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THE NEW REALITY IN CANADA/U.S. RELATIONS: RECONCILING SECURITY AND ECONOMIC INTERESTS AND THE “SMART BORDER DECLARATION”

Robert Hage[†]
Canadian Speaker

Thank you very much. For those of you who do not follow Canada politics, John Manley was declaring his intention to run as the leader of the Liberal Party and to replace the current Prime Minister.¹ So he has, obviously, got other things on his mind these days as well as being Prime Minister and Finance Minister in his leadership campaign.

A few weeks ago I was in Strasbourg, France for a meeting of legal advisors for the Council of Europe. I returned to Canada via Frankfurt and took a bus from Strasbourg to Frankfurt. At one point we had passed a number of abandoned looking buildings. I was sort of curious as to what they were and I looked out the window and there was one of those European Union signs that said Deutschland. We just crossed the France/Germany border. I wondered at the time how much blood had been shed over the centuries defending that border for all intents and purposes for goods and people that have now disappeared. I thought as well, thinking of this conference, how over the years the Canada and U.S. borders have been, in our minds, I think very different.

SECURITY AND THE CANADA-U.S. BORDER

In his masterful book, “Diplomacy,” Henry Kissinger notes one reason the United States has grown so powerful is because of its friendly neighbors. Americans have not had to worry about defending themselves on their

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¹ John Manley Officially Launches bid for Liberal Leadership, Address in Ottawa, Canada (April 10, 2003), *available at* www.johnmanley.ca/en/news_media/speech_apr10.pdf

borders. Since the still famous Caroline case in 1837², I'm not aware of any military incursions across what we still like to call the longest undefended border in the world.

In a recent speech, the U.S. Ambassador in Ottawa, Ambassador Cellucci, referred to Canadians as part of the family.³ Now, his speech had another context that I won't get into, but that reference was all too true for millions of Canadians, including myself. My own grandfather immigrated to Europe from the United States where he married my grandmother who remained an American and a diehard Republican all her life. Years ago, I worked for our Ambassador in Washington who was a French Canadian who always felt very much at home in the United States. You might not know that almost one million French Canadians immigrated to the United States in the 19th and early 20th centuries seeking better economic conditions.⁴ Like me and millions of others crossing the border to visit family and friends on the other side, it was an everyday occurrence. Did we take the border for granted? You bet we did. How things have changed? For the first time in 30 years of foreign service, I purchased a regular blue Canadian passport for personal travel. I purchased it to go to the United States.

² Thomas Graham, Jr., *National Self-Defense, International Law and Weapons of Mass Destruction*, 4 Chi. J. Int'l L. 1 at 6 (2003); *Also see* Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. Rich. L. Rev. 751 at 771. The Caroline case refers to a failed rebellion outside of Toronto in December 1837 in which British colonial forces in Canada boarded and destroyed a private American vessel being used to deliver personnel and arms to a separatist rebel force intended to invade Canada. During the raid, Canadian troops crossed the United States border without American consent to attack rebels in New York. This failed rebellion led to what has come to be known as the Caroline Doctrine developed in 1842 by then Secretary of State Daniel Webster establishing the customary right of self-defense, allowing a state to resort to "necessary and proportional acts of self-defense against aggression if such acts arise out of an instant and overwhelming necessity, leaving no choice of means, and no moment of deliberation."

³ U.S. Ambassador to Canada A. Paul Cellucci Address to the Economic Club of Toronto, (March 25, 2003), *available at* www.usembassycanada.gov/content/content.asp?section=embconsul&document=cellucci_030325

⁴ The largest group of French Canadians to migrate to the U.S. over a two year time period is 1.5 million people. Canadian immigration to the United States peaked in the 1920's when more than 900,000 people crossed the boarder. *See History of French Canadians in Connecticut*, TRINITY COLLEGE, *available at* www.trincoll.edu/prog/ctpeople/FCanadians/history.htm; *Attributing reason for large numbers of French Canadians venturing to the U.S. as simply being in search of making a living to support their family and themselves which they were able to do by working in the textile mills. See Interview with Phillippe Lemay, a French Canadian Textile Worker, Reported by Louis Pare, AMERICAN LIFE HISTORIES: MANUSCRIPTS FROM THE FEDERAL WRITERS' PROJECT, 1936-1940, NEW HAMPSHIRE FEDERAL WRITERS' PROJECT #1801, LIBRARY OF CONGRESS, available at* <http://memory.loc.gov/ammem/ndlpedu/features/timeline/riseind/immgnnts/textile.html>

