
January 2003

Comparing the Southern Border to the Northern Border and the Issues to Be Dealt with at Each - Canadian Speaker

Marcella M. Szel

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

Recommended Citation

Marcella M. Szel, *Comparing the Southern Border to the Northern Border and the Issues to Be Dealt with at Each - Canadian Speaker*, 29 Can.-U.S. L.J. 373 (2003)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol29/iss1/54>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

COMPARING THE SOUTHERN BORDER
TO THE NORTHERN BORDER
AND THE ISSUES TO BE DEALT WITH AT EACH

Marcella M. Szel[†]
Canadian Speaker

As a railroader, which is what I am, I get concerned with how things really work. We know laws and regulations are important, but how do they really work?

Just on a personal basis, when I came down to the United States, they never sort out how it works. They talk about having passports, personal identity cards and all these critical things to get across the border. One of the things they do not tell you is what to do when you send your passport off to Ottawa, your original passport, your original birth certificate, every original document you own, and you are left crossing the border into the United States with nothing.

I came across the border late Friday night. I have a driver's license. However, I keep losing my driver's license because now we have to keep producing our driver's license every time we get on a plane. So, it is a duplicate, duplicate, duplicate, duplicate. The Customs Officer's is not looking very happy. I look for what else have. Oh, yeah, I have got one of these. For those of you that do not recognize it, it is a building pass to get into our offices in Calgary, Alberta. "Will this work?" I ask the border guard. He is not convinced yet, so I have to keep talking. I said, "You know, Officer, what is really ironic about all this is that I am going to a conference to talk about border security." The guy looks at me and says, "Let me see." I literally hauled out the program and then I hauled out my little thing. He

[†] Marcella M. Szel, Q.C., is Vice President, Strategy and Law, Corporate Secretary and Member of the Executive Committee for Canadian Pacific Railway, a position she has held since 1993. Ms. Szel leads the Company's strategic planning in the areas of law and corporate governance for the railway's North American operations. The author of numerous papers, she has more than 20 years of direct legal experience with CPR in litigation and administrative law with a focus on transportation. Ms. Szel served as Alberta general and regional counsel for the railway and for other Canadian Pacific companies until she was appointed to the position of Assistant Vice President, Quality Support. Ms. Szel has also served as Chair of the Canadian Chamber of Commerce, and currently serves on the boards of the Council for Canadian Unity, the British Columbia Business Council and the Esther Honens Foundation. Ms. Szel earned bachelor's and LL.B. degrees from the University of Alberta.

started to read it, then he just burst out laughing. He said, "You are in, but good luck going home." There you are.

FREIGHT MOVEMENT

Let me talk a bit about the movement of freight. What I would like to do is literally talk about how things actually work on the freight side, focusing on the business of transportation business or railroad. I am not going to talk about the people side.

A railroad which is charged with moving things efficiently, safely, securely, timely, and most importantly, as cheaply as possible. What that means is cheaper than truck transport. Those things really influence how we do things. What I would like to do first is give you a little bit of an infomercial. The network of railways in Canada and the United States does stretch into Mexico. We have connectivities with most of the bigger ports in the United States and America and Canada. This is really important, because the connectivity between the railroads and the ports is very critical; particularly as we get around to border issues.

One of the other little infomercial bits is that railroads do not just move the big things. Railroads move everything from running shoes to food. We just recently completed a move of a championship glass squash court from the United States to Canada. These kinds of things happen all the time. To give you a perspective of the volume, we move a value of approximately \$42 billion annually. A slightly different take on this is that we move 36 million railroad carloads every year between the North American railroads.

Canadian Pacific Railway, the company I work with, is one of the smaller Class one railroads in North America. We serve the West coast, the port at the West coast, and the East coast port. The East coast port we serve through Philadelphia, because we are an integrated Canadian/U.S. operator. About 30 percent of our operation is in the United States; the balance of it is in Canada. We have uniquely the most border crossings of any railroad in North America. We have eight, which is the most that any railroad has. So, we care about borders.

Look at this northern border. How you look at this border is really all a matter of your perspective. It might be a perspective of those in the south looking north and saying, "What is this border. It is nothing. It is full of holes. It is virtually nonexistent. It is clearly inefficient. We must do something about it." I have to tell you, we have heard a lot about that in the last couple of years. If you look at it from the Northern perspective looking south you might think, "My God, this thing is not working. It is clearly inefficient and something must be done." Everything is there to prevent things from going across the border as opposed to allowing them to get across.

