Third Country Agreement – Exceptions to the Agreement’, available at: <<http://www.cbsa-asfc.gc.ca/agency-agence/stca-eps-eng.html#exception>> last accessed 15 Sept 2012. The exceptions are listed in section 159.5 of the Regulations Amending the Immigration and Refugee Protection Regulations (IRPR), SOR/2004–217, 12 Oct 2004 <<http://www.canadagazette.gc.ca/archives/p2/2004/2004-11-03/html/sor-dors217-eng.html>> last accessed 15 Sept 2012. It is worth noting that a recent study conducted by the Canadian Council for Refugees (CCR) and Sojourn House casts doubt on whether the family reunification exceptions is consistently applied. The Report notes that ‘[p]ractitioners who work with refugee claimants on both sides of the Canada-U.S. border described what they perceive as a lack of uniform procedure in assessing family relationships’ (at 24). The report further states that ‘experienced practitioners observed that claimants from certain countries appear, at times, to encounter stricter standards of evidence than others. For example, some officers appear to be unfairly sceptical about documents from certain countries, without being adequately sensitive to the challenges of obtaining documents from these same countries’. The Report concludes that ‘unreasonable and inconsistent assessment of family relationships have in some cases undermined the fair application of the family member exception’ (at 25). See, CCR and Sojourn House, ‘Welcome to Canada: the Experience of Refugee Claimants at Port-of-Entry Interviews’ (Nov 2010), available at: <<http://www.ccrweb.ca/files/poereport.pdf>> last accessed 15 Sept 2012.

<sup>17</sup> CBSA, ‘Canada-U.S. Safe Third Country Agreement – Where the Agreement is in Effect’, <<http://www.cbsa-asfc.gc.ca/agency-agence/stca-eps-eng.html#where>> last accessed 15 Sept 2012. See also, the decision of the Federal Court, STCA FC, above n 4, at para 29, which explains as follows: ‘A feature of the STCA regime is that, in accordance with the Regulations, it only operates at land ports of entry. The STCA regime does not apply to travellers arriving in Canada by air or water from the U.S.’. As Macklin further explains: ‘One of the reasons the present Agreement does not apply to inland refugee claims is the impossibility of determining whether inland claimants arrived via the United States. Refugee claimants who wish to pursue their claim in Canada have no incentive to disclose that they passed through the United States and every reason to conceal that fact. The task of establishing a person’s route into Canada or the United States is obviated when the person concerned is literally standing at the Canada-U.S. border’, in A Macklin, ‘Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement’ (2004–2005) 36 Colum Hum Rts L Rev 365–426, at 373. For a discussion of the ‘geographic hypocrisies’ of this requirement, see A Mountz, *Seeking Asylum: Human Smuggling and Bureaucracy at the Border* (University of Minnesota Press, 2010), at 50.

claimants are afforded full consideration of their claims, the restrictions it imposes do not place claimants at risk. The 'safe' designation attests to each country's formal compliance with the Refugee Convention<sup>18</sup> and the Convention Against Torture,<sup>19</sup> and their general human rights record. The STCA explicitly affirms both Canada's and the United States' international legal obligation to protect refugees who are present on their territory, and expresses the parties' desire to 'promote and protect human rights and fundamental freedoms', including those set out in the Refugee Convention and the Convention Against Torture.<sup>20</sup> It also imposes formal safeguards to ensure that claimants are not removed to any country other than Canada or the United States until their claim is heard. These safeguards are ostensibly designed to prevent what is known as chain *refoulement*, or the deflection of a refugee claimant from one country to another until their eventual return to their country of origin to conditions of persecution.<sup>21</sup> The STCA's primary goal, as stated in its preamble, is to enhance 'the international protection of refugees' by promoting 'the orderly handling of asylum applications' and 'the principle of burden sharing'.<sup>22</sup>

The motivations for implementing the STCA varied between Canada and the United States. Critics generally agree that the United States implemented the STCA to enhance border security and counter-terrorism measures in response to the 11 September 2001 attacks. In contrast, Canada was motivated less by a concern for enhancing border security, and more by a desire to reduce the number of refugee claimants eligible to enter Canada. In a report dated July 2010, the Canada Border Services Agency (CBSA) confirms that '[w]hile the primary focus for the United States was security, Canada sought to limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system'.<sup>23</sup> Statistics indicate that the movement of people across the border was indeed uneven prior to the STCA's implementation.

<sup>18</sup> Refugee Convention, above n 13.

<sup>19</sup> Convention against Torture, above n 13.

<sup>20</sup> STCA, above n 1, preamble.

<sup>21</sup> *ibid.*, at art 3(1)–(3) and preamble.

<sup>22</sup> *ibid.*, preamble.

<sup>23</sup> CBSA, 'United States-Canada: Joint Border Threat and Risk Assessment' (July 2010), available at: <<http://www.cbsa-asfc.gc.ca/security-securite/pip-pep/jbtra-ecmf-eng.pdf>> last accessed 15 Sept 2012, at 12. See also, Macklin, above n 17. That the goal of reducing numbers is forefront on the legislature's mind is further suggested by the amendments to section 159.6 IRPR introduced in 2009, designed to plug a hole in the STCA by removing one of its exceptions. Prior to June 2009, nationals of countries to which Canada had imposed a temporary suspension of removals, or 'moratorium countries', were also exempted from the safe third country rule. The amendment removed this exemption, and was intended to 'protect the integrity of the refugee status determination system by ensuring that refugee protection claimants who have had the opportunity to have their claims assessed in the United States are not making claims in Canada, and will reduce pressures on, and costs to, the refugee protection system'. See, 'Amending the Immigration and Refugee Protection Regulations' *Canada Gazette* (vol 143, no 16, 5 Aug 2009), available at: <<http://gazette.gc.ca/rp-pr/p2/2009/2009-08-05/html/sor-dors210-eng.html>> last accessed 15 Sept 2012.

