
January 2004

Border Infrastructure: Getting to Yes on Bridges, Tunnels, Roads and Rail: Customs and Immigration Challenges Proceedings of the Canada-United States Law Institute Conference on Multiple Actors in Canada-U.S. Relations: Border Infrastructure: Getting to Y

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Recommended Citation

James D. Phillips, *Border Infrastructure: Getting to Yes on Bridges, Tunnels, Roads and Rail: Customs and Immigration Challenges Proceedings of the Canada-United States Law Institute Conference on Multiple Actors in Canada-U.S. Relations: Border Infrastructure: Getting to Y*, 30 Can.-U.S. L.J. 93 (2004)
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BORDER INFRASTRUCTURE: GETTING TO 'YES' ON BRIDGES, TUNNELS, ROADS AND RAIL: CUSTOMS AND IMMIGRATION CHALLENGES

James D. Phillips[†]
U.S. Speaker

Rocco, thank you for the very kind introduction. I also want to thank Henry for having me here today and Jonathon Fried for recommending me to Henry some months ago.

As a quick aside, two weeks ago last night, I was speaking at Washington, D.C. at Deputy Commissioner Doug Browning of U.S. Custom Border Protections retirement party. Doug and I worked together for many years. He knew I was coming here this weekend and said to me he particularly wanted me to bring his greetings and fond memories from last year when he was a speaker here among you and he enjoyed himself so well.

I would be remiss not to mention my colleague, Don McRae, who he and I five years ago at the Redding Symposium at Bowling Green, he was speaking on salmon and I was speaking on the border, and I remember the salmon outlook was rather difficult at the time, and since then the good news is that

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Don was very instrumental in solving the salmon dispute and it is gone forward.

I also would be remiss, Allan Cocksedge, who is a partner of mine in consulting on my board, and a very fine ex-representative of Canadian government and very effective individual, is with us again today. He was also Doug Browning's co-speaker last year, so, Allan, we recognize you and appreciate you being here.

I brought a little levity to start. Those of you in the legal profession would appreciate some of things you will see here in a minute. Either a lot of us heard the story about travel delays, or we have travel delays. Therefore, I have an interesting anecdote.

This is an afternoon in Africa a little regional jet was to depart. When the passengers went to leave the building to go aboard the plane, when they were told there was a delay for "circumstances beyond the airline's control." Apparently, a group of lions had congregated under wing of the plane as it provided the only shade around Mt. Kilimanjaro. I think that this is indicative as to why some travelers face such long delays. No intelligent traveler is going to board an airplane when he or she has to walk past a herd of lions.

While humorous, this example provides brief insight into the challenges that face modern travelers in an increasingly shrinking world. I am going to give you a wide overview in a brief period. I am going to explain the concept of perimeter clearance and explain its potential and limitations.

I would like to examine the border situation, by bringing some real world realities from the U.S. perspective.

This is year, 2003, the U.S. inspected 264 million aliens.¹ They found 680,000 inadmissible when they came to the consulates and other places.² They found 398,000 that were refused entry at the border, who then somehow got to our physical borders and were not admissible into the country.³ Further, they removed expeditiously 51,000 individuals in 2003.⁴ There were 72,000 cases of fraudulent documents that were presented at our borders.⁵ Almost 14,000 people claimed they were U.S. citizens and they were not and had paperwork showing they were U.S. citizens.⁶

Another issue is the number of intercepts at the border. An example of an intercept is stopping fathers at the border who were not paying child support, people have taken their children, or people wanted for any kind of a civil or

¹ Press Release, The U.S. Department of Homeland Security, Tight Security, Technology, and Manpower Result in One Million Apprehensions of People Seeking to Illegally Enter the U.S. in 2003 (Jan 14, 2004).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

criminal crime. Over 315,000 individuals were picked up at our borders in 2003. We arrested over 17,000 criminal aliens at the border.⁷ These are criminal aliens from all over the world.

More importantly, what you have not read about, 483 terrorists and serious security violators were picked up and identified at our U.S. borders in 2003.⁸

Finally, 932,000 border patrol apprehensions, mostly people crossing from Mexico.⁹ I think we are catching one in three.