IMPACT OF SEPTEMBER 11TH

September 11th has changed many things. The Canada/U.S. border relationship was certainly one among them. I'd like to take a few minutes to look back on September 11th and even before then to review where we were, where we are now, and why I think the Canadian/U.S. border relationship has been strengthened. My objective is to demonstrate that action on the border was needed before 9-11. Secondly, Canadian prosperity and security are inextricably linked. And, third, in this case, in addressing both sets of issues, Canada and the U.S. have emerged stronger partners, even before September the 11th, and I think Henry was alluding to this, it was clear to the private sector and to many officials on both sides of the border that a dubbing of our trade⁵ since the signing of NAFTA⁶ was putting an incredible strain on the border.⁷ There were infrastructure shortfalls; there were growing volumes of commercial vehicles and people, inadequate resources and a propensity to focus on enforcement rather than facilitation. All of this was starting to have a significant downward economic toll. Unfortunately, there was little political will on either side of the border to act or to spend the kind of money that was needed to significantly address those issues. September 11th changed all that;⁸ in large part, by exposing vulnerabilities in both Canada and the United States.

⁵ Since 1994, the total volume of trade between the three NAFTA parties has expanded from US\$297 billion to US\$676 billion in 2000, an increase of 128 percent. Each day the NAFTA parties conduct nearly US \$1.8 billion in trilateral trade. *See NAFTA At Seven, Building on a North American Partnership*, United States Trade Representative Website, July 2001, available at www.ustr.gov/naftareport/nafta7_brochure-eng.pdf; The increase in Canadian transactions with the U.S. in 1999 was more than fifteen times total commerce with China or twice that with the European Union. Marcus Gleisser, *Former Ambassador Praises U.S.-Canada Trade Relations*, THE PLAIN DEALER, Apr. 15, 2000, at 3C, available at 2000 WL 5143151.

⁶ NAFTA is a trilateral agreement between the United States, Canada, and Mexico designed to increase the trade and economic competitiveness of North America in the world economy by eliminating trade barriers, promoting fair competition, increasing investment opportunities in the territories of the treaty parties, and creating procedures for dispute resolution. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.- U.S., 32 I.L.M. 605 (1993), (entered into force Jan. 1, 1993)[hereinafter NAFTA].

⁷ "Maintaining current border facilities results in a growing financial burden while the strain on border facilities impedes economic growth on both sides of the border." *See Committee III: Transborder Issues, Border Facilitation*, 41ST ANNUAL MEETING OF THE CANADA-UNITED STATES INTER-PARLIAMENTARY GROUP, (2000), available at www.parl.gc.ca/information/InterParl/Associations/U_S/mai00/page30-e.htm

⁸ "The tragic events in New York City on 11 September 2001 spawned, among many things, an immediate crisis at border crossings between Canada and the United States. Greatly heightened security regarding inbound and outbound traffic created unacceptable delays for the delivery of goods on both sides of the border, a problem particularly crucial for companies

In the United States, Americans were attacked on their soil for the first time since the Civil War. There was a never before felt vulnerability and a determination to deal with the threat and to focus on the protection of the homeland. At the same time, September 11th brought into stark relief how interdependent our countries are and vulnerable Canadian prosperity was to the plausibility of closing the border. In those first few terrible hours after the World Trade Center went down, U.S. leaders cast a vote for ways to reassure their population that they were being protected against further terrorist attacks.⁹ One reaction was to virtually shut down the border and posting level one security alert, 100 percent inspection of all people and goods.¹⁰

Most of us have a pretty good sense of the importance of the cross border trade, but it is worth citing, yet again, a few of the statistics in order to explain while virtually shutting down the border was as big of a threat to Canadian sovereignty as the terrorist act themselves. You have probably heard two billion dollars Canadian a day in two-way trade.¹¹ We are each other's biggest export designations by far. Eighty-six percent of merchandise trade from Canada goes to the United States and 23 percent of American trade goes to Canada.¹² Thirty-five percent of Canadian Gross Domestic Product (GDP) is dependent on trade with the United States. Fifty thousand people cross the border every day; and this is the statistic that I find so overwhelming, 200 million border crossings by people every year.¹³ In the

dependent on 'just-in-time' delivery." *Committee III: Transborder Issues, Border Facilitation*, 43ST ANNUAL MEETING OF THE CANADA-UNITED STATES INTER-PARLIAMENTARY GROUP (2002), available at www.parl.gc.ca/information/InterParl/Associations/U_S/Newport/page08-e.htm#sect20

⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism [Hereinafter Patriot Act], PUB. L. 56, 107th Congress, 1st session, October 26, 2001; *Also see* Critical Infrastructures Protection Act of 2001, PUB.L. 107-56, Title X, § 1016, Oct. 26, 2001, 115 Stat. 400; *Also see* International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, PUB.L. 107-56, Title III, Oct. 26, 2001, 115 Stat. 296.