According to Citizenship and Immigration Canada, between 8,000 and 13,000 refugee claimants entered Canada through the United States annually between 1995 and 2001.<sup>24</sup> These figures make sense given Canada's geographic location: unless a claimant can secure arrival by air or water – a prospect that remains beyond the reach of many – the primary point of entry is by crossing the Canada–US border. During this same period, in contrast, only 200 refugee claimants entered the United States from Canada each year.<sup>25</sup>

## 2.2 The effects of implementation

Since its implementation, the STCA has proven effective in reducing refugee eligibility to enter Canada. Because the STCA does not prescribe a mechanism for meaningful monitoring, little reliable information is available about its effects.<sup>26</sup> According to statistics obtained from the CBSA, several hundred refugee claimants have been rejected under the STCA each year since its implementation. The numbers varied by year, ranging from 301 in 2005, rising to a high of 768 in 2009, and declining to 591 in 2011.<sup>27</sup>

These figures, however, only tell part of the story. Since the STCA not only turns claimants away at the border, but also discourages claimants from presenting at the border, its effects are more significant than these numbers reveal. Additional statistics obtained from the CBSA show that, prior to the STCA's implementation, between 8,000 and 14,000 refugee claims were lodged at the Canada–US border each year.<sup>28</sup> In the first

<sup>24</sup> See, Macklin, above n 17, at 394–5, citing 'Report of the Standing Committee on Citizenship and Immigration', Joe Fontana MP (Chair), House of Commons (Dec 2002), available at: <<http://www.parl.gc.ca/CommitteeBusiness/CommitteeHome.aspx?Cmte=CIMM&Language=E&Mode=1&Parl=41&Ses=2>> last accessed 15 Sept 2012.

<sup>25</sup> Macklin, *ibid.* Notably, the United States has registered a steady increase in asylum applications since the implementation of the STCA. According to the International Organization for Migration (IOM), in 2010, the United States registered 13% more asylum applications than it did in 2009, amounting to approximately 55,500 new applications, compared to 49,000 in 2009. See, IOM Regional and Country Figures, available at: <<http://www.iom.int>>, cited in Maria-Teresa Gil-Bazo, 'Responses to Secondary Movements of Refugees: A Comparative Preliminary Study of State Practice in South Africa, Spain, and the USA' (Aug 2011), UNHCR website <[www.unhcr.org/4ef3321b9.pdf](http://www.unhcr.org/4ef3321b9.pdf)> last accessed 15 Sept 2012. While these statistics reflect a range of factors, it is likely that by closing off the Canadian border to land bound refugee claimants travelling through the United States, the STCA at least partially contributed to the overall rise in asylum applications lodged in the United States.

<sup>26</sup> The STCA's mandated monitoring is narrowly focused on whether the STCA is being correctly applied, not on how the STCA, when correctly applied, impacts refugee claimants. See STCA, above n 1, art 8.

<sup>27</sup> The precise figures are as follows. 2005: 301 claimants rejected, 299 at the border, 1 at the airport, and 1 inland. 2006: 402 claimants rejected, all at the border. 2007: 500 claimants rejected, all at the border. 2008: 640 claimants rejected, all at the border. 2009: 768 claimants rejected, 763 at the border, 2 at the airport and 3 inland. 2010: 761 claimants rejected, all at the border. 2011: 591 claimants rejected, 537 at the border and 54 inland. Statistics provided by the CBSA upon request, dated 8 May 2012.

<sup>28</sup> The precise figures for refugee claims lodged at the border are as follows. 2001: 14,009; 2002: 10,856; 2003: 10,938; 2004: 8,904. Statistics provided by the CBSA upon request, dated 8 May 2012.



year of the STCA's operation, the number of claims lodged at the border declined by over 50 per cent, from 8,904 in 2004 to 4,041 in 2005.<sup>29</sup> Recent statistics suggest a continuation of this trend. In 2010, for example, 4,642 claims were lodged at the border. In 2011, the numbers dropped significantly, with only 2,563 claims.<sup>30</sup> In 2012, 3,790 claims were lodged at the border.<sup>31</sup>

Because the STCA applies only at land ports of entry, and does not apply to people who advance 'inland' claims, critics argue that it not only creates incentives for human smuggling, but has also prompted a rise in unauthorized border crossings into Canada.<sup>32</sup> Due to the clandestine nature of unauthorized border crossings, it is difficult to track these numbers with any certainty. A 2010 Evaluation Study of the CBSA Detentions and Removals Program suggests the STCA has inadvertently increased numbers of unauthorized entries into Canada between ports of entry by migrants who wish to avoid being turned back at the border.<sup>33</sup> In this key

<sup>29</sup> Information provided by the CBSA upon request. The CCR reports that, in total, less than 20,000 claims were made in Canada in 2005, fewer than at any point since the 1980s. See, CCR, 'Closing the Front Door on Refugees: Report on the First Year of the Safe Third Country Agreement' (2005), available at: <<http://www.ccrweb.ca/closingdoordec05.pdf>> last accessed 15 Sept 2012, at 3.

<sup>30</sup> CBSA, above n 27. The precise figures for refugee claims lodged at the border are as follows. 2005: 4,041; 2006: 4,478; 2007: 8,191; 2008: 10,803; 2009: 6,295; 2010: 4,642; 2011: 2,563. The higher numbers reported in 2007–09 is attributable largely to the 'moratorium countries' exception, in effect until June 2009 when it was repealed, see above n 23. These figures are noted in a recent CBSA Evaluation Study of the Detention and Removals Program, which suggests that while the STCA 'initially reduced the number of land border refugee claimants, such claims more than doubled between 2005 and 2008 (from 4,042 to 10,801) – essentially increasing the number of refugee claimants to pre-Safe Third Country Agreement levels'. See, Final Report (Nov 2010), available at: <<http://cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html>> last accessed 15 Sept 2012. This Report, however, fails to account for the fact that the numbers decreased significantly (approx. 4,000 claims per year) after the exception's repeal. It is also worth noting that the STCA's impact on specific groups of refugee claimants has been especially severe, particularly those who have difficulties accessing the US system. Eg, in 2004, prior to the STCA's implementation, Colombia was the top country of origin for claims made in Canada, with an 80% acceptance rate. In the first year after the STCA came into effect, the admission rate for Colombian claimants – many of whom are barred from asylum in the United States due to the 'material support for terrorism' bar – dropped to less than a third of the 2004 numbers, see, CCR Report, *ibid*. More recently, Mexican claimants felt the impact of the STCA, given the imposition of visa requirements on Mexican nationals in 2009, but little data is available as to precisely how and to what extent.

<sup>31</sup> Statistics provided by the CBSA upon request, dated 4 Jan 2013.

<sup>32</sup> See, eg, Harvard Immigration and Refugee Law Clinic, 'Bordering on Failure: The U.S.-Canada Safe Third Country Agreement Fifteen Months after Implementation', March 2006 (Harvard STCA Report), available at: <[http://www.law.harvard.edu/programs/hrp/clinic/documents/Harvard\\_STCA\\_Report.pdf](http://www.law.harvard.edu/programs/hrp/clinic/documents/Harvard_STCA_Report.pdf)> last accessed 15 Sept 2012, at 21–2. It concludes that the STCA is making the border less secure, endangers the lives of refugee claimants, and prompts an increase in unauthorized entries into Canada. See also, Mountz, above n 17, for a discussion of the STCA's impact on human smuggling.