In reference to transborder pharmaceuticals, of all the medicines coming into the United States, 15 percent have no active ingredients.¹⁰ Vioxx for arthritis and Nexium for reflux disease are two of the high profile prescription drugs that have zero active ingredients by those that are trying to ship into the United States under their trade names. Thirty percent of the total drugs and medicines coming into the United States are found to be illegal controlled narcotics.¹¹

There is a minimum of 10 million illegal immigrants living in the United States today.¹² That would be 1 in 3 Canadians, if you stop to think about the prerogative. If you look around, the person on your left or right are Canadians, one of you is illegal. That is a big problem. This may provide insight into why the U.S. is a little bit more interested in security.

We have a problem with people trying to get in the U.S. The Third Country Safe Agreement,¹³ which I hope will be finalized and become a reality, will harmonize our various visa requirements. South Korea has presented a big problem for the United States, but not Canada. More South Koreans are trying to get into the states from Canada.

There is a great deal of discussion on security checks at the border. Last year we confiscated 1,600 guns¹⁴ and 3 million knives.¹⁵ Border guards counted my pointed toenail scissors as a knife; they got my toenail scissors. On the next trip, I had them in a suitcase, yet I lost them anyway. The more concerning figure, which I can provide, and you are probably not aware of this, is that 5,700 incendiary devices were taken from passengers trying to

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *The Senate Comm. On Judiciary* (2004) (Statement of Mr. William Hubbard Associate Commissioner for Policy and Planning U.S. Food and Drug Administration).

¹¹ Amanda Spake, *Fake Drugs, Real Worries*, U.S. NEWS, Sept 20, 2004, at 46.

¹² Dianne Solis & Ernesto Londono, *Immigrants Clean Up U.S. Janitors' Wages Have Decreased Since the 1980s*, AUGUSTA CHRON., Jan. 25, 2004, at F01.

¹³ Available at: <http://www.cic.gc.ca/english/policy/safe-third.html> (last visited Sept. 28, 2004).

¹⁴ Leslie Miller, *Feds Hike Fines on Weapons in Luggage*, CHICAGO SUN TIMES, February 20, 2004, at 52.

¹⁵ *Id.*

cross the border.¹⁶ Incendiary devices are everything from hand grenades, which have been found, down to flammable things that should not be carried.

I do not decry or complain about it, but there is need for some very serious reviews. I just thought I would share some of those overarching statistics. I personally serve on Bringing Order to the Border, which has been a four-year old initiative between Michigan and Ontario. I serve on the Stakeholder Advisory Committee of the New Binational Windsor/Detroit Crossing. I serve on the I-94 Detroit/Chicago Steering Committee¹⁷, and I served on the board of the Peace Bridge Authority¹⁸ when we approved the twin bridge in 1997. Currently, they are no closer today to building the twin bridge than they were in 1997. I often said "Put a 400 foot steel tower between the bridges, hang the cables off it, make it look nice and don't get involved with the bridge design."

CLASSIC INFRASTRUCTURE

The Blue Water Bridge is done.¹⁹ It has a twin six lanes. Plaza upgrades on the Michigan side remain. Once that is done, it will be completed. Essentially, it has succeeded, as we have traffic streaming. It extends from 402 to the Blue Water. It has six lanes on twin bridges with a center lane committed in each direction to FAST trucks, NEXUS cars and low risk people. Those center lanes go right up the highway, getting right through the primary and over the bridge and to the booth. Nevertheless, we have to get the vehicle to the booth, not just have a dedicated lane.

The Queenston Bridge is putting a fifth lane on their bridge starting about a year from now. It is going to be a dedicated center lane for FAST trucks and NEXUS cars entering the United States, and you will not have to stop with others.²⁰ The Peace Bridge, the Ambassador Bridge and the Detroit Tunnel are making incremental improvements in plaza design, adding truck booths, making a piecemeal approach.

On the Detroit/Windsor, a new crossing study, has established that there will be a determination of which crossing of the five candidates will be se-

¹⁶ *Id.*

¹⁷ See http://www.semco.org/TranPlan/BorderCrossings/ita/ita_successes.html (last visited Sept. 28, 2004).

¹⁸ The Peace Bridge Authority, available at: <http://www.peacebridge.com/> (last visited Oct. 24, 2004).

¹⁹ U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAYS ASSOCIATION, U.S.-CANADA BORDER TRANSPORTATION PLANNING, "BRINGING ORDER TO THE BORDER" available at: http://www.fhwa.dot.gov/usCanada-data/data_bank_sum/ (last visited Oct. 24, 2004).