¹⁰ The USA Patriot Act of 2001, PUB.L. 56, 107th Congress, 1st session, October 26, 2001, Title IV – Protecting the Border, §§ 401-508.

¹¹ U.S. Commercial Service, *Canada-U.S Trade Relationship*, available at www.buyusa.gov/canada/en/page33.html

¹² *Id.*; Canadian Embassy, *Trade and the Economy: The World's Largest Economic Partnership*, available at www.canadianembassy.org/trade/index-en.asp

¹³ Siobhan Gorman, *A Nation without Borders*, 48 NAT'L J., (2001), available at 2001 WL 25926435 (reporting more than 200 million border crossings occurred in 1999 at 132 legal border-crossing points).

post-NAFTA 90's, Canada-U.S. trade has grown by 11 percent per year.¹⁴ Thirty-eight states have Canada as their biggest export market.¹⁵

Windsor/Detroit handles more trade than any other port of entry in the world.¹⁶ On September 11th, border trade was suddenly backed up as far as 30 kilometers. You might have seen those pictures from the Economist that we hated. I think they used the picture of that long, long border lineup at the Windsor/Detroit crossing in several issues.¹⁷ Tourism dried out, food rotted in trucks. Delays wrecked havoc on delivery schedules, auto plants closed as far south as Georgia. Companies like Toyota began wondering if they made a mistake in investing in Canada if the border was going to be closed,¹⁸ something that has concerned us since NAFTA.

In retrospect, it is something of a miracle how quickly our two governments changed gears and brought order out of chaos.¹⁹ The inextricable link between security and facilitating trade became obvious. Without assurances that security issues were being addressed, opening the border was out of the question. At the same time, there was an early recognition on both sides of the border that we live in an open, free society, that depends on trade, and that if September 11th was successful in shutting down the border, the terrorists have won.²⁰ This led quickly to a common realization that cooperation and risk management are the only ways to deal with threats along the five thousand kilometer border.

We know from the U.S. experience with the southern border that no matter how many resources you throw at a border or how many walls you throw up, closing a border to illegal goods and people is not possible. Therefore, our common focus shifted to high risk. The tiny percentage of trade and travelers that threatened our mutual security and to let Chrysler, G.M., Ford and their goods, which cross hundreds of times per day, and

¹⁴ United States Trade Representative, *NAFTA: 5 Years Report*, Introduction, available at www.ustr.gov/naftareport/building.htm (announcing total U.S. exports to NAFTA Canada and Mexico grew at an average annual rate of 11 percent).

¹⁵ Christopher Sands, *Integration: Process, Condition, or Doctrine?*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, NORTH AMERICAN INTEGRATION MONITOR, Vol. 1 Issue 1, July 2002, available at www.csis.org/americas/canada/naim/0207.pdf

¹⁶ Windsor & District Chamber of Commerce, *Transportation Policy Statement 2002*, at 4, Nov. 25, 2002, available at www.windsorchamber.org/PDFfiles/Transportation%20Policy%20Statement%202002.pdf

¹⁷ *Taking Stock*, THE ECONOMIST, Sept. 22, 2001, available at 2001 WL 7320465.

¹⁸ *Border Issues - Impact of Sept 11 on the Canadian Auto Industry*, NEWSLETTER OF THE JAPAN AUTOMOBILE ASSOCIATION OF CANADA, at 3 Fall 2001 available at www.jama.ca/default.htm?/aq/2001/fall.htm

¹⁹ *Canada-U.S. Border Crime and Security Operation*, Canadian Embassy, available at www.canadianembassy.org/border/crime-en.asp

²⁰ Canadian Minister of National Revenue Martin Cauchon Address at the 2001 Trade Corridor Conference, Flint, Michigan (Oct. 22, 2001), available at www.ccra-adrc.gc.ca/newsroom/speeches/2001/oct/flint-e.html

people posing no threat, cross as quickly as possible. The Canadian government passed the Anti-terrorism Act and invested seven billion dollars in new security spending.²¹ On other significant measures, they included money for infrastructure, tightening of money laundering legislation, provisions to list terrorists and more front end screening of potential refugees.

CHANGES IN BORDER STANDARDS

The two governments then focused on the border. Two months of work and intensive negotiations resulted in the December 12th, 2001, Smart Border Declaration.²² It had a 30-point action plan based on four pillars.²³ First, to secure the flow of goods. Secondly, to secure the flow of people. Third, to safeguard our shared infrastructure. Fourth, coordination and information sharing.

A key point for Canadians worried about their sovereignty. If you know Canadians, that is something we are often worried about. Exactly the reason the Declaration was drafted in Canada and presented to the United States. We were more focused on the linkage between prosperity and security, because our trade with the United States means more for Canada in economic terms than vice versa.