<sup>33</sup> CBSA Final Report, Nov 2010, above n 30. This situation is not unlike that created by Canada's carrier sanctions, which make it increasingly difficult for refugee claimants to enter the country lawfully, but do not preclude them from lodging claims if they enter through unlawful means.

respect, critics argue that the STCA has failed to meet its stated objective of making the border more secure.<sup>34</sup>

### 2.3 Shifting away from Canadian standards

Critics generally agree that the United States provides a significantly diminished level of protection to refugees.<sup>35</sup> This was one of the key findings made by the Federal Court in its STCA decision: the Court found that the United States was in material breach of its international refugee protection obligations such that it was unreasonable for the Governor-in-Council to conclude that the United States is a 'safe' country for refugees.<sup>36</sup> Perhaps most significantly, US law imposes a series of procedural bars that categorically exclude broad classes of refugee claimants on a non-reviewable basis and without individual consideration or balancing, in ways that directly contravene Canadian standards. While a comprehensive analysis of these measures is beyond the scope of this article, a brief overview provides important context for understanding the effects of the STCA.

The US Immigration and Nationality Act imposes a one-year filing deadline, known as the one-year bar, which prohibits claimants who do not file a claim within one year of arrival from seeking asylum, subject to limited discretionary exceptions.<sup>37</sup> Ignorance of the one-year filing deadline is not considered a valid reason for failure to file a timely application.<sup>38</sup> Critics have argued that the one-year bar violates international law

<sup>34</sup> Above n 32.

<sup>35</sup> For analysis, see Harvard STCA Report, above n 32. See also Macklin, above n 17, for discussion.

<sup>36</sup> STCA FC, above n 4, at para 240: 'These instances of non-compliance with art 33 are sufficiently serious and fundamental to refugee protection that it was unreasonable for the GIC to conclude that the U.S. is a "safe country"'. Notably, the Federal Court of Appeal did not specifically overturn these findings. See, STCA FCA, above n 5.

<sup>37</sup> See, 8 USC s 1158(a)(2)(B). The one-year filing deadline allows for exceptions in certain cases involving changed circumstances, serious illness or disability, legal disability or ineffective assistance of counsel: 8 CFR s 208.4(a). For further details see, US Department of Homeland Security, Asylum Officers Basic Training Course: One-Year Filing Deadline, 10–12, 23–4, 26–8, 30–1 (2009), available at: <<http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf>> last accessed 15 Sept 2012. For a discussion of the application of the one-year bar in US case law, see, eg, *Matter of T-M-H- & S-W-C-*, 25 I&N Dec 193 (BIA 2010) (holding that an alien does not receive an automatic one-year extension in which to file an asylum application following 'changed circumstances' under section 208(a)(2)(D) of the INA, 8 USC s 1158(a)(2)(D) (2006)); *Minasayan v Mukasey*, 553 F3d 1224 (9th Cir 2009) (holding that the one-year time period includes the date of entry); *Khunaverdians v Mukasey*, 548 F3d 760 (9th Cir 2008) (holding that proof of an exact date of entry is not required when there is other supporting evidence showing that the asylum application was filed less than one year after arrival); *Matter of F-P-R-*, 24 I&N Dec 681 (BIA 2008) (holding that for purposes of determining if an alien's application for asylum was timely filed within one year of arrival in the United States, the term 'last arrival' in 8 CFR, s 1208.4(a)(2)(ii) (2008) refers to the alien's most recent arrival in the United States from a trip abroad); *Matter of C-W-L-*, 24 I&N Dec 346 (BIA 2007) (holding that an alien who is subject to a final order of removal is barred by both statute and regulation from filing an untimely motion to reopen removal proceedings to submit a successive asylum application under section 208(a)(2)(D) of the Immigration and Nationality Act, 8 USC s 1158(a)(2)(D) (2000), based on changed personal circumstances).

<sup>38</sup> See, US Department of Homeland Security, Asylum Officers Basic Training Course, *ibid*.

and leads to arbitrary denials of refugee protection.<sup>39</sup> There is no such equivalent prohibition in Canadian law, in keeping with international standards providing that asylum requests should not be denied based on failure to fulfill formal requirements.<sup>40</sup> US law further bars from asylum any claimant who has provided ‘material support’ to terrorist organizations or activities,<sup>41</sup> and does not strictly require proof that an individual did so *knowingly*.<sup>42</sup> These policies have been heavily criticized,<sup>43</sup> and stray from the Canadian practice of requiring demonstrated proof of individual responsibility for any criminal or terrorist activity, and allowing for exceptions in cases of duress.<sup>44</sup> The US regime also bars claimants convicted of ‘aggravated felonies’, and classifies as ‘aggravated’ a range of offences that would not be considered particularly serious under Canadian law.<sup>45</sup> In contrast, Canadian law only formally bars claimants who are inadmissible

<sup>39</sup> See, eg, Human Rights First, ‘The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency’ (2010), available at: <<http://www.humanrightsfirst.org/pdf/afd.pdf>>. See also, Karen Musalo and Marcelle Rice, ‘The Implementation of the One-Year Bar to Asylum’ (2008) 31 *Hastings Int’l & Comp L Rev* 693; Philip Schrag, *et al*, ‘Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum’ (Dec 2010) 52 *William and Mary L Rev* 651.

<sup>40</sup> See, ‘UNHCR Comments on Proposed Rules on “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings; and Asylum Procedures”’ (4 Feb 1997). UNHCR’s Executive Committee has stated that, ‘[w]hile asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration’. See, UNHCR Executive Committee Conclusion No 15, 1979. This also contravenes Canadian standards that reject delay as a decisive factor in the adjudication of asylum claims, per *Huerta v MEI*, [1993] FCJ no 271 (CA) and *Hue v MEI*, [1988] FCJ no 283 (CA).

<sup>41</sup> See, 8 USC, s 1182(a)(3)(B) (2005). The 2001 USA PATRIOT Act implements a very expansive definition of ‘material support’ to include ‘transfer[ing] of funds, or other material financial benefit’, and applies a broad definition of the term ‘terrorist activities’, to encompass the use of ‘any weapon or dangerous device’ other than for ‘mere personal gain’. See, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, PubL no 107–56, s 411, 115 Stat 272 (codified at 8 USC s 1182(a)(3)(B)).