²⁰ Press Release, Niagara Falls Bridge Commission, Bridge Commission Provides Expanded Inspection Capability into U.S. (Aug. 13, 2004) (on file with Niagara Falls Bridge Commission).

lected in 2007. Construction will begin in 2010 with an optimistic completion date of 2013, provided there are no law suits or other problems. While this is a long-term plan, there is a need for a crossing in Detroit/Windsor.

Optimistically, the Peace Bridge will be completed at the earliest in 2011.

FIVE ELEMENTS TO THE BORDER

There are five critical elements to the border. First, road approach must be considered. There are only two lanes on the highway coming up to it, no matter how many lanes exist, no matter how big the plaza is, generally, there are only two highway lanes leading to the northern border.

The second element is plaza design. Issues to be addressed include the number of booths, the size, and the layout.

Process constraints are another element. The managing organizations, the management constraints, and the process constraints are part of the process constraint element. The question then becomes, "Do we have enough staff and do we have the right processes?"

The fourth element is the actual bridge or tunnel lanes and the capacity of the actual crossing. That issue is limited to Michigan and New York, because nowhere else is crossing water a factor. In the east, there are highway crossings from Champlain on the east side of New York all the way almost to Maine. In the west, there are numerous crossings, mostly on highways. These crossings, of course, are a little easier to address than crossing water.

The final element is threat conditions. I submit that in next six or eight months delays at the Michigan and New York crossings from Ontario will be caused more by hydroponic marijuana, ecstasy problems, and human smuggling than any other factors. In the last month, inspectors have encountered a couple of cases of live people in empty hopper cars coming from Canada.

There are some of threats that we have to be aware of that are going to impede some things we are doing this summer. Of course, there are the interim infrastructure initiatives by Infrastructure Canada. These initiatives have been very positive, although Windsor and Detroit have experienced some backup as a result. Regardless, other regions of the country from Quebec to B.C. have benefited greatly from the highway improvements, the Peace Arch, the Peck Highway and other crossings enhancements.

The bottom line is that the whole process takes an awful long time. There are paradigm shifts that are occurring at the border, and that is what by other names is beginning to happen. I intend to establish a reality of how far forward we are and how tied in that dirty word "perimeter clearance" Ottawa is.

Approximately four years ago, somebody went to the Prime Minister in a session and said to him, "There is a perimeter creating one North American area, no borders, one customs union, one set of rules. You have to do every-

thing the way the Americans do it or it will not work.” The Prime Minister absolutely shut it off. You could not even talk perimeter for a long period.

PERIMETER CLEARANCE STRATEGIES

I am going to lay it out to you today, what can be called the “Seamless Canada-U.S. Border for Normal Risk,” or it can be called “Push Out the Border.”

This perimeter clearance strategy is around the United States and Canada. There are many reasons why Mexico had a different timetable and will be accorded any benefits that we learned between the U.S. and Canada.

I would like to give a background for this coalition. It was designed in 2000. It was presented to the Federal governments on October 1, 2001.²¹ It was proposed as a road map for key decisions on how to commence really achieving a low risk border. It was presented to both the Canadian and U.S. government officials in October of 2001. We called it the “Perimeter Clearance Strategy.” However, Ottawa appears to be allergic to the word now.

The current concept is that safe, trusted goods or people are identified, preferably before they come, and they are appropriately moved out of the border area expeditiously; leaving the unknown and high risk for real scrutiny and attention coupled with risk management, intelligence and automated technology. In essence, perimeter clearance is the vision to work together, strengthen the externals and expedite low risk in between.

The key concepts are information, pre-screening, biometric, automated, and entry/exit process integration.

What does it need? Perimeter security, perimeter clearance and goods, economic security through expedited low risk cross-border travel.

To clarify, the clearance of goods at first point of arrival was prevalent in 2000-2001. The minimum requirement was, for example, that if a container comes to Montreal, it is going to Chicago. You have to deal with it in Chicago.

Now, we are able to go offshore, this is traffic streaming. Cars and trucks can be identified based on how they come into the border. The reform is that cars will be directed into the left lane as they are now. You want all low risk trucks going with them to the crossing. Only the unprepared trucks are in the right lane anymore. There is FAST for low risk trucks, and NEXUS for cars. U.S. Customs would staff all available booths. The booths would be open in peak periods so regular cars would not up onto the highway. Over time, it will be possible to travel through in six seconds without stopping the NEXUS.

²¹ Courtney Tower, *The Perimeter Approach*, J. OF COMMERCE, October 29, 2001.