Much work remains to be done, but let me quickly highlight some of the accomplishments under the Border Action Accord.²⁴ We assigned customs personnel to prescreen containers arriving at each other's key ports. This is what Steve was talking about. It is underway now. Developing common standards on biometric identifiers. We are sharing passenger information on high-risk travelers arriving in each country. We are doing modeling of computer simulation to ensure that border infrastructure improvements are as effective as possible. We are expanding the number of our integrated border enforcement teams right across the country. Why not look at the Great Lakes? We are working cooperatively with ports and airports abroad. We signed a Safe Third Agreement to address the issue of thousands of refugees that enter Canada through the United States every year.²⁵ We opened

²¹ Anti-terrorism Act, 2001, c. 41, available at <http://laws.justice.gc.ca/en/A-11.7/>

²² *Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North America Zone of Confidence*, Canadian Embassy, available at www.canadianembassy.org/border/declaration-en.asp

²³ *Id.*

²⁴ *U.S. - Canada Smart Border/30 Point Action Plan Update*, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, Dec. 6, 2002, available at www.whitehouse.gov/news/releases/2002/12/20021206-1.html

²⁵ *Canada and U.S. Negotiators Agree to Final Draft Text of Safe Third Country Agreement*, CANADIAN DEPARTMENT OF CITIZENSHIP AND IMMIGRATION, Aug. 30, 2002,

NEXUS lanes at six border crossings and soon at airports.²⁶ A border-wide alternative for inspection lanes for travelers using common identity cards and a free and secure or FAST Program for commercial vehicles to preclear their shipments on either side of the border before they arrive.

So progress has been made, but there are still a number of ongoing problems. Infrastructure remains a question, security at our ports, and better cooperation sharing and intelligence sharing abroad. One of the things I noted and again to fall-off on something Steve said is that cooperation is vital. When I was doing the job with regard to the European Union one of things we were trying to do is what is called trilateralism. That is the cooperation on border questions would be extended to Canada, the United States, and the European Union. What we saw at times was a dialogue between the European Union and the United States. It was sometimes difficult to insert ourselves. I think it is probably in the United States' interest to ensure that Canada is part of that type of discussion.

One of the points is that the fastest route to Chicago for containers from Antwerp or Raritan is through either Halifax or Montreal and then on to Chicago by rail. There are still a number of items on the horizon. Land preclearance, that is the idea of developing a system on both sides of the border where container traffic can be precleared before it crosses; sharing facilities so that you only have one customs station instead of two; and then you get into the questions of law enforcement and sovereignty, that old guns issue again. Can American law enforcement officers enforce on the Canadian side? Can they arrest on Canadian side? What about the Canadian Charter? What about the U.S. Bill of Rights? These are all sorts of questions that have to be addressed. There is also a danger that the sense of urgency that has driven us so effectively will begin to fade.

The Homeland Security Department poses a series of challenges for Canada. Many of our traditional cross border partners, the U.S. Customs Agency, immigration, and various law enforcement agencies now find themselves in a new organization with a large security focus.

We are also tracking the new national security entry/exit registration system that Congress has mandated to put into effect by 2005 that will require aliens entering the United States to register.²⁷ The question is how do you do that with the 200 million border crossings a year between Canada and the United States?

available at www.cic.gc.ca/english/policy/safe-third.html

²⁶ *United States - Canada Nexus Program*, DEPT. OF HOMELAND SECURITY, Sept. 9, 2002 available at www.dhs.gov/dhspublic/display?theme=43&content=348

²⁷ *National Security Entry-Exit Registration System*, fact sheet, U.S. DEPT. OF STATE, June 5, 2002, available at <http://usinfo.state.gov/topical/pol/terror/02060509.htm>

What lessons can we draw and where are we headed? We can celebrate that Canada and the United States have agreed to ensure their security while maintaining an open border for low risk trade and goods and the movement of people. The world's largest bilateral trading relationship has been preserved and those 200-million border crossings will continue. High tech solutions can be used to expedite future crossings. There have been inconveniences and difficulties, but the Smart Border Accord has demonstrated Canada-U.S. cooperation at its best.

Do Canadian see risks to their sovereignty? Absolutely. The border work is not yet done. More infrastructure needs to be built to accommodate those 50-thousand daily truck crossings and rail links. Cooperation needs to be intensified on intelligence sharing, treaty assessments, and dealing with the U.S. exit/entry program. Some business groups and think tanks recommended Europe as a model border-free custom unit for goods and services and a perimeter with open travel inside for people. I do not see any evidence that any of the three NAFTA governments are thinking along these lines. There is a legal thread in all of the economic and security questions that we have addressed. Analyzing them and providing recommendations is an important task for the Canada-U.S. Law Institute. We, therefore, wish you well in these deliberations. Thank you.