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Canada—a Great Place to Ride out the Storm and Stay Awhile—or Stay for Good!

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This article is best described as a fact-based white paper, which seeks to be a report or guide to inform readers in a concise manner about a complex issue, and at the same time presents the author's views on the matter. We have tried to help advance understanding about an important issue of our time, to solve a challenge, and perhaps assist with a decision. The author is a certified specialist by the Law Society of Ontario on matters related to Immigration, Citizenship, and Refugee Law.

The COVID-19 pandemic has impacted every facet of our lives, from how we live to—for increasing numbers—where we live. Cross-border travel and immigration has significantly slowed in order to prevent, and control, the spread of COVID-19. The Canadian border remains closed to non-essential traffic until at least 21 August 2020. Despite the travel restrictions, the Canadian border is seeing an increase in Americans looking to enter—and, for many, to stay in—Canada, much like the increase in 2018 after President Donald Trump's election. The number of U.S. citizens granted permanent residency in Canada in 2019 was the third highest number—this century.[1] Current data from Canada Border Services shows that land border crossings from the United States are increasing. From 6 April to 12 April 2020 over 100,000 travelers entered Canada. During the same period in July, that number rose to 170,000 travelers.[2] Canadian immigration lawyers say they have seen double to triple the standard amount of inquiries from U.S. citizens looking to stay in or immigrate to Canada.[3] A quick glance at recent headlines may show why this comes as no surprise—Canada is uniquely situated to bring in "the brightest and the best from around the world." [4]

[1] Patrick Cain, "About 2,000 more Americans than normal have moved to Canada since Trump's election" (21 August 2018), online: *Global News* <<https://globalnews.ca/news/4396938/move-to-canada-donald-trump/>>.

[2] Kristen Robinson, "More Americans eye move to Canada as COVID-19 cases surge in U.S." (20 July 2020), online: *Global News* <<https://globalnews.ca/news/7195561/americans-immigration-canada-coronavirus/>>.

[3] Kristen Robinson, "More Americans eye move to Canada as COVID-19 cases surge in U.S." (20 July 2020), online: *Global News* <<https://globalnews.ca/news/7195561/americans-immigration-canada-coronavirus/>>.

[4] John Ibbitson & Darrell Bricker, "The coming baby bust", *The Globe and Mail* (8 August 2020) O1.

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The current situation may mirror that of when Americans flocked to the Canadian border during the Vietnam War, making up what has been called “the largest, best-educated group this country ever received.”[5] From 1965-1972 an estimated 40,000 U.S. military dodgers and deserters sought the protection, and freedoms, of Canada.[6] After an uptick in U.S. immigration and public pressure fueled by opposition to the Vietnam War, then Prime Minister Pierre Trudeau and his cabinet implemented an open door policy.[7]

Canadian Immigration policy gets its foundation primarily from the *Immigration and Refugee Protection Act*[8] although Canada is also party to agreements with other countries, the U.S. included. One such agreement is the *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*, commonly referred to as the *Safe Third Country Agreement* (“STCA”). The STCA was enacted in 2004, after the 9/11 terrorist attacks shook the world. Under the STCA, anyone who arrives at a Canadian land port-of-entry via the U.S. is ineligible to make a refugee claim in Canada unless they already have at least one close family member in Canada. Those arriving at a Canadian land port-of-entry via the United States without a close family member already in Canada are typically denied access to Canada’s generous refugee determination program. They are then sent back to the U.S., which had been designated a “safe third country.”

But in the 22 July 2020 landmark Federal Court decision in *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*[9], Justice Ann Marie McDonald determined that the STCA is unconstitutional because the U.S. can no longer be designated a “safe third country.” This ruling resulted after an assessment of compelling evidence about the incidence of U.S. detention of refugees awaiting a decision on their claims, combined with evidence about the appalling conditions of U.S. detention centres. Refugee claimants denied entry into Canada were sent back to U.S. detention centres where they were denied medical care, food, and human dignity. In finding a violation of the life, liberty, and security of the person rights contained in section 7 of the *Canadian Charter of Rights and Freedoms*[10], Justice McDonald wrote, “The evidence clearly demonstrates that those returned to the U.S. by Canadian officials are detained as a penalty.”[11]

[5] Giuseppe Valiante, “U.S. Vietnam war draft dodgers left their mark on Canada” (16 April 2015), online: *Maclean’s* <<https://www.macleans.ca/news/canada/u-s-vietnam-war-draft-dodgers-left-their-mark-on-canada/>>;

[6] Giuseppe Valiante, “U.S. Vietnam war draft dodgers left their mark on Canada” (16 April 2015), online: *Maclean’s* <<https://www.macleans.ca/news/canada/u-s-vietnam-war-draft-dodgers-left-their-mark-on-canada/>>.