BORDER HISTORY

Now, of course, the answer is somewhere in between. What I would like to talk about for a minute about is the history around the border creations, because these perceptions formed around the history. Canadians know a thing or two about creating barriers. Efforts to strengthen the East/West transcontinental links across the British North American side of our continent predate Canada's confederation. In fact, after confederation, Canadian leaders were looking for ways to strengthen those East/West ties and reduce the vulnerability to anything, particularly traffic moving across the border.

Our first Prime Minister, you have heard his name here already, Sir Johnny McDonald.¹ He said, "I say there is a conspiracy, by force, by fraud, or by both to force Canada into the American Union."² He is going to prevent that.

Thomas Jefferson said a century earlier, "In a short time we have reason to hope that the Delegates of Canada will join us in Congress and complete the American union."³ So, what did Canadians do? The first thing they did was build the Canadian Pacific Railway, the one that I work for. They built it very specifically to create the East/West ties and to keep the United States out. Very specifically, Union Pacific and Burlington Northern in the earlier existences were building railway lines into what is now British Columbia. They wanted to prevent that.

They defined a national policy back in 1879 to specifically strengthen the East/West ties and relied on very clear protectionist measures through high tariffs on industrial goods and low rates on grain to make sure that things moved only in Canada, not across the border.⁴ There were preferential trade

¹ Elected on July 1, 1867 to govern the Union, which included Quebec, Ontario, New Brunswick, and Nova Scotia. See, Sir John A. McDonald, *North America Railway Hall of Fame 2001 Induction Awards*, available at www.arvadesign.ca/narhf/nar01/NAR01awards_macdonald.html; Also see, Sir John A. McDonald, *Canadian Confederation Biography*, National Library of Canada, available at www.nlc-bnc.ca/2/18/h18-2360-e.html

² CARMAN CUMMING, *SECRET CRAFT: THE JOURNALISM OF EDWARD FARRER* 8 (1992); In 1866 the United States House of Representatives introduced a bill to annex the Canadian provinces. H.R. 754, 39th Cong. §1 (July 2, 1866), A Bill for the admission of the States of Nova Scotia, New Brunswick, Canada East, and Canada West, and for the organization of the Territories of Selkirk, Saskatchewan, and Columbia, NATIONAL LIBRARY OF CANADA, available at <http://memory.loc.gov/cgi-in/ampage?collId=llhb&fileName=039/llhb039.db&recNum=4308>

³ Letter from Thomas Jefferson to John Randolph (Nov. 29, 1775), available at www.cooperativeindividualism.org/jefferson_c_01.html

⁴ James R. Gallop & Christopher J. Graddock, *The North American Free Trade Agreement: Economic Integration and Employment Dislocation*, 19 J. LEGIS. 265, 268 (1993); *The CPR Story*, CANADIAN PACIFIC RAILWAY ARCHIVES, available at www.cprheritage.com/history/display1.htm

relationships with Britain across the Atlantic. Again, everything was done very specifically to ensure things did not go north and south.

NORTH/SOUTH CROSS-BORDER TRADE

Unfortunately, for Canada, the U.S. industrial productivity was so rapid by the turn of the century that Canada had to rethink its position. Some people say Canada came to their senses and began to work with the United States to figure out how to take down the barriers that Canada had created at the 49th parallel. One of the very first initiatives was trade related. It was the construction of the St. Lawrence Seaway. It was a huge project in 1959 to build trade relations across the two countries.⁵ Just a few others of the major ones that you are familiar with: the 1965 Auto Pact, which created again huge trade relationships between the two countries;⁶ we all know about the Free Trade Agreement and the North American Free Trade Agreement recently,⁷ and now the Smart Border Accord is also supposed to encourage a lot of this movement from going.⁸

Trade flourished, as we all know. Just to give you a sense of the difference it made to a business like ours, up to 15 years ago, I would say about 90 percent of the goods that we moved were East/West; today, 40 to 50 percent of our goods North/South. It depends how you count. Railroads are even better than accountants at accounting. It depends on whether you count carloads, volumes, or tonnages. I will leave it like that.

One of the things that have allowed the movement of goods to go North and South, which David referred to earlier as technology, has made a huge impact on how goods move across that border. Let me just give you a picture of what the northern border really looks like. There are some things that you all know. We have a number of world records between Canada and the United States across the border. First of all, on the Detroit/Windsor gateway and at the cities of Detroit/Windsor there is one road bridge and one rail tunnel. Between those two crossings, Detroit/Windsor is the single largest crossing in the world.⁹ There is no crossing in the world between any two

⁵ See Agreements regarding the Saint Lawrence Seaway, June 30, 1952 and Aug. 17, 1954, U.S.-Can., 5 U.S.T. 1784.