<sup>42</sup> The PATRIOT Act’s ‘reasonably should know’ language appears to establish an objective standard that requires no actual knowledge, *ibid*. The case law further provides that individuals who are extorted by terrorist organizations, even under duress, captivity, or threat of violence, will be barred from asylum. See, eg, *Amaya Arias v Ashcroft*, 143 Fed Appx 464 (2 Aug 2005); *Ramirez v Canada (MEI)* (1992), 2 FC 306 (CA); *Moreno v Canada (MEI)*, [1994] 1 FC 298 (CA); *Sivakumar v Canada (MCI)* (1994), 1 FC 433.

<sup>43</sup> See, eg, Human Rights First, ‘Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States’ (2009), available at: <<http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>> last accessed 15 Sept 2012.

<sup>44</sup> In the case of duress, *Canada v Asghedom* [2001] FCT 972 confirms the Immigration and Refugee Board’s holding that the claimant was not barred from refugee status, despite his complicity in crimes against humanity, because he had acted under duress. Further, Canadian law allows *refoulement* of a refugee only if ‘reasonable grounds’ exist for regarding him as a danger to national security, or if he has been convicted of a serious crime and constitutes a danger to the community. See, eg, *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3.

<sup>45</sup> See, INA s 101(a)(43), 8 USC s 1101(a)(43) (2005) (defining ‘aggravated felony’); INA s 208(b)(2)(B)(i), 8 USC s 1158(b)(2)(B)(i) (2005) (providing that individuals convicted of aggravated felonies will be considered to have been convicted of a particularly serious crime).

on grounds of security, violating human or international rights, and serious or organized criminality.<sup>46</sup>

In each of these scenarios, since Canadian law does not impose such prohibitions, it is likely that a refugee claimant barred from asylum in the United States would, at the very least, be entitled to a refugee determination hearing in Canada. By operation of the STCA, however, these claimants are sent back to the United States (unless they satisfy one of the STCA's exceptions) where they are often detained, and in some circumstances subject to removal orders or returned to their home states to face persecution. As a result, and despite assurances to the contrary in its preamble, the STCA risks *refouling* refugee claimants before they have their claims heard on their merits. In this respect, as Macklin argues, the STCA effectively 'allows Canada to do indirectly what it cannot do directly, namely, deny refugees the rights to which they are entitled according to international and domestic law'.<sup>47</sup>

## 2.4 Shifting the location of border enforcement

The STCA not only restricts refugee eligibility to enter Canada and turns claimants away at the border. No less significantly, the STCA also alters both the location and operation of the Canadian border. The STCA imagines a new kind of border – a 'smart' border – that shifts the site of border enforcement away from Canada's cartographic perimeter with respect to land bound refugee claimants.

The notion that state borders are shifting is increasingly gaining acceptance in the scholarly literature. The movement towards shifting borders is a global one: as globalization continues to destabilize the traditional alignment between territory, authority, and rights, states are developing policies that redraw state boundaries to facilitate heightened migration regulation and enhanced border control.<sup>48</sup> National borders have, in Balibar's words, changed places: '[w]hereas traditionally, and in conformity with both their judicial definition and "cartographical" representation as incorporated into national memory, they should be *at the edge of the territory*, marking the point where it ends, it seems that borders and the institutional practices

<sup>46</sup> See, IRPA s 101(1), and Refugee Convention arts 1(F)(a), 1(F)(b), 1(F)(c), and 1(E), above n 13. In further contrast with Canadian law, US law does not require a balancing between the danger posed by the claimant's criminal acts and the harm that claimant would likely face if returned to a place of persecution. See, eg, *In re A--H--*, 23 I & N Dec 774 (AG 2005), which provides that the Attorney General requires only *potential* belief that a person *may* pose a danger.

<sup>47</sup> Macklin, above n 17, at 380. Macklin argues that this process also gives rise to the 'discursive disappearance' of refugee claimants, and prompts an increase in unauthorized migration, at 365.

<sup>48</sup> This pattern has been well canvassed in the scholarly literature. As Bosniak notes, the 'growing (though uneven) permeability of national borders, often described under the rubric of "globalization" has become axiomatic in much social and economic scholarship', in L. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006), 8–9. For further discussion, see also, S Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996).

corresponding to them have been transported *into the middle of political space*'.<sup>49</sup> Shachar's description is apt:

A novice to the field of immigration might expect the legal boundaries of inclusion and exclusion to correlate with the 'cartographic' borders of US territory. The reality, however, is far more complicated. The firm borderlines drawn in the world atlas do not necessarily coincide with those adhered to, indeed created through, immigration law and policy. Instead, we increasingly witness a border that is in flux: at once more open and more closed than in the past. More important still for the purpose of our discussion, the *location* of the border is shifting – at times penetrating into the interior, in other circumstances extending beyond the edge of territory. And in other contexts, these borders are reappearing, even more robustly, as a physically refortified barrier, offering a sharp demarcation line between the US and its neighbors to the South and the North.<sup>50</sup>

Differing in form and application, shifting border measures imagine national borders as moving barriers that are conceptually, legally, and geographically removed from the cartographic perimeter of the state. These measures allow states to assert greater control over the legal and political rules governing the treatment of outsiders. As Shachar further explains: 'This redesign has been accomplished by enforcing the sovereign prerogative to deny or permit access in a whole new way: by redrawing (indeed, redefining) the once fixed and static territorial border, transforming it into something more malleable and movable, which can be placed and replaced – by the words of law – in whatever location that best suits the goals of restricting access'.<sup>51</sup> By shifting the location of border enforcement, states maintain authority over migration in an age of increased human movements. Selectively utilized, such measures allow states to 'regain control over their crucial realm of responsibility, to determine who to permit to enter, who to remove, and who to keep at bay'.<sup>52</sup>

While not unique among states in its implementation of shifting border measures, Canada is certainly among the most effective. The Canadian government has been implementing interdiction abroad measures for decades, and has been labelled 'something of a pioneer in instruments

<sup>49</sup> E Balibar, *We The People of Europe? Reflections on Transnational Citizenship* (Princeton University Press, 2004), 109 (emphasis in original).

<sup>50</sup> Shachar, above n 6, at 166.