[7] Luke Stewart, “‘Hell, they’re your problem, not ours’: Draft Dodgers, Military Deserters and Canada-United States Relations in the Vietnam War Era” (2018) 85 *Canadian Studies*; Renée Goldsmith Kasinsky, “The Continental Channeling of American Vietnam War Refugees” (1976) 6 *Crime and Social Justice* 28.

[8] SC 2001, c 27.

[9] 2020 FC 770.

[10] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[11] 2020 FC 770 at para 138.



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Justice McDonald is not the only one who has recognized that the U.S. is no longer safe. Two studies by the Brookings Institution and the University of California indicate that U.S. citizens recognize a lack of safety and feel the need to arm themselves should circumstances worsen.[12] Data from these studies demonstrate that Americans purchased an additional three million firearms from March 2020 to June 2020 in comparison to previous years. This upswing in gun sales was accompanied by a firearm violence increase of 8%.[13] These numbers may be driven by personal safety concerns amid anxiety and unease over the ongoing socio-political and pandemic crises.

As of this day, the U.S. has more than 5 million cases of COVID-19 with over 163,000 deaths while Canada has recorded 122,000 cases with 9,000 deaths.[14] Although the U.S. has a much larger population than does Canada, the U.S. currently has 149 daily new cases per million population, while Canada has only 17 daily new cases per million.[15] While Canadian COVID-19 cases remain relatively stable, U.S. COVID-19 cases continue to rise, and rise sharply. The rise in cases is cause for security concerns—both health and employment. Canadian job recovery has outpaced that of the U.S. The Canadian labour market has recovered about 55% of jobs lost, meanwhile the U.S has recouped only an estimated 42% of pandemic job losses.[16]

Economic conditions have led mortgage rates in Canada to drop to record lows, helping new home buyers and current homeowners.[17] There is a considerable and growing upswing in the residential real estate sector. Canadian data demonstrating a recovering oil price suggest an increase in automobile sales.[18]

[12] Christopher Ingraham, "Spike in violent crime follows rise in gun-buying amid social upheaval" (15 July 2020), online: *The Washington Post* <<https://www.washingtonpost.com/business/2020/07/15/gun-sales-jump-protests-coronavirus/>>.

[13] Christopher Ingraham, "Spike in violent crime follows rise in gun-buying amid social upheaval" (15 July 2020), online: *The Washington Post* <<https://www.washingtonpost.com/business/2020/07/15/gun-sales-jump-protests-coronavirus/>>.

[14] John Hopkins University & Medicine, "COVID-19 Dashboard by the Center for Systems Science and Engineering at John Hopkins" (11 August 2020) online: John Hopkins University & Medicine <<https://coronavirus.jhu.edu/map.html>>.

[15] Our World in Data, "Total and daily confirmed COVID-19 cases per million people" (11 August 2020), online: Our World in Data <<https://ourworldindata.org/grapher/total-daily-covid-cases-per-million?country=~CAN>>.

[16] Matt Lundy, "Economy adds jobs for third month", *The Globe and Mail* (8 August 2020) B1.

[17] Pete Evans, "How COVID-19 has changed Canada's economy for the worse — but also for the better" (23 June 2020), online: *CBC* <<https://www.cbc.ca/news/business/covid-economy-changes-1.5618734>>.

[18] Pete Evans, "How COVID-19 has changed Canada's economy for the worse — but also for the better" (23 June 2020), online: *CBC* <<https://www.cbc.ca/news/business/covid-economy-changes-1.5618734>>.