⁶ U.S.-Canada Automotive Products Agreement (Auto Pact), reproduced in 4 I.L.M. 302 (1965).

⁷ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.- Mex., 107 Stat. 2057 (1994), 32 I.L.M. 605 (1993)

⁸ The Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence; And Action Plan for Creating a Secure and Smart Border, Dec. 12, 2001, U.S.-Can., 41 I.L.M. 514 (2002), available at www.dfait-maeci.gc.ca/can-am/menu-en.asp?act=v&mid=1&cat=10&did=1669

⁹ *Detroit, Michigan 511 Case Study: Transportation - Border Crossings & Ontario*,

countries that is as big as the Detroit/Windsor gateway. They move about \$700 million worth of goods daily across those two gateways. Interestingly enough as John Manley just learned in a recent infrastructure discussion, it is also the only border crossing in the world of that size that is controlled by private entities. The road and the bridge are owned by a company called the Ambassador Bridge Company.¹⁰ Of course, the railroad is owned by railroads; all private. We have the world's longest border, about 5,500 miles. If you are Canadian, it is even longer. It is about 8,000 kilometers. Trade across the border has more than doubled since 1994. Canada is the U.S.'s largest trading partner.¹¹

Mexico's gaining on us, and we are working to keep our statistic up there. To give you a sense of that, Canada buys more goods from the United States than do the 15 current members of the European Union combined. Canada buys three times as much as Japan from the United States.¹² Canada supplies the U.S. states with more energy than any other country. The trading relationship is absolutely huge. All this buying and selling that I talked about converts into this: 45,000 trucks, 4,400 railcars, and we know that railcars hold a lot more than a truck, and about 1.3 billion dollars valued of goods cross between Canada and the United States each day.¹³ Not each year, but each day.

BORDER EFFICIENCY

How do they cross? I think, frankly, pretty efficiently. There are a couple of pressures that have been brought to bear to make that happen. Here is a look at our border; what gets us over the border. First is that how things get over the border has driven efficiency into how things get over the border. It is just in time manufacturing and delivery systems. It is actually commerce that has pushed the efficiencies into the border to make those things happen. We talk about the global assembly line and the mobile warehouse. Those are all true.

The railroad is nothing more than a very small link in a huge chain of manufacturing and delivery, which has to become tighter, smaller, and

MICHIGAN DEPARTMENT OF TRANSPORTATION, STUDY CONDUCTED FOR THE U.S. DEPT. OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION JOINT PROGRAM OFFICE, Feb. 2001, available at www.its.dot.gov/511/Mich_cs.htm

¹⁰ *Ammex, Inc. v. Department of Treasury*, 237 Mich. App. 455, 458 (1999).

¹¹ See generally, *NAFTA: A Decade of Strengthening A Dynamic Relationship*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (2002), available at www.ustr.gov/regions/whemisphere/nafta2003/brochure-english.pdf

¹² *United States-Canada: The World's Largest Trading Relationship*, CANADIAN EMBASSY, Aug. 2001, available at www.canadianembassy.org/trade/wltr2001-en.asp

¹³ *Id.*

cheaper every day. Think of how a Dell Computer is brought to your home. Transportation plays a key part in that. Another thing that has driven efficiencies across the border has been the fact that goods do not care about a border. You and I might care about a border, citizens care about a border, but goods do not. We will use a container of wine coming from Spain into Chicago as our example. It could land in the Port of Halifax, the Port of Montreal, or the Ports of New York/New Jersey. The cargo lands in the most efficient place. The total efficiency is the Port of Montreal and the reason for that is the combination of the huge inland seaway and the very efficient CP Railway route into Chicago. So, it will prefer to land there. In order to get there it has to go over a border. It does not care a border exists.

A transportation company has to figure out how to make that border nonexistent in order to compete with the landing of that case of wine into the Ports of New York/New Jersey. The overall efficiency is what has driven efficiency into the actual border crossings. The other issues that have come to play revolve around increased trade. Why is that relevant? It is relevant because our countries are not building new border crossings. They have to make the existing ones as efficient as they possibly can. They do that without adding border crossings.