<sup>51</sup> Shachar, above n 6, at 167. This practice is becoming increasingly commonplace as a migration strategy tool. As the IOM noted in a recent report, '[m]any states which have the ability to do so find that intercepting migrants before they reach their territories is one of the most effective measures to enforce their domestic immigration laws and policies'. See, Human Rights Watch *et al*, NGO Background Paper on the Refugee and Migration Interface (2001), available at: <<http://www.hrw.org/reports/2001/06/28/ngo-background-paper-refugee-and-migration-interface>> at 10, cited in Shachar, above n 6, at 176.

<sup>52</sup> Shachar, above n 6, at 167.

of interdiction'.<sup>53</sup> These measures subject refugee claimants to determinations that would otherwise happen at Canadian ports of entry in places far removed from Canada's territorial boundaries. They also allow Canada to avoid triggering the constitutional protections that extend to refugee claimants who are physically present on state soil.<sup>54</sup>

The Canadian government began implementing interdiction measures in the 1980s, but increased their use and scope significantly since the 11 September 2001 attacks on the United States. Since 2001, Canada has increased interdiction abroad by posting more Immigration Control Officers, Migration Integrity Specialists, and Airline Liaison Officers in overseas locations to prevent asylum seekers from reaching Canada.<sup>55</sup> Officers who are posted overseas also provide information about irregular migrants to Canadian authorities and assist in training airline personnel to detect false documents and suspicious persons. In so doing, as Mountz explains, they 'act informally as liaisons between foreign embassies, private security companies at airports, airlines, and host authorities ... [to] prevent people from reaching sovereign territories to make refugee claims'.<sup>56</sup> The posting of migration officers in offshore locations works in tandem with sanctions that penalize airlines who transport irregular migrants on Canada-bound flights by demanding reimbursement for costs associated with detention, return, and, in some

<sup>53</sup> Macklin, above n 17, at 378–9. In a report dated 1998, Canada's Senate Standing Committee on Citizenship and Immigration concluded that 'the interdiction abroad of people who are inadmissible to Canada is the most efficient manner of reducing the need for costly, lengthy removal process', and increased the implementation of interdiction abroad measures shortly thereafter. See, Senate Report of the Standing Committee on Citizenship and Immigration, Immigration Detention and Removal, recommendation 18 (1998), cited in Shachar, above n 6, at 184. In addition to these offshore measures, the Canadian government also used to authorize the application of 'direct back' procedures in which a foreign national arriving into Canada from the United States can be temporarily returned to the United States without assurances as to their capacity for return. Since the 'direct back' policy is applied at the cartographic border, it does not explicitly rely on the 'shifting border' principle, but nonetheless limits the ability of refugee claimants to enter the state. In response to significant criticism of this policy by UNHCR (see, 'Monitoring Report: Canada-United States "Safe Third Country" Agreement: 29 December 2004 – 28 December 2005' (June 2006), at 25) CBSA issued a new policy guideline stating that, effective from 1 Sept 2006, the use of direct backs 'will be limited to exceptional circumstances and will be subject to monitoring by National Headquarters' (see, CBSA, 'Memorandum for Regional Directors General: Land Border Services Officers: Subject: Direct Back Procedures for Refugee Claimants at the Land Border', 11 July 2006, at 1), though reports conducted by advocacy groups suggest the direct back policy was used long after that date. Notably, the Inter-American Commission on Human Rights recently held that Canada's 'direct-back' policy violates its international human rights obligations. The decision is available on the CCR website, at <[http://ccrweb.ca/files/iachrdecision\\_johndoe.pdf](http://ccrweb.ca/files/iachrdecision_johndoe.pdf)> last accessed 15 Sept 2012.

<sup>54</sup> As the Supreme Court of Canada explained in *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 'every human being who is *physically present in Canada* and by virtue of such presence amenable to *Canadian law*' – including refugee claimants – has the right to have their claims heard on their merits in accordance with the principles of fundamental justice (at para 35).

<sup>55</sup> Mountz, above n 17, at 137. See also, CCR, Interdicting Refugees (May 1998), 29, available at: <<http://ccrweb.ca/files/interd.pdf>> last accessed 15 Sept 2012.

<sup>56</sup> Mountz, *ibid.*

cases, expenses for medical care.<sup>57</sup> The combined use of these measures both presumes and enables a significant change in the perception and operation of the border.<sup>58</sup>

While the STCA is not commonly regarded as an interdiction measure, it nonetheless partakes of the logic of the shifting border principle. Notwithstanding that the STCA is formally applied at the geographic border, it determines a refugee's eligibility to enter Canada when first setting foot on US soil, long before approaching the Canadian border. The fact that a refugee claimant first entered the United States fixes and, indeed, nullifies the ability to lodge a refugee claim at the Canadian border (unless the claimant fits the agreement's narrow exceptions). In effect, therefore, the STCA establishes a moving, fictional boundary around the refugee claimant in question: it imagines the US border as travelling with the refugee into Canada, in ways that preclude the claimant from (legally) entering the state to claim protection. In this way the STCA transforms what was once dubbed the world's longest undefended border into a fortified barrier, making it virtually impossible for land-bound claimants who do not satisfy one of the STCA's exceptions to enter Canada, unless doing so clandestinely.<sup>59</sup> In shifting the *location* of border assessment, the STCA thus also shifts the *operation* of the border, from a point of substantive consideration, to one of procedural refusal. The STCA shifts the focus of the refugee analysis from the 'why' to the 'where': it determines refugee eligibility based on the location from which the claim is made, rather than on its substantive merit.

### 3. Challenging the STCA

#### 3.1 The Federal Court decision

On the first anniversary of the STCA's entry into force, the Canadian Council for Refugees, Amnesty International, and the Canadian Council of Churches challenged its validity before the Federal Court of Canada.

<sup>57</sup> Shachar, above n 6 at 185, citing A Brouwer and J Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21 *Refuge* 6–24, at 10. As Mountz further explains, these measures also point to the growing privatization of border enforcement: 'not only are private companies, such as airlines and transport industries being paid *by* states to build and run detention centers and police borders, but they are also forced to *pay* states when then fail', above n 17 at 137.

<sup>58</sup> For a comparative account, see, Shachar's discussion of the US-VISIT program, above n 6, at 176.

<sup>59</sup> For a discussion of the fortification of North America, see, eg, E Gilbert, 'Leaky Borders and Solid Citizens: Governing Security, Prosperity and Quality of Life in a North American Partnership' (2007) 39 *Antipode* 77. See also, D Bhandar, 'Renormalizing Citizenship and Life in Fortress North America' (2004) 8 *Citizenship Studies* 261; M Sparke, 'Passports into Credit Cards: On the Borders and Spaces of Neoliberal Citizenship' in JD Migdal (ed), *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices* (CUP, 2004).