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Average wages in Canada were up 10.8% in April 2020 and online retail sales more than doubled in the same month.[19]

Also, the increase in online economic activity can be attributed to Canada's booming tech sector. Tech companies, like Ottawa's Shopify, the company fueling e-commerce around the world for stores and individuals alike, represent Canada's fastest growing sector and 5% of Canada's entire GDP. [20] An *Economist* magazine author wrote that, "What is in little doubt is that the COVID-19 crisis, which has turned so many people's lives upside down, will eventually produce a wealth of new business opportunities"[21], and Canadian tech companies are encouraging these opportunities—and also immigration.

The multi-cultural and multi-ethnic City of Toronto is now offering more technology jobs than the Cities of San Francisco, New York, and Seattle. [22] U.K. based tech investor, Entrepreneur First (which has raised U.S. \$500 million in venture capital) cited Canada's world-class university programs, research labs, and untapped talent potential as a reason for choosing Toronto for its North American headquarters.[23] The general manager of Entrepreneur First went so far as to say, "EF as a whole believes a disproportionate share of the next decade's big tech giants will actually be built in Canada." [24] And in the race to the top, Canadian tech companies are not afraid of poaching foreign talent. TechToronto, an organization that helps newcomers navigate the city's tech scene, has noted just how welcoming Canada's tech industry is for immigrants—especially when compared to the U.S.[25]

[19] CBC News, "Canada lost nearly 2 million jobs in April amid COVID-19 crisis: Statistics Canada" (8 May 2020), online: CBC <<https://www.cbc.ca/news/business/canada-jobs-april-1.5561001>> ; Pete Evans, "How COVID-19 has changed Canada's economy for the worse — but also for the better" (23 June 2020), online: CBC <<https://www.cbc.ca/news/business/covid-economy-changes-1.5618734>>.

[20] Pete Evans, "How COVID-19 has changed Canada's economy for the worse — but also for the better" (23 June 2020), online: CBC <<https://www.cbc.ca/news/business/covid-economy-changes-1.5618734>>.

[21] Brett Ryder, "Creative destruction in times of covid" (16 May 2020), online: *The Economist* <<https://www.economist.com/business/2020/05/16/creative-destruction-in-times-of-covid>>.

[22] Joel Rose, "Canada Wins, U.S. Loses In Global Fight For High-Tech Workers" (27 January 2020), online: NPR <<https://www.npr.org/2020/01/27/799402801/canada-wins-u-s-loses-in-global-fight-for-high-tech-workers>>.

[23] Yeji Jesse Lee, "U.K. tech investment fund chooses Canada for North American headquarters" (4 August 2020), online: *The Globe and Mail* <<https://www.theglobeandmail.com/business/article-uk-tech-investment-fund-chooses-canada-for-north-american/>>.

[24] Yeji Jesse Lee, "U.K. tech investment fund chooses Canada for North American headquarters" (4 August 2020), online: *The Globe and Mail* <<https://www.theglobeandmail.com/business/article-uk-tech-investment-fund-chooses-canada-for-north-american/>>.

[25] Joel Rose, "Canada Wins, U.S. Loses In Global Fight For High-Tech Workers" (27 January 2020), online: NPR <<https://www.npr.org/2020/01/27/799402801/canada-wins-u-s-loses-in-global-fight-for-high-tech-workers>>.



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After President Donald Trump suspended new work visas for immigrants, including the H-1B high-skill visa, Shopify vice-president Kaz Nejatian took to Twitter and invited foreigners to apply to Shopify and come to Canada. [26] While Nejatian questioned the wisdom of President Trump's decision, Canadian businesses may benefit from his executive order. In an *Ottawa Business Journal* article, both myself and Shopify CEO Tobi Lütke noted the upside of this executive order for Canadian employers and employees—real opportunity.[27]

In May of this year, Quebec Immigration Minister Simon Jolin-Barrette announced a pilot project to hire 550 orderlies from abroad to work in residential and long-term care centers. Federal Immigration Minister Marco Mendicino noted the important role that immigration plays in keeping Canada moving during the COVID-19 pandemic, yet he did not stop there when stating “immigration is fundamentally about people coming together to build a stronger country, and that is an enduring value that I believe in, that I have faith in Canadians that they believe in, that we will see endure long after COVID-19 is behind us.”[28] Former Immigration Minister and Ambassador to China John McCallum also shared this sentiment and expressed COVID-19's temporary immigration pause when saying “The Canadian government remains extremely positive about continuing high levels of immigration.”[29]

Much like its predecessor *NAFTA*, the newly ratified *United States, Mexico and Canada Agreement (USMCA)* supports immigration into Canada. The *USMCA* places no limits on the number of times eligible professionals and businesspersons may renew their status in Canada. In addition, Chapter 16 of the *USMCA* allows eligible workers facilitated entry to Canada without their employer needing to first obtain a Labour Market Impact Assessment. There are three Canadian immigration programs that support immigration under *USMCA*: 1) Express Entry, 2) the Global Talent Stream, and 3) the Provincial Nominee Programs.