Border crossings, particularly in the East, are getting to be near capacity. In fact, they may be out of capacity. That is just a volume issue. You have applied all the technology you can. There is just simply no more room. Another thing that has made border crossings work is the cooperation between our governments. That is not a small thing. That is been a lot of work, and a lot has been done in that area.

Finally, there is safety and security. The border has generally become virtual. Why is that so relevant today? It is relevant because just ten years ago, this is how goods moved across the border in a train. Goods coming off of a ship in Montreal would get loaded onto a train. They are all containers, which are lifted off. Each container had a metal thingy attached to it. The railroads, brokerage houses, and shippers had to create different documents for customs and port entry for entry into the United States. All those documents were put into this little metal container on the outside of this container.

If the container went from Montreal down into the Detroit area, the train was stopped at Customs in Detroit. A Customs Officer came out of his little building with his clipboard. He would go to the train, go to the first container and pull out the documents, match and measure. After that he would put them back in and he would move to the next container and do the same thing. Just think, he would have to inspect 100, 200 containers. We could not double stack our containers, because the Customs Officer could not reach them. There is no efficiency. The process took just as long as it took a Customs Officer to walk the length of the train and pull out and review these

documents. That was only years ago. Eight years ago, we made major improvements by a single manifest. That is a document upon which we were able to incorporate all the information for all the containers on that particular train.

You may be asking, “Why did you not do that earlier?” As goods were coming off of a ship, we did not always know which container was going to go onto which train going in which direction. There has to be huge logistics coordination to be able to create one document showing what is on each train going through the Detroit gateway. We created the single manifest system and we installed cameras, which really helped the Customs Officers. They could stand in one place and pull out the document. The train would slow down to four or five miles an hour. There was a camera, so if the Customs Officer was not paying attention, he could look at the camera and check things out. From our perspective, the process became incredibly efficient. This is all pre 9-11, by the way. This was great stuff.

Since then there have been huge improvements; all technology related. Again, looking at how things move from Montreal to Chicago today with the technological improvements in place, we will use the case of wine as our example. Forty-eight hours before it gets to the port, we have to send an electronic data interchange (EDI), about the fact that it is coming and a transporter manifest. It all goes to Canada Customs, U.S. Customs, and every other Customs in the world who wants to see it. We do not care. They inspect the containers when they get into Canada, conduct a surveillance check, and then it goes into the intermodal yard where the trains are made up. More documents are created there. Four hours before we get to the Windsor/Detroit gateway, U.S. Customs is alerted to the train arrival. Notification to U.S. Customs and Border Control of the train’s contents and physical entry into the U.S. is sent. As we enter the tunnel, U.S. Customs then looks at video. They do not actually get out of the building anymore. They just look at the video coverage of it. They decide what they want to do with it. We will assume they are going to send it in bond over to Chicago, where it is inspected in Chicago. It is not inspected at the border anymore. This is a huge improvement. A train could start from where it is constructed in Montreal at a track speed is 40 miles an hour. It can go 40 miles an hour right into Chicago, where a train is being broken up and it can be inspected. This is a huge improvement; just in time delivery.

When you look at this process you realize that the border is electronic. Compliance with trade rules and inspections are done inland. Smuggling and security is done basically at the border. There are different issues around the Mexican border, which I am not going to talk about because they have already been talked about and will be again.

POST 9-11 BORDER PROGRAMS

New measures are in place as a result of 9-11. First of all, safety and security became critically important. There were many technological developments and relationships created that were previously in the pipeline. They go through a range of issues including the U.S. automated targeted system, which identifies high-risk shipments and the U.S. Customs-Trade Partnership Against Terrorism (C-TPAT) Agreement.¹⁴ On the Canadian side, there is the Partners in Protection (PIP), which is a similar type of agreement.¹⁵ These all look at risk throughout the entire supply chain, so that you are identifying low risk movements. There are periodic audits. There is a Canada Customs Self-Assessment Program, streamlining it. My favorite is the Canadian Administrative Monetary Penalty System. What all this means is that if you screw up, you are going to pay big time. That is the Canadian way. These things all make it easier to get things across the border. The most recent one is the Vehicle and Cargo Inspection System (VACIS).¹⁶ It is something that has been in existence for quite a while on the Mexican border, but it is brand-new to us on the northern border.

An agreement was signed between U.S. and the Canadian government that included the two Canadian railroads, Canadian National, and Canadian Pacific.¹⁷ It was announced just on April the 3rd after extensive negotiations. The Americans wanted to do was to put into place at all border crossings an x-ray machine, which would virtually peer into every single carload or container that goes across the border and examine its contents. Great idea. Why not?