The named claimant in the case, identified as John Doe, was an asylum seeker from Colombia who sought refugee status in the United States, he was denied as a result of the one-year bar discussed above. John Doe wished to apply for refugee status in Canada, but was precluded from doing so as a result of the STCA.<sup>60</sup> The applicants sought a declaration that the designation of the United States as a 'safe third country' and the resulting ineligibility triggered by the STCA were invalid and unlawful. This argument hinged on the claim that the United States failed to respect its obligations under the Refugee Convention and the Convention against Torture, and thus could not be considered a 'safe' country for refugees. The applicants argued that, as a result, Canada's policy of turning refugee claimants back to the United States under the STCA amounted to indirect *refoulement*. They further argued that the STCA and its associated regulations violated section 15 (equality) and section 7 (life, liberty, and security of person) of the Canadian Charter of Rights and Freedoms and should be struck down.<sup>61</sup>

In a decision issued in November 2007, Justice Phelan of the Federal Court of Canada found the STCA was invalid and declared it of no force and effect. Justice Phelan found that the United States could not be designated a 'safe' country for refugees pursuant to section 102 of the IRPA, given its failure to comply with the *non-refoulement* provisions in art 33 of the Refugee Convention and art 3 of the Convention Against Torture.<sup>62</sup> Justice Phelan held that compliance with these provisions was a condition precedent to the Governor-in-Council's exercise of its delegated authority under section 102 of the IRPA. He further found that the Governor-in-Council acted unreasonably in concluding that the United States complied with these provisions, and in failing to ensure a continuing review of US practices and policies as required by the IRPA. Finally, Justice Phelan held that the STCA violated both sections 15 and 7 of the Charter, in ways that could not be 'demonstrably justified' under the Charter's section 1 analysis.<sup>63</sup> As a result, he declared the STCA and the implementing provisions of the Regulations *ultra vires*.

<sup>60</sup> Notably, as part of the proceedings, the applicants sought an injunction to prevent Canadian authorities from invoking the STCA in the event that John Doe presented himself at a Canadian border post. An interim injunction was granted. Ultimately, against the background of this litigation, the US authorities agreed to have John Doe's refugee claim reconsidered, and eventually granted him refugee status. See, STCA FC decision, above n 4, at para 113.

<sup>61</sup> Charter of Rights and Freedoms, above n 3.

<sup>62</sup> STCA FC decision, above n 4.

<sup>63</sup> Section 1 of the Charter, often referred to as its limiting provision, guarantees the rights and freedoms set out in the Charter 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', above n 3. In order to demonstrate a Charter violation, a claimant must not only prove that his/her rights were violated under, eg, section 7 or 15 of the Charter, but also, that this violation cannot be justified or 'saved' under section 1.



Prior to determining whether a Charter violation had taken place, Justice Phelan had to assess whether the Charter applied in the case, given that John Doe was not physically present on Canadian soil at the time of the application.<sup>64</sup> Justice Phelan evaluated this question in light of the Supreme Court of Canada's decisions in *Singh v Canada*<sup>65</sup> and *United States of America v Burns*.<sup>66</sup> In both cases, the claimants were vulnerable to harm perpetrated by foreign governments on foreign soil: in *Singh* the claimants were at risk of persecution in their home states, while in *Burns* the claimants were at risk of being extradited to the United States to face the death penalty. In both cases, the Supreme Court of Canada ruled that Charter protection extended to the claimants. On this basis, Justice Phelan concluded that 'the Charter would apply to a refugee claimant *at* the Canadian border and under the control of Canadian immigration officials', and to 'every illegal immigrant *in Canada* claiming to be a refugee'.<sup>67</sup> Applying this finding to John Doe's situation, Justice Phelan reasoned it was 'of no import that John Doe has not actually approached the Canadian border', since if he had done so he would have automatically been sent back to the United States.<sup>68</sup> Justice Phelan found it would be 'pointless', 'wasteful', and 'unfair' to force John Doe to approach the Canadian border unnecessarily, as this would only expose him to 'the very harm at issue before the Court', and would be contrary to the spirit of rights protection enshrined in the Charter.<sup>69</sup>

In finding that the Charter applied in this case – notwithstanding that John Doe had not yet crossed or approached the border – the decision effectively *shifts* the border, albeit indirectly. That is, it recognizes the futility of asking John Doe to physically approach the border only to be sent away and, instead, imagines him as having done so already. This finding is logically sound: after all, if the decision can imagine the US border as travelling with the claimant into Canada, can it not also imagine the Canadian border as travelling with the claimant into the United States? The effects of this finding are profound. By shifting the border, the decision brings John Doe with the fold of constitutional protection. In so doing, it recognizes John Doe's legal right to advance a limited but nonetheless actionable rights claim against the state. No less significantly, this finding precludes Canada from summarily dismissing John Doe's claim. Instead, it triggers an enforceable, correlating duty on the part of the state, in keeping with the binding precedent set out in *Singh*, to assess John Doe's claim on its

<sup>64</sup> STCA FC decision, above n 4, at para 277.

<sup>65</sup> *Singh*, above n 54.

<sup>66</sup> *United States v Burns*, [2001] 1 SCR 283.

<sup>67</sup> STCA FC decision, above n 4, at paras 281 and 280 (emphasis added).

<sup>68</sup> *ibid*, at para 48.

<sup>69</sup> *ibid*, at paras 47–8, citing *Viend v Alberta*, [1998] 1 SCR 493.

merits according to the principles of fundamental justice.<sup>70</sup> The decision can thus be read as partaking in the logic of the shifting border principle to circumvent the problematic rights implications that stem from the STCA's shifting of the border. It invokes a legal fiction – imagining John Doe as having approached the border without requiring him to do so – to preserve and maintain an important legal right. The Federal Court of Appeal, however, rejected this approach.