Express Entry is an online system that allows skilled workers to submit applications for permanent residency.

[26] Financial Post, “Canada is awesome’: Shopify moves to poach foreign talent blocked by Trump's immigrant visa ban” (23 June 2020), online: *Financial Post* <<https://financialpost.com/technology/shopify-poach-foreign-talent-blocked-trump-immigrant-visa-ban>>; Also worth noting, a Canadian company called MobSquad opens virtual subsidiaries for US tech companies unable to hire international tech workers due to visa restrictions and rejection.

[27] David Sali, “Trump's visa ban could be boost for talent-hungry Ottawa firms, immigration lawyer says” (25 June 2020), online: *Ottawa Business Journal* <<https://obj.ca/article/trumps-visa-ban-could-be-boost-talent-hungry-ottawa-firms-immigration-lawyer-says>>.

[28] Stephanie Levitz, “Canada will need newcomers after coronavirus pandemic, immigration minister says” (15 May 2020), online: *Global News* <<https://globalnews.ca/news/6949767/immigration-coronavirus-canada/>>.

[29] Nathan Vanderklippe, “Canada's troubles with China are only temporary, says former ambassador: ‘Chinese people and Canadian people are good friends’” (29 July 2020), online: *The Globe and Mail* <www.theglobeandmail.com>.



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In 2015, 600 U.S. residents immigrated via Express Entry. In 2019 that number rose to 10,000.[30] That figure will likely rise again given the uncertainty surrounding both U.S. immigration and U.S. stability. Skilled workers from the U.S. have a competitive edge in Canada because they are typically fluent in English and have high levels of education and work experience.[31]

The Global Talent Stream launched in 2017. This program allows skilled workers to obtain a Canadian work permit within two weeks (often much less) after obtaining a Labour Market Impact Assessment approval (which is also fast-tracked). This immigration stream is lauded in the tech sector and remains open during the COVID-19 pandemic.[32]

Provincial Nominee Programs allow Canadian provinces and territories to nominate individuals who wish to immigrate to a particular province. Each province has a unique program with immigration streams that target certain groups such as students, skilled workers and semi-skilled workers.[33] These programs get their power from the nature of the Canadian constitution and the fact that immigration remains part of both federal and provincial jurisdictions.

If the increase in U.S. inquiries regarding both Canadian citizenship and permanent resident status demonstrates anything, it is that the current differences between life in the U.S. and Canada are motivating migration. One system prides protectionism and fear, the other collaboration and acceptance. While the U.S. displays a “Don’t Trespass!” sign, Canada’s welcome mat benefits from rising nativism elsewhere. It goes without saying that Canada remains a safe haven and a welcoming place where people can ride out the pandemic, and other socio-political storms—with hope. The question is, do you feel hopeful?

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Are you looking to make the move? Do you have any questions about immigrating to Canada?

Please contact **Warren Creates**, head of immigration at *Perley-Robertson, Hill & McDougall LLP/srl* at **(613)238-2022** and/or **wcreates@perlaw.ca**.

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[30] Kareem El-Assal, “U.S. immigration to Canada is skyrocketing” (4 July 2020), online: *CIC News* <<https://www.cicnews.com/2020/07/u-s-immigration-to-canada-is-skyrocketing-0714940.html#gs.c14f4f>>.

[31] Government of Canada, “How Express Entry Works” (12 August 2019), online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-anada/express-entry/works.html>>.

[32] Government of Canada, “Program requirements for the Global Talent Stream” (13 March 2020), online: Government of Canada <<https://www.canada.ca/en/employment-social-development/services/foreign-workers/global-talent/requirements.html>>.

[33] Government of Canada, “How the Provincial Nominee Program (PNP) works” (3 March 2019), online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/provincial-nominees/works.html>>.

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