If I were you, I would join now because in the United States if you are NEXUS, \$80 Canadian and \$50 U.S.,²² five years, you are a low risk traveler, you are going to be excluded from anything that happens with entry/exit U.S. visit. A NEXUS person and a FAST goods truck are excluded from any delays caused by further problems, including a high threat alert.

Case studies show, for instance, if we put NEXUS into operation and we do the expediting of the perimeter, large amounts of gasoline will be saved. Environmental discharge is down over 50 percent by saving all kinds of money.²³

You have layered cargo seals. You have in bond air. You have in transit seals. It is all pieces today that have begun.

In quick summary, I will tell you where they begun. Gamma-ray VACISes are in place now. Sarnia and Windsor are getting U.S. VACIS machines on the Canadian side. We had a lot to do with that. This is how goods flow worked before and with perimeter.

You hear NEXUS air is coming. The pilots are at Vancouver now. NEXUS road is operational and will be operational by August in one database so I can use my card out of Peace Arch, Cascadia. Paul can use his card in Detroit when he visits. This is how passengers flow. They are all in your packet.

Passenger flow is how they work before and after, the various differences, key benefits and challenges, it is better for you to read it. Passenger travel benefits, less construction airports. We use kiosks instead of security lines.

A smart border is extremely critical. Allan Cocksedge is one of the authors of the Shared Border Accord '95.²⁴ I got into it about a week afterwards. Can Am has been in it up to its ears. The Smart Border Accord of December of 2001²⁵ was possible because the shared border, things that had been determined between Canada and U.S. by the operating units that did not have the political will to go anywhere were brought quickly forward, boom, boom, boom, except for the eight law enforcement points. This is where we were about six months ago, in order to do perimeter clearance, these are the steps that have to be taken, who has to do it, and the blue boxes are how far we are on board to get this job done. So were a lot closer to doing that.

²² Available at: <http://www.cbsa-asfc.gc.ca/travel/nexus/faq-e.html#7> (last visited Oct. 24, 2004).

²³ See http://uscis.gov/graphics/shared/lawenfor/bmgmt/inspect/DMIAConRpt_Ch3.pdf (last visited Oct. 6, 2004).

²⁴ Canada-United States Accord on Our Shared Border, Feb. 25, 1995.

²⁵ Declaration available at: <http://www.canadianembassy.org/border/declaration-en.asp> (last visited Oct. 24, 2004) and 30 point plan available at: <http://www.canadianembassy.org/border/actionplan-en.asp> (last visited Oct. 24, 2004).

The integration, this is the key integration, coordination and partnership with industry. These are the 400 organizations that undertook the development of the system and those are the consultants that did the design.

In closing, I want to tell you as I say under a name of a different name, smart border, smart box; you are all familiar with the term smart box. It is been announced last November by Commissioner Bonner, CSI, which is called Container Security Initiative, which says we will put inspectors offshore. All containers coming to the United States and Canada will go through risk management. Those that need to be VACISed, will be VACISed at the origin point in Hamburg, Singapore, Hong Kong, wherever. The container then is going to be sealed as a smart box, three levels of seal, physical seal, a GPS positioner, and a light sensitive seal, so nobody can drill a hole in the side. As soon as the light hits the inside, it goes off. That is all part of the smart box.

Commission Robert Bonner has put that as a high priority. Senator Kay Bailey Hutchinson last week introduced a bill in the Senate that smart box technology would become mandatory.²⁶ Secondly, more officers would be assigned to the originating ports, other than the ones that we have at some nineteen ports.

On March 1, Commissioner Bonner announced Immigrations Security Initiative.²⁷ We are beginning to send customs and border protection officers to France and look at all the people coming out of Orly airport before they get on a plane. Canada has been doing this for two or three years. Over 40,000 inadmissible people have been caught by Canadian inspectors.²⁸ Remarkably, this was accomplished by a mere 45 officers of Canadian services.

The U.S. thought this was great, and the U.S. homeland has agreed to do it. It is part of all this stuff that was in there. Therefore, that is essentially where we are. It is well forward, and I will quit there.

²⁶ S 2297, 108th Cong. (2004).

²⁷ Summary available at: http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp108&r_n=hr541.108&sel=TOC_84693& (last visited Oct. 24, 2004).

²⁸ Deputy Prime Minister & Minister of Public Safety and Emergency Preparedness, Anne McLellan, Speech to Canadian Club of Ottawa, available at: http://www.psepc-sppcc.gc.ca/publications/speeches/20040325_e.asp (last visited Sept. 30, 2004).