### **3.2 The Court of Appeal judgment**

The Federal Court of Appeal overturned Justice Phelan's decision, and restored the validity of the STCA.<sup>71</sup> The majority decision determined it was 'not open to the Applications judge to hold on any of the alleged grounds that the designation of the U.S. as a safe third country and the related Regulations were outside the authority of the [Governor-in-Council] or that the STCA between Canada and the U.S. was illegal'.<sup>72</sup> The Court further ruled that Justice Phelan erred in finding that 'actual' compliance or compliance 'in absolute terms' was a condition precedent to the exercise of the Governor-in-Council's delegated authority.<sup>73</sup> Instead, it found that proof of actual compliance was 'irrelevant', since this was 'not the issue that the Applications judge was called upon to decide'.<sup>74</sup> The Court determined the only relevant issue in dispute was whether the Governor-in-Council 'considered the subsection 102(2) factors, and, 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'.<sup>75</sup> It also found that Justice Phelan erred in conducting a pragmatic and functional analysis, and identified the wrong standard of review.<sup>76</sup>

While the bulk of the Court of Appeal's decision hinges on a thin and largely unconvincing claim about the executive discretion of the Governor-in-Council, its statements about the inapplicability of the Charter are especially important for this analysis. The Court explicitly rejected Justice

<sup>70</sup> When assessed by reference to Hohfeld's theory of rights, this juridical relation would properly be classified as a 'right-duty' relation. See, W Hohfeld, 'Some Fundamental Legal Conceptions As Applied To Legal Reasoning' (1913) 23 *Yale LJ* 28. See also, J Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (1982) *Wisc L Rev* 975.

<sup>71</sup> STCA FCA decision, above n 5.

<sup>72</sup> *ibid.*, at para 82.

<sup>73</sup> *ibid.*, at para 92.

<sup>74</sup> *ibid.*, at para 80.

<sup>75</sup> *ibid.* On this point, the Court further clarified that 'even if "actual compliance" was a condition precedent, the conclusion reached by the Applications judge to the effect that the U.S. did not meet that requirement at the time of promulgation could not stand since it is largely based on evidence which postdates the time of the designation', at para 81. Related to this point, the Court also held that the record does not support the Applications judge's conclusion that the Governor-in-Council was in breach of its obligation to conduct the ongoing review mandated by subsection 102(3) of the IRPA, above n 13, at paras 83–97.

<sup>76</sup> STCA FCA decision, *ibid.*, at paras 59–64.

Phelan's finding that the Charter applied in the case, and found 'no factual basis upon which to assess the alleged Charter breaches'.<sup>77</sup> It reasoned instead that since John Doe 'never presented himself at the Canadian border and therefore never requested a determination regarding his eligibility' he was not entitled to challenge the STCA under the Charter.<sup>78</sup> According to the majority, the very proposition that John Doe 'should nevertheless be considered as having come to the border and as having been denied entry' ran directly against the established principle that Charter challenges 'cannot be mounted on the basis of hypothetical situations'.<sup>79</sup> The concurring minority opinion similarly held that 'Canadian law respecting refugee protection is *only* engaged when claimants seek protections from Canadian officials *in* Canada, including ports of entry',<sup>80</sup> and that as a result, the Charter could not apply in this case.

The finding that John Doe must be physically present at the Canadian border to trigger the application of the Charter is problematic on several levels. Most notably, as Brouwer explains, it prescribes that 'before a court can hear a challenge to the legality of the agreement a refugee must put her life at risk by coming to the border, getting refused and handed over to U.S. authorities for likely deportation to torture or persecution'.<sup>81</sup> However, slightly more subtly, this finding rests on a disingenuous application of two essentially contradictory principles. In stark contrast with Justice Phelan's decision, rather than shifting the border to bring John Doe within the fold of constitutional protection, the Court of Appeal decision conceived of the border in static terms to bar John Doe from Charter protection. The decision thus precludes John Doe from claiming Charter rights because he did not present at the (static) border and did not request a determination regarding his eligibility under the STCA. Yet, at the same time, the decision upholds the validity of the STCA, which shifts the border and prescribes that if John Doe were to request a determination regarding his eligibility, he would be removed from Canadian jurisdiction and handed over to

<sup>77</sup> *ibid.*, at paras 102 and 103.

<sup>78</sup> *ibid.*, at para 101.

<sup>79</sup> *ibid.*, at para 102.

<sup>80</sup> *ibid.*, at para 114, per Evans JA (emphasis added). Justice Evans further continued: 'The provisions of neither the international Conventions relied on in this litigation, nor the Charter, require Canada to abstain from enacting regulations which may deter nationals of third countries in the United States from coming to the Canadian border'.

<sup>81</sup> See, CCR, 'Rights Groups Express Dismay with Appeal Court Ruling on Safe Third Country' (2 July 2008), available at: <<http://ccrweb.ca/eng/media/pressreleases/02july08.htm>>; and CCR, 'Stay of Third Country Decision Puts Refugees' Lives at Risk' (1 Feb 2008), available at: <<http://ccrweb.ca/eng/media/pressreleases/1feb08.htm>> last accessed 15 Sept 2012. Notably, the Court did address this point, at para 101, by suggesting that when a claimant enters Canada, his return is not automatic, given that he is first subject to a preliminary assessment process. The Court suggested that during this process, he could seek counsel and mount a Charter challenge. This suggestion is practically unworkable, and fails to account for the many procedural and substantive obstacles that would prevent a claimant from doing so, not to mention the risks such action would pose to his life and safety.

US authorities. The decision thus puts John Doe in an impossible bind: the static border principle requires him to present at the border to trigger the Charter's application, but the shifting border principle precludes him from doing so. Put another way, the decision places John Doe in a legal catch-22: barred from entry because of the shifting border principle, and denied rights because of the static border principle. Stripped of recourse to effective legal action under Canadian law, and suspended between two conflicting directives, his predicament is that of liminality: he is still subject to the law, but left bereft by it.<sup>82</sup>

This finding carries serious coercive implications for John Doe, and for refugee claimants in his position. The Federal Court decision recognizes John Doe's legal right to challenge the STCA under the Charter. In contrast, the Federal Court of Appeal decision denies John Doe the ability to challenge the STCA before a Canadian court, and leaves him vulnerable to deportation and *refoulement*.<sup>83</sup> No less significantly, whereas the Federal Court decision imposes upon Canada a legal duty, consistent with *Singh*, to provide John Doe with basic constitutional protections, the Federal Court of Appeal confers upon Canada the privilege to summarily disregard, deny, or dismiss his claim.<sup>84</sup> This shift marks a notable change in Canada's approach to refugee protection: it privileges the exercise of state power, and authorizes Canada to dodge John Doe's claim without legal consequence.

Viewed in this light, the Federal Court of Appeal STCA decision does much more than clarify the executive discretion of the Governor-in-Council, or the appropriate standard of review. It in fact redefines the Canadian refugee regime as fundamentally exclusionary towards STCA claimants, and calls into question the central principles by which the Canadian refugee determination regime is distinguished and defined. In *Singh v Canada*, the Supreme Court of Canada held that all refugee claimants physically present on state soil – including those present at the border – are entitled to have their claims heard on their merits and in keeping with the principles of fundamental justice.<sup>85</sup> This is one of the established hallmarks of Canadian refugee law. The Court further stated that refugees who do not have safe haven elsewhere are 'entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the United Nations *Convention Relating to the Status of Refugees*'.<sup>86</sup> In *Canada v Ward*, the Court emphasized

<sup>82</sup> This state is in many ways reminiscent of the 'state of exception', as discussed by Agamben in, eg, G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1995).