Let me give you an example of why this was so difficult to negotiate. As we just said, the Detroit/Windsor gateway is the busiest gateway in the world. That is where they want to put one of these x-ray machines. Great. We said stick it in the Montreal yard where things are coming off the ship, because everything moves in bond and they are secured systems on the containers. That way when it passes through the United States, we can still

¹⁴ *C-TPAT Fact Sheet and Frequently Asked Questions*, U.S. CUSTOMS AND BORDER PROTECTION, available at www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/fact_sheet.xml

¹⁵ *Partners in Protection*, CANADIAN CUSTOMS AND REVENUE AGENCY, available at www.ccr-aadrc.gc.ca/customs/general/enforcement/partners/menu-e.html

¹⁶ *Vehicle and Cargo Inspection System*, Fact Sheet, CANADIAN CUSTOMS AND REVENUE AGENCY, Sept. 2003, available at www.ccr-aadrc.gc.ca/newsroom/factsheets/2003/sept/0911vacis-e.html

¹⁷ *U.S. and Canadian Customs Agencies, and Canada's Two Largest Railways Reach Agreement to Strengthen Security Measures for Transborder Rail Shipments*, U.S. CUSTOMS AND BORDER PROTECTION, April 3, 2003, available at www.cbp.gov/xp/cgov/newsroom/press_releases/042003/04032003.xml

keep going at track speed and break up the train in Chicago. The United States said, "No, that does not protect our border." Granted, this is a very simplification of months and months and months of negotiation. The answer was no. It still is no. It is going to go at the border.

Guess where the border is in the Detroit/Windsor rail gateway. Remember it is a tunnel that goes under the river. The train enters the United States and as it is coming out of the tunnel it is doing so at a grade of over one percent. What do you care about a grade of over one percent? If we have a train that is a kilometer long and we have these huge complex programs that tell us the horsepower ratio to its pulling capacity, we know exactly how long and how heavy a train has to be to need either one locomotive or two locomotives. Locomotives cost a lot of money. Use them efficiently. So, the train has to slow down to four or five miles an hour so it can be x-rayed as it goes through the tunnel. As it comes out of the tunnel it stops. In order to keep the train moving as it goes through the tunnel you have to add more power. More power costs money. That is the impact on our business.

What if they find a container and they do not like what is in it? You have to stop your train and take that container off of it. How do you stop a train coming out of a tunnel on a single lane track? There is nothing you can take into the tunnel to take that container out. These are just examples of the complexities around literally complying with an x-ray machine. You have to find a place to put the x-ray machine. You have to add more locomotive power to make it work. You have to create track capacity. All these things cost money.

Who pays? It is not U.S. Customs. It is not Canadian Customs. It is the railways. The railways have to bear the cost of the x-ray machines and are responsible for the location of them, the track capacity, the yard capacity, and the people. Bless Canada's soul. They are even asking us to pay a fee for the Customs Officers who have to work to manage these machines. At the end of the day, guess who really pays. You do. You do when you buy your goods.

That is just an example of the complexities around how things work. At the higher level, it does work. The border works very efficiently. Things are moving across the border. There was, frankly, hardly a glitch in the process after 9-11. Again, between shippers, railways, and the governments things began to move very well. It is when you get down to how does it really work? How do you manage it? Who does what? What kind of systems do you have to create? Only then do you see the complexity of actually getting the things over the border.

CONCLUSION

Heading back to the beginning, let me just answer a few questions. What is the border? It is a place where you have to manage and control the entry of

goods into your country. It must ensure the safety and security of your citizens. Where is the border between Canada and the United States? Physically it is at the 49th parallel, but it sneaks up on you as far away as mid-ocean. It is virtual. It is not a paper border. It is not an electronic border. How do goods move across the border? At a high level, very efficiently. At a lower level, it takes a lot of work to get it moving across that border. I want to emphasize the work of the two governments and all the parties involved in order to make it move as efficiently as possible given the constraints everybody finds.

Can it be improved? It is our view that it can be improved significantly through more application of technology. We would like to see redundant borders, which do not exist in our business gateways between Canada and the United States. That is a safety and security issue. We also believe a lot more work can be done to create a perimeter border, so that the physical border we see at the 49th parallel is truly and always nonexistent. Canada is very close to being there and understanding the issues around a perimeter border. The United States after 9-11 is not. Thank you very much.