<sup>83</sup> In distinction from the relationship discussed above, when assessed by reference to Hohfeld's theory of rights, this relation would be classified as the 'no-right/privilege' jural relation, above n 54.

<sup>84</sup> Hohfeld, above n 70.

<sup>85</sup> *Singh*, above n 54, at 190.

<sup>86</sup> *ibid.*, at 194.

Canada's commitment to establishing a 'forum of second resort for the persecuted', and underscored the importance of not 'render[ing] illusory Canada's provision of a haven for refugees', by applying adequate standards of refugee protection.<sup>87</sup> This commitment is also clearly stated in the IRPA, which lists among its objectives the goal of 'grant[ing], as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution', and 'establish[ing] fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings'.<sup>88</sup> The Federal Court decision casts serious doubt on these laudable goals.

#### 4. Conclusion

The Federal Court and Federal Court of Appeal's STCA decisions are two of several decisions issued in recent years to address the extraterritorial application of the Canadian Charter. In *R v Hape*, for example, the Supreme Court of Canada assessed whether officers of the Royal Canadian Mounted Police were acting in compliance with the Charter in searching the house of the accused, a Canadian citizen, on Turks and Caicos territory. The Court held that the law of the state in which the activities occur must govern, and that the Charter does not generally apply to searches and seizures in other countries. As the Court explained, 'international customary law and the principle of comity of nations generally prevent the Charter from applying to the actions of Canadian officials operating outside of Canada'.<sup>89</sup> This principle is subject only to the Charter's fair trial safeguards and to the limits on comity that prevent Canadian officers from participating in activities that violate Canada's international human rights obligations.<sup>90</sup> The Court did not provide clear instruction as to when the principle of comity might give way to the human rights exception, but left open 'the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s.24(1) of the *Charter*'.<sup>91</sup>

The Court came close to clarifying when this exception might apply in *Canada (Justice) v Khadr*<sup>92</sup> and *Canada (Prime Minister) v Khadr*,<sup>93</sup> two cases that also involved the extraterritorial application of the Charter. In these cases,

<sup>87</sup> *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at 726–7 and 718.

<sup>88</sup> IRPA, above n 13, at section 2 (c) and (e).

<sup>89</sup> Above n 54, para 14.

<sup>90</sup> *R v Hape*, [2007] 2 SCR 292, 2007 SCC 26, at paras 88–90.

<sup>91</sup> Above n 54, para 101.

<sup>92</sup> *Canada (Justice) v Khadr*, [2008] 2 SCR 143, 2008 SCC 29.

<sup>93</sup> *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, 2010 SCC 3.

the Court ruled on the legality of Canadian citizen Omar Khadr's imprisonment in Guantanamo Bay. In keeping with its statements in *Hape*, the Court explained that while Canadian officials operating outside Canada are not generally subject to the Charter, the jurisprudence 'leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms'.<sup>94</sup> Given findings that the military commission regime in place at Guantanamo Bay engaged in violations of fundamental human rights protected by international law, the Court found that the human rights exception contemplated in *Hape* could apply.<sup>95</sup> On the facts, the Court concluded that the 'Charter applied to the actions of Canadian officials operating at Guantanamo Bay'.<sup>96</sup>

The Federal Court of Appeal's decision in *Amnesty International Canada v Canada (Chief of the Defense Staff)*,<sup>97</sup> however, suggests the Charter would not apply extraterritorially in cases involving refugee claimants, even if fundamental human rights were at stake. The case concerned the transfer of Afghani detainees held by Canadian Forces abroad to Afghani authorities. The applicants sought various forms of declaratory relief, including a declaration that the Charter obliges Canadian forces to halt the transfer in situations that might expose the detainees to a substantial risk of torture, as this would be contrary to Canada's international human rights commitments. The Court held that while Canadian Forces can clearly exercise power beyond state borders, the Charter does not restrict them while operating abroad. It further clarified that the extraterritorial application of the Charter contemplated in *Khadr* could not apply to 'foreigners, with no attachment whatsoever to Canada or its laws'.<sup>98</sup> These cases suggest that while Canadian courts are willing to shift the border outside state soil, the Charter only follows where fundamental human rights are at stake *and* where these rights implicate individuals who have some attachment to Canada. In all likelihood, refugee claimants like John Doe would not be able to prove sufficient attachment in order to satisfy this requirement. Viewed together, these cases thus suggest that while the Canadian border can shift to extend state power abroad, it remains static to limit access to refugee rights and remedies.

Notably, the Supreme Court of Canada denied leave to appeal in both the Afghani transfer case and the STCA appeal. Both cases would have offered the Court the opportunity to establish clear criteria to guide lawmakers and government officials on the troubling question of how far

<sup>94</sup> *ibid*, at para 14.

<sup>95</sup> *Khadr* (2008), above n 92, at para 24; *Khadr* (2010), *ibid*, at para 16.

<sup>96</sup> *Canada v Khadr* (2010), above n 93, at para 16.

<sup>97</sup> *Amnesty International Canada v Canada (Chief of the Defense Staff)*, 2008 FCA 401.

<sup>98</sup> *Amnesty International Canada v Canada*, *ibid*, at para 14.

state power extends across borders. So long as these decisions stand as binding law, the problems and difficulties emerging from the simultaneous application of both the static and shifting border principles will no doubt persist, creating a legal landscape marked by immense uncertainty. This article demonstrates that the logical principles and rhetorical turns applied by legal actors in navigating this landscape are not without import. As Canada increasingly turns to strategies that shift borders and alter geographies, it becomes imperative to recognize that legal measures that shift the borders not only shift Canada's boundary line, but also alter the juridical relationship produced *by* that boundary, as well as the rights and duties it prescribes. If Canadian refugee law continues to determine refugee rights based on a claimant's status vis à vis state borders, it is necessary that it clarify precisely where these borders lie and recognize their changing locations. Canadian refugee law must further avoid the simultaneous application of shifting and static border principles where this application threatens to undo the very foundations of Canada's refugee protection regime. To do otherwise would not only risk undermining Canada's commitment to refugee protection, but would also risk closing Canada's borders to refugees.